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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,846

THE STATE OF FLORIDA,

Petitioner,

vs.

JAMES LENARD,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the Appellee in the District Court of Appeal and the prosecution in the trial court. Respondent, James Lenard, was the Appellant in the District Court of Appeal, and the defendant in the trial court. In this brief, the parties will be referred to as the State and Respondent. The symbol "R" will be used to designate the record on appeal. The symbols "T" and "ST" will be used to designate the transcript of the proceedings and supplemental trancript. The symbol "A" will be used to designate the Appendix to this Brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent was charged by information on June 27, 1983, with robbery with a firearm of a Kentucky Fried Chicken restaurant, in violation of §812.13, Fla. Stat. (1981). (R: 1) The Respondent pleaded not guilty and the case proceeded to trial. (R: 2)

Jury trial commenced on September 13, 1983. (ST: 1) After the prospective juror panel was seated in the courtroom but prior to beginning the voir dire, defense counsel objected to the composition of the jury venire and moved to exclude the

jury on the basis that it was not representative of the community. (ST: 2-3) Defense counsel specifically noted on the record that out of a venire of thirty-five prospective jurors, only three were black. (ST: 2-3) Counsel further pointed out that the Respondent is black and the victim in the case is white. (ST: 4) The trial court denied the motion. (ST: 4)

Jury voir dire then commenced. (ST: 9-116)

The three black prospective jurors were Lewis Marshall, Janette Moss and Lawyer Stanley. (ST: 16, 117) During preliminary questioning by the judge of the entire venire, Mr. Marshall informed the court that he knew the defendant. (ST: 16) Mr. Marshall, however, was not one of the first eighteen prospective jurors called to fill the jury box for voir dire. (ST: 24-25, 117)

Ms. Moss and Mr. Stanley were called on voir dire. (ST: 24) Ms. Moss stated that she is a divorced mother of a ten year old and that her former husband was an electrician. (ST: 25-26) She lives in Opa Locka and has worked for HRS as a clerk typist for nine years. (ST: 25) She stated that in her spare time she sews, cleans house and takes care of her little son. (ST: 112)

Mr. Stanley stated that he has lived in Florida 27 years and is in the lawn and tree landscaping business. (ST: 26)

He is married with eight children; his wife is a nurse and one child is a court reporter in Texas, another is in college studying nursing, another is a postman, two are in the U.S. Army, and two are still in school. (ST: 27-28) He lives in the northwest section of Miami, (ST: 28) In response to the question whether he knew anyone in government service, Mr. Stanley stated that he had a friend who worked for the American Red Cross. (ST: 52) During his free time, Mr. Stanley likes to "eat and sleep and watch a little television," particularly westerns and football games. (ST: 112)

Both Ms. Moss and Mr. Stanley stated they had no moral, religious or personal convictions against sitting in judgment as to the guilt or innocence of another person. (ST: 56)

At the conclusion of the voir dire, the court first asked the prosecutor whether the black prospective juror Janette Moss was acceptable and he replied: "Strike her." (ST: 117) The court then said:

"How about Lawyer B. Stanley?", the second black juror and the prosecutor replied: "The State is striking." (ST: 117) Defense counsel immediately objected to the striking of the two black prospective jurors and stated:

> MR. VIZZI: [defense counsel] Judge, I would like the record to reflect

> Mr. Reich [the prosecutor] has just struck the only two black jurors in the whole entire thirty-five-member panel. (ST: 117)

The prosecutor stated that the two blacks he just struck happened to be sitting on a panel of eighteen prospective jurors and he told the court that he would be willing to state his reasons for the strikes on the record, although he did not have to. (ST: 117) The court noted that everything was on the record and moved on to conduct the challenges to the remaining prospective jurors:

> MR. REICH: [prosecutor] That is incorrect. There happens to be two that happen to be sitting in a panel of approximately eighteen people.
>
> MR. VIZZI: All right. There is one other black person who is in the audience who already said he knows the defendant.
>
> THE COURT: Yes, there may be a problem. There is nothing I can do about that.
>
> Thomas Barbusca?
>
> MR. REICH: Your Honor, I will state the reasons although I'm not obligated to.
>
> THE COURT: The record will reflect the answers given. (ST: 117-118)

The conclusion of the state's case at trial, the Respondent renewed his objections to the composition of the jury panel and the striking of the blacks during peremptory

challenges. (T: 175) The court overruled all objections and denied the motions. (T: 175) The defense then rested and renewed all previous objections and motions, which the court again denied. (T: 176-178)

At the conclusion of the trial, the jury returned a verdict of guilty as charged to robbery with a firearm. (R: 40; T: 263) On September 16, 1983, the trial judge adjudicated the Respondent guilty and sentenced him to life imprisonment with the three year mandatory minimum for carrying a firearm. (R: 41; T: 275-276)

Respondent filed his Notice of Appeal on or about October 12, 1983. On October 17, 1984, the Third District Court of Appeal dismissed said appeal for failure to file a brief.

On May 31, 1985, his appeal was reinstated, Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969), and a brief was filed. Respondent claimed error in only one aspect of the trial below: that the prosecutor had improperly and systematically excluded all blacks from the jury and the trial judge had refused to make any inquiry. The State argued that State v. Neil, 457 So.2d 481 (Fla. 1984) was not to be applied retroactively to pipeline cases.

On October 29, 1985, the Third District reversed for a new trial, applying the rule in Neil retroactively based upon

this Court's applicaiton of Neil to Andrews v. State, 459 So.2d 1018 (Fla. 1984):

> The final judgment of conviction and sentence under review is reversed and the cause is remanded to the trial court for a new trial based on the controlling and indistinguishable authority of State v. Neil, 457 So.2d 481 (Fla. 1984). This appeal -wherein the defendant properly objected at trial to the state's use of peremptory challenges of prospective black jurors allegedly based solely on race - was pending at the time the Neil decision was rendered and accordingly, the rule of Neil is applicable to this case. Andrews v. State, 459 So.2d 1018 (Fla. 1984); Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985); Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985); Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985); City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA), dismissed, 469 So.2d 748 (Fla. 1985); Safford v. State, 463 So.2d 378 (Fla. 3d DCA 1985).
>
> Lenard v. State, 477 So.2d 62 (Fla. 3d DCA 1985) (A-1)

On October 31, 1985, the State sought the discretionary review of this Court. Thereafter, the Third District stayed their mandate. Conflict certiorari review was accepted by this Court on February 4, 1986.

POINT ON APPEAL

WHETHER THE DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS TO BE APPLIED RETROACTIVELY TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME SAID DECISION BECAME FINAL?

SUMMARY OF THE ARGUMENT

This Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984) should not be applied retroactively to cases pending appeal (within the pipeline) prior to Neil being final. This is especially true in light of the clear language in Neil stating said decision was not to be applied retroactively. The exceptions carved out in Andrews v. State, 459 So.2d 1018 (Fla. 1984)(a companion case) and Jones v. State, 464 So.2d 547 (Fla. 1985)(a death case) ratify this Court's intent to follow People v. Wheeler, 583 P.2d 748 (1978) and People v. Thompson, 79 A.D.2d 87, 435 N.Y.D.2d 739 (1981) where similar retroactive applicaiton of this issue germinated. Neil is not applicable to any other case pending at the time of decision. The reason therefore is that the State's strong reliance on pre Neil law prevents retroactivity based on the cost to the judicial system. The reason Neil applies to companion cases and death cases is because the class of reversals is limited, thereby limiting the burden on the judicial system.

ARGUMENT

THE DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS NOT TO BE RETROACTIVELY APPLIED TO ALL CASES PENDING ON DIRECT APPEAL WHEN THE DECISION BECAME FINAL.

On September 27, 1984, this Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984) became final. Said decision established that peremptory challenges cannot be used in a racially discriminatory manner and established the procedure for implementing said rule of law.

Thereafter, Andrews v. State, 459 So.2d 1018 (Fla. 1984), a companion case to Neil, was decided by this Court and was reversed for a new trial. The State moved for rehearing contending that Neil was not retroactive to those cases in the pipeline, to wit: to all cases presently pending. Said rehearing was denied without opinion.

Subsequent thereto, Jones v. State, 464 So.2d 547 (Fla. 1985) a death case, was decided and was reversed under the authority of Neil. This case was reversed despite the State's Supplemental Brief which contended that Neil did not apply to all pipeline cases. Thereafter, Neil was applied to another death case, but no violation was found since there was an insufficient showing that the challenges were used solely based on race. Parker v. State, 476 So.2d 134 (Fla. 1985).

Based on the foregoing decisions several District Courts have held that Neil governs pipeline cases where the issue was properly preserved below and which was pending when Neil was decided. Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985). Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985). Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985); cert granted Case No. 66,965, August 23, 1985. Castillo v. State, 466 So. 2d 7 (Fla. 3d DCA 1985); cert granted Case No. 67,046, August 23, 1985. City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985); Safford v. State 463 So.2d 378 (Fla. 3d DCA 1985), cert granted Case NO. 66,730 August 23, 1984. [1]

This holding was based solely on the fact that this Court after Neil decided pending cases in Andrews and Jones. It ignored the distinguishing factors of said cases, to wit: Andrews was a companion case and Jones a death case.

In Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985), cert granted, the Fifth District specifically rejected the application of Neil to pipeline cases. The Court reasoned:

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[1] The following pipeline cases were also reversed pursuant to Neil. Graham v. State, 475 So.2d 264 (Fla. 3d DCA 1985) petition for review pending and Hernandez v. State, 473 So.2d 1364 (Fla. 3d DCA 1985) petition for review pending.

> The Third District, in Jones v. State, 10 F.L.W. 528 (Fla. 3d DCA February 26, 1985), and the Fourth District, in Franks v. State, 10 F.L.W. 798 (Fla. 4th DCA March 27, 1985), have applied Neil to "pipeline" cases. Because of specificity of the language of Neil set out above, we do not come to the same conclusion. The Court in Neil gave as its reason for not applying the decision retroactively, "the difficulty of trying to second-guess records that do not meet the standards set out herein as well as the extensive reliance on the previous standards . . ." (Emphasis added). Since these reasons apply equally to "pipeline" cases as to cases tried and appeals completed before the decision in Neil was announced, it is our conclusion that the supreme court intended Neil to apply only to those cases going to trial subsequent to Neil.
>
> In the instant case, the trial court predated the decision in Neil and the test described there was not available to the trial court. (footnote omitted).
>
> 471 So.2d at 1295.

That decision not only strictly applies Neil's language, but follows sub silencio the reasoning in People v. Thompson, 79 A.D.2d 87, 435 N.Y.D.2d 739 (1981) and People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) relied upon by this Court in Neil.

This Court in Neil, adopted the procedure enunciated in People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). Regarding retroactivity the Court held.

> [13] Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive. The difficulty of trying to second-guess record that do not meet the standards set out herein as well as the extensive reliance on the previous standards make retroactive application a virtual impossibility. Even if retroactive application were possible, however, we do not find our decision to be such a change in law as to warrant retro-activity or to warrant relief in collateral proceedings as set out in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).
>
> 457 So.2d at 488.

This Court is fashioning the Neil test relied heavily on People v. Thompson, supra, which looked to People v. Wheeler, supra , and Daniel v. Louisiana, 420 U.S. 31 (1975) for support and guidance regarding retroactive effect. In Thompson, supra, the court observed:

> We add that the difficulty of re-construction jury selection pro-cedures, particularly as they re-late to the particular manner in which peremptory challenges were employed, and other factors, such as the undoubted extensive re-liance by prosecutors on the here-tofore statutory inviolability of the peremptory challenge, militate against retroactive application of our decision in this case. (see People v. Wheeler, supra 148 Cal. Rptr.P. 980, 583, P.2d p. 776 N. 31;

Daniel v. Lousiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790).

435 N.Y.S.2d at 755 N 22.

In People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) the Court dealt with retroactivity as follows.

> 31. The rule we adopt herein applies to defendants in the case at bar and in the companion matter of People v. Johnson, post, page 915, of 148 Cal.Rptr., page 774, of 583 P.2d and to any defendant now or hereafter under sentence of death. (Cf. In re Jackson (1964) 61 Cal.2d 420). In all other cases the rule will be limited to voir dire proceedings conducted after the present decision becomes final. (See People v. Cook, (1978) 22 Cal. 3d 67, 99, fn. 18, 148 Cal. Rptr. 605, 624, 583 P.2d 130, 149, and cases cited.)
>
> 583 P.2d at 766 n. 31.

The Wheeler court approved the foregoing limited retroactivity of its decision since it was only by luck of the draw that the companion case to Wheeler was not the case that changed the law and therefore it would be unfair not to apply the decision to the companion case. See People v. Johnson, 583 P.2d 775, 148 Cal.Rptr. 915 (1978). The Wheeler court also included all death cases within its scope of retroactivity

inasmuch as death is different and it would have limited application affecting only those defendants who, sentenced to death, suffered the same prejudicial error as the case that overruled the preceedent. The Court found that since this category would contain a small finite group, and no further numbers to that group would be added, the decision would apply, because it would not over burden the administration of the criminal justice system. See, In re Jackson, 61 Cal.2d 500, 393 P.2d 420, 39 Cal.Rptr. 220 (1964). Finally, the Wheeler Court held that its decision would not be retroactive to all other cases where voir dire proceedings were conducted prior to Wheeler becoming final. The Court reasoned that because official reliance has doubtless been placed on the prior unrestricted use of peremptory challenges, the rule now adopted will only be applicable to voir dire conducted after Wheeler became final. See, People v. Cook, 22 Cal.2d 67, 583 P.2d 130, 148 Cal.Rptr. 605 (1978).

This rationale is supported by the decision in Daniel v. Louisiana, 419 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975). In Daniel, the United States Supreme Court held that its decision in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1970) which held the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community jurors, was not to be

applied retroactively to convictions obtained by juries impaneled prior to the date of the Taylor decision. The Court reasoned:

> As we stated in Taylor v. Louisiana, supra, at 535-536, 95 S. Ct., at 700, "until today no case had squarely held that the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." Given this statement, as well as the doctrinal underpinnings of the decision in Taylor the question of the retroactive application of Taylor is clearly controlled by our decision in DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), where we held Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. L.Ed.2d 491 (1968), to be applicable only prospectively. The three relevant factors, as identified in Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967), are
>
> > "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."
>
> In Taylor, as in Duncan, we were concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression. In Taylor, as in Duncan, our decision did not rest on the premise that every criminal trial,

> or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt v. Floirda, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), in structuring their criminal justice systems is clear. Here, as in Ducncan, the requirement of retrying a significant number of persons were Taylor to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor.
>
> 95 S.Ct. at 705.

Albeit, this Court intended to further rather than impede Article I, Section 16 of the Florida Constitution by discarding the test set-out in Swain v. Alabama, 380 U.S. 202 (1965), the analysis by the United States Supreme Court in Taylor v. Louisiana, supra, is herein apropos. This is especially true when a similar analysis was employed in Thompson, supra and Wheeler, supra, wherein the retroactive rule created in Neil germinated. See: State v. Neil, 457 So.2d at 487 n.12; See also Abrams v. McCray, Case No. 84-1426, 37 Cr.L. 4031.

When the foregoing analysis is applied to Neil, it is clear that Neil was not meant to be retroactively applied to all cases when voir dire was conducted prior to Neil becoming final. Reversal was mandated in Andrews v. State, supra, since Andrews was a companion case to Neil. [2] Accordingly, this Court properly declined to apply the pipeline argument, since Andrews is clearly an exception thereto. Likewise, reversal based on Neil was required in Jones v. State, supra, since Jones was under the penalty of death and therefore Jones was also an exception to the pipeline theory. Likewise, this Court applied Neil to Parker since it was a death case. Therefore, the State submits that Neil does not apply to all cases in the pipeline. [3]

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2 In Jones v. State, supra the Third District Court found that Neil governs those cases where the issue was preserved below and pending when Neil was decided. In support thereof the Court cited Hoberman v. State, 400 So.2d 758 (Fla. 1981) which applied State v. Sarmiento, 397 So.2d 643 (Fla. 1981) to a pending appeal. However, a clear reading thereof, shows that Hoberman was a companion case to Sarmiento and therefore was an exception to the pipeline theory and therefore Sarmiento was applicable thereto.

3 The State recognizes that the Court in Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert denied. 444 U.S. 881, 100 S.Ct. 170, 62 110 (1970) has held, at 387 N.E.2d 518, N. 38, that its rule was held to apply to the defendants in the present case and to the defendants in all cases now pending on direct appeal where the record is adequate to raise the issue. However, since the Florida Supreme Court did not adopt the Soares opinion, the Soares holding on retroactivity is not persuasive and should be rejected for a more workable rule.

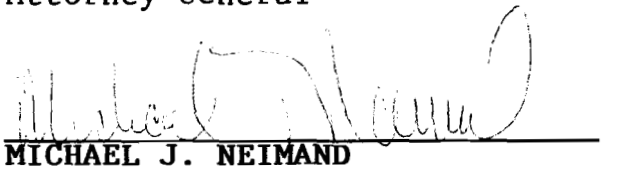
In accordance with the foregoing, it is clear that Neil does not apply to the case sub judice. Neil was final on September 24, 1984. Voir dire in this case was conducted on September 13, 1983 (ST: 1). Since this case is neither a companion case to Neil nor a death case, Neil is inapplicable. Further, at the time of voir dire the previous standards were relied upon inasmuch as the trial court did not permit the State from stating its reasons for challenging the jurors and in light of the difficulty of trying to second guess records that do not meet the Neil standards, the foregoing rationale of Wheeler, Thompson and Daniels control and Neil is inapplicable to all cases, excluding companion cases and death cases, where the voir dire was conducted prior to the final decision in Neil. See Grimes v. State, 244 So.2d 130 (Fla. 1971). (In deciding that Chimel v. California, 89 S.Ct. 2034 (1969) was inapplicable to pipeline cases, this Court looked at the purpose to be served by Chimel, the extent of reliance on the old standards and the effect on the administration of justice of a retroactive application of the new standards).

CONCLUSION

Based on the foregoing facts, authorities and arguments, the State respectfully requests this Court to quash the decisions of the Third District Court of Appeal and direct that Court to reinstate the Respondents judgment and sentence.

Respectfully submitted,

JIM SMITH
Attorney General



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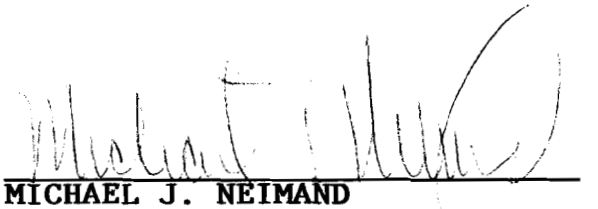
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by mail to **MARTI ROTHENBERG**, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 11 day of February, 1986.



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