047

73,766

IN THE SUPREME COURT OF FLORIDA

CASE NO.

THE STATE OF FLORIDA,

Petitioner,

vs.

ROLAND0 DEL SOL,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Florida Bar No. 0191948
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (N921)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1–3
ISSUE PRESENTED	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6-22
I	6-9
II	11-22
CONCLUSION	23
CERTIFICATE OF SERVICE	23

TABLE OF CITATIONS

CASES **PAGE**

Baisden v. State,
203 So.2d 194 (Fla. 4th DCA 1967).....20

Batson v. Kentucky,
476 U.S. 79 (1986)..... 5

Cash v. State,
507 So.2d 1159 (Fla. 2d DCA 1987).....7

Castillo v. State,
466 So.2d 7 (Fla. 3d DCA 1985).....8

City of Miami v. Cornett,
463 So.2d 399 (Fla. 3d DCA 1985).....9

Germane v. Heckler,
804 F.2d 366 (7th Cir. 1986)..... 9

Hamilton v. State,
487 So.2d 407 (Fla. 3d DCA 1986).....9

Hayes v. State,
368 So.2d 374 (Fla. 4th DCA 1979), cert. den.,
378 So.2d 345 (Fla. 1979).....21

Hobby v. United States,
468 U.S. 339 (1984).....8

Kibler v. State,
501 So.2d 76 (Fla. 5th DCA 1987).....7

Olive v. State,
179 So. 811 (Fla. 1938).....21

Paramore v. State,
229 So.2d 855 (Fla. 1969), modified on other
grounds, 408 U.S. 935 (1972)..... 21

Parker v. State,
476 So.2d 134 (Fla. 1985)..... 9

Parker v. State,
206 So.2d 431 (Fla. 3d DCA 1968), cert. den.,
214 So.2d 623 (Fla. 1968)..... 20

TABLE OF CITATIONS
CONTINUED

CASES **PAGE**

Peters v. Kiff,
407 U.S. 493 (1972)..... 8

Province v. State,
337 So.2d 783 (Fla. 1976); cert. den., 431
U.S. 969 (1977)..... 22

Roman v. Abrams,
822 F.2d 214 (2d Cir. 1987)..... 8

Schlanger v. State,
397 So.2d 1028 (Fla. 3d DCA 1981).....9

Smith v. State,
515 So.2d 149 (Ala. Cr. App. 1987).....7

State v. Bruce,
745 S. W. 2d 696 (Mo. Ct. App., W.D. 1987).....7

State v. Castillo,
486 So.2d 565 (Fla. 1986)..... 8

State v. Neil,
457 So.2d 481 (Fla. 1984)..... 8

State v. Slappy,
522 So.2d 18 (Fla. 1988)..... 7

State v. Vincent,
43 Crim.L.Rep. 2277 (Mo. Ct. App. 1988).....8

State v. Wagster,
489 So.2d 1299 (La. Ct. App. 1986).....7

Taylor v. State,
491 So.2d 1150 (Fla. 4th DCA 1986).....9

Thomas v. State,
502 So.2d 994 (Fla. 4th DCA 1987), rev. den.,
509 So.2d 1119 (Fla. 1987)..... 9

United States v. Arroyave,
477 So.2d 157 (5th Cir. 1973).....21

United States v. Dohm,
597 F.2d 535 (5th Cir. 1979)..... 22

TABLE OF CITATIONS
CONTINUED

CASES	PAGE
United States v. Jackson, 470 So.2d 684 (5th Cir. 1972), cert. den. 412 U.S. 951 (1973).....	20
United States v. Matthews, 803 F.2d 325 (7th Cir. 1986), cert. granted on other grounds, 94 L.Ed.2d 788 (1987).....	9
Watson v. State, 190 So.2d 161 (Fla. 1966), cert. den., 389 U.S. 960 (1967).....	22
Woods v. State, 490 So.2d 24 (Fla. 1986).....	9

PRELIMINARY STATEMENT

The Petitioner, **THE STATE OF FLORIDA**, was the prosecution in the trial court and the Appellee before the Third District Court of Appeal. The Respondent, **ROLAND0 DEL SOL**, was the defendant in the trial court and the Appellant in the Third District. The parties, in this brief, will be referred to as they appear before this court.

The symbol "R" will be used, in this brief, to refer to the Record on Appeal as it appeared before the district court and the symbol "T" will identity the transcript of lower-court proceedings in the same manner. The appendix to this brief will be designated the symbol "App." All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On July 3, 1985, the State of Florida filed an eight-count information charging Respondent with three counts of armed robbery, three counts of armed kidnapping, one count of armed burglary, and one count of possession of a firearm by a convicted felon. (R. 1-8A).

On August 6, 1985, the State of Florida filed an amended information. All of the counts were identical to the initial information except for Count **VIII**. Count **VIII**, the possession of

a firearm by a convicted felon count was amended to change the underlying prior felony from second-degree murder to grand theft. (R. 9-16A).

On August 26, 1985, the State of Florida once again amended the Information. This time the state added a co-defendant to Count I through Count VII. Respondent stood mute to the new information and a not guilty plea was entered. (R. 26).

On October 27, 1985, the court severed Count VIII and the trial began. During jury voir dire the State of Florida used five of their peremptory challenges to exclude blacks. (T. 172-174). At least one (1) black person remained on the jury. (R. 172-174). Counsel for Respondent moved to strike the jury panel alleging that the State had used their peremptory challenges to systematically exclude blacks. The trial court recognized that the state had used challenges to exclude blacks but refused to inquire as to the reason for the challenges. Respondent unsuccessfully argued that Appellant's race was irrelevant to the state's systematic exclusion of blacks. The trial court refused to strike the jury panel. (Tr. 174-176).

During the trial, Respondent moved for several mistrials based upon the trial court's allegedly improper comments. These motions were denied. At the conclusion of the state's case the motions for mistrial were once again renewed by Respondent and denied by the trial court. (Tr. 325-328).

After deliberations, the jury convicted Respondent of both Count I and Count III (Armed Robbery With a Firearm) as charged and found appellant guilty of two counts of false imprisonment which were lesser included offenses of Counts II and IV. Appellant was found not guilty of Counts V, VI, and VII. (R. **39-45**). Prior to the sentencing, Respondent entered a guilty plea as to Count VIII. It was agreed that if Respondent's conviction as to Count I, II, III and IV were reversed, he would be allowed to withdraw his guilty plea as to Count VIII. (T. 400).

On November 19, 1986, the trial court sentenced Respondent to seven years **as** to Count I, seven years as to Count III and five years as to Counts 11, IV, VIII. All the sentences were ordered to run concurrent with each other so that the total sentence was seven years. **(R. 50-53).**

The Third District reversed, finding that a defendant of any race has standing to challenge the exclusion of members of any race from his jury. (App. 1). Also, evidently, the Third District found that the challenge of five **(5)** members of a single race, leaving one (1) member of that race on the jury, absolutely requires that systematic exclusion be presumed, whether the defendant is a member of that race or not.

The Third District also found ". . . the trial court's comments upon the credibility of witnesses. . ." to be error. (App. 1-2).

ISSUES PRESENTED

I.

WHETHER IT IS NOT PER SE REVERSIBLE FOR THE TRIAL COURT TO FAIL TO CONDUCT AN INQUIRY WHERE THE STATE HAS PEREMPTORILY CHALLENGED FIVE (5) BLACK VENIRE PERSONS, LEAVING AT LEAST ONE (1) BLACK PERSON ON THE JURY, WHERE THE DEFENDANT IS WHITE?

II.

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL BASED ON ALLEGEDLY IMPROPER COMMENTS BY THE TRIAL JUDGE?

SUMMARY OF THE ARGUMENT

I.

Where the respondent was a white person who was not tried by an all-white jury, he has no standing to object to the alleged exclusion of black persons from the jury. Equal protection grounds cannot be relied upon, by him, where proof of exclusion of members of the defendant's race is the most basic standing requirement of Batson v. Kentucky, 476 U.S. 79 (1986). On the other hand, he must show, to be entitled to relief due to denial of his right to an impartial jury, that his jury did not comprise a fair cross section of the community, a burden he has not even attempted to meet.

Further, the deference to be given the trial judge's determination precludes reversal based on the alleged exclusion of five black jurors, where the defendant was white and where his jury contained at least one (1) black member.

II.

The trial judge's comments can not be considered harmful error, when considered in context, and respondent failed to meet his required burden of establishing prejudice due to them.

The decision of the Third District should be reversed.

ARGUMENT

I.

IT IS NOT PER SE REVERSIBLE FOR THE TRIAL COURT TO FAIL TO CONDUCT *AN* INQUIRY WHERE THE STATE HAS PEREMPTORILY CHALLENGED FIVE (5) BLACK VENIRE PERSONS, LEAVING AT LEAST ONE (**1**) BLACK PERSON ON THE JURY, WHERE THE DEFENDANT IS WHITE.

First, there is certainly no question that at least one **(1)** black person remained on the jury. (T. **173-174**). Equally, there is no question that the respondent is not a black person. (T. **176**). There is some question as to whether the State used five of six challenges against blacks, as the defense attorney alleged on page **172** of the record, or exercised only five challenges, all against black persons, as he alleged on page **173**.

Certainly, there can be no question that the landmark case in this area is Batson v. Kentucky, **476** U.S. **79 (1986)**. This case has set forth the following basis to establish a sufficient prima facie case to require an inquiry:

> . . . .These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of cognizable racial group, Castaneda v. Partida, supra, at **494,** 51 L.Ed.2d **498, 97** S.Ct.

> 1272, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. (emphasis added).
>
> Id. at 96.

Here, the respondent was unable to show that members of his race were systematically excluded from the jury, the most basic requirement of the Batson case. Batson is cited in State v. Slappy, 522 So.2d 18, 13 F.L.W. 184 (Fla. 1988), so heavily relied on by the defense, no less than eleven (11) times. It certainly appears that the Supreme Court of Florida approves of the Batson, standing requirement. Certainly, the Fifth District has found this standing requirement to be applicable in Florida, Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987). Further, Kibler, has been relied upon by the Second District in Cash v. State, 507 So.2d 1159 (Fla. 2d DCA 1987) and was even cited (albeit on other grounds) in State v. Slappy, 522 So.2d 18, 21 (Fla. 1988).

Further, although the Supreme Court of Arizona, as the defense pointed out below, does appear to support their position (Appellant's Brief, 13), the appellate courts of other States have held that a white defendant has no standing to challenge the exclusion of black jurors. Smith v. State, 515 So.2d 149 (Ala. Cr. App. 1987); McGuire v. State, 363 S.E. 2d 850 (Ga. Ct. App. 1987); State v. Bruce, 745 S.W. 2d 696 (Mo. Ct. App., W.D. 1987); See, State v. Waqster, 489 So.2d 1299 (La. Ct. App. 1986).

Further, the Respondent can draw little support from Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985) which was not quashed on other grounds, as appellant stated below (Appellant's Brief, 11), but was affirmed on other grounds at State v. Castillo, 486 So.2d 565 (Fla. 1986). Indeed, it was affirmed because the prosecutor asked an improper question of a witness. The Florida Supreme Court was never required to reach the issue of whether a non-black defendant can raise a proper objection under State v. Neil, 457 So.2d 481 (Fla. 1984) where it found that the Neil objection made by the defense in that case was untimely. State v. Castillo, 486 So.2d 565 (Fla. 1986).

Likewise, neither the respondent nor the district court can draw much support from Peters v. Kiff, 407 U.S. 493 (1972), which requires that the system of jury selection be proven discriminatory, a burden that the respondent didn't even attempt to meet, in this case. See, State v. Waqster, 489 So.2d 1299 (La. Ct. App. 1986). Thus, at the very least, the defense was required to show that the petit jury it attacks (which contained a black person) did not reflect a fair cross section of the community. See, Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987); State v. Waqster, 489 So.2d 1299 (La. Ct. App. 1986); See, also, Hobby v. United States, 468 U.S. 339 (1984); State v. Vincent, 43 Crim.L.Rep. (BNA) 2277 (Mo. Ct. App. 1988).

Further, a comparison with other cases reveals that there was no requirement that the trial court's decision be disturbed in this case. The trial court is clearly in a better position than the reviewing court to determine if the required substantial likelihood has been demonstrated and its decision may only be overturned if clearly erroneous. Germane v. Heckler, 804 F.2d 366, 368-369 (7th Cir. 1986); United States v. Matthews, 803 F.2d 325, 330 (7th Cir. 1986); cert. granted on other grounds, 94 L.Ed.2d 788 (1987); City of Miami v. Cornett, 463 So.2d 399, 402 (Fla. 3d DCA 1985); See, Schlanger v. State, 397 So.2d 1028 (Fla. 3d DCA 1981). Thus, the use of five (5) peremptory challenges, creating an all-white jury, did not create the required "substantial likelihood." Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986). Nor did the challenge of six (6) black persons resulting in a monochromatic jury. Woods v. State, 490 So.2d 24 (Fla. 1986). See Parker v. State, 476 So.2d 134 (Fla. 1985); Thomas v. State, 502 So.2d 994 (Fla. 4th DCA 1987); rev. denied, 509 So.2d 1119 (Fla. 1987); Hamilton v. State, 487 So.2d 407 (Fla. 3d DCA 1986). As the Florida Supreme Court stated, "exclusion of a significant number of black potential jurors. . . will be insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry." Woods v. State, 490 So.2d 24, 26 (Fla. 1986).

It is respectfully submitted that this court never intended failure to conduct an inquiry to be per se

reversible error where the challenge of five (5) black persons did not result in an all-white jury and where the State's motivation for the allegedly systematic exclusion was certainly minimal, given the defendant's race.

These are factors which a trial court should be able to properly take into account in deciding not to conduct an inquiry and the Third District should, therefore, be reversed on this issue.

II

THE TRIAL COURT DID NOT REVERSIBLY ERR IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL BASED ON ALLEGEDLY IMPROPER COMMENTS BY THE TRIAL JUDGE.

First, an examination of the allegedly prejudicial comments appear to be in order. The first two were, "He's not on trial here," and "Mr. Aguilar is not on trial" referring to a witness. (Appellant's Brief below, 18; T. 233-234). The third, examined in context was;

> BY MR. POTOSKY:
>
> Q: What time did you say this incident occurred?
>
> A: Between 6:00 and 7:00.
>
> Q: When you gave your deposition, you were a lot more specific. You said more or less like around 7:00 o'clock.
>
> A: Between 6:00 and 7:00 o'clock, more or less.
>
> Q: Was your memory better now, or--
>
> MS. JONES: Objection, Judge.
>
> THE COURT: That deposition was taken a year ago.
>
> He's close enouah.
>
> MR. POTOSKY: I object to the Court commenting on the evidence.
>
> In his deposition, he said 7:00 o'clock.
>
> THE COURT: Now he's saying between 6:00 and 7:00.

Let the jury decide. Let them decide for themselves.

MR. POTOSKY: I'm trying to establish, Judge, why Mr. Bottino is going to say---

THE COURT: The jury heard the answer.

BY MR. POTOSKY:

Q: Did you say in your deposition that it happened more or less at 7:00 o'clock?

A: I cannot be exact because at a crucial moment, like what happened to me, nobody is going to be looking for a clock.

Q: All I'm asking you, sir, did you state in your deposition under oath, that it happened more at 7:00 o'clock?

MS. JONES: I object, Your Honor. Asked and answered.

THE COURT: The question will not asked again.

(emphasis added) (T. 238-239, Appellant's Brief below, 19-20).

The fourth comment, in context, was;

Q: Did he tell you how it is or when was the last time he had seen the gun?

A: When he was robbed at a home invasion robbery at his house.

Q: How did he identify it as being his?

A: He gave me the serial number to it and everything. I had the serial number to the gun.

Q: Did he have any independent recollection of what the serial numbers are?

MR. POTOSKY: The question posed to the witness, "did he have an independent recollection---"

THE COURT: Your objection is referring to---

MR. POTOSKY: He can look at the report to refresh his memory.

MS. JONES: Officer, do you need something to refresh your recollection as to the serial number.

THE WITNESS: The property report.

THE COURT: I wish we would not have all of these little picayune objections. Let's get on to the trial.

MR. POTOSKY: I object to the Court that a valid legal objection is a picayune matter.

I would like to come side bar for a motion.

(emphasis added).
(Appellant's Brief below, 22; T. 261).

The fifth comment, in context, was;

(Thereupon, Counsel for the respective parties and the Court Reporter approached the Bench and the following proceedings were had outside the hearing of the jury:)

THE COURT: Can you refer me to any other page?

MR. POTOSKY: No, Judge. I asked him, and he stated in his deposition that he was arrested for

were dropped, and he was dismissed and nothing else, except a suspended license.

THE COURT: No trafficking?

MR. POTOSKY: Correct.

I'm going to show through certified copies.

THE COURT: I did not know they were suspended.

MR. POTOSKY: Nobody asked.

(Thereupon, the following proceedings were had within the hearing of the jury:)

BY MR. POTOSKY:

Q: Isn't it a fact you were put on six months probation for Battery and Grand Theft Auto?

A: No, because I went to Court and they released me under the Pre-Trial Release program.

Q: You said that you were not put on six months probation from 1983?

THE COURT: Sir, I see nothing about that in here.

This is the deposition you're referring to?

MR. POTOSKY: I asked him if he was arrested for anything else and he said no. He said his only arrest was the charges that were dismissed.

THE COURT: He said it was dismissed?

MR. POTOSKY: I'm going to prove---

MS. JONES: The question is, have you ever been convicted of anything else; he said no.

MR. POTOSKY: I will ask the question:

> "Q: Have you ever been arrested or convicted of a crime?"

MS. JONES: What page?

MR. POTOSKY: Page 3, Line 10.

Your answer:

> "A: I have been arrested for Assault and Battery but they dropped the charges.
>
> "Q: Anything else?
>
> "A: No. Traffic, but I believe it was with a suspended license that I did not know it was suspended."

That was your statement in deposition, correct?

A: Correct.

Q: On Line 24, I asked you how long ago was that and you told me, the case was dismissed.

I said, "How long ago," and you said a while back, about nine months ago, correct?

A: Yes, I believe I told you that.

Q: You denied being put on probation for six months for grand theft and battery?

MS. JONES: I'm going to renew my objection.

THE COURT: I'm going to sustain the objection.

This is not here, and I don't want to say anything.

MR. POTOSKY: Please mark this for identification.

THE CLERK: Defense Exhibit A-1 for identification.

(Thereupon, the aforementioned document was marked for identification as Defense Exhibit A-1).

MS. JONES: Judge, I have an objection to this and I would like to have a side bar.

If he's going to be allowed to ask questions about this, I would like to have a side bar.

(Thereupon, Counsel, for the respective parties and the Court Reporter approached the Bench, and the following proceedings were had outside the hearing of the jury;)

MR. POTOSKY: I am going to ask him if that is his signature on the bottom.

THE COURT: No more questions.

MR. POTOSKY: Judge, how can you not allow me to bring this to the jury's attention?

THE COURT: The jury may be excused for a moment.

(Thereupon, the jury left the Courtroom and the following proceedings were had outside the hearing of the jury;)

THE COURT: Mr. Potosky, I stated yesterday and I'm restating it today.

This man is a witness. He's here as an alleged victim, and you are not going to be standing here and malign him in any way.

MR. POTOSKY: Judge, the man is a liar. He made a statement under oath in deposition.

THE COURT: The deposition---

MR.POTOSKY: I'm sorry.

THE COURT: I am not half as sorry as you're going to be sorry.

MR. POTOSKY: Let me proffer. I have certified copies showing that he was put on six months probation for battery and grand theft auto and he signed the bottom of the probation form.

THE COURT: That is not what you asked him in deposition.

MR. POTOSKY: I certainly did, sir. The deposition will speak for itself.

I asked him if he was ever arrested, and he said once for assault and battery.

THE COURT: You're not going to get into it any further now.

MR. POTOSKY: I haven't made a proffer. I have a certified arrest affidavit that showed he was arrested in 1983 for Attempted Burglary, and he was arrested for Resisting Arrest with Violence.

Judge, the man said---

THE COURT: I'm listening to what you said.

MR. POTOSKY: Judge, this is a certified document showing the man is a liar, and he lies under oath.

THE COURT: I'm not going to let you get away with that, sir. I have told you that already before. I'm not going to have you make a Defendant out of a victim.

MR. POTOSKY: He has been a Defendant before and he's denying it under oath.

Judge, he wants to testify that he didn't do these things.

Judge, he wants to testify that he didn't do these things.
Let me ask him the question.

THE COURT: No, that's the end of the line of questioning.

Bring the jury back in.

(Thereupon, the jury entered the Courtroom, and the following proceedings were had within the hearing of the jury:)

THE COURT: I don't want to have this jury misled.

(emphasis added).
(Appellant's Brief below, 21; T. 292-297).

The sixth comment, in context, was;

THE COURT: What page?

MR. POTOSKY: Page 42, and now we're on page 43.

"Q: While you were down on the ground, there was some ransacking going on in the house?

"A: Yes. They were checking the whole house, and the closets and everything.

"Q: (By the Prosecutor) After that, you were tied up and you indicated that took a minute. Is it possible it took longer than a minute to ransack the house, you were on the floor longer than a minute?"

THE WITNESS: To tie me up.

MR. POTOSKY: Let me finish.

Your answer, it's possible.

THE COURT: Let him finish explaining.

MR. POTOSKY: I'm not done reading the passage.

THE COURT: It's going to be prejudiced unless he explains that first.

MR. POTOSKY: I object to the Judge saying it's prejudicial. You are commenting on the evidence, and I, again, ask for a side bar.

Judge, I'm impeaching from the deposition, and the law is clear. I read the entire passage and the witness has an opportunity to explain.

> "Q" Is it possible it took longer than a minute to ransack the house, that you were on the floor longer than a minute?"
>
> "A: It's possible that we were on the floor longer than a minute."
>
> "Q: Do you remember how long you were on the floor?
>
> "A: You see, because when I tied up, Wayne wasn't in the house yet. He was sitting in the car.
>
> "Q: Wouldn't it have been more than a minute?
>
> "A: Yes.
>
> "Q: How long was it that you remember?
>
> "A: About five minutes.
>
> "Q: Five minutes?
>
> "A: Yes. It was a little while longer."

> Do you recall those questions and answers?
>
> **A:** I'm talking, according to what they were going to tie me up, and don't forget my friend was outside in the car and he was waiting there already a few minutes. They were taking off our jewelry and everything.
>
> (Appellant's Brief, 22; (T. 316-317).

The general rule is that trial judges may comment on the evidence, express opinions and admonish counsel and such comments form the bench do not constitute reversible error unless they deprive the defendant of an impartial trial. United States v. Jackson, 470 F.2d 684 (5th Cir. 1972); cert. denied, 412 U.S. 951 (1973). The burden is on the appellant to show prejudice from remarks by the court and, if such remarks are comments on the evidence, there must be a showing of harmfulness to obtain reversal. Parks v. State, 206 So.2d 431 (Fla. 3d DCA 1968), cert. denied, 214 So.2d 623 (Fla. 1968); Baisden v. State, 203 So.2d 194 (Fla. 4th DCA 1967).

The first two (2) comments, concerning Mr. Aguilar not being on trial, could not possibly be considered comments on the evidence, at all. (T. 233-234). Neither could the fourth, concerning, "picayune objections" where defense counsel chose to interrupt the state's examination with his own little comment, "He can look at the report to refresh his memory." (T. 261). Similarly, the court's statement that, "I don't want to have this jury misled" (T. 297) could not

possibly have prejudiced the defendant where the jury had just returned and could not possibly have known what the judge was even talking about. Likewise, the judge's comment that, "It's going to be prejudiced unless he explains that first," (not "prejudicial", as the defense argued)(T. 316-317), could not have harmed the defense where the witness was permitted to explain. (T. 317).

Thus, only the third comment, "He's close enough" could even be considered a comment on the evidence, at all (T. 238-239). It is respectfully submitted that the witness credibility due to the difference between his trial testimony (between 6:00 and 7:00) and his deposition testimony (more or less at 7:00) would not have been so substantially discredited, absent the Judge's remark, that the comment must be considered reversible error.

Admonitions to defense counsel, indeed, holding defense counsel in contempt of court in the presence of the jury, have been held not to constitute harmful error. United States v. Arroyave, 477 So.2d 157 (5th Cir. 1973); Paramore v. State, 229 So.2d 855 (Fla. 1969); modified on other grounds, 408 U.S. 935 (1972); Olive v. State, 179 So.811 (Fla. 1938); Hayes v. State, 368 So.2d 374 (Fla. 4th DCA 1979), cert. denied, 378 So.2d 345 (Fla. 1979).

Further, when the comments in this case are compared with comments in other cases found not to constitute harmful error, the lack of prejudice in this case, due to the alleged comments, become obvious. United States v. Dohm, 597 F.2d 535 (5th Cir. 1979); Province v. State, 337 So.2d 783 (Fla. 1976); cert. denied, 431 U.S. 969 (1977); Watson v. State, 190 So.2d 161 (Fla. 1966); cert. denied, 389 U.S. 960 (1967).

The comments of the trial judge which the respondent attacked did not constitute reversible error.

CONCLUSION

Based upon the foregoing arguments and authorities, the Petitioner respectfully submits that this court should reverse the decision of the Third District Court of Appeal and reinstate the Judgment and Sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CHARLES M. FAHLBUSCH
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
401 N. W. 2nd Avenue (N921)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF** OF **PETITIONER ON THE MERITS** was furnished by mail to **ROBERT KALTER,** Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 13th day of February, 1989.

CHARLES M. FAHLBUSCH
Assistant Attorney General

ss/