IN THE SUPREME COURT OF FLORIDA

Case No. SC06-420
Lower Case No. 3D04-1770

STATE OF FLORIDA,

Petitioner,

vs.

EDGAR SYLVESTER WHITBY,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On April 8, 2004, the State charged the defendant, Edgar Sylvester Whitby, (a black male) with aggravated battery by knowingly or intentionally causing permanent disfigurement to William K. Lacy, for having thrown hot water at him and burning his chest. [R. 5-7]. During voir dire, prospective juror James Matthew Lynn stated that he works with researchers and students and that he is a very analytical person. [T. 93-5]. Mr. Lynn stated that he could find guilt based on a victim's testimony alone, that he would not hold it against a defendant who failed to testify and that he could render a fair judgment. [T. 66, 68, 103]. Both the State and the defense accepted Mr. Lynn as a juror. [T. 113].

Thereafter, the State exercised its second[1] back strike on Mr. Lynn. [T. 123]. The defense requested a race neutral reason stating "although he is a white male . . . he is protected." [T. 123]. The court denied the defendant's request. [T. 123]. The defense stated that it would accept Mr. Lynn for now and asked the court whether it found that Mr. Lynn was not a member of a protected class. [T. 123]. The court answered: "Well, I am finding that there is no basis given that he was discriminated against on the basis that he is a white male. Okay." [T. 124].

[1] The State also moved to strike Ms. Ionie Appleton, an African American woman. [T. 116].The defense requested a race neutral reason. [T. 116-7]. The State argued that she failed to raise her hand at times and that she seemed uninterested. [T. 117-8]. The court allowed the peremptory strike. [T. 119]. Thereafter, the State withdrew its objection and accepted Ms. Appleton. [T. 119].

During trial, the State elicited the victim's and the responding officer's testimony to establish that the defendant threw scalding water on the victim to retaliate against the victim's friendship with the defendant's girlfriend. [T. 162-259]. Immediately after the defendant threw water on the victim, the victim saw his skin bubble and blister. [T. 217-230, 258]. Despite his injuries, the victim did not seek medical treatment. [T. 217-230, 258].

At the close of the State's case, the defense moved for judgments of acquittal arguing that no reasonable juror could find that the defendant had committed a battery with the intent to cause permanent disfigurement. [T. 260-70]. A jury convicted the defendant of battery as a lesser included offense. [R. 31]. The court adjudged the defendant guilty of battery and, because the defendant qualified under the habitual felony offender statute as a result of two prior aggravated battery convictions, sentenced the defendant to 300 days in county prison less credit for time served. [R. 34-8; T. 322-7]. The defendant appealed his conviction and sentence to the Third District Court of Appeal.

On appeal, the defendant argued that reversal was required because the trial court failed to conduct a Neil inquiry on the State's peremptory challenge of Mr. Lynn. The State argued that the trial court acted within its discretion by not requiring the State to proffer a race/gender neutral reason because the defendant failed to lodge a proper objection. The State contended that the defendant's

objection was deficient because it simply identified the race and gender of Mr. Lynn and requested an inquiry without alleging that the strike was being used in a discriminatory manner. The State provided that such an objection should be insufficient to mandate an inquiry under Melbourne[2] or to require a new trial where an inquiry is not made.

The district court reversed the defendant's conviction and sentence based upon State v. Holiday, 682 So. 2d 1092 (Fla. 1996) "and the decisions of the [Third District Court of Appeal] and the various district courts, which have interpreted Melbourne and Holiday as mandating that a Neil[3] inquiry be conducted when defense counsel simply objects to a peremptory challenge, identifies that the juror is a member of a distinct racial or ethnic group, and requests an inquiry, despite no allegation that the challenge was racially motivated." Whitby v. State, 2006 Fla. App. LEXIS 1846 (Fla. 3d DCA 2006), *citing* Pickett v. State, 30 Fla. L. Weekly D2398 (Fla. 3d DCA Oct. 12, 2005); Wicks v. Publix Super Markets, 908 So. 2d 1190, 1193 (Fla. 2d DCA 2005); Alsopp v. State, 855 So. 2d 695 (Fla. 3d DCA 2003); Murray v. Haley, 833 So. 2d 877, 879-80 (Fla. 1st DCA 2003). The district court interpreted this Court's case law on peremptory strikes and held that a party is not required to make an allegation of discrimination to trigger a Neil inquiry. See Whitby, 2006 Fla. App. LEXIS 1846 at *14-15.

[2] Melbourne v. State, 679 So. 2d 759 (Fla. 1996).
[3] State v. Neil, 457 So. 2d 481 (Fla. 1984).

Despite reversing the defendant's conviction and sentence, the district court expressed its misgivings about the current Neil standard as simplified by Johans and Melbourne. See id. at *16-20. It provided that "application of this 'simplified standard' has proven not to be so simple after all and has led to misuse by trial attorneys; lengthy, needless evaluations as to the genuineness of the proffered reason for the challenge; unnecessary reversals due to failure to make an inquiry; and errors made in performing a pretextual analysis." Id. at *17-18. (footnote omitted). The Court explained that "[t]o require a reversal over an error regarding a juror's response in an otherwise fair and impartial trial without so much as an **allegation** that the peremptory challenge appeared to be racially motivated, [takes] good intentions too far, and [results] in needless reversals." Id. at*18 (emphasis supplied). Based upon the recognition that the current procedure for conducting a Neil inquiry was causing reversals for the wrong reasons, the district court certified four questions of great public importance:

> SHOULD THE FLORIDA SUPREME COURT RECONSIDER THE PEREMPTORY CHALLENGE ISSUE IN LIGHT OF THE SERIOUS PROBLEMS WITH THE CURRENT STANDARD?
>
> 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)?
>
> SHOULD FLORIDA FOLLOW FEDERAL CONSTITUTIONAL LAW AND THE STANDARD EMPLOYED IN FEDERAL CASES WHICH REQUIRES THE DEMONSTRATION OF A PRIMA FACIE CASE OF DISCRIMINATION?
>
> SHOULD WE CONTINUE TO REQUIRE REVERSALS DUE TO PROCEDURAL ERRORS REGARDING PEREMPTORY CHALLENGES WHEN THE RECORD LEAVES NO DOUBT THAT THE CHALENGES WERE NOT MOTIVATED BY RACIAL PREJUDICE AND WHERE THERE IS NO INDICATION THAT ANY SUCH PREJUDICE INFECTED THE JURY WHICH TRIED THE DEFENDANT?

Whitby, 2006 Fla. App. LEXIS 1846 at *19-20.

SUMMARY OF THE ARGUMENT

Melbourne requires an allegation of discrimination to trigger a Neil inquiry. Where a party fails to make an allegation of discrimination, there is an insufficient objection and a trial court is not required to, although it can and should, conduct a Neil inquiry. If the current standard under Melbourne does not require an allegation of discrimination, then this Court should require that such an allegation be made to preserve the claim in the record and to discourage the meritless use of Neil inquiries.

As provided by the district court below, during the nine years since Melbourne, trial and appellate courts have continued to have difficulty with Neil inquiries. Melbourne has bound district courts to reverse by elevating form over

substance; meaning that reversals are in no way tied to a finding that discrimination has taken place during jury selection. Due to the continued problems with Neil's standard following Melbourne, this Court should reconsider the procedure in light of the federal prima facie case requirement and the Supreme Court's recent opinion in Johnson v. California.[4] Requiring a prima facie case of discrimination to trigger a Neil inquiry would serve to tie reversals to some indication of discrimination during jury selection and to an implication of defendant's state and federal constitutional rights to an impartial jury and equal protection. Requiring a prima facie case of discrimination would also serve to protect defendants' interests before federal courts on federal habeas review. This Court should reconsider the standard for triggering a Neil inquiry to balance the policy of eliminating discrimination from jury selection with the policy of eliminating unfounded reversible error based on form over substance.

ARGUMENT

A. Background.

The Florida Supreme Court's efforts to eliminate racial bias in the use of peremptory challenges preceded those at the federal level. See State v. Busby, 894 So. 2d 88, 98 (Fla. 2004), *cert. denied*, 125 S.Ct. 2976 (2005); see also Batson v. Kentucky, 476 U.S. 79 (1986), *overruled in part by* Powers v. Ohio, 499 U.S. 400

[4] 125 S. Ct. 2410 (2005).

(1991); State v. Neil, 457 So. 2d 481 (Fla. 1984), *clarified*, State v. Castillo, 486 So. 2d 565 (Fla. 1986). Although not constitutionally guaranteed, peremptory challenges are "one of the most important of the rights secured to the accused." See id. at 98. Unlike a cause challenge, "use of a peremptory challenge need not be supported by a reason, so long as the challenge is not used to discriminate against a protected class of venireperson." See Busby, 894 So. 2d at 99.

This Court has revisited and revised the Neil test, based on evidence of problems in Florida's trial courts in the application of that test. Once again, it is evident that such problems continue to persist, resulting in large numbers of reversals of trial court outcomes, especially in criminal cases. Once again, the need to revisit Florida's current standards has arisen. After this Court dispensed with the need for proof of a prima facie case of discrimination as a prerequisite for any inquiry, Florida became the only jurisdiction in this nation to have such a low threshold for an inquiry. As this Court's standards have been construed by lower courts, even the need for an express allegation of discrimination has been deemed unnecessary. Notwithstanding the lowering of that threshold, problems persist in unacceptably large numbers of cases. However, the critical point at this time is that the cases that our appellate courts are reversing based on noncompliance with Melbourne, 679 So. 2d 759 (Fla. 1996), are often cases which have no reasonable connection to a belief in the existence of a trial tainted by discrimination.

Melbourne's cure has resulted in reversals of convictions where discrimination clearly has not existed. For such reasons, it is imperative to review the manner in which lower courts have diluted this Court's pronouncements in Melbourne or, alternatively, to consider, once again, revising the standards to apply when determining whether peremptory challenges are being used in an impermissibly discriminatory manner.

Initially in Florida, to protect against discrimination during jury selection, a party had to show a "strong likelihood" that a peremptory challenge was being exercised in a discriminatory manner to trigger a Neil inquiry. See Neil, 457 So. 2d at 486-87. After many years, during which Florida trial courts had difficulty in applying the "strong likelihood" standard, this Court disposed of proving any burden and replaced it with a procedural objection to trigger a Neil inquiry. Melbourne, 679 So. 2d at 759; State v. Johans, 613 So. 2d 1319 (Fla. 1993). Two guiding principles that have survived this Court's changes to the procedure for triggering a Neil inquiry are the presumption that all challenges are properly exercised and the accordance of great deference to trial courts to determine whether discrimination is taking place before them. These principles have existed since the recognition that peremptory challenges should not be exercised in a discriminatory manner. See Swain v. Alabama, 380 U.S. 202, 221 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

In Swain, the Supreme Court of the United States relied on the presumption that peremptory challenges are properly used when it held that a prosecutor's peremptory challenge should not be subject to the "demands and traditional standards of the Equal Protection Clause." Id. at 221-22. The Court implied that despite the presumption that challenges are properly exercised, it would entertain an equal protection challenge in some circumstances where the defendant can prove that "in case after case" the prosecutor "is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." Id. at 222-23. The Court did not discuss the effect of the Sixth Amendment right to a fair and impartial jury.

After Swain, courts in California, Massachusetts and New York rejected Swain's impossibly high standard for proving that peremptory strikes are fueled by discrimination. See People v. Thompson, 79 A.D.2d 87 (N.Y. 1981); Commonwealth v. Soares, 387 N.E.2d 499 (Mass.), *cert. denied*, 444 U.S. 881 (1979); People v. Wheeler, 583 P.2d 748 (Ca. 1978), *overruled by* Johnson v. California, 545 U.S. 162, 125 S. Ct. 2410 (2005). In Wheeler, the California Supreme Court reversed the convictions of two black men on the basis that the prosecution's peremptory strikes violated the right to an impartial jury representative of a cross-section of the community pursuant to the California

Constitution, Article I, section 16. Wheeler provided a three-part test based on the presumption that peremptory strikes are properly exercised. See id. at 762-3. The California Court defined the burden of proof as one "which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." Id. at 763. The first step required the defendant to raise an objection that the opponent is using the peremptory challenges in a biased manner and make a prima facie case of such discrimination to the satisfaction of the court. Id. at 764.

The California Supreme Court held that upon showing a prima facie case of discrimination based on circumstances before the court, namely those reflecting the composition of the jury and the use of peremptory strikes, the trial court must determine whether a reasonable inference arises that the peremptory challenges are biased. See id. The state court recognized that trial judges "are in a good position to make such determination . . . on the basis of their knowledge of local conditions and of local prosecutors [and that t]hey are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience." Id. The court held that the burden shifts to the opposing party to prove a lack of discrimination by proffering neutral reasons, only if the trial court finds that a prima facie case of discrimination has been made. See id. at 764-65. It is then that the trial court must determine, as the third step,

whether the neutral reasons are bona fide or sham excuses. See id. A failure to rebut a prima facie case of discrimination results in per se prejudicial error requiring reversal. See id. at 766.

The Massachusetts Supreme Judicial Court followed Wheeler's lead and held that discriminatory use of peremptory strikes results in a violation of the defendant's right to an impartial jury under the Massachusetts Constitution. The Massachusetts court set out a three-part test based upon the presumption that peremptory challenges are properly used. The first step required the rebuttal of the presumption by showing a pattern of exclusion of members of a discreet group and a likelihood that exclusion from the jury is based on their group membership. 387 N.E.2d at 516-17. The second step required the trial judge to determine whether "to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation." Id. at 517. If the trial judge determined that the presumption has been rebutted, the third step would shift the burden to the proponent of the strike to establish that the group members "disproportionately struck were not struck on account of their group affiliation." Id. The Massachusetts court accorded the trial court with great discretion to determine steps two and three. See id. at 516-17.

In Thompson, the Court of Appeals of New York agreed with the procedural tests established in Wheeler and Soares, but parted company "to the extent that

they suggest that a defendant may compel inquiry into the reasons for a prosecutor's use of peremptory challenges merely because the prosecutor has used a particular number of his peremptory challenges to exclude black potential jurors, . . ." 79 A.D.2d at 110-11. The New York court reasoned that "while exclusion of a significant number of black potential jurors will usually be part of the case of a defendant who seeks to have the trial court inquire into the prosecutor's use of peremptory challenges based upon alleged exclusion of blacks," such exclusion is insufficient by itself to warrant reversal of a trial court's determination not to make inquiry. Id.

Like the Wheeler, Soares and Thompson courts, this Court in Neil held, on the basis of Article I, section 16 of the Florida Constitution, which guarantees the right to an impartial jury, that peremptory challenges should not be used to discriminate against jurors because of their race. Neil, 457 So. 2d at 482. This Court set out a three-part test similar to that fashioned by the California, New York and Massachusetts courts and rejected the high burden imposed in Swain. The Neil test required the challenger of a strike to make a showing of discrimination to rebut the presumption that the strike was exercised in a proper manner to mandate inquiry by the trial court into the reasons for the strike. See id. at 486-87. The showing required a demonstration "on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they

have been challenged solely because of their race." Id. at 486. If the trial court determines that race is the only reason for the challenge, then the burden shifts to the proponent of the strike to show that the challenges were not exercised solely because of the prospective juror's race. See id. at 486-87. If the trial court decides that race is not the sole reason for the challenge, then no inquiry needed to take place. See id. at 486. Like Thompson, this Court declined to follow Wheeler and Soares to require inquiry simply because a prosecutor has used peremptory challenges to exclude members of one group. See 457 So. 2d at 486-87, n.10. This Court emphasized "that the trial court's decision as to whether or not an inquiry is needed is largely a matter of discretion." Id.

Two years after Neil, the Supreme Court of the United States in Batson, devised a similar three-part test, although the standard for a prima facie case of discrimination in Batson was lower than that set out in Neil. See Batson, 476 U.S. at 85-86; see generally, King v. Moore, 196 F.3d 1327, 1334 (11th Cir. 1999), *cert. denied*, 537 U.S. 1069, 123 S. Ct. 662 (2002) (noting that Neil exceeds the federal protection expounded in Batson); Reynolds v. State, 576 So. 2d 1300, 1303 (Fla. 1991) (same). In Batson, the Court reaffirmed its earlier ruling in Swain that the Equal Protection Clause forbids "the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors will be unable

impartially to consider the State's case against a black defendant." Batson, 476 U.S. at 89, 91.

The issue in Batson concerned a defendant's burden of proving the State's purposeful discrimination. See id. at 90. The Supreme Court rejected Swain's high burden of proof, but retained the rule that the burden of proving a violation of equal protection on the basis of purposeful discrimination rested on the defendant. See id. at 93. The prima facie test required the defendant to first show "that he is a member of a racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race . . . [, that] peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate" and "that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Id. at 96. The Court accorded great deference to trial judges to decide based on the circumstances before them whether the prosecutor's use of peremptory challenges creates a prima facie case of discrimination that shifts the burden of production to the State to come forward with a race neutral reason. See id. at 93, 97-98.

After Neil and Batson, this Court recognized the difficulty in applying the three-part test set out in Neil, but held steadfast to the principle that peremptory strikes cannot be used to exclude persons from jury service due to constitutionally impermissible prejudice. State v. Slappy, 522 So. 2d 18, 20-21 (Fla.), *cert. denied*,

487 U.S. 1219, 108 S. Ct. 2873 (1988). This Court reaffirmed its commitment "to a vigorously impartial system of selecting jurors based on the Florida Constitution's explic it guarantee of an impartial trial." Id. at 21. While this Court recognized that courts had difficulty employing the "strong likelihood" standard of proof in Neil, it resisted "the temptation to craft a bright line test" believing that "[s]uch a rule could cause more havoc than the imprecise standard" set out in Neil. Id. at 21-22. This Court reaffirmed the spirit and intent of Neil, but attempted to make its application easier by holding that "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor," reasoning that any error should be in the way least likely to allow discrimination. Id. at 22. Again, this Court repeated that the burden does not shift to the proponent of the strike to set forth race-neutral reasons until "the trial judge is satisfied that the complaining party's objection was proper and not frivolous." Id.

Under Neil and Slappy, an opponent of a strike was required to make a prima facie showing that there has been a strong likelihood that jurors have been challenged because of their race. See Reed v. State, 560 So. 2d 203, 205-06 (Fla. 1990), *cert. denied*, 543 U.S. 980, 125 S. Ct. 481 (2004). The trial judge, the only one who is present at trial to discern the nuances of the "spoken word and the demeanor of those involved," was vested with great discretion to determine

whether peremptory challenges are racially intended. Id. at 206; see also Hall v. Daee, 602 So. 2d 512, 514 (Fla. 1992) ("we have often reiterated that the determination of whether the challenger has established a prima facie case rests within the trial court's discretion.").

In Hall, the issue before this Court was whether a Neil inquiry had to be conducted where there had been no challenge of jurors on a racially discriminatory basis, where defendant exercised peremptory challenges on four out of five black prospective jurors. See Hall, 602 So. 2d at 513. This Court answered the question in the negative to the extent that the question asked whether a trial court *must* conduct a Neil inquiry whenever a party exercises four out of five peremptory challenges to strike prospective black jurors. See id. Nevertheless, this Court warned that a trial court *should not refuse* to conduct a Neil inquiry where one has been properly requested under such circumstances. See id. at 514. This Court repeated the sentiment stated in Slappy that a trial court should err in favor of conducting an inquiry that "requires only a minute or two" because the trial court is "in the best position to evaluate the neutrality of the proffered reasons, and its conclusion in this regard will be accorded deference on appeal." Id. at 516.

In 1993, this Court crafted the bright-line rule it had previously sought to avoid by eliminating the requirement of a "strong likelihood" to trigger a Neil inquiry, instead requiring a simple objection that a challenge is being used in a

racially discriminatory manner. See Johans, 613 So. 2d at 1321-22. The Johans Court elected to pursue a simpler procedure because the case law that had developed from Neil failed to "clearly delineate what constitutes a 'strong likelihood.'" Id. at 1321. This Court held that upon a proper objection, a trial court *must* conduct a Neil inquiry. See id.; see also Valentine v. State, 616 So. 2d 971, 974 (Fla. 1993), *cert. denied*, 522 U.S. 830, 118 S. Ct. 95 (1997) (repeating the rule stated in Slappy and Johans, and applying Slappy to hold that a trial court must conduct an inquiry unless it can cite specific circumstances in the record that eliminate all question of discrimination); cf. Windom v. State, 656 So. 2d 432, 436-37 (Fla.), *cert. denied*, 516 U.S. 1012, 116 S. Ct. 571 (1995) (affirming a defendant's conviction on a holding that a proper objection that triggers a Neil inquiry requires an objection and a demonstration on the record that the challenged person is a member of a distinct racial group).

In Melbourne, this Court created guidelines to summarize and reaffirm Neil's procedure as it existed after Johans because it recognized that despite the refinements it had made, "Florida courts have continued to have difficulty in applying Neil, particularly following Johans." 679 So. 2d at 763. With regard to step one of a Neil inquiry, Melbourne's guidelines provide:

> 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, n2 (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 vernireperson is a member of a distinct racial group, n3 (Id.) and c) request that the court ask the striking party its reason for the strike. n4 (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. n5 (See generally id. at 1321 ("We hold that from this time forward a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner."). Johans eliminated the requirement that the opponent of the strike make a prima facie showing of racial discrimination.).

679 So. 2d 764-65. Melbourne did not state new law or modify the standard set in Johans. Further, the opinion did not abandon the two loadstar principles of Florida peremptory law: (1) a presumption of non-discrimination in the exercise of peremptory strikes and (2) a trial court's wide discretion to determine whether discrimination has taken place based on all of the facts and circumstances before it. Although Johans set a lower standard to trigger an inquiry, this Court in cases after Johans and in Melbourne, continued to recognize the importance of the presumption that a strike is being used in a proper way by providing that a trial court is not *required to* (although it can and should) proceed to step two of a Neil inquiry unless a sufficient objection is lodged. See Franqui v. State, 699 So. 2d 1332, 1335 (Fla. 1997); see also Windom, 656 So. 2d at 436-38.

B. Certified Questions.

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 the above certified question in the affirmative because Melbourne requires an objecting party to allege that a challenge is racially (or otherwise) impermissibly motivated to trigger a mandatory Neil inquiry. Below, the State argued that a trial court is not *required* to conduct a Neil inquiry when an objecting party has failed to allege that discrimination has taken place. The Third District Court rejected the State's argument holding that current Florida case law does not require an allegation of discrimination to trigger a mandatory inquiry. The State believes that the district court's holding is wrong because Melbourne requires an objection and an allegation of discrimination to trigger a *mandatory* Neil inquiry.

Step one of Melbourne provides the procedure a party must follow to trigger a mandatory Neil inquiry: (a) object and allege that racial discrimination is taking place (b) show that the venire person is a member of a distinct racial group and (c)

request that the court ask the striking party its reason for the strike. 679 So. 2d at 764, n.2-5. The trial court is not required to ask the proponent of the strike to explain race/gender neutral reasons in support of the strike until all three prongs of step one have been satisfied. See id. The district court, in its decision below, interpreted State v. Holiday, 682 So. 2d 1092 (Fla. 1996), and Franqui as cases that further simplified Melbourne's objection requirements by eliminating the need to make an allegation of discrimination as part of a proper objection. See Whitby v. State, 2006 Fla. App. LEXIS 1846 at *12-14 (Fla. 3d DCA 2006). Specifically as to Holiday, the district court reasoned that this Court's omission of Melbourne's footnotes 2 through 5, resulted in the cancellation of Melbourne's requirement that an allegation of discrimination be made to trigger a Neil inquiry. See id. at *13-14. The district court's interpretation of Holiday and Franqui overlooks the distinguishing procedural posture of those cases and the established doctrine that this Court does not overrule itself *sub silentio*.

Both Holiday and Franqui involved Neil inquiries that were conducted by the trial court following the State's objection to defense peremptory challenges. In Holiday, this Court reviewed a district court reversal that had been based on a finding that the trial court erred when it conducted a Neil inquiry following an inadequate State objection: " . . . , the state's bare request for race and gender neutral reasons was not enough to warrant the trial court's inquiry, and it was

reversible error to disallow the challenge on the grounds that the reasons proffered were insufficient." Holiday v. State, 665 So. 2d 1089, 1091 (Fla. 3d DCA 1995) (citations and footnote omitted); see also Holiday, 682 So. 2d at 1092. This Court reversed and quashed the district court's opinion reasoning that "any doubt concerning whether the objecting party has met its initial burden must be resolved in that party's favor." Holiday, 682 So. 2d at 1093, citing Valentine, 616 So. 2d at 974 (holding that "unless a court can cite specific circumstances in the record that *eliminate all question of discrimination*, it must conduct an inquiry.") (Emphasis added). Thus, Holiday's holding was that the trial court did not err in conducting a Neil inquiry despite the State's allegedly deficient objection.

Perhaps predicting future confusion from Holiday's opinion, Justice Anstead wrote separately "only to caution and emphasize that under Melbourne v. State, 679 So. 2d 759 (Fla. 1996), 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). Justice Anstead recognized Windom's continued validity and provided that Melbourne served to reaffirm and clarify the nature and extent of the initial burden required to trigger an inquiry. See id. In Windom, this Court held that a "defendant's expressed objection did not make it necessary for the trial court to require the State to have

and express a race-neutral reason for the challenge." Id., citing Windom, 656 So. 2d at 437.

In Franqui, this Court expressly recognized Windom's continued viability post-Melbourne. See 699 So. 2d at 1335. Like Holiday, Franqui did not involve a trial court's failure to conduct an inquiry. See id. at 1334-35. At trial, the State had objected to Franqui's peremptory strike by saying "Wait a minute, Judge, are they striking Aurelio Diaz? State would challenge that strike." Id. at 1334. This Court held that the trial court correctly exercised its discretion in denying defendant's strike based on defendant's race/gender neutral reason "I don't like him." See id. at 1335.

This Court disagreed with the dissent's view that Windom applied because there was no need to determine whether the State's objection was sufficient where the trial court conducted an inquiry. See Franqui, 699 So. 2d at 1335. This Court recognized the distinction in procedural postures between an insufficient objection that could be entertained by a trial court and an insufficient objection that could not *mandate* an inquiry by the trial court. See id. Windom did not apply to Franqui's case because, "[o]ur holding in *Windom* was that there was not a sufficient objection to reverse the trial court for not requiring the challenging party to provide race-neutral reasons for the challenge." Id. Thus, in Franqui, the trial court correctly exercised its discretion in conducting a Neil inquiry following the State's

strike; especially in light of the policy stated in Slappy, that trial judges should err on the side of holding a Neil inquiry. See id.

Holiday and Franqui did not dispose of Melbourne's three pronged requirement for step one. To the contrary, Holiday and Franqui distinguished situations that involved a trial court's election to proceed with a Neil inquiry despite a deficient objection. Cases like Holiday and Franqui are controlled by this Court's policy that a trial court has discretion to conduct a Neil inquiry even where there is an insufficient objection.

In contrast, cases that involve an insufficient objection and no resulting Neil inquiry are controlled by Windom and Melbourne. This Court has balanced the policy of erring on the side of conducting a Neil inquiry with the policy of raising some indication before the trial court that a peremptory strike is being exercised in an improper manner. See Holiday, 682 So. 2d at 1095 (Anstead, J., specially concurring); Melbourne, 679 So. 2d at 763-65; Windom, 656 So. 2d at 437; Slappy, 522 So. 2d at 21-22. The latter policy is based on the presumption that a peremptory strike is exercised in a non-discriminatory manner. Thus, while Neil's "strong likelihood" test has given way to a simpler procedure that does not require a showing of discrimination, Melbourne's procedure still requires an allegation of discrimination to trigger a Neil inquiry. Without an allegation of discrimination, no inquiry is triggered because there is nothing to rebut. See generally Johnson,

125 S. Ct. at 2418, n.7 (writing that the burden-shifting framework is an orderly way of arranging the presentation of evidence) (citations omitted).

Finally, the district court's opinion below fails to recognize that this Court does not overrule itself *sub silentio*. See Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002). "Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding." Id. Here, neither Holiday nor Franqui have expressly overruled Melbourne and Windom, and thus, an objecting party is still required to meet all three prongs of step one to trigger a mandatory Neil inquiry.

Should this Court disagree with the State's position and hold that Melbourne does not require an allegation of discrimination, at the very least, this Court should require an allegation of discrimination to trigger a mandatory Neil inquiry. Melbourne's step one is designed to serve multiple purposes. Adequately apprising the trial court of the nature of the objection is one such purpose, but not the only one. When counsel objects under Melbourne, counsel is essentially accusing opposing counsel of engaging in racially discriminatory conduct - such an allegation impugns the integrity and professionalism of opposing counsel, effectively accuses opposing counsel of engaging in illegal conduct - possibly

conduct which could be the subject of a 1983 action, and accuses opposing counsel of engaging in unprofessional conduct. In short, the allegation is of a highly serious nature, regarding conduct which is offensive to the profession and the judiciary. Such accusations must therefore not be lightly made. Requiring an express assertion that opposing counsel is engaging in racially discriminatory conduct puts the burden on counsel to clearly state that counsel believes opposing counsel is engaging in racial discrimination. Eliminating the need for an express allegation of racially discriminatory conduct makes it easy for counsel to obtain an inquiry under Melbourne without holding counsel to the task of alleging that opposing counsel is engaging in racism. It is far too simple to state that a prospective juror is Hispanic, African-American, White, Asian, etc., and demand a race-neutral reason without more.

If counsel need only to identify race or ethnicity of the prospective juror and request an inquiry, counsel has been given a license to obtain an inquiry for every peremptory challenge.[5] Every juror can be identified by some significant racial

[5] See Plaza v. State, 699 So. 2d 289, 293-94 (Fla. 3d DCA 1997) (Sorondo, J., concurring) ("The practical use of this tool, however, is rapidly degenerating into a strategic way for attorneys to pollute the trial record with baseless objections, alleging racial, ethnic and gender discrimination, which are completely unsubstantiated by the record . . . . [I]t is ethically and morally reprehensible to accuse a colleague of racial, ethnic and/or gender discrimination for the sole purpose of trying to create reversible error. Such actions degrade the justice system, undermine the public's confidence in our courts and may ultimately lead to the demise of the peremptory challenge.").

grouping. As Melbourne inquiries can be required on the basis of any race, or on the basis of either gender, counsel need only ask for a neutral reason whenever any peremptory challenge is exercised. See Pringle v. State, 792 So. 2d 533, 534 at n. 1 (Fla. 3d DCA 2001), *rev. denied*, 817 So. 2d 849 (Fla. 2002) (noting that whites constitute a distinct racial group and that gender based challenges are prohibited as well). Thus, the requirement of a specific allegation of racial and/or gender discrimination adds to the likelihood that the objection will be well grounded, will not be frivolous, and will not lightly attribute repugnant conduct to an opposing attorney.

For instance, in Miller v. State, 664 So. 2d 1082 (Fla. 3d DCA 1995), the Third District Court of Appeal held that "the prosecutor's simple declaration that the 'state is requesting a neutral reason' after the strike was attempted was, without more, insufficient to trigger a *Neil* inquiry, *see Windom v. State*, 656 So. 2d 432 (Fla. 1995) . . . ." While, as previously discussed, both Miller and Windom predate Melbourne, the principles for which they stand are still valid, and are recognized as such by this Court.

Melbourne's step one, which replaced Neil's "strong likelihood" test with (a) an objection and allegation of discrimination along with (b) a showing that the venireperson is a member of distinct racial ground and (c) a request that the court ask the striking party its reason for the strike, has lowered the bar far enough.

Melbourne, 679 So. 2d 759; Johans, 613 So. 2d 1319; Neil, 457 So. 2d 481. Not requiring an allegation of discrimination contravenes the guiding principle that all peremptory challenges are presumed to be exercised in a nondiscriminatory manner. See Windom, 656 So. 2d at 437 (noting that in Johans the objection was timely and "the factual demonstrations made."). Finally, there is no reason why this Court would adhere to the last two prongs of the three-part test of step one, Melbourne, 679 So. 2d at 765 (writing in dicta that trial counsel would not be required to conduct an inquiry where counsel failed to request a reason for the strike); Windom, 656 So. 2d at 437 (holding that trial court was not required to conduct inquiry where counsel failed to demonstrate that venire person was a member of cognizable class), but not the first prong. Thus, a proper objection, one that mandates a Neil inquiry, requires satisfaction of all three prongs of step one.

With that in mind, the objection in the instant case falls short. Here, there is no reversible error because the defendant failed to properly object to the State's peremptory strike where there was no allegation that opposing counsel was discriminating against Mr. Lynn. Defense counsel simply identified the race and gender of the prospective juror and requested an inquiry without alleging that the strike was being used in a discriminatory manner. This type of objection is insufficient to trigger a *mandatory* Neil objection, and thus, the trial court acted within its discretion when it did not conduct a Neil inquiry.

As in Melbourne, where this Court wrote in dicta that it would not reverse Melbourne's conviction and sentence because defense counsel failed to lodge a sufficient objection, 679 So. 2d at 765 ("I would raise Baxter Johans challenge, J O H A N S. He's a black man . . . ."), the defendant's failure to allege discrimination here is equally insufficient to mandate a Neil inquiry. In Melbourne, this Court provided that the trial court was *not required* to proceed with an inquiry where defense counsel failed to ask for a race neutral reason for the strike. See id. at 765. Here, the defendant's objection to the State's challenge of Mr. Lynn was that "although he is a white male . . . he is protected." [T. 123]. At no point did the defendant allege any basis in support of the belief that there was discrimination against Mr. Lynn as a white male. [T. 123]. This is despite the trial court's express finding that there was no basis to believe that the State was discriminating against Mr. Lynn as a white male. [T. 123]. Like Melbourne, to require a new trial under these circumstances would do nothing but erode the legitimacy of the principles underlying Neil. See Melbourne, 679 So. 2d at 765; see also Windom, 656 So. 2d at 437. Therefore, this Court should answer the above certified question in the affirmative, reinstate defendant's conviction and sentence and quash the district court's opinion below.

II.

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

This Court should affirmatively answer the above certified question of great public importance to the extent that this Court should require a prima facie showing of discrimination to trigger a Neil inquiry. The current procedure that does not require a showing of discrimination has created reversible error based on form over substance. Under current law, Florida district courts have had to reverse otherwise sustainable convictions based on a finding that a party or trial court has failed to follow Melbourne's procedure despite any indication in the record that discrimination has taken place. These cases include failures to conduct required inquiries, erroneous assessments of the genuineness of proffered reasons, erroneous assessments of the neutrality of the proffered reasons, erroneous decisions as to the validity of prosecutors' reasons, and erroneous denials of defense peremptories in criminal cases. See Whitby, 2006 Fla. App. LEXIS 1846 at *18, n.1 (citing thirty-seven cases that reversed due to Melbourne error). Although a prima facie requirement would not end all disputes as to how to apply its procedure, it would at least ensure that reversals would be based on some indication of a likelihood that discrimination has taken place during jury selection.

This Court has had a history of revisiting and evaluating standards for establishing procedures to deter discriminatory peremptory strikes. Johans and Slappy revisited Neil's standard of "strong likelihood" with Johans ultimately disposing of the "strong likelihood" standard. Melbourne revisited Johans, and cases that interpreted it, "[b]ecause trial courts had difficulty applying Neil," and attempted to set out a simplified procedure for attorneys and judges to follow. Melbourne, 679 So. 2d at 763. As recognized by the Third District Court below, despite this Court's "valiant attempt to eliminate the exclusion of jurors based upon their race, gender, or ethnic origin, and to create a workable, simplified standard for attorneys and judges to follow," a study of "the nine years of its application, suggests that review and modification of the standard, is warranted." Whitby, 2006 Fla. App. LEXIS 1846 at *17.

The current standard has led "to misuse by trial attorneys; lengthy, needless evaluations as to the genuineness of the proffered reason for the challenge; unnecessary reversals due to the failure to make an inquiry; and errors made in performing a pretextural analysis." Id. at 17-18 (footnote omitted). The current procedure requires a "review of each and every prospective juror and every response given by each." Id. at *18. This may involve the questioning of up to 200 jurors and easily lead to a mistake, especially where the trial court is without a record to review. See id. Cf. Overstreet v. State, 712 So. 2d 1174 (Fla. 3d DCA

1998) (recognizing the tremendous pressures and time constraints imposed on the trial courts during voir dire, but suggesting that the more prudent course in evaluating Neil inquiries would be to review the court reporter notes prior to ruling on the issue). "To require reversal over an error regarding a juror's response in an otherwise fair and impartial trial without so much as an **allegation** that the peremptory challenge appeared to be racially motivated," takes good intentions too far. Id. at *18 (emphasis supplied).

For instance, in Pickett v. State, 922 So. 2d 987 (Fla. 3d DCA 2005), the Third District Court was forced to reverse an otherwise valid verdict that was "supported by evidence to a moral certainty that the defendant [was] guilty of a hideous crime, and was infected by no error which could have conceivably affected his substantial rights." 922 So. 2d at *14. (Schwartz, J., specially concurring in part). In Pickett, the State attempted to back-strike prospective juror Munoz. See id. at *12. Defense counsel requested a race-neutral reason for the strike of the female Hispanic juror under Melbourne. See id. The State responded that there was no discrimination as evidenced by several Hispanics seated on the panel. See id. The trial judge did not require a reason for the strike and excused juror Munoz. See id. The State then challenged juror Lopez and the defense asked for a race-neutral reason for the strike since juror Lopez was a Hispanic female. See id. The trial judge did not require a reason for the strike because there had been no

demonstration of a pattern of discrimination. See id. Juror Lopez was excused. See id.

The Third District Court reversed Pickett's conviction and sentence on the basis of Holiday and Melbourne writing that this Court "has mandated that an objecting party to a peremptory strike is required to request race-neutral reasons for the strike of any person who is a member of a distinct racial group without any showing that the challenge is being used impermissibly." Pickett, 922 So. 2d at *12. The district court wrote that there is no specification for a showing of a pattern of discrimination to trigger an inquiry and that the failure to conduct such inquiry constitutes reversible error. See id. at *13. Judge Schwartz concurred in part recognizing that the law bound the result, but wrote that Melbourne and Holiday reduced "the noble idea reflected in Neil and Batson, that peremptory challenges, like everything else in our justice system, may not be employed to effect a discriminatory purpose into a formalistic rite in which any misstep from the intricate choreography prescribed by the cases requires reversal." See id. at *14. (implying that a harmless error analysis should apply to cases where there is a failure to adhere to Melbourne and where there is no indication in the record that discriminatory jury selection has taken place).

The problems associated with Melbourne were noted by Judge Sorondo in a special concurrence to the majority opinion in Plaza. 699 So. 2d at 291-94

(Sorondo, J., specially concurring). In Plaza, the issue was whether reversal was required where the trial court failed to request a race-neutral reason despite recognizing a reason apparent on the record in support of the strike. See id. at 290-91. The district court held that reversal was not required because it would make "no sense to require a trial court, when it is engaged in the proper and thorough rigors of a Neil inquiry, to await a neutral explanation for a strike that is readily apparent from the record before articulating that explanation on the record." Id. at 290-91.

Judge Sorondo disagreed with the majority's holding writing that Melbourne requires a trial court to ask the proponent of the strike for a valid gender neutral reason once an objecting party has met all of the requirements of step one. 699 So. 2d at 291-94 (Sorondo, J., specially concurring). Reasoning that Melbourne's purpose is to determine the subjective intent of the party seeking the peremptory strike, as opposed to reasons that are apparent from the face of the record, a trial court errs where it has failed to conduct an inquiry of the proponent of the strike. See id. at 291-92. Nevertheless, Judge Sorondo would have reached the same result as the majority by finding that the error was harmless where the trial court ruled on the defendant's objection under Melbourne and the record showed "the self-evident validity of the strike." Plaza, 699 So. 2d at 293.

Judge Sorondo noted that the practical purpose of Melbourne is "[r]apidly degenerating into a strategic way for attorneys to pollute the trial record with baseless objections, alleging racial, ethnic and gender discrimination, which are completely unsubstantiated by the record." 699 So. 2d at 294. Judge Sorondo concluded that while some attorneys were using Melbourne to zealously represent their clients, other attorneys were using Melbourne simply to create reversible error; the latter activity leading to the degradation of the justice system and ultimately, the demise of the peremptory challenge. See id. Cf., Murray v. Haley, 833 So. 2d 877, 880 (Fla. 1st DCA 2003).

In addition to the above discussed problems associated with Melbourne, a separate and second reason for reconsidering Florida's peremptory law is the Supreme Court's recent decision in Johnson. In Johnson, the Supreme Court held that California's "more likely than not" standard "is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." 125 S. Ct. at 2416. The opinion explained that the Batson framework is "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury." Id. at 2418. Batson's three-part test aims at preventing "judicial speculation to resolve plausible claims of discrimination." Id. (emphasis added). Thus, an inference of discrimination, such as when all three African-American prospective

jurors were removed from Johnson's jury, is sufficient to establish a prima facie case. See id. at 2419.

The Court rejected the view that Johnson had to prove that discrimination was "more likely than not" because Batson's burden-shifting framework requires the quelling of an inference of discrimination with a proponent's explanation that the reason for the strike is race/gender neutral. Batson, the Court wrote, serves the purpose of encouraging "prompt rulings to peremptory challenges without substantial disruption of the jury selection process." Id. at 2418. Batson also serves to get rid of "inherent uncertainty present in inquiries of discriminatory purpose" and to end "needless and imperfect speculation when a direct answer can be obtained by asking a simple question." Id.

This Court should apply Johnson's policy of creating a record and dispelling uncertainty about whether discrimination has taken place to all the steps of a Neil inquiry. Equally important to ascertaining a proponent's reasons in support of a strike, is clearing any uncertainty as to why the objecting party believes that there is discrimination and determining whether the objection is well founded. This Court recognized early on that the "strong likelihood" standard was too high of a burden to trigger a Neil inquiry. The removal of the burden of production from step one of Neil's test, however, has resulted in too much ease with which attorneys can, under the guise of zealous representation, use the procedure to riddle

the record with unfounded reversible error. See Plaza, 699 So. 2d at 294 (Sorondo, J., specially concurring). While the trial court may realize that the attorney's objection is disingenuous and disregard it, on appeal, the district courts are bound to reverse because the trial court has failed to conduct the mandated Neil inquiry despite a complete lack of indication that discrimination has taken place.

Although this Court has acted under the Florida Constitution, it has constantly noted the principles and developments of the Supreme Court of the United States. For instance, in Melbourne, after acknowledging that Florida courts were having difficulty in applying Neil and Johans, this Court considered the significance of Purkett v. Elem, 514 U.S. 765 (1995), on step two of the three-step test. The State believes that this Court should reconsider Florida's peremptory law, especially with regard to step one, in light of the continuing problems with Neil inquiries and the Supreme Court's opinion in Johnson.

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?

As detailed previously herein, in pages 16 through 18, this Court dispensed with the prima facie case requirement in an effort to minimize problems at the trial court level. The elimination of the prima facie case requirement has not accomplished that result, as evidenced by the large numbers of reversals on appeal

that have persisted. The elimination of the prima facie case requirement has had one deleterious effect, however. Whereas appellate court reversals based on Batson, with its prima facie case requirement, can reasonably be said to be based on a belief that the trial was tainted by discrimination, no such claim can be asserted under Florida law. The prima facie case requirement goes a long way to seeing that the right cases are being reversed on appeal for the right reasons. Cases in Florida are currently being reversed absent any connection to the existence of discrimination. See Whitby, 2006 Fla. App. LEXIS 1846 at *18, n.1. If problems are going to persist in the application of any procedures, our courts should apply those procedures which retain a connection to a belief in the existence of discrimination.

The federal prima facie case requirement established under Batson retains a connection to a belief that discrimination has taken place because under its standard a defendant must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Johnson, 125 S. Ct. at 2416. "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" Id. at n. 4 (citation omitted). To make a prima facie showing, a party is required to proffer to the trial court facts and circumstances that support the inference that discrimination is taking place. See id. at 2416. By making this proffer, the objecting party clarifies

its reasons to the trial court for believing that discrimination is taking place and creates a complete record for subsequent review.

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.[6] Those other jurisdictions do not appear to have had

[6] See People v. Huggins, 2006 Cal. LEXIS 4393 at *99-100 (Ca. 2006); People v. Bell, 702 N.W.2d 128, 129-33 (Mich. 2005); State v. Donaghy, 769 A. 2d 10, 14 (Vt. 2000); State v. Ford, 39 P.3d 108, 110-11 (Mont. 2001); Wright v. State, 690 N.E.2d 1098, 1104 (Ind. 1997); State v. Taylor, 694 A.2d 977, 979-80 (N.H. 1997); Prowell v. State, 921 S.W.2d 585, 590-91 (Ark. 1996), *overruled on other grounds*, State v. Bell, 948 S.W.2d 557 (Ark. 1997); State v. Vargas, 926 P.2d 223, 226 (Kan. 1996); State v. Rhodes, 917 P.2d 149, 151 (Wash. 1996); Tedder v. State, 463 S.E.2d 697, 699 (Ga. 1995); Comm. v. Simmons, 662 A.2d 621, 631 (Penn. 1995); Comm. v. Burnett, 642 N.E. 2d 294, 295 (Mass. 1994); City of Mandan v. Fern, 501 N.W.2d 739, 743 (N.D. 1993); Comm. v. Snodgrass, 831 S.W.2d 176, 178 (Ky. 1992); State v. Henderson, 843 P.2d 859, 860 (Ore. 1992); State v. Batson, 788 P.2d 841, 842 (Haw. 1990); State v. Knox, 464 N.W.2d 445, 448 (Iowa 1990); State v. Walker, 453 N.W.2d 127, 134 (Wis. 1990); State v. Hernandez, 589 N.E.2d 1310, 1313 (Oh. 1992); State v. Ellison, 841 S.W.2d 824, 825-26 (Tenn. 1992); People v. Garrett, 564 N.E.2d 784, 789-90 (Ill. 1991); State v. Bailey, 772 P.2d 1130, 1134 (Ariz. 1989); State v. Moore, 438 N.W.2d 101, 107 (Minn. 1989); State v. Araiza, 856 P.2d 872, 877 (Idaho 1993); Litteer v. State, 783 P.2d 971, 972 (Okl. Cr. 1989), *overruled on other grounds*, Green v. State, 862 P.2d 1271 (Okl. Cr. 1993); State v. Cantu, 778 P.2d 517, 518 (Utah 1989); State v. Marrs, 379 S.E.2d 693, 695 (W. Va. 1989); State v. Gonzalez, 538 A.2d 210, 212-13 (Conn. 1988); Stanley v. State, 542 A.2d 1267, 1269 (Md. 1988); State v. Walton, 418 N.W.2d 589, 591-92 (Neb. 1988); State v. Jackson, 368 S.E.2d 838, 840 (N.C. 1988); State v. Chakouian, 537 A. 2d 409, 413 (R.I. 1988); Ex parte Branch, 526 So. 2d 609, 628 (Ala. 1987); Fields v. People, 732 P.2d 1145, 1152 (Co. 1987); State v. Thompson, 516 So. 2d 349, 353 (La. 1987); Lockett v. State, 517 So. 2d 1346, 1349 (Miss. 1987); Haynes v. State, 739 P.2d 497, 501-02 (Nev. 1987); State v. Sandoval, 736 P.2d 501, 503 (N.M. 1987); People v. Scott, 516 N.E.2d 1208, 1210 (N.Y. 1987); State v. Farmer, 407 N.W. 2d 821, 823 (S.D. 1987); Gray v. Comm., 356 S.E.2d 157, 169-70 (Va. 1987); State v. Gilmore, 511

profound problems applying Batson with its prima facie case requirement. Given the experiences of forty-nine other states and the federal government, it can reasonably be concluded that a prima facie case requirement would constitute an improvement over the current status in Florida.

An additional benefit from the prima facie case requirement is that it forces parties to create a more substantial record in the lower court by identifying the race and/or gender of both challenged and non-challenged jurors. This is something that is often not done in Florida trial court proceedings, and the development of such factual background will serve to facilitate proper appellate review.

The requirement of a prima facie case demonstration would also provide one further benefit for those defendants who are convicted. Many convicted defendants seek review of their state court convictions in federal habeas corpus proceedings under 28 U.S.C. § 2254, after exhausting their state court claims. In federal habeas corpus proceedings, the prisoners may present only federal

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A.2d 1150, 1156-57 (N.J. 1986); Bueno-Hernandez v. State, 724 P.2d 1132, 1134 (Wyo. 1986); Riley v. State, 496 A.2d 997, 1013 (Del. 1985); Brown v. State, 2004 Alas. App. LEXIS 204 at *3-*5 (Alas. Ct. App. 2004); Little v. U.S., 613 A.2d 880, 884-85 (D.C. Ct. App. 1992); Allen v. State, 726 S.W.2d 636, 637-39 (Tex. App. 1987); Smart v. Shakespeare, 1997 Me. Super. LEXIS 148 at *5-*8 (Me. Super. Ct. 1997); see also State v. Starks, 834 S.W.2d 197, 197 (Mo. 1992) (mandating an inquiry whenever an objection is made, although applying Batson to the extent that the inquiry as a whole must meet a prima facie requirement of proof of discrimination to establish error); State v. Chapman, 454 S.E.2d 317, 319-20 (S.C. 1995) (requiring a Batson hearing whenever a party requests one and reasoning that a request for a Batson hearing in effect makes out a prima facie case of discrimination).

constitutional claims; claims based on state law are insufficient. See, e.g., Carrizales v. Wainwright, 699 F.2d 1053 (11th Cir. 1983) ("A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved); see also Rau v. Sec., Fla. Dep't of Corr., 2005 U.S. Dist. LEXIS 35234 (M.D. Fla. 2005) (whether a state court failed to conduct a Faretta hearing pursuant to Fla. R. Crim. P. 3.111 is a matter of state law and is not cognizable on federal habeas review). Moreover, exhausting a claim based on state law does not constitute exhaustion of a similar federal constitutional claim. See, e.g., Mendoza v. Crosby, 2005 U.S. Dist. LEXIS 33611 at *2 (M.D. Fla. 2005) (exhaustion of state hearsay claim did not constitute exhaustion of federal constitutional confrontation clause claim). Thus, a state procedure, under the state constitution, which mandates the prima facie case requirement of Batson and the federal constitution, will likely serve the long-term review interests of convicted offenders by making it more likely that claims will be sufficiently exhausted in state court prior to presentation in federal habeas corpus proceedings.

For the foregoing reasons, this Court should require a party to make a prima facie case of discrimination to trigger a mandatory Neil inquiry. Accordingly, this Court should answer the above certified question of great public importance in the affirmative.

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?

If this Court determines that it will continue to adhere to the guidelines set out in Melbourne and decline to require a prima facie requirement as part of step one of a Neil inquiry, this Court should answer the above question in the affirmative. The argument that harmless error analysis should apply to at least some errors under Melbourne is a narrow argument and it is an argument that exists only because this Court no longer requires an objecting party to present a prima facie case of discrimination prior to mandating an inquiry. As a result, failures to conduct inquiries may have no connection to any discrimination and there may be no reason for presuming that discrimination existed. It is because of the absence of a prima facie case requirement that the Third District Court, in its certified question, can ask whether appellate courts should reverse due to procedural errors "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." Whitby, 2006 Fla. App. LEXIS at *19.

Such a question could not be posed in a jurisdiction that requires a prima facie demonstration of discrimination. A harmless error analysis should apply to the current standard that requires no prima facie showing of discrimination because of the possibility that reversals can ensue with no connection to discrimination. Such an analysis could be limited to facts from jury selection which clearly negate the likelihood of discrimination, even absent the full inquiry mandated by Melbourne. For example, in the present case, the fact that the challenged juror was a white male and that the defendant was a black male strongly undermines any claim that the prosecution was discriminating against white male jurors. This is especially true where the State also sought to strike a black female that the defense challenged. Under these facts, there is simply no conceivable reason why the prosecutor would be acting in a discriminatory manner.

In other cases in which mandated inquiries have not been conducted, the race/gender neutral reasons for the challenges are often apparent from the face of the record. See, e.g., Plaza, 699 So. 2d at 293-94. For example, in Pickett, supra, even though the trial court did not conduct the mandated inquiry, the prosecution did proffer its reason for striking one of the two jurors at issue. In other cases, attorneys have exercised peremptory challenges shortly after their efforts to exercise cause challenges have been rejected by the trial judge. Under such circumstances, the appellate courts should be permitted to review the record to

determine whether a neutral reason existed. Likewise, there will be situations where the genuineness of the reason is apparent to the appellate court even absent an inquiry.

In other cases, a challenge to a juror may come after the party has already accepted substantial numbers of jurors of the same race. While that factor may have limited, if any, significance when a likelihood of discrimination has been established through other factual allegations, absent that demonstration, the history of prior acceptances strongly undermines a claim of discrimination.

Section 924.051(3), Florida Statutes, bars the granting of appellate relief from a conviction and sentence absent a demonstration of "prejudicial error." If a defendant demonstrates that a trial court failed to conduct an inquiry or erroneously permitted a prosecutor to strike a juror absent a demonstration of the likelihood of discrimination, the defendant may demonstrate noncompliance with Melbourne. Noncompliance with Melbourne, however, is not a demonstration of "prejudicial error." Since Melbourne places form over substance, by requiring an inquiry absent the demonstration of a prima facie case of discrimination, noncompliance with Melbourne does not carry with it any presumption of discriminatory conduct in the use of peremptory challenges. Nor does noncompliance with Melbourne provide any basis for believing that the jury selection process and trial have been tainted with discrimination.

Under such circumstances, a mere violation of Melbourne, by failing to conduct an inquiry under Melbourne, can not be deemed "prejudicial error." There is, at that point in time, no basis for believing that any discrimination existed. There is, at that point in time, no basis for believing that a juror has been stricken for race-based reasons. There is, at that point in time, no basis for believing that any of the jurors who served on the case were in any capacity biased or unfair. An error may well exist under Melbourne, but, through the inherent scheme established under Melbourne, divorcing the inquiry from the prima facie demonstration of discrimination, Melbourne bears no rational connection to the concept of prejudicial error. Thus, for reasons related solely to the scheme adopted in Melbourne, the State maintains that a harmless error analysis is appropriate when the State has been permitted to exercise a peremptory challenge after an objection under Melbourne.

The foregoing reasoning would not likely apply if this Court resorted to a test incorporating the prima facie demonstration of discrimination, as had existed under Neil, and as currently exists under Batson. When the requirement of a prima facie demonstration of discrimination exists, the subsequent failure to conduct an inquiry, while permitting the challenge at issue, at least carries with it a reasonable basis for believing that the jury selection process and trial were tainted with discrimination. Reversal without regard to harmless error in such circumstances

might reasonably be viewed as serving to deter future discrimination. The same can not be said when there is no prima facie case requirement.

It might be argued that such a harmless error analysis would totally undermine Melbourne by barring reversal as a matter of course, since there would never be any prima facie demonstration of discrimination. That, however, is far from clear. Although current law in Florida does not require the demonstration of a prima facie case of discrimination, any defense attorney who wishes to preserve his or her client's federal constitutional rights under Batson should be setting forth the prima facie demonstration required by Batson. The failure of defense counsel to do so would likely bar any Batson claims from being asserted in subsequent federal habeas corpus proceedings.[7] Given the motivation of defense counsel to protect a client's right to federal habeas corpus review, the basis for believing in the existence of discrimination should be set forth notwithstanding Melbourne, thereby providing the appellate court with the opportunity of determining whether any reasonable basis for believing in the existence of discrimination existed. When such a basis for believing in discrimination can not even remotely be found to exist, there is no implication of constitutional principles and any error should be deemed harmless under Melbourne. See generally Pickett, 922 So. 2d at *14-16 (Schwartz, J., Senior Judge, specially concurring in part).

[7] See supra, argument on pages 39-40.

Requiring such harmless error analysis would promote any party who wishes to preserve a Melbourne claim to proffer on the record reasons in support of the objection that a peremptory challenge is being used in a discriminatory manner. See generally Lott v. State, 2006 Fla. L. LEXIS 562 (Fla. 2006) (refusing to require an on-the-record-waiver of the right to testify, while demanding that the record "support a finding that [such waiver] was knowingly, voluntarily, and intelligently made."). Where there is no inference in the record that discrimination has taken place during jury selection, a party should not be entitled to automatic reversal. In suggesting such a remedy, the State reiterates that it is doing so only in the absence of a prior demonstration of the likelihood of discrimination. Absent any basis for believing in the likelihood of discrimination, relaxed standards of appellate review are warranted. This Court is undoubtedly aware that objections to peremptory challenges under Melbourne, in criminal cases, are routine.[8] There are

[8] For instance, in the present case, which involves a black defendant, the State moved to strike a white male and a black female and defense counsel raised objections as to each. See State's Answer Brief, Whitby v. State, case number 3D04-1770 at page 5. There is no indication from the record that the prosecutor was discriminating against either prospective juror on the basis of race or gender. In addition, in Pickett, the defense objected to strikes of two female Hispanics even though several Hispanics were seated on the panel at that time. 922 So. 2d at *12. Based on Pickett's facts, Judge Schwartz noted "that the challenges in question were not motivated by racial prejudice and that no hint of any such prejudice infected the jury which actually tried the appellant." 922 So. 2d at *14-*16 (Schwartz, J., specially concurring). See also Murray, 833 So. 2d at 880-81 (Fla. 1st DCA 2003) (reversing for failure to conduct a Melbourne inquiry following a party's objection to peremptory challenges against three females despite the trial

often many such objections within a single trial. Insofar as most of those objections are found to be without merit, it must be concluded that the current standards promote and condone meritless objections. These often meritless objections, nevertheless, have the potential of creating reversible error on appeal. If we are not going to have a requirement of demonstrating a prima facie case of discrimination; if we are not going to require an express allegation of discrimination; if our courts are not going to sanction those who make frivolous objections under Melbourne[9], then some limited form of harmless error analysis

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court's express finding that the party was using the challenges against both men and women for valid reasons); Blackshear v. State, 774 So. 2d 893, 894-95 (Fla. 4th DCA 2001) (where prosecutor admitted that the only reason for the objection to defendant's peremptory strikes was because the defendant had objected to the state's challenge); Michelin N. Am., Inc. v. Lovett, 731 So. 2d 736, 738, 742-43 (Fla. 4th DCA 1999), *rev. denied*, 751 So. 2d 51 (Fla. 1999) (where Neil objection to party's peremptory challenge was made despite party's prior attempt to remove juror for cause and despite substantial record support in favor of the validity of the strike); Plaza, 699 So. 2d at 292-94 (Sorondo J., specially concurring) (noting the egregious use of Neil's procedure where the record disclosed the "self-evident validity of the strike" against prospective jurors); Morris v. State, 680 So. 2d 1096, 1097 at n.2 (Fla. 3d DCA 1996) (involving a questionable Neil objection challenging defendant's strike against a prospective juror of defendant's same race).

[9] The huge number of such objections in our criminal trials, coupled with the relatively modest number that result in some form of relief by either the trial or appellate courts, compel one of two conclusions: either most of the participating attorneys in our criminal trials believe that their opposing attorneys routinely discriminate; or most attorneys making such objections are doing so without any good faith belief that such discrimination exists. Either of those conclusions reflects poorly on the criminal justice system. Both of those conclusions are

should exist when it is clear that no discrimination existed. Not only is there no likelihood of discrimination under such circumstances; there is also no basis for believing that the defendant received a trial that was anything other than fair.

A harmless error analysis applies to the present case based on the record below because there is no indication that discrimination took place against Mr. Lynn. Prior to back-striking Mr. Lynn, a white male, the State had sought to strike, Ms. Appleton, a second African American. [T. 116-19, 123-24]. The trial court conducted an extensive Neil inquiry of the prosecutor before allowing the strike against Ms. Appleton. [T. 117-19]. In an effort to keep the record clean, however, the prosecutor withdrew the strike against Ms. Appleton and accepted her as a juror. [T. 119]. Defense counsel then objected to Mr. Lynn and requested a race/gender neutral reason stating "although he is a white male . . . he is protected" without alleging or stating any basis in support of a belief that the prosecutor was discriminating against Mr. Lynn. [T. 123-24]. The trial court recognized that "there [was] no basis given that he was discriminated against on the basis that he is a white male. Okay." [T. 123-24]. Defense counsel did not challenge the trial court's finding and proceeded to exercise a peremptory strike against another juror. [T. 124].

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rendered possible solely by virtue of the elimination of the prima facie case requirement in criminal cases.

Here, defense counsel did not rebut the trial court's assertion that there was no discrimination against Mr. Lynn for being a white male. Based on this record, it is evident that the trial court exercised its discretion and determined that defense counsel failed to lodge a proper Neil objection and that no discrimination was taking place. A harmless error analysis should apply to the present case because there is no indication in the record that the prosecutor discriminated against Mr. Lynn and no indication that the defendant received anything other than a fair trial.

CONCLUSION

For the foregoing reasons, this Court should affirmatively answer the Third District Court's four certified questions, quash the district court's reversal below and direct reinstatement of the defendant's conviction and sentence.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner was mailed this 17th day of May 2006, to Shannon P. McKenna, 1320 N.W. 14th Street, Miami, Florida 33125.

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Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief meets the requirements of rule 9.210, Florida Rules of Appellate Procedure, and that ŧ is composed in 14 point font, Times New Roman.

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