IN THE FLORIDA SUPREME COURT

KENNETH MICHAEL GARDNER, :

Appellant, :

vs. : Case No. 64,941

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF THE APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

During the voir dire portion of Ken Gardner's trial the State exercised peremptory challenges to excuse prospective jurors Grimes and Lawton. (R1564,1582-1583) Immediately after Lawton was excused, counsel for Gardner lodged the following objection (R1583):

> 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.

The court did not rule upon the objection, or take any action in response thereto. (R1583)

ARGUMENT

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.

The prosecutor below expended peremptory challenges to excuse the only black prospective jurors called up for questioning in this case.

In State v. Neil, 457 So.2d 481 (Fla.1984) this Court held that a party to a criminal jury trial may not exercise peremptory challenges to exclude members of a particular racial group from the jury solely because they belong to that group. When a party makes a timely objection and demonstrates that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race, the trial court must decide if there is a substantial likelihood that the peremptory challenges are indeed being exercised on that basis. If the court finds such a likelihood, the burden shifts to the party who used the challenges to show that they were not racially-based. This Court ordered Neil's case remanded for a new trial, as it was impossible to tell whether the lower court "would have found that Neil had shown a sufficient likelihood of discrimination in order for the court to inquire as to the State's motives." 457 So.2d at 487.

The Court specifically predicated its holding in Neil upon the guarantee of an impartial jury found in Article I, Section 16 of the Constitution of the State of Florida. However,

rights guaranteed by the Federal Constitution are also implicated when a cognizable racial group is systematically excluded from serving on a jury solely because of skin color. For example, in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) the Supreme Court of the United States upheld the right of a white defendant to challenge the exclusion of blacks from a grand jury and a petit jury. The High Court recognized that there is a due process right to a competent and impartial tribunal which imposes limitations on the composition of a jury. The Court explained:

> ...[A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.

33 L.Ed.2d at 94.

In an earlier case, Carter v. Greene County, 399 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), the Court had identified some of the evils attending exclusion of blacks from jury service due to their race:

> The exclusion of Negroes from jury service because of their race is "practically a brand upon them..., an assertion of their inferiority ...." [Footnote omitted.] That kind of discrimination contravenes the very idea of a jury--"a body truly representative of the community," [footnote omitted] composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. [Footnote omitted.]

24 L.Ed.2d at 558.

In another context, that of omission of women from the jury rolls, the Supreme Court discussed the need for juries to be

drawn from a fair cross section of the community in order to conform with the American concept of trial by an impartial jury as embodied in the Sixth and Fourteenth Amendments. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The Court discussed the need for a representative jury:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S., at 155-156, 20 L.Ed.2d 491, 88 S.Ct. 1444. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.... [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Thiel v. Southern Pacific Co. 328 U.S. 217, 227, 90 L.Ed. 1181, 66 S.Ct. 984, 166 ALR 1412 (1946) (Frankfurter, J., dissenting).

42 L.Ed.2d at 698. The Court concluded:

> Defendants are not entitled to a jury of any particular composition [citations omitted], but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

42 L.Ed.2d at 703. By using its peremptory challenges to excuse the only blacks, the State effectively did exclude a distinctive group in the community from the jury venire in Ken Gardner's case, depriving him of an impartial jury representing a legitimate cross-section of the community. This is the practice this Court condemned in Neil, and Ken Gardner should be afforded a new trial as the appropriate remedy.

Although this Court held that Neil was not to be retroactive, it should apply to Ken Gardner's case for at least two reasons. Firstly, he did preserve the issue involved herein for appellate review by lodging a timely objection. Furthermore, courts of this State, including this Court, have generally held that the law in effect while an appeal is pending should govern the outcome of the appeal, even if, as here, there has been a change of law since the time of trial.[1/] See, e.g., Lowe v. Price, 437 So.2d 142 (Fla.1983); Tascano v. State, 393 So.2d 540 (Fla. 1980); Gonzalez v. State, 367 So.2d 1008 (Fla.1979); Wheeler v. State, 344 So.2d 244 (Fla.1977); Brewer v. State, 264 So.2d 833 (Fla.1972); McGoff v. State, 450 So.2d 321 (Fla.2d DCA 1984); Williams v. Wainwright, 325 So.2d 485 (Fla.4th DCA 1975); Collins v. Wainwright, 311 So.2d 787 (Fla.4th DCA 1975); Gallagher v. State, 300 So.2d 299 (Fla.4th DCA 1974).

The Supreme Court of the United States recently addressed the question of retroactivity in Shea v. Louisiana, 53 U.S.L.W.

[1/] Gardner would also point out that while his appeal is still pending it would be a relatively simple matter for this Court to relinquish partial jurisdiction to the trial court for any clarification of the record that might be needed to resolve the Neil issue.

4173 (No. 82-5920, decided February 20, 1985). There the Court held that its decision in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) was applicable to a case pending on direct appeal in state court at the time Edwards was decided. The Court discussed its reasoning for applying new decisional law to cases pending on direct review when the new decision is rendered:

> The Court in [United States v.] Johnson [, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)] found persuasive Justice Harlan's earlier reasoning that application of a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule. See Desist v. United States, 394 U.S. 244,256 (1969)(dissenting opinion); Mackey v. United States, 401 U.S. 667,675 (1971)(separate opinion). The Court noted that, at a minimum, "'all "new" rules of constitutional law must ...be applied to all those cases which are still subject to direct review by this Court at the time the "new" decision is handed down.'" United States v. Johnson, 457 U.S., at 548, quoting from the dissent in Desist v. United States, 394 U.S., at 258. In Johnson the Court "to the extent necessary to decide today's case,...embrace[d] Justice Harlan's views in Desist and Mackey." 457 U.S., at 562. It thus determined that unless the rule is so clearly a break with the past that prior precedents mandate nonretroactivity, a new Fourth Amendment rule is to be applied to cases pending on direct review when the rule was adopted.

53 U.S.L.W. at 4174. The same considerations should lead this Court to apply its opinion in Neil to Ken Gardner's case.

In Jones v. State, 10 FLW 528 (Fla.3d DCA Feb.26, 1985) the Third District Court of Appeal specifically held Neil applicable to "pipeline" cases such as this one, in which the issue was preserved below and the case was pending on appeal when Neil was decided.

CONCLUSION

For the reasons expressed in this supplemental brief, Appellant, Kenneth Michael Gardner, prays this Honorable Court to grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 21st day of March, 1985.

Robert F. Moeller
ROBERT F. MOELLER

RFM:js