IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-420

STATE OF FLORIDA,

Petitioner,

-vs-

EDGAR SYLVESTER WHITBY,

Respondent.

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FLORIDA CASES

OTHER STATE CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS[1]

The defendant accepts the State's statement of the case and facts, with the following additions.

The venire was composed of 30 members, 13 females and 17 males. (R. 11-12; T. 33-147). The State exercised all 6 of its peremptory challenges against males. (R. 11-12). The State did not exercise its extra alternate-juror peremptory challenge. (T. 143). The final jury panel consisted of 4 females and 2 males. (R. 11-12).

Before it struck Juror Lynn, the State attempted to peremptorily strike Juror Appleton. The defendant raised a *Neil* objection noting that this was the State's second strike against an African-American. (T. 116). The prosecutor first proffered a reason that was contradicted by the record. (T. 117). And, when the trial court rejected this reason, the prosecutor argued with the court that its proffered reason was acceptable. (T.

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[1] This cause is before the Court on certified questions of great public importance. The Petitioner, the State of Florida, was the Appellee/Plaintiff in the proceedings below and the Respondent, Edgar Sylvester Whitby, was the Appellant/Defendant in the proceedings below. The Florida Prosecuting Attorney's Association ("FPAA") has filed an Amicus brief on behalf of the Petitioner. In this brief, the parties will be referred to as they stood in the lower courts, by proper name, or as Petitioner, Respondent, or Amicus.

The symbol "T." will denote the transcript of the trial court proceedings. The symbol "R." will denote the record on appeal. The symbol "A." will denote the Respondent's Appendix, which has been filed with this brief on the merits, as a separately bound volume. The symbol "PB." will denote the Petitioner's Initial Brief on the Merits. The symbol "PA." will denote the Appendix to Petitioner's Brief on the Merits. The

117). Only at the trial court's insistence did the State offer a second reason—that the juror was disinterested. (T. 117). The State only withdrew its strike to this juror, after the defense began to dispute the court's ruling. (T. 117).

At trial, the State presented evidence that the incident involved a domestic situation between the defendant, his girlfriend, and the complainant. The defendant referred to the complainant as his girlfriend's little boyfriend. (T. 212). He also made several anti-gay slurs directed at the complainant, who was a gay male. (T. 183, 185, 215). The defendant did not approve of the complainant's relationship with his girlfriend. (T. 159, 166). The day of the incident the complainant and the defendant's girlfriend were hanging out for a couple of hours drinking beers. (T. 206). The defendant saw them together and there was a verbal confrontation. (T. 166, 210). Shortly thereafter, the defendant saw his girlfriend, her daughter, and the complainant waiting to catch a ride to go to a party together. (T. 213-214). It was at this point that the incident took place.

SUMMARY OF ARGUMENT

This Court clearly and unequivocally held in *Melbourne* and *Holiday* that a party raising a *Neil* objection has no burden, other than requesting a neutral reason. This simplified inquiry rule gets to the heart of determining whether a challenge is discriminatory. It produces actual answers to suspicions and inferences that

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symbol "AB." will denote the brief of the Florida Prosecuting Attorneys Association, as Amicus.

discrimination may have infected the jury selection process. It decides cases on the merits, and it only imposes a minimal burden on the trial courts. Importantly, the simplified inquiry rule also places a high value on the equal protection rights of individual jurors. Florida's simplified inquiry rule best serves the rights of its citizens.

Florida should not adopt the federal *prima facie* burden, nor should it require a party raising a *Neil* objection to additionally allege that the strike is racially discriminatory. If Florida were to adopt one of these burdens, it is likely that the number of reversals would drastically increase. When Florida utilized the *prima facie* burden, nearly 1 out of every 4 *Neil* cases was reversed due to a trial court's error in evaluating the *Neil* objector's showing. (A. 5). Since Florida eliminated this burden and adopted the simplified inquiry rule in *Johans*, only 1 out of every 14 cases has been reversed due to this type of error. (A. 5). Since *Melbourne*, only 6 cases in total have been reversed. (A. 30)

Melbourne works remarkably well. The simplified inquiry rule strikes the correct balance between the goal of eliminating discrimination and the full and free use of peremptory challenges. This Court should retain this rule, and not make any changes to the *Melbourne* process.

ARGUMENT

Preliminary Statement

"Despite continuing efforts, racial and other discrimination remains a fact of this nation's evolving history. The United States Supreme Court has characterized it as a problem needing unceasing attention. *McCleskey v. Kemp*, [481 U.S. 279 (Fla. 1987).]" *State v. Slappy*, 522 So. 2d 18, 20 (Fla. 1988). As this Court emphasized in *State v. Davis*, 872 So. 2d 250 (Fla. 2004):

> The issue of racial, ethnic, and religious bias in the courts is not simply a matter of 'political correctness' to be brushed aside by a thick-skinned judiciary. . . . Despite longstanding and continual efforts, both by legislative enactments and by judicial decisions to purge our society of the scourge of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic.

Id. at 254. The judiciary's never ceasing role in the fight against racial, ethnic, and religious bias was underscored by this Court in *Davis*: "The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of our country when called on to act in litigated cases, must remain ever vigilant in its responsibility." *Id.* (quotation omitted).

"Discrimination within the judicial system is [the] most pernicious." *Slappy*, 522 So. 2d at 18, quoting *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986) (citation and quotation omitted). "The appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being—to insure

equality of treatment and even handed justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large." *Slappy*, 522 So. 2d at 20.

"Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994). "[T]he parties before the court are entitled to be judged by a fair cross section of the community . . . [and] citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws." *Slappy*, 522 So. 2d at 20. "[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' *Powers v. Ohio*, 499 U.S. 400, 412 (1991)[;] [this discrimination] undermines public confidence in adjudication." *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2324 (2005) (citations omitted).

Generally, peremptory challenges assist the parties in the selection of an impartial jury. *See State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984). In *Neil*, however, this Court recognized: "It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury." This Court found that the test for evaluating the discriminatory use of peremptory

challenges, articulated in *Swain v. Alabama*, 380 U.S. 202 (1965), impeded rather than furthered this State's constitutional guarantee of an impartial jury. *See* Art. I, § 16, Fla. Const.; *Neil*, 457 So. 2d at 486.

This Court then established its own test to assure "that peremptory challenges will not be exercised so as to exclude members of discrete racial groups solely by virtue of their affiliation." *State v. Aldret*, 606 So. 2d 1156, 1157 (Fla. 1992) (citation omitted). In the first step of the test, the party (a) must make a timely objection, (b) must demonstrate that the juror is a member of a distinct racial group, and (c) must show that there is a strong likelihood that the juror has been challenged solely based on his/her race. *See Neil*, 457 So. 2d at 486. If the party meets this initial burden, then the court must decide if there is a substantial likelihood that the challenge was race-based. *See id.* If yes, then the burden shifts to the other party to show that the juror was not challenged solely on the basis of race. *See id.* If no, then there is no further inquiry. *See id.*

In *Slappy*, this Court recognized that the first step was "one of the most frequently litigated issues in both the federal and state courts. . . ." *Id.* at 21 (citations omitted). The first step determination of the "likelihood" of discrimination does not lend itself to precise definition, for it is not based on numbers alone, on whether a minority juror is seated, or on whether several minority jurors are excused; rather it is based on whether any single juror, independent of any other juror, is excused. *See id.* Instead of crafting a bright-line test, the *Slappy* Court emphasized that the spirit and intent of *Neil* was "to

provide broad leeway in allowing parties to make a *prima facie* showing that a 'likelihood' of discrimination exists." *Slappy*, 522 So. 2d at 21-22.

"Recognizing . . . that peremptory challenges permit those to discriminate who are of a mind to discriminate, [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 (quotation and citation omitted). In establishing this rule, this Court explained: "[o]nly in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question." *Id.* This Court further reasoned that "[i]f we are to err at all, it must be in the way least likely to allow discrimination." *Id.*

In *State v. Johans*, 613 So. 2d 1319 (Fla. 1993), this Court observed that the case law still "does not clearly delineate what constitutes a 'strong likelihood' that venire members have been challenged solely because of their race." *Id.* at 1321 (citations omitted). The Court decided that it was now time to craft a bright-line rule that provided "clear and certain guidance to the trial courts in dealing with peremptory challenges." Accordingly, it held: "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.* In *Valentine v. State*, 616 So. 2d 971 (Fla. 1993), the Court clarified the terms of this rule: "once a party makes a timely objection and demonstrates on the record that the challenged persons are members of a distinct racial group, the trial court must conduct a routine inquiry." *Id.* at 974.

In *Valentine*, this Court was forced to reverse the defendant's conviction and vacate his death sentence because the trial court failed to conduct a *Neil* inquiry. The *Valentine* Court noted that reversal would have been unnecessary "if the trial court had simply followed *Slappy's* clear directive and resolved all doubt in favor of the objector. (citation omitted)." *Valentine*, 616 So. 2d at 975. The *Valentine* Court correctly forecasted: "Our holding in *Johans* will hopefully minimize such costly and frustrating errors—where a lengthy and expensive trial is foredoomed at its very beginning for lack of a five-minute inquiry." *Valentine*, 616 So. 2d at 975.

A few years later, in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), this Court recognized that trial courts were still having difficulty with *Neil's* first step as refined by *Johans*. Citing to the Third District's decision in *Holiday v. State*, 665 So. 2d 1089 (Fla. 3d DCA 1995), the *Melbourne* Court observed that some courts were holding that *Johans* required that the objector must do something more than merely objecting. *See Melbourne*, 679 So. 2d at 763 & n.1. This Court then clarified the parameters of the *Neil* test, and set forth the following first step guidelines:

> 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 (step 1), the court must ask the proponent of the strike to explain the reason for the strike.

Melbourne, 679 So. 2d at 764 (footnotes omitted).

Shortly thereafter, in *State v. Holiday*, 682 So. 2d 1092 (Fla. 1996), this Court quashed the Third District's decision, which held that the objector must do something more than object. In no uncertain terms, this Court held:

> [The Third District] erred when it found that the party must also show that the peremptory challenge is being used impermissibly before the trial court must ask the proponent of the strike for a permissible reason. Rather, the third prong of the test requires the objecting party only to request the trial court to ask the other side its reason for the strike.

Id. at 1094.

"The procedural steps and principles outlined in *Melbourne* have worked remarkably well." *Dorsey v. State*, 868 So. 2d 1192, 1203 (Fla. 2003) (Bell, J. dissenting). Since *Melbourne* was decided ten years ago, the courts have encountered very few problems with its first step simplified inquiry rule. In fact, only a handful of decisions have been reversed because the trial court failed to conduct a *Neil* inquiry as it incorrectly evaluated the *Neil* objector's showing. (A. 30).

The court below, and the State and the Florida Prosecuting Attorneys Association ("FPAA"), in their briefs before this Court, paint a much different picture—one of a system overburdened with needless reversals that emphasize form over function. Arguing that *Melbourne's* first step has proven disastrous, these parties advocate that this Court abandon the simplified inquiry rule and adopt the federal *prima facie* burden, a standard this Court repudiated more than 13 years ago in *Johans.*

The Third District, the State, and the FPAA paint a picture of a system in disarray, yet they offer no support for their allegations. (PA. 13-16; PB. 29, 35-37; AB. 2, 5-7). An analysis of all published decisions ruling on the merits of a *Neil* issue reveals that their picture is completely inaccurate. (A. 1-42). Since this Court eliminated the *prima facie* burden in *Johans*, the number of reversals due to the trial court's error in evaluating the *Neil* objector's showing has been drastically reduced. Before this Court eliminated the *prima facie* burden in *Johans*, nearly 1 out of every 4 cases resolving the merits of a *Neil* issue was reversed due to the trial court's error in evaluating the *Neil* objector's prima facie case. (A. 5). In total, 38 cases were reversed before *Johans*. (A. 6, 13-14).

In contrast, since *Johans*, only 1 out of every 14 cases has been reversed due to a trial court's error in evaluating a *Neil* objector's showing. (A. 5). In total, 15 cases were reversed since *Johans*. (A. 23, 30). After this Court clarified the parameters of the first step in *Melbourne*, the reversal rate has decreased even more significantly. Since *Melbourne*, only 1 out of every 25 cases has been reversed due to a trial court's error in evaluating the *Neil* objector's showing. (A. 5). In total, only 6 cases were reversed since *Melbourne*. (A. 30).

Florida precedent makes clear that *Melbourne* works remarkably well. As further explained *infra*, this Court should not make any changes to *Melbourne's* first-step simplified inquiry rule. Not only does this simplified inquiry rule work well, it is also the best standard for searching out discrimination. The current standard gets to the heart of

determining whether a challenge is discriminatory; it produces actual answers to suspicions and inferences that discrimination may have infected the jury selection process. As the United States Supreme Court recently emphasized in *Johnson v. California*, 545 U.S. 162, 125 S.Ct. 2410 (2005): "The *Batson* framework is designed to produce actual answers . . . [t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* at 2428. *See also Slappy*, 522 So. 2d at 22 ("a full airing of the reasons behind a peremptory strike . . . is the crucial question.").

I. IN LIGHT OF THE SERIOUS NATURE OF THE OBJECTION TO A CHALLENGE (THAT OPPOSING COUNSEL IS CLAIMING THAT THE PROPONENT OF THE CHALLENGE IS ATTEMPTING TO REMOVE A JUROR BASED UPON THE JUROR'S RACE, ETHNICITY, OR GENDER IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS) AND THE SERIOUSNESS OF THE CONSEQUENCES, SHOULD THE OBJECTING PARTY BE REQUIRED TO AT LEAST ALLEGE THAT THE CHALLENGE WAS RACIALLY (OR OTHERWISE IMPERMISSIBLY) MOTIVATED?

This Court should answer this question in the negative. In this question, the Third District is asking whether the party making a *Neil* objection should be required to use the words "that strike is racially (or otherwise impermissibly) motivated," whenever a party tenders a *Neil* objection. The Third District and the FPAA concede that the use of these words is not currently required. (PA. 13; AB. 5). The State argues that an additional allegation of discrimination is currently required under *Windom*, *Holiday*, and *Franqui*, and that if it is not, then it should be required. (PB. 19-29).

The use of these words is not currently required by *Melbourne*, and it should not be a requirement. The Third District suggests that these additional words should be used because of the serious nature of the allegation and the seriousness of the consequences. (PA. 15). The State further suggests that these additional words should be used because a *Neil* objection impugns the integrity and professionalism of the striking attorney. (PB. at 25).

A *Neil* objection does <u>not</u> impugn the integrity and professionalism of counsel.

Rather, a *Neil* objection is based on principles of accountability, and it furthers the goal of eliminating discrimination. *See Reynolds v. State*, 576 So. 2d 1300 (Fla. 1991). As this Court stated in *Reynolds*:

> In no sense do we suggest by this opinion or by our opinion in *Slappy* that the prosecutors of this state are influenced by racist sentiment in the present-day courtrooms of Florida . . . Rather, our opinion today stands foursquare on the principle of accountability, which is the bedrock of American democracy. Our system of government is premised on the belief that every public officer and employee should be accountable and should not lie entirely beyond the reach of public questioning. Both the federal and Florida Constitutions provide a right to petition officials for redress of grievances partly to ensure that such accountability exits.
>
> Ordering the state to justify its use of the peremptory challenge in no sense impugns the state or suggests an accusation of racism. Its sole purpose is to apply the principle of accountability to the peremptory challenge.

Id. at 1302 (emphasis added). The Court further explained that past abuses "have created an appearance of impropriety, however unfounded today, that must be eliminated. Our opinions in *Neil*, *Slappy*, and the present case eradicate this appearance of impropriety by creating a simple, brief, and easily enforced system of accountability in this very limited context." *Reynolds*, at 576 So. 2d at 1302.

This Court reaffirmed this purpose in *Dorsey*, when it found that an attorney's good-faith motive is insufficient to satisfy a proponent's burden of production. In so doing, this Court emphasized: "We make these observations not to impugn the good faith

of attorneys or judges, but out of concern that approval of the Third District decision in this case would undermine the goal of 'the elimination of racial discrimination in the exercise of peremptory challenges.' *Melbourne*, 679 So. 2d at 764." *Dorsey*, 868 So. 2d at 1201 (emphasis added).

The use of the words "that strike is racially (or otherwise impermissibly) motivated" will add nothing of value to the *Neil* objection. It will elevate form over substance. When a party raises a *Neil* objection and requests a neutral reason for a strike, it is implicit in the nature of the objection that the opponent of the strike is raising a challenge based on possible discriminatory practice. This is so, even if a party does not explicitly use the words "that strike is racially (or otherwise impermissibly) motivated." Indeed, there could be no other basis for a *Neil* objection.

An objection must only be "sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978) (citation omitted). "The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings." *Neil*, 457 So. 2d at 486 & n.9, citing *Castor*, 365 So. 2d at 703. The voicing of additional words is superfluous as the trial judge is aware of the nature of a *Neil* objection, whether or not the objecting party alleges that it is discriminatory.

In *Whitby*, the Third District analyzes the history of this Court's *Neil* jurisprudence. The Third District recognized that in *Johans*, this Court "prospectively held that the objecting party only needs to allege that the peremptory challenge is being used in a racially discriminatory manner, in order to trigger an inquiry by the court." *Whitby*, 31 Fla. L. Weekly D482 at *3 (Fla. 3d DCA Feb. 15, 2006). It then observed that the *Valentine* Court emphasized: it is "far less costly in terms of time and financial resources to conduct a brief inquiry and take curative action during voir dire than to foredoom a conviction to reversal on appeal." *Whitby*, 31 Fla. L. Weekly D482 at * 3 (citation omitted). The Third District found that this language "signaled the Court's intention to eliminate the requirement that the party objecting to a peremptory challenge allege the likelihood that the challenge was racially motivated. . . ." *Id.*

The Third District concluded, however, that based on *Windom v. State*, 656 So. 2d 432 (Fla. 1995), this Court apparently did not eliminate this requirement. The Third District cited *Windom* as finding that the trial court did not err in failing to conduct a *Neil* inquiry as the defendant "failed to allege that there was a strong likelihood that the juror was challenged solely because of her race." *Whitby*, 31 Fla. L. Weekly D482 at *3, quoting *Windom*, 656 So. 2d at 437. The Third District's conclusion is incorrect.

Windom did not abrogate either *Johans* or *Valentine*. Importantly, *Windom* was decided under the pre-*Johans* standard. *Johans'* simplified inquiry rule applied prospectively to all trials from the date of its decision, February 18, 1993. The

defendant's trial in *Windom* took place on August 25, 1992.[2] The *Windom* Court specifically pointed out that a party's burden changed under *Johans*. *See Windom*, 656 So. 2d at 437.

Additionally, in *Windom*, the defendant failed to satisfy the first step because he had not identified the juror as a member of a cognizable class (part (b) of the first step inquiry) and not because he otherwise failed to meet his *prima facie* burden (part (c) of the first step inquiry).[3] The defendant's objection would have been insufficient under either the *prima facie* burden or the simplified inquiry rule. As the *Windom* Court highlighted, "[a] timely objection and a demonstration on the record that the challenged person is a member of a distinct racial group have consistently been held to be necessary." *Windom*, 656 So. 2d at 437. The *Windom* holding stands for the proposition that, under the part (b) cognizable class requirement, an objecting party must identify the cognizable class of a juror. It does not stand for the proposition, as suggested by the Third District, that this Court, in *Johans* and *Valentine*, did not intend to eliminate the requirement, under the part (c) burden requirement that the party must allege that the challenge was racially motivated.

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[2] *See Windom v. State*, Florida Supreme Court Case No. 80830, Initial Brief of Appellant at 2, http://www.law.fsu.edu/library/flsupct/80830/80830ini. pdf.

[3] In the first step of the *Neil* test, the party (a) must make a timely objection [the objection requirement], (b) must demonstrate that the juror is a member of a distinct racial group [the cognizable class requirement], and (c) must show that there is a strong likelihood that the juror has been challenged solely based on their race [the burden

After concluding, based on *Windom*, that this Court may not have been ready to eliminate the *Neil* objector's part (c) burden requirement, other than requesting a neutral reason, the Third District analyzed this Court's *Melbourne* decision. The Third District suggests that, in *Melbourne*, this Court may have added the use of the words "that strike is racially (or otherwise impermissibly) motivated" as a requirement of the first-step test. *Whitby*, 31 Fla. L. Weekly D482 at *4, 6. The basis of the Third District's argument is the *Melbourne* Court's references, in footnotes two and five setting forth the first step guidelines:

> 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, (footnote 2: *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984). A simple objection and allegation of racial discrimination is sufficient, e.g. "I object. The strike is racially motivated.") b) show that the venireperson is a member of a distinct racial group, (footnote 3: *Id.*) and c) request that the court ask the striking party its reason for the strike. (footnote 4: *See generally State v. Johans*, 613 so. 2d 1319 (Fla. 1993). If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike. (footnote 5: *See generally id.* at 1321 ("[W]e hold that from this time forward a *Neil* inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." *Johans* eliminated the requirement that the opponent of the strike make a *prima facie* showing of racial discrimination.)

Melbourne, 679 So. 2d at 764 (emphasis added).

Footnotes two and five do not require the party who raises a *Neil* objection to

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requirement]. *See Neil*, 457 So. 2d at 486.

explicitly use the words "that strike is racially motivated" or "that peremptory challenge is being used in a racially discriminatory manner." Footnote two merely provides an example of how an objection may be made. Footnote five merely reiterates that the trial court must be apprised that the objection is based on the striking party's possible discriminatory use of a peremptory challenge.

A *Neil* objection will be sufficient, as long as it is specific enough "to apprise the trial judge of the putative error and to preserve the issue for intelligent review." *Castor*, 365 So. 2d at 703 (citation omitted). This may be accomplished in several ways, including, but not limited to, the following: the objection could invoke the case names of *Neil* or *Melbourne*; it could use the words "that strike is racially motivated;" or it could allege specific facts which indicate the strike is discriminatory.

The Third District, however, suggests that these footnotes require an explicit allegation "that the strike is racially (or otherwise impermissibly) motivated." This interpretation, however, would only be correct if the use of these words was required within the *Neil* objector's part (c) burden requirement, not within the *Neil* objector's part (a) objection requirement. This assertion is true as the specificity of the objection under the part (a) objection requirement does not necessitate the explicit use of any words; it only requires that the trial court be apprised of the specific nature of the objection. *See Castor*, 365 So. 2d at 703.

The Third District's interpretation of these footnote references is incorrect.

Footnote two is specifically linked to the part (a) objection requirement; it is not linked to the part (c) burden requirement. Additionally, it is clear from the body of *Melbourne*, which the Third District acknowledges, that under the part (c) burden requirement the objecting party has no burden other than requesting a neutral reason. If *Melbourne* was not clear enough, this Court, in *State v. Holiday*, 682 So. 2d 1092 (Fla. 1996), made it crystal clear that under the part (c) burden requirement the objecting party has no burden other than requesting a neutral reason.

In *Holiday*, this Court quashed the Third District's decision, which held that the objector must do something more than object. In no uncertain terms, this Court held:

> [The Third District] erred when it found that the party must also show that the peremptory challenge is being used impermissibly before the trial court must ask the proponent of the strike for a permissible reason. Rather, the third prong [the part (c) burden requirement] of the test requires the objecting party only to request the trial court to ask the other side its reason for the strike.

Id. at 1094. The Third District had interpreted *Johans'* first step as requiring that the opposing party must (a) make a timely objection; (b) demonstrate on the record that the challenged juror is a member of a cognizable class; and (c) place on the records facts which reasonably indicate that a peremptory challenge is being used impermissibly. *See Holiday v. State*, 665 So. 2d 1089, 1090 (Fla. 3d DCA 1995).

Here, the Third District recognized that the *Holiday* Court omitted the footnotes when it reiterated *Melbourne's* guidelines. The Third District opined, "[b]y eliminating

these footnotes which state that an allegation of racial discrimination is required, the Court intentionally or unintentionally eliminated the requirement that the party objecting to a peremptory challenge, at least allege that the challenge appeared to be racially motivated." *See Whitby*, 31 Fla. L. Weekly D482 at *5. While the Third District suggests that this Court should now require that an objecting party explicitly use the words "the strike is racially (or otherwise impermissibly) motivated," it acknowledges that these additional words are not currently required.

Other than the Third District's decision in this case, and in its companion case, *Pickett v. State*, 922 So. 2d 987 (Fla. 3d DCA 2005), SC06-661 *petition for review stayed pending decision in Whitby*), no reported case since *Holiday* has suggested that the party raising a *Neil* objection has <u>any</u> burden other than requesting a neutral reason. The Third District's current interpretation of *Melbourne* is virtually identical to its interpretation of *Johans*, in *Holiday v. State*, 665 So. 2d 1089 (Fla. 3d DCA 1995). The only difference is that in *Holiday*, the Third District interpreted *Johans* as requiring that the objecting party place facts on the record reasonably indicating that the challenge is being used impermissibly, whereas here, the Third District suggests that the objecting party must explicitly use the words "the strike is racially (or otherwise impermissibly) motivated." The Third District's suggestion that this Court unintentionally left out this requirement makes no sense under this Court's first-step jurisprudence, which clearly holds that a party has no part (c) burden requirement, other than requesting a neutral

reason. *See Holiday*; *Melbourne.* A more reasoned approach suggests that the footnotes simply illustrated the requirements of the sufficiency of the part (a) objection requirement.

In contrast to the Third District, the State argues that this Court never eliminated a *Neil* objector's part (c) burden requirement that it allege that the strike is racially discriminatory. (PB. 20). Instead, the State concludes that this Court only held that the lack of this allegation—that the strike is racially motivated—does not prohibit the trial court from conducting a *Neil* inquiry, but that its omission does not require the court to conduct a *Neil* inquiry. (PB. 20-21, 23-24). The State is incorrect.

The State argues that this Court's decisions in *Holiday* and *Franqui* only apply when the trial court conducts a *Neil* inquiry, whereas its decision in *Windom* controls when the court fails to conduct an inquiry. (PB. 20-21, 23-24). The State's conclusion that this Court makes a distinction between cases in which the trial court conducted a *Neil* inquiry and those in which it failed to do so is belied by the fact that the trial courts in both *Johans* and *Valentine* refrained from conducting *Neil* inquiries. Therefore, this Court clearly intended its *Johans* simplified inquiry rule, as clarified in *Valentine*, to apply whether or not there is an inquiry.

The State cannot rely on *Windom* to support its conclusions. As previously discussed, *Windom* did not abrogate either *Johans* or *Valentine*. Importantly, *Windom* was decided under the pre-*Johans* standard. Also, *Windom's* holding is based on the part

(b) cognizable class requirement that requires a party to identify the cognizable class of a juror; it is not based on the part (c) burden requirement. Consequently, its holding cannot be applied to interpret the part (c) burden requirement.

The State also cites to *Miller v. State*, 664 So. 2d 1082 (Fla. 3d DCA 1995) in support of its claim that the simplified inquiry rule still requires an allegation of racial discrimination. (PB. 26). Contrary to the State's suggestion, *Miller's* holding that a simple declaration requesting a neutral reason is insufficient to mandate an inquiry is no longer valid. This Court authoritatively rejected this argument in *Holiday*.

In support of its argument, the State concludes that *Holiday's* holding was that the trial court did not err in conducting a *Neil* inquiry despite an insufficient objection. (PB. 21). *Holiday's* holding should not be read so narrowly. First, in *Holiday*, this Court made it crystal clear that the party raising a *Neil* objection has no burden, other than requesting a neutral reason for the strike. *See Holiday*, 682 So. 2d at 1094. The *Holiday* Court never suggested that the State's objection was deficient. *See id.* Second, the *Holiday* Court uses the language "any doubt concerning whether the objecting party has met its initial burden must be resolved in that party's favor" only to explain the genesis of the simplified inquiry rule in *Valentine* and *Johans.* Third, the State's parenthetical citation to *Valentine*, "unless a court can cite specific circumstances in the record that *eliminate all question of discrimination*, it must conduct an inquiry[,]" is not in the *Holiday* opinion. This language is included in the *Valentine* opinion because

Valentine was evaluated under the pre-*Johans prima facie* burden. This language was not included in the *Holiday* opinion since it was decided under the post-*Johans* simplified inquiry rule, not the pre-*Johans prima facie* burden.

Johans, *Valentine*, *Melbourne*, and *Holiday* unequivocally stand for the proposition that the party raising a *Neil* objection has no burden other than requesting a neutral reason for the strike. The obviousness of this point is manifest from the fact that that the State of Florida itself firmly advocated before this Court in *Holiday*[4] and *Franqui*,[5] that under *Johans* and *Valentine* a party raising a *Neil* objection only needs to request a neutral reason for the strike.

The State points to Justice Anstead's dissent in *Holiday* as predicting future confusion. The State cites Justice Anstead as writing "only to caution and emphasize that under [*Melbourne*], we have continued to impose an initial burden on the party objecting to the exercise of a peremptory challenge by the other side. . . ." *Holiday*, 682 So. 2d at 1095 (Anstead J., specially concurring). (PB. 21). However, the State omits the second half of Justice Anstead's remarks where he reiterated *Melbourne's* first step, notably without the previously highlighted footnote references.

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[4] *See Holiday v. State*, Florida Supreme Court Case No. 87318, Brief of Petitioner on the Merits at 44-45, http://www.law.fsu.edu/library/flsupct/87318/87318 merits1. pdf., and Reply Brief of Petitioner on the Merits at 2-3, http://www.law.fsu.edu/ library/flsupct/87318/87318rep.pdf.

[5] *See Franqui v. State*, Florida Supreme Court Case No. 84, Brief of Appellee at 28-29, http://www.law.fsu.edu/library/flsupct/ 84701/84701brief.pdf.

The State next cites Justice Anstead's remark that the defendant's objection in *Windom* was insufficient. (PB. 21-22). But again the State fails to note the reason why the objection in *Windom* was insufficient—because the opponent of the strike did not identify the juror as a member of a cognizable class. The State also fails to note that, at the end of his *Windom* discussion, Justice Anstead reiterated that *Melbourne* clarifies and reaffirms the extent of this initial burden.

The State next discusses how this Court's decision in *Franqui v. State*, 699 So. 2d 1322 (Fla. 1997) recognizes *Windom's* continued viability post-*Melbourne*. (PB. 23). In *Franqui*, this Court held that the trial court did not err in conducting a *Neil* inquiry even though the juror was not specifically identified as belonging to a cognizable class. Similar to *Windom*, *Franqui's* holding is based on the part (b) cognizable class requirement. The *Franqui* Court's reliance on *Windom* is only applicable as it relates to the sufficiency of the part (b) cognizable class requirement.

Finally, the State's argument that this Court does not overrule itself *sub silentio* is unavailing. *Windom* was decided under the pre-*Johans* standard, and therefore, it is inapplicable to this case. Additionally, as previously discussed the footnote references in *Melbourne* do not relate to the part (c) burden requirement; rather, they relate to the sufficiency of the part (a) objection requirement.

This Court should reject the State's attempted resurrection of the requirement that a party specifically allege that a strike is racially motivated. This Court's simplified

inquiry rule works remarkably well. The number of cases that are reversed due to a trial court's error in evaluating the *Neil* objector's showing has been drastically reduced with the simplified inquiry rule. (A. 5). The simplified inquiry rule is the best standard for Florida's citizens, *see infra* at Section III, for it decides cases on the merits, rather than on imperfect and needless speculation.

In this case, defense counsel's objection to the strike of Juror Lynn was sufficient. Defense counsel was not required to additionally allege that the strike was racially or otherwise impermissibly motivated. *See Melbourne* and *Holiday*. The trial court's conclusion that the state was not discriminating, without requiring it to proffer a neutral reason, contradicts this Court's simplified inquiry rule and its underlying policies. It also contravenes the Supreme Court's holding in *Johnson* that the "persuasiveness" only becomes relevant in the third step of the inquiry. *See Johnson*, 125 S.Ct. at 2418.

II. SHOULD THE FLORIDA SUPREME COURT RECONSIDER THE PEREMPTORY CHALLENGE ISSUE IN LIGHT OF THE SERIOUS PROBLEMS WITH THE CURRENT STANDARD?

This Court should also answer this question in the negative. There are no serious problems with the current standard. In fact, under the *prima facie* burden, reversals due to the trial court's error in evaluating the *Neil* objector's showing were more than 6 times likelier to occur than they are under the current simplified inquiry rule. (A. 5). In the ten years since *Melbourne*, only 6 cases were reversed, including this case and *Pickett*, due to a trial court's error in evaluating the *Neil* objector's showing. (A. 30).

Furthermore, while the Third District, the State, and the FPAA, suggest a proliferation of appeals, the rate of reported decisions on *Neil* issues has remained steady throughout the last 22 years since *Neil* was decided. In the nine-year period from *Neil* to *Johans*, there were approximately 18 reported decisions a year. (A. 5). In the thirteen-year period from *Johans* to the present, there have been approximately 17 reported decisions a year. (A. 5).

Since *Melbourne*, 48 cases have been reversed due to a *Neil* error. (A. 30-39). Of these 48 reversals, only 6 were reversed due to a trial court's error in evaluating the *Neil* objector's showing.[6] Two cases were reversed as the trial court failed to recognize that the juror was a member of a cognizable class.[7] One case was reversed because the court deemed the objection untimely.[8] Substituting the *prima facie* burden for the simplified inquiry rule would not affect the reversals based on cognizable class membership and the timeliness of the objection. Therefore, only 6 cases could possibly be remedied by reverting to the *prima facie* burden. Some of these cases may still have been reversed, as the *prima facie* burden may well have been met. *See infra* Section IV

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[6] *See Alsopp v. State*, 855 So. 2d 695 (Fla. 3d DCA 2003); *Archie v. State*, 710 So. 2d 234 (Fla. 3d DCA 1998); *Murray v. Haley*, 833 So. 2d 877 (Fla. 1st DCA 2003); *Pickett v. State*, 922 So. 2d 987 (Fla. 3d DCA 2005); *Vasquez v. State*, 711 So. 2d 1305 (Fla. 2d DCA 1998); *Whitby v. State*, 31 Fla. L. Weekly D482 (Fla. 3d DCA Feb. 15, 2006); *Murray v. Haley*, 833 So. 2d 877 (Fla. 1st DCA 2003).

[7] *See Stephens v. State*, 884 So. 2d 1071 (Fla. 5th DCA 1071); *Olibrices v. State*, 929 So. 2d 1176 (Fla. 4th DCA 2006).

[8] *See Murphy v. State*, 708 So. 2d 612 (Fla. 1st DCA 1998).

(for a *prima facie* analysis of this case).

The remaining 39 cases were reversed for substantive reasons. Twenty cases were reversed due to the erroneous granting of strikes; 19 of these cases were criminal cases, and 1 was a civil case. These cases were reversed because the court found the strikes to be pretextual based on (a) lack of record support,[9] (b) reasons equally applicable to other jurors,[10] (c) failure to examine or perfunctorily examining the juror,[11] and (d) the neutral reason was not related to facts of the case.[12] Three other cases were reversed because the proffered reasons were actually discriminatory.[13] Reverting to a *prima facie* burden would not have prevented these reversals.

An additional 19 cases were reversed due to the trial court's erroneous denial of a

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[9] *See Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003); *Anderson v. State*, 873 So. 2d 1278 (Fla. 4th DCA 2004); *Brown v. State*, 733 So. 2d 1128 (Fla. 4th DCA 1999); *Daniel v. State*, 697 So. 2d 959 (Fla. 2d DCA 1997) (second strike also pretextual as the reason was equally applicable to other jurors); *Estate of Youngblood v. Halifax Convalescent Center, Ltd.*, 874 So. 2d 596 (Fla. 5th DCA 2004) (strike also pretextual as the reason was equally applicable to other jurors); *Georges v. State*, 723 So. 2d 399 (Fla. 4th DCA 1999); *Thomas v. State*, 885 So. 2d 968 (Fla. 4th DCA 2004).

[10] *See Fleming v. State*, 825 So. 2d 1027 (Fla. 1st DCA 2002); *Foster v. State*, 732 So. 2d 22 (Fla. 4th DCA 1999); *Henry v. State*, 724 So. 2d 657 (Fla. 2d DCA 1999); *Perez v. State*, 890 So. 2d 371 (Fla. 3d DCA 2004); *Randall v. State*, 718 So. 2d 230 (Fla. 3d DCA 1998); *Shuler v. State*, 816 So. 2d 257 (Fla. 2d DCA 2002) (strike also pretextual as the reason was unrelated to the trial); *White v. State*, 754 So. 2d 78 (Fla. 3d DCA 2000).

[11] *See Fernandez v. State*, 746 So. 2d 516 (Fla. 3d DCA 1999); *Overstreet v. State*, 712 So. 2d 1174 (Fla. 3d DCA 1998) (strike also pretextual as the reason was equally applicable to other jurors and it lacked record support).

[12] *See Wallace v. State*, 889 So. 2d 928 (Fla. 4th DCA 2004).

[13] *See Baber v. State*, 776 So. 2d 309 (Fla. 4th DCA 2000); *Despio v. State*, 895 So.

defense challenge. Of these reversals, 10 were due to the trial court improperly finding the proffered reason to be non-neutral.[14] The remaining 9 cases were reversed as the trial court incorrectly found that the strike was pretextual.[15] Reverting to a *prima facie* burden would not have prevented these reversals either.

As this case analysis shows, this Court's simplified inquiry rule is working well. Cases are not being reversed simply because the trial court failed to conduct a *Neil* inquiry by incorrectly evaluating the *Neil* objector's showing. Instead, cases are being reversed on the merits. This simplified inquiry rule is the best rule for Florida citizens. *See infra* in Section III. Most certainly the benefits of this simplified inquiry rule outweigh the cost of 6 reversals in the last ten years. Moreover, the reversal rate will most likely skyrocket with a return to the *prima facie* burden. This is true as in the nine-year period between *Neil* and *Johans*, nearly 1 out of every 4 cases that decided the

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2d 1124 (Fla. 3d DCA 2005); *Frazier v. State*, 899 So. 2d 1169 (Fla. 4th DCA 2005).

[14] *See Anderson v. State*, 750 So. 2d 741 (Fla. 3d DCA 2000); *Daniels v. State*, 837 So. 2d 1008 (Fla. 3d DCA 2002); *Dean v. State*, 703 So. 2d 1180 (Fla. 3d DCA 1997); *Douglas v. State*, 841 So. 2d 697 (Fla. 3d DCA 2003); *Greene v. State*, 718 So. 2d 334 (Fla. 3d DCA 1998); *Hernandez v. State*, 686 So. 2d 735 (Fla. 2d DCA 1997); *Jones v. State*, 787 So. 2d 154 (Fla. 4th DCA 2001); *Rojas v. State*, 790 So. 2d 1219 (Fla. 3d DCA 2001); *Russell v. State*, 879 So. 2d 1261 (Fla. 3d DCA 2004); *Squire v. State*, 681 So. 2d 925 (Fla. 3d DCA 1996).

[15] *See Allstate Insurance Co. v. Thornton*, 781 So. 2d 416 (Fla. 4th DCA 2001); *English v. State*, 740 So. 2d 589 (Fla. 3d DCA 1999); *Hamdeh v. State*, 762 So. 2d 1030 (Fla. 3d DCA 2000); *Kelly v. State*, 689 So. 2d 1262 (Fla. 3d DCA 1997); *Lewis v. State*, 778 So. 2d 445 (Fla. 3d DCA 2001); *Michelin North America, Inc. v. Lovett*, 731 So. 2d 736 (Fla. 4th DCA 1999); *Morris v. State*, 680 So. 2d 1096 (Fla. 3d DCA 1996); *Robinson v. State*, 832 So. 2d 944 (Fla. 3d DCA 2002); *Scott v. State*, 920 So. 2d 698

merits of a *Neil* issue was reversed due to a trial court's error in evaluating the *Neil* objector's showing. (A. 5). In contrast, in the thirteen-year period from *Johans* to the present, only 1 out of every 14 cases was reversed for this type of error. (A. 5).

The Third District, the State, and the FPAA, also argue that the simplified inquiry rule has led to misuse by trial attorneys, particularly criminal defense attorneys. (PA. 13-15; PB. 29-36; AB. 7-11). Yet, an examination of the 47 post-*Melbourne* reversals in criminal cases shows that the state objected to the defense's strikes only slightly less than the defense objected to the state's strikes. Of the 47 cases, 21 arose from state objections to defense strikes, and 26 from defense objections to state strikes.

The Third District, the State, and the FPAA additionally suggest that the simplified inquiry rule is causing attorneys to misuse peremptory challenge objections. (PA. 13-15; PB. 29-36; AB. 7-11). But it is difficult to determine whether a *Neil* objection is being misused if the proponent of the strike is never required to proffer a reason for its strike. Indeed, the simplified inquiry rule increases accountability and minimizes the risk that a party is discriminating.

The Third District, the State, and the FPAA, also suggest that the simplified inquiry rule has led to frivolous objections. (PA. 13-15; PB. 29-36; AB. 7-11). Yet frivolous objections are not unique to this area of the law. And if a party is going to object frivolously, changing the current standard is no solution. Rather, the courts have an

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(Fla. 3d DCA 2006).

established mechanism to deal with frivolous objections under Rule 4-3.1 of the Rules Regulating the Florida Bar. The appellate court can also reprimand the attorney who frivously objects. *See Blackshear v. State*, 774 So. 2d 893, 894 (Fla. 4th DCA 2001) (condemning prosecutor's conduct in raising *Neil* objections to defense strikes because the defense raised a *Neil* objection against one of its strikes, and reminding prosecutor "that it is his ethical duty to see that justice is done rather than to secure convictions[]") (citations omitted).

If there is any increase in *Neil* objections, it is because there is an increase in sensitivity to discrimination. Attorneys now have a workable process to handle discriminatory challenges. This is very good. It ensures that Florida courts will continue their fight to eradicate discrimination from the judicial system. *See State v. Davis*, 872 So. 2d 250 (Fla. 2004). Also, there is a distinction between an increase in objections and an increase in "frivolous" or "misused" objections. The increase in *Neil* objections, if any, rather than being based on "frivolous" or "misused" objections, is more easily explained by the fact that the Equal Protection clause guarantees that no single juror may be discriminated against based on his/her race, ethnicity, or gender.

The Third District, the State, and the FPAA, further suggest that trial courts are engaging in needless evaluations as to the genuineness of proffered reasons. (PA. 13-15; PB. 29-36; AB. 7-11). In its decision below, the Third District contends that whenever a *Neil* objection is made, the trial court must review each and every prospective juror, and

their individual responses. (PA. 14-15). The Third District then observes that, in capital cases, the trial court may have to review up to 200 jurors and their responses. (PA. 14-15). Assuming that this is true, this review is certainly better than having to reverse a lengthy and expensive trial for the lack of an inquiry. *See Valentine*, 616 So. 2d at 975. This is especially true in the context of death penalty appeals. Under the pre-*Johans* standard, this Court reversed six capital cases due to the trial court's error in finding that the *prima facie* burden was not met. (A. 13-14). After *Johans*, this Court has reversed no capital case due to the trial court's error in evaluating the *Neil* objector's showing. (A. 23, 30).

The Third District's forecast of lengthy genuineness inquiries also overlooks that it is the objecting party's burden, not the trial court's, to cite the specific reasons why the strike is pretextual. *See Floyd v. State*, 569 So. 2d 1225, 1229 (Fla. 1990). These reasons must include the specific individual juror's responses that the objecting party believes show that the strike is pretextual. If the objecting party does not dispute the proffered neutral reason, then the court is under no obligation to review the jurors and their responses. *See id.* Moreover, this in-court review is much less time consuming than the appellate process and a retrial. Furthermore, the *prima facie* burden will not decrease the court's obligations for reviewing the record. In fact, it may increase the workload of the trial and appellate courts. *See infra* Section III.

Finally, the Third District, the State, and the FPAA, suggest that trial courts are

engaging in needless evaluations of the genuineness of proffered reasons. (PA. 13-15; PB. 29-36; AB. 7-11). Full-fledged genuineness inquiries, though, are essential to search out discrimination, a problem which still exists in the courtrooms of this state. In 2005, for example, two cases were reversed because the prosecutor affirmatively voiced discriminatory reasons for his/her strikes. *See Despio v. State*, 895 So. 2d 1124 (Fla. 3d DCA 2005) (prosecutor proffered that Creole juror may have sympathy for the defendant's Haitian-American alibi witnesses and may have personal beliefs regarding Creole traditions); *Frazier v. State*, 899 So. 2d 1169 (Fla. 4th DCA 2005) (prosecutor proffered that the juror was from Jamaica, a country known for drug trafficking).

Melbourne works remarkably well. This Court should not consider changing the simplified inquiry rule. As detailed above, there are simply no serious problems with the current standard. The number of cases reversed under *Melbourne* due to the trial court's error in evaluating the *Neil* objector's burden is minimal; overall it is less than 4% of all *Neil* reversals.

"Moreover, this Court adheres to the doctrine of stare decisis. *See* [*Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002)." *Dorsey v. State*, 868 So. 2d at 1199. This doctrine only "yields upon a significant change in circumstances after the adoption of the legal rule, or when there has been an error in legal analysis." *Id.* (citing *Puryear*, 810 So. 2d at 905). The only significant change in circumstances since *Johans* is the drastic decrease in reversals due to the trial court's error in evaluating the *Neil* objector's

showing. This is certainly not the type of change that would warrant adopting the *prima facie* burden. Additionally, as detailed *supra* in Section I., there has been no error in legal analysis. Finally, the important policy and constitutional underpinnings of *Johans* and *Melbourne* continue to this day. Their holdings should not be abrogated by a reversion to the cumbersome *prima facie* burden.

III. SHOULD FLORIDA FOLLOW FEDERAL CONSTITUTIONAL LAW AND THE STANDARD EMPLOYED IN FEDERAL CASES WHICH REQUIRES THE DEMONSTRATION OF A *PRIMA FACIE* CASE OF DISCRIMINATION?

This Court should also answer this question in the negative. As previously discussed, the reinstatement of a *prima facie* burden in step one will only cause more reversals. And the few reversals under the current simplified inquiry rule could easily be prevented by the trial courts following the very simple guidelines set forth in *Melbourne*—the proponent of the strike must only proffer a neutral reason, and the trial court must only conduct a brief genuineness inquiry.

The State suggests that Florida should reconsider its standard in light of *Johnson v. California*, 545 U.S. 162, 125 S.Ct. 2410 (2005). (PB. 34-36). But the reasoning behind the *Johnson* decision actually supports Florida's simplified inquiry rule. In *Johnson*, the Supreme Court revisited the parameters of *Batson's prima facie* burden, focusing on the constitutionality of California's *prima facie* burden, which required the *Batson* objector to show that "it is more likely than not the other party's peremptory

challenges, if unexplained, were based on impermissible group bias." *Johnson*, 125 S.Ct. at 2416. After examining the scope of *Batson's* standards, the court concluded that California's standard was "an inappropriate yardstick by which to measure the sufficiency of a *prima facie* case." *Id.*

In reaching this ruling, the court examined *Batson's* burden-shifting framework and found that it "did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not." *Johnson*, 125 S.Ct. at 2416. The Court then held that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 125 S.Ct. at 2417. The Court further explained that *Batson's* first two steps "govern the production of evidence that allows the court to determine the constitutional claim." *Johnson*, 125 S.Ct. at 2417-2418. "It is not until the *third* step that the persuasiveness becomes relevant . . . ." *Id.* at 2418 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995). This conclusion—that the persuasiveness of the challenge only becomes relevant in the third step of the process—supports Florida's simplified inquiry rule.

The *Johnson* Court emphasized that "[t]he *Batson* framework is designed to produce actual answers . . . ." *Johnson*, 125 S.Ct. at 2418. The Court cautioned:

> The inherent uncertainty present in inquiries of discriminatory

> purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. *See Paulino v. Castro*, 371 F.3d 1083, 1090 (C.A.9. 2004) ('[I]t does not matter that the prosecutor might have had good reasons . . . [w]hat matters is the real reason they were stricken' (emphasis deleted)); *Holloway v. Horn*, 355 F.3d 707, 725 (C.A.3 2004) (speculation 'does not aid our inquiry into the reasons the prosecutor actually harbored' for a peremptory strike).

Johnson, 125 S.Ct. at 2418. The *Johnson* Court's emphasis on producing actual answers and refraining from needless and imperfect speculation also pertains to Florida's simplified inquiry rule. The State argues that *Johnson* supports the policies of record creation and dispelling uncertainty about whether discrimination has taken place. (PB. 35). As detailed below, these are the exact same policies that the simplified inquiry rule fosters.

The same day that the Supreme Court issued its opinion in *Johnson*, it issued its decision in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005). *Miller-El* considered the second and third steps of the *Batson* process. In *Miller-El*, the Supreme Court continued its emphasis on the importance of the actual reasons, and on refraining from speculation. The Court observed:

> [A] prosecutor simply has got to state his reasons as best he can . . . A *Batson* challenge does not call for a mere exercise in thinking up a rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El, 125 S.Ct. at 2332.

The State and FPAA further argue that Florida's simplified inquiry rule is inconsistent with the presumption that peremptory challenges are exercised in a non-discriminatory manner. (PB. 27; AB. 6-7). This is incorrect. Before *Johans*, this presumption co-existed with several policies that were applicable to the first-step's *prima facie* burden determination. The *Slappy* Court delineated these first-step policies. First, the spirit and intent of *Neil* was "to provide broad leeway in allowing parties to make a *prima facie* showing that a 'likelihood' of discrimination exists." *Slappy*, 522 So. 2d at 21-22 (emphasis added). Second, "[r]ecognizing . . . that peremptory challenges permit those to discriminate who are of a mind to discriminate, [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.* (emphasis added), quoting *Batson*, 476 U.S. at 96.

In adopting these policies, this Court emphasized: "[o]nly in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question." *Id.* "[I]f we are to err at all, it must be in the way least likely to allow discrimination." *Id.* In *Johans*, this Court simplified the inquiry rule in light of these policies. Therefore, the simplified inquiry rule is entirely consistent with the presumption that peremptory challenges are exercised in a non-discriminatory manner.

Additionally, a *prima facie* burden will increase the court's workload. First, under this burden, a trial court will be required to cite for the record the specific circumstances that eliminate all question of discrimination in rejecting each *prima facie* case. *See*

Valentine, 616 So. 2d at 973-974. Second, once the *prima facie* requisites are met, the proponent of the challenge must explain all of the previous challenges made against that cognizable group. *See Williams v. State*, 574 So. 2d 136 (Fla. 1991). Third, the appellate courts will be required to review the *prima facie* burden determinations to decide if the trial court erred in its analysis.

And the determination of whether a *prima facie* case exists is complicated and dependent on multiple factors. *See Hall v. Daee*, 570 So. 2d 296 (Fla. 3d DCA 1990) (review of pre-*Johans prima facie* determinations). *See also United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1044 (11th Cir. 2005) (example of federal *prima facie* determination). One author reviewed virtually every federal and state court decision applying *Batson* between April 30, 1986 and December 31, 1993. *See* Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 470-479 (1996). The author observed that courts most frequently looked to certain patterns to quantify the *prima facie* case and discovered that the courts actually use one or more of eight different methods for this determination.[16]

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[16] The eight different methods are as follows: Method A—examines the final composition of jury panel; Method B—examines the percentage of members of the targeted group on the jury as impaneled compared with the percentage in the venire; Method C—examines the percentage of members of the targeted group impaneled with the percentage in the jury district or county; Method D—tallies the number of challenges used against members of the targeted group; Method E—examines the percentage of challenges the *Batson* respondent exercised against members of the targeted group; Method F—examines whether the respondent removed all members of the targeted

See id.

Most of the factors examined under the *prima facie* burden (striking pattern, jury composition, venire composition, the nature of the dispute, and comparison of jurors' responses) are examined under Florida's third-step genuineness inquiry. Florida is simply considering this information in the context of a proffered neutral reason, and a genuineness inquiry. Under this method, the courts are not engaging in needless and imperfect speculation; rather they are getting to the heart of the actual reasons for the challenge, and they are making decisions on the merits.

Florida's simplified inquiry rule is the better standard for ferreting out discrimination. It allows for a full airing of the reasons based on the proponent's own explanation, not on the court's imperfect speculation. Additionally, "the nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives." *Slappy*, 522 So. 2d 20 (citations omitted). Further, attorneys and judges may be engaging in unconscious racism. *See Batson*, 476 U.S. at 106 (Marshall, J. concurring). There are strong policies in favor of conducting the *Neil* inquiry, in the trial court, during voir dire. *See Hall v. Daee*, 602 So. 2d 512, 515-516 (Fla. 1992) ("[T]he appellate court is not a forum for conducting an after-the-fact Neil inquiry. Such endeavors are fraught with

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group; Method G—examines the percentage of members of the targeted group in the venire that have been removed by peremptory challenges of the *Batson* respondent; and Method H—examines the percentage of challenges used against the targeted group compared to the percentage of the targeted group in the venire. *See* Melilli, 71 Notre

speculation and seldom reflect the true thought process that occurred at the time of the challenge.") (citations omitted). This full airing of the proponent's reasons facilitates appellate review.[17] There are strong policies in favor of getting the proponent's actual reasons for the strike. *See Kibler v. State*, 546 So. 2d 710, 714 (Fla. 1989). "[When] no inquiry is conducted, [d]eference cannot be shown to a conclusion that was never made." *Hall*, 602 So. 2d at 516 (citation omitted).

Importantly, the simplified inquiry rule also places a high value on the equal protection rights of individual jurors. "Jurors are not fungible. Each juror has a constitutional right to serve free of discrimination." *Joiner v. State*, 618 So. 2d 174, 176 (Fla. 1993). "This is so because the striking of a single black juror for a racial reason violates the Equal Protection clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." *Slappy*, 522 So. 2d at 21.

Additionally, the simplified inquiry rule only imposes a minimal burden on the trial courts. *See Reynolds v. State*, 576 So. 2d at 1301-1302. "It will entail no more than a minute or two of time. . . . The slight inconvenience of this procedure clearly and unmistakably is justified as a means of preventing the injustice that would result if the

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Dame L. Rev. at 470-479.

[17] The State argues that the *prima facie* burden ensures a complete record, but it only ensures a record of the jurors' cognizable classes; it does not ensure any record of the actual reasons for the strike, the integral part of the *Neil* inquiry.

only minority venire member could be peremptorily excused without accountability." *Id.* As the *Valentine* Court stated, "it is far less costly in terms of time and financial and judicial resources to conduct a brief inquiry and take curative action during voir dire than to foredoom a conviction to reversal on appeal." *Id.* at 974.

The State asserts that Florida is the only jurisdiction that has abandoned the *prima facie* burden. Contrary to the State's assertion, recognizing the advantages of a simple inquiry rule, the courts of South Carolina, Missouri, and Connecticut, as well as, the Military Court of Appeal have all rejected the *prima facie* burden.[18]

Florida has a long history and tradition in foreshadowing and exceeding federal standards on the elimination of discrimination in jury selection. Florida has an ongoing commitment to "a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial. *See* Art. I, § 16, Fla. Const." *State v. Slappy*, 522 So. 2d at 21. "[N]o court is more sensitive or responsive to the needs of the diverse localities within a state, or the state as a whole, than that state's own high court. In any given state, the federal Constitution thus represents the floor for basic

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[18] *See State v. Jones*, 358 S.E.2d 701, 703 (S.C. 1987) (adopting this rule to ensure consistency and a complete record for appellate review); *State v. Parker*, 836 S.W.2d 930, 935, 939 (Mo. 1992) (adopting this rule to maximize the equal protection rights of the accused and the excluded venirepersons), *overruling State v. Antwine*, 743 S.W.2d 51, 64 (Mo. banc 1987) (which considered the proffered reason as part of the determination of a *prima facie* case); *State v. Holloway*, 553 A.2d 166 (Conn. 1989) (adopting this rule to provide an adequate record for appeal and to expedite the appellate process); *United States v. Moore*, 28 M.J. 366, 368 (CMA 1989) (adopting this rule as it

freedoms; the state constitution, the ceiling." *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 2001). Florida's simplified inquiry rule best serves the rights of its citizens.

IV. SHOULD WE CONTINUE TO REQUIRE REVERSALS DUE TO PROCEDURAL ERRORS REGARDING PEREMPTORY CHALLENGES WHEN THE RECORD LEAVES NO DOUBT THAT THE CHALLENGES WERE NOT MOTIVATED BY RACIAL PREJUDICE AND WHERE THERE IS NO INDICATION THAT ANY SUCH PREJUDICE INFECTED THE JURY WHICH TRIED THE DEFENDANT?

This Court should answer this question in the affirmative. Initially, the proposed harmless error rule is essentially the *prima facie* burden; it just has a different name. The State even admits that this standard would only apply if the *prima facie* burden were not adopted. (PB. 41-42, 44). The adoption of this harmless error rule would undermine this Court's simplified inquiry rule, and the important policies it protects. Further, under both federal and Florida law, the harmless error rule is inapplicable in the context of the discriminatory use of peremptory challenges. *See Davis v. Secretary for the Dept. of Corrections*, 341 F.3d 1310, 1316-1317 (11th Cir. 2003); *State v. Johans*, 613 So. 2d 1319, 1322 (1993).

The Third District, the State, and the FPAA, all suggest that this rule is necessary since it is inappropriate to require a reversal in an otherwise fair and impartial trial. However, without an inquiry it is impossible to determine whether a jury was otherwise impartial. Without an inquiry, the only thing that is ensured is that the effect of

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was a superior procedure for judicial administration).

discrimination in jury selection will be hidden. As this Court observed in *Neil*, "[a] cross section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased." *Neil*, 457 So. 2d at 487 (quotation and citation omitted). Additionally, the likelihood that discriminatory sentiments will be made by the jurors during deliberation decreases when the jury is composed of both genders and is multi-racial, multi-ethnic and multi-religious. *See Powell v. Allstate Insurance Co.*, 634 So. 2d 787 (Fla. 5th DCA 1994). A fair and impartial cross-section also "safeguard[s] a [defendant] against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86 (citation omitted).

The State argues that future discrimination will be deterred by the *prima facie* burden, not by the simplified inquiry rule. (PB. 45). In fact, the exact opposite is true. Under the simplified inquiry rule, reversals are linked to the merits of the discriminatory issue. It produces actual answers, and moves away from the needless and imperfect speculation of the *prima facie* burden. This Court's simplified inquiry rule ensures that hidden discriminatory motives are flushed out. It also uncovers milder, perhaps unconscious discrimination.

In support of this harmless error rule, the FPAA cites to *Moran v. Clark*, 443 F.3d 646, 653 (8th Cir. 2005) and *Paschal v. Flagstar Bank, FSB*, 295 F.3d 565 (6th Cir. 2002) as examples of how it should be applied. (AB. 15-16). In *Moran*, the Eighth Circuit affirmed the trial court's *Batson* ruling even though the trial court departed from

the typical *Batson* script by failing to rigidly follow *Batson's* three-part test. In *Paschal*, the Sixth Circuit affirmed the trial court's *Batson* ruling even though the trial court improperly combined *Batson's* steps and placed the burden on the proponent of the strike to prove it was not racially motivated.

Neither one of these cases applies to the *prima facie* burden. Additionally, Florida already has similar rules in place. Florida courts have consistently held that no magic words or incantations are required, so long as the trial court makes the requisite genuineness inquiries. *See, e.g., Pringle v. State*, 792 So. 2d 533 (Fla. 3d DCA 2001). Florida has developed rules which ensure the integrity of *Neil* reversals. Under *Floyd*, it is the objecting party's burden to contest the factual existence and pretextual nature of the proffered reasons.[19] Under *Joiner*, the objecting party is required to renew its objection before the jury is sworn. *Id.* at 176. This rule provides the court with a last clear chance to take corrective measures and to avoid the severe step of reversal. *See Milstein v. Mutual Security Life Ins. Co.*, 705 So. 2d 639, 640 (Fla. 3d DCA 1998).

The State and the FPAA argue that under their harmless error rule any error in the simplified inquiry rule process would be harmless unless the *Neil* objector affirmatively

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[19] The State's purported concern that defendants may not satisfy federal habeas requirements under the simplified inquiry rule is unfounded. Under *Floyd's* stringent preservation requirements, a defendant's federal habeas claim should be more than adequately preserved.

proved that discrimination took place. (PB. 42, 45, 46, 48); (AB. 15). This proposed rule surpasses the requirements of the *prima facie* burden. It requires the party raising a *Neil* objection to persuade the trial court that his/her objection is meritorious at the first step of the process. Yet, under the *prima facie* burden, the party raising the *Neil* objection must only show that the record provides no basis for the striking of the juror, other than a discriminatory basis. *See Valentine*, 616 So. 2d at 974; *Reynolds*, 576 So. 2d at 1302. The party raising a *Neil* objection does not need to affirmatively prove discrimination in the first step, the persuasiveness of a challenge is not relevant until *Melbourne's* third step. *See Johnson*, 125 S.Ct. at 2418.

Additionally, the harmless error rule will cause significant work at both the trial and appellate levels. In the trial court, the voir dire process will be delayed while the objecting party makes proffers of discrimination. The appellate court will be saddled with reviewing every record to determine if there was a *prima facie* case. The adoption of this proposed rule will completely negate the time-saving benefits of this Court's simplified inquiry rule.

The State advocates for the adoption of its harmless error approach by discussing the jury selection process in *Pickett*. The State complains that any error in *Pickett* was harmless since several Hispanics were already seated on the panel when the defense objected to the strikes of two female Hispanic jurors. This application of the harmless error rule completely ignores the equal protection rights of the individual jurors. "'A

single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" *Slappy*, 522 So. 2d at 21, quoting *Batson*, 476 U.S. at 95 (citations omitted).

The Third District, the State, and the FPAA all suggest that this harmless error rule would preclude reversal in this case, as there was no indication that discrimination took place against Juror Lynn. (PB. 48-49); (AB15-16). The FPAA argues:

> He offered no factual basis to indicate a discriminatory motivation for the strike, and could not argue that the prosecutor was systematically excluding white males from the jury. In the absence of either, there is no reason to believe that the prosecutor was acting with the intent to discriminate and no reason to believe that the presumption of nondiscriminatory use of peremptories had been rebutted.

(AB. 15) (emphasis added). The FPAA's legal analysis is faulty. The systematic exclusion standard was the precise standard utilized in *Swain* and rejected by this Court in *Neil*. *See Hall*, 602 So. 2d at 515.

The Third District, State, and the FPAA, are also incorrect that there was no *prima facie* evidence of discrimination against Juror Lynn. A review of the record reveals several inferences of discrimination. The State used all six of its peremptory challenges against male jurors, and while males comprised 56% of the venire, they only comprised 33.33% of the jury panel. (R. 11-12). Further, the record does not reveal any reason why the State struck Juror Lynn except for discrimination. Juror Lynn was an analytical person. (T. 93-95). Juror Lynn also gave pro-state equivocal responses

regarding whether he would hold it against a defendant who failed to testify. (T. 103). These are typical attributes of a state-friendly juror.

Moreover, this case involved classic stereotypical reasons for gender bias. Parties often eliminate jurors who will identify with the other party and/or against the complainant and witnesses. This case involved a domestic situation between the defendant, a male; his girlfriend; and the complainant, who the defendant referred to as his girlfriend's little boyfriend. (T. 159, 166, 206, 210, 212-214). It is a stereotype that males will identify with other males, especially in domestic situations. This case also involved the defendant directing several anti-gay slurs at the complainant, a gay male. It is a classic stereotype that men are homophobic and, therefore, they would align with the defendant rather than the complainant. *See, e.g., Tedder v. Georgia,* 463 S.E.2d 697 (Ga. 1995).

The State and the FPAA also suggest that there was no reason for the State to strike an African-American female from the jury. However, the defendant was African-American, and the State may have wanted to strike other African-Americans so they would not identify with him. Further, the prosecutor's actions with regard to this strike of a second African-American from the jury panel suggested a level of unconscious discrimination.[20] Despite contrary assertions, the record manifests specific facts readily

[20] The prosecutor proffered a reason that was contradicted by the record. When the court rejected this reason, the prosecutor argued that the reason was acceptable. Upon

suggesting a discriminatory purpose for the strikes of this second African-American and for Juror Lynn.[21]

"Again, the danger of improper, race-based uses of peremptory challenges is ever present and trial judges must be vigilant gatekeepers of fair and impartial justice." *Dorsey v. State*, 868 So. 2d at 1211 (Bell, J. dissenting). The simplified inquiry rule, pronounced by *Johans*, and clarified by *Melbourne* and *Holiday*, strikes the correct balance between the goal of eliminating discrimination and the full and free use of peremptory challenges. This Court should not adopt the harmless error rule.

CONCLUSION

Based on the foregoing, Edgar Sylvester Whitby respectfully requests that this Court answer the first, second, and third certified questions in the negative; answer the fourth certified question in the affirmative; and, approve the Third District's decision to the extent that it reversed Mr. Whitby's conviction and sentence.

Respectfully submitted,

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the court's insistence, the prosecutor offered a second reason—that the juror was disinterested. This is a classic suspect discriminatory reason. *See Dorsey*. The prosecutor only withdrew its strike, after the defense disputed the court's acceptance of this reason.

[21] This analysis, of course, is only for instructional purposes. Even if this Court revises *Melbourne's* first step and/or adopts a harmless error rule, its revisions would only apply prospectively. *See Johans*, 613 So. 2d at 1321.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered by U.S. mail to Counsel for Petitioner: Richard L. Polin, Bureau Chief, and Valentina M. Tejera, Assistant Attorney General, at the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida, and to Counsel for Florida Prosecuting Attorneys Association: Arthur I. Jacobs, 961687 Gateway Boulevard, Suite 2011, Fernandina Beach, FL 32034 and Rodolfo Sorondo, Jr., Holland & Knight LLP, 701 Brickell Avenue, Suite 3000, Miami, FL 33131, on this ____ day of August, 2006.

By: _____
Shannon P. McKenna

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

By: _____
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