

ORIGINAL

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-

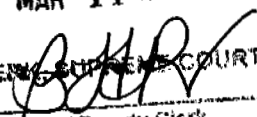
THE STATE OF FLORIDA,

Respondent.

FILED

MD J. WHITE

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

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

Douglas Gurnic
Assistant Attorney General
Florida Bar No. 0000063
Office of the Attorney General
Appellate Division
Republic Tower, 110 S.E. 6th St.
Ft. Lauderdale, Florida 33301
Telephone: (954) 712-4615
Facsimile: (954) 712-4658

Counsel for the State

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INTRODUCTION

The Respondent, the State of Florida, was the prosecution in the trial court, the Appellee in the Third District Court of Appeal, and the Petitioner, Gerardo Plaza, was the Defendant and the Appellant, respectively. In this brief, the parties will be referred to as the Petitioner or Defense and the Respondent or State. The symbol "R." designates the record on appeal. The symbol "T." designates the transcript of the proceedings in the trial court.

STATEMENT OF THE CASE AND FACTS

The Petitioner was indicted for first degree murder, armed burglary, three counts of armed robbery, and the use of a firearm during the commission of a felony. (R 1-5). The Petitioner did not inform the State that he intended to rely on intoxication as a defense until the jury selection process had begun. (T-447).

The voir dire spanned four days during which two separate panels of prospective jurors were questioned in order to obtain twelve jurors and two alternates. (T 111-778). The combined panels consisted of 33 women and 27 men. After the initial group of forty were questioned the State initiated two challenges for cause, both of which were against males. (T-469, 531). One had indicated he had strong feelings against the use of drugs and had a son who had spent considerable time in a rehabilitation program the other one, the prosecutor argued, appeared forgetful and questioned his mental abilities. (T-442, 531-32). In contrast, the Defense initially brought forth seven cause challenges, five of which were against males. (T 510-518). Of these five cause strikes against males the prosecution disagreed with only one. (T-510). When the peremptory strikes began the State first struck a male, who had indicated he did not like to sit in judgement of others. (T-521, 249-50). The State then struck a female, Ms. Tessel, whom the State had attempted previously to have struck for cause based upon her father being an alcoholic and having friends who used drugs.

(T 506-7, 522). The State then struck Ms. Angulo, the prospective juror whose dismissal forms the basis of this appeal. (T-523). The defense objected arguing the State was striking both Ms. Tessel and Ms. Angulo on the basis of their status as young white females. (T-523). In response, the trial court, rather than turning to the State for a response pointed out that although both individuals were young females, Ms. Tessel's father was an alcoholic and Ms. Angulo was a recovering alcoholic herself. (T-523). In particular the trial court pointed out no one else on the panel was a recovering alcoholic. (T-523). The strike was allowed. The Defense next made it's first peremptory strike and it was of a female, Ms. Garcia. (T-524). The State objected to the strike on the grounds of her being a latin female. (T-525). The Defense argued that it had not struck two other latin females and had struck Ms. Garcia based on a fear of impartiality towards drug usage. (T-525). The Defense then struck another man from the panel, to which the prosecutor commented she could make an objection but would not. (T-526). The Defense excused Ms. Drzewicki. (T-527). The State then struck another male from the panel, Mr. Deliford. (T-527). Mr. Deliford had indicated he worked in counseling at a drug treatment program. (T-441).

The State struck Ms. Gonzalez inspiring another gender based objection from the Defense. (T-528). The State's reasons for the strike were the facts that she was an unemployed kindergarten

teacher, that both her and her brother were victims of an attempted kidnaping, and that Gonzalez's brother was charged with concealing a firearm, and the charges in this case involve the use of a firearm. The State specifically pointed out its concern with this fact. (T-529). The Court stated that "it has already been determined that the State has a right to use their peremptory challenges to strike people who may have been previously arrested or have family members who are arrested." (T-531). Additionally, the trial court pointed out that the use of a firearm was definitely an issue of concern in the case, and no one other than Ms. Gonzalez was similarly situated in this regard. Thus, the trial court found the strike was based on valid gender-neutral grounds.

The Defense subsequently struck four more males and one female from the first group. (T 528-539). The State did not object to any of the five strikes.

After the questioning of the second group of prospective jurors the Defense initiated nine cause challenges, five against men and four against women. (T 673-767). The State agreed with all the strikes of the men yet indicated reluctance to the strikes of three of the four women. (T 674-75).

When the peremptory challenges began the State back struck Ms. Rios, inspiring a gender based objection from the Defense. (T-769). The State's reason for striking Ms. Rios was that her ex-

boss had a drug addiction, and she indicated she had counseled him regarding his addiction. (T-436, 530, 770). Additionally, the State also pointed to the fact Ms. Rios had three relatives who were arrested for crimes, two of which were alcohol related, as further justification for the strike. (T-769). In granting the strike the trial court also pointed out that no one else left on the panel had any relatives or relations with drug problems. (T-771).

The Defense used its last two peremptory strikes to back strike both a male and a female. (T-772, 774). The State made no objection to the striking of the male prospective juror. (T-772). The State then struck a female who indicated she would have some sympathy for an individual with an altered mental condition. (T-774, 659-60). After the State next struck Ms. Orr, the Defense again objected arguing the last two strikes by the State were of black females. (T-775). The State's reason for the strike of Ms. Orr was that her husband had a serious drug addiction. (T-775). The trial court added that Ms. Orr's husband is presently in a drug rehabilitation program doing acupuncture, which led it to believe that he is in drug court. (T-775). The trial court allowed the strike and in so doing referred to the fact that "the State had consistently struck people with less (sic) family members who are in rehab or recently so." (T-775).

Finally the State struck Ms. Moya and before the defense could respond the prosecutor asked "Do you want a reason?". Defense

counsel responded "sure". (T-775). The prosecutor stated "Ms. Moya doesn't really seem to be all together. She said if he (referring to her husband) is under the influence he just can't control himself. That took care of that for me." (T-776). The trial court pointed out that because there was no actual objection the issue would not be preserved for appeal, and asked if the defense wanted to object. (T-776). Defense counsel said "No." The State accepted a female as the final panelist. (T-776), The resulting panel consisted of eight females and four males.

In the selection of the two alternates the State struck Ms. Watkins. (T-777). Ms. Watkins had indicated her son had a drug problem and she had gotten him to go to a rehabilitation program the year before. (T 753-54).

The trial proceeded and resulted in the Petitioner being found guilty as charged on all counts, less one armed robbery count which was nolle prossed. (R 36-41).

ISSUE PRESENTED

THE TRIAL COURT'S FAILURE TO REQUIRE THE STATE TO EXPRESS A GENDER NEUTRAL REASON FOR THE PEREMPTORY STRIKE OF A FEMALE JUROR WAS HARMLESS ERROR GIVEN THE REASON FOR THE STRIKE WAS OBVIOUS FROM THE RECORD AND THE CIRCUMSTANCES OF THE VOIR DIRE SHOW THAT THE STATE WAS NOT PRETEXTUALLY STRIKING FEMALES FROM THE PANEL.

SUMMARY OF THE ARGUMENT

The trial court's action of stating the gender-neutral reason supporting the State's peremptory challenge to prospective juror Angulo, although not in conformity to the guidelines for conducting such inquiries as established by this Court in State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Johans, 613 So. 2d 1319 (Fla. 1993); and Melbourne v. State, 679 So. 2d 759 (Fla. 1996), was harmless beyond a reasonable doubt when viewed in light of the circumstances of the voir dire proceedings in total.

The purpose behind a Neil inquiry is to ensure the defendant's right to an impartial jury is not violated by the use of race and/or gender discrimination in the jury selection process. The record here gives no support to the Petitioner's claim that the State was attempting to eliminate females from the panel when it struck Ms. Angulo. The record shows quite the opposite, as the State took steps to keep females on the panel. The only objection raised by the State to a peremptory strike by the Defense was of a female. (T-525). The two cause strikes initiated by the State were both against men. (T-469, 531). The State expressed reluctance to go along with three cause challenges of females initiated by the Defense. (T 674-75). The State used two of there own peremptory strikes against males. (T-521, 527). Every challenge to a strike by the State of a female, except for the

situation with Ms. Angulo, was met with the State providing valid gender-neutral reasons to support the strike. The resulting jury panel consisted of eight females and only four males.

The Petitioner has failed to demonstrate that he was denied the right to an impartial jury. As this Court made clear in Melbourne the guidelines were meant to be just that - guidelines to ensure an unbiased jury selection process, they were not meant to be viewed as a rigid set of rules creating a reversible error trap. Melbourne at 764-65. Because the trial court's failure to precisely follow the guidelines, regarding the challenge to the striking of Ms. Angulo, did not result in the Petitioner being tried by a jury improperly chosen based upon discriminatory grounds he is entitled to no relief. As the Petitioner's right to an impartial jury was not prejudiced his convictions should be affirmed.

ARGUMENT

THE TRIAL COURT'S FAILURE TO REQUIRE THE STATE TO EXPRESS A GENDER NEUTRAL REASON FOR THE PEREMPTORY STRIKE OF A FEMALE JUROR WAS HARMLESS ERROR GIVEN THE REASON FOR THE STRIKE WAS OBVIOUS FROM THE RECORD AND THE CIRCUMSTANCES OF THE VOIR DIRE SHOW THAT THE STATE WAS NOT PRETEXTUALLY STRIKING FEMALES FROM THE PANEL.

This Court, in State v. Neil, 457 So. 2d 481 (Fla. 1984), discussed the importance of addressing challenges to peremptory strikes during the jury selection process. This Court pointed out that:

Article I, Section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid an assist in the selection of an impartial jury.

Id. at 486.

This Court also stated that "[t]he initial presumption is that peremptories are exercised in a constitutionally proper manner." Id. at 485. Although peremptory challenges are generally allowed to be made without providing a reason, objections to such challenges can be made when there is a fear the challenge is being made for improper reasons. Initially this concerned challenges based upon a prospective juror's race, subsequently gender also became recognized as a basis for objecting to peremptory challenges. See 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).

In Neil, this Court set forth a procedure for the trial courts to follow in handling objections to peremptory challenges. The party concerned with the other side's use of a peremptory strike must first timely object. Then they must demonstrate on the record that the challenged person was of a distinct racial group (gender) and show that there was a strong likelihood that the challenge was based solely on that characteristic. Id. at 487. Once this threshold was met it then became the burden of the trial court to decide whether there was as substantial likelihood that the strike was based solely on the cited characteristic. If the court found there was no such likelihood no inquiry was necessary. If the court found such a likelihood was shown to exist it became the complained-of party's burden to show that the challenge was not based solely on that characteristic. If the party is able to do so, the challenge should be allowed and the selection process continues. If it is found that the party has been challenging prospective jurors solely on the basis of their race (gender) the court should dismiss that jury pool and begin voir dire over with a new pool. Id. at 486-87.

Initially, in order to balance the rights of the parties to use peremptory strikes without having to give an explanation, the objecting party had to demonstrate a strong likelihood that the

strike was being made based solely on the impermissible racial or gender classification of the individual. Due to the apparent confusion over what amounted to demonstrating a "strong likelihood" that the strike was based solely on race (gender), this Court in State v. Johans, 613 So.2d 1319 (Fla. 1993) 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. Thus, this Court receded from the requirement of demonstrating a "strong likelihood" that the challenge was being used in a racially discriminatory manner. Thus making it much easier for either party to object to any peremptory challenge by the other side which happened to be of an individual of a specific racial or gender classification.

Subsequently in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), this Court, having found that the trial courts were still having trouble applying Neil, provided further guidelines for addressing objections to peremptory challenges. This Court gave a step by step instruction 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.

At this point the burden of production

shifts to the proponent of the strike to come forward with a race-neutral explanation. 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. The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

Id. at 764.

This Court made a point of explaining that these guidelines were not to be considered a rigid set of rules which had to be employed with precision in every case. Due to the diversity of voir dire proceedings "no rigid set of rules will work in every case." Id. at 764. This Court indicated that the right to an impartial jury is best safeguarded by "reason and common sense" and these guidelines are just that - guidelines to help trial courts ensure impartial juries are selected. Id. at 765. Thus, the goal of these guidelines is to help ensure the empaneling of impartial juries not to create a "maze of reversible error traps" Id.

The majority opinion in Plaza v. State, 699 So. 2d 289 (Fla. 3d DCA 1997) held that the trial court's actions of articulating a gender-neutral reason for the State's peremptory challenge to Ms. Angulo rather than turning to the State to provide an explanation was proper under Neil Plaza at 290. Specifically the court stated "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'". Plaza at 290-91.

Although the Third District Court's majority opinion held the trial court's actions were proper under Neil, as Judge Sorondo explained in his concurring opinion, it seems clear that the purpose of asking the proponent of the strike to give its explanation is not simply "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 at 291. Therefore it appears that the action of the trial court, in supplying an obvious reason, was in conflict with the intent of the guidelines as set out in Melbourne.

However, as this Court pointed out, the guidelines provided in Melbourne for conducting Neil inquiries were not meant to be a rigid set of rules creating a reversible error trap. Thus, departure from these guidelines should not automatically be considered reversible error. Such departure should be analyzed under the totality of circumstances to determine whether it destroyed the Defendant's right to an impartial jury. If the

departure is found to have been harmless the conviction should stand.

This Court explained that courts are supposed to consider all the surrounding circumstances of a strike in determining whether the strike was pretextual. Melbourne, 679 So. 2d at 764; State v. Holiday, 682 So. 2d 1092 (Fla. 1996). Here, as Judge Sorondo found, given the totality of circumstances surrounding this four day voir dire proceeding the State was not impermissibly attempting to eliminate females from the panel based upon their classification as females. Thus, through reason and common sense, it will be seen that the Petitioner's right to an impartial jury was not prejudiced by the trial court's action of supplying the reason for one of the State's peremptory strikes. Because any error in the trial court's providing the reason for the strike of Ms. Angulo was harmless beyond a reasonable doubt, the Petitioner is not deserving of a new trial.

Here the voir dire spanned four days during which two separate panels of prospective jurors were questioned in order to obtain twelve jurors and two alternates. (T 111-778). The combined panels consisted of 33 women and 27 men. After the initial group of forty were questioned the State initiated two challenges for cause, both of which were against males. (T-469, 531). One had indicated he had strong feelings against the use of drugs and had a son who had spent considerable time in a rehabilitation program. The other

one, the prosecutor argued, appeared forgetful and questioned his mental abilities. (T-442, 531-32). In contrast, the Defense initially brought forth seven cause challenges, five of which were against males. (T 510-518). Of these five cause strikes against males the prosecution disagreed with only one. (T-510).

When the peremptory strikes began the State first struck a male, who had indicated he did not like to sit in judgement of others. (T-521, 249-50). The State then struck a female, Ms. Tessel, whom the State had attempted previously to have struck for cause based upon her father being an alcoholic and having friends who used drugs. (T 506-7, 522). The State then struck Ms. Angulo, the prospective juror whose dismissal forms the basis of this appeal. (T-523). The defense objected arguing the State was striking both Ms. Tessel and Ms. Angulo on the basis of their status as young white females. (T-523). In response, the trial court, rather than turning to the State for a response pointed out that although both individuals were young females, Ms. Tessel's father was an alcoholic and Ms. Angulo was a recovering alcoholic herself. (T-523). In particular the trial court pointed out no one else on the panel was a recovering alcoholic. (T-523). The strike was allowed.

The Defense next made it's first peremptory strike and it was of a female, Ms. Garcia. (T-524). The State objected to the strike just as the Defense had done on the grounds of her being a

latin female. (T-525). The Defense argued that it had not struck two other latin females and had struck Ms. Garcia based on a fear of impartiality towards drug usage. (T-525). The Defense then struck another man from the panel, to which the prosecutor commented she could make an objection but would not. (T-526). The Defense excused Ms. Drzewicki. (T-527). The State then struck another male from the panel, Mr. Deliford. (T-527). Mr. Deliford had indicated he worked in counseling at a drug treatment program. (T-441).

The State struck Ms. Gonzalez inspiring another gender based objection from the Defense. (T-528). The State's reasons for the strike were plainly gender neutral. As the prosecutor pointed out, in addition to the fact that she was an unemployed kindergarten teacher and the fact that both she and her brother were victims of an attempted kidnaping, Gonzalez's brother was charged with concealing a firearm, and the charges in this case involve the use of a firearm. The State specifically pointed out its concern with this fact. (T-529). The Court stated that "it has already been determined that the State has a right to use their peremptory challenges to strike people who may have been previously arrested or have family members who are arrested." (T-531). Additionally, the trial court pointed out that the use of a firearm was definitely an issue of concern in the case, and no one other than Ms. Gonzalez was similarly situated in this regard. Thus, as the

trial court found the strike was based on valid gender-neutral grounds.

The Defense subsequently struck four more males and one female from the first group, resulting in the need for another group of prospective jurors to assemble a panel. (T 528-539). The State did not object to any of the five strikes.

After the questioning of the second group of prospective jurors the Defense initiated nine cause challenges, five against men and four against women. (T 673-767). It is interesting to note that the State agreed with all the strikes of the men yet indicated reluctance to the strikes of three of the four women. (T 674-75).

When the peremptory challenges of the second group of prospective jurors began the State back struck Ms. Rios, again inspiring a gender based objection from the Defense. (T-769). The Petitioner argues that the State had expressed on two occasions that involvement with drugs was not a valid reason for a peremptory challenge, but that the State's reason for striking Ms. Rios was that her ex-boss had a drug addiction.(T-530, 770). While initially the prosecution might have been unconcerned with drugs, as the Court commented, "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). The Defense had not brought up the issue of its intent to rely on an

intoxication defense until the jury selection had begun. (T-447). The Prosecutor further remarked that, "since apparently Ms. Ward (defense counsel) made such an issue of this with the jury, particularly with this panel, I don't feel comfortable with Ms. Rios". (T-769). Ms. Rios had indicated that she had counseled a former boss through a drug addiction. (T-436). Additionally, the State also pointed to the fact Ms. Rios had three relatives who were arrested for crimes, two of which were alcohol related, as further justification for the strike. (T-769). In granting the strike the trial court also pointed out that no one else left on the panel had any relatives or relations with drug problems. (T-771). Once again, the reasons for the strike were gender neutral and directly related to issues involved in the case.

The Defense used its last two peremptory strikes to back strike both a male and a female. (T-772, 774). The State again made no objection to the striking of the male prospective juror. (T-772). The State then struck a female who indicated she would have some sympathy for an individual with an altered mental condition. (T-774, 659-60). After the State next struck Ms. Orr, the Defense again objected arguing the last two strikes by the State were of black females. (T-775). The State's reason for the strike of Ms. Orr was that her husband had a serious drug addiction. (T-775). The trial court added that Ms. Orr's husband is presently in a drug rehabilitation program doing acupuncture, which

led it to believe that he is in drug court. (T-775). The trial court allowed the strike and in so doing referred to the fact that "the State had consistently struck people with less (sic) family members who are in rehab or recently so." (T-775). Again, this involvement with problems of addiction was a consistent valid gender-neutral reason to support the peremptory challenge of Ms. Orr.

Finally the State struck Ms. Moya and before the defense could respond the prosecutor asked "Do you want a reason?". Defense counsel responded "sure". (T-775). The prosecutor stated "Ms. Moya doesn't really seem to be all together. She said if he (referring to her husband) is under the influence he just can't control himself. That took care of that for me." (T-776). The trial court pointed out that because there was no actual objection the issue would not be preserved for appeal, and asked if the defense wanted to object. (T-776). Defense counsel said "No." The State accepted a female as the final panelist. (T-776), The resulting panel consisted of eight females and four males.

In the selection of the two alternates the State struck Ms. Watkins. (T-777). Ms. Watkins had indicated her son had a drug problem and she had gotten him to go to a rehabilitation program the year before. (T 753-54). The Defense counsel in continuing to demonstrate her hostility toward the prosecutor stated "Oh, No!". The Prosecutor replied "Hello!". (T-777). The trial court took

control of the situation and secured the final selection of two alternates, one male and one female. (T-778).

As Judge Sorondo concluded "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 (Angulo), the only error in this trial, was harmless beyond a reasonable doubt." Plaza, 699 So. 2d at 289. In fact, the circumstances, as detailed above, shows that the State took steps to keep females on the panel. The only objection raised by the State to a peremptory strike by the Defense was of a female. (T-525). The two cause strikes initiated by the State were both against men. (T-469, 531). The State expressed reluctance to go along with three cause challenges of females initiated by the Defense. (T 674-75). The State used two of there own peremptory strikes against males. (T-521, 527). Every challenge to a strike by the State of a female, except for the situation with Ms. Angulo, was met with the State providing valid gender-neutral reasons to support the strike. As evidenced above, had the State's genuine intent been to eliminate females from the panel it did an incredibly poor job, as the actions of the State contributed to a resulting panel comprised of predominantly females.

Looking at the voir dire as a whole, the circumstances show that the State was not attempting to eliminate females from the

panel. As This Court pointed out in Melbourne, the burden of persuasion never leaves the opponent of the strike to prove purposeful discrimination. The Petitioner here, having failed to make such a showing is entitled to no relief. It is beyond imagination that had the trial court posed the question to the State regarding the strike of Ms. Angulo that the response would have indicated the strike was based upon her gender. This is particularly true where, as the trial court pointed out, her alcoholism was such an obvious reason to support the strike, and where such reasoning conformed to the State's consistency in striking individuals whose family or friends had drug and/or alcohol addiction problems. Given the circumstances, it would be not only inconsistent but hard to imagine the State not striking Ms. Angulo, the only panelist with an addiction problem herself.

The Petitioner's right to an impartial jury was not destroyed by the trial court's jumping the gun and giving the obvious reason for the strike. This is precisely the kind of situation contemplated by this Court's reasoning that the Melbourne guidelines should not be used as a trap for reversible error. Here, other than the trial court's failure to ask the prosecution to give the obvious reason for the strike of Ms. Angulo the rest of the voir dire and the trial itself were flawless. There was no miscarriage of justice in this case. The Petitioner's convictions should be affirmed. § 59.041 Fla. Stat. (1995).

The Petitioner's heavy reliance upon the prosecutor's comment on the gender make-up of the panel is devoid of merit. Near the end of this long process the trial court had just named the remaining panel members and the prosecutor commented "There are eight women, am I right, and four men?". (T-773). Before the trial court could respond, defense counsel quipped "Who knows?". The prosecutor responded "We want to know. We want to know. We're interested in that." The trial court did not get involved in this tussle and simply continued "Back strikes?" (T-774). As shown there was a continuing hostility between the prosecutor and the defense counsel. It appears the prosecutor's remark of interest in the issue was nothing more than retaliation to defense counsel's dismissive comment of "Who knows?". In light of all the evidence of this four day voir dire proceeding, as detailed above, demonstrating that the State was not attempting to eliminate females based on their gender, this one incited comment does not support a conclusion that the State's intent on striking Ms. Angulo was to eliminate her because she was a female.

Petitioner's reliance on Pickett v. State, 537 So., 2d 115 (Fla. 1st DCA 1988) is also misplaced. There, the court reversed and remanded the case for a new trial based upon the trial court's failure to conduct a timely inquiry in response to the defense's objection to the state's third strike of a black prospective juror. In doing so the court pointed out that "there is no evidence in the

record before us that would allow us to make any determination regarding whether the state's peremptory challenges to the three prospective black jurors were grounded on racially neutral reasons." Id. at 116. This is unlike the instant case were, as shown above, there was ample evidence in the record demonstrating that the State was not striking females based upon their gender.

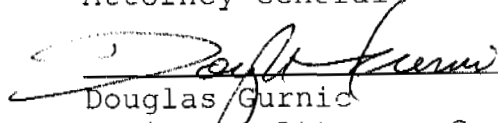
Therefore, because this Court stated in Melbourne that the guidelines set forth for conducting Neil inquiries were not rigid nor were they meant to create a reversible error trap, the trial court's action here of supplying the obvious and consistent reason behind the State's strike of Ms. Angulo does not require the Petitioner's convictions be reversed. The Petitioner suffered no prejudice from this action as he was tried and convicted by an impartial jury. The Petitioner's conviction should stand.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the Respondent respectfully requests this Court to find that the trial court's error was harmless under the circumstances of this case.

Respectfully Submitted,

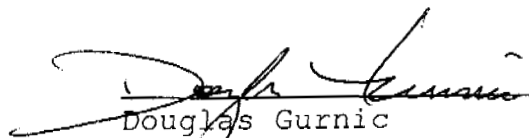
ROBERT A. BUTTERWORTH
Attorney General



Douglas Gurnic
Assistant Attorney General
Florida Bar No. 0000063
Office of the Attorney General
Appellate Division
Republic Tower.110 S.E.6th St.
Ft. Lauderdale, Florida 33301
Telephone: (954) 712-4615
Facsimile: (954) 712-4658

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was mailed this 9th day of March, 1998, to Louis K. Nicholas II, Esq. Special Assistant Public Defender, 780 N.W. 42 Avenue, Suite 300, Miami, Florida 33126-5597.



Douglas Gurnic
Assistant Attorney General