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IN THE SUPREME COURT OF FLORIDA

CASE NO.

91,622

GERARDO PLAZA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
CASE NO. 96-2199

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RESPONDENT'S BRIEF ON JURISDICTION

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## INTRODUCTION

Respondent, The State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Dade County. Petitioner was the appellant and the defendant, respectively in the lower courts. The parties, in this brief, will be referred to as they appear before this Honorable Court.

The symbol "App. A" refers to the appendix Respondent had attached to its jurisdictional brief. Unless otherwise indicated, all emphasis has been supplied by Respondent.

## STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts to the extent that it is accurate and nonargumentative.

## SUMMARY OF THE ARGUMENT

Respondent respectfully submits that this Court lacks jurisdiction to review this case.

The decision in State v. Johans, 613 So. 2d 1319 (Fla. 1993), addressing the procedures to be used when a party challenges a peremptory strike, later refined in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), do not hold that the procedural guidelines presented are to be interpreted as a rigid set of rules which must be followed, without the slightest deviation, in every case under any set of circumstances. To the contrary, this Court made clear in Melbourne that the guidelines given for addressing such challenges were not to be viewed as a rigid set of rules to be followed in every case. The guidelines were designed to be utilize with reason and common sense, not to create a reversible error trap. Id. at 765. (App. A:3). Thus, the Third District Court of Appeals decision finding that the lower court did not err in utilizing its common sense and articulating the gender-neutral reason in support of the peremptory strike, which was clear from the record, is not in conflict with Johans, Melbourne, or Rivera v. State, 670 So. 2d 1163 (Fla. 4th DCA 1996).

## ARGUMENT

THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT IN MELBOURNE v. STATE, 679 So. 2d 759 (Fla. 1996) OR STATE v. JOHANS, 613 So. 2d 1319 (Fla. 1993) OR THE FOURTH DISTRICT COURT OF APPEALS DECISION IN RIVERA v. STATE, 670 So. 2d 1163 (Fla. 4th DCA 1996) ON THE SAME QUESTION OF LAW. (Restated.)

This Court lacks jurisdiction to decide this case because the decision below does not present the necessary express and direct conflict wherein the discretionary jurisdiction of this Court may be sought.

This Court, pursuant to Art. V, § 3(b)(3), Fla. Const., has discretionary subject matter jurisdiction over any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law". Times Publishing Company v. Russell, 615 So.2d 158 (Fla. 1993); Fla.R.App.P. 9.030(a)(2).

Here the Third District Court found "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." (App. A:1). The Court went on to state that "[w]e 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." (App.A:1) The Court concluded by stating "[i]t defies reason and makes no sense to require a trial court, when it is engaged in the proper and thorough rigors of a *Neil*[1] 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.'" (App. A:1).

Contrary to Petitioner's claim this decision is not in direct and express conflict with the decisions in State v. Johans, 613 So. 2d 1319 (Fla. 1993); Melbourne v. State, 679 So. 2d 759 (Fla. 1996; or Rivera v. State, 670 So. 2d 1163 (Fla. 4th DCA 1996).

In State v. Johans, 613 So. 2d 1319 (Fla. 1993),(App. A:2), this Court was addressing the question of what relief should be granted in situations were the trial court does not conduct a proper *Neil* inquiry. This Court held the proper remedy was to reverse and remand for a new trial. In reaching this decision, this Court addressed the burden on the challenging party to show that there is a strong likelihood that the juror was challenged solely on the basis of race. Id. at 1321. The defendant had

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

challenged the State's strike of an African-American venire member. The trial court allowed the strike on the grounds the defendant had not met his threshold burden sufficient to trigger an inquiry. The trial court noted that this was only the first strike of an African-American by the State and there were others remaining in the pool of potential jurors. Id.at 1320. Due to the confusion as to what amounted to a showing of a "strong likelihood" that the strike was being used in a discriminatory manner, this Court held 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." Id. at 1321. Regarding the burden of the striking party, this Court in Johans held that the "race-neutral justification for a peremptory challenge cannot be inferred merely from circumstances such as the composition of the venire or the jurors ultimately seated." Id. Hence, the trial court should have continued with an inquiry.

That opinion does not directly and expressly conflict with the instant decision as nothing in Johans directly or expressly holds that it is improper for the trial court to articulate the gender-neutral reason for a peremptory strike when the record clearly supports that reason.

This Court's decision in Melbourne v. State, 679 so. 2d 759 (Fla, 1996),(App. A:3), further explained the guidelines to be employed in addressing *Neil* challenges as follows:

> 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 venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met, the court must ask the proponent of the strike to explain the reason for the strike.

Id. at 764. After setting forth these guidelines, this Court explained that "[v]oir dire proceedings are extraordinarily rich in diversity and **no rigid set of rules will work in every case. . .** The right to an impartial jury . . . is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense." Id. at 765.

The Third District Court relied on this language in its opinion stating "[i]t 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.'" (App. A:1). Hence, the opinion in Melbourne is not directly and expressly in conflict with the instant decision as Melbourne holds that strict adherence to the guidelines is not required, as a vast diversity of circumstances may be present in voir dire proceedings which could justify deviation from the guideline procedures. As the Third District Court pointed out in its opinion, under the exhaustive circumstances of this voir dire, it was not improper for

the trial court, using common sense, to elucidate the gender-neutral reason for the strike that the veniremember was a recovering alcoholic.

This Court pointed out in Melbourne, that the right to an impartial jury should not be safeguarded by a maze of reversible error traps, however, under Petitioner's interpretation that is exactly what the guidelines would become. Petitioner's interpretation would require rigid adherence to the guidelines in every case and under every set of circumstances and the failure to so follow the guidelines would be reversible error. However, because this is not the holding in Melbourne, as shown above, that decision is not directly and expressly in conflict with the decision of the Third District Court of Appeal.

Finally, the Petitioner also cites to the Fourth District Court of Appeal decision in Rivera v. State, 670 So. 2d 1163 (Fla. 4th DCA 1996),(App. A:4), as being expressly and directly in conflict with the instant case. However, the opinion in Rivera merely addresses the threshold burden of the party making the Neil challenge to a peremptory strike and ultimately holds that regardless of the initial burden the gender-neutral reasons given for the strike were sufficient to meet the requirements of Johans and Neil. Id. At 1165-66. Nothing in the Rivera opinion stands for the proposition that under no circumstances is a trial court

allowed to articulate the reasons for a peremptory strike. The Rivera decision is not in conflict with the instant opinion.

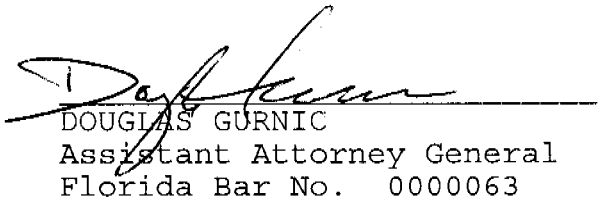
Therefore, the Third District Court of Appeals decision finding that the lower court did not err in utilizing its common sense and articulating the gender-neutral reason in support of the peremptory strike, which was clear from the record, is not in direct and express conflict with Johans, Melbourne, or Rivera. That being so, this Court should deny discretionary jurisdiction to review the decision of the Third District Court of Appeal. See Reaves v. State, 485 So. 2d 829(Fla. 1986).

## CONCLUSION

Wherefore, Petitioner having failed to presented any legitimate basis for the invocation of this Court's discretionary jurisdiction, Respondent respectfully requests that this Honorable Court decline to accept discretionary jurisdiction in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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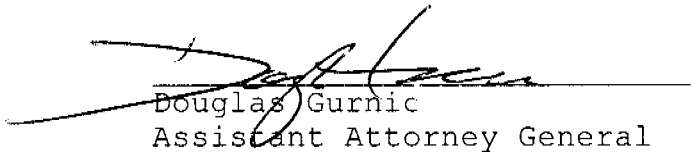
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON JURISDICTION was furnished by U.S. Mail to Louis K. Nicholas II, Esq, SPECIAL ASSISTANT PUBLIC DEFENDER, 780 N.W. 42 Avenue, Suite 300, Miami, Florida 33126-5597 on this 29th day of October, 1997.



Douglas Gurnic
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO.

GERARDO PLAZA,

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ON PETITION FOR DISCRETIONARY REVIEW
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CASE NO. 96-2199

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# RESPONDENT'S APPENDIX TO ITS BRIEF ON JURISDICTION

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IN THE FLORIDA SUPREME COURT

**GERARDO PLAZA,**

Appellant, LOWER COURT NO.96-2199

vs.

**THE STATE OF FLORIDA,**

Appellee.
_____/

**INDEX TO APPENDIX**

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. Allen*, 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.

* * *

**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. Buter-

***1319** 613 So.2d 1319

18 Fla. L. Week. S124

**STATE of Florida, Petitioner,**
**v.**
**Warren A. JOHANS, Respondent.**

No. 79046.
Supreme Court of Florida.
Feb. 18, 1993.

Defendant was convicted in the Circuit Court, Marion County, Victor J. Musleh, J., of, inter alia, attempted sexual battery, and he appealed. The District Court of Appeal, 587 So.2d 1363, reversed and remanded. On application for review, the Supreme Court, Harding, J., held that: (1) Neil inquiry is required when objection is raised that peremptory challenge is being used in racially discriminatory manner, and (2) failure to hold Neil hearing necessitated reversal and remand for new trial.

Approved and remanded.

McDonald, J., concurred in part, dissented in part, and filed opinion.

1. JURY ⚿33(5.15)
   230 ----
   230II Right to Trial by Jury
   230k30 Denial or Infringement of Right
   230k33 Constitution and Selection of Jury
   230k33(5) Challenges and Objections
   230k33(5.15) Peremptory challenges.

   Formerly 230k33(5.1)
Fla. 1993.
There is initial presumption that peremptory challenges will be exercised in nondiscriminatory manner.

2. JURY ⚿33(5.15)
   230 ----
   230II Right to Trial by Jury
   230k30 Denial or Infringement of Right
   230k33 Constitution and Selection of Jury
   230k33(5) Challenges and Objections
   230k33(5.15) Peremptory challenges.

   Formerly 230k33(5.1)

[See headnote text below]

2. JURY ⚿121
   230 ----
   230V Competency of Jurors, Challenges, and Objections
   230k114 Challenge to Panel or Array, and Motion to Quash Venire
   230k121 Trial and determination.
Fla. 1993.
Neil inquiry, at which state must provide racially neutral justification for peremptorily striking juror, is required when objection is raised that peremptory challenge is being used in racially discriminatory manner; defendant need not show "strong likelihood" that juror has been challenged only because of race.

3. JURY ⚿33(5.15)
   230 ----
   230II Right to Trial by Jury
   230k30 Denial or Infringement of Right
   230k33 Constitution and Selection of Jury
   230k33(5) Challenges and Objections
   230k33(5.15) Peremptory challenges.

   Formerly 230k33(5.1)
Fla. 1993.
State's striking of only African-American venire member initially examined by both parties, without any certainty that any African Americans would be seated on jury panel, was sufficient to raise issue of racial discrimination sufficient to require state to proffer race-neutral explanation for strike, in prosecution of black defendant accused of committing sexual offense against white victim; fact that there were other African-Americans in jury pool, and that one African-American actually sat on jury, did not relieve state of minimal burden of justifying peremptory challenge.

4. CRIMINAL LAW ⚿1166.16
   110 ----
   110XXIV Review
   110XXIV(Q) Harmless and Reversible Error
   110k1166.5 Conduct of Trial in General
   110k1166.16 Impaneling jury in general.
Fla. 1993.
Failure to hold Neil hearing, to determine if state had race-neutral explanation for peremptory strike of African-American juror, necessitated reversal and remand for new trial.

***1320** Robert A. Butterworth, Atty. Gen. and Nancy Ryan, Asst. Atty. Gen., Daytona Beach, for petitioner.

James B. Gibson, Public Defender; and M.A. Lucas and Kenneth Witts, Asst. Public Defenders, Daytona Beach, for respondent.

HARDING, Justice.

We have for review Johans v. State, 587 So.2d 1363, 1366 (Fla. 5th DCA 1991), in which the Fifth District Court of Appeal certified "conflict in regard to the form of relief afforded an appellant when the trial court fails to conduct the necessary Neil inquiry." (FN1) We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. The district court noted conflict based upon this Court's approval in Reynolds v. State, 576 So.2d 1300 (Fla.1991), of Parrish v. State, 540 So.2d 870 (Fla. 3d DCA), review denied, 549 So.2d 1014 (Fla.1989) and Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987), review dismissed, 525 So.2d 881 (Fla.1988).

The State charged Warren Johans with burglary of a dwelling with an accompanying battery (FN2) and attempted sexual battery while armed. (FN3) During voir dire, the State peremptorily challenged the only African-American among the initial fourteen potential jurors drawn from the venire. Defense counsel objected to the State's challenge on the ground that the State was using its peremptory challenge in a racially discriminatory manner. In support of its objection, the defense noted that both the defendant and the challenged juror were African-American, that the victim was Caucasian, and that the charge of attempted sexual battery was historically emotionally charged when a defendant is African-American and the victim is Caucasian.

The State responded that it had used three of its peremptory challenges to strike Caucasians prior to challenging the African-American, and thus had not used its challenges in a racially discriminatory manner. In addition, the State argued that the defendant failed to meet the threshold burden imposed by Neil, which requires the complaining party to show that there is a strong likelihood the juror has been challenged solely on the basis of race. Thus, the State asserted that the trial court was not required to conduct a Neil inquiry.

The trial court concluded that, because the State had struck only one African-American, the defendant had not met the threshold burden required to trigger a Neil inquiry. Moreover, the trial court noted that because the venire contained other African-Americans that could be called as potential jurors, the defendant could raise the issue again if the facts showed the State was using its peremptory challenges improperly. Consequently, the trial judge allowed the State to strike the challenged juror without providing a racially neutral justification.

Nine more potential jurors were eventually examined and an African-American ***1321** was selected from that group to serve as a juror. Johans' jury was made up of individuals selected from both groups that were examined. At the conclusion of the trial, the jury found Johans guilty as charged.

On appeal, the district court found that the trial court erred by failing to conduct a Neil inquiry upon the objection to the State's peremptory challenge of the African-American venire member. The district court reversed Johans' convictions and remanded for a new trial. However, the district court noted that conflict existed as to the proper form of relief under such circumstances, and thus certified the case to this Court.

[1] In Florida, there is an initial presumption that peremptories will be exercised in a nondiscriminatory manner. Neil, 457 So.2d at 486. Consequently, we have held that a party concerned about the other party's use of peremptory challenges must make a timely objection, demonstrate on the record that the challenged person or persons are members of a distinct racial group, and show that there is a strong likelihood that those individuals have been challenged solely because of their race. Id. However, the case law that has developed in this area does not clearly delineate what constitutes a "strong likelihood" that venire members have been challenged solely because of their race. Compare State v. Slappy, 522 So.2d 18 (Fla.) (number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988) with Reynolds v. State, 576 So.2d 1300 (Fla.1991) (striking one African-American venire member who was sole minority available for jury service created strong likelihood).

[2] 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.

[3] Because our holding is prospective only in application, we must analyze the instant case under the Neil standard. The record shows that, as required by Neil, Johans' counsel made a timely objection and demonstrated on the record that the challenged person was a member of a distinct racial group. Therefore, the pertinent question is whether there was a showing of a "strong likelihood" that the venire member was being challenged solely because of race. The relevant issue in this inquiry is whether any juror has been excused because of his or her race, independent of any other juror. See Slappy, 522 So.2d at 21. Here, the State struck the only African-American venire member initially examined by both parties without any certainty that any African-Americans would be seated on the jury panel, thus creating, at best, doubt as to whether the threshold had been met. In Slappy, we stated that " any doubt as to whether the complaining party has met its initial burden should be resolved in [the complaining ] party's favor." 522 So.2d at 22 (emphasis added). Thus, we find that even under the Neil "strong likelihood" standard the trial court erred in failing to conduct a Neil inquiry.

The State argues that because there were other African-Americans in the jury pool, and one African-American was eventually seated on Johans' jury, the trial judge did not err by failing to require the State to give a race-neutral reason for the strike. We reject this argument. A race-neutral justification for a peremptory challenge cannot be inferred merely from circumstances such as the composition of the venire or the jurors ultimately seated. The burden imposed on the party required to provide a race-neutral justification is, at worst, minimal. Reynolds, 576 So.2d at 1301. As this Court explained in Hall v. Daee:

> It requires only a minute or two for a party to indicate valid, nondiscriminatory reasons for excluding a potential juror. ***1322.** Once articulated, the trial court is in the best position to evaluate the neutrality of the proffered reasons, and its conclusion in this regard will be accorded deference on appeal. However, where no inquiry is conducted, "[d]eference cannot be shown to a conclusion that was never made."
>
> 602 So.2d 512, 516 (Fla.1992) (citation omitted) (alteration in original) (quoting Reynolds v. State, 576 So.2d at 1302).

This Court has acknowledged the fact that the peremptory challenge is "uniquely suited as a tool to mask true motives; and this mask becomes especially opaque when a peremptory strike eliminates the only minority venire member available for jury service." Reynolds, 576 So.2d at 1301. "Florida law [does] not require the improper use of peremptory challenges to be 'systematic' in order to establish a prima facie case of racial discrimination." Hall, 602 So.2d at 515. We have also held that the proper time for exacting race-neutral reasons for striking a potential juror is during voir dire. Stokes v. State, 548 So.2d 188, 196 (Fla.1989).

[4] 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 objection, the trial judge must conduct a Neil inquiry. See Blackshear v. State, 521 So.2d 1083, 1084 (Fla.1988). As we noted in Blackshear, a hearing conducted well after the trial is untimely. Id. 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.

Accordingly, we approve the decision below and remand the cause for further proceedings consistent with this decision. We approve the opinion in Parrish, wherein the court reversed the conviction and remanded the cause for a new trial. We disapprove the opinion in Pearson to the extent it is inconsistent with this opinion.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW,

GRIMES and KOGAN, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion.

McDONALD, Justice, concurring in part, dissenting in part.

I concur with the majority opinion except that portion which holds 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. I believe that in circumstances where a trial judge failed to conduct an inquiry in violation of State v. Neil, 457 So.2d 481 (Fla.1984), the cause should be remanded to the trial judge to conduct such a hearing. If circumstances, passage of time, or the evidence prevent a finding that the challenge was based on race neutral grounds, then a new trial should be ordered, but the affected party should be afforded an opportunity to factually determine that issue before a new trial is mandated.

If a Neil inquiry was conducted and the trial judge erroneously allowed a peremptory challenge to stand, then a new trial is required. This scenario is different from a no hearing situation.

FN1. State v. Neil, 457 So.2d 481 (Fla.1984).

FN2. Secs. 810.02(1)-(2)(a), 784.03, Fla.Stat. (1989).

FN3. Secs. 777.04(1), (4), 794.011(3), Fla.Stat. (1989).

*759 679 So.2d 759

21 Fla. L. Weekly S358

**Jeanie H. MELBOURNE, Petitioner,**
**v.**
**STATE of Florida, Respondent.**

No. 86029.
Supreme Court of Florida.
Sept. 5, 1996.

Defendant was convicted of two counts of driving under the influence (DUI) manslaughter and one count of DUI serious bodily injury, in the Circuit Court, Orange County, Michael Cycmanick, J., and defendant appealed. Following grant of petition for writ of habeas corpus for belated appeal due to ineffective assistance of appellate counsel, the District Court of Appeal, 635 So.2d 163, 655 So.2d 126, affirmed. Defendant petitioned for review. The Supreme Court, Shaw, J., held that: (1) "genuine" rather than "reasonable" nonracial basis is needed for peremptory strike; (2) defendant failed to preserve issue for review as to whether state's exercise of peremptory strike of venireperson was race-based; and (3) double jeopardy principles did not preclude defendant's conviction of two counts of DUI manslaughter and one count of DUI with serious bodily injury, even though convictions arose from single violation of DUI statute.

Approved.

1. CONSTITUTIONAL LAW ⚖221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

1. JURY ⚖33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla. 1996.

Under section of State Constitution guaranteeing right to impartial jury, and under equal protection provisions of State and Federal Constitutions, party objecting to other side's use of peremptory challenge on racial grounds must: (a) make timely objection on that basis; (b) show that venireperson is member of distinct racial group; and (c) request that court ask striking party its reason for strike. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§ 2, 16.

2. CONSTITUTIONAL LAW ⚖221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

2. JURY ⚖33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla. 1996.

Under section of State Constitution guaranteeing right to impartial jury, and under equal protection provisions of State and Federal Constitutions, party objecting to other side's use of peremptory challenge on racial grounds may satisfy its obligation of making timely objection on that basis by simple objection and allegation of racial discrimination, such as by saying "I object. The strike is racially motivated." U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§ 2, 16.

3. CONSTITUTIONAL LAW ⚖221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

3. JURY ⚖33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla. 1996.
Under section of State Constitution guaranteeing right to impartial jury, and under equal protection provisions of State and Federal Constitutions, once party objecting to other side's use of peremptory challenge on racial grounds meets requirements of making timely objection on that basis, showing that venireperson is member of distinct racial group, and requesting that court ask striking party its reason for strike, burden of production shifts to proponent of strike to come forward with race-neutral explanation; if explanation is facially race-neutral and court believes that, given all circumstances surrounding strike, explanation is not a pretext, strike will be sustained. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§ 2, 16.

4. CONSTITUTIONAL LAW ⚷221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

4. JURY ⚷33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla. 1996.
Under section of State Constitution guaranteeing right to impartial jury, and under equal protection provisions of State and Federal Constitutions, explanation for striking venireperson, who is member of distinct racial group, will be deemed race-neutral as long as no predominant discriminatory intent is apparent on its face. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§ 2, 16.

5. CONSTITUTIONAL LAW ⚷221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

5. JURY ⚷33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla. 1996.
Under section of State Constitution guaranteeing right to impartial jury, and under equal protection provisions of State and Federal Constitutions, if explanation for exercising peremptory strike against venireperson, who is member of distinct racial group, is not facially race-neutral, the inquiry is over and strike will be denied. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§ 2, 16.

6. CONSTITUTIONAL LAW ⚷221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

6. JURY ⚷33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla. 1996.
Under section of State Constitution guaranteeing right to impartial jury, and under equal protection provisions of State and Federal Constitutions, relevant circumstances as to whether explanation for exercising peremptory strike against venireperson is pretext for racial discrimination include, but are not limited to, the following factors: racial make-up of venire; prior strikes exercised against same racial group; strike based on reason equally applicable to unchallenged venireperson; or singling out venireperson for special treatment. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§

2, 16.

7. CONSTITUTIONAL LAW ⚷221(4)
92 ----
92XI Equal Protection *759 of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

7. JURY ⚷33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.

Fla. 1996.

Under section of State Constitution guaranteeing right to impartial jury, and under equal protection provisions of State and Federal Constitutions, court's focus in determining whether explanation for striking venireperson is facially race-neutral and is not pretextual is not on reasonableness of explanation but rather its genuineness. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§ 2, 16.

8. CONSTITUTIONAL LAW ⚷221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

8. JURY ⚷33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.

Fla. 1996.

Provisions of State Constitution guaranteeing rights to impartial jury and to equal protection do not require that explanation for exercising peremptory strike against venireperson be nonracial and reasonable, but only that it be truly nonracial; reasonableness is simply one factor that court may consider in assessing genuineness. West's F.S.A. Const. Art. 1, §§ 2, 16.

9. CONSTITUTIONAL LAW ⚷221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

9. JURY ⚷33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.

Fla. 1996.

Under section of State Constitution guaranteeing right to impartial jury, and under equal protection provisions of State and Federal Constitutions, burden of persuasion never leaves opponent of peremptory strike to prove purposeful racial discrimination. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§ 2, 16.

10. JURY ⚷33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.

Fla. 1996.

Peremptory strikes are presumed to be exercised in nondiscriminatory manner.

11. CRIMINAL LAW ⚷1158(3)
110 ----
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(3) Relating to jury.

Fla. 1996.

Trial court's decision on whether peremptory strike has been exercised in racially discriminatory manner turns primarily on assessment of credibility and will be affirmed on appeal unless clearly erroneous.

12.JURY ⚷33(2.10)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.10) In general.
Fla. 1996.
Right to impartial jury guaranteed by State Constitution is best safeguarded not by arcane maze of reversible error traps, but by reason and common sense. West's F.S.A. Const. Art. 1, § 16.

13.CRIMINAL LAW ⚷1043(1)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(1) In general.
Fla. 1996.
Defendant failed to preserve issue for review as to whether state exercised peremptory strike in racially discriminatory manner, where defendant did not renew her objection before the jury was sworn; it was entirely possible that events transpiring subsequent to initial objection caused defendant to become satisfied with jury and abandon her claim.

14.CRIMINAL LAW ⚷1137(1)
110 ----
110XXIV Review
110XXIV(L) Scope of Review in General
110k1135 Parties Entitled to Allege Error
110k1137 Estoppel
110k1137(1) Assent to proceedings.
Fla. 1996.
Defendant was not entitled to new trial on ground that state exercised race-based peremptory challenge to black venireperson, where defense counsel's entire objection was that he was raising challenge and that venireperson was black man, both state and trial court responded that defense, rather than state, had exercised prior strikes against black venirepersons, defense counsel expressed no further objection, and at no time did defense counsel request that court ask state its reason for strike.

15.DOUBLE JEOPARDY ⚷182
135H ----
135HV Offenses, Elements, and Issues Foreclosed
135HV(C) Identity of Parties
135Hk182 Crimes against different victims.
Fla. 1996.
Double jeopardy principles do not preclude multiple convictions arising from single violation of driving under the influence (DUI) statute when injury results to several persons, even though multiple convictions for driving with suspended license are precluded, since there is direct link between driver's intoxication and his or her inability to drive safely, but there is only indirect link between driving with suspended license and safety.

16.DOUBLE JEOPARDY ⚷182
135H ----
135HV Offenses, Elements, and Issues Foreclosed
135HV(C) Identity of Parties
135Hk182 Crimes against different victims.
Fla. 1996.
Double jeopardy principles did not preclude defendant's convictions for two counts of driving under the influence (DUI) manslaughter and one count of DUI with serious bodily injury, even though convictions arose from single violation of DUI statute, where defendant caused death of two persons and injury to a third person.

17.CONSTITUTIONAL LAW ⚷221(4)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(4) Peremptory challenges.

[See headnote text below]

17.JURY ⚷33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla. 1996.
While sections of Florida Constitution guaranteeing right to impartial jury and to equal protection cannot guarantee that every peremptory challenge exercised in Florida will be rational, they can guarantee that each challenge will be nonracial. West's F.S.A. Const. Art. 1, §§ 2, 16.

*762 Terrence E. Kehoe of the Law Offices of Terrence E. Kehoe, Orlando, for Petitioner.

Robert A. Butterworth, Attorney General, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Respondent.

SHAW, Justice.

We have for review *Melbourne v. State,* 655 So.2d 126 (Fla. 5th DCA 1995), which expressly construes a provision of the state and federal constitutions. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const . We approve *Melbourne* as explained herein.

Jeanie Melbourne was driving under the influence (DUI) on June 12, 1992, when she turned in front of an oncoming vehicle, killing two people and injuring a third. She was convicted of two counts of DUI manslaughter and one count of DUI with serious bodily injury. The district court affirmed.

I. PEREMPTORY CHALLENGE

The following discussion took place at voir dire when defense counsel objected to the State's use of a peremptory challenge to strike a black venireperson, Mr. Wells:

Mr. Mason (defense counsel): 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 strike Number 19, your honor.

Mr. Mason: Mr. Dewey Wells, the black man, I would raise a Baxter Johans challenge, J O H A N S. 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 10, 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--

Mr. Mason: I've used seven per Kim.

Melbourne claims that as a result of the above discussion she is entitled a new trial. First, she asserts that the court failed to conduct a proper inquiry into the State's motivation for striking Mr. Wells as required under *State v. Johans,* 613 So.2d 1319 (Fla.1993). Second, she contends that the explanation offered by the State was insufficient under *State v. Neil,* 457 So.2d 481 (Fla.1984), and *State v. Slappy,* 522 So.2d 18 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). We disagree.

*763 A seminal Florida case on this issue is *Neil,* wherein this Court set out a procedure for dealing with racially-motivated peremptory challenges:

[T]rial courts should apply the following test. The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory

challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race [this is step 1]. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race [step 2]. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause.... [The court must then determine whether] the party has actually been challenging prospective jurors solely on the basis of race .... [step 3].

*Neil,* 457 So.2d at 486-87 (footnotes omitted).

Because trial courts had difficulty applying *Neil,* this Court refined the procedure in subsequent cases. We simplified step 1:

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.

*Johans,* 613 So.2d at 1321.

We also required that in step 2 the proponent of the strike demonstrate "a 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for the [strike]," and that in step 3 the judge must decide whether the proffered reasons are "first, neutral and reasonable and, second, not a pretext." *Slappy,* 522 So.2d at 22.

In spite of these refinements, Florida courts have continued to have difficulty in applying *Neil,* particularly following *Johans.* (FN1) The State in the present proceeding has submitted for consideration the recent United States Supreme Court decision in *Purkett v. Elem,* --- U.S. ----, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), wherein that Court summarized its holding in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) :

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.

*Purkett,* --- U.S. at ---- - ----, 115 S.Ct. at 1770-71 (citations omitted).

The United States Supreme Court elaborated on step 2 further:

The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

*Id.* at ----, 115 S.Ct. at 1771 (brackets in original) (quoting *Hernandez v. New York,* 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 ***764** L.Ed.2d 395 (1991)). The Court noted that in step 3 "[the] whole focus [is not] upon the *reasonableness* of the asserted nonracial motive ... [but] rather ... the *genuineness* of the motive .... a finding which turn[s] primarily on an assessment of credibility." *Id.* at ---- - ----, 115 S.Ct. at 1771-72.

In light of *Purkett* and due to the difficulty some Florida courts have had in applying our state law, we set forth the following guidelines to assist courts in conforming with article I, section 16, Florida Constitution, and the equal protection provisions of our state and federal constitutions. These guidelines encapsulate existing law and are to be used whenever a race-based objection to a peremptory challenge is made. The goal of these guidelines is the elimination of racial discrimination in the exercise of peremptory challenges.

[1] [2] 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, (FN2) b) show that the venireperson is a member of a distinct racial group, (FN3) and c) request that the court ask the striking party its reason for the strike. (FN4) If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike. (FN5)

[3] [4] [5] [6] [7] [8] [9] At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). (FN6) If the explanation is facially race-neutral (FN7) and the court believes that, given all the circumstances surrounding the strike, (FN8) the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. (FN9) Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination. (FN10)

[10] [11] [12] Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. (FN11) Accordingly, reviewing courts should keep in mind two principles when enforcing the above guidelines. First, peremptories are presumed to be exercised in a nondiscriminatory manner. (FN12) Second, the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless ***765** clearly erroneous. (FN13) 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.

[13] Applying these principles to the present case, we conclude that Melbourne failed to preserve this issue for review because she did not renew her objection before the jury was sworn. (FN14) Any error could have been corrected easily at that point without compromising the whole trial at the outset. It is entirely possible that events transpiring subsequent to the initial objection caused Melbourne to become satisfied with the jury and abandon her claim.

[14] We address the merits of the claim for instructional purposes only. As noted above, the entire text of defense counsel's objection reads as follows: "I would raise a Baxter Johans challenge, J O H A N S. He's a black man...." Giving these words their plain meaning, defense counsel seemed to be voicing a general objection on racial grounds to the State's strike. Both the State and trial court responded that the defense, not the State, had exercised prior strikes against black jurors. Defense counsel seemed satisfied, expressing no further objection ("I have nothing else to say."). At no time did defense counsel request that the court ask the State its reason for the strike. To require an entire new trial under these circumstances would do nothing to further the principles underlying *Neil* but rather would erode the legitimacy of that decision. We find no error.

## II. DOUBLE JEOPARDY

[15] [16] As noted above, Melbourne caused the death of two persons and injury of a third for which she was convicted of two counts of DUI manslaughter and one count of DUI with serious bodily injury. Melbourne claims as her second issue that these multiple convictions violate double jeopardy because the convictions arise from a single violation of the DUI statute. We disagree.

This Court has held that only one conviction can arise from a single violation of the driving with a suspended license statute even though injury results to several persons. *Boutwell v. State,* 631 So.2d 1094 (Fla.1994). Florida courts also have held, however, that multiple convictions can arise from a single violation of the DUI statute where injury results to several persons. *See, e.g., Wright v. State,* 592 So.2d 1123 (Fla. 3d DCA 1991), *quashed on other grounds,* 600 So.2d 457 (Fla.1992). The different constructions of these two statutes, we conclude, are not contradictory; the link between the statutory violation and resultant injury is fundamentally different.

In the case of driving with a suspended license, the link between the violation and injury is indirect--the suspended license in no way causes the driver's carelessness or negligence. To allow multiple convictions for a single violation of this statute would be illogical because the violation does not *cause* injury to any of the victims. In the case of DUI, on the other hand, the link is direct--the driver's intoxication results in his or her inability to drive safely. The DUI driver may sustain multiple convictions because the violation causes injury to each victim. We find no error.

III. CONCLUSION

[17] Based on the foregoing, we approve the result in *Melbourne* on the above issues. (FN15) To the extent that *Slappy* and its progeny require a "reasonable" rather than a "genuine" nonracial basis for a peremptory strike, we recede from those cases. While the Florida Constitution cannot guarantee that every peremptory challenge exercised in ***766.** Florida will be rational, it can guarantee that each will be nonracial.

It is so ordered.

KOGAN, C.J., and OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

FN1. *See, e.g., Ratliff v. State,* 666 So.2d 1008, 1014 (Fla. 1st DCA 1996) ("Beginning with step two moves the trial forward more expeditiously."); *Holiday v. State,* 665 So.2d 1089, 1090 (Fla. 3d DCA 1995) ("[A]n objector must do *something* more than merely objecting....").

FN2. *State v. Neil,* 457 So.2d 481, 486 (Fla.1984). A simple objection and allegation of racial discrimination is sufficient, e.g., "I object. The strike is racially motivated."

FN3. *Id.*

FN4. *See generally State v. Johans,* 613 So.2d 1319 (Fla.1993).

FN5. *See generally id.* at 1321 ("[W]e 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."). *Johans* eliminated the requirement that the opponent of the strike make a prima facie showing of racial discrimination.

FN6. The explanation will be deemed race-neutral for step 2 purposes as long as no predominant discriminatory intent is apparent on its face. *See generally Purkett v. Elem,* --- U.S. ----, ----, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995).

FN7. If the explanation is not facially race-neutral, the inquiry is over; the strike will be denied.

FN8. Relevant circumstances may include--but are not limited to--the following: the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment. *See generally State v. Slappy,* 522 So.2d 18 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988).

FN9. The Florida Constitution does not require that an explanation be nonracial *and* reasonable, only that it be truly nonracial. Reasonableness is simply one factor that a court may consider in assessing genuineness. *See generally Purkett,* --- U.S. at ---- - ----, 115 S.Ct. at 1771-72.

FN10. *See id.* at ----, 115 S.Ct. at 1771.

FN11. *See generally Hernandez v. New York,* 500 U.S. 352, 374, 111 S.Ct. 1859, 1874, 114 L.Ed.2d 395 (1991) (O'Connor, J., concurring in judgment) ("Absent intentional discrimination ... parties should be free to exercise their peremptory strikes for any reason, or no reason at all. The peremptory challenge is, 'as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' *Lewis v. United States,* 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011 (1892) (internal quotation marks omitted).").

FN12. *Neil,* 457 So.2d at 486.

FN13. *See, e.g., Ratliff v. State,* 666 So.2d 1008 (Fla. 1st DCA 1996).

FN14. *See Joiner v. State,* 618 So.2d 174, 176 (Fla.1993) ("[C]ounsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection.").

FN15. We agree with Melbourne on her third claim, i.e., that the DUI judgment contains a scrivener's error. We order that reference to section 877.111, Florida Statutes (1991), be struck from the judgment.

*1163 670 So.2d 1163

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**Edgardo Luis RIVERA, Appellant,**
**v.**
**STATE of Florida, Appellee.**

No. 94-3516.
District Court of Appeal of Florida,
Fourth District.

April 3, 1996.

Defendant was convicted of aggravated battery on pregnant woman following jury trial in the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County, Larry Schack, J., and he appealed. The District Court of Appeal, Pariente, J., held that: (1) prosecutor's request for gender-neutral reason for exercise by defense of peremptory strike against woman did not constitute objection or threshold showing which would trigger *Neil* inquiry as to whether challenge was being used in gender-based discriminatory manner, and (2) in any event, sufficient gender-neutral reason was given by pointing out that juror was deputy clerk employed in the jury room at courthouse and knew the participants.

Reversed.

1. CONSTITUTIONAL LAW ⚿221(2)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
92k221(2) Method of selection; jury lists.

[See headnote text below]

1. CONSTITUTIONAL LAW ⚿224(4)
92 ----
92XI Equal Protection of Laws
92k224 Sex Discrimination
92k224(4) Constitution of juries.

[See headnote text below]

1. JURY ⚿33(1.10)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.2) Particular Groups, Inclusion or Exclusion
230k33(1.10) In general.

[See headnote text below]

1. JURY ⚿33(1.15)
92 ----
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k221 Constitution of Juries
230k33(1.15) Race.

[See headnote text below]

1. JURY ⚿33(1.25)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.2) Particular Groups, Inclusion or Exclusion
230k33(1.25) Sex.
Fla.App. 4 Dist. 1996.

Potential jurors as well as litigants have equal protection right to jury selection procedures free from stereotypical presumptions that reflect and reinforce patterns of historical discrimination, and this prohibition extends to discrimination based on ethnicity and gender as well as race and, in Florida, is also based on guarantee of impartial jury. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, §§ 2, 16.

2. JURY ⚿33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla.App. 4 Dist. 1996.

Same procedural safeguards set forth in *Johans* to prevent racial discrimination in jury selection apply to gender-based discrimination, and thus when objection is made that peremptory challenge is being used in a gender-based discriminatory manner, inquiry pursuant to the procedure under *Neil* is required.

3. JURY ⚖33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla.App. 4 Dist. 1996.

There is initial presumption that peremptory challenges will not be exercised in invidiously discriminatory manner, and strike will be deemed valid unless objection is made that challenge is being used in discriminatory manner on basis of race, gender or any other cognizable class entitled to protection.

4. JURY ⚖33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla.App. 4 Dist. 1996.

Prosecutor's statement to court after defense exercised peremptory challenge, "we would ask for a gender-neutral reason" did not constitute either objection or threshold showing which would trigger inquiry as to whether challenge was being used in discriminatory manner.

5. JURY ⚖33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla.App. 4 Dist. 1996.

Fact that prospective juror being challenged is of particular gender, standing alone, should be insufficient to trigger inquiry under *Neil* as to whether peremptory challenge is being used in gender-based discriminatory manner, without either party objecting with some basis that the challenge is being used in such manner.

6. JURY ⚖33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla.App. 4 Dist. 1996.

Number of strikes used to exclude minority jurors is not dispositive of whether discrimination has occurred in process of exercising peremptory challenges, nor is fact that member of minority class in question has been seated as a juror or alternate.

7. JURY ⚖33(5.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) Peremptory challenges.
Fla.App. 4 Dist. 1996.

Even assuming there was sufficient predicate to trigger inquiry as to whether defendant, in prosecution for aggravated battery on pregnant woman, was exercising peremptory strike in a gender-based discriminatory manner, explanation that juror was deputy clerk employed in jury room at the courthouse who knew the participants and worked in the very system that would be responsible for trying defendant constituted clear and reasonably specific gender-neutral reason, and failure of defense counsel to inquire further about whether juror could be fair and impartial did not constitute evidence that reason supplied was pretextual.

***1164** Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Larry Schack, Judge. L.T. Case No. 94-915-CF.

Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

PARIENTE, Judge.

Defendant appeals his conviction for aggravated battery on a pregnant woman. We reverse defendant's conviction because the trial court improperly prevented him from exercising a peremptory challenge to strike a female juror employed in the courthouse as a deputy clerk.

Following the questioning of prospective jurors, defendant sought to exercise his first peremptory

challenge to strike juror Elizabeth Maxwell. The prosecution stated that "we would ask for a gender-neutral reason," after which the trial court requested defense counsel to state her basis for the challenge. Defense counsel explained that the juror worked as a deputy clerk in the courthouse, knew everyone connected with the case and that there is "a built-in prejudice toward the State." Defense counsel reminded the trial court that she was seeking to utilize a peremptory challenge and not seeking dismissal for cause.

Juror Maxwell worked as a deputy clerk in the jury room. The parties' familiarity with juror Maxwell and her familiarity with them was quite apparent from the beginning of jury selection. While the judge was initially going through the list of prospective jurors to be sure that he could pronounce their names correctly, he recognized juror Maxwell and stated: "Miss Maxwell, good afternoon, you'll get to see it from a different perspective today." During the court's voir dire, the judge asked the prospective jurors who either knew or were related to the defendant, the attorneys or the court personnel to raise their hands. When the judge got to juror Maxwell, the judge stated, "And Ms. Maxwell, I think you know everybody here."

Even in light of her position in the courthouse and her familiarity with the individuals involved (except presumably defendant), the trial court did not permit the defense to exercise a peremptory challenge. In denying the challenge, the trial court stated that defendant had not inquired further into whether juror Maxwell's employment status would have any effect on her ability to be fair and impartial after juror Maxwell had told the ***1165** trial court that she could be fair and impartial.

[1] The prohibition against race-based discrimination has been extended to gender, *see J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 1430, 128 L.Ed.2d 89, 101-08 (1994); *Abshire v. State,* 642 So.2d 542 (Fla.1994), as well as ethnicity, *State v. Alen,* 616 So.2d 452 (Fla.1993) . This prohibition applies equally to peremptory challenges exercised by the state or the defendant. *See Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *State v. Aldret,* 606 So.2d 1156 (Fla.1992). Potential jurors, as well as litigants, have an equal protection right to jury selection procedures free from stereotypical presumptions that reflect and reinforce patterns of historical discrimination. *J.E.B.,* 511 U.S. at ----, 114 S.Ct. at 1421, 128 L.Ed.2d at 105.

In Florida this right is not based only on the Equal Protection Clause of the Fourteenth Amendment and the Florida Constitution, article I, section 2, but it is also based on the "guarantee of an impartial jury drawn from a cross section of the community contained in article I, section 16." *Aldret,* 606 So.2d at 1157. As explained in *Abshire:*

> Jury service is a privilege accorded all citizens who meet certain qualifications and the right to an impartial jury is granted to every defendant who is entitled to a trial by jury. To extend or restrict this privilege based solely on the basis of gender is to foster the sex-based stereotypes that have long impeded the progress of women in our judicial system.
>
> *Abshire,* 642 So.2d at 544.

[2] The same procedural safeguards set forth in *State v. Johans,* 613 So.2d 1319 (Fla.1993), designed to prevent racial discrimination in jury selection, likewise apply to gender-based discrimination. *See Abshire; Johans.* When an objection is made that a peremptory challenge is being used in a gender-based discriminatory manner, a *Neil* (FN1) inquiry is required. *Abshire; Johans.*

[3] Under Florida law, there is an initial presumption that peremptories will not be exercised in an invidiously discriminatory manner. *See Neil.* A peremptory strike will be deemed valid unless an objection is made that the challenge is being used in a discriminatory manner on the basis of race, gender or any other cognizable class entitled to protection under *Neil* and its progeny. *See Johans,* 613 So.2d at 1321; *Abshire,* 642 So.2d at 544.

[4] Here the prosecutor did not state an objection that the peremptory challenge was being used in a gender-based discriminatory manner. Rather, he simply stated: "Your Honor, we would ask for a gender-neutral reason." The prosecution's statement did not constitute either an objection or a threshold showing which would trigger the *Neil* inquiry envisioned by *Johans.*

In *Portu v. State,* 651 So.2d 791 (Fla. 3d DCA), *review denied,* 658 So.2d 992 (Fla. 3d DCA 1995),

the third district held that no *Neil* inquiry was triggered by the state's merely noting that the juror was of Hispanic descent. Because the state failed to supply the threshold information necessary for an objection to provoke judicial inquiry into the basis for a peremptory challenge, the third district held that the peremptory challenge should have been granted. *See also Slaton v. State,* 666 So.2d 598 (Fla. 3d DCA 1996); *cf. Johans* (trial court must make inquiry if a party objects on grounds that even a single peremptory challenge is racially motivated).

Gender as a classification comprises 100% of the population. It is thus far from remarkable that the first defense strike would be a female. In painting a total picture of jury selection in this case, it also bears noting that the first peremptory challenge from the prosecution was also a woman and that both the defense and prosecution had agreed to strike three other jurors (two women and one man) for cause. No pattern of gender-based discrimination emerges nor does there appear a rational reason to rebut the initial presumption that the peremptories were being exercised in a nondiscriminatory manner. ***1166** *Cf. Abshire* (prosecutor manifested desire to exclude women from jury); *Laidler v. State,* 627 So.2d 1263 (Fla. 4th DCA 1993)(prosecutor made no secret of her desire to eliminate all women from jury).

[5] [6] The fact that a party has challenged a woman or a man, standing alone, should be insufficient to trigger a *Neil* inquiry without the prosecution or defense objecting with some basis that the peremptory challenge is being used in a discriminatory manner. (FN2) Otherwise, an opponent of the strike could always object and require the proponent to explain its use of a peremptory challenge because, with the exclusion of race, gender and ethnicity, all identifiable groups of the population are now protected from intentional invidious discrimination.

[7] Even assuming that there was a sufficient predicate to trigger a *Neil* inquiry, the reason provided by defendant constituted a clear and reasonably specific gender-neutral reason to meet the requirements of *Johans* and *Neil.* The juror was a deputy clerk employed in the jury room at the courthouse who knew the participants and worked in the very system that would be responsible for trying this defendant. (FN3) Far from being a subterfuge for gender-based discrimination, defendant's concerns with having juror Maxwell on his jury were bona fide and rationally-based. As explained by our supreme court in *State v. Slappy,* 522 So.2d 18, 22 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), the reasons given for exercising a peremptory challenge need not be equivalent to a challenge for cause.

Defendant points out that persons who are inextricably intertwined with the judicial system are statutorily disqualified--the clerks of court, all judges and the members of the Clemency Board. *See* § 40.013(2)(a), Fla.Stat. (1995) ("Neither the Governor, nor Lieutenant Governor, nor any Cabinet officer, nor clerk of court, or judge shall be qualified to be a juror"). Defendant argues that, as a deputy clerk, juror Maxwell is called upon to perform various delegated duties of the clerk. This connection supplies an additional reason for holding that juror Maxwell's employment status supplied a gender-neutral reason for the exercise of a peremptory challenge. *Cf. Gonzalez v. State,* 569 So.2d 782 (Fla. 4th DCA 1990), *quashed in part on other grounds,* 585 So.2d 932 (Fla.1991) (involvement of a juror's close family member with the law); *Betancourt v. State,* 650 So.2d 1021, 1023 (Fla. 3d DCA), *review denied,* 659 So.2d 272 (Fla.1995) (juror who had served as foreman of another jury supplied race-neutral reason).

There was no contrary evidence that the challenge of juror Maxwell was motivated by discriminatory intent. The trial court erroneously assumed that defense counsel's failure to inquire further about whether juror Maxwell could be fair and impartial constituted evidence that the reason supplied by her was pretextual in some way. But none of the *Slappy* factors indicative of a pretextual strike were present. *See Slappy,* 522 So.2d at 22. Defendant desired to strike juror Maxwell, not because of any expressed biases or prejudices, but because she might very well have a built-in bias or prejudice in favor of the system she worked in daily. This did not disqualify her; this did not rise to the level of a challenge for cause in this case; ***1167.** but, it certainly was a gender-neutral reason to strike an individual.

Judge Schwartz observed in *Betancourt,* "[w]here there is no reason in common sense, legal intuition or the record to overcome 'the presumption that the peremptories will be exercised in a non-discriminatory manner,' " the strike should be allowed. Judge Schwartz' observations in

*Betancourt* are equally applicable to the challenge here; there is "no basis for concluding that the challenge involved the evil proscribed by the *Batson-Neil* rule; that is, that it was based on a 'constitutionally impermissible prejudice.' " 650 So.2d at 1023 (citing *Slappy,* 522 So.2d at 20).

In *Purkett v. Elem,* --- U.S. ----, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), the United States Supreme Court revisited the procedure by which courts should analyze a claim that a party is exercising a peremptory challenge in a racially discriminatory or gender-biased manner. In *Purkett,* the Supreme Court held that, under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), a three-step analysis is required: (1) the opponent must make a prima facie case of invidious discrimination; (2) the burden then shifts to the proponent of the strike to come forward with a race-neutral or gender-neutral explanation; and (3) if any race-neutral or gender-neutral explanation is offered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination. --- U.S. at ----, 115 S.Ct. at 1770; 131 L.Ed.2d at 839. The Supreme Court found that it was reversible error to require the proponent of the strike to come forward with a persuasive explanation. Instead, the Supreme Court held that "[t]he second step of the process does not demand an explanation that is persuasive, or even plausible," and stated that to hold otherwise would impermissibly shift the burden of persuasion. *Id.*

Although our supreme court has not revisited *Johans,* in light of *Purkett,* the case before us, like many we have seen recently, highlights the need to re-examine the threshold showing necessary to shift the burden to the proponent of the strike to demonstrate that the strike is being exercised in a non-discriminatory manner. Prior to *Johans,* before a *Neil* inquiry was required, the opponent of the peremptory challenge needed to demonstrate on the record that there was a strong likelihood that the individual was being challenged because of an invidiously discriminatory motive. *See Johans,* 613 So.2d at 1321. As it stands now, all that is required under *Johans* to shift the burden of proof to the proponent of the strike is an objection that any challenge is being exercised in an invidiously discriminatory manner; that is, on the basis of race, gender or other protected classifications.

At the present time the requirements of United States constitutional law on this subject vary in certain material respects from Florida law as to the threshold showing necessary to trigger the inquiry, the type of reason that will suffice to overcome the initial objection, and where the ultimate burden of persuasion rests. Recently, the first district has certified a question to our supreme court concerning which party bears the burden of proving or disproving the validity of the reasons offered in support of a peremptory challenge after a litigant objects to its basis. *See Ratliff v. Florida,* 666 So.2d 1008 (Fla. 1st DCA 1996).

Here, whether we apply the more stringent burden imposed on the proponent of a strike by *Johans* or apply the three-pronged analysis of *Purkett,* there is nothing in the record to indicate that the peremptory challenge was being used by defendant in other than a non-discriminatory, gender-neutral manner. Accordingly we are compelled to reverse the conviction.

WARNER and POLEN, JJ., concur.

FN1. *See State v. Neil,* 457 So.2d 481, 486 (Fla.1984), *receded from in part, State v. Johans,* 613 So.2d at 1321-22.

***1167** FN2. We recognize that the number of strikes used to exclude minority jurors is not dispositive of whether discrimination has occurred in the process of exercising peremptory challenges. Nor is the fact that a member of the minority class in question has been seated as a juror or an alternate. *See State v. Slappy,* 522 So.2d 18 (Fla.) , *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988); *cf. Reynolds v. State,* 576 So.2d 1300 (Fla.1991) (striking one African-American venire member who was sole minority available for jury service created strong likelihood that juror challenged solely because of race).

FN3. In fact, after juror Maxwell was seated as a member of the jury and preliminary instructions administered, the trial court addressed the following remarks directly to her:

Miss Maxwell, since you work in the Jury Room and work in the court system, it's going to be especially important that you be sure to isolate yourself from anything that has to do with any pending criminal trial; will that be any problem for you, ma'am?