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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.

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

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# PETITIONER'S REPLY BRIEF

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## INTRODUCTION

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

(RB): Respondent's Brief on the Merits.

## 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.

Of all parts of the trial, jury selection, including the accused's right to select a jury not depleted by unlawful peremptory challenges, is surely one of the most important. *See Milstein v. Mutual Security Life Insurance Company*, 23 Fla. L. Weekly D286 (Fla. 3d DCA, Jan. 21, 1998) (Sorondo, J., specially concurring):

> I begin with the premise that jury selection is the most significant stage of any trial.
>
> *See generally* Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary's L.J. 575, 575-76 (1985) ("Experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings. In fact, once the last person on the jury is seated, the trial is essentially won or lost."); Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 Am. J. Trial Advoc. 285 (1995) ("[J]ury selection can be the most important phase of a trial. Pick the right jury and the battle is half won. But select the wrong jury, and the case is lost before the evidence is even heard."); Gordon L. Roberts & Timothy R. Hanson, *Jury Selection*, 8-NOV Utah B.J. 14 (1995) ("There are serious people...who have concluded that the selection of the jury is not only the most important part of a jury trial--it is verdict determinative."); Morris Dees, *The Death of Voir Dire*, 20 No. 1 Litigation 14 (1993) ("Skillfully conducted voir dire is the most important element in a fair trial."); Harvey Weitz, *Voir Dire in Conservative Times*, 22 No. 4 Litigation 15 (1996) ("Voir dire is the most important, yet least understood portion of a

jury trial.").

*Milstein*, 23 Fla. L. Weekly at D286, D287, and D288, fn. 3. (*See also* PB 27, and cases cited). The rights afforded to Plaza under Florida law, with respect to voir dire and gender discrimination, must be protected.

The Respondent argues that this Court's ruling in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), is properly altered by lower intermediate courts. (RB 10-15).

To support this theory, the Respondent reviews case law prior to *Melbourne*. (RB 11-12). While this undertaking provides a brief historical analysis of how this Court arrived at the *Melbourne* ruling, it does nothing to support the Respondent's underlying theory -- that the clear law need not be followed by trial court judges.

The State acknowledges that *Melbourne* was written to alleviate the problems trial courts were having in applying *State v. Neil*, 457 So. 2d 481 (Fla. 1984). (RB 12-13). Further acknowledged in the Respondent's Brief is that *Melbourne* provides a step-by-step instruction to assist lower courts in properly applying controlling law in this area. (RB 12-13).

From this point forward, the Respondent cites only two cases in an attempt to support its position.

First, the State cites to *Melbourne*, for the proposition that the clear and easy steps of *Melbourne* need not really be followed. (RB 12-13). This argument is premised on this Court's language regarding the diversity of voir dire, and that no rigid set of

rules will work in every case. *Id.*, 679 So. 2d at 764. This argument misinterprets *Melbourne*.

First, the guidelines provided by this Court in *Melbourne* "**are to be used whenever a race-based objection to a peremptory challenge is made**," *Id.*, 679 So. 2d at 764. (Emphasis added). Had the trial court followed this instruction, a record would have existed as to the State's real reason for the strike of Juror Angulo. Only then could the issue of the facial validity of the strike have been decided. However, since the court did not follow the law, as required, there is no explanation from the proponent of the strike. There is no record; there is only speculation as to the position the State might have taken.

Engaging in speculation, the Assistant State Attorney might have uttered a gender discriminatory reason, as a precursor to her later admission of gender counting. Or, the State might have considered it best to withdraw the strike, rather than suffer the results of being called upon to justify a whole series of improperly motivated gender challenges. Then again, the prosecutor might have given an explanation which required further exploration, and which elucidated the motive behind all of the jury strikes.[1]

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[1] A good illustration of why speculation on this issue should be avoided is found in the State's brief. (RB 23). The Respondent presents an artificially strained interpretation of the Assistant State Attorney's clear words that she wanted to know the gender makeup of the jury (T 773-74). According to the Respondent, Plaza's reliance on the prosecutor's statement that she wanted to know, by the number, the gender makeup of the jury, "is devoid of merit." (RB 23). The steps of *Melbourne*, if followed, clothe the trial court's ultimate determination with a presumption of correctness, eliminating the need for this type of uncertain, (continued...)

Respectfully, such speculation, from either party in this suit, cannot reconstruct the record. There is no statement, as required, from the proponent of the strike. This is precisely why this Court prescribed the step, in these situations, of hearing from the proponent of the strike. It is only after that statement that a lawful determination can be made by the trial judge.

Second, the language quoted by the Respondent does follow, chronologically, the guidelines established by this Court, *Melbourne*, 679 So. 2d at 764-75. Respectfully, Gerardo Plaza asserts that this placement in the opinion was not intended to constitute a license to ignore the guidelines. (RB 13). Instead, this Court's comments about the diversity of voir dire are better viewed as a backdrop against which the guideline steps, once actually undertaken, are to be analyzed by appellate courts. *Id*.

Third, the Respondent is highly selective in the portions of the opinion which are quoted in its brief. Actually, this Court stated:

> Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. [fn. omitted]. 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. [fn. omitted]. Second, the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous. [fn. omitted].

*Melbourne*, 679 So. 2d at 764. (Emphasis added). It is obvious

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[1](...continued)
unsupported decision-making on appeal.

that this Court mandates the enforcement of the guidelines. Contrary to the State's suggestion, the above-quoted portion of the opinion, when considered in its entirety, is not an invitation to trial courts to ignore this Court's directives. Rather, it is the opposite; it is an instruction to appellate courts to enforce the guidelines. If properly followed at trial, the enforcement process on appeal will be undertaken with deference to the trial court's rulings. However, that if the trial court does not require the strike's proponent to offer a gender-neutral reason for the challenge, no credibility determination exists for appellate consideration.

Fourth, and finally, there is no record, law, or argument presented by the Respondent to justify or explain why the trial court could not have turned to the Assistant State Attorney for an explanation for this peremptory challenge. In other words, this Court's set of rules would have worked in this case. Depending on what the Assistant State Attorney said, and the proper follow up by the trial judge, the appellate court could have enforced the guidelines, as this Court requires. However, absent the required inquiry, the record is and will remain forever silent on this issue.

Other than what is, respectfully, an improper analysis of *Melbourne*, the Respondent cites only one other case upon which this Court can uphold the Third District Court of Appeal's ruling. That case is *Plaza*. (RB 13-14, 21). *Plaza* stands alone, unsupported by the law of this State. (PB 17-18).

This Court arrived at *Melbourne* after much consideration, spanning many years. The case, with the exception of *Plaza*, is universally followed. (PB 20-21, and fn. 2, *infra*).

The guidelines which the trial courts must employ are simple and workable. If these steps are tampered with and rewritten, as requested by the State, the trial court judge will be thrust into the position of an advocate for the peremptory challenge. Also, realistically, such an overhaul of the law will actually constitute a retreat to the law of *Neil*. This Court has already refined and explained *Neil* in a manner to make the entire procedure better. Other than to uphold this one aberrant case, the Respondent intimates no basis to move backward and cause such massive confusion. [2] [3]

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[2] Prior to the issuance of the *Plaza* decision, at least one trial court in Dade County properly applied the requirements of *Melbourne*. *See Bachman v. State*, 5 Fla. L. Weekly Supp. D51, D51 (Fla. 11th Jud. Cir., Sept. 26, 1997) ("At that point, the court **must** ask the striking party for its reason for the strike and the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation"). (Emphasis added). The *Plaza* opinion remains a departure from the law of *Melbourne*, even in the Third District. *See Johnson v. State*, 23 Fla. L. Weekly D568, D568-69 (Fla. 3d DCA, Feb. 28, 1998) (noting that the second step of the process, under *Melbourne*, is to determine the facial validity of the prosecutor's reason for the strike); *Stanford v. State*, 23 Fla. L. Weekly D547, D547 (Fla. 1st DCA, Feb. 17, 1998) ("The trial court followed the process required by *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996)...Pursuant to *Melbourne*, the trial court **required** the defendant to state a race-neutral reason for the strikes") (emphasis added); *Dean v. State*, 23 Fla. L. Weekly D70, D70 (Fla. 3d DCA, Dec. 24, 1997) ("As **required** by step 2, the judge then properly asked defense counsel for an ethnic-neutral explanation for the exercise of the peremptory challenge"). (Emphasis added).

[3] Respectfully, Plaza does not agree with the analysis in fn. 1 of *Johnson*, *supra*, fn. 2 -- which suggests that the proponent (continued...)

Discrimination is quite subtle. It is best and most uniformly combatted by a clear set of rules, applied in all cases. Respectfully, the end of any unlawful discrimination in jury selection is best accomplished by enforcing *Melbourne*. Changing the law, to force appellate court judges and attorneys to guess what a trial attorney might have said, and what impact this might have had on the entire voir dire process, is degeneration, not refinement, of the law.

"It is beyond dispute that jury selection is a constitutionally protected keystone on the bridge to justice." *Rangel v. State*, 5 Fla. L. Weekly Supp. 101, 102 (Fla. 11th Jud. Cir., Oct. 10, 1997), *citing* *Slaton v. State*, 666 So. 2d 598 (Fla. 3d DCA 1996). To promote uniformity in trials, to continue forward toward the goal of eliminating discrimination in the exercise of peremptory challenges, and to uphold the principle of stare decisis, Gerardo Plaza 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.

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[3](...continued)
of the strike may explain that he or she believes the juror is an extra-terrestrial, and consequently not sufficiently familiar with life on earth to serve as a juror -- and that such an explanation would be neutral enough to survive step 2. However, this comment does illustrate the importance of having in place a well-defined process, such as the one in *Melbourne*, which must be utilized in all cases.

## 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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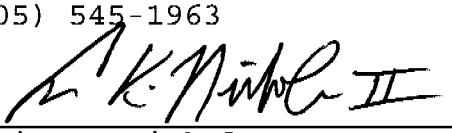
By: 

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** was delivered by mail to the parties of record listed below this 31st day of March, 1998:

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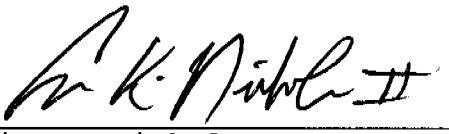
By: 

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