# In the Supreme Court of Florida

**Case No. SC00-1080**

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Lucille Roberts, personally and as Personal Representative
of the Estate of Frederick Roberts,
Petitioner,

v.

Francisco Tejada M.D., Francisco Tejada M.D., F.A.C.P, P.A.
And Francisco Tejada M.D., F.A.C.P, P.A. d/b/a
American Oncology Centers Inc.,
Respondents.

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## PETITIONER'S BRIEF ON THE MERITS

On Petition for Discretionary Review of A Decision
of The Third District Court of Appeal

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Respectfully submitted,
November 30, 2000, by
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## CERTIFICATE OF TYPE SIZE AND STYLE

Petitioner, Lucille Roberts, is utilizing a fourteen (14) point Times New Roman font in this brief.

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## INTRODUCTION

A half century ago, this Supreme Court explained the major reasons for interviewing jurors on *voir dire*: 'to ascertain whether a challenge exists, and to ascertain whether it is wise and expedient to exercise the right to peremptory challenge given by law." This Supreme Court held that "a juror who falsely represents his interest or situation or conceals a material fact relevant to the controversy is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs [the litigants'] right to challenge'. *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953).

After an improper attempt by the Third District Court of Appeal to recede from this well-reasoned opinion, this Supreme Court repeated the principal in *Zaqueira v. de la Rosa*, 659 So.2d 239 (Fla. 1995).

Now, just five years later, the Third District Court of Appeal has again improperly sought to erode and or circumvent the holdings of this Supreme Court. The Third District Court and other district courts have embarked upon a journey away from *de la Rosa*. This journey leads to a strange and dangerous destination, at which the blame for, and burden resulting from, juror non-disclosure is placed upon the shoulders of the innocent litigant.

These efforts of the various district courts have produced strained analyses and

mental gymnastics. The district courts have made the following holdings:

> Jurors cannot, or have not, understood direct, repeated, and unambiguous questions;
>
> Jurors cannot, or will be forgiven for failing to, remember the events of their lives;
>
> Relevancy and materiality will be decided by the district courts from a cold record, rather than by a trial judge or better yet the litigant;
>
> There is now a nebulous 'statute of limitations' on bias or prejudice;
>
> Post-trial, self serving, denial of bias or prejudice made by intentionally concealing jurors, render the concealment immaterial; and, most incredibly,
>
> Litigants must now conduct background investigations before the jury is sworn, and cross-examine potential jurors with the fruits of those investigations.

Petitioner urges this Honorable Court to reject these unsupportable positions, and remove the insurmountable hurdles placed in front of litigants. The Supreme Court is urged to make it clear that jurors *must* tell the truth, and allow litigants to *rely* upon them to do so. This Honorable Court has accepted jurisdiction[1] presumably to set the district courts back on the *de la Rosa* path to honest, fair and impartial jurors and trials.

## STATEMENT OF THE CASE AND FACTS

The Petitioner is the widow and personal representative of Frederick Roberts. Mr. Roberts had suffered from liver cancer. Petitioner alleged that Respondents were negligent in their treatment of the cancer, resulting in Mr. Roberts' death as much as 18 months sooner than otherwise would have naturally occurred.

During *voir dire*, **both** the Trial Court and Petitioner's counsel extensively questioned the prospective jurors about prior litigation. The jurors were questioned by name, one by one, at length.

The Trial Court first raised the subject of prior litigation in *voir dire*. The Trial Court said:

> "I'll ask you ... have you been a party to a lawsuit. What I mean by that is, have you brought a court action against somebody else seeking money from them or if someone brought an action against you, seeking money from you. And it could be because of an auto accident, breach of contract, many other things, divorces and what not. But let me know if you have been a party, a plaintiff or defendant, in a case yourself or maybe a close family member has been involved in a lawsuit. Let me know that as well."

Immediately before Petitioner's counsel questioned each and every potential juror, by name, with follow up questions, he said:

> "He [the judge] asked you if you had ever been a party to a lawsuit. And again, the reason isn't to embarrass you, because you know when you were in the lawsuit, you may

> have won and you thought it was great or you lost, thought it stunk. Or you may have been a defendant and think all the plaintiffs are out to get their money or you may have been a plaintiff and thought otherwise.
>
> It's really important what you bring to the stand on this issue. So I'm going to ask you, each one of you by name whether or not you have ever been a party to a lawsuit. And I mean, ***any kind*** of lawsuit, a divorce, a ***collection of a debt***, a breach of contract, an ***assault and battery***, an ***auto*** accident, a defective product, a medical negligence case, such as this case, a divorce*,* ***anything at all***."

Jurors Paula C. Guerrero and Thelma Fornell specifically answered "**no**". Both served on the jury. Mrs. Fornell was the foreperson. The jury returned a defense verdict.

It is now known that in 1996 Ms. Guerrero had filed a domestic violence petition alleging an *assault and battery*. Ms. Fornell had been party to two civil lawsuits. She was a defendant in a small claims case filed in 1973 and a plaintiff in an *auto* negligence case filed in 1975.

The Petitioner timely filed her Motion for New Trial and/or Mistrial. Before the Trial Court had ruled on the motion, the Petitioner had searched the index to the public records for Miami-Dade County. The Motion for New Trial and/or Mistrial was amended to include the then available public record information. The Petitioner requested a jury interview to ascertain more information about the jurors. The Trial

Court required more information before it could rule, but denied, without prejudice, the request to interview.

Instead, the Trial Judge entered an order to allow the parties access to the jury pool's information on name, address, driver's license, and date of birth. (R.Vol. III, 521-522). Then an "Autotrack" computerized background check was conducted. (R. Vol. IV, 534-743).

Thereafter, the court index was culled to specifically identify the cases involving the jurors. Only then could the individual court files obtained. Some records were unavailable entirely, while others were available at the Dade County Courthouse, others were in off site storage, others at the Metro Justice Building, others at the Coral Gables Court Annex.

At the third hearing, the Trial Court finally ruled. He had carefully considered the three motions, prepared and filed over ten (10) months and he had reviewed the voluminous record of litigation documents. (R. Vol. II, 331-333; III, 513-516; IV 534-743). The Trial Court's ruling constituted the culmination of great and laborious effort.

The Trial Court made the following *findings of fact* in his order (R. Vol. V, 893-896):

> "...these jurors failed to disclose these prior litigation matters despite being asked, **without ambiguity**, whether such matters existed" (May 4, 1999

Order, finding of fact (f)).

"the failure to disclose such information **was not and could not possibly be attributed to any lack of diligence** of... the Plaintiff" (May 4, 1999 Order, finding of fact (g)).

"In point of fact, this court specifically finds that counsel for the plaintiff specifically asked for this information in an **unambiguous fashion**" (May 4, 1999 Order, finding of fact (h)).

"moreover, this court finds that the litigation history of the actual jurors herein is **relevant and material** to their jury service **notwithstanding** the fact that the history may involve a **different type** of case... and may be considered **remote in time**" (May 4, 1999 Order, finding of fact (j)).

The Trial Court ordered a new trial, and Respondents appealed. On appeal, the Respondent argued that the Trial Court erred because: (a) "the court records were inconclusive and the evidence showed that the jurors had common names" and (b) the litigation was "remote" and "insignificant" such that "there was no basis for determining that there was any concealment of a material fact by any juror or that there was any bias or partiality by any of the triers of fact". (Respondent's Initial Brief Summary at p. 11 filed in the Third District Court).

The Third District Court without mention of, or deference to, the Trial Court's findings reversed and remanded. Remarkably, the Third District Court, *sua sponte*, rewrote the diligence prong of *de la Rosa*, without it having been raised by either party or the Trial Court:

> "**Although not raised** by the appellant, we conclude that the diligence requirement was not satisfied in this case... We therefore hold that the time to check the jurors' names against the clerk's lawsuit index is at the conclusion of jury selection. ***If a party does not request the opportunity to make the record search, then that litigant will not be heard to complain later about nondisclosure*** of information which could have been disclosed by reference to the clerk's index."

In fact, the Third District Court even instructed "chief judges of the Eleventh and Sixteenth Judicial Circuits [to] look into this *problem*".

The Third District Court held that "in this case the plaintiff has not given any particularized argument why Ms. Fornell's experience... could plausibly form the basis for a challenge for cause or a peremptory challenge". The Third District Court held that "the voir dire questions did not call for disclosure of a domestic violence petition" by Ms. Guerrero, and thus, "there was no concealment".

Petitioner filed a Motion for Rehearing, Rehearing *En Banc*, Clarification and Certification. All aspects of the motions were denied except for clarification. The Third District Court in the clarified opinion repeated the new requirement to "consult" the clerk's index "before, not after" the trial, and zealously defended their newly created standard by attempting to persuade the reader that it will not create a burden in the trial courts of this state. All other arguments and issues raised in the motion (including conflict with this Supreme Court) were not addressed.

Petitioner then filed her Notice to Invoke the Jurisdiction of the Supreme Court. Jurisdiction was accepted on November 13, 2000.

## SUMMARY OF THE ARGUMENT

Not long ago the Third District Court tried to change long standing law on the issue of juror non-disclosure[2]. The case was reviewed by this Supreme Court[1], which sent the Third District Court a clear message: "NO"! The Supreme Court specifically told the Third District Court that its logic and analysis were wrong. Now, the Third District Court has directly and expressly run afoul of this Supreme Court's ruling and authority.

There seems to be a disturbing trend in recent district court decisions on the issue. The Third District Court and other district courts simply do not like the state of the law relating to juror non-disclosure resulting in new trials. They state a concern that there is a widespread epidemic of new trials based on non-disclosure. There is no factual basis in the record to support such fears.

The courts have misapplied and in some cases, as here, ignored the teachings of *de la Rosa*. The opinions attempt to place unnatural hurdles in front of litigants, both plaintiff and defendant[2]. The opinions strain to avoid a new trial by creating ambiguity in *voir dire* questioning when none was found by jurors, counsel, or trial judges. The opinions substitute the panels' judgement for the judgement of litigants,

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1 *Zaqueira v. de la Rosa*, 659 So.2d 239 (Fla. 1995).

2 State prosecutors and criminal defendants are also impacted. See, e.g. *Buenoano v. State*, 708 So.2d 941 (Fla. 1998); *Forbes v. State*, 753 So.2d 709, (Fla. 1st D.C.A. 2000); *Young v. State*, 720 So.2d 1101 (Fla. 1st D.C.A. 2000); *Massey v. State*, 737 So.2d 557 (Fla. 3rd D.C.A. 1999).

counsel and trial judges on the issue of what is important, relevant and material. The decisions even place an artificial and nebulous ‘statute of limitations’ on bias, prejudice and sympathy.

The District courts should be more concerned with the inability or unwillingness of a *few* jurors to truthfully respond to simple direct inquiry about their experiences. The District courts should instruct the trial courts to properly qualify jurors, making jurors aware of their duty to respond truthfully. Instead, the District courts have changed the law, set up insurmountable hurdles, and forgiven concealing jurors. They have placed the blame on the litigant they negatively describe as one who ‘scours the public record to try to find evidence of a litigation nondisclosure’.

The litigant should not have to ‘scour the public record’. The litigant must be entitled to rely upon the juror to answer so simple a question. **If a juror cannot handle this simple preliminary task, how can the juror undertake the solemn task of deciding a lawsuit?**

The right to a fair and impartial jury is fundamental and unalienable. The interests of this right heavily outweigh the interests of finality or expense. Many legal scholars, professional trial lawyers, and even appellate courts firmly believe that a trial is won or lost in jury selection. If an occasional case must be re-tried due to a concealing juror, so be it.

At the end of the day, the solution is simple. *de la Rosa* must be preserved, intact, as a hard rule. Concealing past litigation when asked *shall* result in a new trial. The trial courts must strongly warn jurors of their duty to conceal nothing. Jurors must be told that their background can, and may well, be investigated. They must know that their failure to disclose requested information would cause an enormous waste of time and money for litigants and taxpayers. They must also know that their transgressions may result in contempt or perjury proceedings.

## ARGUMENT

### Standard of Review

The correct standard of review for the grant of a new trial based on juror non-disclosure is an "abuse of discretion" standard. *Castenholz v. Bergman,* 696 So. 2d 954 (Fla. 4th D.C.A. 1997); see also, *National Western Life Insurance Company v. Walters*, 216 So.2d 485 (Fla. 3rd D.C.A. 1968). The Third District Court makes no mention of the Trial Court having "abused its discretion". The panel's opinion shows no deference to the factual findings made by the Trial Court. The Trial Judge was there to appreciate and observe the demeanor of counsel and jurors, and to grasp the entirety and totality of the circumstances. He made specific findings in his Order. (R. Vol. V, 893-896). The findings, which were ignored by the Third District Court, include:

"...these jurors failed to disclose these prior litigation matters despite being asked, **without ambiguity**, whether such matters existed" .

"the failure to disclose such information **was not and could not possibly be attributed to any lack of diligence** of... the Plaintiff" .

"In point of fact, this court specifically finds that counsel for the plaintiff specifically asked for this information in an **unambiguous fashion**" .

"moreover, this court finds that the litigation history of the actual jurors herein is **relevant and material** to their jury service **notwithstanding the fact that the history may involve a different type of case... and may be considered remote** in time" .

## II. The Opinion Conflicts with *de la Rosa* and Its Progeny

In *Zaquera v. de la Rosa*, 659 So.2d 239 (Fla. 1995), this Supreme Court re-iterated, and made clear, the standard for an order of new trial due to juror non-disclosure. The Court ruled:

> "In determining whether a juror's nondisclosure of information during *voir dire* warrants a new trial, courts have generally utilized a three-part test. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. We agree with this general framework for analysis and note that the trial court expressly applied this test in its order granting a new trial." *de la Rosa*, *supra* at 341, citations omitted.

In this case, the Trial Court properly and expressly applied this Honorable Court's standard as to each of the three prongs of the *de la Rosa* test. Yet the Third District Court disregarded both the Trial Court's express findings, and this Supreme Court's standards.

### The Diligence Prong of *de la Rosa*

#### 1. Intra-trial Investigations Rejected

The Third District Court's opinion is in direct and express conflict with the

holding of *de la Rosa* when is creates a new standard for the "diligence" prong of the test. In *de la Rosa*, this Supreme Court held that collective questioning of the venire specifically satisfied "diligence". Now, even individual and specific questioning of each juror, by name, is not enough.

Now, the Third District Court's opinion requires the seemingly impossible task of intra-trial background searches, follow-up interrogation, cross-examination and impeachment of the potential jurors![3]

Remember, the Third District Court tried this once before, only to have this Honorable Court say "NO"! The Third District Court in *Zaqueira v. de la Rosa*, 627 So.2d 531 (Fla. 3rd D.C.A. 1994) held:

> "There is also considerable doubt about the third [diligence] condition. The information... was compiled from a computer search of the public records obviously conducted by plaintiff's counsel only *after* the jury had found against him. This set of circumstances not only invites the question of why the investigation was not "diligently" conducted previously but, more significantly, presents the disquieting practice of exposing jurors, who have done nothing more than honestly perform their civic duty, to the invasion of their private affairs because they have had the temerity to find against a particular litigant." *de la Rosa*, (3rd D.C.A.) at 533 n.6.

On review, this Honorable Court rejected the proposition that diligence requires a litigant to conduct an investigation before the jury rules. This Supreme

Court expressly adopted, as its own, the dissent penned by Judge Baskin[3], which held:

> "As for the due diligence branch of the test, I find counsel's efforts sufficient. The prospective jurors were questioned in different ways regarding involvement in prior lawsuits. The majority's holding would require counsel to question each juror individually and obtain a response. In addition, the majority mandates pre-verdict discovery of juror concealment even though ***Bernal*** **does not require counsel to discover the concealed facts prior to the return of a verdict**... **I see no reason to extend *Bernal* 's due diligence requirements and would not impose on counsel the onerous burden of investigating the venire during the trial**." *de la Rosa*, *supra* at 534.

Remarkably, in direct conflict with this Supreme Court, the Third District Court tried again, *sua sponte*:

> "**Although not raised** by the appellant, we conclude that the diligence requirement was not satisfied in this case... We therefore hold that the time to check the jurors' names against the clerk's lawsuit index is at the conclusion of jury selection. ***If a party does not request the opportunity to make the record search, then that litigant will not be heard to complain later about nondisclosure*** of information which could have been disclosed by reference to the clerk's index." *Tejada*, at p. 966.

It should be enough that this Supreme Court has previously rejected intra-trial

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[3] "Judge Baskin's dissenting opinion contains a complete yet concise analysis of all of the issues involved herein. Rather than repeat that analysis, we approve and adopt her opinion as our own." *de la Rosa*, at 242.

searches. But the Petitioner argues that the rationale to repeat its rejection is as valid now as it was then.

A search of public records is unworkable. How many counties need one search? What about federal court records? What about other states? How long should the litigant be given? What happens when the search produces 75 entries for 'Yolanda Gonzalez'? Should the litigant then cross-examine the juror with the same name? How can a litigant be sure that the juror is not lying in cross-examination? Should the juror's family be subpoenaed and questioned? Should their personal papers be subpoenaed? What standard should apply: preponderance, clear and convincing, beyond a doubt? (See *Lowery v. State*, 705 So.2d 1367, 1370 (Fla. 1998), and the discussion below at Section II (B)(3) on page 22.)

Understand that the mere act of embarrassing and angering a juror through a 'cross-examination' will likely require a peremptory challenge. Should extra challenges then be given? How many veniremen will be required to seat a panel? How many days to do so?

The problems created by requiring an intra-trial search are far more numerous, and far more thorny, than the occasional new trial or appeal. Rather than repeat here the discussion of the impact on the Court Clerks and Judges, Petitioner directs this Honorable Court to her arguments found in Section IV, below.

## 2. Artificially Created Ambiguity

The diligence required for a new trial has also been improperly expanded by other district courts[4], including the Third District Court in this case, under the guise of ambiguity. The district courts start their analysis with the unsupportable proposition that jurors do not or cannot understand direct, unambiguous questions. For example the Third District Court in *Tejada* states:

> "We also suggest that the court and counsel tread on thin ice when they assume that a juror knows exactly what a "lawsuit" is. Law students have drummed into them the fact that under the Rules of Civil Procedure, a civil action commences with the filing of a complaint. See Fla. R. Civ. P. 1.050. Thus, under a civil procedure definition, a demand letter or prelitigation settlement is not disclosable, but the filing of a lawsuit is.
>
> Lay jurors are not law students and do not have the benefit of a course in civil procedure. Experience suggests that jurors do not have a clear understanding of when a lawsuit technically begins. ***We suspect jurors believe that a lawsuit occurs when the parties proceed to a jury trial in open court, and that all preliminary steps are not a 'lawsuit."***" *Tejada* at 964.

First, compare that analysis with the question asked by Petitioner's counsel. He asked:

> "He [the judge] asked you if you had ever been a party to a lawsuit. And again, the reason isn't to embarrass you, because you know when you were in the lawsuit, you may

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[4] *Silva v. Lazar*, 766 So.2d 341 (Fla. 4th D.C.A. 2000); *Mazzouccolo v. Gardener*, 714 So.2d 534 (Fla. 4th D.C.A. 1998).

have won and you thought it was great or you lost, thought it stunk. Or you may have been a defendant and think all the plaintiffs are out to get their money or you may have been a plaintiff and thought otherwise.

It's really important what you bring to the stand on this issue. So I'm going to ask you, each one of you by name whether or not you have ever been a party to a lawsuit. And I mean, any kind of lawsuit, a divorce, a ***collection of a debt***, a breach of contract, an ***assault and battery***, an auto accident, a defective product, a medical negligence case, such as this case, a divorce***, anything at all***."

Next, look at the responses made by other jurors before the concealing jurors responded:

"MR. RODRIGUEZ: Car accident. Somebody hit me in the back, and I had to sue that person and the insurance company because my neck was damaged permanently.

PETITIONER'S COUNSEL: And were you satisfied with the result?

MR. RODRIGUEZ: Well, not really. **I just settled** because I – you know, prior to that I went to a – through a divorce proceeding, and I spent like a year and a half in this courthouse coming every other day here. And that left a very bad taste in my mouth regarding attorneys, et cetera, et cetera, et cetera. So **I told my attorney settle the case**.

PETITIONER'S COUNSEL: You understand that **if they had taken the case all the way to trial** it is an arduous task, it is a difficult task?

MR. RODRIGUEZ: Yes.

> PETITIONER'S COUNSEL: Mr. Betencourt, have you ever been a party to a lawsuit?
>
> MR. BETENCOURT: Yes, I had a car accident. **We settled out of court**. And I'm going through a divorce proceeding right now." (T. 70-71).

The other jurors did not, as the Third District Court ***suspected*** "believe that a lawsuit occurs when the parties proceed to a jury trial in open court". The Third District Court strained to find a lack of diligence with its factually incorrect *suspicion*. Indeed the Trial Court, which was ignored by the Third District Court, felt that the Petitioner was diligent. The Trial Court stated:

> "The failure to disclose such information **was not and could not possibly be attributed to any lack of diligence** of... the Plaintiff... In point of fact, this court specifically finds that counsel for the plaintiff specifically asked for this information in an **unambiguous fashion**". (R. Vol. V, 893-896).

Who better to reach conclusions on ambiguity, and diligence than the trial judge? The trial judge can see the body language, and vocal inflection of counsel and jurors. He or she can look for puzzled faces, or that "light bulb going on" expression. The trial court watches the dynamic exchange between counsel and venire, juror to juror. Nowhere in their opinion did the Third District Court find that the Trial Judge abused his discretion in concluding that the questions were unambiguous, and that

the Petitioner was diligent.

The opinion of the Third District Court states “counsel framed the inquiry in terms of an action **for damages**”. (Emphasis is incorrectly in panel’s opinion). It is simply wrong. Counsel specifically asked about divorces, which are not actions for damages, and asked for “anything at all”. The entirety of the questions and answers over 4-5 pages of transcript (T. 71-76) must be read in context and understood by one who was there to appreciate the totality of the circumstances: the Trial Judge.

This Supreme Court in *de la Rosa* adopted the following passage, dealing with whether a juror heard and understood the question:

> “As the trial court stated in its order, "[t]he courtroom is quite small and Plaintiff's attorney was standing no more than 5 feet away from the jury panel."
>
> There were several questions regarding involvement in prior lawsuits including whether the jurors were involved in 'a commercial dispute where you have been involved as a litigant.' There is no record basis supporting a conclusion that the juror did not listen to or hear any of counsel's questions. Assuming, *arguendo*, that the juror had no intention of misleading counsel, "the omission nonetheless prevented counsel from making an informed judgment--which would in all likelihood have resulted in a peremptory challenge." *de la Rosa* at 242.

The concealing jurors must have known the information was to be disclosed. The Trial Court certainly felt and ruled that way. The other jurors understood it that way. "It is abundantly clear from the transcript of the voir dire proceedings that no person

sufficiently perceptive and alert to be qualified to act as a juror could have sat through voir dire without realizing that it was ... her duty to make known to the parties and the court" her litigation history. *Mobil Chemical Co. v. Hawkins*, 440 So.2d 378, 381 (Fla. 1st D.C.A. 1983), *rev. den.*, 449 So.2d 264 (Fla. 1984).

**Prejudice/Materiality Prong of *de la Rosa***

**Prejudice Is To Be Presumed**

Even before *de la Rosa* this Supreme Court held that the non-disclosure itself "is prejudicial to the party, for it impairs his right to challenge*"*. *Loftin*, *supra*.

On this issue of materiality, one need simply look at the new trial order expressly affirmed in *de la Rosa*. The order stated:

> "Defendants argue that this concealment is not material. **It is hard for this court to see what could be more relevant than a potential jury [sic] hiding his involvement in litigation."** *de la Rosa*, *supra* at 240 n.1.

The Third District Court ignored this Supreme Court's holding that non-disclosure of litigation is material and prejudicial. The panel also ignored the Trial Court's express findings. The Third District Court held:

> "Turning to Ms. Fornell, we conclude that the nondisclosures were immaterial. She was allegedly named in two lawsuits over twenty years prior to jury selection in this case. One was a 1973 small claims matter in which she was a defendant, and the other a 1975 automobile negligence case in which she was a plaintiff. Both were resolved without trial. The point of asking about litigation history is to determine if the juror bears some animus about the litigation process, or about similarly situated litigants, which would adversely impact on the prospective juror's ability to consider the case fairly." T*ejada a*t 965.

As to materiality, *de la Rosa* could not be clearer. *de la Rosa* spells it out:

> "On numerous occasions, our appellate courts have reversed for jury interviews or new trials, where jurors allegedly failed to disclose a prior litigation history or where other information relevant to jury service was not disclosed. Similarly, we find that **the trial court here acted well within its authority** in concluding that the juror's failure to disclose his prior history of litigation **deprived de la Rosa of a fair and impartial trial."** *de la Rosa* at 241.

**2. Litigation Need Not Be The Same Type**

The Third District Court's holding that Mrs. Fornell's different litigation is not material has also been dealt with before. This Supreme Court addressed the issue in *de la Rosa*:

> "The majority opinion in the district court appeared to be particularly concerned that the juror's prior litigation history did not include a case like the one being tried... Judge Baskin's dissent responded to these concerns and we quote with approval that response: '... Bernal should not be viewed as distinguishable from this case on the ground that this juror's involvement was not in a personal injury action: A person involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general. In these circumstances, counsel must be permitted to make an informed judgment as to the prospective juror's impartiality and suitability for jury service.'" *de la Rosa* at 241.[4]

### 3. The Burden Of Proving Prejudice

As to proving prejudice, the Third District Court misses the point. The panel wrote:

> "In this case the plaintiff has not given any particularized argument why Ms. Fornell's experience... could plausibly form the basis for a challenge for cause or a peremptory challenge". *Tejada, supra* at 965.

This is twisted logic. This Supreme Court, in *de la Rosa* provided the reason for *voir dire* and describes the rights of the parties:

> "In *Loftin*, we explained the major reasons for interviewing jurors on voir dire: '[t]o ascertain whether a challenge exists, and to ascertain whether it is wise and expedient to exercise the right to peremptory challenge given by law... A juror who falsely represents his interest or situation or conceals a material fact relevant to the controversy is guilty of misconduct, and ***such misconduct is prejudicial to the party, for it impairs his right to challenge"***. *de la Rosa* at 241, citing *Loftin* at 192.

In fact, the Third District Court's opinion is in conflict with the holdings of *Lowery*, *supra, State v. Rodgers*, 347 So.2d 610 (Fla. 1977), and *Seay v. State*, 190 So.2d 702 (Fla. 1939). *Lowery*, which interprets *Rodgers,* refused to require a party to demonstrate actual prejudice, finding it to be presumed. *Lowery* states:

> "For the reasons expressed, we agree with the concerns articulated by the district court and answer the certified question with a qualified no, holding that, ***where it is not revealed*** to a defendant that a juror is under prosecution by the same office that is prosecuting the defendant's case,

> ***inherent prejudice to the defendant is presumed and the defendant is entitled to a new trial***." *Lowrey, supra* at 1368.

Thus, contrary to the Third District Court's opinion, a litigant need not show prejudice. It is presumed. In fact, in his specially concurring opinion, Justice Anstead went further and spoke of the problems expected if prejudice must be shown. He wrote:

> "As Justice Hatchett explained: '***I am concerned with the practical application of such a rule***. How can the [moving party] "demonstrate that the juror's [misconduct] affected her ability to render a fair and impartial verdict or that she failed to do so"?... Finally, must the showing of prejudice be by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt?'" *Lowrey, supra* at 1370.

Thus, the Third District Court not only misses the materiality standard of *de la Rosa*, but it has now shifted the burden to the Petitioner to show what the juror was thinking in terms of bias and prejudice. This simply cannot and by law, need not, be done. In fact, the Petitioner never even knew of the *possibility* of any bias or prejudice, because she was not told of the juror's history.

This unmanageable burden of mystically proving prejudice is a high stakes and un-winnable game of Carnac the Magnificent. "Petitioner must provide the [prejudice] answer without ever before having seen the [prejudice] question". This runs afoul of common sense and the "traditional notions of fair play". It is also in

direct conflict with the clear and binding Supreme Court cases of *Loftin*, *Lowery* and *de la Rosa.*

**4. Other 'Materiality' Mistakes**

Other district courts have strained to find a lack of materiality. They have held that the concealed information is too old. *Tejada*, *supra*; *Ford v. D'Amario*, 732 So.2d 1143 (Fla. 2nd D.C.A. 1999); *Leavett v. Krogen*, 752 so.2d 730 (Fla. 3rd D.C.A. 2000). They have held that the complaining party cannot prove they would have challenged the juror if they had known of the concealed information. *Birch v. Albert*, 761 So.2d 355 (Fla. 3rd D.C.A. 2000); *Garnett v. McClellan*, 767 So.2d 1229 (Fla. 5th D.C.A. 2000). The district courts have strained to find a lack of materiality by holding that the concealing juror was previously a plaintiff, and the complaining party (with whom the district court illogically presumes the juror would side) is a plaintiff as well. *Leavett, supra*; *Ford, supra*. Each such case is an error, which needs correction.

**a. Remoteness**

The Third District Court misapplied this Supreme Court's law when it held that: "whether Ms. Fornell's 1970's experience is good, bad, or indifferent, twenty years is too far removed to be material under *de la Rosa.*"

First, *de la Rosa* makes no cut-off of time and indeed never mentions time or

remoteness. Second, to state that the juror's litigation experience is too old is preposterous on the one hand, and misses the point on the other.

What if Mrs. Fornell's mother was treated by Dr. Tejada twenty years ago and was either saved or killed? Upon her non-disclosure, would this Supreme Court hold that it was too remote to form the basis for a new trial?

There are litigants who have been, and continue to be, before the courts who are as bitter and biased from 20 – 30 year old litigation as one can imagine. (See for example *Edelstein v. Donner*, 471 So.2d 26 (Fla. 1985) and related citations from this 1976 action, still pending, stemming from a 1975 arrest). Can it be said that Mr. Brown no longer harbor's a bias or prejudice against the Board of Education, or the state courts? And what of Ms. Donner?

Look at the real world. People carry mental and emotional baggage throughout their entire lives. The Middle East will always be in turmoil. There are still people in the South (and elsewhere) who feel that blacks are not made by the same God as they were. Petitioner's counsel will always love the Dolphins, and despise the Raiders. Just like he did in 1966.

Can the Third District Court, or any court, say how bitter or biased Mrs. Fornell is about when she sued, or was sued? And based on what record? All the Third District Court has is suppositions and suspicions. Mrs. Fornell's feelings and

biases are still unknown.

## Speculative Alignment with Party

As to the district court's guessing or suspecting that a juror's bias is aligned one way or another[5], the simple question is: How do they know that?

How can they say that a juror, formerly a plaintiff, will have sympathy for a plaintiff, and bias against a defendant? What if the juror got a raw deal as a plaintiff? What if she thinks her case was better than the case being considered? Would she think, "I got nothing, so this plaintiff gets nothing"? Who knows? Only she does. And due to her concealment, she never gave the litigants a chance to find out.

And the same may be true of a concealing former defendant. He or she may have thought themselves free of fault. He or she may nonetheless have been found liable and ordered to pay large sums. Why wouldn't that juror think, "if I had to pay one million for doing nothing, this defendant should pay two or three million". Is this the kind of guessing game the district courts should play?

## c. Speculation On Exercise Of Challenge

The strained efforts of the district courts also include their *guessing* as to

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5 See, *Leavitt*, *supra*; and *Ford*, *supra*.

"would the party have challenged the juror if the disclosure was made"[6]. The

[6] See, *Birch*, *supra*; and *Garnett*, *supra*.

district courts hold that since one person who disclosed prior litigation was not challenged, the concealing juror would not be challenged either. How can such a flawed analysis go unchallenged?

Maybe the disclosing juror was queried, and felt to be without bias. Maybe the disclosing juror had other unique characteristics and experiences which, when properly weighed and considered by the litigant, made him or her a good juror. But in the instant case, and others, the concealing juror was not queried. His or her characteristics and experiences were not weighed. Again that is the point. The Petitioner here, and the litigants in the other cases, never got the chance.

Of course, "such misconduct is prejudicial to the party, for it impairs his right to challenge'". *de la Rosa* at 241, citing *Loftin* at 192. Just as discussed in *de la Rosa* and *Loftin*, the Petitioner never got a chance to inquire. But remember, "It is hard for this court to see what could be more relevant than a potential jury [sic] hiding his involvement in litigation." *de la Rosa*, *supra* at n.1.

**d. Post-trial Denial of Bias**

There is even one case[7] where a district Court found that a post-trial, self-serving, denial of bias or prejudice made by an intentionally concealing juror rendered the concealment immaterial. The logic is fatally flawed.

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[7] See, *Leavitt v. Krogen*, 752 So.2d 730 (Fla. 3rd D.C.A. 2000).

The juror was called back to court under the angered and watchful eye of the judge. She must have known that she may have done something wrong to be singled out and called back. It is now easy and convenient for her to say "it made no difference". This is like waiting for your dinner partner to pay the bill and then stating "I would have paid for dinner". Convenient, revisionist history cannot decide materiality.

## III. *Ex-Post Facto* Law

The Third District Court opinion holds that Petitioner's failure to run a juror background search during trial, **which was at that time not required** (indeed it was rejected by this Supreme Court in *de la Rosa*) acts now to deprive her of her otherwise Constitutionally guaranteed right to a fair and impartial jury. The Third District Court re-wrote the law, *ex-post facto*.

"Generally, parties are governed by law of pleading, practice, and procedure as it may exist at the time of their proceeding." *Whittaker v. Eddy*, 147 So. 868 (Fla. 1933). A "Law is 'retrospective' for purposes *of ex-post facto* prohibition if it changes the legal consequences of acts completed before its effective date." *State v. Hootman*, 709 So.2d 1357 (Fla. 1998).

Here, the Petitioner, through counsel, did all that was required under the law of

this state, *de la Rosa*, and then some. Counsel went beyond the 'collective questioning' of the venire, and asked one by one, by name. Counsel gave examples of many types of litigation. He followed up on answers. It was not a simple and single question on a form with no follow up. In short he followed, and even exceeded, the then existing law, in letter **and in spirit**.

If this Supreme Court should decide, in its collective wisdom to recede from *de la Rosa*, or to place difficult hurdles on its path, (Petitioner urges the Court not to) then that is the Court's right. But it would be a travesty, and fundamentally unfair to *ex-post facto* penalize this litigant, Mrs. Lucille Roberts, four years after her trial. It was a trial that clearly and undisputedly was heard by a jury, which included two jurors unfit to serve under the then existing law.

**IV. The Burden on A Class of Constitutional or State Officers**

The Third District Courts opinion effects a class of Constitutional or State officers. To wit: Chief Circuit Judges, Circuit Judges, and Clerks of Circuit Court. The Third District Court in requiring the intra-trial investigation of jurors also wrote:

> "The court would suggest that the chief judges of the Eleventh and Sixteenth Judicial Circuits look into this problem and determine if this information may feasibly be made available at an earlier stage, such as on line in the courtroom or attached to juror questionnaires, if the litigants request it."

The directions of the Third District Court place a burden on the Chief Judge, the Judges and the Clerk of Court to make information available, purchase and maintain computer equipment, and delay trials. The effect of the Third District Court's opinion will be to bring the trial court system to its knees. The effect will be that a litigant would demand that the Chief Judges, Judges and Clerks provide all required information, and allow weeks to do the job correctly. The particular venire would be held over pending the investigation. Imagine the slew of cases seeking a Writ of Prohibition to hold up an eager trial judge insisting that a litigant start his trial.

**The Importance Of Preserving *de la Rosa***

"'Experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings. In fact, once the last person on the jury is seated, the trial is essentially won or lost.' Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias,* 19 Am. J. Trial Advoc. 285 (1995); '[J]ury selection can be the most important phase of a trial. Pick the right jury and the battle is half won. But select the wrong jury, and the case is lost before the evidence is even heard.' Gordon L. Roberts & Timothy R. Hanson, *Jury Selection*, 8-NOV Utah B.J. 14 (1995); 'There are serious people ... who have concluded that the selection of the jury is not only the most important part

of a jury trial-- it is verdict determinative.' Morris Dees, *The Death of Voir Dire*, 20 No. 1 Litigation 14 (1993); 'Skillfully conducted voir dire is the most important element in a fair trial.' Harvey Weitz, *Voir Dire in Conservative Times*, 22 No. 4 Litigation 15 (1996); 'Voir Dire is the most important, yet least understood portion of a jury trial.'" *Milstein v. Mutual Security Life Ins. Co*., 705 So.2d 639, 641 (Fla. 3rd D.C.A. 1998).

The balance between a fair trial and the judicial burden or lack of finality created by an occasional new trial due to a flawed jury selection tips heavily in favor of the fair trial.

**The Solution**

Trial courts must sternly admonish jurors that all questions must be answered fully and honestly. Jurors must be instructed that the trial court (or litigants at the courts instruction) **will** conduct investigations to ensure that the jurors have complied. The jurors must be told that any failure to comply may well result in contempt and or perjury proceedings. Indeed, the following modification to Fla. Std. Jury Inst. 1.0 is suggested:

> "... Please understand that these questions are not intended to embarrass you or pry into your personal affairs. They are intended to obtain a fair and impartial jury to try this case. *This is the most fundamental principle in our judicial system.* It is your *solemn* duty to *listen carefully, think carefully, to remember all of your experiences, and to*

> answer completely and truthfully all of the questions that will be asked of you. *The Court, or the attorneys at my instruction, may well conduct background investigations to ensure that you have answered completely and truthfully.* Any failure to answer completely and truthfully may require this case to end in a mistrial or to be tried again. *Such a result will be a burden on the Court, the litigants, and the taxpayers. Any failure to answer completely and truthfully may subject you to contempt or perjury proceedings. Thus your role in preserving this most fundamental right to a fair and impartial jury is critical.*" (The additions proposed by Petitioner are italicized.)

**A LITIGANT, WHO ASKS FOR THE JURORS' LITIGATION HISTORIES IN AN UNAMBIGUOUS FASHION, YET DOES NOT RECEIVE THAT HISTORY MUST BE GRANTED A NEW TRIAL**.

Petitioner asserts that this Supreme Court in *de la Rosa* has already so defined "Unambiguous fashion". However, to the extent that further definition is required, Petitioner suggests that the definition of "unambiguous fashion" is something strikingly similar to:

> "I'm going to ask you, each one of you by name whether or not you have ever been a party to a lawsuit. And I mean, ***any kind*** of lawsuit, a divorce, a ***collection of a debt***, a breach of contract, an ***assault and battery***, an auto accident, a defective product, a medical negligence case, ..., a divorce***, anything at all***."

Perhaps the question once fashioned by this Supreme Court should be asked by the trial judge, one by one, to each juror, by name.

To the extent any variation or nuance of the question occurs (by counsel or court), the trial court, in the best position to know, should then make the determination as to whether the questioning was asked in an "unambiguous fashion". The trial court's ruling should be reviewed under an 'abuse of discretion' standard.

As to materiality or relevance, ***any*** concealment as to litigation history should be deemed relevant and material as a matter of law. This means regardless of how long ago the litigation took place, the amount in controversy, the nature of relief sought, or the venue.

Remember the juror who concealed 17-year-old litigation is not concealing it seventeen years ago. He or she is concealing the information **right now**, under oath, having been admonished by the judge and asked by counsel. It is not reasonable to believe that competent jurors simply cannot remember being involved in a lawsuit, suing, or being sued, or filing for injunction or restraining orders. These are significant events. The Court should be even more concerned with a juror who 'cannot remember' such matters, even in this day, in our litigious society.

Obviously, if a juror is concerned or embarrassed enough to conceal the information after a proper admonishment from the trial judge, and a proper inquiry from the litigant(s), then there is something at play, which gives rise to the presumption of prejudice about which Justice Anstead and Justice Hatchett wrote.

The courts of Florida must not guess or speculate on whether a challenge would have been used. Nor should they be permitted to guess or speculate about the side upon which the prejudice or bias presumed may fall. The fact of the asking, and concealing, creates the lack of a fair trial for all sides.

## CONCLUSION

Years ago, this Supreme Court set a path for the district courts to follow on these issues. The district courts have strayed. In doing so, they have strained and twisted. They have applied pretzel logic, flawed analyses, and revisionist history. The district courts have engaged in speculation, supposition and even a Johnny Carson comedy skit. It is not funny. It must be corrected. The blame for, and burden resulting from, juror non-disclosure cannot be placed upon the shoulders of the innocent litigant. Particularly not a litigant, as Petitioner here, who went to the lengths shown in this case to find the information.

The concept of intra-trial investigation and cross-examination of jurors was rejected by this Supreme Court five years ago. It is preposterous and unworkable. To the extent *de la Rosa* did not make it clear, this Supreme Court should take this opportunity to tell the district courts that intra-trial investigation is neither required nor workable.

The thought that a district court panel knows what a litigant would do with

information he did not have is equally preposterous. As is the thought that bias and prejudice goes away after five or ten or even twenty years.

Petitioner urges this Honorable Court to reject these unsupportable positions, and remove the insurmountable hurdles placed in front of litigants. This Supreme Court can make it clear that jurors *must* tell the truth, and allow litigants to *rely* upon them to do so.

## PRAYER FOR RELIEF

**WHEREFORE** the Petitioner, respectfully requests that this Honorable Court:

Reverse and quash the Third District Court's opinion; and

Re-instate the Trial Courts Order Granting New Trial; and

Clarify the 'rules' of *de la Rosa*, to the extent necessary, and do so consistent with the positions articulated in this Brief on the Merits; and

Join this case with any other cases now pending before the Court (*D'Amario v. Ford Motor Company*, NO. 95,881); and

Enter such other relief, as this Honorable Court deems just equitable and proper.

Respectfully submitted,

By: _____

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that at copy of the foregoing Petitioner's Brief on the Merits was mailed this ____ day of November 2000 to: Shelley H. Leinicke, Esq., One East Broward Boulevard, 5th Floor, Ft. Lauderdale, FL 33302.

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[1] Under Article V, §3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iii) and 9.030(a)(2)(A)(iv).

[2] *Zaqueira v. de la Rosa*, 627 So.2d 531 (Fla. 3rd D.C.A. 1994).

[3] To date, at least one other district court, citing *Tejada*, has improperly required intra-trial investigation. *Silva v. Lazar*, 766 So.2d 341 (Fla. 4th D.C.A. 2000).

[4] See also *Mitchell v. State*, 458 So.2d 819 (Fla. 1st D.C.A. 1984); *Smiley v. McCallister*, 451 So.2d 977 (Fla. 4th D.C.A. 1984); *Mobil Chemical Company v. Hawkins*, 440 So.2d 378 (Fla. 1st D.C.A. 1983); and *Skiles v. Ryder Truck Lines, Inc.,* 267 So.2d 379 (Fla. 2nd D.C.A. 1972).