IN THE FLORIDA SUPREME COURT

KENNETH MICHAEL GARDNER,

Appellant,

v.

CASE NO. 64,541

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

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SUMMARY OF ARGUMENT

In this case, as asked by Justice MacDonald during oral argument, the victim is Caucasian and Gardner is Caucasian.

The Neil opinion does not provide additional peremptory challenges. This was the defense attorney's only request. Also, the defense attorney failed to set forth an adequate basis in his objection. (R 1583) Never did defense counsel urge that the jurors were stricken because they are black. Clearly, defense counsel did not make clear he was urging his objection on Florida Consitutional grounds. As to the retroactivity (if applicable), then policy consideration suggest a remand to the trial court for Gardner to have an opportunity to demonstrate prejudice. It is the prosecution's position that the context of Florida's peremptory challenges of the two black jurors will show legitimate reasons for their peremption.

ARGUMENT

ISSUE

KEN GARDNER WAS DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BY AN IMPARTIAL JURY BECAUSE THE STATE EXERCISED PEREMPTORY CHALLENGES TO EXCUSE ALL THE BLACK MEMBERS OF THE JURY VENIRE.
(As stated by appellant)

In light of State v. Neil, 457 So.2d 481 (Fla. 1984), supplemental briefs are being filed in this cause.

A. FAILURE TO REQUEST INQUIRY

The Court in Neil held that when a showing is made of a likelihood that peremptory challenges are being exercised solely on the basis of race, a trial court must make an inquiry as to the basis for the challenges. The purported objection reads:

> MR. MENSH: If it please the Court, let the record reflect--
>
> THE COURT: I see, okay, excuse me.
>
> MR. MENSH: --that the Defendant objects to the State's challenge of Miss Grimes and Mr. Lawton. Miss Grimes and Mr. Lawton were the only Black members of the jury venire that have been brought in for examination as prospective members of the jury, and both of them have been stricken now by the State Attorney. I again ask the Court for permission to exercise peremptory challenges.
>
> (R 1583)

Defense counsel never requested an inquiry by the trial court. Although not argued before the lower court, there is historic authority from our sister state of California which contem-

plates that inquiry be made. People v. Wheeler, 22 Cal. 2d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

The "State" would suggest that there can be only one logical explanation for the approach taken by the defense in this respect... recognition that had the prosecution been called on to justify its challenges, it would have been able to do so satisfactorily. In this case, because no basis was set forth in the objection, the defense is unable to demonstrate a prima facie case of discrimination.

Since Gardner made no request for inquiry, he has not preserved for review the question of whether an inquiry should have been conducted. In order to present an issue on appeal, it must be presented to the trial court. See, Clark v. State, 363 So.2d 331 (Fla. 1978); State v. Barber, 301 So.2d 7 (Fla. 1974). If this type of error were fundamental no objection would be needed; however, the claim does not reach fundamental proportions. See, Neil v. State, 457 So.2d at 486, "A party concerned about the other side's use of peremptory challenges must make a timely objection," citing Castor v. State, 365 So.2d 701 (Fla. 1978). Neil, supra, 457 So.2d at 486, n.9.

This requirement cannot be satisfied by making a motion for a more severe sanction than is appropriate. In Justus v. State, 438 So.2d 358 (Fla. 1983), a challenge was made to the propriety of a statement made by and the conduct of a bailiff at the time the court ordered a recess. The defense moved for a mistrial. On review, this Court found no reversible error

in the denial of the mistrial and concluded that by not asking that the court query the prospective jurors about the effect of the remark and conduct or that the court give a curative instruction, defense counsel waived any impropriety in not taking some curative measure.

The reasoning of Justus is applicable here. In each case, the defense made no request for the appropriate remedy and asked only for a more severe sanction than was appropriate. Thus, just as in Justus, it should be concluded that Defendant has waived the right to have considered the question of whether the appropriate remedy should have been utilized.

Should this court find that the failure to request a hearing did not waive Defendant's right to review of this issue, the State submits under the unique facts of this case, a remand for a hearing as to the reasons for the State's exercise of it peremptory challenges, rather than reversal, would be the appropriate remedy. This is so because in light of the lack of a request for an inquiry into this subject, the State was never put on notice during the trial that the failure to conduct an inquiry into the State's rationale would be a subject for review and thus the State was never aware of a need to put its reasons into the record. The only issues that the State could know were subject to review were the issues actually raised by Defendant, issues regarding claims that certain relief was compelled based on the striking of black jurors alone. Given the factual circumstances of this case, the State should be given

the opportunity to state its reasons in a hearing conducted at this time. The Fourth District Court of Appeal employed such a procedure in Franks v. State, case number 84-410, order filed October 15, 1984. See Appendix, in light of the unusual circumstance of Defendant never requesting an inquiry in the present case, it would seem that the approach utilized in Franks would be particularly appropriate here.

B. FAILURE TO OBJECT WITH SUFFICIENT SPECIFICITY

It is clear that the request for mistrial was either merely a statement as to the factual circumstances or general exception to the alleged exclusion of two blacks, without any legal ground or basis for the objection being stated at all. Plainly, objections of this nature are insufficient to preserve the issue for review. See Thomas v. State, 424 So.2d 193 (Fla. 5th DCA 1983); Hufman v. State, 400 So.2d 133 (Fla. 5th DCA 1981); Darrigo v. State, 243 So.2d 171 (Fla. 2d DCA 1971). In addition, no ruling was made by the trial court on these objections and statements and they therefore cannot form a basis for reversal. See Richardson v. State, 437 So.2d 1091 (Fla. 1983); Oliva v. State, 354 So.2d 1264 (Fla. 3d DCA 1978).

It is well settled in Florida that objections must be made with sufficient specificity to apprise the court of the potential error and preserve the point for appellate review. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978). The grounds set forth by Defendant are insufficient to meet this requirement. At no time did the

defense ever assert that any specific provision of the Florida or United States Constitution was being violated. The board references to constitutional rights and concepts is not sufficiently specific to preserve an issue for review. As this court noted in Kujawa v. State, 405 So.2d 251, 252, n.3 (Fla. 3d DCA 1981):

> Kujawa points to the fact that his counsel remarked with respect to the instruction: "...we feel it violates our client's constitutional rights." It is time to point out that such an objection is not, in our view, a distinct statement of grounds. A trial court should not be required to guess which phrase, clause, or amendment of the Constitution is offended.

Thus, it is apparent that Defendant's objections were not sufficiently specific to advise the trial court of the grounds asserted in support of them. Although this fact alone compels the conclusion that Defendant has failed to preserve his present claims for appellate review, it should also be pointed that application of this doctrine is particularly appropriate here. This is because this Court's opinion in Neil v. State, 457 So.2d 481 (Fla. 1984) specifically declined to analyze the issue under the federal Constitution, limiting its analysis instead to the Florida Constitution. 457 So.2d at 487, n.12. The defense's manner of proceeding leaves open the question of whether the broad constitutional references were intended

to encompass the Florida Constitution or not. [1] Accordingly, it should be concluded that the objections made in the trial court were not sufficiently specific to preserve the present issue for review.

C. RETROACTIVITY

Even though the opinion in Neil v. State, 457 So.2d 481 (Fla. 1984) contains language regarding its nonretroactivity, this Court applied Neil to reverse the conviction in Andrews v. State, 459 So.2d 1018 (Fla. 1984). The reversal in Andrews, however, does not compel the conclusion that Neil is to be applied retroactively to cases pending on direct appeal.

This is apparent from a look to the manner in which the California Supreme Court applied People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the case which first established the principle adopted in Neil.

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[1] It is quite conceivable that they were not so intended, as there was no reason prior to Neil to draw a distinction between the two constitutions. In interpreting Article II of the Declaration of Rights of the 1885 Florida Constitution, a provision that is, as regards the impartial jury provision, identical to the present Article I, Section 16, the provision upon which Neil was based, the court stated that the Florida constitutional guarantee "was not intended by the framers of the Constitution either to enlarge or abridge the rights of persons accused of crime." Blackwell v. State, 79 Fla. 709, 86 So. 224, 231 (1920).

In Wheeler, the court found that the rule it adopted would apply in Wheeler and in the companion case of People v. Johnson, 22 Cal.3d 296, 583 P.2d 774, 148 Cal.Rptr. 915 (1978), which was pending in the California Supreme Court while Wheeler was pending, but that the rule would not apply generally to cases pending on appeal, limiting it instead to cases in which the death penalty was imposed and to voir dire proceedings conducted after Wheeler became final. Wheeler, supra, 583 P.2d at 766, n.31.

By applying the Neil rationale to Andrews, which was pending in the Florida Supreme Court at the time Neil was decided, the Florida Supreme Court is doing precisely what the California Supreme Court did in applying Wheeler to Johnson,[2/]

[2/] The State notes that this Court has also applied Neil to reverse the conviction in Jones v. State, __So.2d__ (Fla. 1985), case number 62,098, opinion filed February 21, 1985. This reversal is in accord with the approach taken in Wheeler, as the death penalty had been imposed in Jones.

and is not adopting an approach different than that indicated by the language of Neil.[3/]

Two statements in the opinion are particularly significant. This Court stated:

> Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive.
>
> 457 So.2d at 488.

3/ Of course, in Neil, the case primarily relied upon the court was People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). It appears that the New York appellate court that decided that case also concluded that its reasoning should not apply to cases pending on direct appeal, but only to cases in which the voir dire occurred subsequent to the decision. In the opinion, the court noted that various factors "militate against retroactive application of our decision in this case," 435 N.Y.S.2d at 756, n.22, citing to Wheeler. The court had chance to articulate in later cases exactly what it meant in using the above phrase, as the Court of Appeals of New York subsequently rejected the rationale of Wheeler, Thompson and Neil in People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982). In his dissenting opinion in McCray, however, Judge Meyer noted the apparent inconsistency in the appellate court's affirmance without opinion in McCray and its decision in Thompson and concluded that in light of the fact that the jury in McCray was selected over nine months before the Thompson decision, the apparent inconsistency could have resulted from the conclusion that Thompson should not be applied retroactively to the McCray case.

Had that been all this Court said on the subject, the Court's pronouncement could be interpreted to mean only that Neil would not apply to collateral attacks on convictions, but that it would apply to direct appeals pending when Neil was decided. But that was not all the Court said. The opinion goes on to say:

> Even if retroactive application were possible, however, we do not find our decision to be such a change in the law as to warrant retroactivity or to warrant relief in collateral proceedings as set out in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980).

457 So.2d at 488 (emphasis added).

By using the word "or," the court plainly meant for the word "retroactivity" to apply to something other than collateral proceedings. That something can only be cases pending on direct appeal.

It may therefore be said that the very face of the Neil opinion makes it apparent that this Court did not intend for the dictates of Neil to be applied to cases in which the voir dire proceedings occurred before the Neil decision. The application of Neil in Andrews does not raise a question as to what was meant in Neil when it is realized that such application is wholly consistent with the California Supreme Court's approach in applying its Wheeler decision, which formulated the rationale adopted in Neil.

This conclusion is also buttressed by the fact that analysis of the retroactivity question in light of the United

States Supreme Court standards regarding retroactivity points to the conclusion that Neil should only apply to cases in which the voir dire proceedings took place after the date of the decision.

In United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), the Court concluded that with certain exceptions, decisions of the Court construing the Fourth Amendment are to be applied retroactively to all convictions that are not yet final, including those pending on direct appeal, at the time the decision is rendered. This conclusion was recently extended to decisions construing the Fifth Amendment. Shea v. Louisiana, 470 U.S. ___, 106 S.Ct.__, 84 L.Ed.2d 38 (1985), case number 82-5950, opinion filed February 20, 1985 [36 Cr.L. 3153].

Both Johnson and Shea recognize, however, that a different situation exists when a ruling constitutes "a clear break with the past". As noted in Johnson:

> Conversely, where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," Desist v. United States, 394 U.S., at 248, 89 S.Ct., at 1033, it almost invariably has gone on to find such a newly-minted principle nonretroactive. See United States v. Peltier, 422 U.S. 531, 547, n.5, 95 S.Ct. 2313, 2322, n.5, 45 L.Ed.2d 374 (1975)(BRENNAN, J., dissenting)(collecting cases). In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the "'new' constitutional interpretatio[n]...so change[s] the law that prospectivity is arguably the proper course," Williams v. United States, 401 U.S., at

> 659, 91 S.Ct., at 1156 (plurality opinion). Once the Court has found that the new rule was unanticipated, the second and third Stovall factors/reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule/have virtually compelled a finding of nonretroactivity. See, e.g., Gosa v. Mayden, 413 U.S., at 672-673, 682-685, 93 S.Ct., at 2932-2933, 2937-2938 (plurality opinion); Michigan v. Payne, 412 U.S., at 55-57, 93 S.Ct., at 1970-1971.
>
> 457 U.S. at 549-550, 102 S.Ct. at 2587, 73 L.Ed.2d at 213-214 (footnote omitted).

See also Shea, supra, 36 Cr.L. at 3155.

There can be no question that Neil constitutes "a clear break with the past." As pointed out in footnote one prior to Neil, there was no reason to believe that the Florida Constitution was to be interpreted any differently than the United States Constitution with regard to this issue. The federal constitutional standards had been established in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 284, 13 L.Ed.2d 759 (1965) and certainly imposed no requirements similar to Neil. It is difficult to think of a more clear break with the past than Neil. Under such circumstances, as recognized repeatedly by the cases cited in Johnson, it is simply unfair to hold the government to a standard that it could not have known was to be adopted at some future date. Plainly, therefore, retroactivity analysis, as well as the very wording of Neil itself, demonstrates that Neil should not be retroactively applied.

An additional consideration also exists with regard to the question of retroactivity and that is the applicability of

the harmless error doctrine to cases in which the jury selection process occurred prior to the Neil decision

Florida Statutes §924.33 provides that no judgment shall be reversed unless the appellate court is of the opinion that error was committed that injuriously affected the substantial rights of the appellant and that it shall not be presumed that error affected those rights in such a manner. "While it may be difficult to determine if an error is injurious in a given case, that is what is required by §924.33." State v. Wilson, 276 So.2d 45, 47 (Fla. 1973).

In the present case, it cannot be said that the error found by this court injuriously affected Defendant's substantial rights. Defendant has never claimed that any of the jurors that were actually seated were in any way prejudiced or biased.

Thus, there is no reason to believe that the jury in this case was anything other than completely fair and impartial. Since the opinion in Neil is based on the guarantee of Article I, Section 16, of the Florida Constitution, to an impartial jury, and since Defendant had an impartial jury, his substantial rights were not injuriously affected. Under these circumstances, the dictates of Florida Statutes §924.33 preclude reversal of the judgment.

It is of course true that the opinion in Neil is concerned with society's interest in not having racial groups systematically excluded from juries. Given this interest, it can be said that there exists a prophylactic value in reversing convictions

when the dictates of Neil have been violated, even if there is no showing that any of the actual jurors were biased. Regardless of whether this is said to be the case generally, there can be no question that no prophylactic effect could be achieved by not applying the harmless error concept to the present case, inasmuch as the jury selection here occurred well before the Neil decision. Certainly, reversal of the present conviction will have no greater deterrent effect than did the opinion in Neil itself. Cf. United States v. Peltier, 422 U.S. 531, 540-541, 95 S.Ct. 2313, 2319-2320, 45 L.Ed.2d 374, 383-384 (1975), finding that the deterrent purpose of the exclusionary rule is not served by applying retroactively a Fourth Amendment ruling that worked a "sharp break" in the law, since the law enforcement officer who conducted the search may not properly be charged with the knowledge that it was unconstitutional. See also United States v. Johnson, 457 U.S. 537, 560, 102 S.Ct. 2579, 2593, 73 L.Ed.2d 202, 220-221 (1982). Thus, although this court might conclude that Neil does apply retroactively to this death case, that fact does not mean that this court should not consider the question of whether the error was harmful, regardless of whether this court concludes that such an analysis will be appropriate when the jury selection process occurs after Neil.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority the State continues to urge affirmance of judgment of guilt and sentence of death.

Respectfully submitted,

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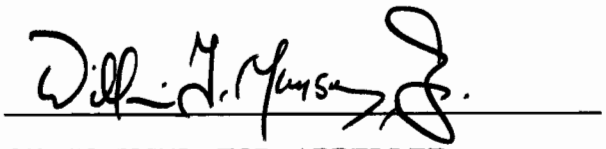
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert F. Moeller, Assistant Public Defender, Hall of Justice Building, 455 N. Broadway Avenue, Bartow, Florida 33830 on this 30th day of April, 1985.



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