IN THE SUPREME COURT OF FLORIDA

Case No. SC06-420

STATE OF FLORIDA,

Petitioner,

vs.

EDGAR SYLVESTER WHITBY,

Respondent.

BRIEF OF AMICI CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS; AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; CARIBBEAN BAR ASSOCIATION; ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF SOUTH FLORIDA; CUBAN AMERICAN BAR ASSOCIATION; FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MIAMI CHAPTER; FLORIDA ASSOCIATION OF WOMEN LAWYERS, MIAMI-DADE CHAPTER; GWEN S. CHERRY/BLACK WOMEN LAWYERS ASSOCIATION; HAITIAN LAWYERS ASSOCIATION; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; AND WILKIE D. FERGUSON, JR. BAR ASSOCIATION IN SUPPORT OF BRIEF OF RESPONDENT

ON CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE FROM THE THIRD DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CASE **PAGE(S)**

TABLE OF CITATIONS (continued)

CASE **PAGE(S)**

TABLE OF CITATIONS (continued)

CASE **PAGE(S)**

TABLE OF CITATIONS (continued)

CASE **PAGE(S)**

FLORIDA CONSTITUTION

STATE RULES

INTERESTS OF AMICI CURIAE

The amici are, generally, public interest, lawyer, or other Florida organizations which include among their primary concerns insuring against racial, ethnic, religious, or gender discrimination, protecting the Bill of Rights and Florida's Declaration of Rights, and safeguarding Florida's criminal and civil justice systems. They are: the Academy of Florida Trial Lawyers (AFTL; statewide not-for-profit organization of approximately 4,000 trial and appellate lawyers); American Civil Liberties Union (ACLU) of Florida (Florida, not-for-profit affiliate of national organization with approximately 30,000 members); the Asian Pacific American Bar Association of South Florida (APABA-S.Fla.; not-for-profit association of Asian Pacific American attorneys, judges, law professors, and law students from Miami-Dade, Broward and Palm Beach Counties); the Caribbean Bar Association (CBA; statewide not-for-profit voluntary bar association); the Cuban American Bar Association (CABA; Florida not-for-profit voluntary bar association); the Florida Association of Criminal Defense Lawyers (FACDL, not-for-profit corporation with approximately 1,600 criminal defense lawyer, professor, and judge members); the Miami Chapter of the Florida Association of Criminal Defense Lawyers (Miami affiliate of the FACDL), the Florida Association of Women Lawyers (FAWL; statewide corporation with approximately 1900 lawyer, judge, and law professor

members), the Miami-Dade Chapter of the Florida Association of Women Lawyers; the Gwen S. Cherry/Black Women Lawyers Association (GSC/BWLA; not-for-profit bar association with approximately 300 lawyer, professor, and judicial Miami-Dade and Broward members); the Haitian Lawyers Association (HLA; not-for-profit organization with approximately 100 lawyer members); the National Association for the Advancement of Colored People (NAACP; national, non-profit civil rights organization), and the Wilkie D. Ferguson, Jr. Bar Association (WDFJBA; Miami-Dade, not-for-profit, voluntary bar association). Their descriptions and interests are more fully set forth in their Unopposed Motion for Leave to File Amicus Curiae Brief in Support of Respondent.

SUMMARY OF ARGUMENT

Melbourne establishes a simple, precise, and easy-to-administer procedure for challenging a litigant's suspected use of a peremptory challenge to discriminate based on race or other impermissible factors. The test is the product of a careful refinement that began in 1984 with *Neil*. The "simplified inquiry" adopted by this Court recognizes that little is required to request, and evaluate, a neutral explanation, but too much is lost if discrimination is permitted to remain undetected. *Melbourne*'s protocol efficiently and effectively safeguards the federal and Florida constitutional prohibitions against discriminatory jury selection.

The criticisms offered by the state and its supporting amicus are unsubstantiated and illusory. Because *Melbourne*'s procedure continues to work well and advances this Court's interest in protecting Florida's court system from unconstitutional discrimination, this Court should, once again, reaffirm *Melbourne.*

ARGUMENT

THIS COURT SHOULD REAFFIRM *MELBOURNE*.

A. The Preeminent Interests Protected by the Federal and Florida Equal Protection Clauses and Florida's Impartial Jury Clause Justify Melbourne's Modest Initial Burden.

The interests protected by *Melbourne v. State,* 679 So. 2d 759 (1996), are of the highest order. Purposeful discrimination based on race, ethnicity, national origin, or gender is antithetical to the United States and Florida constitutions and the democratic society and rule of law that these documents serve. As elucidated by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986):

> [B]y requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we

ensure that no citizen is disqualified from jury service because of his race."

Id. at 99 (footnote omitted). This equal protection guarantee similarly guards against discrimination based on ethnicity, *see, e.g.*, *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *State v. Alen*, 616 So. 2d 452, 454 (Fla. 1993), or gender. *See, e.g.*, *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994); *Abshire v. State*, 642 So. 2d 542, 544 (Fla. 1994).[1]

In Florida, the protection against discrimination enshrined in Article I, Section 2, of the Florida Constitution, is independently buttressed by the guarantee of an impartial jury set forth in Article I, Section 16. Indeed, it was to this impartial-jury provision that this Court first turned in prohibiting racial discrimination in peremptory challenges, *e.g.*, *Neil v. State*, 457 So. 2d 481, 486 (Fla. 1984), and this protection provided an additional basis for this Court's proscription of discrimination based on ethnicity or national origin:

[U]nder the tenets of the Equal Protection Clause of the Florida Constitution, jurors should not be rejected solely on the basis of their

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1 Although *Batson's* scope was initially limited to a prosecutor's peremptory exclusion of jurors of the defendant's race, the Court later permitted *Batson* objections by a defendant who does not share the group characteristics of the excluded juror, *Powers v. Ohio,* 499 U.S. 400(1991), by prosecutors, *Georgia v. McCollum,* 505 U.S. 42 (1992), and by civil litigants. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

> skin color or their ethnicity. To satisfy the state's constitutional guarantee of an impartial jury, citizens who are otherwise qualified to serve as impartial jurors cannot be peremptorily challenged based on their membership in a particular ethnic group.

Alen, 616 So. 2d at 454 (citations and footnote omitted).

Retaining *Melbourne*'s precise and readily administered procedure is essential to ensure a wide array of fundamental interests. For it is not just the rights of criminal defendants or other individual litigants that are at stake, but those of the excluded group member, the group to which he or she belongs, our system of justice, and our democratic society. As the Supreme Court explained in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005):

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, . . . but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice….
>
> Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that overt wrong … casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial ….. That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, . . . and undermines public

confidence in adjudication ....

125 S.Ct. at 2323-24 (citations omitted). *See also Johnson v. California*, 545 U.S. 162, 125 S.Ct. 2410, 2418 (2005) ("[T]he overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race."); *Powers v. Ohio*, 499 U.S. 400, 406-08 (1991) ("The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.") (citation omitted).[2] With such important interests at stake, the scale tips decisively in favor of requiring, upon objection, a brief and direct inquiry designed to uncover impermissible discrimination.

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2 Indeed, the Supreme Court of the United States, in discussing the impact of discriminatory jury strikes on the public's confidence in the courts, chose racially-charged Florida trials and their aftermath as examples of the public outrage that follows such racial discrimination. *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *see Andrews v. State*, 438 So. 2d 480, 482 (Fla. 3d DCA 1983) (Ferguson, J., specially concurring) ("To call the issue 'troublesome' is a myopic understatement. It has been increasingly a 'burning' issue in the community.") (footnote omitted), *quashed*, 459 So.2d 1018 (Fla. 1984).

By contrast, the countervailing right of a litigant to peremptory challenges -- to exclude potential jurors based on whim or utter speculation of bias -- is based on tradition, and not constitutional mandate. *See, e.g.*, *Busby v. State*, 894 So. 2d 88, 107, 109 (Fla. 2004) (Bell, J., concurring and dissenting in part); *Neil*, 457 So2d at 486. This tradition is clearly subordinate to the state and federal guarantees of equal protection and Florida's right to an impartial jury. Thus, *Melbourne*'s protocol correctly favors safeguarding the protections guaranteed by the United States and Florida Constitutions over protecting from meaningful scrutiny, the non-constitutional tradition of peremptory challenges.

B. The Independent Significance of *Melbourne*'s Florida Constitutional Grounds Justify Its Modest Initial Burden.

In *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), this Court recognized the prominence and independent significance of the Florida Constitution in ensuring fundamental rights. The Court noted that "state courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedoms." *Id*. at 962. Looking to Florida's Declaration of Rights, the Court declared:

> The text of our Florida Constitution begins with a declaration of rights -- a series of rights so basic that the framers of our Constitution accorded them a place of special privilege. These rights embrace a broad spectrum of enumerated and implied liberties that conjoin to

> form a single overarching freedom: they protect each individual within our borders from the unjust encroachment of state authority -- from whatever official source -- into his or her life. Each right is, in fact, a distinct freedom guaranteed to each Floridian against government intrusion.

Id. at 963 (citation omitted).

Florida courts have demonstrated the primacy of the Florida Constitution's guarantees against racial, ethnic, and gender discrimination in jury selection. This Court broke the nearly impenetrable barrier to discrimination-based jury challenges erected by *Swain v. Alabama*, 380 U.S. 202 (1965), with the announcement of *Neil*, 457 So. 2d at 486-87, relying solely on the Florida Constitution's Article I, Section 16 (impartial jury), several years before the United States Supreme Court followed suit in *Batson* by invoking federal equal protection. And, while this Court in *Neil* immediately recognized the prosecution's standing to invoke these protections, *id.* at 487, the Supreme Court did not extend standing to prosecutors until six years after *Batson*, in *Georgia v. McCollum*. 505 U.S. 42 (1992). Similarly, Florida recognized a bar to racially discriminatory peremptory challenges in civil cases under Article I, Section 22 of the state constitution, years before the United States Supreme Court acknowledged that bar under the United States Constitution. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *City of Miami v. Cornett*, 463 So. 2d 399, 402 (Fla. 3d DCA), *dismissed*, 469 So. 2d

748 (Fla. 1985); *Johnson v. Florida Farm Bureau Cas. Ins. Co.*, 542 So. 2d 367, 369 (Fla. 4th DCA 1988), *review dismissed*, 549 So. 2d 1013 (Fla. 1989). Additionally, while the Supreme Court in *Hernandez v. New York*, 500 U.S. 352, 360-62 (1991), declined explicitly to extend *Batson* to discriminatory peremptory strikes of Latinos, this Court has expressly recognized Hispanics as a cognizable class entitled to *Neil* protections under the equal protection and impartial jury guarantees of the Florida Constitution. *Alen*, 616 So. 2d at 454.

Consistent with our state's mission of ferreting out discrimination in our legal system, this Court has declared a presumption in favor of an inquiry whenever a suspect peremptory challenge is called to a trial court's attention.[3] In *State v. Slappy*, 522 So.2d 18 (Fla. 1988), this Court held that "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor." *Id*. at 22. "The primary purpose for this rule deferring to the objector is practical -- it is far less costly in terms of time and financial and judicial resources to conduct a brief inquiry and take curative action." *Valentine v. State*, 616 So. 2d

3 Florida's commitment to ending discrimination in the courts also is evidenced by this Court's creation of commissions to study such discrimination and to make recommendations for its elimination. *Foster v. State*, 614 So. 2d 455, 465-66 (Fla. 1992) (citing Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission (1990 & 1991); the Florida Supreme Court Gender Bias Study Commission Final Report (1990)) (Barkett, C. J., concurring and dissenting in part).

971, 974 (Fla. 1993). This Court has reiterated this presumption in favor of an inquiry in its post-*Melbourne* cases. *See Franqui v. State*, 699 So. 2d 1332, 1335 (Fla. 1997), *cert. denied*, 523 U.S. 1040 (1998); *State v. Holiday*, 682 So. 2d 1092, 1093 (Fla. 1996).

Thus, Florida's peremptory-challenge procedure is rooted in separate and distinct provisions of our state constitution, and serves to conserve our judicial resources while ensuring to all who come before our courts the right to a trial by an impartially-selected jury. And the Supreme Court of the United States has explicitly and repeatedly emphasized that it is for the states to formulate the particular procedures for the implementation of *Batson* and its progeny. *Johnson*, 125 S. Ct. at 2416; *Edmonson*, 500 U.S. at 631; *Powers*, 499 U.S. at 416; *Batson*, 476 U.S. at 99 n.24. This Court has chosen, and chosen wisely, the effective and efficient rule established in *State v. Johans*, 613 So. 2d 1319 (Fla. 1993), and *Melbourne.*

C. Overruling *Melbourne* Would Defeat This Court's Efforts to Eliminate Racial Discrimination in Jury Selection.

The FPAA's position, if accepted by the Court, would both undo this Court's bright-line rule, as announced in *State v. Johans* and reaffirmed in *Melbourne*, and promote anew the instability in Florida jurisprudence that those decisions successfully sought to eliminate. In *Johans*, the Court announced a

simplified and uniform approach to rectify the decisional confusion with which the regulation of peremptory challenges had been plagued:

> 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 … 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.

The Court declaimed the many attributes of the *Johans* procedure: "[t]he burden imposed on the party required to provide a race-neutral justification is, at worst, minimal" requiring "only a minute or two;" "the trial court is in the best position to evaluate the neutrality of the proffered reasons," thus "the proper time for exacting race-neutral reasons for striking a potential juror is during voir dire;" a trial judge's ruling on the neutrality issue is "accorded deference on appeal," but "a race-neutral justification cannot be inferred merely from the circumstances such as the composition of the venire or the jurors ultimately seated." *Id. (*citations omitted). The Court admonished that, without an inquiry by the trial court, "[d]eference cannot be shown to a conclusion that was never made." *Id. (*citations omitted).

The Court adhered to *Johans*' simplified initial step in its unanimous

Melbourne decision. The Court reiterated its "guidelines to assist courts in conforming with article I, section 16, Florida Constitution and the equal protection provisions of our state and federal constitutions." 679 So. 2d at 764. [4] Upon a timely objection to a peremptory strike and request for a justification, "the trial court *must* ask the proponent of the strike to explain the reason for the strike." *Id.* (emphasis added).[5] The Court did not intend "an arcane maze of reversible error traps" *id.* at 765, but was not hesitant to articulate its overarching goal: the elimination of discrimination in the exercise of peremptory challenges. *Id.* at 764-65. And, a decade after *Johans*, this Court again reaffirmed that decision's

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4 The significance of the Court's reliance upon the state constitutional provisions cannot be overlooked, particularly in light of the FPAA's urging of the adoption of the federal *prima facie* test. As the FPAA implicitly concedes, this Court is free independently to interpret the Florida Constitution, FPAA Brief at 12 n.5, as indeed it is, *e.g., Traylor v. State*, 596 So. 2d at 964-66, and free independently to prescribe the procedures for ensuring that peremptory challenges are not used to discriminate, as the Supreme Court itself recognized in *Batson*. 476 U.S. at 99 n.24.

5 This Court has encouraged trial courts to err, if at all, in favor of conducting an inquiry, as exemplified by *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997), in which the Court upheld an inquiry of defense counsel where the prosecutor's only objection was: "Wait a minute, Judge, are they striking Aurelio Diaz? State would challenge that strike." *Id.* at 1334-35. The Court noted that the trial court clearly understood that the objection was based upon Cuban heritage and there was never a contention made that the juror was not a member of a cognizable minority or that there should not be an inquiry. *Id.* at 1335. It is somewhat ironic that the trial judge who "understood" the prosecutor's objection is now the co-author of the FPAA's amicus brief, which complains of "conclusory" and "frivolous" objections and advocates for an extensive pre-inquiry burden. FPAA Brief at 7.

procedural refinements in *Dorsey v. State*, 868 So. 2d 1192, 1199-1201, 1203-05 (Fla. 2003), in which the Court continued to speak with one voice on the *Johans-Melbourne* simplified initial step here at issue, despite offering differing interpretations of steps two and three.

As the *Dorsey* majority noted, the doctrine of *stare decisis*, while not absolute, yields only where there is "a significant change in circumstances after the adoption of the legal rule or when there has been an error in legal analysis." *Id.* at 1199. The majority found no basis for a departure from the *Melbourne* strictures; nor did the dissenting Justices, who stressed both *stare decisis*, *id.* at 1203 (Wells, J., dissenting), and the "unambiguous and practical three-step procedure" (Bell, J., dissenting), that so successfully redresses discrimination:

> In *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), a unanimous opinion authored by Justice Leander Shaw, a judicious balance was finally reached in the effort to eliminate racial discrimination, yet maintain the full and free use of peremptory challenges. The procedural steps and principles outlined in Melbourne have worked remarkably well.

* * * *

> The use of peremptory challenges for discriminatory purposes is a very serious issue that every judge must be diligent to ferret out and prevent. Like the majority, I believe that such invidious use of peremptory challenges is all too frequent. However, I believe the process outlined in *Melbourne* is the best mechanism to address the problem.

Id. at 1203, 1211 (Bell, J., dissenting).[6]

The FPAA asserts that the *Johans-Melbourne* test has "proven disastrous," albeit without *any* supporting authority for its attack on the Court's carefully balanced approach to rooting out discrimination in the jury box. FPAA Brief at 4.[7]

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6 The FPAA contends that the *Johans-Melbourne* rule is somehow inconsistent with the presumption that peremptory challenges are exercised in a non-discriminatory manner. FPAA Brief at 6-7. But that argument is based on a misconception of the presumption itself, which is always a given, unless and until a party lodges an objection that calls into question the propriety of the procedure. *See Johans,* 613 So. 2d at 1322 (peremptory strikes' presumption of validity is still the law and a peremptory is deemed valid unless an objection is made, but upon such objection, trial court must conduct an inquiry). It is quite fitting – as well as much more efficient – to require an explanation in response to an objection rather than "engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Johnson v. California,* 125 S.Ct at 2418.

7 Indeed, the FPAA repeatedly refers, without a citation to a single case, to the purported "proliferation of totally frivolous *Melbourne* objections" which "frivolous objections have been particularly egregious in criminal cases", and "[a]s even a cursory review of the case law in this area will establish, this abuse of the *Melbourne* ideals manifests itself predominantly in the criminal arena." (FPAA Brief at 6-7). Added to this wholly unsubstantiated claim, is the FPAA's further assertion without citation that "it is not unusual to *see Melbourne* objections to each of the prosecutor's six or ten peremptory challenges," and that "[a] thorough review of these cases, as in this case, reveals absolutely no suggestion of discrimination." *Id.* at 9. It is, of course, impossible to dispute such a proposition, or offer contrary case analysis, where there is no "cursory review" offered and no citation to the purported "thorough[ly]" reviewed cases. *Id.* at 7, 9.

Along with the state, the FPAA advocates turning back the clock to the pre-*Johans* period, but neither the FPAA nor the state cites case law (or any other authority) that shows *any* ill effects – much less "disastrous" ones – from that test's application.[8] The state and the FPAA also suggest that "Florida seems to be the only jurisdiction that has completely abandoned the requirement of a prima facie demonstration of discrimination as a prerequisite to a judicially mandated inquiry." Petitioner's Brief at 38; *see* FPAA Brief at 12. In actuality, the uniform procedure adopted in *Johans* has worked well, not only in this state, but in other jurisdictions.

Six years before *Johans,* the Supreme Court of South Carolina announced that "[r]ather than deciding on a cases by case basis whether the defendant is entitled to a hearing, based upon a *prima facie* showing of purposeful

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8 The FPAA would have the Court inject yet more uncertainty into the process by which a trial court determines whether to conduct an initial inquiry, by requiring the trial court to consider whether the objecting lawyer has made other meritless objections. FPAA Brief at 11 ("abuse of *Melbourne* objections by an attorney should also be a part, though not dispositive of, the determination of whether a prima facie case has been established"). The differing permutations possible under this construct would revive the case-by-case confusion that *Johans* alleviated, and with even more disturbing disparities and imprecision. And this construct is so myopically concerned with the motivation of the objecting counsel that it overlooks this Court's, and *Batson*'s, focus on the impermissible motivation of the party exercising the peremptory strike. More disturbing, by "punishing" the objecting litigant, the FPAA forgets that the injury from a discriminatory challenge extends beyond the opposing party – to the individual juror, the jury system, the law as an institution, the community at large, and the democratic ideal that is reflected in the processes of our courts. *E.g.*, *Johnson*, 125 S. Ct. at 2418; *Batson v. Kentucky*, 476 U.S. at 87.

discrimination under the vague guidelines set forth by the Unites States Supreme Court," the "better course" would be to require a hearing upon a defendants' objection to a peremptory challenge by the prosecutor whenever a defendant is a member of a cognizable class and objects to the prosecutor's exclusion of members of that class. *State v. Jones*, 358 S.E.2d 701, 703 (S.C. 1987). The court lauded the benefits of this straightforward rule:

> This bright line test would ensure consistency by removing any doubt about when a *Batson* hearing should be conducted. Further, this procedure would ensure a complete record for appellate review.

Id.[9] One year after South Carolina's adoption of its "bright line" rule in *Jones*, the United States Court of Military Appeals adopted South Carolina's rule – at the government's request – to govern all armed-services trials, noting that "[a]s a matter of judicial administration, the *per se* rule has become recognized as the superior procedure for *Batson* challenges." *United States v. Moore*, 28 M.J. 366, 368 (CMA 1989) (citations omitted).

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9 The court clarified its rule some years later:

> Considering the United States Supreme Court's development of the issue, the *Jones* criterion as to when to hold a *Batson* hearing is outdated. However, this Court's concern about ensuring consistency is still legitimate. Therefore, we require that trial courts hold *Batson* hearings whenever one is requested. In our opinion, requesting a *Batson* hearing in effect sets out a *prima facie* case of discrimination.

State v. Chapman, 454 S.E.2d 317, 319-20 (S.C. 1995) (footnote omitted).

And the Supreme Court of Missouri likewise has chosen to require a trial court inquiry for a neutral reason for a strike when the adverse party raises a *Batson* challenge. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. 1992). The court wholeheartedly rejected the state's contention that *Batson* required that the state first be given the opportunity to challenge the prima-facie basis for an objection:

> While requiring the state to provide race-neutral reasons for its strikes each time a defendant raises a *Batson* challenge may be somewhat inconvenient for the state, the procedure is not unconstitutional. The establishment of a prima facie case by the defendant is of no independent constitutional significance. Once an explanation has been offered by the prosecutor or required by the court and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot. The *Batson* prima facie case requirements may be significantly altered or even completely eliminated without offending against the Constitution.

*Id. (*citations omitted); *accord*, *State v. McFadden*, 191 S.W.3d 648, 651 (Mo. 2006).

The Supreme Court of Connecticut, noting that the issue of purposeful discrimination is a matter of "utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole," *State v. Holloway*, 553 A.2d 166, 171 (Conn. 1989) (citation omitted), also chose to follow South Carolina's lead and adopt a simplified-inquiry rule:

> Consequently, because this issue is of such vital importance to our real and perceived adherence to the rule of law, in the exercise of our inherent supervisory authority over the administration of justice, in all future cases in which the defendant asserts a *Batson* claim, we deem it appropriate for the state to provide the court with a prima facie case response consistent with the explanatory mandate of *Batson*. Such a response will not only provide an adequate record for appellate review but also aid in expediting any appeal.

*Id. (*footnote omitted).[10]

The suggestion by the state and the FPAA that the *Johans-Melbourne* rule fosters unnecessary reversals in the absence of demonstrated discrimination is both illogical and unsound. First, requiring trial courts to decide whether a *prima facie* case has been demonstrated *before* conducting an inquiry will likely foster *more,* not fewer, reversals because the appellate courts will be required to review whether a *prima facie* case was established, and to reverse if the trial court erred in declining to conduct an inquiry. Such reversals will be *per se* required where the record fails to provide the prosecutor, or any party exercising a peremptory challenge, with the opportunity to explain that its strike was not discriminatory.

The state and the FPAA essentially advocate a scheme that is designed to

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10 *Accord, State v. Rigual*, 771 A.2d 939, 946 (Conn. 2001) ("[W]e agree with other state Supreme Courts that it is in the best interest of justice to require trial courts to conduct *Batson* hearings upon any party's request when the opposing party exercises its peremptory challenges to remove members of a particular race, gender, ancestry or national origin").

safeguard the very evil that *Neil* and its progeny have sought to eliminate. See Petitioner's Brief at 29 (decrying reversals based upon the lack of "genuineness" and "neutrality" in proffered justifications for peremptory strikes). Their argument boils down to the unacceptable proposition that discarding the *Johans-Melbourne* rule would lead to fewer reversals because no inquiry would be conducted and discrimination would remain undetected. This Court must unequivocally reject the state's position and maintain the current practice, which is well designed to expose discrimination so as to vindicate our constitutional rights and protections.[11]

The impetus for the *Johans-Melbourne* protocol for ferreting out discriminatory peremptory challenges persists today. Case law amply demonstrates that litigants continue to use racial and other impermissible forms of discrimination

11 The state's retreat to a harmless error argument, Petitioner's Brief at 41-49, only denigrates the noble goals of this Court's *Johans-Melbourne* rule. The iniquity that this rule is intended to undo is a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Ford v. Norris,* 67 F.3d 162, 170 (8th Cir. 1995)(citation omitted). Indeed, the Supreme Court has explicitly proclaimed that the interests protected by precluding discriminatory peremptory challenges exceed the interests of the individual defendant, "namely, the interests of jurors themselves in not being improperly excluded from service and the interest of the community in the unbiased administration of justice." *Davis v. Secretary for the Department of Corrections,* 341 F.3d 1310, 1317 (11th Cir. 2003) (citations omitted). This type of structural defect, affecting interests far beyond the litigants, cannot assuredly be absolved by a tenuous hypothesis of harmlessness.

in jury selection.[12] Indeed, as Justice Breyer observed in *Miller-El,* "[T]he use of race and gender-based stereotypes in jury selection seems better organized and more systematized than ever before." 125 S. Ct. at 2342 (Breyer, J., concurring). And as then-Chief Justice Barkett noted in *Foster*, the impermissible discrimination that courts are constitutionally obliged to prevent operates even at a difficult to detect, unconscious level. 614 So. 2d at 466 (Barkett, C.J., concurring and dissenting in part). More recently, Justice Bell also agreed, "Like the majority, I believe that such invidious use of peremptory challenges is all too frequent." *Dorsey,* 868 So.2d at 1211 (Bell, J., dissenting).

In sum, the evil of discrimination has not been vanquished in this State. This is undeniable. And the state and prosecutors do not suggest that discrimination is no more; they simply fear too many objections and too many inquiries into prosecutors' motivations for striking jurors. But the position of the amici curiae, in

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12 *See, e.g., Miller-El v. Dretke***,** 125 S.Ct. at 2341-42 (Breyer, J., concurring); *Frazier v. State*, 899 So. 2d 1169, 1173 (Fla. 4th DCA 2005)(conviction reversed where prosecutor's strike of Jamaican female based on country of origin constituted "surrogate for impermissible racial or ethnic bias"); *Despio v. State*, 895 So. 2d 1124, 1126 (Fla. 3d DCA 2005)(conviction reversed where prosecutor struck Creole-speaking venireperson and explanation given by the state was a classic ethnically-discriminatory strike); *Wallace v. State*, 889 So. 2d 928, 930 (Fla. 4th DCA 2004) (conviction reversed where prosecutor justified strike of African-American woman because of law-office work but left on white lawyer); *Thomas v. State*, 885 So. 2d 968, 971-73 (Fla. 4th DCA 2004)(conviction reversed where prosecutor justified strike of African-American male on silence in voir dire but juror answered every question posed and prosecutor declined to ask a single question).

support of Mr. Whitby and consistent with this Court's jurisprudence over the past twenty years, centers on eradicating discrimination based upon race, gender, nationality, and ethnicity, that can only undermine Florida's jury-selection process. The *Johans- Melbourne* simplified-inquiry rule, designed to ensure a litigant's right to obtain the judgment of the community from which no one has been discriminatorily excluded, is a vital component of Florida's jury-selection procedure that well serves the democratic ideals of litigants, prospective jurors, and the courts and citizens of our state.

CONCLUSION

Based on the foregoing, the amici respectfully request that this Court re-affirm the *Johans-Melbourne* rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of September, 2006, to: Shannon P. McKenna, Public Defender's Office, 1320 N.W. 14th Street, Miami, FL 33125; Richard Polin, AAG, Department of Legal Affairs, 444 Brickell Avenue, #950, Miami, FL 33131; and Rodolfo Sorondo, Jr., Esq., Holland & Knight, 701 Brickell Avenue, Suite 3000, Miami, FL 33131.

By:_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By:_____
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BENJAMIN S. WAXMAN