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IN THE SUPREME COURT OF FLORIDA

JEANIE H. MELBOURNE,

Petitioner,

v. CASE NO. 86,029

STATE OF FLORIDA,

Respondent.
_____/

On Notice To Invoke Discretionary
Jurisdiction To Review A Decision Of The
Fifth District Court Of Appeal

MS. MELBOURNE'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief, the Petitioner, JEANIE H. MELBOURNE, will be referred to as "Ms. Melbourne. The Respondent, STATE OF FLORIDA, will be referred to as the "state." The Appendix attached to this brief will be referred to as "App.," followed by the appropriate page number. The record on appeal will be referred to by the volume number, followed by the appropriate page number. Exhibits will be referred to as in the trial court.

STATEMENT OF THE CASE AND OF THE FACTS

On June 12, 1992, Ms. Melbourne was involved in a two-car accident which resulted in two deaths and another person being seriously injured (VI/212-13). On October 29, 1992, the state filed a five count information charging her with DUI manslaughter (Counts II and IV), vehicle homicide (Counts I and III), and DUI with serious bodily injury (Count V)(VI/207-11). 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). She was sentenced to twelve 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 appealed her conviction, raising ten (10) issues on appeal. In an opinion dated April 21, 1995, the Fifth District affirmed the judgment and sentence, addressing three of the issues. Melbourne v. State, __ So.2d __ (Fla. 5th DCA 4/21/95) [20 Fla. L.

Weekly D975].

The first issue addressed the following peremptory challenge by the state:

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[1] 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 two peremptory challenges to excuse black males and exercised its exercise of the --. (TII/269-70).

Under these facts, the Fifth District held that the trial court did conduct a Neil inquiry. Secondly, the court held that although not articulated by the state, the record itself clearly showed non-racial motivation for the strike.

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[1] This is a stenographical error. Counsel was referring to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The third issue addressed by the court was the propriety of multiple convictions arising out of a single act of DUI. There, the panel majority distinguished Boutwell v. State, 631 So.2d 1094 (Fla. 1994), and held that multiple convictions were proper. Chief Judge Harris dissented on this issue, and would have found a single violation of the core DUI offense.

On May 8, 1995, Ms. Melbourne filed a motion for rehearing or certification to the Florida Supreme Court (App. B). The Fifth District issued a corrected opinion which corrected typographical errors, but did not change the substance (App. A).[2] The motion for rehearing or certification to the Florida Supreme Court was denied on June 1, 1995 (App. C). A notice to invoke the discretionary jurisdiction of this Court was filed on June 19, 1995.

SUMMARY OF THE ARGUMENTS

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION 1) EXPRESSLY AND DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS ON THE ADEQUACY OF THE NEIL INQUIRY AND 2) EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER APPELLATE DECISIONS AND ALSO EXPRESSLY CONSTRUES STATE AND FEDERAL PROVISIONS AGAINST DOUBLE JEOPARDY ON THE ISSUE OF MULTIPLE CONVICTIONS ARISING FROM A SINGLE ACT OF DUI

This Court has jurisdiction pursuant to Art. V, § 3(b)(3) to review cases which directly and expressly conflict with opinions of this Court or other district courts of appeal on the same question of law. This Court must exercise its jurisdiction and accept Ms. Melbourne's case for review because the Fifth District's opinion expressly and directly conflicts with numerous decisions on the

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[2] The corrected opinion also bears the date of April 21, 1995, although it was issued on or about May 31, 1995.

Neil/Johans inquiry issue, and the double jeopardy issue. Additionally, this Court has jurisdiction pursuant to Art. V, § 3(b)(3) to review cases which expressly construe provisions of the state or federal constitution. This case presents an important double jeopardy issue as to the legality of multiple convictions for a single act of DUI.

ARGUMENTS

I

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS ON THE ADEQUACY OF THE NEIL INQUIRY.

As to the peremptory strike issue, the Fifth District's opinion conflicts with numerous other opinions of this Court and district courts of appeal. This Court should therefore accept jurisdiction.

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, __ So.2d ___ (Fla. 2d DCA 5/12/95) [20 Fla. L. Weekly D1155] (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).

In Melbourne, first, 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.

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. 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. This Court should accept jurisdiction because the Fifth

District's opinion expressly and directly conflicts with the cases cited above on this important issue of due process and equal protection.

II

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER APPELLATE DECISIONS AND ALSO EXPRESSLY CONSTRUES STATE AND FEDERAL PROVISIONS AGAINST DOUBLE JEOPARDY ON THE ISSUE OF MULTIPLE CONVICTIONS ARISING FROM A SINGLE ACT OF DUI

The Fifth District's decision upholding three convictions deriving from the core offense of a single act of DUI violates the constitutional prohibition against double jeopardy found in Art. I, §9, Fla. Const.; Amend. VI and XIV, U.S. Const.

Specifically, the decision expressly and directly conflicts with Boutwell v. State, 631 So.2d 1094 (Fla. 1994). There the defendant was charged with, and convicted of, four counts of driving while license suspended causing serious bodily injury. 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 result in Boutwell would not have changed had death, rather than serious bodily injury, resulted to any of the four passengers. Id. at 1095.[3]

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

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[3] In contrast to Boutwell, the cases relied upon by the Melbourne majority (App. A, pp. 5-7), simply do not address the multiple DUI conviction issue.

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(3) can result in only one (1) offense, so too a single driving episode under §316.193 can result in only one offense. The crux of the offense is driving under the influence of alcohol, like the crux of a § 322.34(3) offense is driving while a license is suspended.[4]

The Fifth District's opinion also conflicts with Michie v. State, 632 So.2d 1106 (Fla. 2d DCA 1994), where the Second District followed Boutwell and vacated one of two convictions for DUI arising out of a single act of driving.

Additionally, the Fifth District's decision conflicts with the recent decisions of this Court where the court has held that multiple convictions are not permitted where a defendant is convicted of simply aggravated forms of a single core offense. See e.g., Thompson v. State, 650 So.2d 969 (Fla. 1994); Sirmons v.

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[4] The Fifth District failed to acknowledge its legally and logically inconsistent opinion in Hoag v. State, 511 So.2d 401 (Fla. 5th DCA), rev. denied, 518 So.2d 1278 (Fla. 1987). In Hoag, the defendant was convicted in part 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. Finding that there was only one act of leaving the scene, the court vacated the four convictions for leaving the scene of an accident with injuries. Id. at 402. This is the same logic and statutory analysis that guided the Boutwell decision, but the Fifth District chose to ignore its own precedent.

State, 634 So.2d 153, 154 (Fla. 1994); Goodwin v. State, 634 So.2d 157 (Fla. 1994); Troedel v. State, 462 So.2d 392, 399 (Fla. 1984).[5]

This case presents important double jeopardy considerations arising out of a common fact pattern and should be reviewed on that basis alone. However, it is additionally clear that the Fifth District's opinion on this issue expressly and directly conflicts with those authorities cited above and therefore review should be granted on that ground also to clarify this issue for all courts.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must grant Ms. Melbourne's petition for review, and order briefing on the merits.

RESPECTFULLY SUBMITTED this 28th day of June, 1995, at Orlando, Orange County, Florida.

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[5] It is interesting that the same panel majority that rejected Ms. Melbourne's double jeopardy argument accepted a similar double jeopardy argument in Anderson v. State, __ So.2d __ (Fla. 5th DCA 6/16/95) [20 Fla. L. Weekly D1410] (ruling that the defendant could not be convicted of both perjury in an official prosecution and providing false information in a bail application for a single false statement).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 1995, a true copy of this brief and appendix have been furnished by United States mail, first class postage prepaid, to Barbara A. Fink, 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,

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STATE OF FLORIDA,

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APPENDIX TO
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Appendix A

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

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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

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[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*,

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[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 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*.

Appendix B

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JEANIE MELBOURNE,

Appellant,

v. Case No. 93-1092

STATE OF FLORIDA,

Appellee.
_____/

MS. MELBOURNE'S MOTION FOR REHEARING OR CERTIFICATION TO THE FLORIDA SUPREME COURT

The Appellant, JEANIE MELBOURNE, through undersigned counsel and pursuant to Fla.R.App.P. 9.330, hereby moves this Court to reconsider and vacate the April 21, 1995, opinion in this case, or certify certain matters to the Supreme Court of Florida. In support of this motion, Ms. Melbourne shows this Court as follows:

1. On April 21, 1995, this Court issued an opinion which affirmed Ms. Melbourne's judgments and sentence in a 2-1 decision. Dissenting in part, Chief Judge Harris would have vacated one of the two DUI manslaughter convictions, and the DUI serious bodily injury conviction. Melbourne v. State, __ So.2d __ (Fla. 5th DCA 4/21/95) [20 Fla. L. Weekly D975].

FACTUAL CORRECTIONS

On page two of the slip opinion the Court refers to Ms. Munion as a clerk. In fact, Ms. Munyon was one of the two assistant state attorneys that prosecuted the case.

Page two of the slip opinion also contains what this Court states is the "sum total of the record inquiry" concerning Mr. Wells. In fact, there are two other instances in voir dire where

Mr. Wells answered counsels' inquiries. See Trial Transcripts: Vol. I, p. 188; Vol. II, p. 245.

REHEARING

As to the peremptory strike issue, this Court has misconstrued the record and misapprehended the applicable law. It should therefore consider its decision on this issue.

In the slip opinion, the Court misconstrues the record when it finds that the trial court did conduct a Neil inquiry (slip opinion at 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) (burden is on party exercising peremptory challenge to provide a race-neutral justification); Reynolds v. State, 576 So.2d 1300, 1301 (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.").

In Melbourne, first, the trial court did not make any inquiry. Second, and most importantly, the state did not provide any 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.

The Court bolsters its finding that an inquiry was conducted because the trial court issued a ruling. 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 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 an effort to bolster its decision on this point, this Court has improperly determined that the record provides non-racial reasons for the strike, even though obviously not articulated by the state below. This Court 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. For this Court some two years after the fact to speculate as to possible reasons for the state strike is obviously an attempt to uphold a conviction, while ignoring the plain dictates of Johans, Neil and the other cases cited above.

* * *

Additionally, this Court has misapprehended the law surrounding the Boutwell issue. In part, the majority relies on Wright v. State, 592 So.2d 1123 (Fla. 3d DCA 1991), quashed on other grounds, 600 So.2d 457 (Fla. 1992), a case not previously discussed in either party's brief or at oral argument. In Wright, the Third District simply relied on Pulaski v. State, 540 So.2d 193 (Fla. 2d DCA), rev. denied, 547 So.2d 1210 (Fla. 1989) to uphold the multiple DUI serious bodily injury convictions. Pulaski was later relied upon by Justice Grimes in his dissent in Boutwell. 631 So.2d at 1096. Of course, the Pulaski argument was rejected by six other members of the Supreme Court. More recently, the Second District has implicitly receded from Pulaski in Michie v. State, 632 So.2d 1106 (Fla. 2d DCA 1994), where the Second District applied Boutwell to vacate one of two DUI convictions arising out of a single driving incident. That court stated that only one conviction per DUI episode was permitted. Id. at 1108. The statements in Boutwell which allegedly approve of Wright are simply

those statements which discuss the Wright decision as to the driving while license suspended issue. The Supreme Court's decision in no way mention or approves of the Wright decision as to the DUI issue.

It is interesting to note the majority places much emphasis on Houser v. State, 474 So.2d 1193 (Fla. 1985), for its result. The Third District in Wright, 592 So.2d at 1126, n.2, specifically stated that Houser was inapplicable to this issue. None of the post-Houser cases cited by this Court, slip opinion at 7, in any way discussed the Boutwell issue, much less applied the Boutwell analysis of a single continuing offense to the DUI situation. Houser and its progeny do not resolve the issue presented by Ms. Melbourne to this Court.

Following its decision in Sirmons v. State, 634 So.2d 153 (Fla. 1994), and applying a similar rationale as in Troedel v. State, 462 So.2d 392, 399 (Fla. 1984), relied upon in Chief Judge Harris' dissent (slip opinion dissent at p. 3), the Supreme Court of Florida recently decided Thompson v. State, 650 So.2d 969 (Fla. 1994). In Thompson, the Court ruled that a single sexual act could not support convictions for two separate sexual offenses (sexual battery on physically incapacitated victim and sexual activity while in custodial authority of child). Thompson, like Boutwell, requires a holding that a single act of DUI can support only one conviction and sentence.

* * *

Because Ms. Melbourne was not convicted of violation § 877.11, Fla.Stat., the improper reference to that statute on the judgment must be stricken.

CERTIFICATION TO THE FLORIDA SUPREME COURT

Because "the existing law construing the DUI statute [has been placed] in some doubt," slip opinion at p. 6, and for the reasons stated by Chief Judge Harris in his dissent, the viability of multiple DUI convictions arising out of a single act of driving is an issue that should be addressed by the Florida Supreme Court. Therefore, Ms. Melbourne respectfully requests this Court to certify the following question to the Florida Supreme Court as an issue of great public importance: Can a defendant be convicted of multiple DUI offenses where a single act of driving under the influence or with an unlawful alcohol level caused multiple deaths and/or injuries?

Ms. Melbourne respectfully requests this Court to certify that its decision on the double jeopardy issue conflicts with Boutwell v. State; Troedel v. State, 462 So.2d 392 (Fla. 1984); James v. State, 567 So.2d 59 (Fla. 4th DCA 1990), rev. dismissed, 576 So.2d 288 (Fla. 1991); Michie v. State; and Thompson v. State.

As to the peremptory challenge issue, Ms. Melbourne respectfully requests this Court to certify that its decision conflicts with State v. Johans.

RESPECTFULLY SUBMITTED this 8th day of May, 1995, at Orlando, Orange County, Florida.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 8th day of May, 1995, by U.S. Mail to Barbara A. Fink, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

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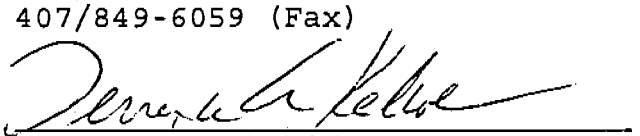

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JEANIE MELBOURNE,
Appellant,

v. CASE NO. 93-1092

STATE OF FLORIDA,
Appellee.
_____/

DATE: June 1, 1995

BY ORDER OF THE COURT:

This Court having issued the April 21, 1995, "Corrected Opinion" in the above-styled appeal, it is

ORDERED that Appellant's MOTION FOR REHEARING OR CERTIFICATION TO THE FLORIDA SUPREME COURT, filed May 8, 1995, is otherwise denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Terrence E. Kehoe, Esq.
Office of the Attorney General, Daytona Beach

Recd 6/5/95