OA 2.8.96

FILED
SID J. WHITE
NOV 15 1995
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JEANIE H. MELBOURNE,

Petitioner,

v. CASE NO. 86,029

STATE OF FLORIDA,

Respondent.
______/

On Discretionary Review Of
Decision Of Florida Fifth District Court Of Appeal

PETITIONER'S INITIAL BRIEF ON MERITS

TERRENCE E. KEHOE
LAW OFFICES OF TERRENCE E. KEHOE
Tinker Building
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (FAX)

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF THE ARGUMENTS 6

ARGUMENTS

I. TRIAL COURT ERRED IN FAILING TO CONDUCT A BATSON/JOHANS INQUIRY WHEN AN OBJECTION WAS RAISED TO THE STATE ILLEGALLY EXERCISING A PEREMPTORY CHALLENGE AGAINST A BLACK VENIRE PERSON 7

II. JUDGMENTS ON COUNTS IV AND V MUST BE VACATED DUE TO DOUBLE JEOPARDY VIOLATION 15

III. SCRIVENER'S ERROR REQUIRES JUDGMENT BE CORRECTED . 28

CONCLUSION 28

CERTIFICATE OF SERVICE 29

APPENDIX . . . . Attached

TABLE OF CITATIONS

CASES **PAGE**

Batson v. Kentucky,
476 U.S. 79, 106 S.Ct. 1712,
90 L.Ed.2d 69 (1986) 9, 11, 12

Boutwell v. State,
625 So.2d 1215 (Fla. 4th DCA 1993) 15

Boutwell v. State,
631 So.2d 1094 (Fla. 1994) 15-26

Canion v. State,
__ So.2d __ (Fla. 4th DCA 10/18/95)
[20 Fla. L. Weekly D2336] 27

Deviney v. State,
579 So.2d 373 (Fla. 4th DCA 1991) 23

Georgia v. McCollum,
505 U.S. 42, 112 S.Ct. 2348,
120 L.Ed.2d 33 (1992) 9

Goodwin v. State,
634 So.2d 157 (Fla. 1994) 23, 27

Hallman v. State,
492 So.2d 1136 (Fla. 2d DCA 1986) 16, 24

Hoag v. State,
511 So.2d 401 (Fla. 5th DCA 1987) 23

Houser v. State,
474 So.2d 1193 (Fla. 1985) 21, 22

Jackson v. State,
634 So.2d 1103 (Fla. 4th DCA 1994) 26

Jones v. State,
640 So.2d 1161 (Fla. 1st DCA 1994) 11

Kibler v. State,
546 So.2d 710 (Fla. 1989) 9

M.P.C. v. State,
659 So.2d 1293 (Fla. 5th DCA 1995) 27

CASES **PAGE**

Michie v. State,
635 So.2d 163 (Fla. 5th DCA 1994) 24

Ponder v. State,
646 So.2d 286 (Fla. 2d DCA 1994) 14

Powers v. Ohio,
499 U.S. 400, 111 S.Ct. 1364,
113 L.Ed.2d 411 (1991) 9

Pulaski v. State,
540 So.2d 193 (Fla. 2d DCA 1989) 15, 16, 22

Reynolds v. State,
576 So.2d 1300 (Fla. 1991) 10

Satterfield v. State,
553 So.2d 793 (Fla. 1st DCA 1989) 23

Sirmons v. State,
634 So.2d 153 (Fla. 1994) 27

State v. Castillo,
486 So.2d 565 (Fla. 1986) 9

State v. Cooper,
634 So.2d 1074 (Fla. 1994) 23

State v. Johans,
613 So.2d 1319 (Fla. 1993) 8-10, 14

State v. Lamoureux,
__ So.2d __ (Fla. 2d DCA 7/7/95)
[20 Fla. L. Weekly D1587] 24

State v. Moreno,
3 Fla. L. Weekly Supp. 393
(20th Jud. Cir. 8/7/95) 24-25

State v. Neil,
457 So.2d 481 (Fla. 1984) 9, 10, 13, 14

State v. Slappy,
522 So.2d 18 (Fla. 1988) 9-14

State v. Thompson,
607 So.2d 422 (Fla. 1992) 27, 28

CASES **PAGE**

State v. Woodruff,
654 So.2d 585 (Fla. 3d DCA 1995) 25

Stroud v. State,
656 So.2d 195 (Fla. 1995) 11

Thompson v. State,
650 So.2d 969 (Fla. 1994) 27

Valentine v. State,
616 So.2d 971 (Fla. 1993) 10

Watson v. State,
655 So.2d 1250 (Fla. 1st DCA 1995) 27

Wick v. State,
651 So.2d 765 (Fla. 3d DCA 1995) 25

Wright v. State,
592 So.2d 1123 (Fla. 3d DCA 1991) 15, 16, 21-23

OTHER AUTHORITIES **PAGE**

Amend. V, U.S. Const. 9, 15

Amend. XIV, U.S. Const. 9, 15

Art. I, § 2, Fla.Const. 9

Art. I, § 9, Fla.Const. 15

Art. I, § 16, Fla.Const. 8

§ 316.193, Fla.Stat. 18-20, 28

§ 316.193(1), Fla.Stat. 17, 20, 21

§ 316.193(1)(b), Fla.Stat (1995) 18

§ 316.193(3), Fla.Stat. 17, 20-22, 27

§ 322.28(2), Fla.Stat. 26

§ 322.34, Fla.Stat. 18-20

§ 322.34(1), Fla.Stat. 16, 17, 20

§ 322.34(3), Fla.Stat. 16, 17, 22

OTHER AUTHORITIES **PAGE**

§ 877.111, Fla.Stat. 28

§ 893.13, Fla.Stat. 28

PRELIMINARY STATEMENT

In this brief, the Petitioner, JEANIE HEATON MELBOURNE, will be referred to as "Ms. Melbourne." The Respondent, State of Florida, will be referred to as the "state."

The record on appeal consists of 14 volumes. Volumes I - IV contain transcripts of hearings on pretrial motions. Volume V contains the sentencing transcript. Volumes VI - VIII contain copies of trial court pleadings, orders, and other documents. The last six volumes contain trial transcripts, also numbered I - VI.

References to the record on appeal will be to the volume number, followed by a slash, followed by the appropriate page number (___/___). The trial transcripts will be noted by T, followed by the applicable volume number, followed by a slash, followed by the appropriate page number (T___/___).

STATEMENT OF THE CASE AND FACTS

A. Proceedings Below

On June 12, 1992, Ms. Melbourne was involved in a two car accident (VI/212-13). On October 29, 1992, the state filed a five count information charging her with DUI Manslaughter (Counts II and IV), Vehicular Homicide (Counts I and III), and DUI Serious Bodily Injury (Count V) (VI/207-11). There were numerous pretrial motions filed with hearings being held on some of them. Prior to the commencement of trial, the original presiding judge, Circuit Judge Richard F. Conrad, sua sponte issued an order of recusal (VII/465). The case was reassigned to Circuit Judge Michael F. Cycmanick who presided over the trial (VII/466). The trial court entered

judgments of acquittal at the close of the state's case-in-chief as to Counts I and III (VII/553; TVI/817). After a four day jury trial, the jury convicted Ms. Melbourne of Counts II, IV and V as charged (VIII/569-71; TVI/1031).

B. Facts

At the time of the accident, Jeanie Melbourne was a 52 year old with no prior criminal record (VIII/654). Ms. Melbourne was a "safe driver" with no prior traffic tickets on her driver's license record. On June 12, 1992, she ate dinner at the Boston Lobster Feast in Orlando (TV/929). At approximately 11:15 p.m., she left the restaurant alone and proceeded down Sand Lake Road (TV/931). It was a dark night and it had been raining (TIV/634-35; TII/504). The roads were wet (TIV/635; TIII/503). Ms. Melbourne stopped at the traffic light at the intersection of Winegard and Sand Lake Roads (TV/931). At about this time, a second vehicle, containing Mr. Fallejo (Count II), Mr. Astillero (Count IV), and Mr. and Mrs. Bryant (Count V), was heading in the opposite direction on Sand Lake Road (TII/317-19). Mr. Fallejo and Mr. Astillero had just picked up the Bryants from the airport after they flew in from California (TII/311-12). The Fallejo vehicle was travelling at least 55 mph (TII/318; TIV/635). Ms. Melbourne made a left hand turn onto Winegard Road and the Fallejo vehicle crashed into the side of her automobile (TV/931). As a result of the crash, both Mr. Astillero and Mr. Fallejo died (TIV/762-63, 769). Ms. Bryant suffered a fracture of her elbow and pelvis (TIII/422).

The scene after the accident was chaotic. Trooper Matthews of the Florida Highway Patrol arrived, but did not believe that a death was involved, and therefore did not contact a traffic homicide investigator (TIV/636-37). The net result of this was that very little investigation as to the cause of the accident was developed that evening (TIV/628-41). It was not until the next day that Trooper Hoops went to the location of the accident and attempted to reconstruct and develop a causation theory (TIII/523-24). Causation was a great subject of debate during the trial. Ms. Melbourne testified that the Fallejo vehicle came out of nowhere (speeding) and struck her automobile unexpectedly (TV/931).

As to the other element of the state's charges, blood alcohol evidence was presented to the jury (TIV/681, 734). After Ms. Melbourne was transferred to Sand Lake Hospital, the doctor ordered that blood be drawn to determine among other things, blood alcohol content (TIV/649). This "medical blood" was drawn at approximately 1:05 a.m. and registered .22 (TIV/656, 734). The validity of this .22 reading was hotly debated during the trial, and the state's own witness stated that it was inaccurate (scientific reliability) and could be as low as .17 (TIV/798-99). Ms. Melbourne presented an expert on blood toxicology, who testified that this medical blood reading was not scientifically reliable and if reliable could be as low as .16 (TV/867). Legal blood was drawn at the direction of Trooper Matthews approximately 3 hours and 16 minutes after the accident occurred (TIV/658-60). The laboratory analysis on this specimen of blood showed a .12 blood alcohol content reading

(TIV/680). Ms. Melbourne presented expert, retrograde extrapolation testimony showing that based upon her stomach contents, her true blood alcohol reading at the time of the accident was .023 to .048 (TV/874). Ms. Melbourne's blood toxicologist tested the second vial of the "legal blood" evidence, which revealed a blood alcohol reading of .06, versus the state's reading of .12 (TV/833). No facet of the state's case against Ms. Melbourne was uncontested.

C. Sentencing

Ms. Melbourne was sentenced on May 5, 1993 (V/164-205). Over 41 members of the community wrote letters on Ms. Melbourne's behalf and were present at her sentencing hearing (V/179; VIII/571-637). Of the 40 plus persons who were present at the hearing, five testified as to Ms. Melbourne's good character (V/180-85). The decedents' family members testified and asked the court not to grant Ms. Melbourne mercy or leniency (V/189-95). The court granted over objection the state's motion to score 21 points for severe victim injury (Count V), which bumped Ms. Melbourne's sentencing category one cell. The trial court sentenced Ms. Melbourne to 12 years in the Department of Corrections on Counts II and IV and five years on Count V, all to run concurrently (V/198; VIII/659-65). Ms. Melbourne had no prior criminal record and was granted bond on appeal (VIII/672). A timely notice of appeal was filed (VIII/666).

D. Fifth District

Ms. Melbourne's appeal was dismissed for failure to timely file her initial brief. Melbourne v. State, 633 So.2d 1093 (Fla. 5th DCA 1993). This Court denied discretionary review, Melbourne v. State, 637 So.2d 236 (Fla. 1994), and a petition for writ of mandamus to reinstate the appeal, Melbourne v. District Court of Appeal, 637 So.2d 236 (Fla. 1994). The Fifth District reinstated the appeal on a petition for writ of habeas corpus. Melbourne v. State, 635 So.2d 163 (Fla. 5th DCA 1994). Ms. Melbourne's supersedeas bond was also reinstated.

Ms. Melbourne raised ten points on appeal to the Fifth District. On April 21, 1995, the Fifth District issued an opinion addressing three of the points. Melbourne v. State, 655 So.2d 126 (Fla. 5th DCA 1994)(App. A). First, the court ruled that there was an adequate inquiry into the reasons behind the state's peremptory strike of a black venireman. Id. at 127-28. Second, the Fifth District ruled that while the trial court erred in not striking one juror for cause, it did not err in failing to strike a second juror for cause. Because the trial court awarded the defense one additional peremptory challenge, the Fifth District ruled that no reversible error occurred. Id. at 128. Third, the court ruled that Ms. Melbourne's multiple convictions would be upheld because three separate offenses occurred. Id. at 129. Chief Judge Harris dissented on the multiple convictions issue. Based primarily on Boutwell v. State, 631 So.2d 1094 (Fla. 1994), Chief Judge Harris

would have vacated the convictions and sentences on Counts IV and V. Id. at 129-32.

Ms. Melbourne filed a motion for rehearing or certification to the Florida Supreme Court. The Fifth District issued a corrected opinion, which eliminated the reference to Ms. Munyon as a clerk (App. B).[1] Although the corrected opinion was also dated April 21, 1995, it was not released until on or about May 31, 1995. By order dated June 1, 1995, the Fifth District denied the motion for rehearing or certification, in light of the corrected opinion.

On June 19, 1995, Ms. Melbourne filed her notice to invoke the discretionary jurisdiction of this Court. A motion to stay was filed in the Fifth District and denied. A motion to stay was filed in this Court and denied. The trial court then revoked Ms. Melbourne's supersedeas bond and she is presently incarcerated in the Florida Department of Corrections.

SUMMARY OF THE ARGUMENTS

I.

TRIAL COURT ERRED IN FAILING TO CONDUCT A BATSON/JOHANS INQUIRY WHEN AN OBJECTION WAS RAISED TO THE STATE ILLEGALLY EXERCISING A PEREMPTORY CHALLENGE AGAINST A BLACK VENIRE PERSON

The state struck a black venire person. Under State v. Johans, 613 So.2d 1319 (Fla. 1993), a hearing is mandated once an objection is made. Despite a Batson objection and a request for a

[1] It must be noted that the opinion printed in the advance sheets of the Southern Reporter is the first, not the corrected, opinion (compare App. A and B). Undersigned counsel has advised the Fifth District of this. It may be corrected when the hardbound volume is issued.

Johans hearing being made, the trial court failed to hold such a hearing. Therefore, this case must be reversed for a new trial.

II.

JUDGMENTS ON COUNTS IV AND V MUST BE VACATED DUE TO DOUBLE JEOPARDY VIOLATION

There was only one act of driving while under the influence of alcoholic beverages involved in this case, which act resulted in two deaths and one bodily injury. Applying the rationale of Boutwell v. State, 631 So.2d 1094 (Fla. 1994), there can be only one conviction arising out of this case. Therefore, the convictions on Count IV and V violate double jeopardy and must be vacated.

III.

SCRIVENER'S ERROR REQUIRES JUDGMENT BE CORRECTED

The case must be remanded for correction of a scrivener's error. The judgment erroneously reflects three convictions under § 877.111, Fla. Stat.

ARGUMENTS

I.

TRIAL COURT ERRED IN FAILING TO CONDUCT A BATSON/JOHANS INQUIRY WHEN AN OBJECTION WAS RAISED TO THE STATE ILLEGALLY EXERCISING A PEREMPTORY CHALLENGE AGAINST A BLACK VENIRE PERSON

During the jury selection process, the state improperly used one of its peremptory challenges to exclude a black juror. The following recitation contains the entire record colloquy on this issue. As can be seen below, the failure of the trial court to

require this state to provide any explanations as to the exclusion of this venireman warrants a new trial.

Mr. Bressler: (state)	We'd also strike number 19, your honor.
Mr. Mason: (defense)	Mr. Dewey Wells, the black man, I would raise a Baxter[2] Johans challenge, J O H A N S. He's a black man, number 19.
Ms. Munyon: (state)	The state has not stricken any black jurors at all. The defense has stricken number ten, Tillman, as well as juror number 13, which are black. The state accepted both of those jurors.
Mr. Bressler:	Kelvin McCall was a black juror that the defense struck.
Mr. Mason:	I have nothing else to say.
The Court:	Well, I don't see anything in this record to indicate that there's any -- that the state in exercising this challenge to a black person is in any way acting in a discriminatory fashion, or singling out Mr. Wells because of his race in its exercise of peremptory challenge. The record should reflect that the defense has excused (sic) two peremptory challenges to excuse black males and exercised its exercise of the --. (TII/269-70).

It should be noted that Ms. Melbourne's trial began on March 31, 1993, some 41 days after this Court issued its opinion in <u>State v. Johans</u>, 613 So.2d 1319 (Fla. 1993).

B. Introduction - <u>Neil</u> Legal Standard

This Court has held that Article I, Section 16 of the Florida Constitution is violated when the state discriminatorily exercises a peremptory challenge to strike a member of a cognizable racial

---

[2] This is a stenographical error. Counsel was referring to <u>Batson v. Kentucky</u>, <u>infra</u>.

group. State v. Neil, 457 So.2d 481, 486 (Fla. 1984), clarified, State v. Castillo, 486 So.2d 565 (Fla. 1986). Equal protection under the law is violated when the state or the defense discriminatorily exercises a peremptory challenge to a venireman. Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986); State v. Slappy, 522 So.2d 18, 21 (Fla.), cert. denied, 487 U.S. 1219 (1988); State v. Neil, 457 So.2d 481 (Fla. 1984). See also, Art. I, § 2, Fla. Const.; Amend. V and XIV, U.S. Const. The accused/complaining party need not be of the same racial makeup as the venireman stricken. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991); Kibler v. State, 546 So.2d 710, 712 (Fla. 1989).

C. Law of Johans - Inquiry Mandated Upon Objection

On February 18, 1993, this Court issued its opinion in State v. Johans, 613 So.2d 1319 (Fla. 1993). The Court, in response to a deluge of cases interpreting whether the defense had satisfied its initial burden under Neil, supra, decided that this prong of the Neil standard should be modified.

> Rather than wait for the law in this area to be clarified on a case-by-case basis, we find it appropriate to establish a procedure that gives clear and certain guidance to the trial courts in dealing with peremptory challenges. Accordingly, we hold that from this time forward a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. We recede from Neil and its progeny to the extent that they are inconsistent with this holding.

Id. at 1321.

This Court reiterated in Valentine v. State, 616 So.2d 971 (Fla. 1993), that the accused no longer has the initial burden to show that the state is exercising its peremptory challenges in a discriminatory manner. A Neil inquiry is automatically required once the accused objects and points out that the party being peremptorily stricken by the state is a member of a distinct racial group.

> To give this rule effect and minimize the risk of reversal, we recently held in State v. Johans, 613 So.2d 1319 (Fla. 1993), that once a party makes a timely objection and demonstrates on the record that the challenged persons are members of a distinct racial group, the trial court must conduct a routine inquiry.

Id. at 974. Although the trial court in this case had the benefit of the Johans opinion, no inquiry was made of the state as to its peremptory strike of black venireman Wells.

In its opinion, the Fifth District misconstrued the law and the record when it found that the trial court did conduct a Neil inquiry (App. A, p. 2). A Neil inquiry requires the trial court to inquire of the party making the challenge as to a non-racial reason for the challenge. See State v. Johans, 613 So.2d 1319, 1321 (Fla. 1993) (trial court must conduct Neil inquiry; burden is on party exercising peremptory challenge to provide a race-neutral justification); Reynolds v. State, 576 So.2d 1300, 1301 (Fla. 1991) (trial court must inquire of state; state must provide reason for strike; trial court must evaluate reason provided by state); State v. Slappy, 522 So.2d 18, 22 (Fla.), cert. denied, 487 U.S. 1219 (1988) ("Neil imposes upon the other party an obligation to rebut the inference created when defense met its initial burden of

persuasion. This rebuttal must consist of a 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for the state's use of its peremptory challenge."); Stroud v. State, 656 So.2d 195 (Fla. 2d DCA 1995)(failure to provide non-racial reasons for strike required reversal); Jones v. State, 640 So.2d 1161, 1163 (Fla. 1st DCA 1994)(state obligated to provide racially neutral explanation for strike).

D. State's Burden To Show Non-Discriminatory Reasons For Peremptory Challenges

Once it is determined that the accused has made a Johans objection, the burden automatically shifts to the state to provide non-discriminatory reasons for its peremptory challenge which must be supported by the record. In response to the trial court's inquiry, the state's "rebuttal must consist of a 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons'" for its challenges. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988), citing Batson v. Kentucky, 106 S.Ct. at 1722-24, n. 20. It is the trial court's obligation to evaluate not only the credibility of the state's response, but the credibility of the state's representative. Slappy, 522 So.2d at 22. The trial court cannot sustain the peremptory challenge unless it concludes based upon record support that the reasons offered are: (1) neutral and reasonable; and (2) are not a pretext. Id. The record must support the state's reasons for the strike. Id. Factors which the court should consider in deciding if the state's reasons are not neutral are:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to jurors who were not challenged.

Id. at 22.

The underlying rationale for requiring a full and thorough inquiry is that prejudice and discrimination evince themselves in subtle forms.

> Nor is outright prevarication ... the only danger here "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." .. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. ... [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts." ... Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels. ...

Id. at 22-23, quoting Batson v. Kentucky, 106 S.Ct. at 1728 (Marshall, J., concurring) (citations omitted). If the record does not support the state's reason for the strike or if the strike is a pretext, the challenge cannot be sustained.

In Melbourne, as argued above, the trial court did not make any inquiry of the state. Second, and most importantly, the state did not provide any lawful explanation for its strike. It provided absolutely no non-racial reason for the challenge. Instead, both Ms. Munyon and Mr. Bressler merely pointed out that defense counsel

had previously stricken black jurors. In other words, the prosecutors merely sought to justify their exclusion of Mr. Wells on the basis of the defense's prior exclusion of other blacks. Of course, prior exclusion of any other blacks by either party is irrelevant. Slappy, 522 So.2d at 21. If the striking party fails to provide a sufficient non-racial basis for the striking of any one juror, it matters not that other jurors were properly or improperly stricken.

E. Facts Contained Within Melbourne Record Constitute Reversible Error

During jury selection, defense counsel made a timely objection that the state had exercised a peremptory challenge to strike a black venireman in a racially discriminatory manner. At that point, it was incumbent upon the trial court to conduct a Slappy inquiry and determine if the state was illegally exercising its peremptory challenges. The mere fact that the accused had previously stricken a black venireman is irrelevant and no substitute for this court mandated inquiry. Slappy, 522 So.2d at 22.

The Fifth District bolstered its finding that an inquiry was conducted because the trial court issued a ruling (App. A, p. 3). Merely because the trial court issued a ruling does not mean that an adequate Neil inquiry was held. It merely means that the trial court chose to overlook the state's explicit Slappy burden and, despite the state's failure to articulate a non-racial reason for the challenge, merely upheld the challenge. It is apparent from this record that neither the state nor the trial court was aware of

the duty imposed upon it in the recent Florida Supreme Court decision of State v. Johans, 613 So.2d 1319, 1322 (Fla. 1993), much less prior cases such as Neil and Slappy.

In a further effort to bolster its decision on this point, the Fifth District has improperly determined that the record provides non-racial reasons for the strike, even though obviously not articulated by the state below. This appellate determination misses the point. The purpose of the Neil inquiry is to have the state articulate its basis for the strike. Ponder v. State, 646 So.2d 286, 287 (Fla. 2d DCA 1994). It is not permissible to allow a trial court (in this case) or the defense counsel to speculate as to the state's basis for the strike. The purpose for the Johans rule is to require the party making the strike (the state) to articulate its basis so that the basis can be evaluated by the trial court, opposing counsel, and so that it exists in the record for appellate review. The Fifth District improperly leapfrogged over this vital component of the Neil/Johans line of cases. For an appellate court some two years after the fact to speculate as to possible reasons for the state's strike is obviously an attempt to uphold a conviction, while ignoring the plain dictates of Johans, Neil and the other cases cited above.

By twisting the record the Fifth District attempted to avoid the Johans mandate. In so doing the Fifth District has failed to apply the mandate set forth by this Court in Slappy and its progeny. In accord with Johans, and this Court's previously articulated positions on due process and equal protection in the

selection of a jury, this case must be reversed and remanded for a new trial.

II.

JUDGMENTS ON COUNTS IV AND V MUST BE VACATED DUE TO DOUBLE JEOPARDY VIOLATION

Ms. Melbourne's multiple convictions for DUI manslaughter and DUI serious bodily injury violate the constitutional prohibitions against double jeopardy found in Art. I, § 9, Fla. Const.; Amend. V and XIV, U.S. Const.

A. Boutwell

In Boutwell v. State, 625 So.2d 1215 (Fla. 4th DCA 1993), the defendant had entered a plea to four counts of DUI serious bodily injury, and four counts of driving while license suspended (DWLS) serious bodily injury. In the trial court, he did not complain of his multiple convictions. Id. at 1217 n.3. On appeal, he challenged the multiple DWLS serious bodily injury convictions as violating the double jeopardy clause. Id. at 1217. The Fourth District denied that challenge, relying upon Pulaski v. State, 540 So.2d 193 (Fla. 2d DCA), rev. denied, 547 So.2d 1210 (Fla. 1989). Pulaski involved a situation where a defendant was convicted of two counts of DUI serious bodily injury arising from one incident. The Fourth District certified that its opinion was in conflict with Wright v. State, 592 So.2d 1123 (Fla. 3d DCA 1991), quashed on other grounds, 600 So.2d 457 (Fla. 1992). Boutwell did not challenge his multiple DUI convictions on appeal.

This Court accepted review of the Fourth District's decision in Boutwell v. State, 631 So.2d 1094 (Fla. 1994). This Court ruled

that where multiple injuries arose from a single driving episode, there could be only one conviction arising under § 322.34(3), Fla.Stat. (1991). The Court stated:

> It is evident that section 322.34(3) does no more than enhance the penalty for driving with a suspended license in cases where the driver through the careless or negligent operation of his vehicle causes death or serious bodily injury. If the violation of section 322.34(1) in a single driving episode can be only one offense, the violation of section 322.34(3) in a single driving episode should be considered as one offense. We agree with Wright that regardless of the number of injured persons, there can only be one conviction under section 322.34(3) arising from a single accident.

Id. at 1095 (footnote omitted). This Court distinguished situations in which there was an intent to commit separate crimes, stating "In the instant case it was fortuitous that four persons were injured as a result of Boutwell's negligent driving instead of only one." Id.

Besides Wright, the other case relied upon by this Court in Boutwell was Hallman v. State, 492 So.2d 1136 (Fla. 2d DCA 1986). In Hallman, the Second District ruled that a defendant could not be convicted of two counts of DWLS arising out of a single driving episode. The Second District held that driving with a suspended license was a continuing offense in which only one conviction could be obtained unless the defendant had resumed driving following the police intervention.

Justice Grimes dissented, relying on Pulaski and Wright. He argued that since multiple convictions were permitted for DUI

related offenses, they should be permitted for driving while license suspended offenses. 631 So.2d at 1096.

It is important to note that the result in Boutwell would not have been changed had death, rather than serious bodily injury, resulted to any of the four passengers. Again, this Court ruled that " ... the violation of section 322.34(3)[which enhances the penalty based on either death or serious bodily injury to another human being] in a single driving episode should be considered as one offense. Id. at 1095; emphasis added. The same rationale requires vacation of the convictions of Counts IV and V in Ms. Melbourne's case.

Like § 322.34(3), the DUI statute provides that someone who operates a motor vehicle while either impaired or with an unlawful blood alcohol level and who causes death or serious bodily injury to another human being is guilty of an enhanced crime. The DUI manslaughter/serious bodily injury statute does no more than enhance the penalty for DUI in cases where the driver causes death or serious bodily injury. Just as a single driving episode under § 322.34(1) can result in only one offense, so too a single driving episode under § 316.193(1) can result in only one offense. Therefore violation of § 316.193(3), just as a violation of § 322.34(3), should also be considered as one offense. The crux of the § 316.193(3) offense is driving under the influence of alcohol, like the crux of a § 322.34(3) offense is driving while license is suspended. The logic and rationale of Boutwell must be applied by this Court to the DUI statute as well.

B. Statutory Comparison

DUI - § 316.193, Fla.Stat. (1993)	**DWLS - § 322.34, Fla.Stat. (1993)**
(1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and: (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that his normal faculties are impaired; or (b) The person has a blood or breath alcohol level of 0.10[3] percent or higher.	(1) Except as provided in subsection (4), any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, except persons defined in s. 322.264, and who drives any motor vehicle upon the highways of this state while such license or privilege is canceled, suspended, or revoked, upon conviction of a first offense, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Any person convicted of a second or subsequent charge of driving while license is canceled, suspended, or revoked shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
(2) [penalty provisions for DUI based on number of convictions]	(2) [penalty if driver is habitual traffic offender]

[3] This level is now 0.08 percent or higher. § 316.193(1)(b), Fla.Stat. (1995).

DUI - § 316.193, Fla.Stat. (1993)	**DWLS - § 322.34, Fla.Stat. (1993)**
(3) Any person: (a) Who is in violation of subsection (1); (b) Who operates a vehicle; and (c) Who, by reason of such operation, causes: 1. Damage to the property or person of another is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. 2. Serious bodily injury to another, as defined in s. 316.1933, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. 3. The death of any human being is guilty of DUI manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s 775.083, or 775.084.	(3) Any person who operates a motor vehicle: (a) Without having a driver's license as required under s. 322.03; or (b) While his driver's license or driving privilege is canceled, suspended, or revoked pursuant to s. 316.655, s. 322.26(8), s. 322.27(2), or s. 322.28(2) or (5), and who by careless or negligent operation of the motor vehicle causes the death of or serious bodily injury to another human being is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.
(4) [increased penalties where driver has blood alcohol level of .20 or above, or a passenger in the vehicle was under the age of 18].	(4) [offense where person drives a commercial motor vehicle].
(5) [probation and substance abuse requirements]	
(6) [probation and jail requirements].	
(7) [conviction not a bar to civil suit].	

DUI - § 316.193, Fla.Stat. (1993)	DWLS - § 322.34, Fla.Stat. (1993)
(8) [requirement of notice concerning revocation of license].	
(9) [standards for release from custody].	

As can be seen by comparing these statutes, subsection (1) of both statutes sets forth the base offense. In § 316.193(1), it is either being in actual physical control of a vehicle or driving under the influence of an alcoholic beverage, chemical substance, or controlled substance when affected to the extent that his normal faculties are impaired, or being in actual physical control of a vehicle or driving with an unlawful blood alcohol level. In § 322.34(1), it is driving while one's license or privilege has been canceled, suspended, or revoked.

Even more importantly, a comparison of subsections (3) indicate they are analogous. Both seek to punish a driver who is driving in violation of a certain law and who, while so driving, causes death or serious bodily injury to another.[4] Like a DWLS offense under § 322.34(1), a DUI offense when § 316.193(1) is a continuing offense in which only one conviction can be obtained unless the defendant resumes driving following police intervention. § 316.193(3) does no more than enhance the penalty for driving

[4] It is of no importance that the legislature sought to add an additional category in the DUI statute, that of damage to the property or person or another, which would not rise to the level of serious bodily injury or death. That section too is merely an enhancement provision. The addition of such a category in the DWLS statute would not have changed the Boutwell decision or analysis.

under the influence in cases where the driver has caused death or bodily injury. It is beyond dispute that a violation of § 316.193(1) in a single driving episode can only be one offense. Therefore, a violation of § 316.193(3) in a single driving episode must be considered as only one offense. Like Boutwell, in Ms. Melbourne's case it was simply "fortuitous" that multiple persons were injured or killed as a result of her driving instead of only one.

It should be noted that the state can circumvent Boutwell in order to punish more severely someone who injures or kills more than one person in a single driving incident. The state simply has to allege in a single count that the defendant, while driving under the influence or while driving with a suspended license, caused the death of "A" and "B" and seriously injured "C." Then, upon a properly specific verdict, the defendant would receive appropriate "victim injury" points for each death or injury under the Florida sentencing guidelines.

C. Pre-Boutwell

The Fifth District based its decision primarily on two pre-Boutwell cases: Houser v. State, 474 So.2d 1193 (Fla. 1985), and Wright v. State, 592 So.2d 1123 (Fla. 3d DCA 1991), quashed on other grounds, 600 So.2d 457 (Fla. 1992). Neither dictate the Fifth District's conclusion.

Houser was a case in which this Court determined that a single death would not support a conviction for both DUI manslaughter and vehicular homicide. The Court did not address the consideration of

whether an individual in a DUI case could be charged with multiple counts of DUI, depending on how many injuries, deaths, or how many pieces of property were damaged. However, in dicta, this Court stated that DUI manslaughter was not merely an enhancement of the penalty for driving while intoxicated. Id. at 1196. The Court stated that the additional element of death raises DUI manslaughter beyond mere enhancement and placed it within this state's regulation of homicide.[5] Id. It is respectfully submitted that the Houser dicta cannot be read consistently with Boutwell. Section 322.34(3), like § 316.193(3), clearly contains the additional element of the death of another human being. Yet in Boutwell, this Court specifically stated that the section was an enhancement section.

In Wright, the Third District had upheld four convictions for DUI serious bodily injury, based on Pulaski, supra, while reversing four convictions for driving with a license suspended causing serious bodily injury. Contrary to the Fifth District in Melbourne, the Third District stated that Houser was inapplicable. Id. at 1126, n. 1. Wright simply explained that DWLS was a single offense whereas injuries to four persons warranted the multiple DUI

---

[5] It should be noted the context within which this Court made this statement. The argument in Houser was that the death involved in DUI manslaughter merely enhanced the offense of driving under the influence and therefore, under Blockburger, was a crime distinct from vehicular homicide. The Court found that even though for Blockburger purposes vehicular homicide and DUI manslaughter were separate offenses, the legislature did not intend to punish a single homicide under two separate statutes.

with injuries convictions. The Wright court made no effort to analogize or differentiate between the two statutes. The multiple DUI convictions were not discussed in this Court's brief opinion.

The Fifth District failed to discuss one of its own prior, analogous cases. In Hoag v. State, 511 So.2d 401 (Fla. 5th DCA), rev. denied, 518 So.2d 1278 (Fla. 1987), the defendant was convicted, among other things, of one count of leaving the scene of an accident with a death and four counts of leaving the scene of an accident with injuries. In vacating the four convictions for leaving the scene of an accident with injuries, the Fifth District stated:

> ... the failure of Hoag to stop at the scene of his accident constituted but one offense although that accident resulted in injuries to four persons and the death of a fifth.

511 So.2d at 402. See also, Deviney v. State, 579 So.2d 373 (Fla. 4th DCA 1991)(defendant could not be convicted of both DUI and DUI with an accident); Satterfield v. State, 553 So.2d 793 (Fla. 1st DCA 1989)(defendant could not be convicted of both DUI and DUI manslaughter).

D. Post-Boutwell

Since it issued Boutwell, this Court has had two occasions to discuss cases involving multiple deaths arising out of a single driving incident. In both State v. Cooper, 634 So.2d 1074 (Fla. 1994), and Goodwin v. State, 634 So.2d 157 (Fla. 1994), the issue concerned whether a defendant could be convicted under two separate

statutes for a single death. Neither case presented the Melbourne situation, where a single driving statute was used to support multiple convictions for multiple deaths/injuries.

In Michie v. State, 632 So.2d 1106 (Fla. 2d DCA 1994), the defendant was charged with two counts of DUI serious bodily injury, and two counts of driving while license suspended with serious bodily injury. The jury convicted Michie of two counts of DUI and two counts of driving while license suspended. The Second District ruled that it must vacate one conviction and sentence for each offense. It agreed, based upon Hallman v. State, 492 So.2d 1136, 1138 (Fla. 2d DCA 1986), that:

> ... the traffic offenses such as driving under the influence or driving with a suspended license are "continuing offenses" permitting a single conviction per episode.

Id. at 1108, citing Boutwell. However, in a post-Melbourne decision, the Second District has limited Michie to simple DUI situations. In State v. Lamoureux, __ So.2d __ (Fla. 2d DCA 7/7/95)[20 Fla. L. Weekly D1587], the Second District ruled that a defendant could be convicted of multiple DUI serious bodily injury offenses arising out of one act of driving.

In State v. Moreno, 3 Fla. L. Weekly Supp. 393 (20th Jud. Cir. 8/7/95) the defendant was charged with, among other things, one count of DUI with damage to property and one count of DUI with damage to a person. There was only one victim. The court ruled that:

> ... a careful reading of [316.193(3)(c)(1)] indicates that the legislature intended the section to provide one offense which can be proved two ways.

Id. The court ruled that the state could charge both counts, but was entitled to enforce only one conviction and sentence. Id.

Several weeks prior to Melbourne, the Third District in Wick v. State, 651 So.2d 765 (Fla. 3d DCA 1995), upheld convictions for DUI manslaughter, DUI serious bodily injury, and DUI damage to another on the authority of Wright, supra. It distinguished Boutwell on the basis that Boutwell did not involved the DUI statute.

Several weeks later, the Third District issued another opinion touching on this subject in State v. Woodruff, 654 So.2d 585 (Fla. 3d DCA 1995), rev. accepted, Fla. S.Ct. Case No. 86,019[6]. Woodruff actually involves a speedy trial issue. However, in discussing that issue, the Third District stated:

> Section 316.193 defines only one type of DUI offense, see Collins v. State, 578 So.2d 30 (Fla. 4th DCA 1991), punished with increasing severity in successive violations. Jackson v. State, 634 So.2d 1103, 1106 (Fla. 4th DCA 1994)(en banc)(statutory scheme requires increased punishment "based on the number of times the defendant drives under the influence").

Id. at 587; footnote omitted.

---

[6] Oral argument is set for February 7, 1996, the day before Ms. Melbourne's oral argument.

The Fourth District considered a related issue in Jackson v. State, 634 So.2d 1103 (Fla. 4th DCA 1994)(en banc). In that case a defendant was convicted of one count of DUI serious bodily injury and two counts of DUI causing property damage. Unlike Ms. Melbourne, the defendant did not challenge the multiple convictions. Id., n. 1. Instead, the Fourth District considered these multiple convictions in the context of a permanent revocation of a driver's license.

Jackson has one prior DUI conviction. The trial court added the three DUI convictions arising out of the one accident with the prior DUI and concluded that Jackson had four DUI convictions, requiring permanent revocation under § 322.28(2)(e). In discussing Boutwell, the Fourth District stated:

> There are certainly similarities between Boutwell and the present case. Just as in Boutwell, there was no intent here to commit separate crimes, and it was "fortuitous" here that the single driving episode injured one person and damaged two vehicles.

Id. at 1106. The court then went on to conclude:

> ... the overall scheme is for increased terms of suspension based on the number of times the defendant drives under the influence, not based on the happenstance consequences of one episode of driving under the influence.

Id. The Fourth District vacated the permanent revocation and ruled that Jackson should be treated as a second offender for the purposes of license revocation. The rationale of Jackson, that the defendant should be punished for the single act of DUI, not as

multiple consequences, should be applied as well to criminal convictions under § 316.193(3).

E. "Core Offense" Analysis

In Sirmons v. State, 634 So.2d 153 (Fla. 1994), the defendant was convicted of robbery with a weapon and grand theft of an automobile. This Court ruled that both offenses were merely degree variance of the core offense of theft, and ruled that the duel convictions could not stand. Id. at 153. That said day, in Goodwin v. State, 634 So.2d 157 (Fla. 1994), the court ruled that convictions for DUBAL manslaughter and vehicular homicide arising out of one death were aggravated forms of a single underlying offense distinguished only by degree factors. Therefore, multiple punishments were not allowed.

Subsequently, in Thompson v. State, 650 So.2d 969 (Fla. 1994), this Court ruled that the defendant could not be convicted of both sexual battery on a physically incapacitate victim and sexual activity while in custodial authority of a child, based on a single act. See also, State v. Thompson, 607 So.2d 422 (Fla. 1992)(defendant could not be convicted of both grand theft and either filing a false insurance claim or burning with intent to defraud, since all three involved the core offense of theft); Canion v. State, __ So.2d __ (Fla. 4th DCA 10/18/95)[20 Fla. L. Weekly D2336](single act of improperly exhibiting a dangerous weapon cannot support multiple convictions); M.P.C. v. State, 659 So.2d 1293 (Fla. 5th DCA 1995)(single act of possessing a firearm

can support only one conviction; convictions for carrying a concealed firearm and possession of a firearm by a minor vacated; conviction for possession of a firearm by a delinquent permitted to stand); Watson v. State, 655 So.2d 1250 (Fla. 1st DCA 1995)(same as State v. Thompson, 607 So.2d 422).

The same "core offense" or "degree variant" double jeopardy analysis must be applied to Ms. Melbourne's DUI convictions. The multiple counts of which she was convicted are simply degree variants of the core offense of DUI, or simply aggravated forms of a single underlying DUI offense. In this situation, multiple convictions are not permitted.

III.

SCRIVENER'S ERROR REQUIRES JUDGMENT BE CORRECTED

In Counts II, IV, and V, Ms. Melbourne was charged and convicted of violating § 316.193. Nonetheless, the judgment reflects that she was convicted of violating both § 316.193 and § 877.111, Fla.Stat. The DUI counts alleged that Ms. Melbourne was impaired either by alcohol, drugs (§893.13), or chemical substances (§877.111). The only evidence presented at trial was impairment by alcohol. The reference to §877.111 is therefore improper and must be stricken from the judgment.

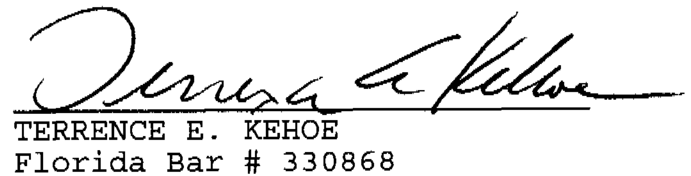
CONCLUSION

Based on the arguments and authorities set forth above, this Court must reverse the decision of the Fifth District Court of Appeal, and remand Ms. Melbourne's case for a new trial. In the

alternative, this Court must reverse the Fifth District's opinion and order Counts II and IV vacated, and remand for resentencing as to Count I only.

RESPECTFULLY SUBMITTED this 13th day of November, 1995, at Orlando, Orange County, Florida.

LAW OFFICES OF TERRENCE E. KEHOE
Tinker Building
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (FAX)



TERRENCE E. KEHOE
Florida Bar # 330868

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 1995, a true copy of this brief and appendix have been furnished by United States mail, first class postage prepaid, to Kellie A. Nielan, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

TERRENCE E. KEHOE

IN THE SUPREME COURT OF FLORIDA

JEANIE H. MELBOURNE,

Petitioner,

v. CASE NO. 86,029

STATE OF FLORIDA,

Respondent.

______________________________/

On Discretionary Review Of
Decision Of Florida Fifth District Court Of Appeal

APPENDIX TO PETITIONER'S INITIAL BRIEF ON MERITS

TERRENCE E. KEHOE
LAW OFFICES OF TERRENCE E. KEHOE
Tinker Building
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (FAX)

INDEX TO APPENDIX TO PETITIONER'S INITIAL BRIEF ON MERITS

Tab	Document
A	Opinion in Melbourne v. State, 655 So.2d 126 (Fla. 5th DCA 1995)
B	Corrected opinion in Melbourne v. State, Fla. 5th DCA Case # 93-1092.

Appendix A

5. Criminal Law ⚷1134(3), 1158(3)

Competency of juror challenged for cause presents mixed question of law and fact to be determined by trial court; manifest error must be shown to overturn trial court's finding.

6. Criminal Law ⚷984(3.1)

Defendant did not receive multiple convictions for one incident of driving under influence but, rather, there were three offenses, i.e., two homicide crimes and one driving under influence resulting in serious bodily injury, even though all three offenses arose from same incident. West's F.S.A. § 316.193.

Terrence E. Kehoe, of Law Offices of Terrence E. Kehoe, Orlando, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Barbara Arlene Fink, Asst. Atty. Gen., Dayton Beach, for appellee.

PER CURIAM.

Jeanie Melbourne was driving under the influence when she turned in front of an oncoming vehicle, killing two people and seriously injuring another. She was convicted of two counts of DUI manslaughter and one count of DUI with serious bodily injury. Although we affirm, appellant has raised three issues that deserve discussion.[1]

Appellant contends that the court violated the rule of *Neil*[2] by not conducting a proper inquiry after she objected to the state's peremptory challenge of a black juror. This is the sum total of the record inquiry concerning this matter:

> MR. MASON [Trial Defense Attorney]: Does anyone have alcoholism in their family or any friends who are alcoholics, or anything along those lines?
>
> MR. WELLS: My wife. She died of alcohol.
>
> MR. MASON: What do you do for W.E.S.H. T.V.?
>
> MR. WELLS: I work in programming. Whatever you see is whatever I do.
>
> MR. MASON: Do you work nights or do you work days?
>
> MR. WELLS: I work days.
>
> MR. MASON: Would you like to serve again?
>
> MR. WELLS: I will do what I have to do.
>
> * * * * * *
>
> MR. BRESSLER [Prosecutor]: We'd also like to strike number 19, your honor.
>
> MR. MASON: Mr. Dewey Wells, the black man. I would raise a *Baxter Johans* Challenge ... *Johans.* He's a black man. Number 19.
>
> MS. MUNYON [Clerk]: The state has not stricken any black jurors at all. The defense has stricken juror number ten, Tillman, as well as juror number 13, which are black. The state accepted both of these jurors.
>
> MR. BRESSLER: Kevin McCall was a black juror that the defense struck.
>
> MR. MASON: I have nothing else to say.
>
> THE COURT: Well, I don't see anything in this record to indicate that there's any—that the state in exercising this challenge to a black person is in any way acting in a discriminatory fashion, or singling out Mr. Wells because of his race in its exercise of peremptory challenge.

[1] Appellant urges that the process used by the court in upholding the challenge to Mr. Wells violated the bright-line rule set out in *State v. Johans,* 613 So.2d 1319, 1322 (Fla.1993):

> Under our decision today, the presumption of validity of peremptory strikes established in *Neil* is still the law in Florida. Furthermore, a peremptory strike will be deemed valid unless an objection is made that the challenge is being used in a racially discriminatory manner. However, upon such objections, the trial judge must conduct a *Neil* inquiry.... Thus, we hold that the proper remedy in all cases where the trial court errs in failing to hold a *Neil* inquiry is to reverse and remand for a new trial.

1. The remaining issues on appeal do not warrant discussion.

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

In *Johans,* no *Neil* inquiry was conducted because the trial judge ruled that the defense had failed to establish the *Neil* threshold to require the inquiry. The supreme court in *Johans* eliminated the threshold burden previously carried by the one challenging the strike. Here, however, the court *did* conduct a *Neil* inquiry. It is true that the prosecutor anticipated the question by the judge and, without the judge actually asking the question, proceeded into the state's explanation that its peremptory strike was not racially motivated. While somewhat free-form, inquiry was nevertheless conducted, as evidenced by the court's ruling.

[2] Although not raised below, appellant now contends that the reason offered by the prosecution was insufficient to meet its burden of showing a non-racial reason for the challenge. Appellant points out that the state's response merely asserts its non-racial motivation and does not go forward with a race-neutral reason for the strike. Nevertheless, because the trial court can consider all that it has seen and heard, in addition to the explanation that comes directly from the mouth of the lawyer who has announced the peremptory challenge, reversal is not required. The record, as brief as it is in relation to the Wells strike, clearly shows the non-racial motivation. This is a case in which a woman, allegedly driving under the influence, caused the death of two persons and seriously injured another. Mr. Wells informed the court that his wife had died as a result of alcoholism. This revelation was not pursued by either attorney. It is possible, of course, that Mr. Wells might have been unaffected by his previous misfortune. It is more likely, however, that he would either have been sympathetic to appellant because of her weakness or hostile to her because of her conduct. In the event of either sympathy or hostility, a race-neutral reason for this strike was apparent on the record. Moreover, though not alone dispositive, the jury selection proceedings to that point demonstrated that the state's challenge was not a ploy to prevent African Americans from serving on the jury.

[3, 4] Appellant's second issue also involves jury selection. The defense raised challenges to two jurors [3] for cause which were rejected. The court erred in not striking Mr. Csandli for cause because his responses clearly showed that Mr. Csandli's personal experiences might affect his ability to be impartial. The court did not err, however, in failing to excuse Mr. Jilani for cause. Mr. Jilani responded to a defense inquiry concerning driving and drinking as follows:

> MR. JILANI: The [law] says don't drink and drive, no drinking.
>
> * * * * * *
>
> MR. MASON: If you drink alcohol, or whatever your tolerance is, I have no idea, but if you drink alcohol and get in your car and drive, there's no crime that's ever been committed.
>
> If you drink alcohol and you get in your car and you drive and you are impaired, that's the crime. You agree with the law or disagree with the law, Mr.Jilano [sic]?
>
> MR. JILANI: It's a crime.
>
> MR. MASON: It's a crime?
>
> MR. JILANI: Uh-huh.

[5] The difficulty with a compound question is that it often draws a confused answer. The final part of the question asked indicated that it was a crime to drive while impaired. He then asked if Mr. Jilani agreed. Mr. Jilani agreed that such would be a crime. He did not directly respond to Mr. Mason's first statement that driving after drinking, so long as there is no impairment, would be legal. Mr. Jilani never indicated that he could not or would not follow the law as instructed by the judge. The competency of a juror challenged for cause presents a mixed question of law and fact to be determined by the trial court. Manifest error must be shown to overturn the trial court's finding. *Mills v. State,* 462 So.2d 1075 (Fla.), *cert. denied,* 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985). The defense has simply failed to meet this standard. Since the trial court awarded the defense one additional peremptory challenge, the court's ruling on Mr. Csandli was harmless error.

3. Defense's challenge to a third juror was withdrawn during oral argument.

[6] Finally, v
ment that appell
for each of the t
with serious inju
Florida Statutes
on *Boutwell v. S*
1994) is misplac
under considerati
al persons in one
was driving with
support multiple
of driving while
serious injury.
question in the n
offense was drivi
with the penalty
injury; and that
jured was fortuit

It is important
proved by the *Bo*
State, 592 So.2d
quashed on othe
(Fla.1992). The
upheld four convic
ous injury while
tions for driving
causing serious i
explained simply t
ed license was a
injuries to four pe
ple DUI with inju
this analysis is
Wright court reac
Unfortunately, as
ris shows, given
ture of the two st
in explaining its
placed the existin
statute in some d
two similarly cons
penalty enhancem
fense, the logical
the other statute s
This would mean t
enhances the pe
offense. The fact
offenses have nev
as *Wright* vividly

4. *See Cooper v. St*
(Fla. 5th DCA 199

issue also in-
defense raised
or cause which
:ed in not strik-
because his re-
t Mr. Csandli's
affect his ability
id not err, how-
Jilani for cause.
defense inquiry
king as follows:
says don't drink

* *

rink alcohol, or
, I have no idea,
l get in your car
ime that's ever

you get in your
u are impaired,
ee with the law
Mr.Jilano [sic]?
ne.
ne?

compound ques-
confused answer.
a asked indicated
while impaired.
ni agreed. Mr.
uld be a crime.
to Mr. Mason's
after drinking, so
ment, would be
ndicated that he
llow the law as
ne competency of
presents a mixed
be determined by
error must be
l court's finding.
1075 (Fla.), *cert.*
S.Ct. 3538, 87
efense has simply
l. Since the trial
e one additional
court's ruling on
error.

[6] Finally, we reject appellant's argument that appellant could not be convicted for each of the two homicides and the DUI with serious injuries under section 316.193, Florida Statutes (1991). Appellant's reliance on *Boutwell v. State,* 631 So.2d 1094 (Fla. 1994) is misplaced. There the court had under consideration whether injury to several persons in one accident where the offender was driving with a suspended license would support multiple convictions for the offense of driving while license suspended causing serious injury. The court answered the question in the negative, reasoning that the offense was driving with a suspended license with the penalty enhanced by the fact of injury; and that the number of persons injured was fortuitous. *Id.* at 1095.

It is important to note that the case approved by the *Boutwell* court was *Wright v. State,* 592 So.2d 1123 (Fla. 3d DCA 1991), *quashed on other grounds,* 600 So.2d 457 (Fla.1992). The *Wright* court had expressly upheld four convictions for DUI causing serious injury while reversing the four convictions for driving with a suspended license causing serious injury. The *Wright* court explained simply that driving with a suspended license was a single offense whereas the injuries to four persons warranted the multiple DUI with injuries convictions. Although this analysis isn't very instructive, the *Wright* court reached a common-sense result. Unfortunately, as the dissent of Judge Harris shows, given the similarity in the structure of the two statutes, the supreme court, in explaining its reasoning in *Boutwell,* has placed the existing law construing the DUI statute in some doubt. If "injury" in one of two similarly constructed statutes is merely a penalty enhancement to the underlying offense, the logical conclusion to reach is that the other statute should be treated the same. This would mean that death or injury merely enhances the penalty for the single DUI offense. The fact is, however, that these two offenses have never been treated the same, as *Wright* vividly demonstrates.[4]

In our view, this issue was decided by the Florida Supreme Court in *Houser v. State,* 474 So.2d 1193 (Fla.1985), where the court had under consideration whether a single death would support conviction of both DUI manslaughter and vehicular homicide. In *Houser,* the court made note of the fact that the structure of the DUI statute suggested that death was no more than an enhancement; however, the court found that the legislature had, indeed, intended that "DUI manslaughter" be a homicide statute, not an enhancement to DUI. In essence, although similarly constructed by the legislature, the two offenses of "DUI manslaughter" and "driving with license suspended causing death" are fundamentally distinct. To treat them identically merely based on their structure in reliance on *Boutwell* would place the holding in *Houser* in doubt, and the supreme court has repeatedly and recently reiterated its satisfaction with *Houser. State v. Cooper,* 634 So.2d 1074 (Fla.1994); *Goodwin v. State,* 634 So.2d 157 (Fla.1994); *State v. Chapman,* 625 So.2d 838 (Fla.1993); *State v. Thompson,* 607 So.2d 422 (Fla.1992). Ms. Melbourne did not improperly receive multiple convictions for one incident of driving under the influence. There were three offenses: two homicide crimes and one driving under the influence resulting in serious bodily injury.

AFFIRMED.

PETERSON and GRIFFIN, JJ., concur.

HARRIS, C.J., concurs in part; dissents in part, with opinion.

HARRIS, Chief Judge, concurring in part; dissenting in part:

I concur with the majority in its resolution of the jury selection issues. I respectfully dissent, however, from the majority's analysis of *Boutwell.*

Melbourne contends that she cannot be found guilty of more than one DUI offense under section 316.193, Florida Statutes (1993), arising out of a single accident because of the principle announced in *Boutwell v. State,* 631 So.2d 1094 (Fla.1994). I agree

4. *See Cooper v. State,* 621 So.2d 729, 732 n. 7 (Fla. 5th DCA 1993), *approved,* 634 So.2d 1074 (Fla.1994).

and would reverse but I would certify this issue to the supreme court.

In *Boutwell*, the supreme court considered section 322.34 (driving with a suspended license), a statute structured similarly to section 316.193 involved in our case, and held:

> Under section 322.34(1), Florida Statutes (1991), a person who drives with a suspended license is guilty of a misdemeanor of the second degree. However, *Boutwell* was convicted under section 322.34(3), which provides:
>
> > Any person whose driver's license has been canceled, suspended or revoked ... and who operates a motor vehicle while his driver's license is canceled, suspended or revoked and who by careless or negligent operation thereof causes the death of or serious bodily injury to another human being, is guilty of a felony of the third degree ...
>
> It is evident that section 322.34(3) does no more than enhance the penalty for driving with a suspended license in cases where the driver through the careless or negligent operation of his vehicle causes death or serious bodily injury. If the violation of section 322.34(1) in a single driving episode can be only one offense, the violation of section 322.34(3) in a single driving episode should be considered as only one offense. We agree with *Wright* that regardless of the number of injured persons, there can only be one conviction under section 322.34(3) arising from a single accident.

Boutwell, 631 So.2d at 1095.

I concede that to apply *Boutwell* to this case, at least at first blush, appears inconsistent with *Houser v. State*, 474 So.2d 1193, 1196 (Fla.1985), which held:

> First, DWI manslaughter is not merely an enhancement of penalty for driving while intoxicated.... [T]he additional element of the death of a victim raises DWI manslaughter beyond mere enhancement and places it squarely within the scope of this state's regulation of homicide.

It is important to recognize, however, the context of this holding. The issue before the *Houser* court was whether an intoxicated driver involved in an accident in which a single passenger was killed could be convicted both of DWI manslaughter *and* vehicular homicide. The argument made in *Houser* to support dual convictions was that the death involved in DWI manslaughter merely enhanced the offense of driving under the influence and therefore, under *Blockburger*, was a crime distinct from vehicular homicide. The *Houser* court reasoned that even though the death did enhance the crime of driving under the influence, such enhancement (which made the misdemeanor now a second degree felony) also created a homicide offense separate and distinct from vehicular homicide. The court found, however, that even though they were *Blockburger* separate offenses, because the legislature did not intend to punish a single homicide under two separate statutes, only one conviction could stand.

The issue before us is not whether a single death can constitute two homicide convictions; it is whether multiple victims can convert an enhancement statute of a single core offense into a general manslaughter statute authorizing multiple prosecutions.

It is, of course, without doubt that manslaughter is within the scope of our regulation of homicide. Indeed, both sections 782.07 and 782.071, Florida Statutes (1993), are manslaughter statutes, either of which might well justify the prosecution for each death caused by the defendant in this case. The question before us is not whether each death is subject to prosecution, however; the issue is whether, by the manner in which it enacted section 316.193, the legislature intended that *all* of the deaths resulting from a single act of driving under the influence could be prosecuted under this particular statute.

In considering section 810.02, Florida Statutes (1981), another statute structured similarly to the one in our case, the supreme court held:

> Committing an assault during a burglary and being armed during a burglary are two grounds upon which a charge of burglary can be enhanced in seriousness under section 810.02, Florida Statutes (1981). However, neither the allegation nor the proof of both enhancement factors can transform one instance of unlawful entry

from one cri
was no evide
unlawful entr
merged count
sentencing pu
of rendering
tion.

Troedel v. Stat
1984).

Relying on *Tr*
State, 567 So.2d
that two convict
tery could not st
it clear whether
merely two dist
victim) because

Battery, like
within the scop
And, without d
prosecuted bot
784.03. The st
prosecute both
ment statute and
del, refused. Be
(predictability) i
who practice la
justify disparate

Consider the
the statute invo

(3) Any perso
Driving under

(c) Who, b
causes:

2. Serious
is guilty o
...

3. The de
guilty of
of the se

Melbourne argu
this statute is si
322.34 and 810.0
reach a similar
is so structured
offense (either b
suspended or d
then if addition
proved, the defe
more serious co
tional elements

d could be convict-
hter *and* vehicular
made in *Houser* to
vas that the death
ıghter merely en-
ng under the influ-
Blockburger, was a
ılar homicide. The
at even though the
ne of driving under
ement (which made
second degree felo-
le offense separate
lar homicide. The
t even though they
e offenses, because
ntend to punish a
) separate statutes,
. stand.

ot whether a single
o homicide convic-
ple victims can con-
ute of a single core
anslaughter statute
secutions.

ıt doubt that man-
cope of our regula-
eed, both sections
ida Statutes (1993),
es, either of which
rosecution for each
endant in this case.
s not whether each
ution, however; the
manner in which it
the legislature in-
ths resulting from a
ınder the influence
ıder this particular

810.02, Florida Stat-
ute structured simi-
case, the supreme

t during a burglary
ing a burglary are
ich a charge of bur-
d in seriousness un-
rida Statutes (1981).
allegation nor the
cement factors can
e of unlawful entry

from one crime into two crimes. There was no evidence of more than one such unlawful entry. The court should have merged counts four and five not only for sentencing purposes but also for purposes of rendering a single judgment of conviction.

Troedel v. State, 462 So.2d 392, 399 (Fla. 1984).

Relying on *Troedel*, the court in *James v. State*, 567 So.2d 59 (Fla. 4th DCA 1990), held that two convictions of burglary with a battery could not stand (the case does not make it clear whether there were two victims or merely two distinct batteries on the same victim) because there was but a single entry.

Battery, like manslaughter, is squarely within the scope of this state's regulation. And, without doubt, the state could have prosecuted both batteries under section 784.03. The state, however, attempted to prosecute both batteries under an enhancement statute and the court, pursuant to *Troedel*, refused. Because the court's consistency (predictability) is the stock in trade of those who practice law, we should minimize and justify disparate treatment of similar issues.

Consider the provision of section 316.193, the statute involved in our case:

> (3) Any person [who violates section (1), Driving under the influence]
>
> (c) Who, by reason of such operation causes:
>
> 2. Serious bodily injury to another ... is guilty of a felony of the third degree ...
>
> 3. The death of any human being is guilty of DUI manslaughter, a felony of the second degree....

Melbourne argues that since the structure of this statute is similar to that in both sections 322.34 and 810.02, it should be construed to reach a similar result. That is, each statute is so structured that if one commits the core offense (either burglary, driving while license suspended or driving under the influence), then if additional, more serious elements are proved, the defendant may be subjected to a more serious consequence than had the additional elements not occurred.

In section 322.34(3), death or great bodily injury are considered together to form only one new felony, while section 316.193(3) treats them separately and forms two new felonies. But in section 810.02, additional elements form three new felonies. It appears that the number of newly formed felonies is not significant under the *Boutwell* analysis which, summarized by the supreme court, is:

> In the instant case it was fortuitous that four persons were injured as a result of Boutwell's negligent driving instead of only one. We find this case more analogous to *James v. State*, 567 So.2d 59 (Fla. 4th DCA 1990), *rev. dismissed*, 576 So.2d 288 (Fla. 1991), in which the court held that it was error to convict on two counts of burglary with a battery because only one entry had been proven.

Would the result of *Boutwell* have been different if some of the seriously injured victims had died? The court seems to say no:

> It is evident that section 322.34(3) does no more than enhance the penalty for driving with a suspended license in cases where the driver through the careless or negligent operation of his vehicle causes *death* or serious bodily injury. [Emphasis added].

Boutwell, 631 So.2d at 1095.

Justice Grimes, in a well reasoned dissent, acknowledges the similarity of the structure of sections 322.34 and 316.193 and the analytical inconsistency between *Houser*, if it is construed to permit multiple convictions under 316.193, and the result in *Boutwell* when he states:

> If multiple convictions are permitted for DUI manslaughter and DUI with serious bodily injury when multiple victims are involved, there is no reason why the same principle should not apply to driving with a suspended license and causing serious bodily injury to more than one person.

Boutwell, 631 So.2d at 1096.

The majority in *Boutwell* did not deny the logic of Justice Grimes' contention that the two statutes should be construed similarly; it instead rejected the concept of separate

crimes based on a single violation of the core offense and appears to have overruled previous decisions which permitted multiple convictions based on separate victims of a single event of driving under the influence.

In *Wright v. State,* 592 So.2d 1123, 1126 (Fla. 3d DCA 1991), *quashed on other grounds,* 600 So.2d 457 (Fla.1992), the court held that, although multiple convictions based on the number of victims would be appropriate under section 316.193(3)(c), such would not be appropriate under section 322.34(3) because the defendant's action of driving with a suspended license was "a single continuing offense and thus a single violation of section 322.34." That is, so long as you are driving with a suspended license uninterrupted, you are committing but one violation of the statute. But is that not also true of driving under the influence? So long as you drive impaired uninterrupted, are you not "continuing" to commit a single offense?

I would reverse all but a single conviction of DUI manslaughter and would certify the question to the supreme court since, in my view, the result herein is in conflict with *Troedel, James* and *Boutwell.*

Michael CORTES, Taliver Heath, Robert Klepper, and Mohit Ramani, Appellants,

v.

STATE of Florida, BOARD OF REGENTS and Florida Public Interest Research Group, Inc., Appellees.

No. 93-1886.

District Court of Appeal of Florida, First District.

April 25, 1995.

Rehearing Denied June 13, 1995.

Students filed petition to determine invalidity of board of regents rule leaving to state university presidents the decision whether to authorize collection of fee for financing of chartered nonprofit public interest research organizations, and conferring discretion on presidents to choose between positive or negative checkoff system. The Division of Administrative Hearings, Don W. Davis, Hearing Officer, denied petition, and students appealed. The District Court of Appeal, Benton, J., held that: (1) rule advanced statutory purposes of establishing research programs with emphasis on state and national needs, fostering diversity of educational opportunity, and promoting service to public; (2) portion of rule allowing presidents to choose negative checkoff system was invalid on grounds that it was devoid of standards purporting to guide that exercise of discretion; (3) rule, after elimination of negative checkoff option, did not authorize collection of tax or authorize state subsidy of organizations' fundraising efforts in violation of State Constitution; and (4) rule did not authorize compulsory subsidization of ideological activity in violation of First Amendment.

Affirmed in part, reversed in part, and remanded with directions.

1. Administrative Law and Procedure ⚷391

Petitioners seeking to invalidate administrative rule share burden to show, at administrative hearing, that agency adopting rule has exceeded its authority, requirements of rule are not appropriate to ends specified in legislative act, and requirements of rule are not reasonably related to purpose of enabling legislation but are arbitrary and capricious, or that rule is otherwise invalid exercise of delegated legislative authority. West's F.S.A. §§ 120.52(8), 120.56(1).

2. Administrative Law and Procedure ⚷391

Challengers' burden to demonstrate invalid exercise of delegated legislative authority in promulgating administrative rule is a stringent one indeed. West's F.S.A. §§ 120.52(8), 120.56(1).

Appendix B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1995

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

JEANIE MELBOURNE,

Appellant,

v.

CASE NO. 93-1092
CORRECTED

STATE OF FLORIDA,

Appellee.

______________________________/

Opinion filed April 21, 1995

Appeal from the Circuit Court
for Orange County,
Michael Cycmanick, Judge.

Terrence E. Kehoe, of Law Offices
of Terrence E. Kehoe, Orlando,
for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Barbara Arlene Fink,
Assistant Attorney General, Dayton Beach,
for Appellee.

PER CURIAM.

Jeanie Melbourne was driving under the influence when she turned in front of an oncoming vehicle, killing two people and seriously injuring another. She was convicted of two counts of DUI manslaughter and one count of DUI with serious bodily injury. Although

rec'd 6-2-95
tth

we affirm, appellant has raised three issues that deserve discussion.[1]

Appellant contends that the court violated the rule of *Neil*[2] by not conducting a proper inquiry after she objected to the state's peremptory challenge of a black juror. This is the sum total of the record inquiry concerning this matter:

> MR. MASON [Trial Defense Attorney]: Does anyone have alcoholism in their family or any friends who are alcoholics, or anything along those lines?
>
> MR. WELLS: My wife. She died of alcohol.
>
> MR. MASON: What do you do for W.E.S.H. T.V.?
>
> MR. WELLS: I work in programming. Whatever you see is whatever I do.
>
> MR. MASON: Do you work nights or do you work days?
>
> MR. WELLS: I work days.
>
> MR. MASON: Would you like to serve again?
>
> MR. WELLS: I will do what I have to do.
>
> * * *
>
> MR. BRESSLER [Prosecutor]: We'd also like to strike number 19, your honor.
>
> MR. MASON: Mr. Dewey Wells, the black man. I would raise a *Baxter Johans* Challenge...*Johans*. He's a black man. Number 19.
>
> MS. MUNYON: The state has not stricken any black jurors at all. The defense has stricken juror number ten, Tillman, as well as juror number 13, which are black. The state accepted both of these jurors.
>
> MR. BRESSLER: Kevin McCall was a black juror that the defense struck.
>
> MR. MASON: I have nothing else to say.

---

[1]The remaining issues on appeal do not warrant discussion.

[2] *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

> THE COURT: Well, I don't see anything in this record to indicate that there's any - - that the state in exercising this challenge to a black person is in any way acting in a discriminatory fashion, or singling out Mr. Wells because of his race in its exercise of peremptory challenge.

Appellant urges that the process used by the court in upholding the challenge to Mr. Wells violated the bright-line rule set out in *State v. Johans*, 613 So. 2d 1319, 1322 (Fla. 1993):

> Under our decision today, the presumption of validity of peremptory strikes established in *Neil* is still the law in Florida. Furthermore, a peremptory strike will be deemed valid unless an objection is made that the challenge is being used in a racially discriminatory manner. However, upon such objections, the trial judge must conduct a *Neil* inquiry . . . . Thus, we hold that the proper remedy in all cases where the trial court errs in failing to hold a *Neil* inquiry is to reverse and remand for a new trial.

In *Johans*, no *Neil* inquiry was conducted because the trial judge ruled that the defense had failed to establish the *Neil* threshold to require the inquiry. The supreme court in *Johans* eliminated the threshold burden previously carried by the one challenging the strike. Here, however, the court did conduct a *Neil* inquiry. It is true that the prosecutor anticipated the question by the judge and, without the judge actually asking the question, proceeded into the state's explanation that its peremptory strike was not racially motivated. While somewhat free-form, inquiry was nevertheless conducted, as evidenced by the court's ruling.

Although not raised below, appellant now contends that the reason offered by the prosecution was insufficient to meet its burden of showing a non-racial reason for the challenge. Appellant points out that the state's response merely asserts its non-racial motivation and does not go forward with a race-neutral reason for the strike. Nevertheless, because the trial court can consider all that it has seen and heard, in addition to the

explanation that comes directly from the mouth of the lawyer who has announced the peremptory challenge, reversal is not required. The record, as brief as it is in relation to the Wells strike, clearly shows the non-racial motivation. This is a case in which a woman, allegedly driving under the influence, caused the death of two persons and seriously injured another. Mr. Wells informed the court that his wife had died as a result of alcoholism. This revelation was not pursued by either attorney. It is possible, of course, that Mr. Wells might have been unaffected by his previous misfortune. It is more likely, however, that he would either have been sympathetic to appellant because of her weakness or hostile to her because of her conduct. In the event of either sympathy or hostility, a race-neutral reason for this strike was apparent on the record. Moreover, though not alone dispositive, the jury selection proceedings to that point demonstrated that the state's challenge was not a ploy to prevent African Americans from serving on the jury.

Appellant's second issue also involves jury selection. The defense raised challenges to two jurors[3] for cause which were rejected. The court erred in not striking Mr. Csandli for cause because his responses clearly showed that Mr. Csandli's personal experiences might affect his ability to be impartial. The court did not err, however, in failing to excuse Mr. Jilani for cause. Mr. Jilani responded to a defense inquiry concerning driving and drinking as follows:

MR. JILANI: The [law] says don't drink and drive, no drinking.

* * *

MR. MASON: If you drink alcohol, or whatever your tolerance is, I have no

---

[3]Defense's challenge to a third juror was withdrawn during oral argument.

idea, but if you drink alcohol and get in your car and drive, there's no crime that's ever been committed.

If you drink alcohol and you get in your car and you drive and you are impaired, that's the crime. You agree with the law or disagree with the law, Mr.Jilano [sic]?

MR. JILANI: It's a crime.

MR. MASON: It's a crime?

MR. JILANI: Uh-huh.

The difficulty with a compound question is that it often draws a confused answer. The final part of the question asked indicated that it was a crime to drive while impaired. He then asked if Mr. Jilani agreed. Mr. Jilani agreed that such would be a crime. He did not directly respond to Mr. Mason's first statement that driving after drinking, so long as there is no impairment, would be legal. Mr. Jilani never indicated that he could not or would not follow the law as instructed by the judge. The competency of a juror challenged for cause presents a mixed question of law and fact to be determined by the trial court. Manifest error must be shown to overturn the trial court's finding. *Mills v. State*, 462 So. 2d 1075 (Fla.), *cert. denied*, 473 U. S. 911, 105 S. Ct. 3538, 87 L. Ed. 2d 661 (1985). The defense has simply failed to meet this standard. Since the trial court awarded the defense one additional peremptory challenge, the court's ruling on Mr. Csandli was harmless error.

Finally, we reject appellant's argument that appellant could not be convicted for each of the two homicides and the DUI with serious injuries under section 316.193, Florida Statutes (1991). Appellant's reliance on *Boutwell v. State*, 631 So. 2d 1094 (Fla. 1994) is misplaced. There the court had under consideration whether injury to several persons in one accident where the offender was driving with a suspended license would support

multiple convictions for the offense of driving while license suspended causing serous injury. The court answered the question in the negative, reasoning that the offense was driving with a suspended license with the penalty enhanced by the fact of injury; and that the number of persons injured was fortuitous. *Id.* at 1095.

It is important to note that the case approved by the *Boutwell* court was *Wright v. State*, 592 So. 2d 1123 (Fla. 3d DCA 1991), *quashed on other grounds*, 600 So. 2d 457 (Fla. 1992). The *Wright* court had expressly upheld four convictions for DUI causing serious injury while reversing the four convictions for driving with a suspended license causing serous injury. The *Wright* court explained simply that driving with a suspended license was a single offense whereas the injuries to four persons warranted the multiple DUI with injuries convictions. Although this analysis isn't very instructive, the *Wright* court reached a common-sense result. Unfortunately, as the dissent of Judge Harris shows, given the similarity in the structure of the two statutes, the supreme court, in explaining its reasoning in *Boutwell*, has placed the existing law construing the DUI statute in some doubt. If "injury" in one of two similarly constructed statutes is merely a penalty enhancement to the underlying offense, the logical conclusion to reach is that the other statute should be treated the same. This would mean that death or injury merely enhances the penalty for the single DUI offense. The fact is, however, that these two offenses have never been treated the same, as *Wright* vividly demonstrates.[4]

In our view, this issue was decided by the Florida Supreme Court in *Houser v. State*,

---

[4] *See Cooper v. State*, 621 So. 2d 729, 732 n.7 (Fla. 5th DCA 1993), *approved*, 634 So. 2d 1074 (Fla. 1994).

474 So. 2d 1193 (Fla. 1985), where the court had under consideration whether a single death would support conviction of both DUI manslaughter and vehicular homicide. In *Houser*, the court made note of the fact that the structure of the DUI statute suggested that death was no more than an enhancement; however, the court found that the legislature had, indeed, intended that "DUI manslaughter" be a homicide statute, not an enhancement to DUI. In essence, although similarly constructed by the legislature, the two offenses of "DUI manslaughter" and "driving with license suspended causing death" are fundamentally distinct. To treat them identically merely based on their structure in reliance on *Boutwell* would place the holding in *Houser* in doubt, and the supreme court has repeatedly and recently reiterated its satisfaction with *Houser. State v. Cooper,* 634 So. 2d 1074 (Fla. 1994); *Goodwin v. State,* 634 So. 2d 157 (Fla. 1994); *Chapman v. State,* 625 So. 2d 838 (Fla. 1993); *State v. Thompson,* 607 So. 2d 422 (Fla. 1992). Ms. Melbourne did not improperly receive multiple convictions for one incident of driving under the influence. There were three offenses: two homicide crimes and one driving under the influence resulting in serious bodily injury.

AFFIRMED.

PETERSON and GRIFFIN, JJ., concur.
HARRIS, C.J., concurs in part; dissents in part, with opinion.

HARRIS, C. J., concurring in part; dissenting in part: **Case No. 93-1092**

I concur with the majority in its resolution of the jury selection issues. I respectfully dissent, however, from the majority's analysis of *Boutwell.*

Melbourne contends that she cannot be found guilty of more than one DUI offense under section 316.193, Florida Statutes (1993), arising out of a single accident because of the principle announced in *Boutwell v. State*, 631 So. 2d 1094 (Fla. 1994). I agree and would reverse but I would certify this issue to the supreme court.

In *Boutwell*, the supreme court considered section 322.34 (driving with a suspended license), a statute structured similarly to section 316.193 involved in our case, and held:

> Under section 322.34(1), Florida Statutes (1991), a person who drives with a suspended license is guilty of a misdemeanor of the second degree. However, *Boutwell* was convicted under section 322.34(3), which provides:
>
> > Any person whose driver's license has been canceled, suspended or revoked . . . and who operates a motor vehicle while his driver's license is canceled, suspended or revoked and who by careless or negligent operation thereof causes the death of or serious bodily injury to another human being, is guilty of a felony of the third degree . . .
>
> It is evident that section 322.34(3) does no more than enhance the penalty for driving with a suspended license in cases where the driver through the careless or negligent operation of his vehicle causes death or serious bodily injury. If the violation of section 322.34(1) in a single driving episode can be only one offense, the violation of section 322.34(3) in a single driving episode should be considered as only one offense. We agree with *Wright* that regardless of the number of injured persons, there can only be one conviction under section 322.34(3) arising from a single accident.

Boutwell, 631 So. 2d at 1095.

I concede that to apply *Boutwell* to this case, at least at first blush, appears inconsistent with *Houser v. State*, 474 So. 2d 1193, 1196 (Fla. 1985), which held:

> First, DWI manslaughter is not merely an enhancement of

> penalty for driving while intoxicated. . . . [T]he additional element of the death of a victim raises DWI manslaughter beyond mere enhancement and places it squarely within the scope of this state's regulation of homicide.

It is important to recognize, however, the context of this holding. The issue before the *Houser* court was whether an intoxicated driver involved in an accident in which a single passenger was killed could be convicted both of DWI manslaughter and vehicular homicide. The argument made in *Houser* to support dual convictions was that the death involved in DWI manslaughter merely enhanced the offense of driving under the influence and therefore, under *Blockburger*, was a crime distinct from vehicular homicide. The *Houser* court reasoned that even though the death did enhance the crime of driving under the influence, such enhancement (which made the misdemeanor now a second degree felony) also created a homicide offense separate and distinct from vehicular homicide. The court found, however, that even though they were *Blockburger* separate offenses, because the legislature did not intend to punish a single homicide under two separate statutes, only one conviction could stand.

The issue before us is not whether a single death can constitute two homicide convictions; it is whether multiple victims can convert an enhancement statute of a single core offense into a general manslaughter statute authorizing multiple prosecutions.

It is, of course, without doubt that manslaughter is within the scope of our regulation of homicide. Indeed, both sections 782.07 and 782.071, Florida Statutes (1993). are manslaughter statutes, either of which might well justify the prosecution for each death caused by the defendant in this case. The question before us is not whether each death is subject to prosecution, however; the issue is whether, by the manner in which it enacted

section 316.193, the legislature intended that all of the deaths resulting from a single act of driving under the influence could be prosecuted under this particular statute.

In considering section 810.02, Florida Statutes (1981), another statute structured similarly to the one in our case, the supreme court held:

> Committing an assault during a burglary and being armed during a burglary are two grounds upon which a charge of burglary can be enhanced in seriousness under section 810.02, Florida Statutes (1981). However, neither the allegation nor the proof of both enhancement factors can transform one instance of unlawful entry from one crime into two crimes. There was no evidence of more than one such unlawful entry. The court should have merged counts four and five not only for sentencing purposes but also for purposes of rendering a single judgment of conviction.

Troedel v. State, 462 So. 2d 392, 399 (Fla. 1984).

Relying on *Troedel*, the court in *James v. State*, 567 So. 2d 59 (Fla. 4th DCA), held that two convictions of burglary with a battery could not stand (the case does not make it clear whether there were two victims or merely two distinct batteries on the same victim) because there was but a single entry.

Battery, like manslaughter, is squarely within the scope of this state's regulation. And, without doubt, the state could have prosecuted both batteries under section 784.03. The state, however, attempted to prosecute both batteries under an enhancement statute and the court, pursuant to *Troedel*, refused. Because the court's consistency (predictability) is the stock in trade of those who practice law, we should minimize and justify disparate treatment of similar issues.

Consider the provision of section 316.193, the statute involved in our case:

(3) Any person [who violates section (1), Driving under the influence]

(c) Who, by reason of such operation causes:

> 2. Serious bodily injury to another . . . is guilty of a felony of the third degree . . .
>
> 3. The death of any human being is guilty of DUI manslaughter, a felony of the second degree . . . .

Melbourne argues that since the structure of this statute is similar to that in both sections 322.34 and 810.02, it should be construed to reach a similar result. That is, each statute is so structured that if one commits the core offense (either burglary, driving while license suspended or driving under the influence), then if additional, more serious elements are proved, the defendant may be subjected to a more serious consequence than had the additional elements not occurred.

In section 322.34(3), death or great bodily injury are considered together to form only one new felony, while section 316.193(3) treats them separately and forms two new felonies. But in section 810.02, additional elements form three new felonies. It appears that the number of newly formed felonies is not significant under the *Boutwell* analysis which, summarized by the supreme court, is:

> In the instant case it was fortuitous that four persons were injured as a result of Boutwell's negligent driving instead of only one. We find this case more analogous to *James v. State*, 567 So. 2d 59 (Fla. 4th DCA 1990), *rev. dismissed*, 576 So. 2d 288 (Fla. 1991), in which the court held that it was error to convict on two counts of burglary with a battery because only one entry had been proven.

Would the result of *Boutwell* have been different if some of the seriously injured victims had died? The court seems to say no:

> It is evident that section 322.34(3) does no more than enhance the penalty for driving with a suspended license in cases where the driver through the careless or negligent operation of his vehicle causes <u>death</u> or serious bodily injury. [Emphasis added].

Boutwell, 631 So. 2d at 1095.

Justice Grimes, in a well reasoned dissent, acknowledges the similarity of the structure of sections 322.34 and 316.193 and the analytical inconsistency between *Houser*, if it is construed to permit multiple convictions under 316.193, and the result in *Boutwell* when he states:

> If multiple convictions are permitted for DUI manslaughter and DUI with serious bodily injury when multiple victims are involved, there is no reason why the same principle should not apply to driving with a suspended license and causing serious bodily injury to more than one person.

Boutwell, 631 So. 2d at 1096.

The majority in *Boutwell* did not deny the logic of Justice Grimes' contention that the two statutes should be construed similarly; it instead rejected the concept of separate crimes based on a single violation of the core offense and appears to have overruled previous decisions which permitted multiple convictions based on separate victims of a single event of driving under the influence.

In *Wright v. State*, 592 So. 2d 1123, 1126 (Fla. 3d DCA 1991), *quashed on other grounds*, 600 So. 2d 457 (Fla. 1992), the court held that, although multiple convictions based on the number of victims would be appropriate under section 316.193(3)(c), such would not be appropriate under section 322.34(3) because the defendant's action of driving with a suspended license was "a single continuing offense and thus a single violation of section 322.34." That is, so long as you are driving with a suspended license uninterrupted, you are committing but one violation of the statute. But is that not also true of driving under the influence? So long as you drive impaired uninterrupted, are you not "continuing" to commit a single offense?

I would reverse all but a single conviction of DUI manslaughter and would certify the question to the supreme court since, in my view, the result herein is in conflict with *Troedel*, *James* and *Boutwell*.