IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,766

THE STATE OF FLORIDA,

Petitioner,

-vs-

ROLAND0 DEL SOL,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

In the trial court, the respondent, ROLANDO DEL SOL, was the defendant and the petitioner, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood in the lower court. The symbols "R." and "T." will be used to refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as being accurate. However, the state in its statement of the case incorrectly stated that the Third District Court of Appeals 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 facts establish that the trial court specifically found that the respondent had made a sufficient showing of racial prejudice to require a hearing pursuant to State v. Neil, **457** So.2d **481** (Fla **1984)** and that the court refused to conduct such a hearing only because the Respondent was not black. (Tr. **174-176).** Therefore, the Third District Court of Appeals never ruled that a Neil hearing is automatically required whenever the state excludes five blacks from the jury. The Third District Court of Appeals only ruled that when a trial court finds sufficient cause for a Neil hearing a hearing must be conducted no matter what color the defendant happens to be.

POINTS INVOLVED ON APPEAL

I.

THE THIRD DISTRICT COURT OF APPEALS CORRECTLY CONCLUDED THAT ANY DEFENDANT NO MATTER WHAT HIS RACE HAS THE RIGHT TO OBJECT TO THE STATE'S SYSTEMATIC EXCLUSION OF A SPECIFIC RACE FROM JURY SERVICE AND THEREFORE THE TRIAL COURT'S REFUSAL TO CONDUCT A NEIL HEARING SOLELY BECAUSE RESPONDENT WAS NOT BLACK ENTITLES RESPONDENT TO A NEW TRIAL.

II

THE THIRD DISTRICT COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT'S IMPROPER COMMENTS IN FRONT OF THE JURY CONCERNING HER VIEW OF THE EVIDENCE AND THE CREDIBILITY OF THE WITNESSES ENTITLED RESPONDENT TO A NEW TRIAL.

SUMMARY OF ARGUMENT

Point I.

The Third District Court of Appeals ruled that a defendant, whatever his race, has standing to challenge the arbitrary exclusion of members of any race for grand or petit jury service.

The State of Florida used all five of its peremptory challenges to exclude black jurors. Respondent requested a Neil hearing. The trial court recognized that Respondent established a substantial likelihood of racial discrimination in jury selection but refused to conduct a Neil hearing since Respondent was not black. (T. 174-76).

The State of Florida's commitment to eliminate racial discrimination in jury selection is based on the Florida Constitutional right to have a fair cross section of the community serve on a defendant's jury. See, Article 1, Section 16 of the Florida Constitution. Every citizen no matter what his or her color has the right to have a fair cross section of the community serve on their jury. Therefore, any defendant no matter what their color has the right to object to the State's systematic exclusion of blacks from the jury.

The state's reliance on the United States Supreme Court case of Batson v. Kentucky, 106 So.2d 1712 (1986) to support their argument that a standing test should exist in the State of Florida is misplaced. In Batson the United States Supreme Court ruled that the Equal Protection Clause of the United States

Constitution prohibited racial discrimination in jury selection. The court further ruled that in order for a party to make an equal protection argument the complaining party must have standing.

If this court had relied upon the Equal Protection Clause rather than the Article 1 Section 16, of the Florida Constitution then the state may be correct in arguing that a defendant could not object to the state's improper exclusion of blacks from the jury unless that defendant was black. However, since State v. Neil, supra, and its progeny rely upon a defendant's right to have a fair cross section of the community serve on his jury the Third District Court of Appeals correctly concluded that in the State of Florida any defendant no matter what his race can object to the state's systematic exclusion of blacks from the jury.

Point II.

The Third District Court of Appeals also decided Respondent was entitle to a new trial since the trial court made several improper comments before the jury concerning her view of the evidence and the credibility of the state's witnesses. The decision of the Third District Court of Appeals is consistent with all of the cases from this court which have continuously held that a defendant is entitle to a new trial when the trial judge makes improper comments before the jury. Therefore, this court should affirm the decision of the Third District Court of Appeals.

ARGUMENT

Point I.

THE THIRD DISTRICT COURT OF APPEALS CORRECTLY CONCLUDED THAT ANY DEFENDANT NO MATTER WHAT HIS RACE HAS THE RIGHT TO OBJECT TO THE STATE'S SYSTEMATIC EXCLUSION OF A SPECIFIC RACE FROM JURY SERVICE AND THEREFORE THE TRIAL COURT'S REFUSAL TO CONDUCT A NEIL HEARING SOLELY BECAUSE RESPONDENT WAS NOT BLACK ENTITLES RESPONDENT TO A NEW TRIAL.

The Third District Court of Appeals ruled that a defendant, whatever his race, has standing to challenge the arbitrary exclusion of members of any race for grand or petit jury service and relied on the cases of Castillo v. State, 466 So.2d 7 (Fla. 3rd DCA 1985) and Peters v. Kiff, 407 U.S. **493**, 92 S.Ct. 2163, 33 Ed.2d 83 (1972). The Third District Court of Appeals recognized that their decision conflicts with the Fifth District Court of Appeals decision in Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987) wherein the Fifth District held that a defendant must establish standing before he can object to the state's systematic exclusion of black's from the jury. In Kibler, Judge Orfinger wrote a concurring opinion wherein he concluded that this Court did not establish a standing test in State v. Neil, supra.

At the conclusion of jury voir dire the State of Florida used all five (5) of its peremptory challenges to exclude black jurors. Respondent objected and requested that the court conduct a Neil inquiry. The trial court refused to conduct a Neil inquiry and specifically stated that no Neil inquiry was

necessary since the Respondent was not black. Counsel then inquired from the court whether the court would have considered Respondent's argument if Respondent was black. The following colloquy occurred:

> THE COURT: This is not a black defendant. I do not consider your argument.
> Mr. POTOSKY: Would the Court consider my argument if Mr. Del Sol was black?
> THE COURT: Yes. (T. 174-176).

Therefore, it is apparent that the court refused to conduct a Neil inquiry in this case only because the Respondent was not the same race as the group of jurors that were being systematically excluded from the jury. The state's argument that the Third District Court of Appeals ruled that a Neil hearing is automatically required whenever five members of a race are excluded is completely without merit. The trial court specifically stated that a sufficient showing of racial discrimination was made and that the only reason a Neil inquiry was not done was because Respondent was not black. Therefore, the only issue the Third District Court of Appeals had to decide and the only issue this Court has to decide is whether a non-black defendant has standing to object to the state's systematic exclusion of black's from the jury.

To support the contention that a defendant must establish standing to object to the state's systematic exclusion of blacks from the jury the state argues that this Court in State v. Slappy, 522 So.2d 18 (Fla. 1988) has adopted the standing test spelled out by the United States Supreme Court in Baston v. Kentucky, 476 U.S. 79 (Fla. 1986). Other than arguing that this

Court mentioned Batson several times in the Slappy opinion the state offers no support for the conclusion that this Court has ruled that a defendant must establish standing to object to the state denying him a jury consisting of a fair cross section of the community.

An analysis of this Court's decisions dealing with wrongfully exclusion of blacks from a jury and the Batson opinion reveal that the standing requirement in Batson is not applicable in the State of Florida. In Batson the United States Supreme Court ruled that the Equal Protection Clause is violated when the state systematically excludes blacks from the jury. The court recognized in the opinion that in order for a defendant to argue that he is being denied equal protection he must establish standing. In footnote four (4) of the opinion the United States Supreme Court specifically stated that the decision in Batson was based solely on an equal protection argument and not on a Sixth Amendment argument.

In State v. Neil, supra, and State v. Slappy, supra, this court recognized that Florida's commitment to destroy racial discrimination in jury selection is based on the Florida Constitution and that under the Florida Constitution every criminal defendant no matter what the color of his skin is entitle to a jury consisting of a fair cross section of the community.

In State v. Neil, supra, this Court held the following:

> Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional

> dimensions. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenaes be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury. As did the New York, California and Massachussetts courts, we find that adhering to the Swain test of evaluating peremptory challenges impedes, rather than furthers, article I section **16's** guarantees. We therefore hold that the test set out in Swain is no longer to be used by this state's courts when confronted with the allegedly discriminatory use of peremptory challenges.''

The fact that this Court's decision in Neil was based on the Florida Constitution's right to a fair cross section of the community and not on the Equal Protection Clause of the United State's Constitution is further evidenced by this court's decision in State v. Slappy, supra, wherein this court held the following:

> In interpreting our own Constitution this court in State v. Neil. **457** So.2d **481** (Fla. **1984)** clarified sub nom, State v. Castillo, **486** So.2d **565 (1986)** recoqnized a protection against improper bias in- the selection of juries that preceded, foreshadowed and exceeds the current federal guarantees. We reaffirm this state's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida's Constitution's explicit guarantee of an impartial trial. See Art. 1, section **16**, Fla. Const.

Therefore, this Court has made it abundantly clear that a defendant's right to object to the state's wrongfully exclusion of blacks from the jury is based solely on the Florida Constitution's right to a fair and impartial jury and not on the Equal Protection Clause of the United State's Constitution. The

State of Florida completely ignores this fact in their brief and fails to argue to this court why a non-black should not have the right to object to the state's systematic exclusion of blacks from the jury.[1]

In State v. Bruce, 745 S.W.2d 696 (Mo. App. 1987) a case relied upon by the state, the Missouri court ruled that the Sixth Amendment did not require that a jury consist of a fair cross section of the community and therefore a standing test is appropriate when a defendant complains about racial discrimination in jury selection. Since this court has ruled that the Florida Constitution does guarantee that a defendant have the opportunity to have a fair cross section of the community serve on his jury the holding in State v Bruce, supra, is not applicable in this state. The reasons for rejecting a standing requirement in a situation where the state wrongfully excludes blacks from the jury were recognized by Judge Manford who wrote a dissenting opinion in State v Bruce, supra. Judge Manford stated the following:

> What Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.E.d.2d. 69 (1986); Smith, supra: and the present cases continue to illustrate is the hypocrisy in the law today. This hypocrisy arises from the hue and

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1 The State cites cases from other states to support its position that the Third District Court of Appeals erred in ruling that in the State of Florida a non-black has the right to object to the state's wrongful exclusion of blacks from a jury. An analysis of the cases cited by the state reveal that in those cases the state's have not relied on their own state's constitutional right to have a fair cross section of the community serve on the jury but instead have relied on the Equal Protection Clause. Therefore, these cases have no relevance to the issue before this court.

> cry and repeated assertion that the law is color blind or race neutral: but then on the other hand, Batson and other rulings provide a constitutional safeguard limited by the race of the accused. As stated in Smith, 737 S.W.2d at 742, the only thing separating the various defendants and a right versus the denial of a right to challenge particular venire persons, is the color of their skin. So long as Batson, Smith, and other cases follow such reasoning, discrimination will never be eliminated from jury selection."

Whereas a standing test is appropriate in an Equal Protection context, the color of a defendant's skin is completely irrelevant in determining whether the state's systematic exclusion of blacks from the jury denies a defendant the right to a jury composed of a fair cross section of the community. See, Judge Brennan's dissent in Teague v. Lane, U.S. Supreme Court Case No. 87-5209, Criminal Law Reporter 44, No. 20 Pg. 3144. The Florida Constitution guarantees all criminal defendant's the right to have a jury that consists of a fair cross section of the community. This protection does not apply only to blacks. Both black and white defendant's have the right to have both blacks and whites serve on their juries. To hold that only black defendant's have the right to object to the state's systematic exclusion of blacks from the jury would be to reinforce the prejudice that the this Court has tried to eliminate in Neil and Slappy.

The California Supreme Court, similar to this Court, has recognized the importance of a jury consisting of a fair cross section of the community in People v. Wheeler, 583 P.2d 748 (Cal. 1978) when the court held the following:

> Summing up, we repeatedly emphasized (at

> p. 754, 278 P.2d at p. 18) the need for compliance with the representative cross-section rule as a precondition to trial by an impartial jury: "The American system requires an impartial jury drawn from a cross-section of the entire community and recognition must be given to the fact that eligible jurors are to be found in every stratum of society. . . Any system or method of jury selection which fails to adhere to these democratic fundamentals, which is not designed to encompass a cross-section of the community or which seeks to favor limited social or economic classes, is not in keeping with the American tradition and will not be condoned by this court." (See also *People* v. *Carter* (1961) 56 Cal.2d 549, 568-570, 15 Cal.Rptr. 645, 364 P.2d 477.)

The Arizona Supreme Court on July 19, 1988, in State v. Superior Ct. (Gardner) 43 Crim.L. 1069 held that racial bias in jury selection requires a new trial in that state even if the defendant was not of the same race as the jurors that were excluded. The Arizona court's logic is compelling:

> "If we apply the Batson principle exclusively to those cases in which the defendant and the excluded jurors are of the identical race or ethnic group, our trial judges and lawyers will frequently be forced to inquire into the racial and ethnic makeup of particular jurors.
>
> We should adopt the rule that would obviate or reduce the necessity for such an unseemly intrusive procedure.
>
> The discriminatory exclusion of jurors from any cognizable group necessarily violates the right to a chance for a fair cross section no matter what the racial or ethnic characteristics of the defendant, his lawyer, the judge, or any party to the action. (emphasis on "necessari1y" added to demonstrate the court's ruling that the actions are a per se requirement. This court should not consider the failure to inquire harmless error).

In conclusion it is Respondent's position that the Third

District Court of Appeals correctly concluded that a non-black has the right to object to the state's systematic exclusion of blacks from the jury. Since the trial court failed to conduct a Neil inquiry only because the court felt Respondent had no standing to object to the state's wrongful exclusion of blacks from the jury, Respondent is entitle to a new trial. Therefore, this court should affirm the decision of the Third District Court of Appeals which granted Respondent a new trial.

POINT 11.

THE THIRD DISTRICT COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT'S IMPROPER COMMENTS IN FRONT OF THE JURY CONCERNING HER VIEW OF THE EVIDENCE AND THE CREDIBILITY OF THE WITNESSES ENTITLED RESPONDENT TO A NEW TRIAL.

During the trial, Respondent made several motions for mistrial since the trial judge was making comments before the jury concerning her view of the evidence, the credibility of the witnesses and her opinion of the defense strategy. At the conclusion of the case, counsel for Respondent renewed his motion for mistrials. All of the motions were denied. (Tr. 233, 234, 238, 261, 297, 316, 325-328).

The trial judge is the dominant figure at a trial and her comments tending to show her view as to the weight of the evidence, the credibility of a witness or the guilt of the accused destroys the required impartiality of the trial. See Hamilton v. State, 109 So.2d 442 (Fla. 3d DCA 1975); Parese v. State, 320 So.2d 444 (Fla. 3d DCA 1975); Gordon v. State, 449 So.2d 1302 (Fla. 4th DCA 1984); Whitfield v. State, 479 So.2d 208 (Fla. 4th DCA 1985); and Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1983).

In Hamilton v. State, supra, the Court recognized the following:

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an

> accused, it thereby destroys the impartiality of the trial to which the litigant or accused is entitled.

In Parese v. State, supra, the Court once again recognized the importance of a trial judge not making comments in front of the jury that may have led the jury to believe the judge has an opinion on the weight of the evidence or the credibility of the witness when the court stated the following:

> The firmly established rule in Florida is that the trial judge should avoid making directly to or within the hearing of the jury any remark which is capable directly or indirectly, expressly, inferentially or by innuendo of conveying any intimation as to what view he (or she) takes of the case or as to what opinion the judge holds as to the weight, character or credibility of any evidence adduced. Leavine v. State, 109 Fla. 447, 147 So. 897 (1933); Seward v. State, Fla. 1952, 59 So.2d 529; Raulerson v. State, Fla. 1958, 102 So.2d 281.

In the instant case, the trial judge made numerous comments before the jury during Respondent's cross examination of crucial state witnesses which, when viewed together, clearly could have left the jury with the impression that the judge believed the witnesses' testimony and that Respondent was being unfair in trying to attack the credibility of these witnesses. The court also made comments during Respondent's objections which also gave the jury the impression that the court had an opinion on the strategy of Respondent's counsel and the validity of his defense. An analysis of all of the improper comments individually will reveal that the trial court did make several improper comments to the jury. If the court then considers the cumulative effect of all of the improper comments, it will become

apparent that the Third District Court of Appeals correctly concluded that the trial judge's comments denied Respondent a fair trial and therefore a new trial is warranted.

The first improper comment made by the trial judge was during the cross examination of the victim Maximiliano Aguilar Diaz. On direct examination, Mr. Diaz had testified that he was a car salesman and a fisherman. Counsel for Respondent in cross examination was attempting to show that the victim had not told the truth about his employment. Counsel attempted to show this by establishing that the victim never filed an income tax return. The following colloquy occurred before the jury:

> Q (By Mr. Potosky) Did you fill out an income tax return in 1984?
>
> MS. JONES: Objection, Judge.
>
> THE COURT: Sustained. He's not on trial here.
>
> MR. POTOSKY: He should be, Judge.
>
> MS. JONES: That is a bad statement. I would like to have that stricken.
>
> THE COURT: Sustained. (emphasis added)

(Tr. 233.

Several questions later, the following colloquy also occurred before the jury:

> Q (By Mr. Potosky) Tell me what your income was from these cars.
>
> MS. JONES: Objection, Judge.
>
> THE COURT: Sustained.
>
> Mr. Aguilar is not on trial. (emphasis added).
>
> MR. POTOSKY: Judge, I'm going to reserve another motion. The Judge should not be

making statements like that in front of the jury.

One of the most essential goals of cross examination is to attack the credibility of a witness. The trial court's continuous comments before the jury that the witness was not on trial resulted in the judge indirectly commenting on her view of the credibility of the witness. If the court thought the questions posed by Respondent on cross examination were improper, the court had the right to sustain the objections made by the state. However, the court's comment before the jury that the witness is not on trial clearly left the jury with the wrong impression that it was improper for Respondent to attack the credibility of the witness.

Further on in the cross examination of Mr. Aguilar, counsel for Respondent questioned him concerning when the robbery occurred. The victim responded between six and seven o'clock. While counsel for Respondent was attempting to impeach the witness, the following colloquy occurred before the jury:

BY MR. POTOSKY:

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 enough.

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. (emphasis added).

The above quoted colloquy establishes that the trial judge commented directly before the jury that she felt that the witness' testimony at the trial was consistent with his testimony given during his deposition. In Raulerson v. State, 102 So.2d 281 (Fla. 1958), this Court specifically held the following:

> The rule was announced as early as 1896 in Lester v. State, 37 Fla. 382, 20 So. 232, and was re-announced as late as 1952 in Seward v. State, supra. We adhere to it now for the reasons so often given, namely, that the facts are left to the independent and unbiased consideration of the jury and the judge should not enter their sphere of operation else the accused would be deprived of his right to trial by a jury. Because of the judge's exalted position his appraisal of testimony would likely give such emphasis to it as to influence the jury in their deliberation."

Whether the victim's testimony at trial concerning when the robbery occurred was consistent with his testimony at deposition was a decision for the jury and it was totally improper for the trial judge to comment before the jury on her opinion whether the testimony was consistent.

During the cross examination of Mr. Bottino, another victim, Respondent attempted to impeach him concerning his past criminal record. After a side bar conference was held and the court instructed Respondent not to inquire further concerning the

victim's prior record the trial judge made the following comments in the presence of the jury:

> (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.

Therefore, once again the judge made a comment before the jury that it was improper to attack the credibility of a witness and by attempting to do this Respondent was trying to mislead the jury. It is extremely prejudicial to a defendant if a trial court keeps making comments to the jury that defense counsel is improperly misleading the jury. If the trial judge thinks a defense attorney is misleading a jury this should not be discussed in the presence of the jury.

Further on in the cross examination of Mr. Bottino, Respondent questioned him concerning the length of time that the robbery took. In an attempt to impeach the witness, Respondent began to read from a deposition given by Mr. Bottino. In the middle of reading the deposition, Mr. Bottino wanted to interrupt and explain his answer. Respondent's counsel stated that he wanted to finish reading the deposition. The following colloquy occurred in the presence of the jury:

> Q (Mr. Potosky): 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, its possible.

The next question--

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 its prejudicial. You are commenting on the evidence, and I, again, ask for a side bar. (emphasis added).

(Tr. 316).

This comment by the judge in the middle of Respondent's attempt to impeach the witness was another example of the judge's continuous comments made in front of the jury which may have led the jury to believe that the witness was credible and that the jury should believe his testimony.

Finally, during the direct testimony of one of the police officers, Respondent objected to a question since it called for a hearsay answer. Rather than overrule or sustain the objection the trial court made the following comment in front of the jury:

MR. POTOSKY: Objection, hearsay.

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

THE COURT: I wish we would not have all of these little picayune objections. Let's aet 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).

(Tr. 261).

Counsel for Respondent had an obligation to defend his client. One of the functions of an attorney is to object to

improper questions and answers. It is inappropriate for a trial judge to comment before a jury that she wishes "counsel would not have all of these little picayune objections". (Tr. 261). As counsel correctly pointed out, legal objections are not picayune matters and it was improper for the court to leave the jury with the impression that objections are picayune. When counsel for Respondent requested a sidebar to move for a mistrial, the request was denied. Therefore, counsel moved for a mistrial in front of the jury. The motion was also denied. (Tr. 262).

An analysis of all the above-mentioned remarks made by the judge in the presence of the jury clearly establishes that the court made several improper comments before the jury which conveyed her view of the case, and her opinion of the weight, character and credibility of the witnesses. In Kellum v. State, 104 so.2d 99 (Fla. 3d DCA 1958), the Court cited several passages from old cases of this court which are still applicable today.

In Lester v. State, 37 Fla. 382, 20 So. 232, this court stated the following:

> "* * * but great care should always be observed by the judge to avoid the use of any remark in the hearing of the jury that is capable, directly or indirectly, expressly, inferentially, or by innuendo of conveying any intimation as to what view he takes of the case, or that intimates his opinion as to the weight, character, or credibility of any evidence adduced. All matters of fact, and all testimony adduced, should be left to the deliberate, independent, voluntary, and unbiased judgment of the jury, wholly uninfluenced by any instruction, remarks, or intimation, either in express terms or by innuendo, from the judge, from which his view of such matters may be discerned. Any other course deprives the accused of his right to trial by jury, and is erroneous. State v. Ah

Tiong, 7 Nev. **148; 1** Thomp.Trials, § 219, and citations."

In Raulerson v. State, supra, this Court once again emphasized the long standing rule that a new trial is warranted when a trial judge makes improper comments in front of a jury when the court stated:

> After an intense study of the parts of the record relevant to the remark of the judge, which Appellants so strenuously attack, we conclude that we can only hold that it was prejudicial, reversible error. Certainly persons charged with a crime, no matter how heinous it may be, are entitled to a fair trial in accordance with law and with precedents established through the years. One of the oldest of these under our system is an inhibition against any comment by the judge on the evidence in the case. It was stated with clarity and emphasis in the opinion in Leavine v. State, supra [109 Fla. **447, 147** So. (897), 9021: * * * a trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly inferentially, or by innuendo of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character, or credibility of any evidence adduced. (emphasis added).

The above analysis clearly supports the Third District Court of Appeals decision that the cumulative effect of the improper comments made by the trial judge denied Respondent a fair trial. Since the state has failed to establish that the Third District's decision conflicts with any case from this Court or any other district court, this Court should affirm the decision of the Third District Court of Appeals.

CONCLUSION

Based on the foregoing argument, authorities, and policies discussed, the certified question must be answered in the negative, and the decision of the District Court of Appeal should be affirmed in all respects.

Respectfully submitted,

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BY: _____
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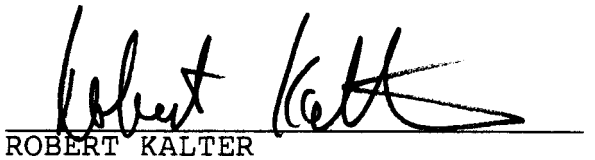
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was delivered by mail to the Office of **CHARLES M. FAHLBUSCH, Assistant Attorney General, 401 N.W. 2nd Avenue, Room #N-921, Miami, Florida this 1st day of March, 1989.**



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