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IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,622

THIRD DISTRICT COURT OF APPEAL CASE NO. 96-2199

L.T. CASE NO. 95-5734A

GERARDO PLAZA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

In this Brief, the parties will be referred to as Gerardo Plaza or Plaza (Petitioner) and The State of Florida or State (Respondent). Citations to the record, with appropriate page numbers, will be referred to as follows:

(R) : Clerk's Record on Appeal. (PP. 1-82).

(T) : Transcript of Proceedings. (PP. 1-1530).

(PB): This Petitioner's Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Gerardo Plaza, was indicted for and convicted of first degree murder, and other charges. (R 1-5, 36-40).

During jury selection, the State exercised a number of challenges against female jurors. The State's peremptory challenges against four female venirepersons prompted Plaza's *Neil* objections premised on gender discrimination.[1]

As to potential juror Ms. Eileen Angulo (T 147-48, 262-64, 340-42, 436-37, 522), in reaction to the defense objection, the trial court refused to conduct a *Neil* inquiry. Instead, the trial judge advocated its own gender-neutral reason for the State's strike. The strike was allowed, absent any inquiry from the State, over defense objection. (T 522-23).

On appeal, Plaza challenged the trial court's failure to conduct a *Neil* inquiry, as to juror Ms. Eileen Angulo, as required by law. Also, Plaza asserted that the State's peremptory challenges to other females were pretextual, based on the entire record.

The Third District Court of Appeal, in its decision rendered September 10, 1997, agreed that the trial court refused to conduct a *Neil* inquiry as to the one female juror. *Plaza v. State*, 699 So. 2d 289, 290 (Fla. 3d DCA 1997). However, the majority found no error in the procedure employed:

> Additionally, we find no error in the trial

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[1] *State v. Neil*, 457 So. 2d 481 (Fla. 1984), *clarified by State v. Castillo*, 486 So. 2d 565 (Fla. 1986), *receded from in part*, *State v. Johans*, 613 So. 2d 1319 (Fla. 1993).

> 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 the entire record of voir dire concerning particular juror, court will not overturn trial court's determination of propriety of peremptory strike); *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996) (trial court's assessment of credibility of reasons for strike will be affirmed unless clearly erroneous).

Plaza, *id*. Likewise, Plaza's claim of pretext as to the striking of the other women was rejected on appeal. *Id*.

On October 9, 1997, Plaza timely filed his Notice to Invoke the Discretionary Jurisdiction of the Supreme Court. (T 81-82). Review was sought, by the Petitioner, based on the *Plaza* opinion being in direct and express conflict with a decision of this Court or of another District Court of Appeal on the same point of law. (R 81-82). Art. V, § 3 (b) (3), *Fla*. *Const*. (1980); Fla. R. App. P. 9.030 (a) (2) (a) (iv). On January 22, 1998, this Court accepted jurisdiction.

In the trial court, Gerardo Plaza was indicted for first degree (alternatively premeditated or felony) murder with a firearm, §§ 782.04 (1), 775.087, and 777.011, *Fla*. *Stat*. (1995)

(Count I), armed burglary of an occupied dwelling with an assault, §§ 810.02, 784.021, and 777.011, _Fla_. _Stat_. (1995) (Count II), three counts of armed robbery with a firearm, §§ 812.13 and 777.011, _Fla_. _Stat_. (1995) (Counts III-V), and use of a firearm in the commission of a felony, §§ 790.07 and 777.011, _Fla_. _Stat_. (1995) (R 3-5). Counts V and VI were nolle prossed. (R 1).

Count VI was renumbered Count V for the Verdict form. The jury rendered guilty verdicts on Counts I-IV and VI. (R 36-40; T 1471-73). The jury recommended that Plaza be given treatment to counter the effects of a life-long addiction to drugs. (T 1475). Plaza was adjudicated guilty. (R 41-42; T 1479). Plaza was sentenced to life, on counts I-IV, with a twenty five year minimum mandatory provision on Count I, and a three year minimum mandatory provision on Counts II-IV, concurrent with each other and consecutive to Count I. (R 43-45). The life sentence on Counts II-IV is consecutive to the life sentence on Count I. (ST 47).

As the issues raised on appeal involve gender discrimination during voir dire, the rest of the facts are focused upon the jury selection proceedings. Specifically, the circumstances surrounding the State's peremptory challenges of four prospective female jurors are detailed below.

After introductory comments by the Court (T 123-190), and numerous cause challenges (T 238), peremptory challenges were exercised.[2]

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[2] The following venirepersons were challenged for cause: Patrick Codero (T 238), Amparo Cardenas (T 305-06), Sara Rodriguez (continued...)

The State utilized its peremptory challenges to strike Mr. Rifchin (T 521), Ms. Tessel (T 521-22), Ms. Angulo (T 522), Mr. Deliford (T 527), Ms. Barbara Gonzalez (T 528), Ms. Ethel Ward (T 774), Ms. Moya (T 775), Ms. Rios (769-70), and Ms. Diana Orr. (T 774-75).

The defense peremptorily challenged the second Mrs. (Marisela) Garcia (T 524-25), Mr. Arnaldo Lopez (T 526), Ms. Drzewicki (T 527), Mr. Steven Werhle (T 528), Mr. Archer (T 531), Ms. Aleman (T 531), Mr. John Arnold (T 539), Mr. Knapp (T 539), Mr. Beighey (T 772), and Ms. Zuccone (T 774).

Throughout the process, the State struck a number of female jurors, prompting four separate defense objections premised on gender discrimination. In the order stricken, the defense challenged the State's peremptory challenges of prospective female jurors Ms. Eileen Angulo (T 147-48, 262-64, 340-42, 436-37, 522), Ms. Barbara Gonzalez (T 169-71, 351-52, 438-39, 528), Ms. Escarly Rios (T 152-56, 218, 268-69, 335-37, 395, 428-29, 436, 547, 677, 769-70), and Ms. Diana Orr (574-76, 600-01, 683, 718-22, 750-52, 774-75).

The State's action in striking Ms. Eileen Angulo was contested

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[2] (...continued)
(T 306), Del Rey (T 306), Nguyen (T 307), Rosalba Montero (T 307), Mr. Warren (T 469-70), Mr. McBride (T 538-40), Mr. Lopez (T 510), Medina (T 510-11), Alejandro Garcia (T 511), Ms. Saari (T 511-12), Mrs. Fultz (T 515), Vargas (T 515-16), Mr. Pellish (T 518), Ms. Mosley (T 649), Mr. Lopez (T 673), Mr. Cooper (T 673), Mrs. Phillips (T 674), Mr. Garrido (T 674), Mrs. Cazanas (T 675), Ms. Willmitch (T 675), Rudman (T 765-66), Ms. Lopez (T 766), and Mr. Rodriguez. (T 768).

by Plaza. (T 522). The Petitioner objected, arguing that this was the second white female stricken by the State. (T 522). Both Ms. Angulo and Ms. Tessel are young, white females in their early twenties. (T 522). They were sitting side by side. (T 522). The State struck both of them. (T 522-23). The defense believed that they were being stricken because of their class as young, white females. (T 523).

The Court did not require the State to provide gender neutral reasons for the strike:

> 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. Tessel is an Anglo female and Ms. Angulo 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. Tessel, 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. Angulo, no one is a recovering alcoholic except Ms. Angulo. I will allow the strike.

(T 523). The defense objected. (T 523).

The court added:

> For the record, insofar as Mrs. Angulo is concerned, there is no one else who is a recovering alcoholic on this panel, and there is only one other female who discussed anybody vaguely close to them recovering from any drug use. That is Ms. Drzewicki, who has a good friend recovering from alcohol, and she sits on the panel. We have twelve, talking about backstrikes.

(T 524).

The State's challenge of Ms. Barbara Gonzalez resulted in a

second defense objection. (T 528). Plaza noted that she is a young, Latin woman, in her early twenties. This prospective juror has a job with the school, as do other jurors on the panel who have been accepted by the State. (T 528). The defense asserted that there was no reason for the challenge, other than race and gender. (T 528).

The State responded that Gonzalez has a number of differences from other jurors. According to the prosecutor, a number of reasons for the strike, all of which were race neutral, were present. (T 528-29). After being corrected, the State asserted that gender and national origin neutral reasons existed. (T 529). Gonzalez is an unemployed kindergarten teacher. Her and her brother were victims of an attempted kidnapping. Her brother was charged with a concealed firearm. That concerns the State, as they were talking about weapons in this particular case. She is rather young. There were things about her demeanor during voir dire. Most importantly, she is a victim of a kidnapping and her brother was charged with a concealed weapon. That makes it unique and gender and national origin neutral, which is the standard. (T 529).

The defense argued that another juror who was accepted, Ms. Rios, had an uncle charged with a crime. It was not a firearms violation, but it was a drug violation, which has as much nexus to this case as drugs have to the case. (T 529-30). The kidnapping happened when she was very young. It was her parents who were aware of it, as compared to her. It was a letter sent to her

parents when she was a child. As to the unemployed teacher status, there were other people involved in the school system. (T 530).

The State responded that that might be true from the defense's position, but drugs have nothing to do with this case from the State's position. Therefore, they are not concerned about that. (T 530).

The court told the defense to not even comment on her being part of the school system, as it had to be something reasonably related to the case. (T 530). It has been determined that the State can use peremptory challenges to strike people who have been arrested or whose family members were arrested. (T 530-31). As firearms are an issue for the State's case, the strike is not used in a gender or national origin bias fashion, and this juror is the only one with a similar situation. The court allowed the strike. (T 531).

The third dispute about the State striking female jurors arose when the prosecutor attempted to strike Escarly Rios. (T 769). The defense objected, noting Rios was another young Latin female. (T 769). She was accepted on two or three go arounds by the State, and there was nothing other than her race and gender that would be a basis for a challenge. (T 769).

The State responded that she has three relatives who were arrested for crimes, and another friend or ex-boss who she counselled through his drug addiction. She is unique in that position, notwithstanding that she has three relatives arrested and convicted, and two of them have to do with alcohol, which is an

addiction. (T 770).

The defense countered that when this was brought up earlier, the State denied that Ms. Rios was the same as another juror with a DUI problem, because the people arrested in Rios' life were not related. The State and court denied that this was the same person. (T 770). The defense argued that many people have talked about how they counselled family members and friends, and the State exaggerated the amount of counselling that she did. (T 771).

The court allowed the strike, finding her to be the only one on the panel distantly or closely having any kind of drug problem. Drugs are reasonably related to the intoxication defense. (T 771).

At this point, considering the panel, the State said "There are eight women, am I right, and four men? (T 773). The defense responded "who knows"? (T 773). The State said "We want to know. We want to know. We're interested in that." (T 773-74).

Immediately after the record statement that the State wanted to know and was interested in the gender makeup of the jury, the prosecutor struck Ms. Ethel Ward and Ms. Diana Orr. The defense objected as to Ms. Orr, who was a female, black juror. (T 775).

The State responded that her husband has a serious drug addiction. The court added that he is doing acupuncture, which leads it to believe he is in drug court. (T 775). The court allowed the strike, because the state has consistently stricken jurors with family members in rehab or recently so. (T 775).

One final factor bears mentioning.

As the defense exercised peremptory challenges, the State

objected on gender and race grounds. One such objection was to the defense's striking of Ms. Marisela Garcia. (T 525). The State argued that this Latin female, a member of two protected classes, said nothing to distinguish herself from other panel members. There seems to be no reason to challenge her. The State believed the challenge was improper. (T 525).

The court requested a response. The defense indicated it kept the others, Ms. Rios and Ms. Garcia. Ms. Garcia brought up that her sister in law had a drug problem, when the defense was discussing the drug use issue. The way she described it was somewhat judgmental, and defense counsel got the distinct impression that she did not approve of this. That type of attitude might reflect on Plaza. (T 525-26).

The court allowed the strike. (T 526).

Throughout and at the end of voir dire, all defense objections to the panel were renewed. (T 769, 777).

SUMMARY OF THE ARGUMENT

Peremptory challenges based on gender are impermissible. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89 (1994). This Court has established the procedure that must be followed when a party raises a *Neil* challenge. In short, upon proper objection, the trial court **must** inquire of the party exercising the strike, in order to determine whether the peremptory challenge is being exercised for gender-neutral reasons. *Smith v. State*, 699 So. 2d 629, 636-37 (Fla. 1997); *Curtis v. State*, 685 So. 2d 1234, 1236-37 (Fla. 1996); *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996); *State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993). The Fourth District Court of Appeal applies this procedure as well. *See Rivera v. State*, 670 So. 2d 1163 (Fla. 4th DCA 1996).

The Third District Court of Appeal has now ruled that the trial court need not inquire of the party exercising a peremptory challenge, notwithstanding a proper objection to the strike. Rather, the court may enunciate its own reason why the strike is not discriminatory and gender-based. *Plaza v. State*, 699 So. 2d 289, 290 (Fla. 3d DCA 1997). This decision directly and expressly conflicts with *Melbourne*, *Johans*, and *Rivera*. The *Plaza* decision rewrites the law, and eliminates the protection provided by this Court in the above-cited decisions. Parties, trial and appellate courts, and potential jurors will all suffer the consequences of the Third District's new procedure.

The Third District Court's new method of resolving claims of improper gender based jury strike, reversible standing alone, is

particularly erroneous in light of the subtle discrimination evident from the State's striking of four women jurors in this case. The trial court did not properly evaluate the challenged strikes in light of the entire record.

Reversal, with directions to grant Plaza a new trial, is required.

ARGUMENT

THE TRIAL COURT FAILED TO REQUIRE THE STATE TO COME FORWARD WITH A GENDER NEUTRAL EXPLANATION FOR THE STRIKE OF A FEMALE JUROR. UNDER PREVAILING LAW, AND ALSO CONSIDERING THE INDICATORS OF PRETEXT EVIDENT IN THE RESPONDENT'S STRIKING OF FOUR FEMALE JURORS, REVERSIBLE ERROR WAS COMMITTED AT TRIAL.

The end of four days of jury selection brought the following, unguarded record exchange:

> MS. DANNELLY [Assistant State Attorney]: There are eight women, am I right, and four men?
>
> MS. WARD [Defense Attorney]: Who knows?
>
> MS. DANNELLY: **We want to know. We want to know. We're interested in that.**

(T 773-74). (Emphasis added). This comment is reminiscent, and analogous, to an Assistant State Attorney's comment "Judge, if we can get something besides women and former police officers, we'll get us a panel." *Abshire v. State*, 642 So. 2d 542, 543, fn. 4 (Fla. 1994); *see also Laidler v. State*, 627 So. 2d 1263, 1264, fn. 2 (Fla. 4th DCA 1993). Against this backdrop of improper motive, the trial court, notwithstanding a defense objection, refused to require the State to explain its striking of a female venireperson. (T 523). This ruling, in light of *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), constitutes reversible error. Given the subtle record indications of discrimination, by the State, against potential female jurors, the trial court's failure to apply the law is particularly improper. Reversal is required.

The decision of the District Court of Appeal in this case expressly and directly conflicts with the decisions of this Court in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), and *State v.*

Johans, 613 So. 2d 1319 (Fla. 1993), and the Fourth District Court of Appeal's decision in *Rivera v. State*, 670 So. 2d 1163 (Fla. 4th DCA 1996) -- all of which require a *Neil* inquiry upon the defense's challenge to the State's discriminatory use of a peremptory challenge.[3]

The trial court improperly handled the State's dismissal of potential juror Ms. Eileen Angulo.

The prosecutor dismissed Ms. Angulo. (T 522). The defense objected, based on gender discrimination. (T 522-23). This was the second white female stricken by the State. (T 522).

The court refused to turn to the State for a non-gender based explanation for the strike. (T 523). Instead, the court advocated the position that this challenge would be allowed because Ms. Angulo was a recovering alcoholic. (T 523-24). *See Plaza*, 699 So. 2d at 290. Then, the court added that another juror, Ms. Drzewicki, discussed something "vaguely close to them recovering from any drug use," and that Drzewicki remained on the panel. (T 524). The defense objected. (T 523).

The court erred in failing to require a gender-neutral response by the State. *Smith v. State*, 699 So. 2d 629, 636-37 (Fla. 1997); *Curtis v. State*, 685 So. 2d 1234, 1236-37 (Fla. 1996); *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996); *State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993); *Rivera v. State*, 670 So.

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[3] The protection and procedures of *Neil*, *Johans*, and *Melbourne* apply equally to jury challenges based on improper gender discrimination. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89 (1994); *Abshire v. State*, 642 So. 2d 542 (Fla. 1994); *Rivera v. State*, 670 So. 2d 1163 (Fla. 4th DCA 1996).

2d 1163 (Fla. 4th DCA 1996); *J.H.C. v. State*, 642 So. 2d 601 (Fla. 2d DCA 1994); *Preston v. State*, 641 So. 2d 169, 169-70 (Fla. 3d DCA 1994). It is wholly inappropriate for the trial court to give and then sustain its own reason for allowing a strike. *See* *Mitchell v. State*, 548 So. 2d 823 (Fla. 1st DCA 1989) ("When determining the reasonableness of an explanation the court should properly decline to substitute its judgment for that of counsel"). The trial court's intrusion as an advocate for the State ruined any real record of what explanation the State might have offered for its strike. *Pickett v. State*, 537 So. 2d 115, 116-17 (Fla. 1st DCA 1988).

The law requires the proponent of the strike to explain his or her reasoning, *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996); only then will the court be properly positioned to decide whether or not the strike is nonpretextual. *See* *Mansell v. State*, 609 So. 2d 679, 682 (Fla. 1st DCA 1992) (trial judge must critically evaluate State's explanation to assure it is not a pretext for discrimination).

In this case, rather than apply the controlling precedents of *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996) and *State v. Johans*, 613 So. 2d 1319 (Fla. 1993), the Third District Court of Appeal created a new procedure, by which the trial court judge becomes an advocate for the proponent of a peremptory challenge. Respectfully, to maintain consistency and fairness, and to promote nondiscrimination in jury selection, this Court should reaffirm *Melbourne* and *Johans*, and remand this case for a new trial.

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

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

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

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

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

procedure. *See Plaza*, 699 So. 2d at 290-91.[4]

The Third District's decision to veer from this Court's binding precedent is enigmatic. Because of the *Plaza* opinion, Florida's trial judges may now legally decline to require a party exercising a strike to provide a gender neutral reason for its action. *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992) (citations omitted) (decisions of District Courts of Appeal bind all Florida trial courts, absent interdistrict conflict, until overruled by Florida Supreme Court). This case replaces "Step 2" of the *Melbourne* process, *see Melbourne*, 679 So. 2d at 764, with a completely inappropriate alternative.

Melbourne v. State, 679 So. 2d 759 (Fla. 1996), and *State v. Holiday*, 682 So. 2d 1092 (Fla. 1996), are cited by the Third District Court of Appeal in support of its newly enacted procedure. *See Plaza*, 699 So. 2d at 290. These citations, however, are unpersuasive. *Melbourne* conflicts with *Plaza* on the issue raised herein. Appellate affirmance of the trial court's assessment of credibility and propriety of the reasons for the strike, in both *Melbourne* and *Holiday*, resulted after the proper, required record inquiry was conducted of the party exercising the strike. *Compare Plaza*, 699 So. 2d at 290, with *Melbourne*, 679 So. 2d at 764-65 (upon objection, court must ask proponent of strike to explain;

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[4] Ironically, this result was reached while the court simultaneously noted that the trial court properly conducted inquiries of the State as to other stricken jurors: "The trial court was in the midst of a series of exhaustive *Neil* inquiries in which the defense challenged the State's peremptory strikes **and the court properly required a gender-neutral explanation.**" *Plaza*, 699 So. 2d at 290. (Emphasis added).

counsel waived issue by failing to renew objection before the jury was sworn), and with *Holiday*, 682 So. 2d at 1094 (trial court properly conducted *Neil* inquiry).

The *Plaza* decision, under review here, is legally unsound for several reasons.

First, *Plaza* eliminates the critical "Step 2" of *Melbourne*. By not requiring the State to explain its strike of Juror Ms. Angulo, the trial court forever sealed the record without eliciting and evaluating why the State struck this juror. Under Florida law, the trial judge must inquire of the State. *Melbourne*, 679 So. 2d 759, 764 (Fla. 1996); *State v. Slappy*, 522 So. 2d 18, 22 (Fla. 1988), *cert. denied*, 487 U.S. 1219, 108 S. Ct. 2873 (1988); *see Mansell v. State*, 609 So. 2d 679, 682 (Fla. 1st DCA 1992) (trial judge must critically evaluate State's explanation to assure it is not a pretext for discrimination). It is impossible to retrospectively determine the true reason for the strike. Instead, in reviewing the record, this Court must guess what the Assistant State Attorney might have said, and whether the explanation would have been construed as a pretext,[5] had the prosecutor been properly required to speak. Upon that guesswork lies Plaza's fate.

Respectfully, the trial court's failure to comply with the reasoned, easy steps of *Melbourne* and *Johans*, resulting in no record as to the State's true position, compels a decision in Plaza's favor, not a penalty founded in speculation. *Cf. Abshire*

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[5] *See Taylor v. State*, 643 So. 2d 1122, 1123, fn. 1 (Fla. 3d DCA 1994) (noting same prosecutor's obvious lack of candor).

v. State, 642 So. 2d 542, 544-45 (Fla. 1994), *quoting* *State v. Johans*, 613 So. 2d at 1321 ("A [gender neutral] justification for a peremptory challenge cannot be inferred merely from circumstances such as the composition of the venire of the jurors ultimately seated").

The legal basis for requiring the proponent of the strike to explain his or her reasons is just and sound. Often, parties tender unjustified reasons, which are rejected by the trial judge. For example, one of the State's reasons for striking prospective juror Ms. Barbara Gonzalez, that she was an unemployed school teacher, was flatly rejected by the trial court. (T 529-30). At times, the reasons, in context or in comparison to treatment of other prospective jurors, point to a subtle nuance of discrimination. It is only by hearing from the party attempting to strike the juror that it can be determined what that party is thinking:

> It seems clear to me that the purpose of the second step of the analysis is not to determine whether a valid gender-neutral reason exists, but, rather, whether the party exercising the strike is doing so on the basis of a valid gender-neutral reason. It is the subjective intent of the proponent of the peremptory which must be evaluated by the trial judge during step 2 of the analysis.

Plaza, 699 So. 2d at 291 (Sorondo, J., specially concurring).[6] If

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[6] It is interesting to note that one Judge found the failure to conduct the *Neil* hearing to be error. *Id*. Judge Sorondo's reasoning in finding the error to be harmless is, respectfully, incorrect. Unless the proffered reason for removing the juror comes from the proponent of the strike, there is no means of determining the gender-neutrality of the strike.

the party need not explain, a decision of the party's non-gender based reason for the strike cannot be determined. Without such a proper determination, this Court's required procedure to address *Neil* challenges is rendered illusory.

Second, this case validates the trial judge being an advocate, as opposed to an impartial magistrate, in the voir dire proceedings. The trial judge below proffered and accepted her own reasons for the strike of juror Ms. Angulo. A judge should remain neutral at all times. *See Moton v. State*, 659 So. 2d 1269, 1271 (Fla. 4th DCA 1995) (Farmer, J., concurring specially) ("The trial judge should not become an advocate for either side in a case..."). Here, the court's advocacy unequivocally favored the State and damaged Plaza; a juror unfavorable to the State and wanted by the defense was removed from service.

Third, the *Plaza* decision is in clear disaccord with the law. *Plaza* is not only irreconcilable with *Melbourne* and *Johans*, it is inexplicably at odds with the Third District's own prior and subsequent decisions. *See, e.g., Dean v. State*, 23 Fla. L. Weekly D70 (Fla. 3d DCA, Dec. 24, 1997); *Davis v. State*, 691 So. 2d 1180, 1182 (Fla. 3d DCA 1997); *Morris v. State*, 680 So. 2d 1096, 1097 (Fla. 3d DCA 1996); *Preston v. State*, 641 So. 2d 169, 169-70 (Fla. 3d DCA 1994). The court's retreat from *Preston*, without explanation, is particularly puzzling. In *Preston*, the Third District Court of Appeal wrote:

> *Johans* has held that "a *Neil* inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." 613 So. 2d

> at 1321. [Footnote omitted]. Because there was a timely objection that the peremptory challenge had been impermissibly exercised on the basis of gender, and there was no *Neil* inquiry, the convictions are reversed under the authority of *Abshire v. State* and remanded for a new trial. [Citation omitted].

Preston v. State, 641 So. 2d 169, 169-70 (Fla. 3d DCA 1994); *accord*, *Rivera v. State*, 670 So. 2d 1163, 1165 (Fla. 4th DCA 1996) (applying requirement for *Neil* inquiry to cases involving gender discrimination); *Johans*, *supra*; *J.H.C.*, *supra*; *Smith v. State*, 661 So. 2d 358, 360-61 (Fla. 1st DCA 1995); *Pickett v. State*, 537 So. 2d 115, 116-17 (Fla. 1st DCA 1988) (where no inquiry is made of the State, there is no record from which the appellate court can determine whether challenges are [gender] neutral); *Johnson v. State*, 537 So. 2d 117, 122 (Fla. 1st DCA 1988) (same).

Fourth, public policy strongly favors this Court's established rules for addressing gender discrimination in jury selection. Striking women jurors because they are women is an abhorrent practice.

In *Abshire*, *supra*, this Court applied the precedent of the U.S. Supreme Court, invalidating considerations of the gender makeup of the jury (T 773-74):

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. [fn. omitted]. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law - that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. [Citation omitted]. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our

judicial system is jeopardized.

Abshire, 642 So. 2d at 543, *quoting* *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89 (1994); *see also* *Preston v. State*, 641 So. 2d 169 (Fla. 3d DCA 1994).

Complying with this Court's procedure, as outlined in *Melbourne*, is not a daunting task. *Cf*. *Franqui v. State*, 699 So. 2d 1332, 1335 (Fla. 1997) (encouraging trial judges to err on the side of conducting a *Neil* inquiry). By requiring the State to state its reason for exercising the peremptory challenge, the court can make a real determination on the issues of discrimination and pretext. Where the court fails to do so, as it did here, discrimination is allowed to lurk, unmasked, in the proceedings.

The importance of jury selection is well-known to Courts and to lawyers. The laudable goal of trying to end the improper bias against groups of jurors, in this instance women, is served by this Court's procedure, as set forth in *Melbourne* and *Johans*. The Third District Court of Appeal, by protecting the State from saying its reason for juror strikes upon proper defense objection, invalidates this Court's decisional law. Respectfully, this Court has already established, and should now adhere to, the reasonable method of procedure in addressing *Neil* inquires. *See* *Melbourne*.

In addition to not making the State explain why it struck Ms. Angulo, the challenge of this juror is problematic for another reason.

One of the reasons argued by the court for the challenge was that a similarly situated juror, Ms. Drzewicki, remained on the

panel.

Actually, Ms. Drzewicki (T 129-30, 233-36) was accepted by the State. (T 520). She was later stricken by the defense. (T 527). Thus, the State's approval of Ms. Drzewicki argues against the court's own rationalization for allowing Ms. Angulo to be removed from service. That Drzewicki was approved by the State, rather than stricken, suggests that Ms. Angulo's dismissal was not legally authorized by comparison to Ms. Drzewicki. This, in turn, indicates an impermissible pretext for the strike. *Slappy*, 522 So. 2d at 22; *Valentine v. State*, 616 So. 2d 971, 974 (Fla. 1993); *Givens v. State*, 619 So. 2d 500, 502 (Fla. 1st DCA 1993); *Mayes v. State*, 550 So. 2d 496, 498 (Fla. 4th DCA 1989).

The trial court's refusal to conduct the required inquiry of the State, while reversible on its own, is highlighted and intensified by the record instances reflecting gender discrimination by the State throughout voir dire.

In this case, the trial court failed to perform its function of critically evaluating the State's proffered explanations, in conjunction with the whole record, to assure reasonableness and the absence of a pretext for discrimination. *Givens v. State*, *id.*, *citing* *Roundtree v. State*, 546 So. 2d 1042 (Fla. 1989), *Mansell v. State*, 609 So. 2d 679, 682-83 (Fla. 1st DCA 1992), and *Gooch v. State*, 605 So. 2d 570 (Fla. 1st DCA 1992).

Here, there was a pretext. The State's candid admission of gender-counting (T 773-74) was made in the midst of four defense challenges to the prosecution's striking of female jurors. The

record, spontaneous remark by the prosecutor gives this Court a rare glimpse at the truth. The State, contrary to the law, was picking and striking men and women because of their gender. As a consequence, the State's strikes were pretextual. The trial court should have disallowed all of the challenged strikes, along with requiring an explanation as to prospective juror Ms. Angulo; its failure to do so constitutes reversible error. *J.E.B. v. Alabama*, *supra*; *Abshire v. State*, *supra*; *J.H.C. v. State*, *supra*; *see Plaza*, *supra*, 699 So. 2d at 292 (Sorondo, J., concurring) (improper exclusion of juror...by way of a peremptory challenge is...reversible error) (citations omitted).

In addition to the State's overt position that gender was important, other factors support that the identified strikes were pretextual.

The State indicated, on two occasions, that involvement with drugs was not a valid reason for a peremptory challenge. The State had no concern about drugs, because drugs had nothing to do with this case, from the State's perspective. (T 530). Also, notwithstanding that Ms. Marisela Garcia's sister in law had a drug problem, the State asserted that the defense's challenge to this juror was improper, and that there was no reason to challenge her. (T 525-26). Yet, the State reasoned that its strikes of jurors Ms. Rios (T 770) and Ms. Orr (T 775) were justified, based upon drug use by their relatives. The court permitted the challenges to Ms. Rios and Ms. Orr specifically because of relatives' involvement with drugs (T 771, 775). Having declared drug use insignificant,

and having objected to this factor for a defense strike, using the same reason to strike two women is a pretext. The court should have recognized it as such.

Pretext appears, also, in the State's baffling treatment of Ms. Escarly Rios.

Ms. Rios first disclosed, to the court, several already closed criminal cases against two uncles and a friend. (T 152-56). She also had an ex-boss with a serious drug problem. She tried to help, but did not call police or go to rehab with him. (T 436). Rios said she could follow the law. (T 218, 268-69). The State asked no questions whatsoever about the issues it would later give as reasons to strike this juror. (T 268-69). She was questioned briefly by the defense about guns. (T 335-37). She could apply the presumption of innocence. (T 395). She understood reasonable doubt and the elements of a crime. (T 428-29).

Armed with this knowledge of Ms. Rios, the State accepted her as a juror. (T 523). The State tendered, with Rios on the panel. (T 527).

Next, when attempting to justify its strike of Ms. Barbara Gonzalez, the State specifically negated that the drug violation of Ms. Rios' uncle was of any concern to the State. (T 530).

Then, the State again tendered, with Ms. Rios on the panel. (T 540, 547). After additional voir dire and strikes, the State made no effort to remove Ms. Rios from the jury. (T 676-77).

Finally, after having accepted Ms. Rios on a number of occasions, and without any further information about Ms. Rios

coming to light in the interim, the State tried to remove her from the jury. (T 769). The court permitted the strike, because "drugs have become an issue based upon the jury selection, and it's reasonably related because intoxication is going to be a defense raised by the Defense." (T 771). Validating the specter of drugs at this point was allowing a pretext.

The court, in this case, was required to inquire into the State's reasons for striking Ms. Angulo from the panel. The trial court, likewise, was obligated to meaningfully consider the pretext underlying the strikes. In light of the whole record, and considering the prosecutor exercising the challenges, the court's failure to require an explanation as to Angulo, and allowance of the four strikes of females, is reversible error. *J.E.B. v. Alabama*, *supra*; *Melbourne v. State*, *supra*; *Preston v. State*, *supra*.

Gerardo Plaza urges this Court to continue applying the law, as it has since *Melbourne*. Consistent with the doctrine of *stare decisis*, the procedural safeguard of requiring the striking party to explain its peremptory challenge must remain the law. *See Smith v. State*, 699 So. 2d 629, 636-37 (Fla. 1997); *Curtis v. State*, 685 So. 2d 1234, 1236-37 (Fla. 1997); *see generally Perez v. State*, 620 So. 2d 1256, 1259 (Fla. 1993) (Overton, J., concurring).[7] Considering the reality that even the Third District Court of

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[7] "The doctrine of precedent is basic to our system of justice. In simple terms, it ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any particular judge. In other words, precedent requires that, when the facts are the same, the law should be applied the same." *Id*.

Appeal consistently cites *Melbourne's* requirements as governing law, it is apparent that *Plaza*, in its current state, is an aberration.

Gerardo Plaza is entitled to the protection of the law in this area. Plaza was entitled to have the court consider both the State's explanation for striking prospective juror Ms. Angulo, and the pretext issue in the context of the entire trial. *Melbourne*. "The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." *Francis v. State*, 413 So. 2d 1175, 1178-79 (Fla. 1982), *citing Pointer v. United States*, 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894), and *Lewis v. United States*, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892). In order to "reaffirm the state's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial," *State v. Slappy*, 522 So. 2d 18, 20-21 (Fla. 1988), *cert. denied*, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed 2d 909 (1988), this Court must reverse. *See Abshire*, 642 So. 2d at 544, *citing* Art. I, § 16, *Fla. Const.* (1980).

CONCLUSION

Based on the individual and cumulative assigned error, the arguments and authorities presented, and the record, the Petitioner, Gerardo Plaza, respectfully requests this Court to reverse the decision of the Third District Court of Appeal, and to remand this cause with directions to vacate his convictions, judgments, and sentences, and to grant him a new trial.

Respectfully submitted,

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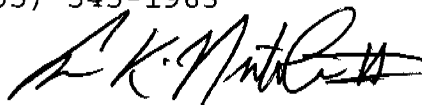

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was delivered by mail to the parties of record listed below this 17th day of February, 1998:

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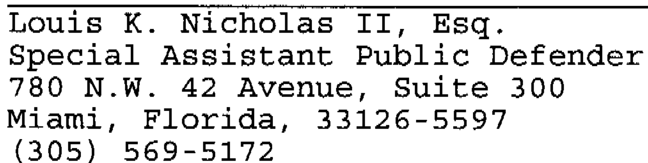
By: 

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