

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED

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JAN 29 1987

CLERK SUPREME COURT

CASE NO.

By 69-159
Deputy Clerk *pl*

ROBERT W. BROOKS,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE:</u>
TABLE OF CITATIONS.....	ii
SUMMARY OF ARGUMENT.....	1
POINT ON APPEAL <u>ARGUMENT:</u>	
WHETHER REVERSIBLE ERROR HAS BEEN DEMONSTRATED IN ALLOWING THE JURY TO SEPARATE OVERNIGHT AFTER BEGINNING DELIBERATIONS DESPITE THE DEFENDANT'S REQUEST FOR SEQUESTRATION WHERE NO SPECIFIC OBJECTION TO THE TRIAL COURT'S RULING THAT SEQUESTRATION WAS NOT REQUIRED IN NON-CAPITAL CASES WAS MADE SO AS TO PRESERVE THE ISSUE FOR APPELLATE CONSIDERATION.....	2-4
CONCLUSION.....	5
CERTIFICATE OF SERVICE.....	5

TABLE OF CITATIONS

CASE:

PAGE:

Raines v. State,
65 So.2d 558 (Fla. 1953)4, 5

Taylor v. State,
11 F.L.W. 648 (Fla. Dec. 18, 1986).....2, 3, 4

SUMMARY OF ARGUMENT

Although the same certified question presented in this case has already been answered in Taylor v. State, 11 F.L.W. 648 (Fla. Dec. 18, 1986) wherein this Court determined that it was reversible error, per se, to allow a jury in a non-capital case to separate overnight after previously retiring to deliberate, the respondent respectfully submits that in this case that alleged error has not been adequately preserved for appellate consideration due to acquiescence by trial counsel in the then apparently proper determination by the trial court.

ARGUMENT

NO REVERSIBLE ERROR HAS BEEN
DEMONSTRATED IN ALLOWING THE JURY TO
SEPARATE OVERNIGHT AFTER BEGINNING
DELIBERATIONS DESPITE THE
DEFENDANT'S REQUEST FOR
SEQUESTRATION WHERE NO SPECIFIC
OBJECTION TO THE TRIAL COURT'S
RULING THAT SEQUESTRATION WAS NOT
REQUIRED IN NON-CAPITAL CASES WAS
MADE SO AS TO PRESERVE THE ISSUE FOR
APPELLATE CONSIDERATION.

In Taylor v. State, 11 F.L.W. 648 (Fla. Dec. 18, 1986), this Court answered the same certified question posed by the district court of appeal in this case and held that it was reversible error per se to allow a jury in a non-capital case which had already retired for deliberations to separate overnight and then reassemble to resume deliberation and reach a verdict. The state, however, respectfully submits that the Taylor decision does not control in this situation inasmuch as the district court of appeal below improperly determined that the matter had been adequately preserved for appellate consideration.

In this case, unlike Taylor, there was no specific objection by defense counsel to the trial judge's decision not to sequester the jury for the night. Rather, while defense counsel did request sequestration of the jury for the evening, when the lower court noted for counsel's edification that there was no requirement that he do so in a non-capital case and then exercised his discretion to deny sequestration, defense counsel raised no argument or specific objection to the lower court's ruling. (R 534-535) As properly noted by the trial court there is no procedural rule, statutory provision, nor was there any

specific case law requirement prior to Taylor, for the overnight sequestration of jurors who have begun deliberations in a non-capital case. The decision in Raines v. State, 65 So.2d 558 (Fla. 1953), noted by this Court in Taylor as support for applying the sequestration rule in non-capital cases, turns specifically upon statutory sections that clearly required the sequestration procedure in all cases; however, those statutory provisions no longer exist and no present rule of procedure specifically requires sequestration after deliberation has begun. This clearly explains the trial judge's, at that time, proper decision to utilize his discretion in this non-capital case and allow the jury to disband for the evening only after strongly admonishing them not to discuss the case or expose themselves to outside influences. (R 536-538) The state submits, that under this particular factual scenario it was the petitioner's duty to raise a specific objection to the trial judge's decision to forego sequestration in this non-capital case since in reaching that determination the trial judge announced his reason for doing so, i.e., that under the law in this state there was no requirement in a non-capital case for sequestration. The petitioner's obvious acquiescence in that legal ruling without specific objection and/or assertion of particular legal authority to the contrary (e.g., the Raines decision) left the trial court inadequately apprised of the particular legal basis upon which the petitioner's sequestration request was based and failed to afford the court the opportunity to make an informed decision because of the petitioner's apparent agreement, through


acquiescence, with that ruling. Absent just such a timely and complete contemporaneous objection the respondent submits that the petitioner cannot be said to have adequately preserved this issue for appellate consideration.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished by mail to Michael S. Becker, Assistant Public Defender for Petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 28th day of January, 1987.


OF COUNSEL