# ORIGINAL



IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,622

THIRD DISTRICT COURT OF APPEAL NO. 96-2199

L.T. CASE NO. 95-5734A

GERARDO PLAZA,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

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ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, THIRD DISTRICT
STATE OF FLORIDA

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## PETITIONER'S JURISDICTIONAL BRIEF

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## INTRODUCTION

In this Brief, the parties will be referred to as Gerardo Plaza or Plaza (Petitioner) and The State of Florida or State (Respondent).

## STATEMENT OF THE CASE AND FACTS

The Petitioner, Gerardo Plaza, was indicted for, and convicted of, first degree murder, and other charges.

During jury selection, the State exercised a number of challenges against female jurors. The State used a peremptory challenge against a female venireperson, prompting Plaza's *Neil* objection premised on gender discrimination.[1]

Reacting to the defense objection, the trial court refused to conduct a *Neil* inquiry. Instead, the trial judge advocated its own gender-neutral reason for the State's strike. The strike was allowed, absent any inquiry from the State, over defense objection.

On appeal, Plaza challenged the trial court's failure to conduct a *Neil* inquiry, as required by law. The Third District Court of Appeal, in its decision rendered September 10, 1997, agreed that the trial court refused to conduct a *Neil* inquiry as to the one female juror. *Plaza v. State*, 22 Fla. L. Weekly D2143, D2144 (Fla. 3d DCA, Sept. 19, 1997). However, the majority found no error in the procedure employed:

> Additionally, we find no error in the trial court's efficient and thorough elucidation of the gender-neutral reason supporting the State's peremptory strike of the venire member who was a recovering alcoholic. The trial court was in the midst of a series of exhaustive *Neil* inquiries in which the defense challenged the State's peremptory strikes and the court properly required a gender-neutral explanation. We see no reason to shackle the court

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

> in its conduct of voir dire by requiring that it first ask for, and then await the State's explanation for a strike. If the record clearly supports the gender-neutral reason for a peremptory strike, and the trial court properly articulates that reason, there is no error in allowing the strike. *See State v. Holiday*, 682 So. 2d 1092 (Fla. 1996) (based upon review of the entire record of voir dire concerning particular juror, court will not overturn trial court's determination of propriety of peremptory strike); *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996) (trial court's assessment of credibility of reasons for strike will be affirmed unless clearly erroneous).

*Id.*, 22 Fla. L. Weekly at D2144. [Appendix: "1"].

On October 9, 1997, Plaza is timely filing his Notice to Invoke the Discretionary Jurisdiction of the Supreme Court.

## SUMMARY OF THE ARGUMENT

This Court has established the procedure that must be followed when a party raises a *Neil* challenge. In short, upon proper objection, the trial court **must** inquire of the party exercising the strike, in order to determine whether the peremptory challenge is being exercised for gender-neutral reasons. *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996); *State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993). The Fourth District Court of Appeal applies this procedure as well. *See Rivera v. State*, 670 So. 2d 1163 (Fla. 4th DCA 1996).

The Third District Court of Appeal has now ruled that the trial court need not inquire of the party exercising a peremptory challenge, notwithstanding a proper objection to the strike. Rather, the court may enunciate its own reason why the strike is not discriminatory and gender-based. *Plaza v. State*, 22 Fla. L. Weekly D2143, D2144 (Fla. 3d DCA, Sept. 19, 1997). This decision directly and expressly conflicts with *Melbourne*, *Johans*, and *Rivera*. The *Plaza* decision rewrites the law, and eliminates the protection provided by this Court in the above-cited decisions. Parties, trial and appellate courts, and potential jurors will all suffer the consequences of the Third District's new procedure.

This Court should accept jurisdiction, and resolve the conflict, by affirming that the requirement of *Melbourne* and *Johans* -- that upon proper objection, a *Neil* inquiry must be conducted of the party exercising the strike -- remains the law.

## JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or of another District Court of Appeal on the same point of law. Art. V, § 3 (b) (3), *Fla. Const.* (1980); Fla. R. App. P. 9.030 (a) (2) (a) (iv).

## ARGUMENT

> The decision of the District Court of Appeal in this case expressly and directly conflicts with the decisions of this Court in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), and *State v. Johans*, 613 So. 2d 1319 (Fla. 1993), and the Fourth District Court of Appeal's decision in *Rivera v. State*, 670 So. 2d 1163 (Fla. 4th DCA 1996) -- all of which require a *Neil* inquiry upon the defense's challenge to the State's discriminatory use of a peremptory challenge.

In 1993, addressing the evolving method of handling a *Neil* challenge, this Court ruled that a *Neil* inquiry is **required** when an objection is raised to the improper, discriminatory use of a peremptory challenge:

> 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.

*State v. Johans*, 613 So. 2d at 1321. (Emphasis added).

Three years later, in 1996, this mandatory procedure to be used with respect to a *Neil* objection was reaffirmed in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996): "...the court **must** ask the proponent of the strike to explain the reason for the strike," *id.*, 679 So. 2d at 764 (emphasis added), *citing Johans*, *supra*; *see also State v. Holiday*, 682 So. 2d 1092, 1094 (Fla. 1996), and *Rivera v. State*, 670 So. 2d 1163 (Fla. 4th DCA 1996) ("When an objection is made that a peremptory challenge is being used in a gender-based discriminatory manner, a *Neil* inquiry is **required**"). *Rivera*, 670 So. 2d at 1165 (emphasis added), *citing Abshire v. State*, 642 So. 2d 542 (Fla. 1994), and *Johans*, *supra*.

The protection and procedures of *Neil*, *Johans*, and *Melbourne* apply equally to jury

challenges based on improper gender discrimination. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89 (1994); *Abshire v. State*, 642 So. 2d 542 (Fla. 1994); *Rivera v. State*, 670 So. 2d 1163 (Fla. 4th DCA 1996).

Notwithstanding this Court's unmistakably clear and certain directive to use the *Melbourne* guidelines whenever a challenge to a peremptory strike is made, *see Melbourne*, 679 So. 2d at 764, the Third District Court of Appeal decided to not apply this governing procedure. *See Plaza*, 22 Fla. L. Weekly at D2144.

Sidestepping binding precedent, the Third District Court of Appeal rewrote the law in this State. As of September 10, 1997, *Johans* and *Melbourne* are overruled. Now, there is a completely different procedure to guide all trial courts in this State. *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992) (citations omitted) (decisions of District Courts of Appeal bind all Florida trial courts, absent interdistrict conflict, until overruled by Florida Supreme Court).

*Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), and *State v. Holiday*, 682 So. 2d 1092 (Fla. 1996), are cited by the Third District Court of Appeal in support of its newly enacted procedure. *See Plaza*, 22 Fla. L. Weekly at D2143. These citations, however, are unpersuasive. *Melbourne*, as indicated in this brief, conflicts with *Plaza*. Appellate affirmance of the trial court's assessment of credibility and propriety of the reasons for the strike, in both *Melbourne* and *Holiday*, resulted after the proper, required record inquiry was conducted of the party exercising the strike. *Compare Plaza*, 22 Fla. L. Weekly at D2144, with *Melbourne*, 679 So. 2d at 764-65 (upon objection, court must ask proponent of strike to explain; counsel waived issue by failing to renew objection before the jury was sworn), and with *Holiday*, 682 So. 2d at 1094 (trial court properly conducted *Neil* inquiry).

After *Plaza*, a party's objection to an improper jury challenge based on gender discrimination does not trigger the need for an inquiry of the striking party. Indeed, the trial court may simply refuse to conduct any inquiry of the party exercising the strike. Instead of hearing from the strike's proponent, the trial judge actively advocates for the peremptory strike. This is accomplished by relying only on the trial judge's rationale supporting the strike; the trial judge personally proffers reasons supporting the challenge. Any actual motive in striking the potential juror remains in the thought processes of the striking party. As a result, the proponent's actual explanation and reason for the strike forever remains a mystery. *Plaza*, *supra*.

The direct and express conflict between *Plaza*, and *Melbourne* and *Johans*, is apparent and obvious. This Court has ruled that a *Neil* inquiry is required upon objection. The Third District Court of Appeal has ruled it is not.[2]

The legal basis for requiring the proponent of the strike to explain his or her reasons is just and sound. Often, parties tender unjustified reasons, which are rejected by the trial judge. At times, the reasons, in context or in comparison to treatment of other prospective jurors, point to a subtle nuance of discrimination. It is only by hearing from the party attempting to strike the juror that it can be determined what that party is thinking:

> It seems clear to me that the purpose of the second step of the analysis is not to determine whether a valid gender-neutral reason exists, but, rather, whether the party exercising the strike is doing

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[2] Ironically, this result was reached while the Court simultaneously noted that the trial court properly conducted inquiries of the State as to other stricken jurors: "The trial court was in the midst of a series of exhaustive *Neil* inquiries in which the defense challenged the State's peremptory strikes **and the court properly required a gender-neutral explanation**." *Plaza*, 22 Fla. L. Weekly at D2144. (Emphasis added).

> so on the basis of a valid gender-neutral reason. It is the subjective intent of the proponent of the peremptory which must be evaluated by the trial judge during step 2 of the analysis.

*Plaza*, 22 Fla. L. Weekly at D2143 (Sorondo, J., specially concurring).[3] If the party need not explain, a decision of the party's non-gender based reason for the strike cannot be determined. Without such a proper determination, this Court's required procedure to address *Neil* challenges is rendered illusory.

The importance of jury selection is well-known to Courts and to lawyers. The laudable goal of trying to end the improper bias against groups of jurors, in this instance woman, is served by this Court's procedure, as set forth in *Melbourne* and *Johans*. The Third District Court of Appeal, by protecting the State from saying its reason for juror strikes upon proper defense objection, invalidates this Court's decisional law. Respectfully, if the law is to drastically altered in this important area, it should be done by this Court -- not by a conflicting intermediate appellate court's ruling. This Court should accept jurisdiction, and continue forwarding the goal of gender-neutral jury selection.

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[3] The concurring opinion is not cited as a basis for conflict. However, it is interesting to note that one Judge found the failure to conduct the *Neil* hearing to be error. *Id.* Judge Sorondo's reasoning in finding the error to be harmless is, respectfully, incorrect. Unless the proffered reason for removing the juror comes from the proponent of the strike, there is no means of determining the gender-neutrality of the strike; thus, the error cannot be harmless. In any event, the basis for conflict herein lies in the majority's opinion finding no error.

## CONCLUSION

WHEREFORE, the Petitioner, Gerardo Plaza, respectfully requests this Court to exercise its discretion, and to accept jurisdiction to resolve the express and direct conflict in the law caused by the decision rendered by the Third District Court of Appeal in this case.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S JURISDICTIONAL BRIEF** was delivered by mail to the parties of record listed below this 9th day of October, 1997:

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# APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

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tentionally shoots at, within, or into a building for the primary purpose, or with the specific intent, of shooting at a person *in* or *near* the building" has violated section 790.19. *Skinner v. State*, 450 So. 2d 595, 596 (Fla. 5th DCA 1984) (emphasis added); *Smith v. State*, 463 So. 2d 542, 545-46 (Fla. 5th DCA 1985). This reasoning applies equally to a thrown missile. Additionally, the missing officer's testimony would not have added anything regarding this issue, as the evidence presented at trial was that Appellant was throwing the rock at the victim. Therefore, the testimony was not critical.

With respect to the final argument issue, the state's comment in question was:

> The only testimony and, again, think about what the opening statement was, what the defense told you where the case was going. The opening statement was: The defendant never threw a rock. Did you ever hear anything from this stand but the fact that that man threw a rock? You have no testimony from this stand that indicates otherwise.

In this case, defense counsel, in opening statement, asserted that Appellant did not throw the rock. Certainly, if the prosecutor's remarks imply that Appellant should have testified, the remarks are improper.

In the opening statement, defense counsel had stated:

> When [Appellant] approached [the victim] and asked her about this incident, she became enraged and violent. [Appellant] never threw a brick at [the victim]. He never got—he never became violent. She was the only one that became violent. There were other people in front of Dorothy's Convenience Store at the time. [Appellant] did leave the area and go home.

The trial court did not err in construing the prosecutor's statement as not being a comment on Appellant's failure to testify. Rather, it was a response to the defense assertion that Appellant did not throw the rock. The prosecution could lawfully respond that the defense argument is not what the evidence shows, by reminding the jury that all of the testimony was to the contrary and that the victim's testimony was confirmed by the store owner who saw a man commit the offense. *See Mitchell v. State*, 678 So. 2d 1362, 1363 (Fla. 1st DCA), *rev. denied*, 686 So. 2d 580 (Fla. 1996) (stating in dicta that the prosecutor's closing remarks were an invited, fair reply to defense counsel's remarks and did not constitute prejudicial error when considered in context); *Crowly v. State*, 558 So. 2d 529, 530-31 (Fla. 4th DCA 1990); *Romero v. State*, 435 So. 2d 318 (Fla. 4th DCA 1983). We note that the defense was not denying Appellant's presence or that the communication had occurred. Neither do we interpret the state's comments as misleading the jury as to the burden of proof. *Vazquez v. State*, 635 So. 2d 1088 (Fla. 3d DCA 1994). The state has a right, and even a duty, to respond to the defense's suggestion. To ignore it gives it credence. Under the circumstances, the prosecutor's comment was not improperly stated. The prosecutor made no mention of either the defendant or defense witnesses, or any duty to present the same.

Additionally, if this comment was improper, we deem it harmless error. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Bertolotti v. State*, 476 So. 2d 130 (Fla. 1985); *State v. Murray*, 443 So. 2d 955 (Fla. 1984); *Knox v. State*, 521 So. 2d 322 (Fla. 4th DCA 1988); *Ryan v. State*, 457 So. 2d 1084 (Fla. 4th DCA 1984).

Therefore, the judgment and sentence are affirmed. (DELL and STEVENSON, JJ., concur.)

* * *

SINGLETARY v. OWENS. 4th District. #96-3580. September 10, 1997. Appeal from the Circuit Court for the Nineteenth Judicial Circuit. Reversed. *See Singletary v. Wellon*, 692 So. 2d 300 (Fla. 4th DCA 1997); *Singletary v. Jones*, 681 So. 2d 836 (Fla. 1st DCA 1996).

* * *

**Criminal law—Habeas corpus—Jurisdiction—Where defendant was in state custody when he filed petition for writ of habeas corpus, trial court had jurisdiction to consider petition on the merits and erred in striking petition based on court's mistaken conclusion that defendant was in federal custody**

HERBERT BLOOM, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 96-2379. L.T. Case No. 96-13436. Opinion filed September 10, 1997. An Appeal from the Circuit Court for Dade County, Victoria Platzer, Judge. Counsel: Herbert Bloom, in proper person. Robert A. Butterworth, Attorney General, and Sylvie Perez Posner, Assistant Attorney General, for appellee.

(Before NESBITT, GODERICH and SHEVIN, JJ.)

(PER CURIAM.) As the state properly concedes, defendant was in state custody when he filed the petition for writ of habeas corpus and at all times since filing the petition. The trial court, therefore, had jurisdiction to consider the petition on the merits and erred in striking the petition based on the court's mistaken conclusion that defendant was in federal custody. *See Jacobs v. State*, 687 So. 2d 24 (Fla. 5th DCA 1996). We reverse the order and remand the cause for consideration on the merits.

Reversed and remanded.

* * *

**Criminal law—Sentencing—Credit for time served**

THOMAS JAMES, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case Nos. 96-870, 96-989 & 96-990. L.T. Case Nos. 91-9026, 91-18240, 91-18963 & 93-44126. Opinion filed September 10, 1997. Appeals from the Circuit Court of Dade County, Marc Schumacher and Leonard E. Glick, Judges. Counsel: Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Steven Groves, Assistant Attorney General, for appellee.

(Before NESBITT and FLETCHER, JJ., and BARKDULL, Senior Judge.)

(PER CURIAM.) Pursuant to the State's proper confession of error this cause is remanded to the trial court for the calculation and award of credit for time served by the defendant during the initial period of incarceration prior to the probationary period of his split sentence. The trial court's orders are otherwise affirmed.

* * *

**Criminal law—Jurors—Challenges—Peremptory—Gender discrimination—No error in trial court's conduct of *Neil* inquiries where trial court considered state's specific reasons for peremptory strikes of prospective female jurors, and properly found them to be gender neutral—No error in trial court's articulating gender neutral basis for strike of female juror who was recovering alcoholic without asking for and awaiting state's explanation, where record clearly supported gender-neutral reason for strike—Trial court, when engaged in proper and thorough rigors of *Neil* inquiry need not await a neutral explanation for a strike where gender-neutral reason is readily apparent from record**

GERARDO PLAZA, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 96-2199. L.T. Case No. 95-5734A. Opinion filed September 10, 1997. An Appeal from the Circuit Court for Dade County, Amy N. Dean, Judge. Counsel: Bennett H. Brummer, Public Defender, and Louis K. Nicholas, II, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Douglas Gurnic, Assistant Attorney General, and Emma Savadier, Legal Intern, for appellee.

(Before JORGENSON and SORONDO, JJ., and BARKDULL, Senior Judge.)

(PER CURIAM.) Defendant appeals from judgments of conviction and sentences for first degree murder, armed burglary, and armed robbery. We affirm.

During jury selection, the State exercised four peremptory challenges on prospective female jurors. Each State challenge occasioned a separate defense objection based upon gender discrimination. When the defense objected to one particular strike, the court stated:

> I am not going to even turn to the State. I am making a record why I'm not turning to the State. It is true that . . . she's[1] a recovering alcoholic, as she testified, for three weeks.

The court allowed the strike, after further finding that no other juror against whom the State exercised a peremptory challenge was a recovering alcoholic. The defense objected.

On appeal, the defendant argues that the four peremptory strikes made by the State of female venire members were impermissibly based on gender, and that the trial court failed to consider the totality of the record when allowing those strikes. In addition, the defendant argues that the trial court erred in failing to conduct any *Neil* inquiry when the defense challenged the State's peremptory strike of the recovering alcoholic.

We find no deficiency in the trial court's conduct of the *Neil* inquiries. The court considered the State's specific reasons for the strikes, and properly found them to be gender neutral.

Additionally, we find no error in the trial court's efficient and thorough elucidation of the gender-neutral reason supporting the State's peremptory strike of the venire member who was a recovering alcoholic. The trial court was in the midst of a series of exhaustive *Neil* inquiries in which the defense challenged the State's peremptory strikes and the court properly required a gender-neutral explanation. We see no reason to shackle the court in its conduct of voir dire by requiring that it first ask for, and then await the State's explanation for a strike. If the record clearly supports the gender-neutral reason for a peremptory strike, and the trial court properly articulates that reason, there is no error in allowing the strike. *See State v. Holiday*, 682 So. 2d 1092 (Fla. 1996) (based upon review of entire record of voir dire concerning particular juror, court will not overturn trial court's determination of propriety of peremptory strike); *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996) (trial court's assessment of credibility of reasons for strike will be affirmed unless clearly erroneous).

"The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense." *Melbourne*, 679 So. 2d at 765. It defies reason and makes no sense to require a trial court, when it is engaged in the proper and thorough rigors of a *Neil* inquiry, to await a neutral explanation for a strike that is readily apparent from the record before articulating that explanation on the record. "The law does not require futile acts." *Hoshaw v. State*, 533 So. 2d 886, 887 (Fla. 3d DCA 1988).

AFFIRMED. (JORGENSON, J., and BARKDULL, Senior Judge, concur.

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(SORONDO, J., specially concurring.) The majority finds no error in the trial court's ruling on the gender-neutrality of a peremptory challenge exercised by the state without asking the prosecutor to proffer her reasons. Specifically, the majority says:

> We see no reason to shackle the court in its conduct of voir dire by requiring that it first ask for, and then await the state's explanation for a strike. If the record clearly supports the gender-neutral reason for a peremptory strike, and the trial court properly articulates that reason, there is no error in allowing the strike.

I believe that a careful reading of the Florida Supreme Court's decision in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), requires a finding that the trial court erred by not asking the state's attorney for a valid gender-neutral reason for the exercise of her peremptory challenge. However, because I believe the error to be harmless, I agree that the convictions and sentences in this case should be affirmed.

The most recent refinement of the standards set forth in *State v. Neil*, 457 So. 2d 481 (Fla. 1984), was announced by the Supreme Court of Florida in *Melbourne*. The Court established the following analysis for determining the racial, ethnic, and/or gender neutrality and genuineness of a peremptory challenge:

> Step 1 A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike.
>
> Step 2 At this point, the burden of production shifts to the proponent of the strike to come forward with a race neutral explanation.
>
> Step 3 If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained.

After setting forth the requirements of step 1, and before discussing the shifting of the burden of production, the Court stated, "If these initial requirements are met (step 1), the court *must* ask the proponent of the strike to explain the reason for the strike." *Id.* at 764 (emphasis added). The language used by the Court is mandatory. It seems clear to me that the purpose of the second step of the analysis is not to determine whether a valid gender-neutral reason exists, but, rather, whether the party exercising the strike is doing so on the basis of a valid gender-neutral reason. It is the subjective intent of the proponent of the peremptory which must be evaluated by the trial judge during step 2 of the analysis. For example, if the juror at issue had been previously arrested and prosecuted by the state attorney's office, clearly a valid gender-neutral reason,[2] but, having been asked to proffer a valid reason the prosecutor responds that in his opinion a woman could not be fair in a murder case, the court would be obligated to disallow the peremptory challenge because the stated reason, reflective of the attorney's subjective intent, is discriminatory. The fact that the record contained a valid gender-neutral reason would not justify the strike because it would be clear that the strike was, in fact, gender-based. In the present case, the defendant objected to the state attorney's use of a peremptory challenge on the grounds that it was being used upon a female juror in a discriminatory manner. In so doing, the defendant satisfied the requirements of step 1. At this point, the burden of producing a valid reason for the strike shifted to the state, and the trial court was obligated to ask the state's attorney for a valid gender-neutral reason for excusing the juror in question. By not doing so, the trial judge erred.[3]

The law is clear that the failure to exclude a potential juror who is excusable for cause or by the proper exercise of a peremptory challenge is reversible error, if the issue is properly preserved. *Hill v. State*, 477 So. 2d 553 (Fla.), *cert. denied*, 485 U.S. 993, 108 S. Ct. 1302, 99 L. Ed. 2d 512, (1988); *Kelly v. State*, 689 So. 2d 1262 (Fla. 3d DCA 1997); *Gill v. State*, 683 So. 2d 158 (Fla. 3d DCA 1996). It is equally true that the improper exclusion of a juror for cause or by way of a peremptory challenge is also reversible error. *Farina v. State*, 679 So. 2d 1151 (Fla. 1996); *Abshire v. State*, 642 So. 2d 542 (Fla. 1994); *State v. Alen*, 616 So. 2d 452 (Fla. 1993). The question presented in this case is whether an error committed by a trial judge during the course of conducting a *Melbourne* inquiry is reversible if it does not result in the improper exclusion or inclusion of a potential juror. I believe that it is not, and conclude that the trial judge's error here was harmless. A review of the record of the voir dire process supports this conclusion.

Before beginning an analysis of the jury selection process in this case it is important to note that the defendant was charged with first degree murder, armed burglary and armed robbery. The defense in the case was voluntary intoxication, a valid defense to a specific-intent crime.[4] Because of this anticipated defense, potential jurors were questioned extensively about their use of alcohol and drugs and any acquaintance they might have had with others who had drug and/or alcohol problems.

In order to effectively discuss the exercise of the peremptory challenges herein it is necessary to refer to individual jurors. Because the nature of the relevant inquiry in this case is of a personal nature, and in the interest of not embarrassing those who fulfilled their civic obligation by responding to jury duty, I will refer to the potential jurors in question by their first names. Also,

to avoid redundancy, the "potential" jurors which were stricken will be referred to as jurors.

The first female juror stricken by the state was Juror Carol. The defense did not object to this strike but it is significant that both her father and mother are alcoholics. She went on to express very strong feelings about the use and abuse of drugs and alcohol but concluded by saying she could be fair. Before exercising a peremptory challenge the state sought to excuse her for cause but the motion was denied.

The next juror the state sought to strike was the critical subject of this case, Juror Eileen. She told the court and the attorneys that she was a recovering alcoholic and that she had been sober for three weeks. She added that hearing about the alcohol and/or drug problems of another might help her in her recovery process. The defense objected to the exercise of the peremptory on the grounds that Eileen, like Carol before her, was a young, white female and that the strike was gender-based and being exercised in a discriminatory manner.

After defense counsel concluded her objection the trial judge responded:

> I am not going to even turn to the State. I am making a record why I'm not turning to the State. It is true that Ms. [Carol] is an Anglo female, and Ms. [Eileen] appears to be a Hispanic female. Insofar as these two people are concerned, she's a recovering alcoholic, as she testified, for three weeks. Insofar as your challenge here as a strike, I am looking at the other individual stricken by the State and comparing it to Ms. [Carol], for example, who has alcoholism in her family, mainly her father. No one has similarly suggested those left on that have that kind of situation. And on particularly Ms. [Eileen], no one is a recovering alcoholic except Ms. [Eileen]. I will allow the strike.

As indicated above, the trial judge should have asked the state for a valid gender-neutral reason, but, obviously impressed by the self-evident validity of the strike, the court ruled on the basis of the record before her.[5] Although the judge erred in not asking the state's attorney for a valid reason, it is irrefutable that the strike was validly gender-neutral and that the potential juror was properly excused.

The next juror stricken by the state was Juror Escarly. The defense objected, again arguing that Escarly was a young, Latin female and renewing the suggestion that the strike was gender-based and discriminatory. The trial court made the *Melbourne* inquiry and the state responded that Escarly had an uncle who had been arrested for DUI and possession of crack cocaine. She also had a close friend who was arrested for DUI and her former employer had an alcohol problem which he had discussed with her. The trial court correctly found these to be valid gender-neutral reasons.

Juror Barbara was the next female juror challenged by the state. The defense objected on the same grounds. The state responded to the court's inquiry by saying that Barbara was an unemployed kindergarten teacher; that she had been the victim of a kidnapping; that her brother had been arrested and prosecuted for carrying a concealed firearm; and, that she was young. Additionally, Barbara had friends who experimented with drugs, two of whom had a serious problem. She added that she had counseled them to try to get them to acknowledge their dependency. Again, the trial court correctly found these reasons to be validly gender-neutral.

The state then struck Juror Ethel. The defense did not object, but it is worthy of mention that Ethel had a niece and nephew who used crack cocaine and she counseled them about their problem.

The defense's next *Melbourne* challenge was raised when the state struck Juror Diana. In response to the court's inquiry the state observed that Diana's husband had been arrested for drug possession and that she had indicated that he had a serious drug addiction. Diana also mentioned that he was in "rehab" as they spoke. The court correctly concluded that this was a valid gender-neutral reason.

Ana was the next juror stricken by the state. Again the defense objected for the same reasons as before. The state explained that Ana had told the court that when her husband is under the influence of alcohol he cannot control himself. The court correctly ruled that the reason was validly race-neutral.

The last female stricken by the state was Juror Irish. The defense did not object, but it is noteworthy that her son was having a serious problem with drugs.[6]

Every peremptory challenge exercised by the state was justified by valid gender-neutral reasons (one of which was common to all of the stricken potential female jurors) and completely consistent with each other, thus eliminating the possibility of pretext and the suggestion that the state was exercising its strikes in a discriminatory manner. In short, this case was tried by a female prosecutor and a female defense attorney, before a female judge, and to a jury of 12 people, 8 of whom were females. This record is devoid of even the slightest evidence of gender discrimination. The totality of the jury selection process confirms my conclusion that the trial court's error during the *Melbourne* inquiry dealing with juror Eileen, the only error in this trial, was harmless beyond a reasonable doubt. *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986).

I conclude by observing that the *Melbourne* guidelines were created by the Supreme Court for the purpose of eliminating racial (as well as ethnic and gender) discrimination in the exercise of the peremptory challenge. *Melbourne*, 679 So. 2d at 764. The practical use of this tool, however, is rapidly degenerating into a strategic way for attorneys to pollute the trial record with baseless objections, alleging racial, ethnic and gender discrimination, which are completely unsubstantiated by the record. Clearly, an attorney is compelled to zealously represent his or her client. A lawyer who honestly believes that his or her opponent is using peremptory challenges in a discriminatory manner is ethically and morally bound to raise an objection. Likewise, in the absence of any indication of such a corrupt motive, it is ethically and morally reprehensible to accuse a colleague of racial, ethnic and/or gender discrimination for the sole purpose of trying to create reversible error. Such actions degrade the justice system, undermine the public's confidence in our courts and may ultimately lead to the demise of the peremptory challenge.

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[1]The court was referring here by name to one of the challenged female jurors.

[2]*Miller v. State*, 605 So. 2d 492 (Fla. 3d DCA), *rev. denied*, 613 So. 2d 7 (Fla. 1993); *Knight v. State*, 559 So. 2d 327 (Fla. 1st DCA), *rev. denied*, 574 So. 2d 141 (Fla. 1990).

[3]Once the proponent of the peremptory challenge articulates a valid gender-neutral reason I see no problem with the trial judge perfecting the record by articulating other valid reasons in the record which the judge may find relevant to the analysis in step 3.

[4]*Gurganus v. State*, 451 So. 2d 817 (Fla. 1984) (first degree murder); *Eberhardt v. State*, 550 So. 2d 102 (Fla. 1st DCA), *rev. denied*, 560 So. 2d 234 (Fla. 1990) (burglary); *Graham v. State*, 406 So. 2d 503 (Fla. 3d DCA 1981) (robbery).

[5]In fairness to the trial judge I note that this case was tried before publication of the Supreme Court's decision in *Melbourne*.

[6]The state's other two peremptory challenges were exercised against male jurors. One of them had a history of involvement in drug counseling and the other one stated that he did not feel comfortable judging another person.

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**Criminal law—Evidence—Possession of firearm by violent career criminal—Trial court did not abuse discretion and did not depart from essential requirements of law in entering order in limine prohibiting state from using statutory term "violent career criminal" when referring to defendant on ground that such reference would paint misleading picture of defendant's prior record and unfairly prejudice defendant's right to fair trial**

THE STATE OF FLORIDA, Petitioner, v. SAMUEL EMMUND, Respondent. 3rd District. Case No. 97-1517. L.T. Case No. 96-7922. Opinion filed September 10, 1997. On petition for writ of certiorari from the Circuit Court for Dade County, Paul Siegel, Judge. Counsel: Katherine Fernandez Rundle, State Attorney, and Angelica D. Zayas, Assistant State Attorney; Robert A. Butter-