JURY SELECTION
IN FLORIDA CRIMINAL COURTS

Eugene F. Zenobi
Office of Regional Counsel
401 NW 2nd Avenue
South Tower - Suite 310
Miami, Florida 33128
305-679-6550
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INTRODUCTION TO SEPTEMBER 2016 EDITION

The following represents a substantial revision of the (two years ago) jury selection manual. As in the past edition, the case law sections have been extensively revised. The basic narrative defines general jury selection while the capital case matters require an entire separate section. Also, several additional (edited) transcripts from trials have been added. There are several new sections (i.e. jury note-taking, jury questions to witnesses) which are discussed with relevant case citations. Lastly, the situational voir dire questions have been extensively revised and expanded. Although the narrative section is for the reader's convenience to peruse, the case law section and questions are specifically meant to be an in-court tool to be used for counsel's immediate need and reference.

This edition is dedicated to Public Defender Carlos Martinez and the Honorable Stan Blake , both of whom I deeply respect and have known professionally and personally for over three decades.

My sincerest thanks to the multitude of defense lawyers, judges, and prosecutors from whom I've received advise and excellent ideas for this edition. Also, my special thanks to Kristen Kawass for her invaluable help in preparing this edition and making suggestions that proved invariably correct.

SELECTING A JURY

"What would you do if I sang out of tune
Would you stand up and walk out on me
Lend me your ear and I'll sing you a song
And I'll try not to sing out of key"

Lennon/McCartney

Choosing a jury is preparation, understanding, patience, insight and a good amount of perspiration – knowing that you've chosen well and an acceptable jury still may not happen. It is at once the most simple and most perplexing part of the jury trial. Counsel is subjected to no evidentiary rules, unknown personalities, and the possibility of any interaction to help or hinder weeks of preparation.

Thus, the primary objectives of Defense voir dire are three-fold:

a. **To get to know each venireperson as thoroughly as possible; (I. THE JURORS);**

b. **To establish the advocate's role in the prospective trial; (II. THE LAWYERS);**

c. **To alert the jurors as to the theory and nature of defense and the Defendant in the presentation of the evidence; (III. THE CAUSE).**

I. THE JURORS

Jurors must be at least 18 years of age, citizens of the United States, and legal residents of the State of Florida and the county where the juror is sitting. The juror must possess a driver's license or identification card issued by the Department of Highway Safety or have executed an affidavit pursuant to this section. § 40.01, Fla. Stat. Twelve persons sit as jurors in capital cases, six persons in all other criminal cases in which a jury is permitted. § 913.10, Fla. Stat and Fla. R. Crim. P. 3.270. Furthermore, Fla. R. Crim. P. 3.281 provides that each party shall be furnished with a list of names and addresses of prospective jurors and copies of all questionnaires returned by prospective jurors. (It is suggested that Counsel request this list immediately along with the jurors' information sheets and request a reasonable amount of time to read this information.)

<u>Peremptory Challenges</u>: § 913.08, Fla. Stat. and Fla. R. Crim. P. 3.350(a)

1. **Offense punishable by Life or Capital:**

   State 10 - Defense 10 (§ 913.08(1)(a), Fla. Stat.)

2. **Offense punishable by imprisonment of more than 12 months but less than Life:**

   a. **State 6 - Defense 6 (§ 913.08(1)(b), Fla. Stat.)**

3. **All other offenses:**

   b. **State 3 - Defense 3 (§ 913.08(1)(c), Fla. Stat.)**

In joint trials, State has as many challenges as the aggregate of all defendants: e.g., two-defendant, Grand-theft joint trial, (Defense = 6 challenges each), (State = 12 challenges) --- § 913.08(2), Fla. Stat. and Fla. R. Crim. P. 3.350(b).

Rule 3.315 - Challenges shall be exercised outside the hearing of the jury "on the motion of any party." The rule provides this manner of selection "so that the jury panel is not aware of the nature of the challenge."

Rule 3.320 - Although this rule does not provide a challenge for cause to be made outside the hearing of the jury, such practice is advisable. If cause exists, it may taint the rest of the panel. Secondly, the nature of some challenges for cause: i.e., language difficulties, hearing problems, may be sources of misunderstanding by the jury panel, where the Court should avoid anyone's embarrassment.

Rule 3.310 - A juror may be challenged at any time before the juror is sworn to try the case at hand. The Court may allow a challenge after the jury is sworn but before evidence is presented for good cause.

Challenges For Cause - § 913.03, Fla. Stat. - Statutory grounds for challenge to individual jurors for cause.

A challenge for cause to an individual juror may be made only on the following grounds:

1. **The juror does not have the qualifications required by law;**
2. **The juror is of unsound mind or has a bodily defect that renders him incapable of performing the duties of a juror; except that in a civil action, deafness or hearing impairment shall not be the sole basis for a cause challenge.**

   N.B. (Note the specific exception applying to "a civil action");

3. The juror has conscientious beliefs that would preclude him from finding the Defendant guilty;

N.B. (This section is misleading since it should read " . . . not guilty. . .", particularly in capital cases.) See also Fla. Stat. §913.13, wherein that section provides a person "shall not be qualified as a juror in a capital case "if his or her "beliefs would preclude him or her from finding a Defendant guilty of an offense punishable by death". This is similarly in error since the statute, by omission, misleads qualifications for jurors in a capital case;

4. The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information or affidavit;

5. The juror served on a jury formerly sworn to try the Defendant for the same offense;

6. The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit.

N.B. (This section is incomplete since the words "or related offense" should be included.);

7. The juror served as a juror in a civil action brought against the Defendant for the act charged as an offense;

8. The juror is an adverse party to the Defendant in a civil action, or has complained against or been accused by him in a criminal prosecution;

9. **The juror is related by blood or marriage within the third degree to the Defendant, the attorney of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;**

10. **The juror has a state of mind regarding the Defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the Defendant shall not be sufficient ground for challenge to a juror if he declares and the Court determines that he can render an impartial verdict according to the evidence. N.B. (This section has been virtually re-written by the appellate courts.);**

11. **The juror was a witness for the State or the Defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;**

12. **The juror is a surety on Defendant's bail bond in the case.**

<u>Additional Challenges</u>: (in cases of multiple counts or multiple defendants) <u>Fla. R. Crim. P. 3.350(c)</u> - The Court may grant extra peremptory challenges "in the interest of justice . . . in extenuating circumstances" when there is a possibility that the State or the Defendant may be prejudiced.
Each party shall receive equal additional challenges.

Additional Challenges: Fla. R. Crim. P. 3.350(e) - The Court may grant additional peremptory challenges when appropriate in the Court's discretion N.B. (This section is not limited by the multiple count requirements of Fla. R. Crim. P. 3.350(c), and may apply to only one party. It is suggested that if Counsel's challenge for cause is deemed (and all peremptory challenges have been exhausted) that additional challenges are requested, the request be first made pursuant to section (e). If the request under section (e) is denied, another request be made pursuant to section (c)).

Alternate Jurors: Fla. R. Crim. P. 3.280 - Alternate Jurors shall sit as directed by the Court. This rule is discretionary with the Court.

Fla. R. Crim. P. 3.350 - Each party is entitled to one peremptory challenge for each alternate to be seated. These challenges can only be directed against the alternate prospective jurors.

Regulating, Separating and/or Sequestrating the Jury During Trial – Fla. R. Crim. P. 3.370 provides that, once the jury is sworn, the Trial Court, at its discretion, may sequester the jury. The rule also allows the Trial Court, in capital cases, absent a showing of prejudice, to separate and then reconvene the jury at a fixed time between the first and second phases after submission of the case to the jury. Fla. R. Crim. P. 3.370 empowers the trial judge to allow the jury to separate for a definite time, then reconvene in the courtroom to consider their verdict unless the jury has been kept together during trial.

During deliberations – Fla. R. Crim. P. 3.370 provides that in all non-capital cases, the Trial Court, in its discretion or on motion of Counsel or on the Court's initiative, may order that the jury be permitted to separate (although the trial judge shall give "appropriate cautionary instructions." In all capital cases, the jury must be sequestered unless waived by the State and the Defendant, or unless there are "exceptional circumstances").

Those persons disqualified or excused from jury service are (§ 40.013, Fla. Stat.):

1. **No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror. N.B. (This section has been revised by a rule of executive clemency allowing non-violent offenders who have completed all terms of their sentence, made any required payment of their restitution to the victims, and are free of any pending charges.)**
2. **(a) Neither the Governor, nor Lieutenant Governor, nor any Cabinet officer, nor clerk of court, or judge shall be qualified to be a juror.**

(b) Any full-time federal, state, or local law enforcement officer or such entities' investigative personnel shall be excused from jury service unless such persons chose to serve.

3. **No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the State or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation.**

4. **Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excused from jury service.**

5. **A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service, except that no person shall be excused from service on a civil trial jury solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby. However, nothing in this subsection shall affect a litigant's right to exercise a peremptory challenge.**

6. **A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity.**

7. **A person who was summoned and who reported as a prospective juror in any court in that person's county of residence within 1 year before the first day for which the person is being considered for jury service is exempt from jury service for 1 year from the last day of service.**

8. **A person 70 years of age or older shall be excused from jury service upon request. A person 70 years of age or older may also be permanently excused from jury service upon written request. A person who is permanently excused from jury service may subsequently request, in writing, to be included in future jury lists provided such person meets the qualifications required by this chapter.**

9. **Any person who, because of mental illness, intellectual disability, senility, or other physical or mental incapacity, is permanently incapable of caring for himself or herself may be permanently excused from jury service upon request if the request is accompanied by a written statement to that effect from a physician licensed pursuant to chapter 458 or chapter 459.**

10. **Any person who is responsible for the care of a person who, because of mental illness, mental retardation, senility, or other physical or mental incapacity, is incapable of caring for himself or herself shall be excused from jury service upon request.**

II. THE LAWYERS

QUESTIONS TO THE PANEL

In Florida state courts, the Prosecution will have spoken first at voir dire and Defense Counsel is then allowed to address the panel. Prior to that time, Counsel should check with the Court as to whether Counsel must address the panel entirely at one time (as opposed to an individual voir dire in rare cases). Addressing the entire panel imposes the formidable task of questioning all prospective jurors at one time, although Counsel receives the benefit of knowing the complete order of each prospective juror. Counsel should be aware as to whether, in courts where the panel is addressed repeatedly as challenges are exercised, he/she may re-question jurors remaining on the panel after challenges have been exercised. Counsel must know whether "back-striking" will be permitted by the Court or by the rules of court. (In Florida state courts, it is reversible error to prevent a challenge before the jury is sworn. In federal courts, it is at the judge's discretion). Also, counsel must ask the judge how strikes will be performed. In other words, state first always, or alternate first strikes, or (rarely) defense first.

Most jurors are "first-timers" who have been required to leave their jobs and families to serve as jurors. They are usually stuffed into uncomfortable rooms and told to report in an instant to certain courtrooms at anytime during the day. They are prodded, cajoled and quite often irritated by the entire system. To top this off, they are asked a myriad of questions in front of their peers. Voir dire sometimes causes a juror to feel he is being tried before his peers. Jurors also speak to other jurors, and counsel

should be aware that there is no bar to excused jurors or panel members talking to your future jurors about cases, lawyers, theories of defense etc. There is also no bar to the Court instructing jurors on the initial panel to not speak about the case to other jurors during voir dire. Also, the instruction may include that no juror should inquire about the facts anywhere.

Since courtrooms may vary in design, Counsel would do well to become acquainted with the floor plan before voir dire begins. With the Court's permission, Counsel may choose to move around during voir dire, especially when Counsel seeks to bring several jurors into a line of questioning. Suppose Counsel is questioning juror number one sitting to the far left but wants the remaining five jurors in the first row to be aware of the questioning (with the hope of bringing jurors numbers two through six into the same line of questioning). Instead of remaining at the podium, simply move to the right of the jury. The move to Counsel's right now requires the remaining jurors to be between Counsel and juror number one. They become part of the questioning process.

Although Counsel must be aware of the composition of the jury, no precise theory is available in exercising peremptory challenges. The dynamics of each panel are so diverse that, often, peremptory challenges are being reconsidered by Counsel at sidebar. Every challenge should be exercised with an awareness of the interplay of jurors during deliberations. In other words, which persons will form alliances? Or which juror will influence another juror? Or which juror's history and background will allow that person particular insight into the facts and law during deliberations?

The bottom line is that the best voir dire questioning means little if challenges are exercised without considering the dynamics of the entire resultant jury.

I recently failed to perceive a juror's past experience reflecting her ability to sit as a juror in a second-degree homicide case. The woman explained that she was held up at gunpoint and said she would never forget the experience. (She was left on the jury as an alternate.) I felt that my self-defense case wherein my client pulled his firearm and shot an overly aggressive non-armed drug dealer would be too threatening to her. I simply did not perceive the fact that a person who has been on the wrong end of an aimed pistol realizes that retribution by violence is better than getting killed, and I believe such jurors are generally predisposed to accept retaliation to a perceived danger.

I've found that jurors will explain about employment. One of the reasons, I believe, is that there isn't the pressure to give just the "desirable" answer. Encouraging a juror to open up is difficult enough in the court atmosphere, so Counsel might wish to ask basic questions concerning employment to develop other areas. Counsel should be aware that employment held for an extended period may explain juror's perspective well beyond other influences.

One of the stock questions in most voir dire is whether the juror or any member of his family has ever been accused (or convicted) of a crime. If the responses may be minimal, I've found that some helpful references can be elicited when the panel is also asked whether they have been the "target" (accused) of an administrative procedure; i.e., union grievance hearing,

lawsuit, disciplinary proceeding in the armed services or employment related, and/or a proceeding (suspension, expulsion, etc.) brought during high school or college days. (One of the most unsettling experiences of a person's adolescent life is being called to the principal's office for disciplinary action.)

JUROR ALLIANCES

I am certain there exists a moral ground upon which the relationships between juror and statutory law is anchored but it is not understood nor translatable in traditionally logical form. Otherwise, I could not explain life recommendations in homicide cases where aggravating circumstances outweigh mitigating circumstances, or where a jury votes for acquittal in the face of formidable inculpatory evidence. Most explanations of racial bias or sympathy are insufficient and I believe jury composition (alliance) is far more significant. For example, two jurors may disagree during voir dire over the accused's right to remain silent (or not to explain his side of the case) but yet those two jurors may form a core alliance based upon life experiences to persuade the remaining members. There may be no immediate alliance during deliberations since jurors may hold his or her vote in the first ballot wanting to listen to further discussions of facts, interpretations, observations, etc., by other jurors. This is the third option or fourth option. It is in the presentation of the juror's total responses within the group that alliances are formed. Counsel would do well to listen to the <u>way</u> a response is given, as well as the content of that response.

I hardly suggest that juror alliances can be determined definitively, and I suppose that Counsel will partly rely on instinct. In any case, allow me to put forth any basic premise -- I am looking for jurors who will form an alliance during trial and at deliberations. I am weighing/analyzing their potential for seeing factual interpretations the same way. It is a reasoned choice of probabilities: i.e., that the interaction of jurors will coincide with the interaction of evidence and facts as related to guilt or innocence.

For example, two jurors differed completely as to where the burden of proof resided. One juror recited the presumption of innocence correctly in his own words stating the law during questioning at voir dire (and adding the Defendant had no obligation to testify.) The second juror felt both sides had "equal burdens" and was force-fed the State's burden to prove the case and eventually (although reluctantly) agreed that the Defendant had no obligation to take the witness stand. The facts of that homicide case (twelve-person jury) showed the testifying eyewitness to be a morally reprehensible (drugs, prostitution, etc.) witness. Both jurors' backgrounds showed a tight family life with strong moral beliefs. It was determined that this dual alliance outweighed the difficulty with a legalism. (In short, it is sometimes hasty to dismiss a jury panel member having difficulties solely with a legal maxim when all other statements by the juror indicate a favorable position.)

I do not believe that peer pressure is primarily determined by the proportional size of the majority to the minority. It is the logarithmic/psychological function of the presence of a fellow dissenter (ally)

that vastly improves a juror's ability to persuade the majority. The difference between an ally (10-2) and no ally (5-1) is monumental (as a recent highly-publicized trial showed).

Risking oversimplification, I submit that most alliances incorporate the following factors (in no particular order): (a) the jurors' intellectual/emotional interaction (i.e., reasonable doubt instruction applied to law and order functions); (b) previous life experience relating to Defendant, witness or victim (Is it the victim or complainant?); (c) economic status and leadership propensities; and (d) religious propensity and bias (i.e., vengeful God or compassionate God in capital cases.)

I believe that juries are often questioned much like the "man" (read "woman") as a "stranger to the environment" syndrome. In other words, it is the idea of non-linear (as a non-conventional) thinking towards jury work that I am seeking to explore. Clearly, traditional attitudes must be considered; however, allowing the <u>panel</u> to establish the juror-attorney relationship, to define the law and to define themselves requires a certain abdication of the litigator's control. It suggests the litigator step aside and deal with the uncertainty of not being the universal center of the process--and still define his or her role in that process. It suggests that the <u>jurors</u> will deal with the probabilities of arriving at the desired result. I suggest that there is a certain amount of courage to ask open-ended questions, then step back and allow the jurors to "run" with questioning. Counsel may feel he or she has lost control. That may happen but the results

can be productive for the client. The following are a few paths through the voir dire maze.

COUNSEL'S CONCEPTUALIZATION OF JURY

If Counsel cannot hire test juries (and most Counsel do not have the time and/or resources to do so,) I suggest that time be set aside to think about the juror who can best serve. The object is not only to consider the ideal juror, but also the second, third, etc., choices. A juror may be a computer programmer, a bus driver or a stockbroker. If Counsel is accustomed to treating individuals by their perceived (by Counsel) station in life, that practice will end when each of those six (or twelve) persons who will determine the Defendant's future become canonized upon being sworn as the triers of fact: for example, about one week before trial, I practice watching people--their clothes, walk, belongings, etc. Just the experience of daily conversation with anyone outside the legal circle gives insight beyond any evidence manual. The voir dire questioning process, I believe, requires the ability to inquire in a sincere, non-threatening way, and garner a vast amount of information or knowledge about many occupations, experiences and feelings. (Admittedly, Counsel will <u>never</u> have enough knowledge for all voir dire purposes.)

Counsel should think about the <u>kind</u> of juror wanted (or not wanted) before walking into court. The primarily favorable juror and the clearly negative juror tend to be rather obvious during voir dire (and subject to peremptory challenges). It is the secondary tier of acceptable jurors that holds the balance of power in most panels. In other words, the defense of the case may be ideally aimed toward certain jurors; i.e., a young male

charged with sexual battery upon a woman he met that night at a bar wherein the defense is consent. Defense Counsel may want young male jurors, but Counsel for the State may strike those jurors. Defense Counsel, having previously contemplated prospective alternative jurors, may be (for example) seeking older women with strict religious backgrounds who would find the female accuser's actions provocative and improper. Counsel cannot trade a client's best defense (the composition of the jury) for political correctness. Also, rules against striking a particular class by either side have become more stringent. Counsel must (yes, must) allow each juror to speak openly and frankly about all issues to justify a challenge or to protect against an opposition's improper challenge.

THE PROCESS ITSELF

It is essential to explain to the jury that their function is to decide facts alone. With the Court's permission, explaining the order of a trial prior to beginning voir dire may not only help to relax the jury, but also gives the panel a perspective on <u>who</u> will give the law (the judge) and <u>when</u> it will be given (after closing statements but before deliberations.) The jurors will realize that they are not allowed to interpret, revise, or change the law and/or jury instruction and that the law exists for good cause: i.e., that the State's burden of proving its case beyond a reasonable doubt is part of the Constitution, which was enacted to protect individuals from the transgressions by the English Crown. It may be necessary to make each juror aware that he or she is sworn to follow the law, even though he or she may not like it: i.e., that reasonable doubt may require an acquittal even

though that juror "knows" an accused is "morally guilty." Admittedly, this is a difficult task for some jurors. It is one of the reasons I generally do not joke with jurors. If a juror has emigrated from another country for political reasons, Counsel may wish to point out that, in some countries, a Defendant must "prove his innocence" at trial or that the particular foreign state need not eliminate every reasonable doubt before taking away a person's liberty. (The words "freedom" and "liberty" and "rights" are recurring themes to remind jurors what is at issue in their tasks).

THE INTERCHANGE

Major errors of voir dire:

1. **The failure by Counsel to listen to what is said by jurors and how it is said.**
2. **The inability of Counsel to draw out from jurors as complete responses as possible in limited voir dire circumstances.**
3. **Counsel asking questions requiring limited responses.**
4. **Counsel lecturing the panel without an overriding purpose.**

If we accept the jury's decision-making process as essentially inductive (and I do)--in other words, that jurors focus on one or two ideas, then redesign evidentiary matters to fit those ideas--then evidence is actually presented during the first voir question. If one assumes jurors are deductive thinkers, then the closing statement occupies a paramount position whereas the inductive keys are voir dire and the opening statement. Since most jurors are at peak level attention span during voir dire and the opening statement, the inductive method is primarily served during those periods.

Also, the traditional idea that closing argument delivers a favorable verdict may be sometimes true, but without the accessible jury, the greater percentage of verdicts tilt toward a successful voir dire and opening statement.

If the judge permits relevant questions of law, Counsel should allow jurors to define various legal definitions; for example, "Do you know what the word "presumption" means?" The answer given by one panel member may be correct or incorrect, but serves to bring in other panel members.

Q. (to Juror A): "Do you know what "presumption" means?"

Q. (to Juror B): "Do you agree with the answer of Juror A?"

The prospective jurors are (1) initially defining a legal premise giving Defense Counsel insight into their background, (2) allowing the panel to become involved as a group, and (3) allowing a definition from their own mouths and not one merely recited by Counsel. This practice may elicit an incorrect answer, so Counsel should be prepared to deal with not causing embarrassment to that respondent. Pointing out the intricacies and vagaries of legal definition in certain areas can relax the panel members but at no time should Defense Counsel purport that the law of the presumption of innocence and State's burden of proof beyond a reasonable doubt are anything but absolute non-abstract cornerstones of the fact-finding duty of a jury.

It is <u>useless</u> to ask inconsequential yes/no questions when the proper questioning would further Counsel's purposes. Some examples are as follows:

Q. "Now, Mr. Jones, would you be able to find the Defendant not guilty if the State failed to prove guilt beyond a reasonable doubt?"

Counsel can reword this thought to allow the juror's answer as much latitude as possible.

Q. "Mr. Jones, do you know what the State's burden is in a criminal case?"

A. *(Juror #1) "The State's burden is to prove its case beyond all doubt."*

Counsel can then address another juror (to Juror #2).

Q. "Do you agree with that?"

A. (Juror #2) "No, the State's burden is to prove its case beyond all reasonable doubt."

Q. (to Juror #1) "How do you feel about that?"

-or-

(to Juror #3) "Do you agree with either juror's statement?"

The questions are designed to elicit as much response as possible without suggesting an answer. Counsel wants the jurors to tell as much about themselves and their perceptions as possible; i.e. what the juror says, how the question is answered, how the juror deals with discussions and what emphasis is placed on which word. When two jurors begin a dialogue, there is an opportunity to literally stand back to watch jurors interact which increases Counsel's perceptions and reveals jurors' characteristics that may be missed talking one-on-one. Also, Counsel not only can watch the participant jurors, but the rest of the panel. With these observations, Counsel may bring in Juror #4, Juror #5, etc. Thus, the more definitions given by the jurors, the more impact is had upon the entire panel. The following is a transcript example of the jury well defining the law among themselves. The following juror (Ms. S.) was an Assistant United States Attorney

(Mr. Z = Defense Counsel):

(Ms. S = Juror):

Mr. Z: *Do you work with state agents also, Mrs. S?*

Ms. S: *Yes, because a lot of them are on the federal task forces. We have a lot of federal task forces that include, for instance, FBI agents, and then there will be some Metro Dade guys on it, or city of Miami police officers. We have the out of town forces, out of both DEA, Customs, and they all have local law enforcement people that are assigned to those federal task forces.*

Mr. Z: *Are you working on one of those details with the local police at the present time?*

Ms. S: *I work a lot of my cases with task force guys who work as police officers, yes.*

Mr. Z: *Do you have any at this particular time?*

Ms. S: *Yes.*

Mr. Z: *Now, if I may, the line between prosecution and non-prosecution sometimes can be very thin, Mrs. S, is that correct?*

Ms. S: *Yes.*

Mr. Z: *And then there are times when you are pure prosecution, and there are times when you don't prosecute?*

Ms. S: *Yes.*

Mr. Z: *Let's just say in your particular input, into that idea, of whether a case should be prosecuted. Do you make recommendations?*

Ms. S: *Yes, all the time.*

Mr. Z: *When you look at a case, as to whether a case should be prosecuted, what is the standard that makes you suggest to the police that it be prosecuted?*

Ms. S: *Well, the standard is probable cause, for the charge.*

Mr. Z: *And if I am correct, you look at a case, you say, this amount of proof is probable cause. Therefore, we shall bring an action against certain people, right?*

Ms. S: *Yes.*

Mr. Z: *Would the standard of probable cause that brings the case be sufficient to convict that person in front of a jury?*

Ms. S: *No.*

Mr. Z: *Why not?*

Ms. S: *Because it's a much lesser standard. It's a standard that just brings the charges, so that you can start the process against the individual, and then when you get to the trial level, then that standard is elevated considerably, to beyond a reasonable doubt.*

Mr. Z: *If you look at Mr. S right now, there has been a determination made of what at this point?*

Ms. S: *Probable cause.*

Mr. Z: *That means, to bring the lawsuit?*

Ms. S: *Correct.*

Mr. Z: *And what is he, as far as legal status is concerned right now?*

Ms. S: *He is innocent.*

Mr. Z: *He is presumed innocent?*

Ms. S: *Correct.*

Mr. Z: *Under the law, he is presumed innocent?*

Ms. S: *Right now.*

Mr. Z: *And you can presume him innocent?*

Ms. S: *Yes.*

Mr. Z: *Even though you are a federal Prosecutor, you can presume him innocent?*

Ms. S: *Yes, of course. I mean, I think if anyone knows what the law is and knows that they have to follow the law as a Prosecutor, that's what we do everyday.*

Mr. Z: *And to overcome that presumption of innocence, he must be found guilty beyond a reasonable doubt?*

Ms. S: *Correct.*

Mr. Z: *Need he say anything to defend himself at all?*

Ms. S: *He doesn't have to say anything.*

Mr. Z: *And why not?*

Ms. S: *Because under the law, a Defendant does not have to incriminate himself in any case, he can just stand silent, and allow the government to prove the case against him.*

Mr. Z: *So, as we heard some jurors talk about, they wanted to hear from Mr. S, does he have to tell anything about his case?*

Ms. S: *Absolutely not.*

Mr. Z: *And his absolute right to remain silent arises from where?*

Ms. S: *He has the right under the Fifth Amendment.*

Mr. Z: *The Fifth Amendment, that's exactly right. The right to remain silent, and the right not to say anything comes from?*

Ms. S: *The Fifth Amendment.*

Mr. Z: *The Fifth Amendment is where?*

Ms. S: *In the Constitution.*

The above interchange provided by a member of a prosecutorial agency was invaluable and meant more to this particular case than anything Counsel or the presiding judge could offer. Also, the questions were leading to elicit a particular answer from that juror. This is far different than a _____ leading question to elicit a "yes" or "no." Here, the answers were expected to be correct and educational for the remaining jurors.

The voir dire inquiry may reveal a misleading, and perhaps, a false answer. Since voir dire is not cross-examination at trial, Counsel may commit a grievous error by allowing a juror to appear incorrect or foolish in front of others. Counsel may explain as follows:

Q. (To a Juror that may have not defined the law exactly) "Your statement about the burden of proof was not quite correct but certainly very close. Do you see the difference that we're trying to get at? The reason I point this out, Mr. Jones, is not to show one person is right and another wrong. The law is sometimes so intricate that even lawyers get confused. But now we're dealing with the heart of the justice system, and this is a rule of law we must understand; otherwise, it would be impossible to be a fair juror in our justice system."

Jurors should be made aware of Defense Counsel's function. It is a truism of societal thought that a criminal Defense Counsel defends a "criminal." Rather than neutralize the advocate's role, Counsel may choose to call the juror's attention that he/she is an adversary, although one who will be fair in the presentation of the case. That fairness also requires an inquiry which <u>precisely</u> covers possible biases:

(Mr. Z = Defense Counsel):

(Mr. L = Juror):

Mr. Z: *Now, does anyone have that situation with narcotics, whether it be yourself, relatives, child, friends, raise your hand, and we can go ahead and discuss it in public, or in private if you like. Now, do you prefer to discuss it at sidebar, Mr. L?*

Mr. L: *Okay, well, it was my son.*

Mr. Z: *Was it cocaine rehab?*

Mr. L: *Cocaine, yes.*

Mr. Z: *If you hear testimony that there's narcotics involved here, how would that affect you, Mr. L?*

Mr. L: *I have some strong feelings with regards to illegal narcotics.*

Mr. Z: *Why don't you tell me what they are?*

Mr. L: *Well, I have friends who have been involved in this, and that's one area where I have some very strong feelings.*

Mr. Z: *If you hear that there's some involvement with narcotics, may that get in the way of your listening to the rest of the evidence because sometimes*

people hear the word "drugs", and that's it. They just close their mind off right there.

Mr. L: *Well, I am going to listen to the rest of it. But certainly, it will be a strong influencing factor.*

Mr. Z: *Can you tell me how?*

Mr. L: *Well, negative thoughts, you know, anyone who is involved, be it using, or selling, in any respect, with narcotics, I have very strong feelings, negative feelings. It would be a factor. Would it be that I wouldn't listen to anything else, that it would be absolute decision make, I can't tell you that. But it certainly would be an influencing factor.*

The Court: *For a moment, please. The real question is, if a person admits voluntarily that he or she is addicted to drugs, would that bar that person's testimony? Would that erase that person's value as a witness?*

Mr. L: *No.*

Mr. Z: *Now, would the sale of narcotics be the same response, if you find there to be testimony about sale of drugs? Would you look at it the same, not the use, but the sales?*

Mr. L: *Yes.*

Mr. Z: *You could still be fair?*

Mr. L: *I would try to be fair. Cannot tell you that it would not have any bearing. I can't tell you that.*

N.B. Case law states that "try to be fair" is grounds for a cause challenge which in fact occurred and was granted.

One of the most difficult moments of voir dire is the juror who simply vents against Counsel. The following juror (Mr. A) was actually helpful to bring out many jurors on the panel. The following exchange shows dramatically how a juror can recite an antagonistic position and have a profound effect in bringing out the sentiments of other jurors. Counsel should be aware that not all hostility on a panel should be ignored (I have actually found these jurors to be quite helpful in bringing forth other panel members). The transcript illustrates as follows:

(Mr. Z = Defense Counsel):

(Mr. A = Juror):

Mr. Z: *Now, do you agree that people dealing with drugs is a bad thing?*

Mr. A: *No, no, I'm very open minded. It's just the questions. It's the way you are posing the questions. And let's face it, we live in Miami. This place here is so diverse with different cultures. You ask a black individual what they feel about cops, they will tell you. You ask a Hispanic what they feel about cops, they will tell you. You ask a white Anglo what they feel about cops, they will tell you. Everyone has different experiences. And we can't all agree that every single police officer, or a majority of them, coerce testimony, or information from a criminal. That's why they are classified as criminals. They need to be in jail or in the ground. Criminals are what is destroying this county, this state, this whole nation.*

We have a war going on overseas but yet there's more crime over here than anywhere else, because our justice system, our laws, we try to

eliminate the Second Amendment to eliminate guns. But yet, criminals don't even have laws that they abide by when it comes to weapons. They will shoot it. If there's a kid in the way, that kid is going to get shot. Now, we are talking about two people that are dead here, any many more that are addicted, and probably haven't died from crack. Crack is a very serious drug. And who is profiting from it. Those are the criminals, not the addicts. If an addict gets rehabilitated, he's got a second chance in life. But you can't rehabilitate a crack dealer, because he is too much into it for the money. And he will not let anyone stand in his way, of his profit. That's my opinion. You know what they say about opinions, right.

Mr. Z: *Mrs. B, you are shaking your head, you disagree?*

Ms. B: *I disagree with part of it.*

Mr. Z: *Tell me about your disagreement, Ms. B.*

Ms. B: *He is saying that we are all humans, and we all fail, and we make mistakes. And you wake up and say, I'm going to be a criminal, or that's what I am. Different criminals, in different societies, face different situations based on where they live. It's not a decision that they make. Sometimes that's all they grow up around. If their mom or their dad are on drugs or whatever, then that's what most of them grow up to do, because they think that's the only outcome that they have seen all their lives. Yes, the law has failed in some ways, in letting some of the victims out. But it has not failed entirely. Because most of them aren't in jail. And it's painful, what they have done. I mean, you just cannot say that they deserve to be that way. You have to look into your situation. You've got to take off your shoes and walk in that person's shoes, and try to find out what happened, what took place that day, that made this person kill*

or react the way that they react, at that moment, or at that instant. You don't know, you weren't there. And the only individual that was there was that person. And the Man up above, and then you hear statements from everybody else that was around. So you have to look into it. You have to say, don't look at the whole picture, he is a murderer, he is a rapist, then you will get up and say, I'm going to be a rapist. Take your shoes off and put yourself in that person's place, and see what situation, or where they are coming from, to see why they came out the way that they came out. Or why did they react the way that they react. If you look at it, a drug dealer, I mean, some of these people they have been going to jail all of their life. They come back out in society. And society is not giving them a good chance to get a job, to find an apartment. If they go out of jail, they can't live, they have to live at home, not because they want to, but somebody will not rent them an apartment because they know they were in jail. You know, so what that leaves them to do, come back out on the street, doing the same thing they went to jail to do in the first place. So you have to look at the whole picture, you can't just say, boom, no, I'm sorry.

In this actual transcript, the comments by Juror Mr. A and response by Ms. B led to an extensive discussion with responses by several jurors. I have found that the enthusiastic juror response can often reveal volumes about jurors' sentiments and attitude necessary to Counsel making intelligent selections for jurors who will hear (or not hear) the cause.

USING STANDARD JURY INSTRUCTIONS

The use of jury instructions themselves can be invaluable in anticipating issues to be litigated at trial. I recommend Counsel carry a

separate copy of jury instructions; for example, reading from the instruction that reasonable doubt may arise from "the evidence, conflict in evidence or lack of evidence" during jury selection can be recollected during closing argument in precisely the same fashion.

Another instruction regarding witness testimony includes whether the "witness (had) the opportunity to see and know the things about which the witness testified." If cross examination anticipates undermining the witness's opportunity to observe, those instructions can become the fulcrum of closing argument. The word "seem" in the standard instructions regarding witness credibility may cause jurors to lessen the State's burden of proof and must be clarified during voir dire. It is somewhat confusing that "seem" is used in subsections (1) and (2) of Jury Instruction §3.9, and not used in other sections. In other words, the instruction, more precisely, should read; i.e., (2) "Did the witness have an accurate memory?" The word "seem" adds nothing to the instruction (especially in light of the other paragraphs). I have requested several judges to delete "seem" and most have agreed to do so.

I've found that cases wherein confessions/statements were admitted require jury preparation for that statement. Clearly, the Court has discretion to the mere reciting of legal instructions. However, it is also clear that admissibility and weight are legal concepts that can be troublesome to jurors (and to lawyers and judges). I submit it is proper inquiry into a juror's ability to serve whether or not the juror can follow Jury Instruction §3.9(e) and consider a Defendant's statement claimed to be made outside of Court with

caution and weigh it with great care to make certain it was freely and voluntarily made (since some jurors will tell Counsel that "if he said it, it must be true").

The remainder of Jury Instruction §3.9(e) concerning "threats" and "promises" (<u>it</u> <u>is</u> <u>conjunctive</u>) is critical to the instruction. Furthermore, the instruction concludes by stating that the juror "should" disregard the out of Court statement if the juror finds the statement was "not freely and voluntarily made." It is important to note that the standard instruction is incorrectly worded since this last line of Jury Instruction §3.9(e) omits the word "knowingly," yet the very same instruction requires that the juror "determine from the evidence that the Defendant's alleged statement was knowingly, voluntarily, and freely made." Therefore, Counsel should move to amend the instruction so that the last line reads: "If you conclude the Defendant's out of court statement was not knowingly, freely and voluntarily made, you should disregard it."

If the Defendant has given a statement, it is absolutely necessary to inquire as to the jurors' perspective on that statement. The following transcript excerpt illustrates the panel defining the various conditions of giving/taking a Defendant's statement:

(Mr. Z = Defense Counsel)

(Mr. L, Mr. M, Ms. C, Mr. B = jurors)

Mr. Z: Tell me how you feel about statements taken by the police.

Mr. L: *I believe that any statement, whether it's taken by the police or anyone, what a Defendant says has to be given a lot of weight. You have to look at the total picture.*

Not only how it was given, but I do take what someone says pretty much for what it is.

Mr. Z: *You accept what they say as true?*

Mr. L: *Yes. For the most part.*

Mr. Z: *Why is that?*

Mr. L: *I just think that people are honest. You would like to think that people are honest, so I give it the benefit of the doubt.*

Mr. Z: *Are you saying that the person who gives the statement is honest, or the person who takes the statement?*

Mr. L: *The person who gives the statement.*

Mr. Z: *Mr. M, what is your feeling about statements taken by the police?*

Mr. M: *Well, I agree as Mr. L stated, that I think that you expect when people give a statement, when they talk about something, that they are honest, admitted what they did. And also, you've got to look at the person taking the statement, because now, somebody could be talked into it.*

Mr. Z: *What do you mean by that?*

Mr. M: *Well, is it a proper statement, you know?*

Mr. Z: *Okay. And can you explain that a little bit more?*

Mr. M: *In a way, okay, in taking the statement, if the police suggest what a person should say, or didn't say or did say.*

Mr. Z: *Now, you are saying that the statement is given in a certain way, does that make it so?*

Mr. M: *Yeah, sure.*

Mr. Z: *So any statement that is taken by a police authority, you would agree with it?*

Mr. M: *Yes and no.*

Mr. Z: *Why would it be no?*

Mr. M: *Because you also have to hear the persons that took that statement, too, and see what they have to say. Not only taking the officer's view on it, but also seeing if the person also agrees to the statement, that the officer is saying is true.*

Mr. Z: *Mr. M, are there any situations where the police take a statement that may not be so?*

Mr. M: *I don't know.*

Mr. Z: *Have you heard of any instances?*

Mr. M: *Not personally, no.*

[At this point, another juror is brought in to the discussion to see her point of view, but also to watch which juror will be allies at deliberation].

Mr. Z: *Mrs. C, how do you feel about that?*

Ms. C: *If a police officer takes a statement there's always two parts to it. It's not necessarily that it's going to be a true statement.*

Mr. Z: *Why do you feel that there's two sides?*

Ms. C: *Well, you have to hear both parts of the situation, and see what it is.*

Mr. Z: *Are there situations which lead, in your opinion, you to think that the statement may not be so?*

Ms. C: *Yes. I just feel if everybody makes a statement, that it don't necessarily have to be true.*

Mr. Z: *Can you give us examples of why it may not be true?*

Ms. C: *You have to listen to the facts, and see what it is.*

Mr. Z: *And what are the reasons, in your mind, that it would not be true?*

Ms. C: *Well, like trying to cover up something, to make him write a statement.*

[The key words here are "cover up something," which allows counsel to explore the views of another juror].

Mr. Z: *Thank you, Mrs. C. Now, same questions, Mr. B., a policeman takes a statement from somebody. Do you always believe that's what they said?*

Mr. B: *Not always, policemen are human beings, and they have motivations and biases like anyone else, you know, sometimes they will take a statement, and they may color it, you know, with theories that they already have in their mind. And, sometimes, people take a statement, to cover certain things up. Okay. And they are good and bad people like anyone else. You treat them like any other witnesses. Well, for instance, let's say a policeman, off the top of my head, a policeman wants to make a case against somebody. So, you know, they will add a little extra to the statement, to try to make it stronger, I imagine some things like that might happen.*

Mr. Z: *Do you have an opinion as to why they do that?*

Mr. B: *Well, you know, they could do that, like I said, I'm just speculating, I mean, that could be done, you know, because they say, oh, we want to get somebody, you know, or they make more cases, maybe they get promoted. You know, all sorts of human motivations behind why they turn out the way they do. Police aren't robots. You know, they are not like a tape machine that spits out what it is.*

Mr. Z: *Okay. Now, can you think of any particular case?*

Mr. B: *I can't think of a specific one right off the top of my head, but, you know, you see sometimes, you know, like confessions or statements, there are cases where later on, they have been shown to be incorrect, or false or perhaps that the Defendant was intimidated. In fact, there's a case just recently, with a retarded kid, who spent such a long time in jail for murder who was just released by a Federal Judge. Because they found that his statement was improperly taken, and he was coerced into making the statement, okay, and saying what he said. That's one case in particular I can think of.*

Mr. Z: *Are you talking about the case that occurred in Fort Lauderdale?*

Mr. B: *Yes, that one.*

Mr. Z: *He allegedly admitted to a crime, and now someone else confessed to it.*

Mr. B: *That's the one.*

Mr. Z: *Does that mean he won't wind up in jail and do time?*

Mr. B: *Yes, I think he did quite a bit of time.*

Mr. Z: *I guess you are saying that there are statements that may be correct, and there are statements that may not be correct, is that the case?*

Mr. B: *That's true.*

Mr. Z: *And it may be coerced?*

Mr. B: *Yes.*

Mr. Z: *Just because a police officer says he said it?*

Mr. B: *Doesn't mean he said it, you have to look at them like any other witness.*

Mr. Z: *I believe that statement in Fort Lauderdale was a written statement, it that correct?*

Mr. B: *Yes, I believe so. It may have been recorded, I'm not sure. But it was definitely memorialized in some fashion. The circumstances upon which it was taken were such that you couldn't rely on it, that it was really – it shouldn't have been relied on as evidence.*

[After this juror has given educational responses, counsel can return to the preceding juror to ask her views].

Mr. Z: *Thank you. Now, Mrs. C. You agree with what Mr. B said?*

Ms. C: *Yes.*

Mr. Z: *How do you feel about what he said?*

Ms. C: *I agree.*

Mr. Z: *The Fort Lauderdale statement was either written or recorded. I don't think it was video recorded. The Judge ultimately said it had been coerced or suggestive, I believe he said that, that's correct?*

Mr. B: *In some ways, the Judge found it was coerced and it was done improperly.*

Mr. Z: *And you believe, in your opinion, that police suggestions can be put into a statement?*

Mr. B: *They can do that.*

Mr. Z: *I'm not saying it's always done.*

Mr. B: *They do it, sure.*

[Once the juror has come full circle on presenting the conclusion sought, counsel can now ask other jurors their conclusions].

Mr. Z: *And Mr. L, how do you feel about that?*

Mr. L: *It's possible.*

Mr. Z: *In other words, what I'm getting at is, just because the police says it doesn't make it so?*

Mr. L: *Just because an officer says it doesn't make it so.*

Mr. Z: *And Mr. B spoke about the fact that a person who gives a statement may be forced or threatened to change some things. You think that's a possibility?*

Ms. B: *Yes, it's a possibility. Because at that point, a person can be nervous, because everybody is there, okay, and they may twist something of what he said, okay, and then we don't really know what he said.*

Mr. Z: *May I go back to Mr. B, because he gave us such a good example. Can a statement be given to protect oneself?*

Mr. B: *Sure.*

Mr. Z: *Now, Ms. S, you knew that I would come back to you. Police officers would never create a situation like that, would they?*

In questioning jurors, there may be a particular juror with expertise or experience in the questioning line. For example, the following juror (Ms. S), an assistant United States Attorney, was quite eloquent in explaining

statements by Defendants (even though her response may have been beneficial to both the State and Defense).

(Mr. Z = Defense Counsel)

(Ms. S = Juror):

Ms. S: *You can never say never, that's for sure. But you have to look at the circumstances around the statement, how it was taken, when it was taken, what proximity to the crime. If there was audio, if it was recorded, if it was video taped. And you have to find out what the demeanor of a Defendant was. Mr. B is talking about a case where the individual was below average intelligence, and possibly could have been mentally retarded in some way. Okay. So, that's a very different case from the usual Defendant, who comes in, is read his rights, and gives a statement. And for the most part, nobody comes in and says, I'm guilty, I committed such, X, Y, and Z crimes, when they really didn't do it. Because most people aren't going to admit to things that they didn't do. I mean, that doesn't make any sense. So, you have to look at the circumstances around it, the fact that somebody comes in, and once they are given their rights, makes a statement and incriminates themselves, okay, it's hard to discount it. You have to look at it and say, why did they say something like this. Okay. I mean, if they are innocent, they will jump up and down and say, it's not me, it's not me, and try to protect themselves.*

Along with that government attorney, this particular panel contained an attorney who did some criminal defense work.

(Mr. Z = Defense Counsel)

(Mr. D = Juror)

Mr. Z: *Mr. D, someone is read their rights, is your opinion still the same, when they are read their Miranda rights, you have the right to remain silent?*

Mr. D: *Well, it depends on what the circumstances indicated. It depends on their intelligence level. Sometimes, people are read their rights, and they don't really understand what the heck the police are telling them. You have the right to remain silent, and you've got police officers with guns sitting in front of you. And you might feel like, you know, you really do have the right to remain silent, or you don't. Okay. A lot of times, when you get into interviews, it's a coercive atmosphere. You are not free to leave. And sometimes you think, if I say something, well, I will be freed. Okay. And so, there's many motivations, as to how statements are taken, and why somebody would give a statement, you know. And sometimes, the police officer is there, and they say, well, just tell us what happened, and the guy goes to jail.*

The questioning then went back to the government attorney.

Mr. Z: *Okay. Now, is the optimum situation to videotape Defendant's statements, Ms. S?*

Ms. S: *Well, I don't know if it's the optimum, but it's, in that case, I think for a jury, to be able to see exactly what's happened, and what the individual is actually saying. And what their demeanor is, you have to rely less on an*

officer's testimony regarding the circumstances, because you are watching the circumstances.

Mr. Z: *There's a movement in some counties, for example, in Broward County, to, as you know, and in the southern district of Florida, which you are a part of, to videotape all confessions. Is that movement also going forward in the federal department?*

[This juror presented the rare opportunity to extract an (almost) expert opinion on the issue (as an explanation to the panel)].

Ms. S: *No, every agency really has their own protocol. It's not always done. For instance, U.S. Customs, for the most part, records their statements. DEA usually does not record or videotape. And a lot of times, it depends on the individuals. Some individuals come in, and they are asked, can we record you, can we videotape you, and they say, no, I want to talk to you, but I don't want to be recorded and I don't want to be videotaped, but I will tell you what happened. And then in those circumstances, you are not going to forego taking a statement, because they don't want to be videotaped or audiotaped. It's their choice. But it doesn't mean the statement is less reliable.*

Mr. Z: *If in fact the equipment is available, and there's no objection from the person, would you want a videotaped statement of a Defendant?*

Ms. S: *Ideally, a videotaped statement, in some circumstances, is better evidence. Not more reliable evidence, but better evidence. Because an officer, well, you can see what's happening, visually, just listening to an officer testifying about how it occurred.*

Defense Counsel may not always hear that response reflecting the Defense position, but the jury panel will understand a very necessary concept through their own speaking members, i.e. that reasonable persons can come to separate distinct reasonable conclusions and interpretations. No Defense Counsel's explanations can have the impact of the explanations of the jurors next to each other.

Another consideration may be whether a statement by itself would affect the jury. This question should not be asked for "conditioning" purposes, but in context of proof to be considered in evidence presented, particularly since the Defense and Prosecution may be interested in responses where no other direct inculpatory evidence will be presented at trial. (Also, the question is the product of a previous Prosecution inquiry.)

(Mr. Z = Defense Counsel)

(Mr. B, Mr. F, Mr. R = Jurors)

Mr. Z: *There may be just a statement, and that's the case. Would that be enough?*

Mr. B: *Well, it probably wouldn't.*

Mr. Z: *Why?*

Mr. B: *Well, if that's the only evidence that you have, the statement, and you don't have anything else, nothing to corroborate it, okay, and you can show that everything in the statement is correct, you have to look at that statement extra hard to see how it was taken, and why did the person say what he did, what questions did the police ask, you know, you've got to look at all the circumstances. I mean, that's all the evidence that there is.*

Mr. Z: *Would retaliation be a consideration?*

Mr. B: *Yes.*

Mr. Z: *Conditioning?*

Mr. B: *Absolutely.*

Mr. Z: *Mrs. F, how do you feel about what Mr. B said?*

Ms. F: *Yes, I agree.*

Mr. Z: *Mr. R, same question, you have one statement and nothing else. Okay. Would you have to look at it carefully?*

Mr. R: *Very carefully.*

Mr. Z: *Mrs. S?*

Ms. S: *I think you've got to look at it carefully, but because you don't have fingerprint or DNA or any other kind of physical evidence that corroborates it, doesn't mean the crime didn't happen. I mean, you are talking about someone who may be smart enough to commit the perfect crime, where they wear gloves, and don't leave fingerprints or DNA, and they commit the crime, whatever it may be, and then they shouldn't be not held responsible, because they were smart enough to use the right implements not to get caught.*

[At this point, all the jurors involved have given their views, but more directly, each juror has voiced the words, "look at it carefully," which became the crux of the inquiry].

If Counsel can elicit responses alerting the panel to particular issues (as above), reminding the panel of critical legal instructions should be brought into discussion. Consequently, the perception of gamesmanship as to the

constitutional guarantees must be dissipated by reminding the panel that reasonable doubt and presumption of innocence are not to be compromised as per the instruction that "If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case." The jury will hear that again in closing address and the Court's instructions.

Lastly, the Court (quite rightly) should regard legal instructions as the province of the Court, and I do not suggest Counsel usurp that function. Instructions are points of clarification and definition for particular jurors who have raised concerns as to their ability to be fair or to understand their obligation under the facts and law. It is to this end that Counsel aims and, if necessary, the Court may be called upon at sidebar to read any applicable instructions.

However, the case law is clear that Counsel may and should ask the vagaries and intricacies as to whether the jurors can <u>understand and accept</u> a particular defense: i.e., entrapment, voluntary intoxication, insanity, etc. Counsel must ask (at sidebar) the Court as to specific questions about prospective defenses (to protect the record for possible appeals).

III. THE CAUSE

THE CLIENT

It is arguable that opening statements really start at the beginning of voir dire. The way Counsel and Defendant dress immediately register in the jury's mind. You may call your client "Mr. Smith" or "the Defendant" or "the

Accused." The choice really is a subjective matter with which Counsel feels comfortable. Counsel can humanize the Defendant only by understanding the jury's perception of that case; for example, the charge is burglary and the defense is that the wrong man is arrested. The Defendant can be made human and real, since it is the system's full weight on the back of an innocent man. However, the charge of sale of drugs with the affirmative defense of entrapment may allow less latitude in humanizing the client.

There are essentially two attitudes that will be directed towards the Defendant by jurors to be considered before voir dire. Defense Counsel either offers the client as the human being entitled to all the justice, or he is the bearer of the entire panoply of constitutional rights, which exist almost separately from his alleged malevolent deeds or a hybrid of these two situations. I suggest counsel actually reflect before trial the path counsel wishes to proceed upon.

If Defense Counsel contemplates the ability of the ethnic juror to identify with his client, consider the following caution; the ethnic minority juror who has worked hard and long, raised a family and has become successful on his own terms may be initially sympathetic toward a fellow ethnic Defendant. Sympathy for the person in that juror's mind, however, will not supercede the realization of the predicament. The class experience of the juror may also reflect an understanding of an accused's intemperate or irrational ethnic personality.

VIEWING THE CLIENT

There are two basic ways in voir dire to prepare the panel members for

most defenses:

a. to associate with Defendant's personality, and/or
b. to associate with Defendant's predicament.

If the Defendant is accused of a violent crime for which his defense will not incorporate his character, testimony, or personal affirmative defense, i.e., self-defense, then the jury must be made to deal with his situation (predicament). In other words, the panel should comprehend the rule of law, have great respect for that law, but also have some personal background association with the accused's situation; i.e., the classic provincial example of the first generation European elderly juror appreciating the black ghetto tribulations. This association is often misinterpreted to mean that this juror will acquit based upon visceral reactions. While this may be done in the very small percentage of cases, the reality is that a vote for acquittal arises from that juror's perception of the evidence and the juror's integrity to follow the reasonable doubt instruction and not (as is commonly believed) upon the simple sentimentality that results in a jury pardon.

If the accused must testify or the demeanor of the accused is integrally intertwined with the defense, voir dire allows Defense Counsel to humanize his client. During voir dire, Defense Counsel may choose to use his client's first name, have his client stand up, touch his client, or do whatever is a matter of Counsel's style. Of paramount importance in this approach is to dissipate the juror's perception of the trial as a disassociated play or

television show and impress upon the juror the integration, participation, and interaction of the human being into the reality of a criminal trial.

As discussed before, if Counsel suspects that the State will introduce the accused's statement (and such statement will be against the accused's interest), Counsel may wish to use voir dire to prepare the jury for that statement. The instruction provides that "such statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made" with consideration for the time and place and conditions under which it was made. In other words, the jury is instructed that they may "suppress" that statement if they wish.

To explain that approach further, often the validity of a statement against interest made by an accused will necessarily be involved with police conduct. The Defense posture will either be that (1) the police are not telling the truth, or (2) the police are overly aggressive (but honest) participants in the sordid business of solving crimes. There is a subtle duality that may undermine the "cops are lying" defense. Jurors who have reverence for the reasonable doubt standard may be the same jurors who respect police conduct and responsibility. The more palatable defense for these jurors to accept is overzealous police action (since this is, in effect, good police work). If Counsel anticipates a situation wherein the testifying policeman will be caught in a major fabrication, these jurors will probably be most offended, since police activity and testimony may be held to a higher standard of integrity than that of a lay witness.

The language of the law is quite masculine, so it may be necessary to make appropriate changes when quoting an instruction to a jury regarding a key point; for example, if the Defense Attorney's presentation of the case will include an impeachment of a key female Prosecution witness, Counsel may wish to discuss or submit a special instruction that "(A) witness may be discredited or the weight of her testimony weakened or destroyed…." In any case, instructions (whether submitted or standard) should be tailored to the case at trial, and consequently be as precise as possible. I have asked every trial judge in the past decade to change the word "conviction" to "belief" in the reasonable doubt instruction (based upon the premise that the word "conviction" is misleading) and each judge has agreed to do so. (The reasonable doubt jury instruction in Florida reads "… there is not an abiding conviction of guilt or, if have a conviction, it is one which is not stable…" The request should be that both "convictions" be changed. I leave it to Counsel's discretion as to whether the word "conviction" in the first sentence should be requested to be changed.)

THE INFORMANT

If the case involves a paid confidential informant or a testifying Codefendant who has made a deal, voir dire must necessarily include the following pertinent questions:

Q-1. Do you know what an informant is?

Q-2. Have you read or seen anything about paid informants used by the authorities?

Q-3. What are your opinions or feelings about paid informants?

a) Why?

Q-4. Are you familiar with the phrase "testifying Codefendant"?

Q-5. Have you read or heard anything about Codefendants who testify for lenient treatment?

a) What are your opinions of such persons?

Q-6. What are your feelings about a person testifying who may be involved in the crime?

a) Why?

b) Trustworthiness?

Q-7. Informant not prosecuted?

a) Feelings?

b) Why?

Q-8. Deals made with Informant?

(a) Why does the State make deals?

(b) Why does the State not prosecute?

(c) Please give reasons for non-prosecution of witnesses.

Questioning along these lines would best serve Counsel if the inquiry remains relatively neutral since jurors learn quickly whose side the informant, testifying Codefendant, etc., are on, and the strident questions are best saved for cross-examination. Again, those questions are directed at finding out about the JUROR as opposed to drilling home a Defense position. Finally, the testifying witness should not be called an "accomplice," since he probably will testify that he acted in concert with the Defendant. The word

"accomplice" has been shown in juror studies to establish connotations adverse to a Defendant's interest.

One of the anomalies of a former Codefendant cooperating with the authorities and now testifying against a Defendant at trial is that the testifying Codefendant was, at one time, subject to the same treatment by police as the Defendant (most likely quite "bad"). If this is the case, inappropriate police conduct can be brought out through the Codefendant (especially if there was brutality or coarse language involved, which have been denied by the authorities). If the testimony of the testifying Codefendant and the officers is significantly contradictory, the door may be open to question the veracity of other testimony. Consequently, if the particular facts apply, Counsel's voir dire may address the lack of veracity of the Codefendant and the authorities.

THE WORD "VICTIM"

In many cases, the word "victim" carries connotations contrary to the Defendant's interest. If the case is a homicide case, the word "decedent" or "deceased" is my word of choice. In a self-defense or similar case, the word "victim" should never be used by the Defense.

The following voir dire questions are related to specific issues which may arise in trial, either capital case or not. Those issues may require specific inquiry depending on circumstances or charges in that case.

SITUATIONAL JUROR QUESTIONS

(KEY indicates critical questions)

BURGLARY VOIR DIRE

Q-1. **How long were you the owner/tenant of the premises burglarized?**

Q-2. **Dwelling or Structure?**

- **a) Have bars on windows and doors? Did you install them?**

Q-3. **Where located? Ever had a burglary before? If there was a previous burglary, did you take any of the following precautions:**

- **a) install security system?**
- **b) get guard dogs?**
- **c) get a firearm?**

  Explain: type of system, type of firearm(s), taken course in firearm use? When? Where? From whom? Police instruction?

Q-4. **How many persons lived there?**

- **b) Do children live with you? Who?**
- **c) Do parents live with you? Who?**

Q-5. **What time did the burglary occur?**

Q-6. **Was anyone there when the burglary occurred?**

Q-7. **Who called the police? How long did the police take to report?**

Q-8. **Did you go into the home before the police arrived? (KEY)**

(This question asks whether the Victim was looking through the house not knowing whether someone was still there. The answer can be very revealing. The intrusive nature of a burglary is usually never forgotten – especially if the Victim is in the house or the first to enter.

Q-9. Did you watch the police investigation?

Q-10. What was taken?

- **a. personal belongings - (personal irreplaceable belongings)?**
- **b. cash?**
- **c. important papers?**
- **d. heirlooms or antiques--explain nature of these properties and how long in family?**
- **e. Furniture--electronic goods?**
- **f. Total loss?**

Q-11. Property recovered or not?

Q-12. Insured? Replaced or received money for lost property? Received total value? Did you have any issues or trouble in dealing with insurance company agents, government agencies, etc.

Q-13. Perpetrator caught?

Q-14. Know perpetrator? Know perpetrator's family and/or relatives?

Q-15. Other burglaries in the neighborhood? When? Opinion of crime in your neighborhood.

Q-16. Prior burglary of your home? When? Same home or apartment you live in?

Q-17. Give statements to police?

a. To State Attorney's Office? To whom? When? How many times? Give deposition? Impression of deposition process? (KEY) Impression of Court proceedings? (KEY)

Q-18. What was your mental state after the burglary occurred? (KEY)

Q-19. Did this intrusion leave you with a fear of future burglaries?

Q-20. Form a Citizen's Crime Watch Group? When? How many citizens? Did you form group yourself? Are you an officer in that organization?

a) Neighbor's burglarized? Explain- when and where? Your reaction?

b) Friends or relatives burglarized? Explain- when and where? Your reaction?

PREVIOUS JURY EXPERIENCE

Q-21. **When?**

Q-22. **Where?**

Q-23. **What Courts (State/Federal/In-State/Out-of-State) Petit or Grand? Length of cases or service?**

Q-24. **Numbers of jurors?**

Q-25. **Kind of cases - Nature of charge?**

Q-26. **Foreperson? Opinion of your foreperson's leadership?**

Q-27. **Length of deliberations?**

Q-28. **Questions difficult?**

Q-29. **What did you think about experience?**

Q-30. **Want to sit in this case? Why or why not?**

FIFTH AMENDMENT (Defendant not to testify)

Q-31. **Do you believe that the Defendant who does not testify has something to hide?**

Q-32. **Would this be an indication of guilt to you?**

Q-33. **Do you personally want to hear from the accused here? Why?**

a) Have you ever questioned a family member or friend about a criminal charge? Explain what happened (may need a side bar).

Q-34. **Would an innocent person want to remain silent in the face of these charges? (KEY) (The most important question in Fifth Amendment voir dire).**

a) Why or why not? (These questions are usually better asked of multiple jurors to allow interaction of responses. See transcripts within the narrative part of this manual as to multiple juror interaction.)

ADMINISTRATIVE ACCUSATION

Q-35. **Have you ever been charged or accused of a violation that required an administrative hearing or informal proceeding? Administrative law judge? Administrative panel? Employment-related supervisor or arbitration group?**

a) Social security hearing, workman's compensation hearing, unemployment compensation hearing? Explain your feelings about that experience.

Q-36. **Did you deny the allegations? Were you found innocent of the charges?**

Q-37. **How did you feel, even though you knew you did nothing wrong? (KEY)**

Q-38. **How did you feel about the injustice of the allegations?**

Q-39. **Did you feel you were prejudged?**

Q-40. **Did you fight back?**

N.B. I have found that administrative hearings (a person fighting for his/her job, social security benefits, unemployment compensation benefits) can often cause a person to feel much as a Defendant and can have lasting impressions (which Counsel should always explore). (See also Q-41 through Q-44).

SIZE OF ENTITY BRINGING ADMINISTRATIVE CHARGES

Q-41. **How did you feel vs. Large Corporation/State/Government, etc.?**

Q-42. **Did the Corporation/State have more resources to come after you?**

Q-43. **How did you feel without those resources?**

Q-44. **Did you hire an attorney? Personally pay the attorney? Get your attorney's fees back?**

- **a. What effect, if any, have those proceedings had on you and your family's life?**
- **b. Are you left with any emotional reminders (the word "scar" should not be used) of dealing with this (entity)?**

N.B. Counsel may also ask if the juror was a <u>witness</u> in any administrative proceeding (for which side) and to explain his/her feelings about that proceeding. It is important to ask whether that juror was for or against the target-respondent of the hearing.

<u>If Applicable</u>:

- **a. Have you or a member of your family been sued in a civil proceeding?**
  - **a. Which court? Jurisdiction? When?**
  - **b. How did lawsuit affect you (or your family)?**
  - **c. Describe your feelings.**

GOVERNMENT/STATE WORKERS/REFERRAL GROUP

Q-45. **Where?**

Q-46. **How long?**

Q-47. **Positions? Management-Supervisor? Over how many persons?**

Q-48. **Union member? Member of Quasi-union group?**

Q-49. **Do you feel you owe anything to State/Government due to employment?**

Q-50. **Would participating in this case cause problems once back at work?**

Q-51. **Work pool membership? i.e., temporary service, union hall employment, referral service, etc? When have you been referred? How long at this referral service or employment pool?**

Q- **(If juror is state employee?)**

- **a. Which agency? Which location?**
- **b. How many years there? Near retirement?**
- **c. Explain your function ("day-to-day job")?**
- **d. Come into contact with other agencies?**
  - ***i.e.*** **State Attorney's Office?**
    Public Defender's Office?
    Police Departments?
    Police officers?
    Attorneys?
- **e. Explain nature and names of contact with persons in other agencies.**

POLICE TESTIMONY

Q- What is your feeling about the testimony of the police in relationship to the testimony by a non policeman?

Q- What is your opinion about police having a difficult job in this county? In this country?

Q- Do you believe a policeman must make instantaneous decisions?

Q- Do you believe that a policeman may decide that a suspect is guilty of an offense?

- **a. Do you understand that this belief by a policeman is not the same as your decision for guilt?**
- **b. Explanation for reasonable doubt**

Q- Therefore, does the belief of guilt by a policeman during the case equal what your verdict or job is?

- **a. What's the difference? (leads to probable cause dialogue)**

Q- Do you, Mr. Juror, have an interest in being sure [the defendant] is found guilty?

- **a. What is that interest?**
- **b. Do the police, in your opinion, have that interest?**

Q- Do police, in your opinion, get involved in the side of prosecuting a defendant?

- **a. If Yes – because the State and police are part of the enforcement branch.**
- **b. Are police departments part of the State Attorney's office?**

Q- Do you think that the jury is part of the police or State Attorney's Office?

a. Because the jury stands as the protection between the active pursuit of crime and prosecution and fairness.

b. Does jury guarantee Defendant's liberty? (Leading question -- Answer should be "no" -- jury guarantees Defendant's right to a fair trial)

c. Why or why not?

d. What does jury guarantee?

EXPERT TESTIMONY/PSYCHIATRIST/PSYCHOLOGIST

Q-52. **One of the witnesses testifying will be a psychiatrist - Read names of each psychologist, experts - Ask if known to anyone. Do you know the difference between psychiatrists and psychologists?**

Q-53. **Have you or any family member or friend used the services of a psychiatrist/psychologist? (KEY)**

Q-54. **Names of experts used by juror or family?**

Q-55. **Would you please tell us what experience you (or your family or friends) had with the psychiatrist or psychologist? Could you tell the length of time involved?**

- **a. Medication prescribed? Kind of medication?**
- **b. Helpful or not helpful? Explain (KEY)**
- **c. If not helpful, did you believe psychiatrists or psychologists to have limitations? Why or why not?**
- **d. Did you pay psychiatrist or psychologist out of your pocketbook? Why or why not?**

Q-56. **Have you studied or have you any knowledge of psychiatry or psychology?**

- **a. Could you explain where you studied and the nature of your studies?**
- **b. Are you familiar with schizophrenia? How so? Explain.**
- **c. Are you familiar with manic-depression (or a related illness)? How so? Explain.**

d. (Careful) Are psychiatrists/psychologists, in your opinion, used as an excuse for criminal activity? Do you trust psychiatrists/ psychologists? Explain.

e. Specific Issues

i. Post-traumatic Stress

a. Do you believe it happens?

b. Why or why not?

c. Can you give examples?

d. Anyone you know have that issue? Explain.

e. Cures? Explain. (This question can show how well a juror knows an illness and the extent the juror accepts the legitimacy of that illness.)

f. Medications? Therapies?

ANTICIPATING PARTICULAR FIELDS OF EXPERT TESTIMONY

Q-57. Juror familiarity with:

a. Ballistics / Explain?

b. Fingerprints / Explain?

c. Serology / Explain?

d. DNA / Explain?

e. Special Testimony by FBI or FDLE / Explain?

f. Tool mark identification / Explain?

Q-58. If "yes" response:

a. Nature of contact or familiarity?

b. Background in testimony/courses in school?

c. Laboratory work/who did you work for? Tests that you have studied or done on evidence?

d. Area of experience?

1. Special training?

2. Who were teachers?

i.e., military/civilian

e. Explain the extent or degree of knowledge of that field.

f. Believe that tests in this field are valid?

g. Believe that tests in this field are always correct? If not, what are the problems and/or deficiencies?

h. Explain nature of television programs vs. actual trial testimony.

i. Which television programs have you seen dealing with experts? (*i.e.* CSI, etc.) Explain.

I.e. **Which programs? / How often watched? /**

Impression from those programs? /

Are programs credible?

<u>JUROR VICTIM OF CRIME</u> (MAY BE DIFFICULT FOR JUROR – THEREFORE, INDIVIDUAL VOIR DIRE)

Q-59. If juror is victim of crime, when/what?

- **a. Is case pending? Recently concluded?**
- **b. If recent or pending, what stage is it at now?**
- **c. Describe steps of reporting the crime. Did you go to State Attorney's Office to give statement? Describe.**
- **d. Waiting to go to Court? Received subpoena for Court as victim or witness?**
- **e. Investigation handled by which officer or detective? Which department?**
- **f. Effect of crime on family? i.e. divorce, hospitalization, monetary loss**
- **g. Permanent injury/emotional injury?**
- **h. Physical treatment and/or therapy? Describe treatment and your reaction.**
- **i. Psychological treatment and/or therapy?**
    1. **Names of doctors, type of doctors' specialization.**
    2. **Opinion or treatment by doctors and/or clinics.**

FAMILY/FRIEND VICTIM OF CRIME

Q-60. Family members victims of crime? Friend?

a. You must inquire into relationship/closeness/familiarity to juror.

b. Physical/psychological trauma to victim?

c. How did trauma affect juror?

d. Victim being treated by physician/counselor/therapist for physical/psychological injury? Opinion of treatment?

e. Amount of trauma?

f. Juror bringing friend or relative to therapy?

g. How did trauma affect that person's life and family?

h. How did trauma affect juror's life and family?

IMMIGRANT EXPERIENCE

Q-61. **When did your family arrive in United States?**

- **a. Reason(s) for coming?**
- **b. How many in family?**
- **c. Are you a citizen? (N.B. - Non-citizenship is a cause for disqualification of that juror).**
- **d. Family citizens or applying for citizenship?**

Q-62. **Relatives still in homeland?**

- **a. Still in touch with relatives?**
- **b. Who visits U.S. from homeland?**
- **c. You or your family visit your homeland? How often?**

Q-63. **Familiar with foreign country life/economy (Transpose to Haitian-Cuban immigration or any other applicable nationality)**

Q-64. **Familiar with government control of society?**

- **a. How familiar?**
- **b. Government control extent?**
  - **1 . You serve in foreign country military?**
  - **2. Father-Uncle-Grandfather or member of family?**

Q-65. **How/when did you arrive?**

Q-66. **Any part in particular immigration?**

Q-67. **Reason(s) for leaving?**

Q-68. **Familiar with hospitals/mental institutions in foreign homeland?**

Q-69. **You or your family in foreign country institutions? Now or before?**

Q-70. **Treatment of mentally ill felons in foreign country?**

Q-70a. Opinion of government immigration policy?

a. Immigration taking jobs? Affect your employment?

Q-71. Mentally ill vs. criminally ill?

a. Difference?

b. Jail vs. hospitals?

Q-72. Mentally ill = Crime?

Q-73. Foreign government-controlled institutions/jail?

a. Process for sending persons to hospitals?

b. Decision made by government?

c. Opinion; i.e., foreign government releasing persons from jails/institutions?

SEXUAL BATTERY/ DOMESTIC

Q-74. **Nature of charges - Sexual Battery?**

Q-75. **Sexual Battery - You, Family, Friend?**

Q-76. **Women's support group?**

Q-77. **Other organizations?**

Q-78. **Sexual Harassment? Restraining Order? Name of Court? Judge? When? What happened?**

Q-79. **Consent as Defense-Length of time persons knew each other? (Consent)**

Q-80. **Sexual Battery require trauma? i.e., Marks? Beatings?**

Q-81. **Extramarital affair - Feeling toward that behavior?**

Q-82. **Criminal Court not morality decision**

- **a. But proof beyond reasonable doubt**
- **b. Accused need not testify**

Q-83. **Divorces/Previous marriage/What happened?**

Q-84. **Separation?**

Q-85. **Custody?**

Q-86. **Support?**

Q-87. **Witness in any proceedings? For whom? Results?**

Q-88. **Past breakups in your life?**

- **a. Family?**
- **b. Friends?**

Q-89. **Your children - involved in divorces, custody, etc.?**

Q-90. Friends/Family/Children?

Q-91. Daughters-Age/School/Religious Upbringing?

Sons-Age/School/Religious Upbringing?

a. Problems - Sexual Battery?

b. Drugs? Treatment? Type of Program?

SEXUAL BATTERY/CHILD

L & L/CHILD VOIR DIRE

Q-91. Number of Children?

- **a. Ages? Gender?**
- **b. All schools attended by child?**
- **c. Religious schooling?**
- **d. Apart from regular schools?**
- **e. Juror involved in school activities or children-related activities?**
  1. **Type of activity?**
  2. **Position in activity?**
  3. **How much participation? Describe.**
  4. **Does Juror disallow child's participation in (certain) activities?**
- **f. Precautions with children?**
  - **a. Require telephone calls from child at intervals?**
  - **b. Child have cell phones?**
  - **c. Special bracelet, beeper, etc to find child at any time?**
- **g. Your children or yourself?**
  1. **Subject or bring accusations of abuse, molestation, etc.?**
  2. **Anyone in your family either immediate or extended family?**

3. **Nature of accusations?**

4. **What happened? (This would most likely be done at sidebar or separately from the panel.)**

5. **It is strongly suggested these questions be asked of the entire panel with a show of hands – then discussed separately at sidebar or individually**

6. **How did this affect you?**

h. Friends, acquaintances involved in above charges? (Repeat above questions.)

i. Read or follow any recent cases involving child abuse? Opinion of these?

HOMICIDE

ABSENCE OF BODY

INTRODUCTION: One of the elements of homicide is that the victim is dead.

Q-92. What is your feeling about sitting as a juror if no body is found?

a. Why?

Are there circumstances when a crime is committed and no body is found?

a. Can you recall any circumstances?

b. What are they?

c. What are your feelings about those cases?

Do you wonder if (in those cases) a person will be found later?

a. Explain.

b. Could the State do anything different?

Should the State of Florida prosecute a case when no body is recovered?

a. Why?

b. Where? (Can you give examples?)

How long should the State wait to prosecute?

a. Why?

LENGTH OF TIME TO PROSECUTE

Q-92(i). How do you feel about the length of time for a murder occurring twenty years ago?

a. Why?

Do you feel the State may not be fair (or diligent) in this prosecution?

a. Why?

Should the State prosecute a murder case where there is a twenty year delay and no body found?

a. Why or why not?

FRIEND / FAMILY MEMBER DISAPPEARANCE

Q-92 (ii) Any juror have a family member or relative disappear?

- **a. Circumstances?**
- **b. Length of time disappeared?**
- **c. Person found?**
- **d. Where and what condition?**
- **e. Your feelings about the loss?**

Read about persons who disappeared?

- **a. Found, not found?**

Why do you think that person disappeared?

- **a. Feel about disappearances?**

Death or disappearance in family of person at young age?

- **a. Feelings about death?**
- **b. How did you cope?**
- **c. Effect on you and your family?**

FRIEND/FAMILY MEMBER ARRESTED FOR CRIMINAL OFFENSE

Q-93. **Type of offense?**

Q-94. **Juror go to Court?**

Q-95. **As observer or witness or both? How many times?**

- **a. Describe what you saw in Court?**
- **b. If witness, what was nature of testimony?**
  - **1. Date of incident?**
  - **2. Character witness?**
- **c. Would you have been a character witness if asked to do so?**
- **d. Did you actually testify, or were you under subpoena?**
- **e. Did anyone take your deposition?**

Q-96. **What happened to charges?**

Q-97. **How long did it take to resolve case?**

Q-98. **What did you think of resolution of case? Instead of asking "Was the resolution fair?", it is suggested that counsel ask, "Did you believe there could have been a different resolution?" This question implies "fairness" and follow-up questions will clarify that answer. (KEY)**

STATEMENTS / CONFESSIONS

Q-98(i) **Feeling about statements?**

Q-98(ii) **Must be true if police took the statement, right?**

(One of the few questions that suggests the answer and is meant to push the inquiry)

Q-98(iii) **Everything police say is true?**

Q-98(iv) **Police:**

- **a. Oral statement from memory / report?**
- **b. Expect police to write down the statement in handwriting?**
  - **i. Prefer notes taken during investigation?**
- **c. Should police record everything from the moment someone is taken into custody?**
  - **i. *i.e.* DUI on street – TV camera always going**
- **e. Make audio recording?**
  - **i. Suppose audio recordings made after non-recorded interrogation? (In other words, after the "pre-statement.")**
  - **ii. Credibility of audio recording?**
  - **iii. Has recording been certified by independent person or laboratory?**
- **f. Want statement written in person's handwriting?**
- **g. Suppose statement is taken down by a stenographer who works for the police?**
- **h. Would a video recording be better?**
  - **i. Should video recording start rolling from the beginning of the interrogation? Why or why not?**

Q-98(v) **Familiar with other confession cases? Newspapers?**

Q-98(vi) **What are your initial impressions about statements taken by police and introduced in court?**

Q-98(vii) **Any problems with police conduct in taking confessions?**

Q-98(viii) **Read about recent cases where confessions were taken?**

- **a. Feelings about those cases?**

Q-98(ix) **Any problems with police conduct in taking confessions?**

Q-98(x) **Suppose evidence in the case is just a confession?**

- **a. No physical evidence**
- **b. No eyewitness testimony**
- **c. No fingerprints on any item or any firearm**

Q-98(xi) **Can a person give a statement that may not be true?**

- **a. How so?**
- **b. Examples? (Allow jurors to explore coercive techniques)**

Q-98(xii) **Watch CSI on television?**

- **a. Opinion of watching investigation on TV?**
- **b. What did you learn? Explain.**

IDENTIFICATION

(These questions may accompany particular offense questions)

Q-99. **Have you had occasion to look at photographs (mug shots) or to view a line-up?**

- **a. When?**
- **b. Where? (at your home, police department, etc.)**
- **c. In relation to what incident? Explain.**
- **d. Officers or detectives' names? Defendant?**

Q-100. **How many times were you called to look at photos?**

Q-101. **How were the photographs presented? (loose, single photographs, 6-photo folder, etc.)**

Q-102. **What did the officer/detective say to you before looking at the photos?**

Q-103. **Were other members of your family or other persons present to help you, or to make their own identification?**

Q-104. **Were you together when making the identification?**

Q-105. **How long did you look at the photos?**

Q-106. **Did the photos seem similar in appearance?**

Q-107. **What was the ethnic background of the photos?**

Q-108. **Did you make an identification? Explain how you told this to the officers (orally, signature, etc.).**

Q-109. **What did the officer/detective say to you after you made the identification?**

Q-110. **(Careful) Were you positive about your identification? Explain.**

Q-111. **Were there subsequent proceedings after the identification?**

Q-112. **(Careful) Did you consider it difficult to make the identification?**

OR

a. If no identification made, did you see any photos that look like the offender but you were not quite sure?

1. If answer is yes, the follow-up questions should be:

(a) Did you feel responsible to be absolutely sure of the identification?

(b) Was this difficult for you? Explain your feelings at this time.

NARCOTICS/ALCOHOL

Q-113. General opinion toward narcotics.

a. Distinction between marijuana and other narcotics?

b. Abuse of prescription medicine/alcohol?

c. Narcotic laws sufficient or too strict or not strict enough/area of disagreement; i.e., what should laws be?

Q-114. Is there a narcotics problem in your neighborhood?

Explain/Describe

a. Citizens watch group?

b. How do you deal with it?

c. What do you advise your children?

Schools in neighborhood?

Churches in neighborhood?

Narcotics near schools/churches?

Police presence in neighborhood/Describe

Personal knowledge of persons who sell/buy narcotics?

Q-115. Is there a narcotics problem at your local school?

a. Type of school: elementary/middle/high school?

b. How far from your home?

c. Advice to your children?

- **Ages/Gender?**
- **Grade?**
- **Children walk to school/take bus/taken by parent?**
- **Problems at school being dealt with?**
- **Problems taken care of by parents/school authorities? Are you satisfied with the solutions?**

Q- 115. Are drugs / narcotics / non-prescribed medication a problem to you?

a. Your family? Friends?

Q-116. Work for or with a drug program counselor? Ever?

a. Rank?

b. Branch of service?

c. Where did you serve?

[PRIVACY]:

Q-116 (i) You or your family have a situation with rehabilitation?

a. Seek professional help?

b. Counselor, Psychologist, Psychiatrist?

c. For Stress? -- Trial like this can be very stressful

Q-116(ii) Does anyone have friends, or children of friends, with a drug problem?

i.e. **prescriptions, etc.**

Q-116(iii) Person in family/friends who have narcotics/alcohol problem?

a. Arrest/Convictions/Employment accusations?

b. Trials/Juror attend trial?/Give deposition?/Give advice?

c. Lawyer represent person?

d. Rehabilitation programs?

- **Name?**
- **Where located?**
- **How long in program?**
- **Did it help?**
- **What is juror's opinion of rehabilitation program?**
- **Doctors/Therapists/Counselors in program? Names of each.**
- **Medicines prescribed?**

Q-117. Effects of narcotics/alcohol use

a. Cause divorce/separation?

b. Effect on children/custody contest? (KEY) (The problems caused by narcotics/alcohol to family relationships are critical to know.)

c. Court proceedings/Type/Where?/How long in Court system?

d. Mediation/counseling? With whom? Which program?

e. Feelings about new marijuana legislation? Why?

FIREARMS VOIR DIRE

Q-118. Do you own any firearms?

- **a. How many?**
- **b. Where kept?**
- **c. Types of Firearms?**
- **d. Use for firearms? Self protection, hunting, etc.**
- **e. How often do you use firearms?**
- **f. Receive firearms publication?**
- **g. Member of National Rifle Association? Oppose NRA?**
- **h. Carry firearm outside house? License to do so?**

Q-119. Courses in firearms use?

- **a. Type of course? Where? When?**
- **b. Course teach firing of firearms?**
- **c. Course teach taking firearms apart (for cleaning or repairing)?**
- **d. Receive ability apart from formal training to operate (take apart) firearms?**
- **e. How did you obtain that information and or ability? i.e., hunting, military?**

Q-120. Familiar with types of firearms?

- **a. Handguns?**
- **b. Automatic?**
- **c. Semi-automatic?**
- **d. Rifles?**

Q-121. Military Service/Firearms?

a. Branch of service? Rank? National Guard? Called to Active Service?

b. Nature of assignments, duties requiring firearms or firearms training?

c. Type of military training?

d. Use of Firearms?

e. Firing Range?

f. Combat? When/Where? Explain?

g. Type of firearms used in Military?

h. Instructor in firearms?

Q-121(i) Anyone have relatives/friends in War conflict?

Q-121(ii) Feelings about possession of firearms by civilians?

Q-121(iii) Do you feel/believe that Florida laws are too strict , too lenient or just right about firearm possession?

Q-121(iv) Do you have a license for a firearm?

Q-121(v) Do you carry a firearm outside the home?

a. What kind?

Q-121(vi) Do you have a firearm in your home?

a. Why?

Q-121(vii) Know about gunshot residue (GSR) on deceased's hands?

Q-121(viii) CSI?

Q-121(ix) Thoughts about rights to carry firearms? Explain.

a. Any litigation on those rights? Why or why not?

Q-122. Fear of Firearms?

a. Why?

b. How long?

c. Reason for fear?

Q-123. Opinions about firearms? (CAREFUL) (BETTER USED FOR JURY MEMBER INTERACTION)

a. Attitude toward public using firearms?

b. Attitude toward NRA?

c. Attitude toward Second Amendment?

d. Attitude toward firearm use in community?

e. Attitude toward citizen's right (ability) to carry firearms?

f. Attitude toward carrying concealed firearm laws? (Should CCF Law be changed? Changed how?)

g. Attitude about placing armed guards or teachers carrying firearms in public and/or private schools.

INTRO TO HOMELESS PERSONS

(Lead in questions / To set-up "Homeless" inquire)

Q-124: What section of County do you live?

Q-125: Do you rent/own home? Apartment? Condo?

Q-126: Areas you drive through?

Questions as to homeless persons affect both attitudes towards your witnesses and defendant.

HOMELESS

Q-127: Encounter persons panhandling or begging on the street?

a. **Explain what happens**
b. **What do panhandlers do to you and others?**
c. **Describe these persons *(should be as particular as possible)***
d. **Your reaction/opinion of behavior *(answer is sometimes irrelevant due to follow-up)***
e. **Frightened by these people?**

If yes – explain:

(Most jurors will reflexively respond "Not afraid" *(you must probe these jurors)*).

f. **Tricky follow-up – be careful:**

Why are you not afraid?

g. **See homeless when driving?**

Near Home?

Near Job?

h. **Approach your car?**

Where?

What do you do?

(i.e.: Roll up windows? Stare straight ahead? Give money? Never give anything)

Q- 127(i): Opinion as to credibility of street people?

Throw in questions: Opinion whether male or female:

a. Street person have more credibility?

SELF-DEFENSE

Q-128: Do you have or what is your opinion about Florida's self-defense laws?

(This question opens up the answers to self-defense and stand-your-ground)

a. **(What do you think of _____?:)**

b. **Are the Florida self-defense laws fair?**

Why? Or Why not?

c. **How would you change these?** ***(If you can ask this question, the answers are revealing)***

(Possible – turn to Judge and ask to read self-defense instruction to be read after you have begun substantial questioning.)

D N A

These questionings should allow for juror interaction to define their thoughts and define nature of D N A:

Q-129: Do you watch TV?

a. CSI shows etc..

b. Like these types of shows?

c. Why?

d. Are they credible?

Why? Or Why not?

Q-130: Do you know what D N A is? ***(Should be asked to multiple jurors for the purpose of getting different answers.)***

a. Describe? ***(Jurors will eventually define what D N A is and what it is not)***

b. Do you believe it is a credible science?

Why? Or Why not?

There is no need for you to define D N A, only to have it described by jurors and whether they accept it as science.

- ***CAREFUL:*** **Might D N A be not acceptable or junk science or not credible?**

SOCIAL MEDIA

- **What social media networks do you use?**
- **How often do you use social media?**
    - **Daily?**
- **How often do you post things – *i.e.* photos, status updates, article links, etc.?**
- **What topics do you post or comment about most often?**
- **What types of pages/links/people do you mostly "follow" on these mediums?**
- **Anyone have a personal website?**
    - **If yes, please explain.**
- **Does anyone read online blogs?**
    - **If so, which ones?**
    - **How often?**
    - **Why those particular blogs?**

SELECTED

VOIR DIRE

CASES

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I. PUBLIC COURTROOMS/VOIR DIRE/FUNDAMENTAL CONSTITUTIONAL RIGHT/DEFENDANT'S FAMILY

FAILURE TO OBJECT TO CLOSURE OF TRIAL CONSTITUTES A WAIVER OF ONE'S RIGHT TO A PUBLIC TRIAL

Alvarez v. State, 827 So.2d 269 (Fla. 4th DCA 2002)

Appellant challenges his sentence following revocation of community control on the ground that the court erred in closing the courtroom during his revocation hearing pursuant to section 918.16, Florida Statutes (2000). We affirm because appellant's failure to object to the closure waived his right to a public trial. In doing so, we recede from *Williams v. State,* 736 So.2d 699 (Fla. 4th DCA 1999), to the extent it holds that failure to object to the closure of the courtroom does not constitute a waiver of the right to a public trial.

There are four prerequisites that must be satisfied before the presumption of openness may be overcome. First, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; second, the closure must be no broader than necessary to protect that interest; third, the trial court must consider reasonable alternatives to closing the proceedings; and fourth, the court must make findings adequate to support the closure.

OBJECTION TO CLOSURE OF TRIAL MUST BE SPECIFIC

Mansingh v. State, 68 So.3d 383 (Fla. 5th DCA 2011)

Defendant's claim that he was deprived of his constitutional right to a public trial when the trial court excluded the public during voir dire, despite his objection and request that they be allowed to sit in the jury box, was not preserved for appeal; although defendant lodged a general objection to individuals not being allowed to sit in the jury box, he did not argue, as he did on appeal, that the trial court was required to make findings of a compelling governmental interest and that closure was narrowly tailored to serve that interest, and he also did not alert the trial court that it was required to make certain findings. U.S.C.A. Const.Amend. 6.

ALLOWING DEFENDANT'S FAMILY TO SIT IN COURTROOM DURING JURY SELECTION

Campbell-Eley v. State, 756 So.2d 1043 (Fla. 4th DCA 2000)

Judge ordered last row of the courtroom cleared for jury selection. Defense Counsel requested that the Defendant's family members, if present, be allowed to sit in unused jury box seats during jury selection. The Court refused to do so and to accommodate Defendant's father.

The Appellate Court reversed conviction holding that the "right to public trial" guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution and Article 1, § 16 of the Florida Constitution is not absolute and may be abridged in a criminal case only by showing a "compelling

government interest." Closing the courtroom was overbroad and the Trial Court failed to consider reasonable alternatives and failed to make findings to justify its decision. Furthermore, the harmless error rule does not apply to the fundamental right of public trial. Once a violation of the right to public trial is established, prejudice is presumed.

The Appellate Court relied on *Williams v. State*, 736 So.2d 699 (Fla. 4th DCA 1999). In *Williams*, a trial judge refused to set up three chairs in the back of the courtroom to accommodate the Defendant's family members. The Appellate Court held that infringement of the right to public trial is fundamental error and that the Trial Court's closure was broader than necessary to alleviate overcrowding and safety concerns.

LESSON: the trial judge's reasons for closing the courtroom must:
a) Have specific findings; and
b) Be related to a compelling governmental interest (overcrowding, safety concerns and Fire Marshall limitations are not prima facie "compelling.")

Presley v. Georgia, 130 S.Ct 721 (2010)

Defendant was convicted of cocaine trafficking. Conviction was affirmed by the Supreme Court of Georgia and Defendant sought certiorari claiming that his Sixth and Fourteenth Amendment rights to a public trial were violated when the judge excluded the public from the voir dire of prospective jurors. Specifically, the trial judge noticed a lone observer in the courtroom and asked the man to leave explaining that prospective jurors were about to enter the courtroom. The trial judge asked the man not only to

leave the room but also the floor of the courthouse so he would not have any contact with the prospective jurors. The Trial Court questioned the man and learned that he was the Defendant's uncle.

Defense Counsel objected to the exclusion of the public from the courtroom. The Trial Court explained that there was no space in the audience for the public to sit. Defense Counsel then requested some accommodation. The Court denied the request and stated that the uncle could return once trial began but there was no need for him to be present during jury selection and that all the rows would be taken up by the panel.

After he was convicted, the Defendant moved for a new trial based on the exclusion of the public from the voir dire. In support of this motion, he presented evidence that 14 of the jurors could have fit in the jury box and the remaining 28 could have fit on one side of the courtroom, leaving plenty of room for the general public.

The Court denied the motion and indicated that it preferred to sit jurors throughout the courtroom and that "it's up to the individual judge to decide...what's comfortable." Furthermore, the Court stated, "It's totally up to my discretion whether or not I want family members in the courtroom to intermingle with the jurors and sit directly behind the jurors where they might overhear some inadvertent comment or conversation."

The Georgia Supreme Court upheld the Trial Court's decision to exclude the public during voir dire because Defense Counsel did not offer any alternatives.

The U.S. Supreme Court disagreed and pointed out that earlier in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1984), it held that Trial Courts must consider reasonable alternatives to closure *even when* they are not offered by the parties.

Moreover, the U.S. Supreme Court noted that the right to a public trial rests not only on the Sixth and Fourteenth Amendments, but also on the First Amendment as held in *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.,* 464 U.S. 501, 104 S.Ct. 819 (1984). In *Press-Enterprise I*, the U.S. Supreme Court found that it was error to close the courtroom even though neither the Defense nor the Prosecution requested an open courtroom and in fact argued in favor of keeping the transcript of the proceedings confidential.

Based on these precedents, the Supreme Court ruled that the Trial Court had erred for excluding the Defendant's uncle. It reversed and remanded the case holding that "Trial Courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."

PARTIAL CLOSING OF COURTROOM DURING CHILD VICTIM'S TESTIMONY DOES NOT VIOLATE RIGHT TO PUBLIC TRIAL

Kovaleski v. State, 103 So.3d 859 (Fla. 2012)

At Kovaleski's trial in 2006, the trial court partially closed the courtroom during the testimony of the victim pursuant to section 918.16(2), Florida Statutes (2001), which provided for partial closure of the courtroom during the testimony of a victim of a sex offense upon the victim's request regardless of the victim's age. Kovaleski was again convicted of two counts

of lewd and lascivious acts on a minor.

Kovaleski contends that the trial court's closure during J.L.'s testimony pursuant to section 918.16(2) violated his right to a public trial under the Sixth Amendment to the United States Constitution and article I, section 16 of the Florida Constitution. Specifically, Kovaleski asserts that a partial closure pursuant to section 918.16(2) runs afoul of the United States Supreme Court's decision in *Waller,* which sets out requirements that must be satisfied before the presumption of openness may be overcome: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court *861 must consider reasonable alternatives to closing the proceedings; and (4) the court must make findings adequate to support the closure. 467 U.S. at 48, 104 S.Ct. 2210.

Section 918.16(2) provides for partial closure of a trial during the testimony of victims at a sex offense trial:

(2) When the victim of a sex offense is testifying concerning that offense in any civil or criminal trial, the court shall clear the courtroom of all persons upon the request of the victim, regardless of the victim's age or mental capacity, except that parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney may remain in the courtroom. § 918.16(2), Fla. Stat. (2001).

Pursuant to the statute, the courtroom is partially closed not automatically but

only upon the request of the victim.

We find that section 918.16(2) acceptably embraces the requirements set forth in *Waller.*

II. CRITICAL STAGES OF JURY PROCEEDINGS

JURY PROCEEDINGS/CRITICAL STAGES AFFECTING CONSTITUTIONAL RIGHTS REQUIRING PRESENCE OF COUNSEL

The Defendant has a right to Counsel at every critical stage of the proceedings. *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Anderson v. State*, 420 So.2d 574 (Fla. 1982). Critical stages of jury-related proceedings that are deemed constitutionally critical stages requiring the presence of Counsel include the reading of jury instructions (*Fruetel v. State*, 638 So.2d 966 (Fla. 4th DCA 1994)); discussions concerning the evidence outside the presence of the jury (*Vileenor v. State,* 500 So.2d 713 (Fla. 4th DCA 1987)); sentencing of Defendant (*Smith v. State*, 590 So.2d 1078 (Fla. 2d DCA 1991)); return of a verdict by the jury *(United States v. Osterbrock,* 891 F.2d 1216 (6th Cir. 1989)) and Fla. R. Crim. P. 3.180(a)(8); jury's request to review evidence or to hear additional instructions (*Ivory v. State*, 351 So.2d 26 (Fla. 1977)) and Fla. R. Crim. P. 3.410; discussions and response to a jury's question requesting copy of jury instructions during deliberations (*Williams v. State,* 488 So.2d 62 (Fla. 1986)).

Wilson v. State, 764 So.2d 813 (Fla. 2000)

In *Wilson*, the Appellate Court held that in-court discussion in response to jury's note during deliberations violated Defendant's right to Counsel but was harmless error. In that case, Defense Counsel was absent when a jury note was sent to the Court (Defense Counsel arranged for a "straw-man" attorney to merely sit in while Defense Counsel was out of town during deliberations). The Court distinguished between "structural defects" and "trial error". The applicability of harmless error review depends on whether the constitutional error is classified as trial error or structural defect. Structural defects require automatic reversal because they "infect the entire trial process."

***Wilson* relied on *Henderson v. State*, 155 F.3d 159 (3d. Cir. 1998) which held that the absence of Counsel during a critical stage is not always a structural defect requiring reversal. Applying the trial error/structural defect analysis, the *Wilson* Court found that absence of Counsel was merely a "trial error" since the Defendant was without Trial Counsel only for a brief time (when the jury note was sent in concerning "how long" deliberations would be allowed to continue.) The Court found that no evidence or instruction was given to the jury in Counsel's absence, and thus, no action could have influenced the jury's verdict (which came in a "short time" after the note). There was, therefore, no structural error and no need for reversal. The Court held that prejudice resulting from Defense Counsel's absence was "purely speculative and unsubstantiated."**

LESSON 1: If Counsel feels further voir dire is necessary, Counsel should point out, <u>with specificity</u>, the areas of questioning to be covered and the particular jurors (or entire panel) needed to be questioned.

LESSON 2: The severity of the charge test is illusory since it may ignore the true consideration--which is the complexity of the case. The connection between a third degree felony and a "simple case" is not always present, and Counsel should be prepared to discuss those complexity issues with the Court when requesting additional voir dire time. In other words, if the third-degree felony encompasses an entrapment defense, Counsel should specify that the seriousness of the charge cannot be the determining factor to limit voir dire.

Ferrell v. State, 29 So.3d 959 (Fla. 2010)

Defendant was convicted of first-degree murder, armed robbery, and armed kidnapping and sentenced to death. The Defendant filed a petition for writ of habeas corpus. One of the issues raised by Defendant is that Defense Counsel was ineffective when he failed to appear without explanation on the date jury selection was scheduled to begin.

By the time the Trial Court held an evidentiary hearing on the matter, Defense Counsel was deceased, and therefore, the Trial Court presumed deficient performance. However, the Trial Court held that the Defendant did not meet the *Strickland* test as he was unable to show prejudice.

The Florida Supreme Court affirmed the denial of relief on this ground.

III. JURY SELECTION/TIME ALLOWED

TIME ALLOWED FOR JURY SELECTION

Rodriguez v. State, 675 So.2d 189 (Fla. 3d DCA 1996)

In armed robbery case, jury panel consisting of 30 potential jurors was examined by Trial Court for 30 minutes and by State for 45 minutes. After Defense Counsel had been conducting voir dire for 45 minutes, the Trial Court without previous notice told Defense Counsel to wrap it up in 5 minutes. Defense Counsel objected to time limit but Trial Court refused to give extra time.

Appellate Court noted that although Trial Court has discretion to limit voir dire, it must give reasonable notice of limitation so Counsel can pace timing of voir dire. Appropriateness of time limitation depends on nature of case and reasonableness of attorney's use of time allotted. Appropriateness of time limitation and of timeliness of notification will be evaluated on case-by-case basis.

Watson v. State, 693 So.2d 69 (Fla. 2d DCA 1997)

Prior to start of voir dire in aggravated battery case, Trial Court informed parties that they would have 30 minutes each to conduct questioning. Appellate Court noted that length of time allowed for conducting voir dire does not necessarily correlate to the fairness afforded the parties in selecting an impartial jury.

The Appellate Court held that Trial Court did not abuse its discretion in imposing time limitations on voir dire process where it gave parties advance

notice, Defense Counsel made tactical decision regarding what questions to ask, there were no surprise replies, and proferred questions Defense Counsel would have asked were either of minimal significance, covered by jury instructions, or covered by State's voir dire.

Barnhill v. State, 834 So.2d 836 (Fla. 2002)

Trial judge did not unreasonably limit Defense Counsel's voir dire where judge tried to help Defense Counsel focus in on questions Defense Counsel was trying to ask. Appellate Court held that Trial Court did not err as it did not bar or limit actual questioning.

Mendez v. State, 898 So.2d 1141 (Fla. 5th DCA 2005)

Due to the Trial Court's restrictions in severely limiting Defense Counsel's right to conduct a meaningful voir dire examination, Defendant suffered the loss of his fundamental right to probe the jury's understanding of several core issues, including the burden of proof principles. That the State suffered the same fate was of no significance to the disposition, except that on remand, it too was entitled to the rights afforded by Fla. R. Crim. P. 3.300.

Once the jury venire was seated for Mendez's trial, the Trial Court conducted a brief, general voir dire directed to the entire panel. In very broad terms, the Trial Court discussed the concepts of the presumption of innocence, Mendez's right not to testify, and the State's burden of proof. After the trial judge discussed each topic, the panel as a whole was asked,

"[A]nybody have a problem with that, think they can't handle that?" None of the jurors responded to the Court's questions.

Later, when both the State and Defense Counsel attempted to question the prospective jurors regarding these general topics, the trial judge responded "[W]e've already talked about that. Move on to something else." Mendez's attorney then attempted to proffer several questions she wished to ask the prospective jurors, but the trial judge made it clear that he thought Defense Counsel was "wasting time."

The Trial Court's voir dire consumed nine pages of transcript. The State's voir dire took twenty pages while Defense Counsel's consumed only ten pages of transcript. While the transcript does not reveal how long the entire voir dire lasted, based on the length of the transcript, it was no more than thirty minutes.

Roberts v. State, 937 So.2d 781 (Fla. 2d DCA 2006)

Trial Court's imposition of 10-minute time limit on Defense Counsel in midst of questioning of potential jurors was abuse of discretion that constituted reversible error.

III. JURY SELECTION/INDIVIDUAL VOIR DIRE

INDIVIDUAL VOIR DIRE DUE TO PRETRIAL PUBLICITY

Dippolito v. State, 143 So.3d 1080 (Fla. 4th DCA 2014)

The District Court of Appeal, Warner, J., held that:

[1] sequestered, individual voir dire of prospective jurors prior to jury selection due to pretrial publicity was not initially required;

[2] such voir dire was mandatory once it became apparent that a multitude of jurors had been exposed to publicity;

[3] entire jury panel was required to be stricken after they heard comment from one juror that a media report alleged defendant tried to poison victim; and

[4] trial court's error in failing to strike panel was not harmless.

Moreover, much of the evidence contained in the media reports would later be admitted as evidence at trial. The YouTube videos of appellant were admissible and, indeed, were later played at trial. Thus, exposure to these videos would not necessarily have required disqualification of prospective jurors. *See id.* (exposure to prejudicial information "might not require disqualification of prospective jurors if this information were going to be introduced into evidence"). When individually questioned, jurors who indicated they could not be fair because they had seen the videos were stricken and did not sit on the jury. Appellant failed to identify any other prejudicial information to which prospective jurors could have been exposed. She mainly objected to the tone of the media coverage, which she believed implied her guilt. On this record, we cannot say the trial court abused its discretion by denying the motion for individual, sequestered voir dire prior to jury selection.

However, this trial shows why individual voir dire should have been conducted once it became apparent that a multitude of prospective jurors had been exposed to pretrial publicity. Appellant had the right to ask these

jurors what specific information they had learned from the media; the jurors' show of hands was insufficient to protect her right to a fair and impartial jury. *See Bolin,* 736 So.2d at 1164–65; *Kessler,* 752 So.2d at 551–52. The trial court's refusal to allow appellant to do so on an individual basis posed the danger that one juror's response could taint the entire panel. This is, in fact, what occurred when one juror mentioned the poisoning allegation. We thus find that the trial court abused its discretion when appellant renewed her request to individually voir dire the jurors on the media coverage during her counsel's opportunity to question the jurors. *See Bolin,* 736 So.2d at 1164–65; *Kessler,* 752 So.2d at 551.

The trial court then erred by failing to strike the jury panel after all the jurors had heard the poisoning allegation. Because it involved an attempt to kill the same victim, it was closely related to the pending charges and could have prejudiced jurors in rendering their verdict. Even though appellant had not been formally charged with a crime based on the alleged poisoning, we find the comment analogous to comments informing prospective jurors of a defendant's criminal history, other pending charges, or arrests.

V. JURY SELECTION/QUESTIONING AS TO SPECIFIC DEFENSES

LIMITATIONS IMPOSED BY TRIAL JUDGE REGARDING INQUIRY ON VOIR DIRE AS TO WHETHER JURORS CAN ACCEPT SPECIFIC DEFENSE (ENTRAPMENT) IS ERROR

Walker v. State, 724 So.2d 1232 (Fla. 4th DCA 1999)

Defendant was charged with trafficking in cocaine and conspiracy to traffic in cocaine. Defense Counsel was permitted to inquire as to the jurors' understanding of the term "entrapment" in the ordinary sense, but Counsel was precluded by the Trial Court from inquiring as to whether they were willing and/or able to accept that defense.

The Appellate Court reversed for a new trial (citing *Lavado v. State*, 492 So.2d 1322 (Fla. 1986)) stating that Counsel should be allowed to ask a juror if they could accept the entrapment defense "as such questioning did not rise to a level of pre-trying the facts or attempting to elicit a promise from the jurors as to how they would weigh that defense." The Appellate Court found this to be a violation of the Defendant's right to a fair and impartial jury. (*Lavado* dealt with the limitation on inquiry into the defense of voluntary intoxication to a robbery charge).

> **LESSON: It is unclear from *Lavado* and *Walker* whether Defense Counsel renewed their objections prior to the jury being sworn or whether *Lavado* is indicating a <u>fundamental</u> constitutional right (to which no objection is required.) The better practice would be to renew objections prior to the jury being sworn as to each <u>specific</u> area that is precluded by the trial judge.**

<u>COURT'S LIMITATION ON VOIR DIRE QUESTIONING AS TO PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF WAS IMPROPER</u>

Campbell v. State, 812 So.2d 540 (Fla. 4th DCA 2002)

Defendant charged with sale of cocaine within one thousand feet of a school. Trial judge questioned the jury extensively on presumption of innocence, the burden of proof, and the right to remain silent. The State then questioned the jury panel for 45 minutes, and the trial judge limited the

Defense to 20 minutes. The Trial Court then refused to allow Defense Counsel to inquire as to the presumption of innocence and the client not testifying.

The Appellate Court reversed the conviction and found that Fla. R. Crim. P. 3.300 provides for Counsel to examine jurors and that "a juror's response to a judge's questions may be different than if asked by one of the attorneys to explain their belief." The *Campbell* Court relied on *Miller v. State,* 785 So.2d 662 (Fla. 3d DCA 2001). The *Miller* Court noted that the Trial Court cannot question prospective jurors on core issues and then prevent Counsel further individual examination under the guise that it would be repetitive. *See also Mosely v. State*, 842 So.2d 279 (Fla. 3d DCA 2003).

TRIAL COURT MUST ALLOW COUNSEL TO INQUIRE PRIOR TO SUA SPONTE DISMISSAL FOR CAUSE

Howard v. State, 869 So.2d 725 (Fla. 2d DCA 2004)

While prospective jurors were being questioned by prosecutor, the trial judge observed that two jurors were becoming confused. The trial judge attempted to discern answers, but received conflicting responses. The trial judge then sua sponte dismissed both jurors for cause and denied Defense Counsel's request to question one of the jurors to clarify her answer.

Appellate Court reversed conviction finding that "Trial Court abused its discretion in dismissing juror for cause without granting (Defense) Counsel's request to inquire further."

N.B. – Appellate Court in this case did not decide whether excusal was per se error and found other grounds for excusal.

Lesson: In light of Fla. R. Crim. P. 3.300 that both Counsel shall have the right to examine jurors, it would take an extraordinary circumstance to not, at least, allow Counsel to inquire.

COUNSEL PERMITTED TO QUESTION ABOUT SPECIFIC LEGAL DOCTRINES

Wyatt v. State, 78 So.3d 512 (Fla. 2012)

After Defendant's first-degree murder conviction and death sentence was affirmed on appeal, Defendant filed a petition for writ of habeas corpus. In his third claim, Wyatt alleges that his appellate counsel was ineffective in failing to challenge a line of questioning during voir dire where the State discussed that sometimes a murder occurs in order to eliminate a witness. Defense counsel objected, asserting that the prosecutor was attempting to give an opening statement during voir dire. The trial court overruled the objection, and the prosecutor continued asking a juror if he understood that the State could prove its case without relying on eyewitness testimony to the murder. Counsel objected again.

As this Court has recognized, "where a juror's attitude about a particular legal doctrine ... is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of the voir dire properly includes questions about and references to that legal doctrine even if stated in the form of hypothetical questions."

LIMITATIONS ON COUNSEL QUESTIONING PANEL AS TO SPECIFIC CASE ISSUE; I.E., EYE-WITNESS IDENTIFICATION

Williams v. State, 744 So.2d 1103 (Fla. 3d DCA 1999)

Defense Counsel began questioning specific jurors as to whether they had experienced any life situations where mistakes or misidentification occurred. The trial judge admonished Counsels "not to pre-try your case." The trial judge then addressed the entire panel by asking, "Does anyone believe humans cannot misidentify people?" and "Does anyone feel that it will be impossible for people to make misidentification?" and "Let the record reflect that no hand has been raised." However, the trial judge stopped Defense Counsel when it followed the Court's questions with "Are you (to a particular juror) aware of circumstances when those events (misidentification) have occurred?"

The Appellate Court affirmed (by a 2-1 margin with a vigorous dissent) holding that "The juror's involvement, or lack of involvement, has nothing to do with the crucial issue of whether (the juror) could accept the defense that the (Defendant) had been wrongfully identified."

The Appellate Court distinguished *Lavado v. State*, 492 So.2d 1322 (Fla. 1986) as requiring that Counsel be allowed to ask jurors about their "willingness and ability to accept a defense" (i.e., *Lavado* involved voluntary intoxication) as opposed to Counsel's ability to ask about a juror's life experiences with that defense. The Court went on to make the distinction between a juror's experience as a victim or having been accused of a crime as opposed to accepting the premise of a legal defense. The Court (majority) said that, "to misuse voir dire (is to use it) for a purpose which is properly

served only by final argument (and although) understandable, it is nonetheless unacceptable."

The dissenting opinion cited Fla. R. Crim. P. 3.300 which gives Counsel "the right to examine jurors orally on their voir dire." The dissent found the propounding of collective questions to the jury to be inadequate without follow-up questions by Counsel and stated, "Counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors," and "such broad inquiries (as done by the Trial Court) failed to call attention to specific matters which might lead jurors to display disqualifying attitudes and preoccupations."

LESSON 1: Defense theory questions are far more effective when asked as follow-ups to other questions (See proposed question section in this manual.)

LESSON 2: Defense Counsel must object to the judicial curtailment of voir dire and state specific grounds along with specific proposed questions.

LESSON 3: Defense Counsel must renew objections before the jury is sworn.

Trellez v. State, 909 So.2d 463 (Fla. 3d DCA 2005)

After Defendant discovered that his girlfriend had been seeing other men, he went to work with her one evening and, during an encounter in a parking lot, strangled her. After each witness testified, the judge would ask the jurors if they had any questions of that witness. Juror questions would be submitted sidebar in writing to the Court. The attorneys would then have the opportunity to make objections to the individual questions and the trial

judge would rule on the objections. If a juror's question was asked of the witness, the attorneys would be allowed to ask follow-up questions.

The Appellate Court held that the procedure established by the trial judge was within his discretion and was not an abuse of discretion. The juror questions specifically asked of the Defendant were not properly objected to or preserved for appellate review and were harmless beyond a reasonable doubt. Therefore, Defendant was not denied a fair trial.

> **N.B. This procedure is within the Trial Court's discretion and thus has been held not to be an abuse of discretion when used. See *McGlocklin v. State*, 907 So.2d 1288 (Fla. 3d DCA 2005)**

Ramirez v. State, 901 So.2d 332 (Fla. 3d DCA 2005)

Before the beginning of jury selection, the Trial Court instructed the State and Defense Counsel that they could not get up during voir dire and start talking about reasonable doubt and burden of proof. The Appellate Court held that under Fla. R. Crim. P. 3.300, Counsel for both the State and Defendant had the right to examine jurors orally on their voir dire. Therefore, the Trial Court could not question prospective jurors on such crucial areas as the presumption of innocence, burden of proof, and the right to silence, then prevent Counsel from further individual examination under the guise that it would be repetitive.

Before the beginning of jury selection, the Trial Court instructed the State and Defense that "you can't get up . . . during voir dire and start talking about reasonable doubt, burden of proof, and all that stuff." TR. 8. Defense Counsel objected as follows:

[DEFENSE COUNSEL]: From what I just heard, that I would be prohibited from asking any juror whether or not they agree that reasonable doubt is not too burdensome for the State or any questions dealing with reasonable doubt?

For the record, objection. I would tend to ask those questions, same with burden, that I cannot ask the jury whether or not I have any burden of proof of the Defendant's innocence?

The Trial Court replied that it would instruct the jury on the burden of proof and the presumption of innocence. The following transpired:

[DEFENSE COUNSEL]: I was also going to say, I understand that you may instruct the jury. My query is whether or not you're prohibiting me from any questions regarding whether they can presume him innocent even though he's here.

THE COURT: I'm going to go over that myself.

[DEFENSE COUNSEL]: So I cannot ask that question?

THE COURT: Correct.

[DEFENSE COUNSEL]: I will be objecting for the record that I would ask whether or not because he's here and been arrested, whether or not they still presume him to be innocent.

Jury selection proceeded under the ground rules that the judge had announced. At the conclusion of jury selection, Defense Counsel renewed his objection:

> **[DEFENSE COUNSEL]: Your Honor, you asked me whether or not I accept the jury. I do with the predicate that I'm actually moving to strike the panel. I believe that I haven't had the ability to have an effective voir dire, that I have not been able to speak individually to jurors about their willingness to follow the law regarding reasonable doubt, presumption of innocence and burden of proof. So therefore, assuming that you're denying my motion, if I would accept this jury over that objection as to the -- what I believe is a failure to conduct a meaningful voir dire --**
>
> **THE COURT: Noted. Please bring in the jury.**

JUROR CHALLENGE FOR STUPIDITY MAY MASK A RACIALLY MOTIVATED CHALLENGE

John v. State, 741 So.2d 550 (Fla. 4th DCA 1999)

Prosecutor excused peremptorily an African-American juror for "stupidity." Defense Counsel objected but did not further preserve that objection.

The Appellate Court affirmed on failure to preserve objection. Concurring opinion stated that, "I am concerned . . . that a lack of intelligence (reason for peremptory challenge) could easily mask a strike actually motivated by the gender or race of the juror." The concurring

opinion cited *Spencer v. State*, 615 So.2d 688 (Fla. 1993), wherein the Florida Supreme Court found "there is no legal basis for excusing a juror based on the trial judge's arbitrary evaluation of the juror's IQ. The fact that the juror was confused was no basis for excusing her in this manner."

LESSON: Juror's confusion or inability to respond correctly (as in a minority or immigrant juror) requires Counsel to use simple and non-confusing questions. For example, Counsel's question, "Will you be able to try this case as an impartial juror?" should <u>never</u> be asked. The word "try" is confusing and may contribute to an acceptable juror being unacceptable.

VI. JURY SELECTION/GROUNDS RELATING TO PEREMPTORY CHALLENGES

PRIOR ARREST OF PROSPECTIVE JUROR OR JUROR'S RELATIVE IS A RACE-NEUTRAL REASON FOR CHALLENGE

***Fotopoulos v. State*, 608 So.2d 784 (Fla. 1992)**

***Allen v. State,* 643 So.2d 87 (Fla. 3d DCA 1994)**

***Aikens v. State,* 609 So.2d 764 (Fla. 3d DCA 1992)**

***Miller v. State,* 605 So.2d 492 (Fla. 3d DCA 1992)**

***Siegel v. State*, 68 So.3d 281 (Fla. 4th DCA 2011)**

Siegel was charged by information with one count of knowingly utilizing the internet to attempt to seduce, solicit, lure, or entice a child, or a person believed to be a child, to commit any illegal act relating to sexual battery, lewdness, or child abuse, in violation of section 847.0135(3), Florida Statutes (2002)

At trial, during jury selection Siegel sought to strike prospective juror Berman, a female school teacher. When the state asked for a gender-neutral

reason for the strike of Ms. Berman, defense counsel stated that Siegel "would rather not have someone that has continued contact with children. She is a teacher." The court ruled: "I find that is not a genuine strike and I disallow it." Defense counsel added that Berman "said she goes to chat rooms, and I [would] rather have somebody that doesn't go in chat rooms." The court reaffirmed its ruling. Siegel also challenged another female teacher, and the court likewise found the reason to be pretextual.

When the selection of the jurors began, defense counsel again reiterated his challenge to the two teachers, which the court again disallowed. After stating again his objection to the selection process, the court decided to begin anew the jury selection process. Defense counsel again challenged Ms. Berman on the ground that she was a teacher who had contact with children. The state did not object, but the court nonetheless announced, "I disallow *285 that strike as it was challenged last time, and I found that [it] was ... not a genuine strike but actually a pretext based on the State's request for a gender-neutral reason."

Defense counsel also challenged Ms. Walker–Raines, a bank manager who had testified that she had a cousin in the Palm Beach County jail charged with a sexual crime—"a similar charge, not involving a computer crime." When the state requested a gender-neutral reason, defense counsel explained that he did not want her on the jury because she "has a family member who is sitting with a sex crime in prison, and she has two family members with a sex crime." The court disallowed the strike: "I find that is a pretext ... and not a genuine strike. She has one cousin who is in prison for a

crime similar to that which your client is accused of." Defense counsel stated, "It's a sex crime." However, the court responded: "And I deny the motion to strike her for peremptory. I find it is an effort, a pretextual effort to strike, so I disallow the strike on Walker–Raines." Eventually, Siegel accepted the panel subject to his prior objections.

A trial court's rulings on the propriety of peremptory challenges are reviewed under the abuse of discretion standard. *See Franqui v. State,* 699 So.2d 1332, 1334–35 (Fla.1997). In *Melbourne v. State,* 679 So.2d 759 (Fla.1996), our supreme court set forth a three-part procedure that must be followed whenever a peremptory strike is challenged as discriminatory. First, the objecting party must make a timely objection, show that the venire person is a member of a distinct protected group, and request that the court ask the striking party to provide a reason for the strike. *Id.* at 764. Second, the burden shifts to the proponent of the strike to come forward with a race-neutral or gender-neutral explanation. *See id.; see also Welch v. State,* 992 So.2d 206 (Fla.2008) (applying *Melbourne* to claims of gender-based discrimination). Third, if the explanation is facially race-neutral or gender-neutral, the court must determine whether the explanation is a pretext "given all the circumstances surrounding the strike." *Melbourne,* 679 So.2d at 764. "The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness." *Id.*

Circumstances that are relevant to the "genuineness" inquiry may include, but are not limited to: the racial (or gender) make-up of the venire; prior strikes exercised against the same racial (or gender) group; a strike

based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment. *Melbourne,* 679 So.2d at 764 n. 8. Likewise, while the constitution does not require that the explanation be reasonable, reasonableness is one factor that a court may consider in assessing genuineness. *Id.* at n. 9. Because identifying the true nature of an attorney's motive behind a peremptory strike turns primarily on a credibility determination, a trial judge's ruling on the genuineness of a peremptory challenge will be affirmed on appeal unless clearly erroneous. *Young v. State,* 744 So.2d 1077, 1082 (Fla. 4th DCA 1999).

Here, as in *Jones,* the relevant colloquy between counsel and the trial court indicates that the court never really undertook a "genuineness" analysis, but simply stated that the reasons for the strikes were pretextual. As noted above, relevant circumstances that the trial court is to consider in determining the "genuineness" of a strike include the racial or gender make-up of the venire; prior strikes exercised against the same group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment. *Melbourne,* 679 So.2d at 764 n. 8. Nothing in the record suggests that consideration was given to any of these factors, many of which were relevant.

When defense counsel sought to strike Ms. Berman, no prior strikes had been exercised against women. The reason stated for the strike—that juror Berman was a school teacher who had routine contact with children—was both gender-neutral and eminently reasonable in light of the nature of the charged crime. After the court re-started the jury selection process, the

prosecutor did not even lodge an objection to the peremptory strike of juror Berman. Instead, the court simply *sua sponte* disallowed the challenge because the court had done so the first time around. Nothing in the record supported the court's conclusion that Siegel was improperly attempting to keep Ms. Berman off the jury because of her gender.

Likewise, even if the court conducted an unstated genuineness analysis of the attempted strike of Ms. Walker–Raines, it was clearly erroneous for the trial court to determine that the reason for the strike was not genuine. Here, the defense sought to strike juror Walker–Raines because she had a relative charged with a sex crime. The fact that a juror has a relative who has been charged with a crime is a facially neutral reason for excusing that juror. *Fotopoulos v. State,* 608 So.2d 784, 788 (Fla.1992). The reason for defense counsel's strike was not applicable to any other jurors, and there was no indication that the defense was singling out juror Walker–Raines. Although males comprised the majority of the venire, this was only the second attempted strike of a female juror after the court re-started the jury selection process. Quite simply, the record did not support the trial court's conclusion that defense counsel's reason for the strike was a pretext for keeping Ms. Walker–Raines off the jury because of her gender.

In sum, the relevant colloquy between defense counsel and the trial court indicates that the court never really undertook a "genuineness" analysis, and it was clearly erroneous for the court to determine that defense counsel's stated reasons for the strikes were pretextual. We thus must reverse for a new trial.

"GENUINENESS" ANALYSIS

West v. State, 168 So.3d 1282 (Fla. 4th DCA 2015)

The District Court of Appeal, Haimes, David A., Associate Judge, held that new trial was warranted because trial court failed to conduct a "genuineness analysis" of the State's peremptory challenge of a Hispanic juror.

During jury selection, the State exercised a peremptory challenge against a prospective juror as follows:

[Defense]: Your Honor, again, a race neutral reason?

[Court]: What race is she?

[Defense]: She's Spanish.

[Court]: Okay.

[State]: I don't know that she's Spanish.

[State2]: Judge, I don't know if—

[State]: Judge, I don't know if it was ever established that she's Spanish.

[Court]: Do you have a—what's your reason for striking her?

[State]: She's unemployed.

[Court]: All right. That's a race neutral reason. I think she was a housekeeper.

[Defense]: She said she's a housekeeper for a retirement home. Her husband was the one that was unemployed—no, I'm sorry, her kids are unemployed, but she's a housekeeper for a retirement home.

[State2]: She didn't say she was married. She's not married.

[Defense]: She's employed.

[State]: We don't want a housekeeper on our jury.

[Court]: All right. How many have you used? I'll permit that one.

The trial court allowed the strike and a jury was eventually selected. After jury selection and before the jury was sworn, the defense counsel renewed the objection to the juror.

Defendant argues on appeal that the State's asserted reason for dismissing the juror was pretextual and that the trial court erred by not determining the genuineness of the State's proposed race neutral reason for striking the juror. The State responds that the trial court conducted an explicit genuineness analysis for other strikes, arguing this shows that the trial court would have done so on the record if it did not accept the genuineness of the strike.

Denis v. State, 137 So.3d 583 (Fla. 4th DCA 2014)

Defendant, Michael Denis, appeals his conviction for felony criminal mischief (causing damage to property valued at $1,000 or more). He argues that the trial court erred in failing to conduct a "genuineness analysis" of the State's peremptory challenge of an African–American juror. We agree and

reverse for a new trial.

During jury selection, the state initiated a peremptory challenge against a prospective juror, and the following exchange occurred:

> **[DEFENSE]: Um, let the record reflect this person is African–American and I would ask that the state um cite a race neutral reason for that strike.**
>
> **[STATE]: She had her eyes closed and was dozing off while the judge was speaking.**
>
> **[DEFENSE]: I didn't observe that. I don't know if the court did.**
>
> **[THE COURT]: No, I didn't, but I'll take [the State]'s word for it. And I guess that would be a legitimate race neutral reason.**

The court allowed the strike and the parties then discussed the remaining venire members. After jury selection and before the jury was sworn, defense counsel stated that she accepted the jury "subject to the prior objection."

The defendant argues that the trial court erred in failing to conduct a genuineness analysis of the state's peremptory challenge. The state responds that the defendant did not preserve the issue for appellate review because he did not specifically object to the state's proffered race-neutral reason for the strike and merely renewed a general objection before the jury was sworn.

Because the record is devoid of any indication that the trial judge implicitly or explicitly conducted a genuineness analysis, as required by step three of the *Melbourne* procedure, we reverse the defendant's conviction and

remand for a new trial.

Landis v. State, 143 So.3d 974 (Fla. 4th DCA 2014)

Appellant, Mitchell Landis ("Defendant"), was charged with trafficking in cocaine. When the case proceeded to a jury trial, the State exercised a peremptory challenge during jury selection on a prospective juror who was African–American. The trial court found the race-neutral reason given by the State to be "genuine" and allowed the strike.

When the State requested a peremptory strike of this juror, defense counsel objected and requested a race-neutral reason for the strike. The following exchange then took place:

> **THE COURT: For the record, [the prospective juror] is an African American male.**
>
> **[THE STATE]: He looks Indian to me.**
>
> **THE COURT: He's not Caucasian. He's a member of the protective class whether Indian or Island or African American. He appears to be from the protective class. I will ask you for a race/neutral reason.**
>
> **[THE STATE]: Judge, he's a kitchen manager. Although that means nothing to your honor or counsel. I worked in a restaurant a lot. A lot of personal drugs run rampant. I don't want a person like that on my jury panel.**

Here, the State did not question the potential juror concerning his occupation, or what effect it might have had on his ability to serve as a juror. No questions were posed about whether his employment in the restaurant

business caused him to form a more permissive attitude toward narcotic use. Without this record, this court is unable to sustain the trial court's finding that the State's race-neutral explanation was genuine.

In sum, there is insufficient information contained in the record before us to support the trial court's finding that the prospective juror's occupation was a legitimate race-neutral reason for the State's peremptory challenge. As a result, we are compelled by the cases cited herein to find that the trial court's determination of the genuineness of the strike lacked sufficient grounds and was clearly erroneous. *Melbourne,* 679 So.2d at 764–65; *Hayes,* 94 So.3d at 462; *Young v. State,* 744 So.2d 1077, 1082 (Fla. 4th DCA 1999). Therefore, we reverse Defendant's conviction and hereby order a new trial.

Spencer v. State, 196 So.3d 400 (Fla. 2d DCA 2016)

We conclude that the supreme court in *Hayes v. State,* 94 So.3d 452 (Fla.2012), has not placed an automatic burden on the trial court to perform a full genuineness analysis on the record in every instance in which a party objects to a peremptory challenge and the proponent provides a facially neutral reason. If an opponent wants the trial court to determine whether a facially neutral reason is a pretext, the opponent must expressly make a claim of pretext and at least attempt to proffer the circumstances that support its claim. Because the defendant did not preserve a *Melbourne* issue in this manner, we affirm.

****N.B. This issue was certified to the Florida Supreme Court. The discussion in this case is a complete exposition on the challenge**

practice and an excellent source of understanding what counsel should do in this practice**

Ellis v. State, 152 So.3d 683 (Fla. 3d DCA 2014)

As this Court and the Florida Supreme Court have each recognized, "the genuineness of the explanation is the yardstick with which the trial court will determine whether or not the proffered reason is pretextual." *Hayes v. State,* 94 So.3d 452, 462 (Fla.2012) (quoting *Davis v. State,* 691 So.2d 1180, 1183 (Fla. 3d DCA 1997)). The genuineness of the explanation is subjective and credibility-based, and simply put, requires the trial court to determine, based upon a consideration of all the circumstances surrounding the strike, whether it believes that the proffered explanation is truly the reason for the exercise of the peremptory challenge. *See Young v. State,* 744 So.2d 1077, 1082 (Fla. 4th DCA 1999) (recognizing that "identifying the true nature of an attorney's motive behind a peremptory strike turns primarily on an assessment of the attorney's credibility.") Thus, the trial court in this case erred in stating that the genuineness of the proffered reason for the challenge is not a part of the analysis, contrary to the dictates of *Melbourne* and its progeny.

Of course, it is also true that "the *Melbourne* procedure does not require the trial court to recite a perfect *689 script or incant specific words in order to properly comply with its analysis under step three." *Hayes,* 94 So.3d at 463. "Nevertheless, '*Melbourne* does not relieve a trial court from weighing the genuineness of a reason just as it would any other disputed

fact.' " *Id.* (quoting *Dorsey v. State,* 868 So.2d 1192, 1202 (Fla.2003)). Despite the deference afforded to the trial court in this regard, the reviewing court "cannot assume that a genuineness inquiry was actually conducted in order to defer to the trial court." *Id.* (agreeing that "deference does not imply abandonment or abdication of judicial review.") (quoting *Nowell v. State,* 998 So.2d 597, 602 (Fla.2008)). And "where the record provides no indication that the trial court engaged in the required genuineness inquiry," "Florida's appellate courts have fairly consistently reversed for a new trial." *Id.*

We reject the State's argument that the trial court implicitly considered the genuineness of the proffered explanation. It is not simply that the record fails to indicate whether such an analysis was conducted; rather, it reveals the trial court specifically rejected any such analysis as irrelevant. As to each juror, the defense squarely raised the genuineness of the State's purported explanations for the strike, and the trial court squarely rejected any consideration of genuineness as "not part of this analysis." The trial court's failure to consider the genuineness of the State's explanation for the strike was clearly erroneous.

First, the trial court considered this factor only after expressly rejecting any consideration of genuineness.[7] Of significance, the *Slappy* factors form a part of the trial court's analysis in step 3, where the central focus is on the genuineness of the proffered explanation. Given the trial court's refusal to consider genuineness, its subsequent consideration of a single *Slappy* factor cannot salvage the inadequate *Melbourne* analysis conducted here.

**The *Slappy* Court articulated a non-exclusive list of five factors:

> We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.

522 So.2d at 22 (citing with approval *Slappy v. State,* 503 So.2d 350, 355 (Fla. 3d DCA 1987)) (emphasis supplied). In *Melbourne,* the Court included two additional factors which may be considered in the analysis: "the racial make-up of the venire" and "prior strikes exercised against the same racial group." *Melbourne,* 679 So.2d at 764 n. 8.

**The mere fact that there was no similarly-situated juror with whom a comparison could be made does not render the proffered basis for the peremptory "genuine" nor reasonably lead to the conclusion that it was not pretextual. To permit a finding of no pretext by reliance upon a single, inapplicable *Slappy* factor would eviscerate *Melbourne* and invite gamesmanship, as an attorney

would merely need to proffer, as a reason for the strike, some race-neutral circumstance or characteristic that is not shared by any other prospective juror, thereby defying a comparison of similarly-situated jurors, and foreclosing a finding of pretext.

PREDISPOSED DISPOSITION TO FELONS IS A RACE-NEUTRAL REASON FOR CHALLENGE

Harris v. State, 183 So.3d 1086 (Fla. 4th DCA 2015)

The alleged victim (and essentially, state's key witness) had himself been previously convicted of eight felonies.[1] Harris's defense strategy included self-defense and the theory that the *victim* was engaging or preparing to engage in felonious activity at the time of the alleged crime. Both Harris and the victim gave vastly divergent scenarios as to the events that transpired on the day that led to a charge of attempted murder.

During voir dire, defense counsel asked the subject prospective juror if she believed "that a person who has been charged with a felony in the past is more likely to commit a crime in the future," and she responded affirmatively. The state ultimately exercised a peremptory challenge against her and defense counsel requested a race-neutral reason. The state responded by citing the prospective juror's pre-conceived notion as to her "once a criminal; always a criminal supposition." The trial court overruled the defense objection to the state's peremptory challenge.

The state's race neutral reason for striking the potential African–American juror was her explicit statement that she believed that a person who committed a felony in the past was more likely to commit a felony in the

future. This was clearly a legitimate, race-neutral reason for the strike because the victim had been previously convicted of eight felonies, and in Harris's version of the events, Harris was not engaged in criminal activity and instead was simply defending himself while the *victim* was engaging in felonious activity. Accordingly, the reason for the peremptory strike was both facially race-neutral and genuine, as it was directly relevant to the credibility of the victim—again, the state's key witness in its prosecution of Harris.

OCCUPATION OF JUROR MAY BE A VALID REASON TO EXCUSE EVEN IF UNRELATED TO FACT OF CASE

James v. State, 768 So.2d 1221 (Fla. 3d DCA 2000)

The State challenged a Hispanic female, a paralegal who had recently completed law school and had taken the Florida Bar examination. The State's reason for excusal was that the juror was a recent law graduate and did not want to serve. The Trial Court allowed the peremptory challenge as ethnic- and gender-neutral.

Defendant relied on *Johnson v. State,* 600 So.2d 32 (Fla. 3d DCA 1992) for the proposition that a juror's occupation is not a valid reason for challenge, unless there is some connection between the occupation and facts of the case. However, the Appellate Court reevaluated the *Johnson* decision in light of *Melbourne v. State*, 679 So.2d 759 (Fla. 1996).

In *Melbourne* , the Florida Supreme Court created a three-step process for considering a party's claim that opposing Counsel's peremptory challenge is discriminatory. Step 1 requires the opponent of the challenge to make out a prima facie case of racial or ethnic discrimination. Step 2 shifts the burden

to the proponent of the strike to provide a race-neutral explanation. This step only has to be facially valid. Step 3 requires the Trial Court to decide whether the opponent of the strike has proved purposeful racial discrimination. The focus is the genuineness of the asserted motive not its reasonableness.

Based on the *Melbourne* test, the Appellate Court in *James* affirmed.

MERE RECITATION OF JUROR'S OCCUPATION IS INSUFFICIENT TO SATISFY *MELBOURNE* ANALYSIS

Cook v. State, 104 So.3d 1187 (Fla. 4th DCA 2012)

The issue presented is whether the trial court erred in allowing the exclusion of two African–American jurors without conducting an inquiry into the genuineness of the race-neutral reasons given by the state. We find that the trial court erred in not conducting an inquiry into the genuineness of the reasons offered by the state for its exclusion of the two jurors. We therefore reverse and remand.

In this case, two juries were selected consecutively from a single jury panel. The state was represented by the same prosecutor in both cases. During voir dire in the other defendant's case, the prosecutor asked prospective juror 9, a retired registered nurse, about her prior experience as a juror and whether she would have any problem following the law. The prosecutor initially used a peremptory challenge on juror 9 without objection.

Subsequently, juror 9's name was reached for consideration in the jury

selection in the present case, and again the state sought to use a peremptory challenge for prospective juror 9:

[STATE]: The State would use a peremptory on [juror 9]. That's the last I think.

THE COURT: Correct.

[DEFENSE]: Defense would like to point out that [juror 9] is an African–American and asks for a race-neutral reason for the strike.

[STATE]: She's a nurse.

[DEFENSE]: I would ask that the State explain why being a nurse is—would make her unfit to be a juror on this case or have any bearing at all on whether she could be a juror.

[STATE]: I don't have to explain that to you. She's a nurse. I don't want a nurse on my panel. It's a race-neutral reason. It's not one of the protected classes. It's a valid reason.

THE COURT: All right. I'll sustain the strike. That takes us to [the following prospective juror].

As to prospective juror 9, step one occurred when appellant objected and asked the state for a race-neutral reason. Step two occurred, as the burden shifted to the state to articulate a race-neutral reason for the peremptory strike of juror 9. At this point, the state replied by stating that the race-neutral reason for the strike was because "she's a nurse." "[T]he

defendant, as the opponent of the strike, carrie[d] the burden of persuasion to demonstrate purposeful discrimination and [had to] overcome the presumption that the State's strike was exercised in a nondiscriminatory manner." *Id.* at 462 n. 6. In the present case, appellant met this burden by asking "the state [to] explain why being a nurse is—would make her unfit to be a juror on this case or have any *1190 bearing at all on whether she could be a juror."

The record does not state why being a nurse could satisfy the genuineness prong of step three. For example, during voir dire, the state did not question juror 9 "regarding the effect her employment might have upon her ability to fulfill jury duty." *Mayes v. State,* 550 So.2d 496, 498 (Fla. 4th DCA 1989). As stated in *Hernandez v. State,* 686 So.2d 735, 736 (Fla. 2d DCA 1997):

> **[A] mere recitation of a juror's occupation in many cases would not be sufficient to state a facially race-neutral reason. Because almost every potential juror works, either in the home or outside the home, there is a real risk that occupation could be used pretextually as a "facially" race-neutral reason to strike practically any juror.**

In response to appellant's request that the state explain the connection between juror 9's occupation as a nurse and her ability to serve, the state asserted that it did not "have to explain that to [appellant]." At this point, step three, the trial court was required to determine whether the state's explanation was a pretext when considering all the circumstances, and to determine if the state's explanation was genuine. Since the trial court did not articulate any analysis on the record, and merely summarily "sustain[ed] the strike" of the state, we find that the trial court did not

conduct the genuineness analysis of step three, as required by *Melbourne.*

PEREMPTORY CHALLENGE REVIEW APPLIES TO THOSE IMPROPERLY EXERCISED ON BASIS OF GENDER

*Guevara v. State,*164 So.3d 1254 (Fla. 2d DCA 2015)

The District Court of Appeal, Altenbernd, J., held that state was required to provide gender-neutrals reasons in response to objection to peremptory strikes of male jurors.

The assistant state attorney in this case argued during jury selection that males are not a protected class and convinced the trial court that the strike of a male juror did not require the trial court to follow the procedures established in *Melbourne v. State,* 679 So.2d 759 (Fla.1996).

In this appeal, the State properly admits that the law is to the contrary: a party exercising a peremptory strike of a male juror can be called upon to give a gender-neutral reason for the strike. *See J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 146, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) ("[T]he Equal Protection Clause prohibits discrimination in jury selection on the basis of gender...."); *Abshire v. State,* 642 So.2d 542 (Fla.1994). Once the *1256 objecting party asks for a gender-neutral reason, the trial court must follow the procedure in *Melbourne* and direct the party exercising the peremptory to provide one. *Welch v. State,* 992 So.2d 206, 211–12 (Fla.2008). So long as the objecting party takes the steps necessary to preserve this issue, as Mr. Guevara did here, the trial court's failure to ask for a gender-neutral reason constitutes per se reversible error.

Knight v. State, 919 So.2d 628 (Fla. 3d DCA 2006)

Defendant was charged with theft and burglary. Defendant contended that the State's reason for striking a prospective female juror on the basis of "passive personality" was not genuine.

During jury selection, the State exercised its fourth peremptory challenge against prospective juror Rivera, a female nurse. Defense Counsel informed the Trial Court that the State used three challenges against females and requested a gender-neutral reason for this challenge. The State replied that the juror was a nurse who might be too sympathetic to the victim and, therefore, not "the best candidate for this panel." The Trial Court rejected the State's reasoning because multiple prospective jurors were in the medical field.

The State then proffered that prospective juror Rivera had a "passive personality" that was not "best suited for this case." The State then elaborated and contrasted the differences between prospective juror Touissant and prospective juror Rivera, both of whom were females employed in the medical field. The prosecutor stated that prospective juror Touissant was "outspoken" and "she had great conviction," and that she would be more suitable for the jury panel.

Defense Counsel inquired how anyone could determine that prospective juror Rivera was passive, especially "when she was not asked any questions." The prosecutor responded: "Passive" means -- plenty of Counsel's questions were directed at the panel in general, and [prospective

juror Rivera] never spoke up or tried to interact with any individual thought during Counsel's questions or [the Trial Court's questions]. The only time she directly spoke is when [the Trial Court] went over the occupation with her and I think Counsel asked her one question about what kind of nurse she was.

The trial judge, noting Defense Counsel's objection, allowed the strike but warned the State, "just the way I advised the defense, I am keeping an eye on you on the female people, all right?" The final jury panel consisted of four females, two males, and two female alternates.

A review of the record refutes the contention that the Trial Court's decision was clearly erroneous. *See, e.g., Dorsey v. State*, 868 So.2d 1192, 1195 (Fla. 2003), (emphasizing that a Trial Court record is necessary for "meaningful appellate review"). On the record, the State pointed out to both the Trial Court and Defense Counsel that one of its reasons for striking prospective juror Rivera was that she did not interact verbally in response to questions posed to the jury panel, in contrast to prospective juror Touissant, who was outspoken. The record reflects that many other prospective jurors interacted more than prospective juror Rivera.

The Appellate Court held that, applying the third step in *Melbourne* to a situation involving verbal behavior, the Trial Court did not erroneously determine that the State's proffered reason for the strike was genuine. The Appellate Court noted that the record reflected that many other prospective jurors interacted more than the challenged juror. Finally, four females were

picked as jurors and two females were picked as alternates, which supported the Trial Court's decision that the peremptory challenge was not pretextual.

DISSENT

As set forth by the majority, the State attempted to use its fourth peremptory challenge on venire panel member Rivera, a female nurse. After the Trial Court rejected the State's initially proffered reason for the strike, the State suggested that she should be stricken because she had a "passive personality." When the Defense objected to this characterization, the State offered that Rivera had never spoken up in response to any of the State's group questions directed to the entire panel. Without more, that is not a constitutionally valid race-neutral reason for striking a juror.

Furthermore, the prosecutor's reasoning is entirely illogical. If Rivera had nothing to say in reaction to the State's group questions, there was no reason for her to respond. If a panel member agreed with the prosecutor or understood the point intended by the question, then there was no reason for a prospective juror to say anything. The transcript shows that the majority of venire members did not respond to the group questions. Thus, Rivera's failure to respond to the group questions does not distinguish her from the rest of the venire and cannot give rise to a legitimate reason for striking her from the jury panel.

Hayes v. State, 93 So.3d 427 (Fla. 5th DCA 2012)

During jury selection Appellant sought to use a peremptory challenge on a young, female prospective juror. The State objected to the challenge

and asked for a gender-neutral reason, noting that Appellant previously struck one prospective female juror and attempted to strike another. Defense counsel replied that the prospective juror at issue was young and did not appear to be strong in her convictions. Counsel expressed concern that the juror would be influenced by other jurors if her views were in the minority. The trial court denied the challenge, stating in reference to defense counsel's reason for the strike: "I don't believe it's gender-neutral." This was error.

The State concedes that the proffered reason for the strike was facially gender-neutral, but argues that the record suggests that the trial court's ruling was actually intended to be a finding that the reason was not genuine. We reject this argument because, although a trial court is not required to follow a specific script or incant particular words in conducting the *Melbourne* analysis, *see Hayes,* 94 So.3d at 463, we have to assume that the trial court in this case said what it meant and meant what it said in ruling that the reason for the strike was not gender-neutral. Indeed, under these circumstances, it would be improper for this court to assume that the trial court conducted a genuineness inquiry and determined that the reason for the strike was pretextual. *Id.* at 463 ("[W]here the record is completely devoid of any indication that the trial court considered circumstances relevant to whether a strike was exercised for a discriminatory purpose, the reviewing court … cannot assume that a genuineness inquiry was actually conducted in order to defer to the trial court.").

The trial court's erroneous determination that the proffered reason for the peremptory challenge at issue in this case was not gender-neutral and its

subsequent failure to carry out step three of the *Melbourne* analysis constitutes per se reversible error.

VII. JURY SELECTION/RACIAL PEREMPTORY CHALLENGES/PATTERN CHALLENGES

PATTERN OF STRIKING AFRICAN-AMERICAN JURORS NOT BASED ON IMPROPER GROUNDS

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

During jury selection, the State attempted to peremptorily strike Juror Anderson, a black woman who moved to Florida from Jamaica several years ago. Appellant objected, noting that Anderson was the only black person remaining on the panel. The following exchange occurred concerning the juror:

> **Ms. Neuner: Judge, I strike juror number fourteen, Ms. Anderson.**
>
> **Mr. Fleischman: Judge, I'm going to raise *Melbourne* on Anderson. At this point she would be the only black female. . . . She would be the only black person on the jury.**
>
> **The Court: Okay, State.**
>
> **Ms. Neuner: Yes, Judge. Miss Anderson has testified that prior to living in Miramar she was from Jamaica. Jamaica is known to be a high area**

for narcotics to be transported in from Jamaica to the United States. Being that we are dealing with a trafficking case that is my challenge for her being, that she, the area of where an individual is from is a factor to go into whether or not they can sit as a juror. In being that she is from an area that is highly known for narcotics, trafficking. I would strike her on that ground.

The Court: Defense, do you have anything you wish to say about that? It is a race neutral reason and it does appear to be genuine.

Mr. Fleischman: Judge, the only, when you say I do have a response, the only response to that would be that there was no questioning into that particular area. Which certainly the State could have gone into with her, even if outside the presence of the other jurors. So you're simply making--

The Court: It's a race neutral fact that she's from Jamaica. She's the only person from Jamaica and the Court is familiar that Jamaica is a place where drugs many times import from. In fact we have many tourists that buy these little dolls that are stuffed full of cannabis and other goodies.

Mr. Fleischman: I want to if I could make a few other points in regard to Miss Anderson. She, however, again there was nothing on the

record to indicate her knowledge or experience with any trafficking from Jamaica.

The Court: The fact that is that if she had knowledge and experience it would be a challenge for cause. All that's required is it be a race neutral reason.

The Trial Court allowed the strike under the *Melbourne* test. In this case, the prosecutor explained that she struck the black juror because she was an immigrant from Jamaica, a country known for drug trafficking. Implicit in her stated reason is an assumption that Jamaicans have more exposure to the drug trade and thus are likely to harbor some bias or predisposition in drug prosecutions. The trial judge ruled that the prosecutor's explanation was race-neutral.

The Appellate Court disagreed and held that prosecutor's explanation that juror was struck because juror was from Jamaica was not race/ethnic-neutral explanation for peremptory challenge. The Appellate Court relied on *Hernandez v. New York*, 500 U.S. 352, 360 (1991) for defining a "neutral explanation" as "an explanation based on something other than the race or ethnicity of the juror." The Appellate Court pointed out, "As *Hernandez* recognizes, an explanation can serve as a surrogate for impermissible racial bias, particularly where there is a high correlation between race or ethnicity and the prosecutor's stated criterion."

The Appellate Court noted that the prosecutor invoked the juror's place of origin as a reason to exclude her from jury service. The Court reasoned, "Given the inextricable link between the juror's race, ethnicity, and country of origin, we do not view this explanation as race/ethnic-neutral. The juror's Jamaican national origin is so closely tied to her race and ethnicity that to exclude her from jury service solely because of it violates the Equal Protection Clause. The guarantee of equal protection forbids the exclusion of prospective jurors on the basis of assumptions that arise solely from their racial or ethnic ancestry, which may encompass their country of origin." *See Hernandez v. Texas*, 347 U.S. 475, 477-78, 98 L. Ed. 866, 74 S. Ct. 667 (1954) (stating that "exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment"). *Cf. Wamget v. State*, 67 S.W.3d 851 (Texas Crim. App. 2001) (holding that a prospective juror's birth in a foreign country was a race-neutral reason for a peremptory challenge).

POORLY ARTICULATED JUROR RESPONSES/JUROR OF RACIAL GROUP MUST BE EVALUATED SEPARATELY EVEN THOUGH SAME RACIAL GROUP JURORS ARE ACCEPTED

Heggan v. State, 745 So.2d 1066 (Fla. 3d DCA 1999)

State exercised a peremptory challenge after trial judge denied cause challenge. State argued that juror had been asked twice if he would believe a police officer less than a civilian witness and both times he stated that he would. Defense Counsel objected noting that juror was African-American and requested State provide race-neutral reason. State began to provide

explanation but trial judge cut State off and said he was satisfied that race-neutral reason had been given.

On appeal, Defendant claimed that trial judge failed to follow the *Melbourne* analysis. Defendant argued that juror in question did not say he would believe police officers less than other witnesses, and, if he did, he did not say it twice. The *Heggan* Court attached the transcript of the exchange between the prosecutor and the juror which read as follows:

Prosecutor: [Sir], are you going to believe a police officer more because they are police officers?

Prospective Juror: No.

Prosecutor: What about less simply because they are police officers?

Prospective Juror: Yes, they work just like the rest.

Prosecutor: Simply because they are police officers you are going to believe them?

Prospective Juror: Yes.

Defense Counsel: Judge, could we get [the juror] to repeat his last response?

Prospective Juror: They are just like a person.

Neither the Prosecution nor Defense Counsel attempted to clarify the "poorly articulated responses." The Appellate Court noted that peremptory challenges are presumed to be non-discriminatory. The Appellate Court expressed satisfaction with the State's race-neutral explanation. The Court stated, that "although the questions propounded and the answers received are not as clear as we would like, the juror did at one point answer affirmatively to a question which asked whether he would believe a police officer less than others, albeit with an unclear caveat."

The Appellate Court then noted, "the fact that the prosecutor in this case accepted two other African-Americans on the jury was relevant, although by no means dispositive of the trial judge's assessment of the genuineness of her stated reason for excusing the juror in question.

Moreover, the Court noted that although the prosecutor "accepted other members of the same group," the excuse of each peremptory challenge "must be evaluated on its own merits."

LESSON: For purposes of challenging peremptory strikes, the accepted jury members do not matter--but sometimes they do--but sometimes they don't, etc.

Muniz v. State, 18 So.3d 1140 (Fla. 5th DCA 2009)

Defendant claimed in postconviction motion that Counsel was ineffective during voir dire for failing to challenge a juror for cause where the juror indicated that a police officer's testimony was more reliable than that

of other witnesses and that Defense Counsel would have to prove to him that the officer's testimony was unreliable. Counsel did not challenge the juror for cause and did not question the juror further as to whether or not he could set aside this bias and render his verdict solely on the evidence and the law. The Trial Court denied relief on this ground.

The Fifth District Court of Appeal held that the order denying relief did not conclusively refute the Defendant's claim and remanded to the Circuit Court for further consideration on this ground.

JURORS' RESPONSES/WHEN EVERYONE GIVES THE SAME ANSWERS BUT LOOKS DIFFERENT

White v. State, 754 So.2d 78 (Fla. 3d DCA 2000)

Two African-American jurors and one white juror responded to questions concerning police officers in similar ways; i.e., that police officers stick together in police brutality prosecutions. The prosecutor excused the two African-American jurors, which the Trial Court allowed after Defense objections.

The Appellate Court held that prosecutor's explanation for peremptory challenge of minority prospective juror who had prior bad experience with police officer was a valid race-neutral reason. However, Appellate Court held that prosecutor's explanation for peremptory challenges on two other minority prospective jurors who expressed a similar view to that of unchallenged white prospective juror was pretextual. In reaching this conclusion, the Appellate Court applied the *Melbourne* test. The Court held

that the issue in the case did not involve Step 2 (proponent of strike must provide a race-neutral reason) but rather Step 3 (strike will be sustained if Trial Court believes that under all the circumstances surrounding the strike the explanation is genuine and not pretextual).

Based on the *Melbourne* test, the Appellate Court found that the trial judge's comments made it clear that she was concerned about the genuineness of the State's reasons for striking the two African-American jurors. Furthermore, the Appellate Court noted that although the trial judge does not have to utter any specific words such as "genuine" or "pretextual" to satisfy Step 3 of *Melbourne* it was clear from her concerns that she was prompted by this requirement. The trial judge's decision to allow the State's peremptory challenges on these two jurors indicated that she found the reasons given by the State to be genuine. However, the Appellate Court found this decision to be clearly erroneous and reversed.

FAILURE OF COUNSEL TO OBJECT TO PEREMPTORY CHALLENGES AND RAISE *NEIL* OBJECTION IS SUBJECT TO ACTUAL BIAS STANDARD

Jones v. State, 10 So.3d (Fla. 4th DCA 2009)

Defendant claimed that Trial Counsel was ineffective when he failed to raise a *Neil* objection to State's peremptory striking of two African-American jurors. The Court applied the actual bias standard set out in *Carratelli v. State*, 961 So.2d 312 (Fla. 2007) and held that the Defendant was not entitled to postconviction relief as he had failed to show that his Counsel's error resulted in a jury that was not impartial.

VIII. JURY SELECTION/AMBIVALENT OR EQUIVOCAL JUROR RESPONSES/ FAILURE TO QUESTION FURTHER BY COUNSEL

JUDGES MUST BE AWARE OF NON-VERBAL BEHAVIOR WHEN CHALLENGES FOR CAUSE ARE CONTESTED BY COUNSEL

Dorsey v. State, 868 So.2d 1192 (Fla. 2003)

The issue in this case arises when a reason offered for a peremptory challenge is based on a juror's nonverbal behavior, such as lack of interest, inattentiveness, or lack of eye contact.

The Court held that like verbal responses to questioning, a juror's lack of interest, inattentiveness, or other nonverbal behavior can constitute a racially neutral reason for a strike. However, the question became how to determine the genuineness of the reason based on nonverbal communication when Opposing Counsel challenges the factual basis for the explanation, the Trial Court did not observe the behavior, and the record does not otherwise support the reason advanced.

The Court held that the State is not entitled to this presumption of validity unless the existence of its proffered reason is either confirmed by the Trial Court or otherwise supported by the record. Just as the failure to offer any reason whatsoever would be inadequate to sustain a strike, equally inadequate is an unconfirmed subjective impression that cannot be confirmed by the Trial Court or reviewed by the Appellate Court because there is no record support. The Court found that a potential juror's nonverbal behavior, the existence of which is disputed by Opposing Counsel

and neither observed by the Trial Court nor otherwise supported by the record, is not a proper basis to sustain a peremptory challenge as genuinely race neutral.

In response to the prosecutor's contention that the venireperson, Ms. George, was "disinterested," Defense Counsel countered with his observation that the African-American juror was "very attentive [and] smiled in a lighthearted manner." Defense Counsel further observed that when asked who was happy to be on jury duty, Ms. George was the only person to "affirmatively respond" that "she was happy when she got her jury document notice."

Despite these conflicting views by the attorneys of the juror's responses and demeanor, the Trial Court took the prosecutor's statement that the juror was uninterested at "her word." Thus, the Trial Court not only ruled in the prosecutor's favor without confirming the purported lack of interest, but did so without explaining why he chose the representation of one "officer of the court" over that of another.

Although the dissent acknowledged that every Trial Court judge must closely observe the venire process and assiduously provide record support for the denial of any objection to a peremptory challenge; nevertheless, it found that the Trial Court's acceptance of the prosecutor's word as "an officer of the court", was proper.

> **Lesson: Trial judges must now watch, observe and probably take notes on not only <u>what</u> is said, but also the juror's non-verbal behavior. The written notes would help a trial judge recall non-verbal behavior after**

a lengthy voir dire process when the challenges are exercised hours later.

PROSPECTIVE JURORS' AMBIVALENT ANSWERS REGARDING GREATER WEIGHT TO POLICE TESTIMONY

Clemons v. State, 770 So.2d 296 (Fla. 1st DCA 2000)

Prospective juror's response to question of credibility of police officers testifying in uniform was, "Well, I don't think it's the uniform . . . all things being equal, maybe I would tend to give the police officer's version more credence . . . ." No effort to rehabilitate was made. Challenge for cause was denied after all peremptories were used up.

The Appellate Court reversed holding that Trial Court's failure to excuse juror for cause based upon his preconceived belief that a police officer's testimony is automatically worthy of more credibility than a civilian witness constitutes reversible error.

See also *Henry v. State,* 756 So.2d 170 (Fla. 4th DCA 2000), ruling that ambivalent answers indicating a prospective juror might give greater weight to police testimony are grounds for challenge for cause.

See also *Polite v. State*, 754 So.2d 859 (Fla. 3d DCA 2000); *Adkins v. State,* 736 So.2d 719 (Fla. 2d DCA 1999); *Lazana* v. *State,* 666 So.2d 588 (Fla. 2d DCA 1996).

Guzman v. State, 934 So.2d 11 (Fla. 3d DCA 2006)

Defendant claimed that the Trial Court erred in refusing to grant a challenge for cause against a prospective juror. During jury selection, the

prospective juror indicated that his son had been a police officer in Florida, but that his son later worked in the computer industry in Colorado and was serving as a reserve officer. Viewing the voir dire questions and answers in their entirety, the Appellate Court concluded that the prospective juror's statements revealed nothing more than an inclination toward law enforcement work and upholding of the law.

The Appellate Court noted that the trial judge, who observed and evaluated the prospective juror's demeanor, was in the best position to determine whether or not it was necessary to disqualify him for cause. Even assuming that the prospective juror's words tended to show equivocation, the Appellate Court concluded that the Trial Court did not commit manifest error in determining that he could render an impartial decision. Additionally, because Defendant failed to show manifest error, there was no basis for concluding that the trial judge erred in denying Defendant an extra peremptory challenge for a different juror.

During voir dire, the following exchange took place:

THE COURT: -- knowing in this case as I've already told you that the victim is a law enforcement officer, do you think you might not be able to be fair and impartial in this case?

MR. THIES: I think I can be fair.

THE COURT: Okay. We're also going to be hearing testimony from

police officers, do you think you might give them more credibility than anybody else because of your relationship with your son as a police officer?

MR. THIES: I would listen to the judgment of a police officer because they are supposed to be, you know, truthful in the matter. I wouldn't say that I would always give the [sic] credibility because, you know, he's at a different angle. For instance, with a situation you'll always see things different from that standpoint. I think I can be fair.

THE COURT: Would you treat them differently simply because he's a police officer, he's going to come up here wearing a police uniform, would you treat him differently than anybody else because of that?

MR. THIES: The only thing I can say is that I would do the best I could.

THE COURT: Okay. Well, can you do it?

MR. THIES: I think so.

[PROSECUTOR]: Mr. Thies, some of the people who testify in this case may be police officers, and they may be testifying about what they do as police officers, what their work is. My question to you and to

everyone, same question, because I know that you have some contact with law enforcement, other people do as well.

If a witness sits in that chair and says I make my living as a cop, I'm a police officer, would you tend to believe whatever that person says just because they are a police officer and your son was an officer and maybe they remind you a little of your son. Will you do that?

MR. THIES: I'll say that I would try to be impartial but I have a tendency to be for the law.

[PROSECUTOR]: Would you give more attention to the testimony of somebody who was a police officer and think that you would believe what they say more than someone else?

MR. THIES: That is difficult.

[PROSECUTOR]: It is. It's difficult being a juror . . . but it is a job that has to be done fairly --

MR. THIES: Yes.

[PROSECUTOR]: -- fairly, so that's why [I] ask you over and over again --

MR. THIES: Okay.

[PROSECUTOR]: -- can you do this?

MR. THIES: If there is another police officer or another one on hand and his story was similar to the one that you had here on the stand, yes, I would give quite a bit of prejudice to it.

[PROSECUTOR]: So you're looking for what we might call corroboration?

MR. THIES: Corroboration.

[PROSECUTOR]: That the testimony of one person would agree with another person and that that testimony agree with the evidence, that would help you decide that person was believable?

MR. THIES: Yes.

[PROSECUTOR]: Let's get down to the very bottom of the equation though.

MR. THIES: Okay.

[PROSECUTOR]: Let's assume you're just listening to what somebody is saying, are you going to believe a police officer more than someone who's not a police officer?

MR. THIES: Not necessarily. As I said I believe earlier, it depends on perhaps there was another police officer that saw things from another angle.

[PROSECUTOR]: Okay. Mr. Thies, do you think that this part of the trial process, jury selection, where the lawyers and the Judge are asking questions, do you think that's important?

MR. THIES: I think it's very important to be able to find the people that are impartial in this case.

[DEFENSE COUNSEL]: Sure. And when two of your sons came to you and were pointing the finger at each other saying he started it; no, he started it. Would you normally want to hear from both of them, hear their version?

MR. THIES: I would also like to hear from somebody else who saw it.

[DEFENSE COUNSEL]: Okay. But you would expect to hear from both of them telling you what happened?

MR. THIES: Yes, I would. Yes, I would.

[DEFENSE COUNSEL]: Okay. Would everyone agree that's a natural tendency to want to hear from both sides, hear from both people?

PROSPECTIVE JURORS: Yes. (Collectively.)

[DEFENSE COUNSEL]: How would you feel if Mr. Guzman didn't testify; would it -- might it influence your decision?

MR. THIES: Not necessarily, but if he did testify and there were things that came out that he could collaborate, maybe it would shift the case in his favor.

[DEFENSE COUNSEL]: Okay. Would you go in the jury room if he didn't testify and say, if he was innocent, why didn't he get up on the stand and say so, what's he's [sic] hiding, chances are, you know, he's probably guilty?

MR. THIES: I would still have to base it upon the evidence that was presented.

[DEFENSE COUNSEL]: [H]ow [do] you feel about police officers versus civilians, do you think that police officers are less likely to lie under oath than civilians?

Can you still look at them and scrutinize their testimony but all things being equal, a police officer because they're police officers are less likely to lie than civilian?

MR. THIES: To me that's a difficult question because I would have to look at collaboration between the stories.

[DEFENSE COUNSEL]: Do you think that [a police officer taking an oath to swear to tell the truth is] less likely to lie; not be mistaken, but out and out lie. Do you think a police officer could do that?

MR. THIES: I think if he is a veteran on the force and he's had a good record I would say he would be less likely to lie.

[DEFENSE COUNSEL]: Than a civilian?

MR. THIES: I couldn't say that because I know there's a difference in people.

[DEFENSE COUNSEL]: Okay.

MR. THIES: And I mean I really -- this is the best answer that I could give.

[DEFENSE COUNSEL]: All right.

MR. THIES: Because everyone is different.

[DEFENSE COUNSEL]: That's true. What if you hear from two people that are both saying opposite things and only one person is being truthful, the other person is lying. They both seem believable, the only difference that you can find is that one is a police officer and one of them isn't.

Would you be more likely to think that that person who is a police officer is telling the truth?

MR. THIES: If the evidence is on his side I would say yes.

[DEFENSE COUNSEL]: Well, let's say they're both -- you can't tell, they both seem believable. The only difference is one of them is a police officer and one of them isn't. Would you tend to give the one who is a police officer a little bit more credibility because he is a police officer?

MR. THIES: I could not really honestly say, I really can't.

Defense Counsel attempted to challenge Thies for cause, claiming that Thies repeatedly expressed a bias in favor of police credibility, and that he never indicated unequivocally that he could set aside this bias. The State opposed the challenge for cause claiming that Thies repeatedly stated that

police officers were no more likely to tell the truth than civilians, and that he would have to hear the evidence and testimony before determining whom to believe. The Trial Court denied Defense Counsel's motion to strike Thies for cause. Defense Counsel exercised its last peremptory challenge on Thies.

Defense Counsel requested an extra peremptory challenge for juror Samson-Mojares, identifying Samson-Mojares as an objectionable juror. The Trial Court denied the request for an extra peremptory challenge and Samson-Mojares sat on the jury.

The Appellate Court noted that it is within the Trial Court's province to determine whether a challenge for cause should be granted based on a juror's competency, and such a determination will not be disturbed on appeal absent manifest error. *Busby v. State*, 894 So.2d 88, 95 (Fla. 2004)(quoting *Fernandez v. State*, 730 So.2d 277, 281 (Fla. 1999)); *Morrison v. State*, 818 So.2d 432, 442 (Fla. 2002); *State v. Williams*, 465 So.2d 1229, 1231 (Fla. 1985); *Mills v. State*, 462 So.2d 1075, 1079 (Fla. 1985). "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." *Busby*, 894 So.2d at 95 (citing *Lusk v. State*, 446 So.2d 1038, 1041 (Fla. 1984)).

As long as there is support in the record for the Trial Court's decision to deny a cause challenge, the decision will be upheld on appeal. *Id*. at 95 (citing *Gore v. State*, 706 So.2d 1328, 1332 (Fla. 1997); *Mendoza v. State*, 700 So.2d 670, 675 (Fla. 1997)). A trial judge has a unique vantage point from which to evaluate potential juror bias and make observations of the

juror's voir dire responses, which cannot be discerned by this Court's review of a cold appellate record. *Morrison*, 818 So.2d at 442; *Mendoza*, 700 So.2d at 675; *Smith v. State*, 699 So.2d 629, 635-36 (Fla. 1997)(citing *Taylor v. State*, 638 So.2d 30, 32 (Fla. 1994)).

Furthermore, a trial judge has broad discretion regarding juror competency because "[t]he trial judge hears and sees the prospective juror and has the unique ability to make an assessment of the individual's candor and the probable certainty of his answers to critical questions presented to him." *Williams*, 465 So.2d at 1231.

Based on the record before us, we conclude that the Trial Court did not commit manifest error in determining that prospective juror Thies was competent to serve as a juror. *See Williams*, 465 So.2d at 1231. Viewing the voir dire questions and answers in their entirety, we conclude that Thies' statements "reveal nothing more than an inclination toward law enforcement work and upholding of the law." *See Skipper v. State*, 400 So. 2d 797, 798 (Fla. 1st DCA 1981), *rev'd on other grounds*, 420 So.2d 877 (Fla. 1st DCA 1982); *see also Peri v. State*, 412 So.2d 367 (Fla. 3d DCA 1981)(holding that the Trial Court acted within its discretion in refusing a cause challenge against a prospective juror who indicated that he would give police testimony a little more credence and that his acquaintanceship with police officers would have "a little effect," but who ultimately stated that he would keep an open mind and follow the instructions of law given by the Court). The trial judge, who observed and evaluated Thies' demeanor, was in the best position

to determine whether or not it was necessary to disqualify Thies for cause. *See Skipper*, 400 So.2d at 798.

The facts of the instant case do not rise to the level of potential juror bias that concerned this Court in *Salgado* and *Martinez*. In the instant case, prospective juror Thies stated at the outset, "I wouldn't say that I would always give [a police officer] credibility because, you know, he's at a different angle." Thies stated that he would be fair and that he would do the best he could.

Throughout his voir dire responses, Thies consistently indicated that he would look for corroborative testimony and that he would expect to hear from both sides, but Thies stressed that he would ultimately base his decision "upon the evidence presented." Thies also expressed the importance of juror impartiality. Moreover, when Thies' responses are read in context and in their entirety, it is clear that Thies' use of words such as "I think," "I would try," and "not necessarily," do not establish that he was equivocal. Instead, a thorough reading of his record responses suggests that Thies used such terms when reasoning through his answers.

However, even assuming that Thies' words tended to show equivocation, we conclude that the Trial Court did not commit manifest error in determining that Thies could render an impartial decision. *See, e.g., Busby*, 894 So.2d at 96 (holding that a juror need not be excused for cause merely because he gives equivocal responses). Again, we emphasize that the trial judge was in the best position to observe Thies' demeanor, assess his candor, and determine whether Thies was impartial.

After a thorough review of the record, we cannot find that the trial judge committed manifest error in determining that Thies was competent to serve as a juror. *See, e.g., Morrison*, 818 So.2d at 442 (holding that an Appellate Court must give deference to the trial judge's determination of juror competency). Since we hold that *Guzman* failed to show manifest error, there is no basis for concluding that the trial judge erred in denying *Guzman* an extra peremptory challenge for juror Samson-Mojares. *See Williams*, 465 So.2d at 1231.

N.B. This decision illustrates that Appellate Courts will not disturb a Trial Court's finding at voir dire. However, this case's transcript also reflects that possibly the more correct questioning by Counsel may have brought out this juror's bias.

PROSPECTIVE JUROR'S ANSWERS REGARDING CREDIBILITY OF OFFICERS

Freeman v. State, 50 So.3d 1163 (Fla. 2d DCA 2010)

Prospective juror should have been excused for cause because her answers indicated a basis for reasonable doubt as to her ability to be impartial and free from bias in her assessment of witnesses' credibility; while prospective juror first said that she could be fair and impartial when faced with testimony from law enforcement officers, thereafter she was consistently equivocal, and juror's final "honest" answer was that she might give more credibility to police officers.

After inquiring of another veniremember, defense counsel returned to the prospective juror previously questioned, and the following exchange occurred:

[Defense counsel]: Now going back to you ..., do you think it's fair, and I don't want to put words in your mouth, do you think it's fair to say because of your experience and relatives you in your own mind you have some doubt whether or not you could start a police officer on the same line, you might tend to find them a little more believable?

[Prospective juror]: Are you just asking me the same thing?

[Defense counsel]: Well, I'm actually phrasing it a little bit differently. But what my question basically is, do you think because of your life experience and your relatives, in your own mind do you think you might tend to find a police officer more believable because they're a law enforcement officer?

[Prospective juror]: I don't think that's necessarily always the case. I know they are people just like everyone else. But to be honest I—

[Defense counsel]: That's all we're asking you to do.

[Prospective juror]:—I may, I may give them a little more credibility. Yes.

JUROR'S RESPONSES THAT MAY BE INDETERMINATE OR QUESTIONABLE

Brown v. State, 755 So.2d 737 (Fla. 4th DCA 2000)

During voir dire in a robbery case, a juror said that her niece had been murdered. When asked by the prosecutor whether the juror could be impartial, juror responded, "I would certainly try." Defense moved to strike for cause, which was denied. Another juror stated her home was burglarized and that her brother-in-law was murdered. In responding to the prosecutor's question as to whether these experiences would affect her ability to be fair, the juror stated, "I didn't think so." Asked whether the juror could be fair, the response was "I think so." Defense Counsel moved to strike for cause, which was denied.

The Appellate Court affirmed conviction. The Court found that these jurors' responses did not require per se reversal and that the cause challenge was in the discretion of the trial judge who is "best positioned to observe a prospective juror's demeanor and credibility."

The Court cited *Chapman v. State*, 593 So.2d 605 (Fla. 4th DCA 1992), wherein a prospective juror's mother was murdered during a convenience store robbery and she responded that her mother's murder "may" adversely affect her attitude toward the Defendant. Further, when the juror was asked whether she would be more inclined to convict, the juror said, "I don't think I would be . . .. I don't know." In *Chapman,* the Court reversed holding that "although recognizing that the question was close, this Court found that juror should have been removed because her responses created a reasonable doubt as to her ability to be impartial."

Croce v. State, 60 So.3d 582 (Fla. 4th DCA 2011)

Prospective juror's stated concerns that she could not separate her past experience as the victim of a brutal crime from her potential service as a juror raised a reasonable doubt as to her ability to be impartial, and thus trial court should have granted defendant's for-cause challenge to the prospective juror; prospective juror's responses to voir dire questions concerning her ability to be fair and impartial were, at best, ambiguous.

When defense counsel inquired if she could put aside her past experience as a victim, Juror One stated:

> **To be honest, I'm not sure. Coming here and hearing it was a criminal trial—I mean it's a little hard for me to be in a courtroom as it is....**
>
> **My last experience was not a good one. So I have been trying knowing that this is—it has nothing to do with my personal case, but I don't know if I can be one hundred percent open minded....**
>
> **The question you proposed, rather than listening to the prosecution where—like, it took me on a different spin where I *584 was like, oh, I know what I'm supposed to say but I don't feel that way.**

LESSON: Counsel must develop responses from juror such as "I think so" and "I would certainly try." The test for excusing for cause is whether there is a reasonable doubt as to the juror's impartiality. The definition of impartiality is whether the juror can lay aside any bias or prejudice and render his/her verdict solely upon the evidence presented and the instructions on the law given by the Court. The final decision is within the Trial Court's discretion based upon what the Court hears and observes and will not be set aside absent manifest error. *Lusk v. State*, 446 So.2d 1038 (Fla. 1984); *Mills v. State*, 462 So.2d 1075 (Fla. 1985); *James v. State*, 736 So.2d 1260 (Fla. 4th DCA 1999); *Montozzi v. State*, 633 So.2d 563, (Fla. 4th DCA 1994).

EQUIVOCAL JUROR RESPONSES

Brown v. State, 728 So.2d 758 (Fla. 3d DCA 1999)

A juror in a robbery prosecution stated that "a good friend of mine was involved in an attempted murder . . . and I have little patience for these types of crimes." The Trial Court attempted to rehabilitate the juror asking whether the juror could put these "personal feelings" aside. The juror responded, "I'm not really positive . . . I can't say for sure." The Court then said, "If I instructed you that you could not take (your feelings) into consideration, that you had to listen and judge this case solely based on what you hear without being influenced by any of those things, could you follow that instruction?" The juror responded, "Yeah, I think so." The Defense unsuccessfully challenged the juror's competency to sit as a juror.

The Appellate Court reversed, finding that the " . . . Trial Court's discretion is not absolute . . . ." The Appellate Court found that the juror's responses were "equivocations" which raised reasonable doubt as to the juror's fairness.

Also, in *Brown,* the concurring opinion found that the Trial Court also manifestly erred in failing to excuse an additional prospective juror for cause. The prospective juror stated, "I was held up at gunpoint and I don't have any sympathy." The Trial Court tried to rehabilitate and the juror responded that he could set aside his personal feelings. Later, in response to Counsel's questions as to whether he might relive the incident, the prospective juror said, "I can't say 'yes' or 'no,' it all depends." The Appellate Court said, "It is difficult to understand how (the juror) could have been sufficiently rehabilitated to serve as a fair and impartial juror in a case of this nature. As the Defendant correctly asserts, a juror is not impartial when one party must

overcome that juror's preconceived opinion in order to prevail." See *Hamilton v. State*, 547 So.2d 630 (Fla. 1989); *Hill v. State*, 477 So.2d 553 (Fla. 1985).

Kopsho v. State, 959 So.2d 168 (Fla. 2007)

William Michael Kopsho was indicted, tried, and convicted of armed kidnapping and first-degree murder of his wife, Lynne Kopsho. The question before this Court is whether the Trial Court should have granted a cause challenge based on Mullinax's equivocal responses when he was asked if he could be impartial if Kopsho exercised his right not to testify. As noted in *Busby v. State*, 894 So.2d 88, 96 (Fla. 2004), the mere fact that a juror gives equivocal responses does not disqualify that juror for service. The question is whether the juror's responses were sufficiently equivocal to generate a reasonable doubt about his fitness as a juror. *Id*.

During voir dire, the following exchange occurred between Mullinax and Defense Counsel:

> **MR. MILLER [Defense Counsel]: . ..Is there anyone on this panel who is going to have a difficult time returning a verdict in this case without hearing from my client?**
>
> **JURY VOIR [D]IRE: (no response)**
>
> **MR. MILLER: I mean, it's okay if you have a problem with that. Just because the law says--I am getting back to what I talked about earlier on.**

This is an extremely important point. Just because the law says that you cannot presume anything--I am not telling you whether or not you are going to hear from Mr. Kopsho.

Again these are hypothetical questions. But if you did not, the Court is going to instruct you that you can't draw anything from that. That that is irrelevant. Should not come into your thinking.

My question is: Does anybody have a problem with that? Does anybody think that the law should be different?

MR. MULLINAX: I do. I think he should have to.

MR. MILLER: Okay.

MR. MULLINAX: I know the law is not that way, but I think so.

MR. MILLER: Now again, a more difficult, philosophical question. You know setting aside thoughts like that are tough to do. Can you do it?
MR. MULLINAX: I don't know.

MR. MILLER: You don't know?

MR. MULLINAX: Whether he is guilty or not, you have to stand before

your maker. You are going to have to give an account for what you did here. That is what I think the law should be.

MR. MILLER: I understand that. And I respect that. You know that. I told you, and I meant it. I want to hear what you really feel deep down in here. (indicating)

But what I am asking is: Is there a possibility feeling that way, you would not be able to set that aside and that you would have trouble deliberating this case and not considering that in deliberations if Mr. Kopsho chose not to testify?

You don't know? In other words, you are not sure?

MR. MULLINAX: I am not sure.

MR. MILLER: Okay.

MR. MULLINAX: But I would like to hear his side.

MR. MILLER: That is why I asked. No wrong answers. I respect that.

MR. HANSON [another venire person]: I agree.

MR. MULLINAX: Unless you have an eyewitness account, everything

else is hearsay, according to the way I believe. It's all hearsay, unless you have a witness that saw him do it.

The only two people who know what happened is him and the person who died, unless he can give an account that it did not happen or a way it happened.

Neither the State nor the Trial Court attempted to rehabilitate Mullinax after this exchange with Defense Counsel. The Defense moved to strike Mullinax for cause because Mullinax was not certain that he could deliberate impartially in the event that Kopsho chose not to testify. The Trial Court denied the motion, explaining:

THE COURT: At no time did [Mullinax] indicate that he would be anything other than fair and impartial. Actually, he couched his comment by saying: Unless you have eye witness statements that he killed someone, I would like to hear his side of the story. Correct me if I'm wrong Counsel for the Prosecution, but do you not have such statements?

MR. TATTI: Yes.

THE COURT: I recognize also, Counsel for the Prosecution, do you intend to introduce the videotaped statement on Mr. Kopsho after his

arrest?

MR. TATTI: Yes.

THE COURT: In which case, Mr. Kopsho's version of events would also be before the jury. But I did not find his answers to indicate he would not be impartial. Accordingly the challenge for cause is denied.

Mullinax's equivocation regarding his ability to be impartial cannot be distinguished from the juror comments at issue in *Overton v. State*, 801 So. 2d 877 (Fla. 2001). In *Overton*, this Court found that the Trial Court erred in refusing to dismiss for cause a juror who expressed his belief that the Defendant should testify.

Specifically, when questioned by Defense Counsel, juror Russell stated: "I always think if a person's innocent they should get up on that stand and speak for themselves. That's the way I believe. But also, I understand what the Judge said, too. It's like confusing to me. . . . But in all honesty, that's what I really believe. I believe a person should get up there and say, I didn't do this." *Id.* at 890. Juror Russell was then further questioned by the Trial Court:

THE COURT: When we were out there in the open group there, you had some reservations about the Defendant's right to remain silent.
MR. RUSSELL: Yeah.

THE COURT: What if, as part of the evidence, you were not presented with testimony from the Defendant?

MR. RUSSELL: Well, I will--I will be able to follow your instruction without--

THE COURT: meaning if I sit here and say he doesn't, the Defendant--

MR. RUSSELL: If he doesn't testify and you say that he doesn't have to, then I respect that.

THE COURT: Not only doesn't he have to, but it can't be considered as evidence of guilt.

MR. RUSSELL: Right, I would--right.

THE COURT: It cannot be used in any adverse way against him.

MR. RUSSELL: Right.

THE COURT: It cannot come into your deliberations whatsoever.

MR. RUSSELL: Right.

THE COURT: Yesterday you had reservations about that.

MR. RUSSELL: Well, that's--right, that's the way I always feel about it when someone doesn't take the stand, I figure they've got something to hide. That's the way I've always believed.

THE COURT: Right.

MR. RUSSELL: But I can shut that out. If you tell me to shut it out, I still shut it out.

In light of this precedent and the record on appeal, the Appellate Court in *Kopsho* disagreed with the trial judge's conclusion that "[a]t no time did [Mullinax] indicate that he would be anything other than fair and impartial." Like juror Russell in *Overton*, Mullinax expressed a belief that the law should require a Defendant to testify. Most importantly, when asked if he could set aside his personal beliefs while deliberating, Mullinax repeatedly answered that he was not sure if he could disregard a Defendant's decision not to testify. Mullinax never stated that he would be able to deliberate impartially if seated on Kopsho's jury were Kopsho to decide not to testify. Mullinax's consistently equivocal responses raise reasonable doubt about his fitness as a juror.

Furthermore, the trial judge's conclusion that there was no reasonable doubt regarding Mullinax's impartiality because the Prosecution would be admitting Kopsho's taped statements is not a correct application of law. The

Appellate Court pointed out that it has repeatedly held that the presumption of innocence is defeated if "a juror is taken upon a trial whose mind is in such condition that the accused must produce evidence of his innocence to avoid a conviction." *Overton*, 801 So.2d at 891 (quoting *Singer v. State*, 109 So.2d 7, 24 (Fla. 1959) (quoting *Powell v. State*, 131 Fla. 254, 175 So. 213, 216 (Fla. 1937))). Whether the Defendant's "version of events" will ultimately be presented to the jury is immaterial. A prospective juror who cannot presume the Defendant to be innocent until proven guilty is not qualified to sit as a juror.

In summary, the record reflects that Mullinax repeatedly admitted that he was not certain whether he could deliberate in an unbiased manner in this type of case. This record can support no other conclusion than that Mullinax should have been excused from the panel for cause. The Trial Court erred in denying the challenge for cause.

The Appellate Court agreed that Defense Counsel properly preserved this issue for review and demonstrated prejudice pursuant to this Court's decision in *Busby v. State*, 894 So.2d 88 (Fla. 2004). In *Busby*, a majority of the Court held:

[E]xpenditure of a peremptory challenge to cure the Trial Court's improper denial of a cause challenge constitutes reversible error if a Defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury. *See Trotter v. State*, 576 So. 2d 691 (Fla. 1991). As explained in *Trotter*, "This juror must be an individual who actually sat on the jury and whom the Defendant either challenged for

cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted." *Id*. at 693. A Defendant cannot demonstrate prejudice if the Trial Court grants the same number of additional peremptories as cause challenges that were erroneously denied. *See Conde*, 860 So.2d at 942; *Busby*, 894 So.2d at 96-97.

In the instant case, Defense Counsel challenged juror Mullinax for cause. The trial judge denied this challenge. Later, Defense Counsel used a peremptory challenge to strike Mullinax. After exhausting *all* remaining peremptory challenges, Defense Counsel requested an additional peremptory, noting that the additional peremptory would be used to strike potential juror Bellet.

Concurring Opinion (J. Bell)

I agree that the trial judge erred in denying Kopsho's cause challenge to venire member Mullinax; however, Kopsho immediately corrected this error by electing to use one of his ten peremptory challenges to strike Mullinax from the panel. Consequently, the jury that rendered the verdict in this case was impartial. Given these undisputed facts, I again urge this Court to abandon the *Trotter* per se prejudice standard and to adopt the actual prejudice standard applied by both the federal courts and the vast majority of state courts.

In *Busby v. State*, 894 So.2d 88, 105-14 (Fla. 2004) (Bell, J., concurring in part and dissenting in part), I explained in detail my disagreement with this Court's continued adherence to the *Trotter* per se prejudice standard. Here, as in *Busby*, the majority applies the *Trotter* standard to overturn a

verdict rendered by a constitutionally impartial jury. *See Trotter v. State*, 576 So.2d 691 (Fla. 1991). I write again in this case to emphasize two points. First, I highlight how the majority's adherence to the *Trotter* per se prejudice standard ignores the curative purpose of peremptory challenges, a core reason behind the statutory grant of these challenges. Second, by citing to the most recent state supreme court decision on this issue, I reiterate my argument in *Busby* that this Court should join the ever-growing majority of states that have abandoned or rejected a per se prejudice standard in favor of the federal rule requiring a showing of actual prejudice. Under this actual prejudice standard, no reversible error occurred in Kopsho's trial because, as he concedes, no juror who decided his case was legally objectionable.

I. The *Trotter* Deficiency

The *Trotter* per se prejudice standard ignores the curative purpose of peremptory challenges. These challenges give all parties, including criminal defendants, the ability to correct improperly denied cause challenges at the trial level. When parties elect to use a peremptory challenge for this purpose, they immediately cure the trial judge's mistake, ensure that the trial is conducted before an impartial jury, and thereby alleviate the delay and expense of a retrial after appeal. In other words, peremptory challenges work in tandem with cause challenges to secure the constitutional right to trial by an impartial jury. See U.S. Const. Amend. VI; Art. I, §§ 16, 22, Fla. Const.; *see also* William T. Pizzi & Morris B. Hoffman, Jury Selection Errors On Appeal, 38 Am. Crim. L. Rev. 1391, 1406 (2001) (explaining that peremptory and cause challenges "compliment [sic] one another" in protecting the right

to an impartial jury). The majority's continued adherence to the *Trotter* per se prejudice rule in criminal cases vitiates the curative purpose of peremptory challenges.

The failure of the *Trotter* standard to account for the curative purpose of peremptory challenges is amplified by the suggestion that Trial Courts can avoid reversal on appeal by granting extra peremptory challenges to cover any Defense cause challenges that an Appellate Court may later decide were improperly denied. *Majority Op*. at 8 (citing *Busby*, 894 So.2d at 97 ("A Defendant cannot demonstrate prejudice if the Trial Court grants the same number of additional peremptories as cause challenges that were erroneously denied.")). This suggestion ignores two simple truths. Trial judges (1) do not knowingly err in denying cause challenges and (2) cannot divine the result of a future appellate decision on the issue. It also ignores the fact that the *Trotter* rule encourages Counsel to "push the envelope" in voir dire by over-asserting cause challenges, and when these challenges are denied, seeking extra peremptory challenges.

Lastly, my overarching concern is that the *Trotter* standard unnecessarily manufactures reversible error. The *Trotter* standard "[b]estow[s] a substantial right upon the exercise of a peremptory challenge," and "manufactures reversible error in cases where the case has been decided by a fair and impartial jury." *Stopher v. Commonwealth*, 57 S.W.3d 787, 814 (Ky. 2001) (Keller, J., dissenting), quoted with approval in *Morgan v. Commonwealth*, 189 S.W.3d 99, 105 (Ky. 2006).

Stated otherwise, the *Trotter* standard causes Florida courts to retry cases in which a Defendant has suffered no actual prejudice because his constitutional right to an impartial jury was not violated. Such unnecessary reversals are costly to the judicial system and provide a strong incentive to state legislators to cut down or eliminate peremptories. *Busby*, 894 So.2d at 114 (Bell, J., concurring in part and dissenting in part) (citing *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (Kozinski, J., dissenting); *State v. Hickman*, 205 Ariz. 192, 68 P.3d 418, 426 (Ariz. 2003)).

N.B. The Justice Bell concurring opinion has been included to indicate that the *Trotter* per se standard is the Florida state court standard. I suggest there may be a change with the Florida new court justices.

Reyes v. State, 56 So.3d 814 (Fla. 2d DCA 2011)

Reyes was charged with sexual battery on a child less than twelve years of age based on an alleged incident that took place in May 2008. When asked by the State, "Would your involvement with them affect your ability to focus on the facts we present to you?" the following exchange took place:

> **[Juror]: *Very possible.* My mother—there were things in my family with my mother and her sister. There is something on my boyfriend's side with his grandson.**
>
> **[State]: That are possible victims of sex abuse?**
>
> **[Juror]: Yes, ma'am.**

[State]: You don't think you could put those aside?

816 [Juror]: I have seen, when it comes to my mother and sister—or her sister, I mean—*what they have gone through* in their lives. *It would be very difficult actually.

[Defense counsel]: To reiterate, I know this is regarding your son. You can be fair. *But with the actual charges and respect to your family history, can you be fair based on that charge?*

[Juror]: *I don't know.* What happened with my mother and her sister happened years ago. *That was pushed under the rug because nobody wanted to believe it happened to them.* That was with them. Now, recently, back in July, my boyfriend's grandson, there was a family member on his wife's side who was accused of asking my boyfriend's grandson to do something with him. I don't know if it is true or isn't.

[Defense counsel]: *You would have difficulty? You are not for sure?*

[Juror]: *Uh-huh.*

(Emphasis added.) Defense counsel asked for a cause challenge "regarding whether [the juror] is not sure if she is fair and impartial regarding the sex cases and what has gone on in her personal life." The State objected to the challenge, and the trial court sustained the objection, stating, "I think my opinion is that she can be a fair and impartial juror." Defense counsel then stated, "Your Honor, since the Court did deny the cause challenge, we ask

permission, although we are out of strikes, we would ask for a strike on [the juror] because we would have used it, had we had one." The trial court denied the request for an additional peremptory strike. A strike for the alternate seventh juror was granted, and the trial court noted, "I will not get an alternate. I will go ahead and take a chance."

We conclude based on the nature of the crime at issue and the responses the juror provided during the information-gathering process that the trial court erred in denying Reyes' cause challenge of the juror. A juror should be excused for cause where there is reasonable doubt concerning the juror's ability to render an impartial verdict. *Darr,* 817 So.2d at 1093 (citing *Hill v. State,* 477 So.2d 553, 555 (Fla.1985)). "In close cases, any doubt as to a juror's competency should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality." *Thomas v. State,* 958 So.2d 1047, 1050 (Fla. 2d DCA 2007).

EQUIVOCAL JUROR RESPONSES NOT CLARIFIED BY THE DEFENSE

Byers v. State, 776 So.2d 1012 (Fla. 5th DCA 2001)

Juror was questioned and stated his friend shot his wife and went to prison for fifteen years. Asked by the prosecutor if he thought this would affect his ability to sit as a juror, he said "I don't think so." Asked if he could put this out of his mind, the juror responded "I will certainly try." Defense Counsel did not pursue the answers. Defense Counsel challenged for cause (after he had no further peremptory challenges).

The Appellate Court affirmed and held, "[Juror's] response to prosecutor's questions does not rise to the level of being equivocal, and thus the trial judge did not err in refusing to excuse him for cause."

LESSON: Counsel must clarify phrases such as "I don't think so" and "I will certainly try." Add to this list "I believe so" and "I'll do my best." Not only are clarifications by follow-up questions related to cause challenges, but Counsel may find further responses necessary to whether a peremptory challenge should be exercised on that juror.

ASSISTANT STATE ATTORNEY FROM PROSECUTING OFFICE SITTING AS JUROR

Bethel v. State ,122 So.3d 944 (Fla. 4th DCA 2013)

Defendant argues that the trial court erred in denying his cause challenge to a potential juror who was an assistant state attorney in the same state attorney's office as the prosecutor. After *voir dire* concluded, the defense moved to strike Juror 7 for cause. The following exchange occurred:

Defense: She is currently a prosecutor with the Broward State Attorney's Office. I think it is inappropriate for the State Attorney to be both prosecuting the case and deciding the case. There is one sitting on this table, and there is one in the jury box. I think that there is just inherent conflict based on that employment alone. Again, it is not that she is on the administrative staff with the prosecutor's office. She is actually a prosecutor prosecuting cases.

Court: I will deny your challenge for cause on that basis.

The defense ultimately used a peremptory challenge on Juror 7. After

exhausting its remaining peremptory challenges, the defense requested the court to grant an additional peremptory challenge. In support of the request, the defense argued that because the court would not strike Juror 7 for cause, the defense used a peremptory challenge on Juror 7. The defense then stated that, if the court granted an additional peremptory challenge, the defense would use that challenge on Juror 4. The court denied the request. Juror 4 was selected for the jury.

While the assistant state attorney here stated that she could be a fair juror, that assurance is not determinative of the question, but the trial court must look at all of the evidence before it. Here, the prospective juror was the supervisor of the assistant state attorney trying the case, and one of her duties was to evaluate her performance. Also, as noted above, she was an employee at will of [the] State Attorney … in whose name all prosecutions are brought….

Not only for the reasons cited above *but also for the integrity of the judicial process and the guarantee of the defendant's constitutional right to trial by a fair and impartial jury,* we hold that it is error to fail to excuse from jury service an assistant state attorney from the very office charged with prosecuting a defendant.

We acknowledge that the Florida Legislature has not enacted a law disqualifying as jurors all assistant state attorneys from the prosecuting office. However, our holding in *Denson,* that it is error to fail to excuse from jury service an assistant state attorney from the very office charged with prosecuting a defendant, continues to have force and effect. *Cf. Aurora Grp.,*

Ltd. v. Dep't of Revenue, **487 So.2d 1132, 1133 (Fla. 3d DCA 1986) ("It is ... clear that the common law shall have continuing force and effect where the Legislature has not acted to change it.").**

In sum, because the trial court erred in denying the defendant's cause challenge to Juror 7, we reverse the defendant's conviction and sentence, and remand for a new trial.

LACK OF INFORMATION CAUSED BY COUNSEL'S FAILURE TO INQUIRE CANNOT BE A REASON TO SUPPORT A PEREMPTORY CHALLENGE

Fernandez v. State, 746 So.2d 516 (Fla. 3d DCA 1999)

The prosecutor struck an African-American juror based upon "lack of information" due to failure of Counsel to inquire of juror. The Appellate Court reversed and held that "An attorney cannot decline the opportunity to question a prospective juror, then use the lack of information caused by this failure as a reason to support his or her peremptory challenge. A perfunctory examination (or none) is indicative of a disingenuous or pretextual reason for a challenge."

Slappy v. State, 522 So.2d 18 (Fla. 1988)

The utter failure to question challenged jurors on the grounds alleged for bias renders the State's explanation immediately suspect.

Burris v. State, 748 So.2d 332 (Fla. 4th DCA 1999)

Explanation given by State that prospective juror was unable to understand the proceeding was proper race-neutral basis for peremptory strike.

Overstreet v. State, 712 So.2d 1174 (Fla. 3d DCA 1998)

A perfunctory or cursory examination of a potential juror as to her uncertainty about accepting testimonial evidence was insufficient.

Haile v. State, 672 So.2d 555 (Fla. 2d DCA 1996)

The utter failure to question a potential juror about the subject matter forming the basis of the strike was a source of immediate suspicion.

FAILURE TO ADEQUATELY VOIR DIRE OR REQUEST INDIVIDUAL VOIR DIRE

Kilgore v. State, 55 So.3d 487 (Fla. 2011)

Defendant was convicted of first-degree murder and sentenced to death. He filed a motion for postconviction relief claiming several grounds, including ineffective assistance of Counsel. Defendant alleged that Counsel was ineffective, among other things, for failing to adequately voir dire on the issues of race and homosexuality. Specifically, Defendant claimed that trial Counsel was ineffective for failing to (1) request individual voir dire on the issues of race and homosexuality; (2) effectively inquire into issues of bias concerning homosexuality or race; (3) elicit meaningful responses indicative of prejudice; and (4) request additional peremptory challenges.

In support of his motion, the Defendant referred to responses from eight (8) of the twelve (12) selected jurors that indicated anti-homosexual sentiment. The Trial Court held an evidentiary hearing. Defense Counsel testified that he did not feel it was necessary to voir dire on the issue of homosexuality and was comfortable with the jurors' responses. Furthermore, Counsel testified that he did not see the case as one of race and did not want to highlight a non-issue.

The Trial Court found Defense Counsel to be credible and that he had made a strategic decision not to conduct individual voir dire or further inquire into issues of homosexuality and race. The Trial Court ruled that Counsel was not deficient in his performance, and thus the Defendant did not suffer any prejudice.

The Florida Supreme Court affirmed and found Defendant was not entitled to relief.

Solorzano v. State, 25 So.3d 19 (Fla. 2d DCA 2009)

Defendant was convicted of one (1) count of driving under the influence (DUI) manslaughter and three (3) counts of DUI with serious bodily injury. He filed a motion for postconviction relief alleging several grounds. The Trial Court summarily denied seven (7) of the nine (9) grounds for relief and denied the remaining two (2) grounds after an evidentiary hearing. Defendant appealed the denial of his postconviction motion.

In his motion for postconviction relief, the Defendant alleged that trial Counsel was ineffective for failing to move to strike a prospective juror either

for cause or peremptorily after she stated during voir dire that before making a decision she would want to hear "everything from everybody." According to the Defendant, this answer suggested that the juror would shift the burden to the Defense.

The Trial Court denied this claim of juror bias and attached portions of the transcript of jury selection during which the juror was questioned to show that the juror was not actually biased as required under *Carretelli v. State*, 915 So.2d 1256 (Fla. 4th DCA 2005).

In reviewing the Trial Court's denial of this claim, the Appellate Court agreed with the denial but on different grounds. According to the Second District Court of Appeal, the Defendant's claim was not one of juror bias that required a showing of actual bias under *Carratelli*, but rather a claim of ineffective assistance of Counsel based on failure of Counsel to conduct meaningful voir dire after the juror made the statement at issue.

In his motion, the Defendant contended that had Counsel conducted further questioning of the juror, he might have uncovered a basis to challenge her for cause or peremptorily. In other words, Counsel's failure to conduct a meaningful voir dire prejudiced the Defendant as it prevented Counsel from intelligently and effectively using challenges against the juror.

In reviewing this claim, the Appellate Court noted that a claim that Counsel was ineffective for failing to "follow-up" on questioning to establish grounds for a for-cause challenge has been held to be legally insufficient because such a claim is based on mere conjecture. *See Reaves v. State*, 826 So.2d 932, 939 (Fla. 2002); *Green v. State*, 975 So.2d 1090, 1105 (Fla. 2008).

Thus, the Appellate Court held that Defendant's claim that Counsel was ineffective for failing to conduct meaningful voir dire was based on mere speculation and therefore, Defendant was not entitled to relief on this ground.

The Appellate Court then reviewed the other claim made by Defendant in his postconviction motion which had been denied by the Trial Court. The Defendant alleged that Counsel was ineffective for failing to question a prospective juror at all during voir dire who ended up being seated on the jury. In denying this claim, the Trial Court applied the *Carratelli* standard and held that the Defendant had failed to show actual bias on the part of the juror.

However, again the Appellate Court disagreed with the Trial Court's analysis of the claim as one of juror bias. Instead, the Trial Court viewed Defendant's claim as one of ineffective assistance of Counsel for failing to conduct meaningful voir dire. Here, Defendant alleged that Counsel wholly failed to question the prospective juror during voir dire and that, as a result, Counsel had no basis to determine whether the juror was competent to sit as an unbiased juror. Not only was the juror not questioned by Defense Counsel, but the juror was not asked any questions by the State or by the Court.

The Appellate Court found that the Defendant had stated a facially sufficient claim for ineffective assistance of Counsel. It remanded the case and ordered the Trial Court to attach record excerpts that refuted the claim of inadequate voir dire or to hold an evidentiary hearing on the issue.

In its opinion the Appellate Court noted the importance of jury selection in criminal cases. It wrote:

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the Court's instructions and evaluate the evidence cannot be fulfilled. *See Connors v. United States*, 158 U.S. 408, 413, 15 S.Ct. 951, 953, 39 L.Ed. 1033 (1895). Similarly, lack of adequate voir dire impairs the Defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts."

The Court pointed out that failure of Counsel to question a juror during voir dire may be deficient performance. Consequently, "prejudice would be inherent in the denial of the Defendant's constitutional right to be assured of a fair trial before an impartial jury." *See Rosales-Lopez*, 451 U.S. 182, 188 (1981).

According to the Appellate Court, a claim of prejudice caused by a failure of Defense Counsel to question a juror could be conclusively refuted one of two ways. It can be refuted by record evidence that the Trial Court or prosecutor asked sufficient questions of the venire, which would make any questioning by Defense Counsel redundant. The other way to conclusively refute a claim of prejudice caused by a failure of Defense Counsel to conduct any voir dire of a juror is by attaching record evidence that the Defendant personally and affirmatively accepted the jury prior to its being sworn, thus affirmatively representing to the Court that the jury composition and jury selection process were acceptable.

FAILURE TO STRIKE JURORS FOR CAUSE OR IF DENIED TO EXERCISE PEREMPTORY CHALLENGES AND FAILURE TO RETAIN JUROR

Nelson v. State, 73 So.3d 77 (Fla. 2011)

Defendant was convicted of first-degree murder and sentenced to death. He filed a postconviction motion alleging, among other things, that Counsel was ineffective for failing to move to strike for cause the venire members who were allegedly pro-death penalty, for failing to retain a juror who was anti-death penalty, and for failing to use peremptory strikes to remove the pro-death penalty jurors.

The Florida Supreme Court noted that the test for juror competency and impartiality is whether or not a given juror is capable of placing any bias or prejudice aside and is willing and able to render a verdict recommendation based solely on the evidence presented at trial and the instructions on the law given by the Court. If a juror does not possess such impartiality, it is the duty of Trial Counsel to ferret out that state of mind during voir dire and challenge for cause. However, the Trial Court is not required to excuse the juror if, upon further questioning, the Court is able to establish that the juror is able to make a decision based solely on the evidence and the law.

If a Trial Court denies a cause challenge, Counsel may move to strike through the use of a peremptory challenge. However, the Florida Supreme Court pointed out that it is very difficult for a Defendant to prove that a jury would have reached a different verdict if Trial Counsel had used peremptory challenges in a different manner. Such a claim is usually mere speculation

that fails to rise to the level of prejudice required to establish a claim of ineffective assistance of Counsel for which postconviction relief is granted.

In this case, the Defendant claimed that Trial Counsel was ineffective for failing to strike six (6) venire members, three (3) of whom actually served as jurors, due to their predisposition in favor of the death penalty. However, upon a review of the record, the Florida Supreme Court noted that Trial Counsel did move to strike for cause those venire members with a predisposition in favor of the death penalty.

However, at that stage of questioning, the jurors had not been provided an explanation of Florida law. Upon proper explanation and further questioning, these venire members indicated that they could follow the law and consider both aggravating and mitigating factors. Therefore, the Florida Supreme Court found that Counsel was not ineffective for failing to move for cause those venire members upon proper and full questioning.

The Defendant then claimed that Trial Counsel should have moved to strike peremptorily those same jurors who had survived the cause challenges. However, the Defendant is unable to establish how the failure of Trial Counsel to exercise peremptory challenges for the allegedly pro-death penalty jurors prejudiced the outcome of his case. The Florida Supreme Court held that it was mere speculation on the Defendant's part that the use of peremptory challenges in a different manner would have resulted in a positive outcome for him.

Finally, the Defendant claims that Trial Counsel was ineffective because he failed to ensure that a juror who was against the death penalty served on

the jury. However, the Florida Supreme Court found that the Trial Court's excusal of the prospective juror for cause was proper because the venire person stated that he could not set aside his personal aversion to the death penalty and impartially recommend a sentence, even after Trial Counsel provided a reasonable justification for imposition of the death penalty.

In sum, the Florida Supreme Court did not find that Counsel was ineffective during jury selection as alleged by the Defendant.

IX. JURY SELECTION/JUROR'S BIAS OR IMPARTIALITY /NOT CURED BY COURT REHABILITATION

JUROR'S INITIAL IMPARTIAL STATEMENT MAY NOT BE CURED BY LATER STATEMENT THAT JUROR COULD FOLLOW THE LAW

Lowe v. State, 718 So.2d 920 (Fla. 4th DCA 1998)

The Appellate Court held it was "manifest error" to retain a juror who had stated he would require a Defendant to present some evidence of innocence. The Court further stated that "This would be true even when the juror later states he would be able to follow the law." The Appellate Court noted that "juror's single statement that he would acquit if the State presented insufficient evidence was tortuously teased from him only by the most pointed of leading questions."

Huber v State, 669 So.2d 1079 (Fla. 4th DCA 1996)

Trial Court erred when it failed to dismiss juror who initially doubted he could presume Defendant innocent because he "believed arrest indicated guilt" and believed "police do not arrest innocent people" despite Trial Court's

attempt to rehabilitate juror by eliciting response that he could follow the law. The Court indicated that the juror's impartiality was not overcome by his subsequent capitulation and agreement that he would follow the law as given to him by the Trial Court and therefore, the Trial Court erred when it did not dismiss him for cause.

JUROR'S FREE-SPOKEN EXPRESSIONS OF BIAS ARE NOT CURED BY THE TRIAL COURT'S REHABILITATION BASED UPON QUESTIONS OF APPLYING THE LAW

Bryant v. State, 765 So.2d 68 (Fla. 4th DCA 2000)

Defendant was charged with sexual battery on two of his children. Juror responded, "It happened in my family growing up, to my two sisters, so right off the bat I've got him guilty." The juror then stated, "It would be hard for me to (presume the Defendant innocent,)" and "I would be biased (in cases involving children)." Lastly, the juror commented, "I don't understand (that the sexual batteries happened five times.)"

The Trial Court asked the juror if he would be able to require the State to prove their case beyond a reasonable doubt, to which the juror said, "I can do that." The Defense Counsel moved to challenge for cause, which was denied, and thereafter preserved.

The Appellate Court reversed finding that the "responses prompted by questions from the judge are simply insufficient to do away with the doubt cast upon (the juror's) partiality as the result of his earlier free-spoken expressions of bias, his emotionally charged responses to the charges, and his

candid remark that "right off the bat I've found him guilty." *See Williams v. State*, 638 So.2d 976 (Fla. 4th DCA 1994).

JUROR'S BIAS FROM PERSONAL EXPERIENCE MAY BE SO MANIFEST THAT COURT'S ATTEMPT TO REHABILITATE EXTRACTS RESPONSES OF SIMPLE RESPECT FOR COURT AUTHORITY

Straw v. Assoc. Doctors Health and Life, 728 So.2d 354 (Fla. 5th DCA 1999)

During voir dire, a juror was asked about his feelings toward insurance companies. He said, "I do. It is negative." The juror was then asked whether there was anything that could be said to him that would change his opinion. The juror responded, "(My opinion) is subconscious. It is there. . . . if they came down it would be real close. It would be negative, you know." The Trial Court then sought to rehabilitate the juror by asking, "You had indicated . . . you could be fair and impartial. . . and try this case based on the evidence even though you have had some personal experience with insurance companies but...the question is, can you evaluate the facts as they come to your attention in this trial?" The juror responded, "Yes, I believe so." Defense Counsel challenged for cause which was denied.

The Appellate Court reversed holding that the juror:

a) Clearly manifested a bias against insurance companies and that bias was based on his personal experience; and

b) The juror's later responses to the Court's attempt to rehabilitate were equivocal and he may have responded affirmatively simply out of respect for the Court.

Although the Appellate Court recognized that the Trial Court has great discretion in ruling on cause challenges, it held that the Trial Court should favor dismissing jurors whose bias or prejudice cannot be set aside. The Appellate Court compared the exchanges to those in *Goldenberg v. Regional Import and Export Trucking, Co.*, 674 So.2d 761 (Fla. 4th DCA 1996), wherein a juror's statement that she was a "fair person" was held to be insufficient to demonstrate impartiality where she earlier indicated bias against personal injury plaintiff. The *Goldenberg* Court noted that "[c]lose calls involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality."

LESSON: This analysis has a four-step test:
(a) Juror manifests a clear bias;
(b) Juror's bias comes from personal feelings;
(c) Juror's responses to Court rehabilitation are equivocal; and
(d) Juror's responses are to agree out of respect for the Court.

If (a), (b), and (c) are shown, (d) does not need a finding of genuineness from the Court as juror is a cause challenge
If (a) and (b) are shown but not (c), then (d) becomes a discretionary call by the Trial Court.

JUROR'S COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY

***Welch v. State*, 189 So.3d 296 (Fla. 2d DCA 2016)**

[DEFENSE COUNSEL]: [T]he judge will instruct you that you are not to consider, you know, the defendant's, Mr. Welch, exercising his right to remain silent as evidence of guilt against him. Mr. Strickland, are you comfortable going through a whole trial without hearing Mr. Welch testify?

JUROR STRICKLAND: Am I uncomfortable?

[DEFENSE COUNSEL]: Are you comfortable with it?

JUROR STRICKLAND: No.

[DEFENSE COUNSEL]: No, you are not? You would expect that the person on trial would testify in [his] or her defense?

JUROR STRICKLAND: Yes. That's—that's just me.

[DEFENSE COUNSEL]: That's just you. And that's perfectly fine, you know. It is important to be completely candid. So, you know, if I told you, you know—so, if it happened that he didn't testify today, that's going to be lingering in your mind if you are deliberating?

JUROR STRICKLAND: Honestly, it would be lingering, yes.

. . . .

JUROR STRICKLAND: If it's proven beyond a reasonable doubt, I am okay with that. If there is that, you know, in between where he could have helped or hurt himself by testifying, that would be the thing that's

lingering in my mind.

. . . .

[DEFENSE COUNSEL]: Okay. So, you don't know how—to what extent that would weigh on your mind, is that fair to say?

JUROR STRICKLAND: There you go.

. . . .

[DEFENSE COUNSEL]: No. So, you know, would you agree with the right to remain silent? I mean, are you going to hear the case on your own, and if you don't hear Mr. Welch testify you wouldn't—it wouldn't affect your deliberations, or would it affect your deliberations?

JUROR WOLFF: Probably not.

[DEFENSE COUNSEL]: Probably not?

JUROR WOLFF: Yes.

When presented with a challenge for cause to a prospective juror, a trial court must consider "if there is basis for any reasonable doubt" concerning that prospective juror's ability "to render an impartial verdict based solely on the evidence."

"Although the trial court has discretion in determining a challenge for cause, the challenge must be granted if there is any reasonable doubt regarding a potential juror's impartiality. 'Ambiguities or uncertainties about a juror's impartiality should be resolved in favor of excusing the juror.'

In the case at bar, both Mr. Strickland and Ms. Wolff expressed misgivings about how they would judge the facts of the case if Mr. Welch did not testify in his defense. Mr. Strickland very candidly responded that if the State's case were "in between" being proven or unproven, then Mr. Welch's refusal to testify "would be the thing that's lingering in my mind." Ms. Wolff agreed, adding that she would "need to hear everything," clearly referring to Mr. Welch's testimony. These views—held by two prospective jurors—would compromise Mr. Welch's right to remain silent and his presumption of innocence.

McKay v. State, 61 So.3d 1178 (Fla. 3d DCA 2011)

The State of Florida filed an information charging McKay with the sale of cocaine within one thousand feet of a school zone. During the initial colloquy during the jury selection process, the following exchange took place:

MR. KRYPEL: You are saying you want to hear from Mr. Terrell McKay?

PROSPECTIVE JUROR A.F.: Yes.

MR. KRYPEL: If you don't hear from Mr. Terrell McKay, you are going to be thinking what is that guy hiding?

You know a bad answer is a false answer.

Outside of the presence of the other jurors, the following exchange took place:

PROSPECTIVE JUROR A.F.: Just the answer to the question counsel

asked. The reason why I said I didn't want to explain wasn't only because as an attorney I have worked in the past—not criminal law, but administrative law. It is almost the government versus an individual. So just as a philosophical versus an individual. So just as a philosophical point as an attorney, the way I would advise my client in this situation, tell me the truth and we will work from there. And I understand counsel. They may have their reason why and strategically and everything else, "Just take the offer."

My concern is *if counsel for whatever reason does not want his client to testify and State presents the evidence and it is credible, then I am going to be more inclined to basically convict* and that is what I want to say. I didn't want to say it in front of the jury because I didn't want somebody to sit there, "If he is an attorney, then he must know something," and that is why I asked for the privacy.

PROSPECTIVE JUROR A.F.: If the State doesn't meet their burden?

THE COURT: What is the verdict?

PROSECTIVE JUROR A.F.: Innocent.

THE COURT: Not guilty?

THE COURT: Would it matter to you at all whether or not Mr. McKay decided to testify? Is there an issue?

PROSPECTIVE JUROR A.F.: It is not necessarily—it is not necessarily an issue, but as I said my only concern is if the State presents the case.

THE COURT: What you are telling me, if you are not convinced beyond and to the exclusion of every reasonable doubt, that it would still be an issue for you as to why Mr. McKay—

PROSPECTIVE JUROR A.F.: No.

THE COURT—didn't testify?

MR. PONT (defense attorney): Bottom line, are you still going to be affected if you are chosen as a juror in this case if the defendant does not testify? It sounds like you may be affected.

PROSPECTIVE JUROR A.F.: I think it is only—this is just being the lawyer part of me. But for all consideration *if the State presents their evidence and I find—hypothetically speaking, I find the evidence to be credible and yet despite cross examination I don't hear from counsel and from your client, then that is going to sway me to the direction to the State's burden.* This is the way I am speaking hypothetically.

Defense counsel ultimately exhausted all of his peremptory challenges. He then requested an additional challenge against another juror which the trial court granted, stating that the court would "allow one and only one."

Based upon the totality of juror A.F.'s responses, we must conclude that the statements clearly established a reasonable doubt as to whether he could render an impartial decision.

Juror A.F. initially stated that he wanted to hear from McKay and requested to speak in private so that his comments would not affect the jury.

Outside the presence of the jury, he unequivocally stated that if the State presented credible evidence and McKay did not testify, he would "be more inclined to basically convict." This statement is entirely at odds with a defendant's presumption of innocence and right to remain silent at trial, two of the most basic tenets at the heart of our system of justice. It served to create a reasonable doubt as to whether this juror could be impartial. If a prospective juror's statements raise reasonable doubts as to that juror's ability to render an impartial verdict, the juror should be excused.

Caldwell, IV v. State, 50 So.3d 1234 (FLA. 2d DCA 2011)

Defendant argues on appeal that Juror E's comments raised a reasonable doubt as to her ability to be impartial and that she was not rehabilitated by the State. The following discussion occurred during *voir dire:*

DEFENSE COUNSEL:.... Now another principle that we need to discuss is the idea of a person[']s not testifying in their own trial. Okay? How do you feel about that ... ?

PROSPECTIVE JUROR [H]: I can deal with that. I can, you know, just draw from the evidence and make a decision.

DEFENSE COUNSEL: Right. Anyone else?

PROSPECTIVE JUROR [E]: I have a question. Why would someone not want to have the opportunity to speak the truth?

DEFENSE COUNSEL: Okay. Can you suggest a reason?

The State then objected, and a sidebar conference was held, during which the trial court overruled the State's objection. The following continued before the prospective jurors:

DEFENSE COUNSEL: [Juror E]?

PROSPECTIVE JUROR [E]: Yes, sir.

DEFENSE COUNSEL: You asked me a question, you said why might a person—

PROSPECTIVE JUROR [E]: Not want to.

DEFENSE COUNSEL: And I asked you, can you think of a reason?

PROSPECTIVE JUROR [E]: Unless they are guilty.

DEFENSE COUNSEL: Unless they are guilty. Does anybody—what about nervousness? Could that be reason? Yes, ma'am?

Defense counsel then used a peremptory strike on Juror E and requested more peremptory strikes, identifying three jurors he wished to strike. The trial court denied defense counsel's request for more peremptory strikes. One of the objectionable jurors served on the jury. Caldwell renewed the objection before the jury was sworn.

Here, even after defense counsel informed the potential jurors that a defendant has an absolute right to not testify, Juror E stated that she did not understand why somebody would not want the opportunity to speak the

truth. When asked by defense counsel why someone might not want to testify, Juror E stated "[u]nless they are guilty." As in *Mitchell,* Juror E's comments created a reasonable doubt regarding her ability to be fair and impartial.

When sufficient grounds arose to sustain the challenge for cause as to Juror E, it was not defense counsel's obligation to rehabilitate her.

Defense counsel twice asked the panel if a decision to not testify would prevent them from finding the person not guilty, but Juror E did not respond to this question. "[A] juror's silence to a question asked of the entire panel" is not sufficient to overcome a concern about the impartiality of that juror caused by the juror's earlier comments.

EQUIVOCAL JUROR RESPONSES/CONTINUED REHABILITATION BY THE COURT MAY BE INSUFFICIENT

Kerestesy v. State, 760 So.2d 989 (Fla. 2d DCA 2000)

Juror No. 1 was asked one question during jury selection as to whether he "could be fair and impartial." The juror said that he would find it "difficult" to follow the law regarding consideration of Defendant's out-of-court confession. No further questions were asked of that juror.

Juror No. 2 responded to the prosecutor's question that she "guessed" she could be fair. Upon questioning by Defense Counsel, the juror further stated, "When the judge was reading the charges, I watched the man, and it's just . . . it's a seed in my mind. He couldn't look out and face the potential jurors." Defense Counsel then asked Juror No. 2 whether she could presume

the Defendant innocent, to which she admitted that she had a doubt in her mind as to whether or not she could do so.

The Court then interjected by asking questions as to burden of proof and reasonable doubt and asked in part ". . . would you follow the law?" to which the juror indicated she would but added, "...when I listened to you read the charges and watched the man, it just, it was an automatic [reaction]."

The Court then asked the juror if she could wait for all the evidence and instructions and arguments of Counsel before "rendering a final decision" to which the juror said, "Yes." Defense Counsel asked, "Would you be able to render a not guilty verdict?" to which the juror answered, "Yes." The Court then asked if the juror said "yes." The Defense requested challenges for cause as to both jurors which the Trial Court denied and then asked for an additional peremptory challenge, which was denied.

The Appellate Court reversed. The Court found Juror No. 2's equivocal responses to have cast a reasonable doubt as to her ability to be a fair and impartial juror. The Court held that both jurors should have been excused for cause based on statements that raised doubt as to their ability to be fair and impartial.

KEY: "The fact that the Trial Court continued questioning until Juror No. 2 relented and stated she would follow the law was not sufficient to erase doubts as to her impartiality." The Appellate Court found Juror No. 2's equivocal response, in itself, sufficient to establish a cause challenge.

The Court then added, "Even when a prospective juror eventually states that he will follow the law, the Court should grant a challenge for cause if it

appears that the prospective juror is nevertheless not in the state of mind to do so." See *King v. State*, 622 So.2d 134 (Fla. 3d DCA 1993); *Singer v. State*, 109 So.2d 7 (Fla. 1959).

JUROR'S EXPRESSED VIEW FOLLOWING RESPONSE THAT HE WOULD "FOLLOW THE LAW"

CIVIL CASE: *Pelham v. Walker*, 2013 WL 5225340 (Fla. 2d DCA 2013)

During jury voir dire, Pelham's counsel asked the venire how they felt about noneconomic damages, such as pain and suffering or loss of enjoyment for the capacity of life. A veniremember, Juror G, stated, "I don't like them, but I can follow the law." When asked why she does not like noneconomic damages, she stated that she was a risk manager and that such damages seemed "punitive against the other side." She explained that for the past twelve years, she had assessed worker's compensation and general liability claims and reviewed about 300 to 400 claims per year. Pelham's counsel asked Juror G if she "might be slightly more defense-oriented," and she answered, "Yes. Yes, absolutely." Pelham's counsel asked if her past experiences might "make it difficult for [her] to be fair and impartial sitting as a juror in this particular case." Juror G answered that "without knowing any more than I do right now," she could not say yes or no. The following exchange then occurred:

[PELHAM'S COUNSEL]: Is there that thought in the back of your head that when, if you got selected on the jury, you might be sitting there thinking, oh, I just know from my experience I'd be looking for certain things

because of what I've analyzed during the past?

[JUROR G]: Yes.

Because he was out of peremptory challenges, Pelham's counsel moved for an additional peremptory challenge. The trial court also denied that request. Pelham's counsel objected to the jury, but the trial court denied the objection, and the jury was seated and sworn with Juror G as a member.

Pelham's counsel moved to strike Juror G from the proposed jury for cause, arguing that her answers indicated that she could not be fair and impartial. The trial court denied Pelham's challenge for cause.

The subsequent questions asked by both attorneys did not serve to rehabilitate Juror G. Even though Juror G later said that she could be fair and that she could follow the law, she never "recanted or receded from [her] earlier expressed view" that she was "absolutely" defense-oriented and believed that noneconomic damages are punitive to the defense.

We conclude that Juror G's answers during voir dire demonstrated a reasonable doubt about her ability to be impartial and that the trial court therefore abused its discretion in denying Pelham's challenge for cause to Juror G.

<u>CIVIL CASE</u>: *Disla* v. *Blanco,* 129 So.3d 398 (Fla. 4th DCA 2013)

In this case, the attorneys questioned the prospective jurors regarding seatbelt use. While discussing comparative negligence, Disla's counsel asked whether any of the jurors felt that, if there was evidence that plaintiff was not wearing her seat belt, they "would automatically find that she was

negligent." The juror in question responded that she could follow the law but thought that someone not wearing a seatbelt would have to be negligent. She then clarified her response that she would follow the law, although in response to a further question she stated that, without hearing any evidence, she felt that someone who did not wear a seatbelt would be negligent to some degree, "but the percentage of it depends on what comes out at trial." The attorney did not explain to the jury the distinction between negligence and evidence of negligence.

Defense counsel asked the juror: "in determining whether the seatbelt was used and whether it is the cause of the injury, will you listen to the evidence as opposed to just right now making a decision[?]" The juror readily admitted that she would and stated that she would "listen to the evidence to determine what role it plays in this case." She explained, "What I said was if it is determined that the seat belt was not used, then I have to say that that was a contributing factor in the injuries." She continued: "I'm saying if it is shown at trial that a seat belt was not used, then in my mind, that is a contributing factor in the injuries sustained. The amount, the percentage, depends on what the evidence is, what is introduced at trial." She stated that she would "[m]ost definitely" listen to the evidence and would be fair in that regard.

There is competent substantial evidence that the juror could be fair and would listen to the evidence and follow the law.

This case is not like *Algie v. Lennar Corporation,* 969 So.2d 1135 (Fla. 4th DCA 2007), in which a juror expressed a belief that, in all slip and fall

cases, the person who fell was at least partially responsible for the fall and would bear some of the responsibility, regardless of the circumstances. Unlike *Algie,* the juror in this case simply expressed a view that follows the law. She prefaced the entire discussion by stating that she would follow the law. And she affirmed that she would listen to the evidence and her conclusion would be based on the evidence presented at trial. There is no manifest error in denying the challenge for cause.

JUROR IN DOMESTIC VIOLENCE CASE SAID SHE WOULD TRY TO SET ASIDE HER EXPERIENCES AND TRY TO BE FAIR

Rodriguez v. State, 816 So.2d 805 (Fla. 3d DCA 2002)

Prospective juror in prosecution for felony battery in a domestic violence case stated that she had been physically abused by her boyfriend and that her sister had been a victim of physical abuse by a boyfriend. Juror said she "might have a problem with (Defendant's) case" but she "would try to be fair" and "put aside her experiences." Defense Counsel moved for cause challenge which was denied.

Appellate Court reversed conviction holding that Trial Court erred when it failed to excuse juror for cause. The Appellate Court noted that "if a prospective juror's statements raise reasonable doubts as to juror's ability to render an impartial verdict, the juror should be excused." In sum, "close cases should be resolved in favor of excusing the juror." *See also Hall v. State,* 682 So.2d (Fla. 3d DCA 1996).

JUROR'S RESPONSE THAT HE WOULD "TRY NOT TO BE BIASED"

SHOULD BE CHALLENGE FOR CAUSE

Bell v. State, 870 So.2d 893 (Fla. 4th DCA 2004)

In a prosecution for battery on a law enforcement officer, during voir dire, the challenged juror stated that he would "try not to" be biased or prejudiced against Defendant. Reversing for a new trial, the Appellate Court held that the juror's remarks were legally insufficient indicia of his impartiality. There was a reasonable doubt the juror possessed an impartial state of mind as the juror clearly expressed an unequivocal bias in favor of the State and his remark, "I'd try not to (be prejudiced)," demonstrated that even he was uncertain he could put that bias aside. The juror never uttered any affirmative words indicating that he could in fact lay aside any bias or prejudice. Based on this, the Appellate Court held that the trial judge lacked discretion to refuse Defendant's challenge, and the juror should have been excused for cause.

The State asserts that the juror was later rehabilitated when the Court inquired of the panel whether they could remain impartial and he did not respond. While Florida law permits the rehabilitation of a juror whose responses in voir dire raise concerns about impartiality, reasonable doubt is not overcome by a juror's silence to a question asked of the entire panel.

N.B.- the juror also stated he was a victim on an attempted armed robbery and had a favorable impression of police investigation (prior to his "try not to" response).

JUROR'S REMARKS THAT SHE HAD NO FAITH IN JURY SYSTEM WARRANTED DISQUALIFICATION FOR CAUSE

Kochlaka v. Bourgeois, 162 So.3d 1122 (Fla. 2d DCA 2015)

The District Court of Appeal, Kelly, J., held that:

[1] prospective juror's acknowledgment of bias in favor of one party and additional remarks that she had no faith in jury system warranted disqualification for cause;

[2] trial court's failure to disqualify prospective juror was per se error warranting new trial;

Counsel then moved on to discussions with other prospective jurors, and eventually asked: "Is there anybody who hasn't already told us some things who feels like one side or the other starts out ahead because of your life experiences?" Prospective juror Blake raised her hand, leading counsel to state: "Yes, ma'am. Ms. Blake. Somebody does. You don't need to tell us who [you would favor]." He then asked her to explain that life experience, and she described how she no longer believes in the jury system at all, stating:

> **MS. BLAKE: Yeah. It doesn't have to do with this case, not this case, but this type of case. But recently, about two years ago, I went to a trial with my brother and I think the jurors didn't—we all believed in the jury system. He went to trial and he was convicted and he's doing 25 years. And now I don't believe in the jury system.**
>
> **MR. WOOD: That's very emotional.**
>
> **MS. BLAKE: It failed him. It failed the family.**

Counsel then noted that Ms. Blake had appeared to be crying when Ms.

Bonfe previously discussed her own disdain for the judicial system, and Ms. Blake agreed, stating:

MR. WOOD: Now, I may have perceived it wrong, but it seemed to me also that when Ms. Bonfe talked about what happened to her mother you seemed to well up or eye up a little bit at that point. Did I perceive that correctly or incorrectly?

MS. BLAKE: Yeah. I—we thought that the jury system would be more lenient and more considerate, but after what we experienced—

MR. WOOD: Okay.

MS. BLAKE:—we don't—he was innocent.

MR. WOOD: I understand that was a criminal case. This is not criminal. This is a civil.

MS. BLAKE: I know but somewhere—because some of these people are going to be picked on this jury and the people—the Defendant probably is going to be thinking that they are going to be there for them and be understanding, but it didn't happen for him.

MR. WOOD: Okay. Are you saying that you feel like you would have a hard time judging a case because of that experience?

MS. BLAKE: I think so because we didn't—after that we didn't have any faith in the jury system.

Ms. Blake's additional remarks that she had no faith in the jury system

likewise should have led to her disqualification. *See Levy v. Hawk's Cay, Inc.,* 543 So.2d 1299, 1300 (Fla. 3d DCA 1989) (reversing for a new trial where the trial court refused to strike potential jurors who "indicated that they had negative attitudes toward the legal system due to previous unfavorable experiences with lawsuits filed against themselves or members of their families"). Her remarks in this case raised a reasonable doubt "as to whether [she] possesse[d] the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the law announced at trial." *See id.* Thus, *1126 the trial court erred when it did not resolve that doubt by striking Ms. Blake for cause.

X. JURY SELECTION/CAUSE CHALLENGES

FAILURE TO STRIKE A JUROR FOR CAUSE, WHEN REQUIRED, IS NOT SUBJECT TO A HARMLESS ERROR ANALYSIS, MUST BE REVERSED AND REMANDED FOR A NEW TRIAL

See *Ferrell v. State,* 697 So.2d 198 (Fla. 4th DCA 1999)

***Street v. State,* 592 So.2d 369 (Fla. 4th DCA 1992), *review denied*, 599 So.2d 658 (Fla. 1992)**

***Blake v. State*, 110 So.3d 534 (Fla. 1st DCA 2013)**

The State seeks rehearing after this court's opinion reversing Appellant's conviction due to the trial court's error granting, over Appellant's objection, the State's challenge for cause as to a prospective juror. In its Answer Brief, the State conceded the error, but argued that it was harmless because the State still had available to it a peremptory challenge that it *535 could have used to strike the juror—a position directly rejected by the Florida

Supreme Court in *Ault v. State,* 866 So.2d 674 (Fla.2003).

During *voir dire,* the subject prospective juror indicated that he was engaged to a public defender in a different circuit. He acknowledged that his fiancee talked to him about the types of cases she worked on, but indicated he would have no problem finding a person guilty if the evidence supported such a result. The State moved to strike for cause this prospective juror solely on the basis of his engagement to a public defender employed in a different circuit. Over Appellant's objection, the court granted the strike. Appellant objected to the jury panel before it was sworn.

The State correctly concedes error, but argues the error was harmless because it still had an unused peremptory challenge that could have been used to strike the juror.

The unexercised peremptory argument assumes that the crucial question in the harmless-error analysis is whether a particular prospective juror is excluded from the jury due to the trial court's erroneous ruling. Rather, the relevant inquiry is "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error."

In its rehearing motion, the State argues that the precedent of the U.S. Supreme Court case of *Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), upon which our supreme court relied in *Ault,* was limited to capital cases in the later decision of *Ross v. Oklahoma,* 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). But the Florida Supreme Court's decision in *Ault* was decided in 2003—15 years after *Ross*—and yet our supreme court did not limit the concept pronounced in *Gray* to capital cases only. Thus, *Ault*

is controlling, and we are constrained to apply its rationale to non-capital cases such as this one. Consequently, although the State's concession of the trial court's error is correct, its harmless error argument *536 is not. Thus, we reverse and remand for a new trial.

Carratelli v. State, 961 So.2d 312 (Fla. 2007)

In this case, the Appellate Court explained the standard that courts should apply in deciding whether a Trial Counsel's failure to preserve a challenge to a potential juror constitutes ineffective assistance of Counsel. In doing so, the Court resolved a conflict concerning the application of the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Carratelli's claim that, in preserving an objection, Counsel acts as Appellate Counsel, and therefore the prejudice analysis should focus on the appeal, is based on the Eleventh Circuit's decision in *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003). In *Davis*, a Florida Defendant filed a petition for habeas corpus in federal court alleging that Trial Counsel was ineffective for failing to renew (and thus preserve) an objection to the State's peremptory challenge. *Davis*, 341 F.3d at 1312-13; *see Davis v. State*, 710 So.2d 723, 724 (Fla. 3d DCA 1998) (finding that the objection was not preserved); *Davis v. State*, 763 So.2d 332 (Fla. 3d DCA 2000) (affirming the summary denial of Davis's postconviction motion alleging ineffective assistance of Counsel for failing to preserve the claim).

The Eleventh Circuit acknowledged that under *Joiner*, to preserve an objection Counsel had to renew it at the conclusion of voir dire or accept the jury with a reservation. The federal court decided, however, that in such an "unusual" circumstance Counsel acts as Trial Counsel when first raising the issue, but as Appellate Counsel when renewing it. *See Davis*, 341 F.3d at 1315-16; see also *Purvis v. Crosby*, 451 F.3d 734, 739 (11th Cir.) ("This Court held that because the failure of Counsel was solely in his role as Appellate Counsel at trial (those are not the words we used in Davis, but it is what we meant), the prejudice inquiry should focus on the effect that Counsel's omission at trial had on the appeal."), *cert. denied*, 127 S.Ct. 587, 166 L. Ed. 2d 436 (2006). The Court concluded that the failure to preserve the issue by renewing the objection was error related to the appeal and "by its nature, unrelated to the outcome of [the] trial." 341 F.3d at 1315.

The Appellate Court indicated its belief that "*Davis* misreads our opinion in *Joiner*." Having concluded that a Defendant alleging Counsel's ineffectiveness in failing to renew an objection to the jury must demonstrate prejudice at the trial, the Appellate Court considered the standard a Court must apply. The Appellate Court in *Carratelli* concluded that to establish prejudice the Defendant must demonstrate that an actually biased juror served on the jury and applied this standard to the case.

The Appellate Court in *Carratelli* noted that although it agreed that the *Singer* standard may be appropriate for direct appeals, it is not appropriate as a postconviction standard. Instead, *Strickland* applies and under *Strickland*, to demonstrate prejudice a Defendant must show that there is a reasonable

probability—one sufficient to undermine confidence in the outcome—that, *but for* Counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694. Applying the *Strickland* standard to the denial of challenges for cause, such prejudice can be shown only where one who was actually biased against the Defendant sat as a juror.

Therefore, in *Carratelli*, the Appellate Court held that where a postconviction motion alleges that Trial Counsel was ineffective for failing to raise or preserve a cause challenge, the Defendant must demonstrate that a juror was actually biased. As we have said, "[t]he sole exception to the contemporaneous objection rule applies where the error is fundamental." *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003). To be fundamental, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *State v. Delva*, 575 So.2d 643, 644-45 (Fla. 1991) (quoting *Brown v. State*, 124 So.2d 481, 484 (Fla. 1960)).

The Appellate Court noted that due to the fact that the failure to raise or preserve a cause challenge is not reviewable on direct appeal, it cannot constitute fundamental error per se. If an Appellate Court refuses to consider unpreserved error, then by definition the error could not have been fundamental. Yet, as *Anderson* recognized, by imposing no greater burden on post conviction than on appeal, a standard such as that articulated in *Austing* allows courts to review—and order new trials based on—unpreserved non-fundamental error. To make matters worse, such new trials will occur much

later in the process—after the post conviction motion is filed and decided, which may happen years after the original trial.

The *Carratelli* Court pointed out that if it agreed to such a standard, it would be more efficient simply to allow Appellate Courts to review unpreserved error even if not fundamental. Such a rule would eliminate the contemporaneous objection requirement and permit Counsel to save certain arguments for appeal. However, the Appellate Court refused to go down that that dangerous path.

Having determined that the prejudice standard applicable to Carratelli's post conviction claim is whether the juror is actually biased, the Appellate Court considered the circumstances of this case. As stated above, Carratelli's case was the subject of much pretrial publicity, including an article appearing in the Palm Beach Post the day before jury selection began. The undisputed facts were that Carratelli was speeding through a red light when his car collided with another vehicle, killing all six passengers. Carratelli's reported defense, which he used at trial, was that he was unconscious at the time because of a medical condition attendant to his Type I diabetes. *Carratelli I*, 832 So.2d at 857. Potential jurors were questioned about their exposure to media reports and their opinions about the case.

When Mr. Inman—the only juror at issue—was questioned, he stated that he had heard a recent newscast about the incident; had overheard—but did not participate in—a discussion in a barbershop about it; and had read the recent Post article. Although the barbershop patrons opined that Carratelli was guilty, Inman had no opinion. Asked if he could listen to the evidence,

ignore the media reports and conversations he had overheard, and follow the law, Inman replied: "I believe that I could, and listen to what was here and what was said to be the law and I would follow that."

Defense Counsel questioned him about the barbershop conversation, and Inman responded that the barbershop patrons did not believe Carratelli's explanation for the incident. Emphasizing that he had not joined the conversation, Inman said that after hearing it, he had "not form[ed] any definite opinion of yes or no" about the case. Questioned whether he had any indefinite opinion, Inman said he knew nothing about diabetes, but he thought "there should have been some kind of forewarning [of the reaction]," "because when you get sick you have some kind of forewarning." He did not have the opinion that Carratelli was guilty. The following exchange then occurred:

> **DEFENSE COUNSEL: So when you left [the barbershop] you felt that the defense that was being asserted didn't make some sense?**
>
> **INMAN: That's basically it, that was my thought. Asked about the article in the Post, Mr. Inman said he found it too "editorialized."**
>
> **Defense Counsel continued:**
> **DEFENSE COUNSEL: How did that do—what did that [the article] do to the opinion that you had already held about the defense not making sense?**

INMAN: I believe in my own mind that if there is some—I will call them doctors, whatever that can say, that there would be no forewarning of any symptoms to cause him to stop or continue or anything like that, I would listen to it.

Later, the following exchange ensued:

DEFENSE COUNSEL: Would you say that this is a fair statement that you have an opinion about the defense but it's not—you have not positively made up your mind?

INMAN: That's correct.

DEFENSE COUNSEL: But it would certainly be more difficult for Mr. Carratelli to convince you of his innocence now than if you had not read the article and had not been involved in that discussion?

INMAN: I believe that's a fair statement.

The Court then questioned Mr. Inman as follows:

COURT: Mr. Inman, you used a phrase a minute ago but I don't want to put words in your mouth, as to this type of defense; I gather that you think it's possible there is a medical explanation that would explain the situation?

INMAN: Well, there's a possibility that that could happen.

COURT: And regardless of what discussions you had already, you'd be willing as a juror, to sit here and listen to whatever medical testimony you hear?

INMAN: Absolutely.

COURT: Whether it makes sense or it doesn't?

INMAN: Yes.

COURT: Would you be able to set aside any input you had, bias or prejudice, and sit here and assure us all that you can be a fair and impartial juror?

INMAN: If I come in here as a juror, I will sit down with an open slate and listen to what is said and make up my mind from there.

After reviewing this same record on direct appeal, the Fourth District affirmed without discussing Carratelli's claim that the Trial Court abused its discretion in denying his cause challenge to juror Inman. *See Carratelli I*, 832 So.2d at 855. In reviewing Carratelli's ineffective assistance claim in his 3.850 motion, the en banc court applied to these facts the actual bias standard the Florida Supreme Court adopted and held that "[j]uror Inman's slight familiarity with the case did not rise to that level of actual bias necessary for post conviction relief." *Carratelli II*, 915 So.2d at 1261.

The Florida Supreme Court agreed with *Carratelli II* and held that the record plainly showed that juror Inman held no firm opinion except that he could be fair, listen to the evidence, and follow the law. Thus, the Florida Supreme Court found that Carratelli failed to demonstrate prejudice under *Strickland*.

Smithers v. State, 18 So.3d 460 (Fla. 2009)

Defendant was convicted of two counts of first-degree murder and sentenced to death. Defendant filed a postconviction motion in which he claimed Trial Counsel was ineffective for failing to strike a prospective juror for cause based on juror's views on the death penalty.

The following dialogue took place during voir dire between a prospective juror and Defense Counsel:

> **DEFENSE COUNSEL: Okay, I guess the same questions, can you conceive of circumstances that you think might be worth considering as far as mitigating circumstances, things involving either people's mental or physical circumstances, upbringing, those sorts of things?**
>
> **PROSPECTIVE JUROR COLLINS: I guess it depends if the person is abused as a kid or something, I don't know. But if they are guilty without a doubt they should get the death penalty.**
>
> **DEFENSE COUNSEL: If someone is found guilty and you are totally**

convinced they are guilty of the offense whatever that particular murder case is about, do you feel that there could ever be any other sentence except the death penalty for first degree murder?

PROSPECTIVE JUROR COLLINS: Maybe life without parole.

DEFENSE COUNSEL: Those are the two choices by the way, life without parole or the death penalty. But what I'm asking is do you feel there could be circumstances where you vote for a recommendation for life?

PROSPECTIVE JUROR COLLINS: Yes, if I have to.

The Florida Supreme Court viewed the preceding exchange as record evidence that Juror Collins could consider life without parole, not just the death penalty, as a possible sentence for first-degree murder. Therefore, applying the *Carratelli* standard, the Florida Supreme Court denied the Defendant relief because he was unable to show actual bias that would prevent Juror Collins from serving as an impartial juror.

Orme v. State, 25 So.3d 536 (Fla. 2010)

Defendant was convicted of first-degree murder and sentenced to death. Defendant filed a motion for postconviction relief which was denied. He then appealed and petitioned for a writ of habeas corpus. The Florida Supreme Court remanded the case for a new penalty phase. On resentencing,

the Defendant was again sentenced to death. He then appealed the order of the Trial Court sentencing him to death following resentencing.

On appeal, the Defendant raised several claims. He alleged that the Trial Court erred when it refused to allow him to challenge for cause prospective jurors who could not consider remorse as a mitigator. During voir dire, Defense Counsel asked one of the prospective jurors whether he could consider remorse. The prosecutor objected. The Trial Court sustained the objection and ruled that such a question was inappropriate.

However, after acknowledging that remorse could be considered a mitigator, the Trial Court allowed Defense Counsel to inquire about remorse but ruled that Counsel could not ask jurors how much weight they would give it. Moreover, the Trial Court held that if a juror could not consider remorse as a mitigator, it could only be grounds for a peremptory challenge, not a cause challenge.

The Florida Supreme Court agreed with the Defendant that the Trial Court had erred when it held that a juror's refusal to consider remorse could only be a basis for a peremptory challenge. However, the error was not preserved for appeal because Defense Counsel did not question prospective jurors on the issue of remorse as a mitigator after the Court ruled on the issue. In order to preserve the issue for appeal, the Florida Supreme Court held that Defense Counsel had to question prospective jurors on the issue and then attempt to challenge for cause those jurors who refused to consider it as a mitigator. As a result of Counsel's failure, the Defendant was not entitled to relief on this claim.

The Defendant also contended that the Trial Court erred when it refused to allow him to inquire of prospective jurors whether they could consider recommending a life sentence as a matter of mercy even if the aggravators outweighed the mitigators. The State argued that the Trial Court did not err because although it did not allow inquiry on this issue during the first stage of jury selection, it did allow questioning on the issue during the second stage of jury selection.

The Defendant pointed out in his motion that during the first stage of voir dire Defense Counsel questioned prospective jurors about whether they could consider mercy during the sentencing proceedings. After a juror stated he could not consider mercy, Defense Counsel moved to strike him for cause. The Trial Court denied the challenge for cause. Defense Counsel then asked another juror the same question. The prosecutor objected and the Trial Court sustained the objection and restricted the questions regarding mercy. Later, Defense Counsel asked the Trial Court to reconsider its ruling regarding asking jurors about considering mercy. The Trial Court allowed the Defendant to revisit the issue of mercy during the second stage of voir dire.

After the Trial Court's ruling allowing Defense Counsel to inquire about mercy during the second stage, and though still in the first stage, Defense Counsel asked more prospective jurors about the issue. The State did not object. Defense Counsel also asked the question during the second stage of voir dire.

The record reflected that after Defense Counsel asked jurors about mercy during the second stage of jury selection, the parties continued to

argue about the role of mercy. The Trial Court ruled that the prosecutor could not bring up the issue of mercy unless Defense Counsel opened the door. On appeal, the Defendant claimed that due to this ruling, he was unable to raise the issue during jury selection because he did not want the State to make the improper argument that only the governor could exercise mercy.

The Florida Supreme Court held that the issue was not preserved for appeal because after the Trial Court's ruling, Defense Counsel never questioned prospective jurors about mercy for the rest of the voir dire. As a result, the Defendant was not entitled to relief on this claim.

The Florida Supreme Court held that the prosecutor's comments on how only the governor could grant mercy to the Defendant by way of a clemency hearing were improper and misleading to the jury. It ruled that the Trial Court erred when it overruled Defense Counsel's objection to the prosecutor's statements. However, the Florida Supreme Court held that the prosecutor's improper remarks constituted harmless error because none of the jurors indicated they could not consider mercy, the jury recommended death by a vote of eleven to one, and the Trial Court found the aggravators outweighed the mitigators. Thus, relief was not warranted.

The last issue regarding jury selection that the Defendant claimed in his appeal was that the Trial Court erred when it failed to dismiss the venire after a prospective juror indicated that he was opposed to a life sentence without parole for twenty-five years because the Defendant had been convicted of the murder fifteen years ago. Defense Counsel moved to strike the panel arguing that the prospective juror's comments had poisoned the pool.

The State suggested that the situation could be remedied by giving the jury a special instruction to explain the sentence of life without parole for twenty-five years according to the Florida Supreme Court's decision in *Green v. State*, 907 So.2d 489 (Fla. 2005). The Trial Court denied Defense Counsel's motion to strike the panel but read the agreed-to instruction to the jury.

The Florida Supreme Court reviewed the Trial Court's decision not to strike the panel for an abuse of discretion. The Florida Supreme Court noted that "in order for the statement of one venire member to taint the panel, the venire member must mention facts that would not otherwise be presented to the jury." *Johnston v. State*, 903 So.2d 888, 897 (Fla. 2005).

In this case, the fact that the Defendant had committed the crime fifteen years earlier was a fact presented to the prospective jurors in the State's brief summary of the case during voir dire. Therefore, the Trial Court did not abuse its discretion in denying the Defense's motion to dismiss the venire.

The Defendant further argued that the jury instruction to clarify that there was no guarantee that the Defendant would be paroled after twenty-five years if given a life sentence without possibility of parole for twenty-five years should have been given by the Trial Court at the beginning of voir dire. The Florida Supreme Court rejected the Defendant's argument. It held that the Trial Court followed the procedure used by the Trial Court and affirmed by the Florida Supreme Court in *Green v. State*, 907 So.2d 489 (Fla. 2005).

Moreover, the Florida Supreme Court pointed out that this jury instruction actually favored the Defendant because it reminded those jurors

leaning towards the death penalty based on the perception that the Defendant could be paroled in the near future due to credit for time served that the Defendant could stay in jail longer and there was no guarantee that he would be paroled.

Furthermore, even though this instruction was not read at the beginning of voir dire, the Florida Supreme Court held that it still remedied and clarified the concern that several prospective jurors had with the sentencing option of life without the possibility of parole after twenty-five years. Thus, the Florida Supreme Court ruled that the Trial Court did not err in failing to strike the venire.

Troy v. State, 57 So.3d 828 (Fla. 2011)

Defendant was convicted of first-degree murder and sentenced to death. In a motion for postconviction relief, the Defendant claimed that Counsel was ineffective, among other things, for failing to question and remove a juror for cause.

Defendant claims that Counsel was ineffective for failing to question a juror about his alleged undisclosed connection with the victim's family and then for not moving to strike the juror from the panel. Specifically, the Defendant asserts that Counsel did not adequately question the juror during voir dire about whether he knew the murder victim's father. According to the Defendant, Counsel should have discovered a connection between the juror and the next of kin because both were members of the local chamber of commerce and lived and worked in the same community. A review of the

record revealed that during voir dire the Trial Court asked prospective jurors about whether they knew the victim's family or the victim.

The Florida Supreme Court found that the juror was candid and forthcoming in his response during voir dire. Furthermore, the Trial Court conducted an interview of the juror in open court. During this interview, both the juror and the victim's father testified that they did not know each other.

Based on the foregoing, the Florida Supreme Court denied relief on the claim that Counsel was ineffective for failing to adequately question the juror.

Defendant also asserted that Counsel was ineffective for failing to strike the juror for cause. In support of his claim, he also pointed to the allegedly hostile nature of the victim's father.

In reviewing this claim, the Florida Supreme Court applied the prejudice standard set forth in *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007). In other words, Defendant had to prove that the juror was actually biased. The Florida Supreme Court held that the juror indicated he was willing to serve and was open to hearing the facts and circumstances. The fact that the juror and the victim's father shared an affiliation with the local chamber of commerce and lived and worked in the same community did not establish actual bias.

The Florida Supreme Court held that the record refuted the Defendant's claims of ineffective assistance of Counsel.

SPECIFICITY OF CAUSE CHALLENGE

Gonzalez v. State, 143 So.3d 1171 (Fla. 3d DCA 2014)

The Defendant's argument on appeal is that the trial court abused its discretion by denying the Defendant's motion to strike Ms. Johnson for cause based on her responses, which he claims suggest that Ms. Johnson would have been prejudiced against the Defendant. That particular argument was not, however, the basis of the Defendant's objection to the trial court below. During jury selection, the Defendant's counsel moved to strike Ms. Johnson for cause on the basis that: "She [Ms. Johnson] was molested as a child. She suffered as a victim in the same way as the victim in this case." In challenging Ms. Johnson for cause, the Defendant specifically claimed that "[t]here is case law that a victim with the same type of offense cannot serve as a juror." Thus, the Defendant's objection was based on his argument that the mere fact that Ms. Johnson had been a victim of a similar offense meant she must be stricken for cause, not that Ms. Johnson could not be a fair and impartial juror based on her specific responses. Based on the Defendant's objection, the trial court correctly noted that there is no case law holding that a juror is automatically disqualified from serving if he or she had been the victim of a similar offense as the one being tried and therefore denied the challenge.

Because the trial court did not err by denying the Defendant's motion to strike Ms. Johnson for cause based on the specific objection raised—that because Ms. Johnson was a victim of a similar offense, she could not serve as a juror—and this was the sole ground raised by the Defendant, the Defendant did not preserve the argument he now makes on appeal. *See Carratelli,* 832 So.2d at 855–57 (finding that the trial court erred by denying the

defendant's for-cause challenge of three jurors, but affirming the conviction because the objections had not been properly preserved).

Simply put, this case is not *Matarranz.* To find manifest error for failing to remove Ms. Johnson for cause in the instant case would essentially strip the trial court of all the discretion expressly given it over the past century in decisional law. We do not believe *Matarranz* stands for such a radical proposition, nor do its words purport to do so. The trial court must examine the totality of the juror's responses to determine whether there are any concerns that the juror can render an unbiased and impartial verdict and then scrutinize expressions of bias stemming from a juror's unchangeable life experiences.

FAILURE OF COUNSEL TO OBJECT WHEN EXCUSED JUROR SERVED ON JURY

Hayes v. State, 42 So.3d 936 (Fla. 2d DCA 2010)

Defendant was convicted of burglary of a dwelling. He filed a motion for postconviction relief claiming ineffective assistance of Counsel. In ground nine of his motion, the Defendant alleged that Counsel was ineffective for failing to object when an excused juror actually sat on the jury. The Defendant claimed that the juror had been excused for cause because she stated that she could not decide the case on the merits, but somehow ended up serving on the jury during trial. The Trial Court denied relief on this ground but failed to attach the portion of the record that conclusively refuted the allegation that the juror was excused but ultimately sat as a juror.

The Appellate Court reversed and remanded for the Trial Court to attach portions of the record to rebut the allegation or to hold an evidentiary hearing.

CHALLENGE FOR CAUSE MAY BE EXERCISED, EVEN THOUGH JUROR'S OPINION AS TO NOT FOLLOWING A PARTICULAR INSTRUCTION MAY BENEFIT DEFENDANT

Calvert v. State, 730 So.2d 316 (Fla. 5th DCA 1999)

Juror stated he disagreed with the principal theory insofar as it permitted a Defendant to be found guilty of killing though Defendant was involved only in planning a lesser crime and killing was beyond his control. The prospective juror also expressed his feeling that in our criminal justice system the punishment does not fit the crime. He also indicated that at times it would be difficult to put aside his feelings regarding an appropriate sentence and render a verdict solely on the facts and the evidence. After the Trial Court assured the juror it was not a death penalty case, the juror stated he could apply the law of principals, though he did not like it.

Defendant challenged for cause which the Trial Court denied. The Appellate Court affirmed, holding "We cannot say the Trial Court erred in finding this single statement insufficient to overcome the juror's bias against the principal theory and concerns about harsh sentencing." The possibility that (Defendant) could be found guilty of felony murder under the principal theory is a situation (the juror) specifically stated he could not countenance."

LESSON: Defense Counsel is in a better position to sustain challenge for cause when juror bias is against Defendant's case.

Cottrell v. State, 930 So.2d 827 (Fla. 4th DCA 2006)

During voir dire, Defense Counsel questioned a prospective juror concerning Defendant's right to remain silent. The juror indicated that it was not fair for only the State to have to produce evidence, and that she thought Defendant's failure to put on a case would affect her judgment. As a result, Defense Counsel moved to strike the prospective juror for cause. The Trial Court denied the motion finding, *inter alia*, that the prospective juror had not indicated that she would not follow instructions. The jury subsequently found Defendant guilty. The Appellate Court held that the Trial Court erred in failing to strike the juror for cause and noted the following exchange:

> **DEFENSE COUNSEL: Now, the Judge had already said [the Defendant] and I could sit here and not do a thing. The State could put on all of their evidence, have all of their witnesses come in and testify, we don't have to do anything. Do you think that's fair?**
>
> **PROSPECTIVE JUROR: No, I don't think it's fair.**
>
> **DEFENSE COUNSEL: Why?**
>
> **PROSPECTIVE JUROR: You have to say something. It should be both.**
>
> **DEFENSE COUNSEL: Okay. So, let's say we just do that. That's what we do, we just sit there. How's that going to effect [sic] your judgment if selected as a juror?**

PROSPECTIVE JUROR: Well, it will effect [sic] my judgment because I [sic] only hearing on one side not on both sides.

Defense Counsel moved to strike the prospective juror for cause. The Trial Court denied the motion and stated:

THE COURT: "Okay. Well, I - she did not say she couldn't follow the instruction. She didn't say she'd hold it against you [Defense Counsel]. She said she'd only hear one side and she wouldn't think that would be fair cause people like to hear two sides of every story. And, if they're only presented with one, most people say well, that's not fair if I only hear one side of the story and I think that's what she was talking about not whether or not she would follow that instruction. She didn't in anyway indicate she wouldn't follow the instruction. And, that's the reason I didn't make a note on her during the voir dire. I made a note on every other cause challenge that you all - that either one of you have."

Defense Counsel requested an additional peremptory challenge, which the Trial Court denied. Defense Counsel exhausted his peremptory challenges and then identified the juror that would have been stricken had the additional peremptory challenge been allowed. The jury found the Defendant guilty. The Trial Court sentenced him to a five-year term of imprisonment.

XI. JURY SELECTION, CHALLENGES, ADDITIONAL RENEWED BEFORE SWEARING/NUMBER OF CHALLENGES

JUDGE IN BEST POSITION TO ASSESS JURORS' RESPONSES DURING VOIR DIRE

Brown v. State, 994 So.2d 1191 (Fla. 4th DCA 2008)

Appellant, Stephanie Brown, appeals the Trial Court's order withholding adjudication and sentencing her to two years of probation. The Appellate Court had jurisdiction under Fla. R. App. P. 9.140(b)(1)(A).

Brown was charged with throwing a deadly missile into a dwelling, resisting an officer without violence, and criminal mischief, for events occurring on July 27, 2005. During jury selection, the State moved to strike juror number three, Regis Ramkhelawan, using a peremptory challenge. Defense objected as follows:

> **DEFENSE: We need a racially neutral reason, Your Honor. Being the Defendant is African American, Mr. Regis is of a minority, and we would like racially neutral reason for him being struck.**
>
> **STATE: He just wasn't very talkative, wasn't participating.**
>
> **COURT: I'm going to accept the challenge. Juror number 15?**

DEFENSE: You are striking over objection?

COURT: Striking over.

DEFENSE: Over Defense objection, Your Honor.

COURT: Yes, sir, I know.

The judge then moved on to discuss the next juror with no further consideration of the reasons for the State's strike. Brown accepted the jury subject to the objections made concerning the strikes, specifically naming juror Ramkhelawan. At the conclusion of the trial, Defense again renewed the jury selection objections. Brown was found guilty as charged on all three counts.

On appeal, Brown argues that the Trial Court erred by allowing the State's peremptory challenge without conducting a proper genuineness analysis of the State's race-neutral reason for the strike as required by *Melbourne v. State*, 679 So.2d 759 (Fla. 1996). The State counters that the issue was not properly preserved for appeal, and that even if it was, Brown has not presented any error by the Court.

The issue of whether the Trial Court erred in allowing a peremptory strike over Defense objection was not properly preserved because Brown never objected to the State's proffered race-neutral reason for its strike. Although Defense Counsel objected to the strike initially, to properly

preserve this issue for appeal, Defense Counsel must "place the Court on notice that he or she contests the factual existence of the reason." *Floyd v. State*, 569 So. 2d 1225, 1229 (Fla. 1990); *Hoskins v. State*, 965 So.2d 1, 9 (Fla. 2007); *Doe v. State*, 980 So.2d 1102, 1104 (Fla. 4th DCA 2008).

In the present case, the Appellate Court held that Defense Counsel was required to point out that there were other jurors who had been just as quiet as Ramkhelawan, if not more so, but who had not been challenged, and thus, that the State's proffered race-neutral reason was pretextual. Because the issue was not preserved, the Appellate Court refused to address whether the Trial Court erred in allowing the strike.

N.B. Defendant must object to preserve appellate issue by "placing the Court on notice… to contest the factual existence of the reason"; i.e., that there were other jurors, not challenged who were similar to juror in question.

Singleton v. State, 783 So.2d 970 (Fla. 2001)

Three jurors, in a highly publicized case, stated (during individual *voir dire*) that each had heard certain facts related to the case. Each juror stated that he/she had no fixed opinion and could decide the case based solely on the evidence presented. All three jurors were cause challenged by the Defense, and all were denied (the Court did excuse 70 jurors for cause.)

The Supreme Court affirmed holding that the trial judge did not abuse his discretion, since the test of when that "discretion" is abused is "only where no reasonable person would take the view held by the Trial Court."

The Court then restated (in this most recent Supreme Court *voir dire* case) that the test remains: "A juror should be excused for cause if there is any reasonable doubt about the juror's ability to render an impartial verdict." See *Turner v. State,* 645 So.2d 444 (Fla. 1994).

Pagan v. State, 29 So.3d 938 (Fla. 2010)

Defendant was convicted of two counts of first-degree murder, two counts of attempted first-degree murder, one count of armed burglary, and one count of armed robbery and sentenced to death. The Defendant moved for postconviction relief. In his petition for writ of habeas corpus, the Defendant claimed that he was denied equal protection when two prospective jurors were struck because English was not their first language.

The Florida Supreme Court ruled that the Defendant was procedurally barred because he did not raise the issue on direct appeal and noted that regardless, the claim was without merit.

According to the Florida Supreme Court, the Trial Court had authority to excuse a juror for cause, if after questioning the juror, determined that the juror was not qualified to serve. Although a juror cannot be excused for not speaking English well, the juror could be excused based on his inability to understand English. The Florida Supreme Court relied on its reasoning in *Cook v. State*, 542 So.2d 964, 970 (Fla. 1989) wherein it recognized that the trial judge who is present during voir dire is in a far superior position to properly evaluate the jurors' responses.

The Florida Supreme Court pointed out that the trial judge explained to the parties that he would question those potential jurors who required individual questioning and would allow the parties to question the jurors or object to the excusals. The trial judge then proceeded to explain to the two jurors that she was concerned with their ability to understand English not how well they could speak the language. Both jurors stated they had difficulty understanding what the judge was saying. Based on these responses, the trial judge excused both men for cause. Neither State nor Defense Counsel objected to their removal. The Florida Supreme Court ruled that the Trial Court had not abused its discretion.

FAILURE TO RENEW OBJECTION

Baccari v. State, 145 So.3d 958 (Fla. 4th DCA 2014)

[Defense counsel]: Judge, yesterday the jury panel was sworn. I had made several objections during jury selection. And in order to preserve those issues—in order to preserve those issues I needed to object prior to the jury panel being sworn. I don't think this cures—actually, *961 I'm almost certain that it doesn't cure the issue, but I wanted to accept the panel subject to the previous objections I've made.

The Court: Okay.

[Defense counsel]: I don't think that this is going to cure the issue. But I've tried several trials in front of Your Honor. And, typically, we wait for JOA arguments and accepting the jury panel, we do that at the bench. And I

didn't make my objection contemporaneously.

The Court: Yeah. It's close enough to be timely. I'll find that that's a timely objection. The only objection I think that would be preserved as to the jury panel on behalf of anybody would be the issue of me deny or denying your peremptory challenge on that one juror.

[Defense counsel]: I understand, Judge. I just feel that anything would be waived without me, at least, saying that.

The Court: Okay.

[Defense counsel]:—I'm accepting subject to previous objections.

The Court: All right.

[Defense Counsel]: I just wanted to get that on the record.

"In order to preserve the issue of whether the trial court's ruling on a peremptory challenge constitutes reversible error, the appellant must accept the juror, or panel, subject to its prior objection and/or renew the objection before the jury is sworn."

Appellant relies upon *Sparks v. Allstate Construction, Inc.,* 16 So.3d 161, 164 (Fla. 3d DCA 2009), where the plaintiff "did not renew the objection before the jury was sworn, but rather waited until after lunch, before further proceedings began." The court in *Sparks* found that the objection to jury selection was preserved despite the fact that the objection occurred after the swearing in of the jury panel, because "there was no affirmative acceptance

of the jury." *Id.* In the present case, unlike *Sparks,* appellant affirmatively accepted *962 the jury at the time of impaneling and swearing in the jury.

In the instant case, both counsel for the co-defendant and defense counsel attempted to exercise a peremptory challenge to juror 5–7 during voir dire. The state objected and requested a race- and gender-neutral reason. After defense counsel gave three reasons, the trial court denied the peremptory challenge, and voir dire continued. The transcript reflects that the trial court asked the parties for approval of the final makeup of the jury panel which included juror 5–7. Both defense counsel and counsel for the co-defendant accepted the panel, without commenting on juror 5–7. Then two alternates were selected, and the twelve jurors—including juror 5–7—were sworn in and impaneled for this case. At no point prior to the impaneling and swearing in of the jury did defense counsel, or counsel for the co-defendant, reassert any objection to any juror, or specifically juror 5–7. The court recessed for the day. The next morning, defense counsel re-raised the denial of his peremptory challenge in an attempt to "cure" his failure to preserve the issue, and the trial court found it "close enough to be timely."

We find that appellant abandoned his earlier objection when he affirmatively accepted the jury at the time the jury was sworn and impaneled without any reference to his prior objection. To allow appellant to come back to court the next morning, and reverse himself, regardless of the trial court's willingness to accept appellant's belated acceptance "subject to previous objections," would insert great uncertainty to the jury selection process.

State v. Chattin, 877 So.2d 747 (Fla. 2d DCA 2004)

State peremptorily challenged an African-American woman explaining, "(Juror) was non-responsive during *voir dire* and seemed disinterested." The Trial Court accepted the State's reason as genuine, and Defense Counsel made no further objections.

The Appellate Court affirmed stating, "We have examined the record and have serious concerns about the manner in which the State articulated its allegedly race-neutral explanation for the strike. Nevertheless, any issue was waived when the Defense Attorney failed to renew his objection before the jury was sworn." Moreover, Defense Counsel's failure to preserve objection did not prejudice outcome of proceeding where prospective jurors did not ultimately serve on the jury.

Romero v. State ,105 So.3d 550 (Fla. 1st DCA 2013)

Appellant's first issue is unpreserved for review because defense counsel affirmatively accepted the jury "immediately prior to its being sworn without reservation of his earlier-made objection." *Joiner v. State,* 618 So.2d 174, 176 (Fla.1993). We briefly address this issue as a reminder to practitioners that the reasoning behind this rule is to prevent defense from proceeding to trial "before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial." *Id.* at 176 n. 2. *See also Mitchell v. State,* 620 So.2d 1008, 1009 (Fla.1993); *Milstein v. Mutual Sec. Life Ins. Co.,* 705 So.2d 639, 640 (Fla. 3d DCA 1998); *Bauta v. State,* 698 So.2d 860, 862 (Fla. 3d DCA 1997).

Although there have been instances where an explicit renewal of the objection was deemed "futile" because a jury was sworn in within a matter of minutes after the initial objection, *Gootee v. Clevinger,* 778 So.2d 1005, 1009 (Fla. 5th DCA 2000), such was not the appellant's case. Instead, there was a day's lapse between appellant's initial objection and the jury being sworn. Moreover, affirmative acceptance as required by *Joiner* can be inferred from counsel's failure to renew his objection. *See Milstein,* 705 So.2d at 641; *Watson v. Gulf Power Co.,* 695 So.2d 904, 905 (Fla. 1st DCA 1997). As this issue was not properly preserved, we do not reach the merits.

TRIAL COURT GRANTING ADDITIONAL PEREMPTORY CHALLENGES WHERE CAUSE CHALLENGES DENIED

Williams v. State, 755 So.2d 714 (Fla. 4th DCA 1999)

Jurors stated that they would require the Defendant to present some evidence of innocence. The Trial Court denied two cause challenges but then granted two extra peremptory challenges after Defense Counsel had struck those cause jurors with peremptory challenges. Defense Counsel requested more additional challenges for other previously cause-challenged jurors.

The Appellate Court affirmed holding that failure of Trial Court to excuse these jurors for cause was not reversible error since the Defendant was granted two additional strikes after he exhausted all of his peremptory challenges. Therefore, the Appellate Court reasoned that the Defendant failed to show prejudice warranting reversal.

The Appellate Court cited *Hill v. State*, 477 So.2d 553 (Fla. 1985), wherein the Supreme Court held that "it is reversible error for a Court to force

a party to use peremptory challenges on persons who should have been excused for cause provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied."

REFUSAL TO ACCEPT PANEL PRESERVES THE DENIAL OF ADDITIONAL PEREMPTORY FOR APPEAL

Ranglin v. State, 55 So.3d 744 (Fla. 4th DCA 2011)

During voir dire, after discussing self-defense, prospective Juror Kenneally indicated there were no circumstances under which it was appropriate for a man to strike a woman. The following colloquy occurred:

DEFENSE COUNSEL: Okay. Now, I am going to ask this question for Ms. Kenneally.

Is it ever appropriate if—for a man to strike a woman?

MS. KENNEALLY: No.

DEFENSE COUNSEL: Under any circumstances?

MS. KENNEALLY: No.

...

DEFENSE COUNSEL: Or—I don't want to put words in your mouth, tell me why it's under no circumstances ever appropriate for a man to strike a woman.

MS. KENNEALLY: I believe it tends to escalate, and instead of resolving the problem it gets worse.

...

DEFENSE COUNSEL: Okay. Ms. Kenneally, my question to you was, are there any circumstances that you can think of where it would be okay for a man to strike a woman. And your answer was?

MS. KENNEALLY: No, I don't believe that is appropriate. I believe that it escalates the problem instead of resolves it.

At the conclusion of jury selection, counsel for Ranglin moved to strike Juror Kenneally for cause, which the trial court denied. Ranglin exercised a peremptory challenge to excuse Juror Kenneally. Thereafter, Ranglin had exhausted his peremptory challenges and moved for an additional peremptory, which the trial court also denied. When the jury was sworn Ranglin refused to accept the jury panel as constituted, thereby preserving the issue for appeal.

NUMBER OF PEREMPTORY CHALLENGES NOT DEPENDENT ON NOTICE OF HABITUAL CRIMINAL ENHANCEMENT

Cox v. State, 764 So.2d 711 (Fla. 1st DCA 2000)

Defendant was charged with sale/delivery of narcotics within 1000 feet of a school. The State filed a notice of intent to classify Defendant as a habitual offender, which made the first-degree felony subject to a life sentence.

Defendant's Counsel asked for ten (10) peremptory challenges due to fact that Defendant was now facing a potential life sentence. The Trial Court

granted six (6) challenges, which Defendant exhausted. Defendant then requested more challenges, which were denied.

The Appellate Court affirmed the Trial Court, reasoning that a contrary interpretation "would lead to inconsistent treatment, because a Defendant whose notice to habitualize was filed before jury selection would receive ten peremptory challenges, while a Defendant who received notice later in the proceedings would be limited to six peremptory challenges." *Whitaker v. State,* 784 So.2d 448 (Fla. 3d DCA 1999); *Smellie v. State,* 720 So.2d 1131 (Fla. 4th DCA 1998); *Inmon v. State,* 383 So.2d 1103 (Fla. 2d DCA 1980).

NUMBER OF PEREMPTORY CHALLENGES (SIX OR TEN) NOT DETERMINED BY FILING OF A HABITUAL OFFENDER SENTENCE ENHANCEMENT NOTICE

Whitaker v. State, 784 So.2d 448 (Fla. 3d DCA 1999)

The Appellate Court rejected argument that ten (10) peremptory challenges were required when a habitual offender sentence enhancement notice is filed. The Court reasoned that since the enhancement notice can be filed pursuant to Fla. Stat. §775.084(3)(h) before or after jury selection, the Defendant's argument would produce an incongruous result; i.e., one Defendant would be facing a six-challenge (non-life sentence) voir dire, while another Defendant would receive ten peremptory challenges.

> **LESSON: The problem exists in the statute, which most likely produces a procedural due process problem; i.e., that a Defendant has no valid notice as to sentencing alternatives when the post-trial enhancement notice is allowed to be filed.**

PEREMPTORY CHALLENGES OR OBJECTIONS TO CHALLENGES MAY BE RAISED ANY TIME BEFORE JURY IS SWORN

Puryear v. State, 891 So.2d 2 (Fla. 2d DCA 2004)

A jury convicted Defendant of second-degree murder with a firearm, two counts of aggravated assault with a firearm, and carrying a concealed weapon. Defendant appealed, but the Court affirmed his convictions and sentences. Even though the Trial Court erred in dismissing a prospective juror without giving Defendant an opportunity to question the juror to clarify whether his answers to prior questioning indicated an inability to fulfill his obligations as a juror, the Appellate Court found that Defendant abandoned his objection to the dismissal of the juror by affirmatively accepting the jury without reservation of his earlier objection.

During voir dire, one of the prospective jurors advised that he had received information about the case which caused him concern as to whether he could render a fair and impartial verdict. Puryear objected to the Trial Court's excusing the prospective juror for cause without first giving the Defense an opportunity to examine him. Following voir dire, however, Defense Counsel affirmatively accepted the jury panel without reservation of his prior objection.

Florida Rule of Criminal Procedure 3.300 provides that both Counsel for the State and the Defendant "shall have the right to examine jurors orally on their voir dire." In this case, it was error for the Trial Court to dismiss the prospective juror without giving Puryear "an opportunity to question the

juror to clarify whether [his] answers to prior questioning indicated an inability to fulfill [his] obligations as a juror." *Howard v. State*, 869 So.2d 725, 726 (Fla. 2d DCA 2004); *see also Melendez v. State*, 700 So.2d 791 (Fla. 4th DCA 1997). Although Puryear contemporaneously objected to the Trial Court's dismissal of the prospective juror without inquiry by the Defense, by affirmatively accepting the jury without reservation of his earlier objection, Puryear abandoned his objection to the dismissal of the prospective juror.

N.B. Defense Counsel must object before jury is sworn to preserve voir dire error.

McNeil v. State, 158 So.3d 626 (Fla. 5th DCA 2014)

The record reflects that during jury selection, a list of both State and defense witnesses was read to the venire. The panel was then asked, "Are any of you related by blood or marriage to any of these potential witnesses, or do any of you know any of them through any business or social relationships?" Prospective juror Erik Perez, who was eventually selected and sworn as a juror, did not indicate that he knew any of the witnesses.

Trial proceeded and McNeil's son, Nicko, was called to testify for the defense. During a recess in that testimony, Perez informed the courtroom deputy that he recognized Nicko. The trial judge informed the lawyers about Perez's disclosure, and the lawyers were given an opportunity to question Perez outside the presence of the other jurors.

During questioning, Perez stated that he knew Nicko only in Perez's capacity as a physical therapist for a local high school. He had treated Nicko for football-related injuries on approximately five or six occasions. Perez

indicated that since he did not know McNeil personally, he would remain neutral. However, Perez obliquely expressed some concern about the possibility that Nicko would recognize him as having served as a juror. Specifically, he said: "I mean, I guess, in the future, if [I] *627 see [Nicko] like at a movie theater or something, you know, I don't know what that interaction would be like." In response to follow-up questions by the trial judge, Perez reiterated that knowing the witness would not impact his ability to be fair and impartial. The trial court denied the State's request to strike Perez for cause, but allowed the State to use a peremptory challenge over the defense's objection. On appeal, McNeil argues that the trial court erred in removing Perez.

Moreover, the fact that the trial court denied the State's motion to strike Perez for cause indicates that the trial court believed Perez's testimony that he did not recognize Nicko's name when read during voir dire and that he could remain impartial. The trial court made explicit that it was allowing the State to exercise a peremptory challenge to strike Perez. Stated differently, implicit in the trial court's ruling that the State could not challenge Perez for cause was a finding that Perez either did not commit misconduct or that any misconduct did not require removal. Accordingly, the trial court erred in allowing the State to strike Perez using a peremptory challenge after the trial had begun.

We have neither found nor been directed by the parties to any case that involved a trial court improperly allowing a party to use a peremptory challenge mid-trial. Allowing the exercise of peremptory challenges to

continue into the trial would encourage tactical gamesmanship, a result *629 that we are unwilling to condone and one for which we feel compelled to provide a remedy. Accordingly, we reverse.

CIVIL CASE: *Aquila v. Brisk Transportation*, 170 So.3d 924 (Fla. 4th DCA 2015)

Jury selection continued for the rest of the day. At the end, the parties selected two additional alternates, with the first alternate moving into the jury panel. The plaintiff's counsel did not request to backstrike a member of the panel that had been sworn. He accepted the jury without mentioning his prior objection to the disallowance of backstriking.

Although the trial court erred in refusing to allow backstriking of the panel originally selected, the issue is not preserved. In *Tedder v. Video Electronics, Inc.,* 491 So.2d 533 (Fla.1986), the supreme court clearly held that the right to the unfettered exercise of a peremptory challenge includes *the right to view the panel as a whole before the jury was sworn.* "[A] trial judge may not selectively swear individual jurors *prior* to the opportunity of counsel to view as a whole the entire panel from which challenges are to be made."

CIVIL CASE: *Szmanski v. Cardiovascular Associates of Lake County,* 62 So.3d 649 (Fla. 5th DCA 2011)

Trial court's refusal to allow patient to exercise her peremptory challenges in malpractice case before the jury was sworn was reversible error; trial court adopted a procedure that deprived patient of a valuable right by offering patient only two choices, neither of which was proper, and

one of these choices required patient not to exercise peremptory challenge of first six jurors after alternates were chosen and the other required a piecemeal swearing of jury, and patient agreed not to exercise backstrike of any of the first six jurors, but objected to the entire panel based on the procedure employed to select it, and jury returned verdict in favor of medical clinic. West's F.S.A. RCP Rule 1.431(b, f).

***Fernandez v. State,* 746 So.2d 516 (Fla. 3d DCA 1999)**

***Black Shear v. State,* 521 So.2d 1083 (Fla. 1988)**

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

***Williams v. State*, 551 So.2d 492 (Fla. 1st DCA 1989)**

"UNSTRIKING' A JUROR

***McCray v. State*, 2016 WL 3533852 (Fla. 4th DCA 2016)**

The trial court's denial of defendant's motion to "unstrike" juror, upon whom he used his last peremptory strike, so that he could use his last peremptory strike on a different juror was not an abuse of discretion.

DEFENSE: [Judge], can we back-strike or unstrike [Juror 2.5] then?

COURT: Unstrike?

DEFENSE: Or back-strike.

COURT: This is a first for me.

STATE: I have never heard of an unstrike.

COURT: It's not a back-strike because [Juror 2.5 has] already been stricken.

....

DEFENSE: ... You're right, Judge. We've already stricken [Juror 2.5].

COURT: *I don't know how I can unstrike a strike because then that messes up everybody else's decisions on what you struck or so.* That's our jury....

During jury selection, the state used six of its ten peremptory strikes. The defense used all ten of its peremptory strikes. Thereafter, the jury panel and an alternate were accepted by both sides. Defense counsel then told the [trial] court that [the defendant] wished to withdraw a peremptory [strike] made on one juror and use it to strike another. The state objected and the trial court denied the request. The jury was then sworn.

Similar to *Davis,* we cannot say here that the trial court erred in denying the defendant's motion to "unstrike" Juror 2.5, upon whom he used his last peremptory strike, so that he could use his

last peremptory strike on Juror 3.9. The reason is because, as in *Davis,* after the defendant used his last peremptory strike on Juror 2.5, the state accepted the panel, *thereby revealing the state's strategy to accept Juror 3.9.* Allowing the defendant to reveal the state's strategy to accept Juror 3.9, and then allowing the defendant to "unstrike" Juror 2.5 in order to strike Juror 3.9, would have prejudiced the state.

We note, however, that our holdings in this case and *Davis* may conflict with our sister court's holding in *McIntosh v. State,* 743 So.2d 155 (Fla. 3d DCA 1999), regarding the circumstances by which a party may or may not "unstrike" a juror.

***McIntosh* held, under different circumstances, that a court did not abuse its discretion in *granting* a motion to "unstrike" a juror. Thus, to the extent the results of this case and *Davis* may be perceived to conflict with *McIntosh,* we certify conflict.**

XII. JURY SELECTION/MOTIONS TO STRIKE PANEL

REASONS TO STRIKE A JURY PANEL (AND THE REQUIREMENT TO RENEW OBJECTIONS BEFORE SWEARING IN THE JURY)

***Lavin v. State*, 754 So.2d 784 (Fla. 3d DCA 2000)**

During voir dire, prosecutor made reference to instruction in State Attorney's Manual that requires prosecutors to make sure that the innocent are not charged. Defense Counsel objected and was sustained. A sidebar discussion then ensued and the prosecutor continued voir dire and reiterated his role to make sure that the innocent are not prosecuted. Defense Counsel objected but was overruled. The next day, Defense Counsel renewed his objection (during the second day of voir dire), due to the prosecutor's comment, and moved to strike the panel. The trial judge agreed the statement was improper but refused to strike the panel but offered a curative instruction which the Defense refused.

The Appellate Court held that prosecutor improperly expressed his personal belief in Defendant's guilt during voir dire and that this expression compromised Defendant's right to a fair trial; however Defense Counsel failed to preserve this jury selection issue.

In *Lavin,* the Defense exhausted its challenges and the Court announced, "That's it. Bring the jury in." The Appellate Court found that *Lavin* "did not affirmatively accept the jury immediately prior to its being sworn without reservation of the earlier objection." Defense Counsel's actions were different from those of Counsel in *Karp v. State,* 698 So.2d 577 (Fla. 3d DCA 1997), wherein the Defense unconditionally accepted and tendered the selected jury before it was sworn without renewing his objection. This distinction was irrelevant since Counsel in *Lavin* failed to preserve the issue.

The Court found that *Joiner v. State*, 618 So.2d 174 (Fla. 1993) controlled. Under *Joiner*, the Defendant was held to have waived his *Neil*

objection when he accepted the jury. The *Lavin* Court also pointed to *Milstein v. Mutual Sec. Life Ins. Co.,* 705 So.2d 639 (Fla. 3d DCA 1998) for the proposition that, "The logic of *Joiner* requires the litigant to renew the previous objection even when the litigant had made no statement affirmatively accepting the jury."

N.B. - *Karp* involved a situation where a motion to strike a panel was denied after a potential juror made spontaneous prejudicial comments.

***See also Stripling v. State*, 664 So.2d 2 (Fla. 3d DCA 1995) (where Counsel objected to an unduly restricted voir dire; held issue not preserved); *Green v. State,* 679 So.2d 1294 (Fla. 4th DCA 1996) (time limitations imposed on voir dire; held issue not preserved).**

LESSON: Counsel must renew objections with specificity prior to the jury being sworn.

Middleton v. State, 41 So.3d 357 (Fla. 1st DCA 2010)

Defendant was charged by indictment with first-degree murder and was convicted of the lesser offense of second-degree murder. He filed a motion for postconviction relief alleging, among other things, that Defense Counsel was ineffective for failing to move for a mistrial after a juror was stricken during deliberations but before the verdict was announced for failing to disclose that he had been convicted of a felony. The Trial Court granted the State's motion and removed the juror from the panel.

The Appellate Court held that the Defendant had satisfied both the deficient performance and prejudice prongs of *Strickland v. Washington*, 466

U.S. 668, 104 S.Ct. 2052 (1984) as he was denied a procedural right to a new trial to which he was entitled under the law.

Floyd v. State, 18 So.3d 432 (Fla. 2009)

Defendant was convicted of first-degree murder and sentenced to death. In postconviction motion, the Defendant claimed that Counsel was ineffective for failing to object to a prospective juror or to seek a new panel. Had Defense Counsel done so, the Trial Court would have had to question the panel as a means to separate those members who had been affected by prospective juror's comments regarding the death penalty and those who were not affected.

During jury selection, the following exchange occurred between the State and the prospective juror:

> **STATE: Mr. Wilkinson, you indicated you probably would not make it back to jury duty again.**
>
> **Is there anything in particular that would interfere with you being a good juror in this case for this week?**
>
> **VENIREMAN: Well, I don't know about this week or any other week. But the only thing I know for sure is the justice system sometimes works in right ways and other times it don't.**
>
> **If a man is sentenced to die in the electric chair, I feel they ought to go ahead after a certain period of time and go ahead and electrocute the man and get it over with, not give him a lifetime or send them over**

there for years and years and years, cost the taxpayer. My opinion, too much money.

(Clapping erupted by prospective jurors.)

THE COURT: Please, we need to maintain order. This is not a rooting session.

Defendant claims that these comments by the prospective juror and outbreak of applause tainted the prospective panel and Counsel's failure to act constituted deficient performance and prejudiced his trial.

The Florida Supreme Court held that this challenge to the prospective juror's comments was procedurally barred as it was not raised on direct appeal. With regard to Defendant's ineffectiveness claim, the Florida Supreme Court held that the Defendant was not entitled to relief as he failed to produce any evidence that Counsel was deficient, and thus, could not satisfy the burden of proof.

PROCEDURAL REQUIREMENTS FOR MOTION TO STRIKE PANEL

Johnson v. State, 141 So.3d 698 (Fla. 1st DCA 2014)

The District Court of Appeal, Swanson, J., held that defendant failed to preserve his claim that potential juror's comment during voir dire about defendant's criminal history entitled defendant to dismissal of the entire venire.

Hayes v. State, **954 So.2d 1265, 1266 (Fla. 5th DCA 2007) (holding that although defendant did not formally accept the jury panel, defendant failed to preserve his claim that the trial court should have granted his motion to strike the entire venire where he failed to renew his objection or motion to strike prior to the jury being sworn). Thus, we affirm due to the lack of preservation.**

Cargill v. State**, 121 So.3d 1157 (Fla. 1st DCA 2013)**

The prosecutor and defense attorney questioned the jurors who had been called to serve in the defendant's case and ultimately selected a six-person jury and one alternate for the trial. Subsequently, defense counsel voiced the following objection:

> **Your Honor, I do have to make one procedural objection just is that the panel, and I recognize that a lot of this has to deal with demographics, but the panel lacked any African–Americans this morning. So I just for that purpose would just like to lodge that objection just in case Mr. Cargill at some point in time needs to address that on appeal.**

At that point, the trial judge asked defense counsel why he had waited until after the *voir dire* examination to make the objection. Specifically, the judge inquired, "So I don't know what you're asking that—now that we have selected the jury, what are you asking that I do." Defense counsel responded by stating, "It is something I didn't do on the front end, but I just wanted to make sure that for record preservation purposes that I noted there were not

African–Americans in the panel." The judge then denied the motion to strike the jury panel.

The standard governing a claim that the jury panel does not fairly represent the community is set out in *Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). There, the Court held that in order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Id.* at 364, 99 S.Ct. 664.

Rule 3.290 of the Florida Rules of Criminal Procedure provides that a "challenge to the panel shall be in writing," that it "shall specify the facts constituting the grounds," and that it must be "made and decided before any individual juror is examined." By the terms of the rule, a challenge to the panel "shall be tried by the court" before the jury selection begins in a particular case. These provisions give the parties an opportunity to present statistical data pertaining to the representation of distinctive groups within the community, and other evidence pertaining to the method of identifying particular citizens who will be summoned to serve on a jury. If a distinctive group has been systematically excluded in the jury venire, the error can be corrected before the defendant is forced to stand trial before a jury that does not fairly represent the community.

PREJUDICIAL COMMENTS MADE BY JURY PANEL MEMBERS OUTSIDE COURT PROCEEDINGS DURING VOIR DIRE

Brower v. State, 727 So.2d 1026 (Fla. 4th DCA 1999)

Defendant was faced with a three-week voir dire in a first-degree murder prosecution. During voir dire, the Defense Counsel brought forth witnesses that prospective jurors on the panel commented to other jurors, "Why are we going through this? Where I come from, we would have strung him up." and "They're going to have to prove to me that he did not do it." The Trial Court excused all the offending prospective jurors who made the remarks but not the jurors who heard them. (One of those jurors sat on the trial jury.) Defense Counsel objected and moved to excuse the entire panel, which was denied.

The Appellate Court affirmed holding that these remarks did not violate Defendant's right to a fair trial or an impartial jury and did not entitle him to striking of the panel. The Appellate Court noted that "a great deal of time was devoted to voir dire, including extensive individual questioning of jurors, during which Defense Counsel could inquire as to whether a specific individual had pre-judged the case or were not taking the responsibility of jury duty seriously. None of the offending jurors served." The Court held that, "there is nothing in the record to indicate the offensive remarks were offered or taken seriously, or that they referred to the facts of this case, and all evidence to the contrary."

The dissent said, "to show our condemnation, we should refuse to go forward with prospective jurors exposed to such corrupt and destructive

influences. Nor do I believe that the lame attempts of the jurors to minimize the words justify any discretion of the trial judge. . . . No amount of after-the-fact justification can possibly remove the stain and save the venire. I do not understand why any trial judge would not unhesitatingly get rid of the entire room of jurors who had been subjected to these comments and start anew with an uncontaminated group."

LESSON: If this situation occurs and the Trial Court refuses to strike the panel, Counsel must request:

1. **An individual voir dire (on the subject of those comments); and**
2. **Questioning to be done by Counsel <u>first</u> (to avoid juror capitulation to judicial authority for fear of having done something wrong, contemptuous or prosecutable).**

McPherson v. State, 35 So.3d 981 (Fla. 3d DCA 2010)

Defendant was convicted of leaving the scene of an accident with injuries and fleeing a law enforcement officer. The Defendant filed a motion for postconviction relief asserting ineffective assistance of Counsel for refusing to ask the Trial Court to voir dire potential jurors regarding their interactions with police officers during a recess in jury selection. The Trial Court denied the motion for postconviction relief without an evidentiary hearing and the Defendant appealed.

In support of his motion for postconviction relief, the Defendant attached a sworn affidavit submitted by his brother. His brother stated that during a recess in jury selection, he witnessed some of the prospective jurors interacting with some of the police officers who were sitting outside the courtroom. According to the Defendant's brother, some of the members of

the jury panel asked the police officers their opinion of someone charged with leaving the scene of an accident on a police officer. The officers replied that "every Defendant of this charge must be found guilty." The Defendant's brother averred in the affidavit that he notified Defense Counsel of his observations.

In his motion, the Defendant claimed that he asked his attorney whether or not he had spoken to his brother about the jury's contact with the police officers. According to the Defendant, Counsel acknowledged having the conversation with the Defendant's brother. The Defendant stated that he asked his Counsel to inform the Trial Court so that the Trial Court could question each juror about their conversations with the police officers and/or declare a mistrial. Trial Counsel refused to bring the matter to the Court's attention.

The Trial Court denied the Defendant postconviction relief on the grounds that this issue regarding jury selection should have been raised on direct appeal, and thus, was not properly raised in a postconviction motion.

The Appellate Court disagreed with the Trial Court's assessment that the matter was an "issue regarding jury selection." Instead, the Third District Court of Appeal characterized the interaction between the jurors and the police officers that took place during the recess in jury selection as one of whether or not the jurors had an inappropriate conversation which biased them against the Defendant.

The Appellate Court held that since the Defendant's motion involved a private conversation between the Defendant and his lawyer which could not

be conclusively refuted by the record, the Appellate Court reversed and remanded so that the Trial Court could conduct an evidentiary hearing on the issue.

EXCUSAL OF PANEL NOT ALWAYS REQUIRED FOR JUROR'S BIASED COMMENT

McCoy v. State, 113 So.3d 701 (Fla. 2013)

Defense counsel's failure to move to strike entire venire in capital murder trial after one prospective juror expressed opinion that defendant was "of a Moslem descent," and that what he knew "of the Moslems is that death isn't that big of a deal" did not constitute deficient performance, as required to support claim of ineffective assistance of counsel; prospective juror did not serve because of his statement that he could not impose a sentence of death for any reason, no single juror referenced or inquired into defendant's religion, and defendant's trial occurred prior to terrorist attacks on the World Trade Center.

McCoy contends that trial counsel was ineffective for failure to move to strike the entire venire after one prospective juror made negative comments about Islam. During voir dire, the following dialogue occurred:

TRIAL COUNSEL: [Y]ou said yesterday that you were against the death penalty.

PROSPECTIVE JUROR: Yes, sir.

TRIAL COUNSEL: And I am not going to try to change your mind or anything. I just want to see how strong your feelings are. Can you think of

a situation where you could vote for a death sentence for someone convicted of first degree murder?

PROSPECTIVE JUROR: No, sir, not necessarily. Coming into this Court[,] I abide by the laws of this state and this county[,] so the point is to find the truth, but in my heart and searching my soul I am still going to vote for a life sentence due to the fact if, you know, the defendant is guilty or even if he is not[,] the point is[,] ***from what I gathered so far by the change of his name[,]*** **[5]** ***he is of a Moslem descent ...*** ***714** ***and what I know of the Moslems is that death isn't that big of a deal. The penalty of death, to be killed[,] is not that big of a deal.***

Me as a Christian faith I have learned that him living a life, giving of himself to someone else to better their life is more of a punishment and a learning system for him than to take his life.

(Emphasis supplied.) This was the only reference during voir dire to the Muslim faith. Trial counsel did not move to strike the entire jury panel in response to the comment; however, the prospective juror did not serve because of his statement that he could not impose a sentence of death for any reason.

The prospective juror's assertions about McCoy's name change and tenets of the Muslim faith constituted unsubstantiated opinions—not details presented and asserted as true by the prosecutor. As noted by the Fourth District Court of Appeal in *Brower,* "[p]rospective jurors are frequently exposed, before and during voir dire, to innumerable comments, attitudes,

and points of view, the subscription to which would be improper for an unbiased juror." 727 So.2d at 1027. Were excusal of an entire panel required for every allegedly biased or improper comment by a prospective juror, selecting a jury in a case—especially a capital case—would be exceedingly difficult. Thus, we agree with the postconviction court's determination that trial counsel was not deficient for failing to request that the entire venire be struck, and this subclaim of ineffectiveness fails.

XIII. JURY SELECTION/MISCONDUCT/NON-DISCLOSURE JUROR MISCONDUCT/NON-DISCLOSURE

FAILURE TO DISCLOSE CONVICTED FELON STATUS

Boyd v. State, 2015 WL 9170916 (Fla. 4th DCA 2015)

Boyd asserts that he is entitled to a new trial because two jurors failed to disclose information pertinent to his decision to retain them for jury service, thereby denying him a fair and impartial jury.

Boyd argues that jurors Tonja Striggles and Kevin Rebstock failed to disclose information concerning their criminal histories, which denied Boyd a fair and impartial jury at trial. According to Boyd, the presence of Juror Striggles and Juror Rebstock—one, a convicted felon who had not timely had her civil rights restored; the other, a former misdemeanor defendant for whom adjudication had been withheld—on the jury of his criminal trial was inherently prejudicial to his legal interests. Consequently, Boyd asserts, because his constitutional right to a fair trial was denied when he was

convicted by a jury that consisted of said jurors, a new trial must be granted without any further showing of actual bias or prejudice.

The First District affirmed the defendant's conviction for carrying a concealed firearm but certified for review the following question as one of great public importance:

> **MUST A CONVICTED DEFENDANT SEEKING A NEW TRIAL DEMONSTRATE ACTUAL HARM FROM THE SEATING OF A JUROR WHO WAS *UNDER CRIMINAL PROSECUTION* WHEN HE SERVED BUT THOUGH ASKED, FAILED TO REVEAL THIS PROSECUTION?**

According to the record, Striggles was about nineteen years old at the time of her first false-bombing reporting in August 1983, and twenty-four at the time of her last known adjudication in March 1988. Certified records indicate that Striggles' civil rights were restored on April 4, 2008—more than six years after she served on the jury of Boyd's 2002 trial. When asked by the trial court how long ago she was involved with the criminal justice system, Striggles responded that she was a juvenile. She did not otherwise apprise the court or counsel of her series of convictions as an adult (beginning in August 1983).

The record also reflects that Juror Rebstock was arrested in Broward County in November 1991 and charged with misdemeanor solicitation of prostitution; however, the presiding court withheld adjudication. During voir dire in the present case, Rebstock reported on the voir dire questionnaire form that he did not have any family or friends involved in the legal system. He did not report his own encounter with law enforcement, and no further

inquiries were made by the trial judge or counsel for either party concerning Rebstock's answer to this question.

Moreover, we see no practical reason to believe that those who, for instance, have not become rehabilitated since being prosecuted over a decade before serving on the jury of a criminal trial are more likely than similarly situated persons—but who have also had their civil rights restored—to favor the State over the defense.

The United States Supreme Court has emphasized that "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough [Power Equip., Inc. v. Greenwood],* 464 U.S. [548], 556, 104 S.Ct. 845 [78 L.Ed.2d 663 (1984)]; *see also United States v. Carpa,* 271 F.3d 962, 967 (11th Cir.2001) (citing *McDonough,* 464 U.S. at 553, 104 S.Ct. 845).

> **Although a criminal defendant has a constitutional right to be tried by an impartial jury, a criminal defendant does not have a constitutional right to be tried by a jury free of convicted felons. Instead, the right to be tried by a jury free of convicted felons is granted by statute. And by statute, a violation of this "right" only requires a new trial if the defendant demonstrates that such a violation "actual[ly] prejudice[d]" him.**

Besides, we do not think that it is pragmatic to promulgate a per se rule that one's status as a convicted felon denotes inherent bias against a criminal defendant's legal interests. Otherwise, courts would be placed in the

precarious position of ordering new trials based not on legally sufficient evidence of actual bias or prejudice, but wholly on gut reactions to sociological generalizations of human tendencies. *See Uribe,* 890 F.2d at 562 ("To be accorded weight, a bias claim requires more than subjective characterizations unanchored in the realities of human experience."); *Boney,* 977 F.2d at 633 ("A *per se* rule [requiring a new trial whenever a felon serves on a jury] would be appropriate, therefore, only if one could reasonably conclude that felons are always biased against one party or another. But felon status, alone, does not necessarily imply bias.").

JUROR MISCONDUCT/NON-DISCLOSURE OF MATERIAL FACT REQUIRES HEARING IF SUFFICIENT POST-TRIAL AFFIDAVITS ARE PRESENTED

Forbes v. State, 753 So.2d 709 (Fla. 1st DCA 2000)

Following conviction, Defendant presented motion for new trial Defendant presented a motion for new trial supported by affidavits that stated that juror knew Defendant, lived in neighborhood of Defendant, and was aware of some of the crimes for which Defendant was investigated. The Trial Court applied the three-prong test of *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995) for granting new trial based upon juror non-disclosure during voir dire. The *De La Rosa* test requires the movant for new trial to show: (1) the information the juror withheld is relevant and material to jury selection; (2) the juror concealed such information; and (3) the failure to disclose the information was not, attributable to the movant's lack of diligence.

The Trial Court found that the Defendant had failed to satisfy parts 2 and 3 of the *De La Rosa* test. Defendant appealed arguing that the Trial Court should have permitted a juror interview before applying the *De La Rosa* test.

The Appellate Court agreed with Defendant that he was entitled to a juror interview before the Trial Court ruled on the motion. The Appellate Court stated that if allegations contained in affidavits were proven to be true, a new trial was warranted, "unless the State is able to demonstrate that there was no reasonable possibility that the misconduct affected the verdict .... If it is shown that (Defendant) knew the juror but withheld that knowledge, such fact would constitute a waiver of any issue of juror misconduct."

Furthermore, the Court cited *Baptist Hospital of Miami v. Maler*, 579 So.2d 97 (Fla. 1991) wherein the Florida Supreme Court concluded that a jury inquiry is permissible only when "the moving party has made sworn factual allegations that, if true, would require a Trial Court to order a new trial." However, the Appellate Court added that if the Defendant knew the juror and withheld that information such fact would constitute an issue of juror misconduct. *See Rooney v. Hannon*, 732 So.2d 408 (Fla. 4th DCA 1999), review denied, 744 So.2d 456 (Fla. 1999).

Birch v. Albert, 761 So.2d 355 (Fla. 3d DCA 2000)

A juror failed to disclose (in medical malpractice lawsuit) that she had been sued in County Court for non-payment of a $1,000 anesthesiologist bill. During voir dire, juror was not asked directly about medical lawsuits.

The Appellate Court held that juror information is concealed where information is "squarely asked for" and not provided. The Court found that juror's response cannot constitute concealment where the juror's response is ambiguous and Counsel does not inquire further to clarify the ambiguity. Moreover, the Appellate Court found that in this case non-disclosure of litigation information was not material. The Court noted, "Materiality must be analyzed on a case-by-case basis, and we clarify that *Wilcox v. Dulcam,* 690 So.2d 1365 (Fla. 3d DCA 1997), does not mandate an automatic new trial whenever there has been a nondisclosure of litigation information."

Based on the foregoing, the Appellate Court ruled that a new trial was not warranted.

> **LESSON NO. 1: Counsel must ask specific questions with extended follow-up questions when these issues arise. The concurring opinion by Judge Sorondo says it all:**
>
> > **"In order to avoid these misunderstandings, it is imperative that questions propounded to potential jurors be absolutely clear. This includes explaining the meanings of all legal terms contained within the questions. Our juries are composed of people from all segments of the community. Miami-Dade County in particular, enjoys a racial and ethnic diversity which is unique in the State of Florida. Potential jurors can be from a variety of countries and may have learned English as a second or even third language. Even the simplest of legal terms can be confusing to people born and raised in foreign countries."**

LESSON NO. 2: This case is an excellent case to support Counsel's need for additional voir dire time when the Court wants to limit questioning. Of course, the need for specificity of Counsel's questions is necessary to support Counsel's position.

MATERIALITY OF NON-DISCLOSURE BY JUROR UNDER *DE LA ROSA V. ZEQUEIRA*

De La Rosa v. Zequeira, 659 So.2d 239 (Fla. 1995)

The Florida Supreme Court established a three-part test to determine whether a juror's non-disclosure of information during voir dire warrants a new trial. The complaining party must establish that:

1) **The information withheld was relevant and material to jury service in the case;**
2) **The juror, in fact, concealed the information during questioning;**
3) **The failure to disclose the information by the juror was not attributable to the complaining party's lack of diligence.**

Non-disclosure is considered "material" if it is substantial and important so that if the facts were known, the party may have been influenced to peremptorily challenge that juror. *James v. State*, 751 So.2d 682 (Fla. 5th DCA 2000).

The Appellate Court in *De La Rosa* held that plaintiff was entitled to a new trial when juror, despite being asked, failed to disclose he had been involved in six prior lawsuits. The Court determined that this information was material.

The Appellate Court cited *Bernal v. Lipp,* 580 So.2d 315 (Fla. 3d DCA 1991) wherein the Court held that failure of juror to disclose he had been Defendant in personal injury case required reversal even though jury member had been involved in a minor accident which had been settled by insurer.

The Court also noted *Mobil Chemical Co. v. Hawkins,* 440 So.2d 378 (Fla. 1st DCA 1983) wherein the First District Court of Appeal held that party was entitled to a new trial because juror concealed fact that she was related to the

plaintiff's wife and had been represented by the plaintiff's former attorney who still had a fee interest in the case.

Johnston v. State, 63 So.3d 730 (Fla. 2011)

Defendant was convicted of first-degree murder and sentenced to death. He filed a motion for postconviction relief alleging ineffective assistance of Counsel. Among his claims, the Defendant alleged that Counsel was ineffective for failing to sufficiently question a juror at voir dire and failing to cite juror misconduct in a motion for new trial.

The juror in question had served as the foreperson. During the penalty phase of the trial, the juror was arrested for an outstanding capias for civil contempt charges as a result of not paying court costs in a misdemeanor obstruction of justice case which she had pled to months earlier. The juror did not disclose this prior plea during jury selection.

Defendant raised this issue on direct appeal. The Florida Supreme Court rejected the argument on appeal holding that the capias did not disqualify the juror for serving under section 40.013(1), Florida Statutes, and that Counsel never raised the issue of non-disclosure with the Trial Court.

For these same reasons, the Florida Supreme Court in reviewing the postconviction motion again rejected the notion that the Defendant was entitled to relief on this ground. Moreover, the Court held that Counsel was not deficient because his decision to keep the juror was a result of a strategic decision to have a young and minority jury.

During an evidentiary hearing, Counsel testified that the juror's prior misdemeanor case and active capias did not make her any less desirable to the Defense. He would not have moved to strike the juror even if upon further questioning she would have made the disclosure. As evidence of this, after learning of the juror's arrest, the Defense objected to her removal, expressing a preference for her over the alternate juror.

Since the Defendant could not establish deficiency and prejudice, the Florida Supreme Court denied relief on this ineffectiveness claim.

The Defendant also raised the claim that Counsel was ineffective for not citing the juror's misconduct based on non-disclosure in a motion for a new trial.

The Florida Supreme Court reviewed this claim under the three-prong test articulated in *De La Rosa v. Zequiera*, 659 So.2d 239, 241 (Fla. 1995).

Under the first prong of *De La Rosa*, the Defendant must establish that the non-disclosed information is relevant and material to jury service. A juror's non-disclosure is considered material if it is so substantial that, if the facts were known, the Defense likely would peremptorily exclude the juror.

The Florida Supreme Court held that the Defendant could not satisfy the materiality prong under *De La Rosa*. It found nothing in the character and extensiveness of the juror's experience to suggest that she would be biased against the Defendant. In fact, the Florida Supreme Court noted that the juror's experience as a prior Defendant made bias against the Defendant especially unlikely.

In addition, the Florida Supreme Court stated that there was no evidence to suggest that had the facts been known, the Defense would have peremptorily excluded the juror from the jury. As Defense Counsel testified during the evidentiary hearing, the juror matched the profile of the optimal juror sought by the Defense and the substance of the non-disclosure would have caused the Prosecution - not the Defense - to exclude or strike the juror.

Consequently, the Florida Supreme Court determined that the Defendant could not prove materiality and thus, any motion for new trial based on the juror's non-disclosure would have been denied.

Therefore, the Defendant's claim of ineffectiveness of Counsel for failing to move for a new trial based on juror non-disclosure lacked merit.

Foster v. State, 2013 WL 5659482 (Fla. 2013)

After his first degree murder conviction and death sentence were affirmed on appeal, Defendant filed a motion for postconviction relief. In one of his claims, Foster contends that the trial court erred in summarily denying his claim that the State committed a *Brady* violation when it failed to disclose the fact that Juror Q had been prosecuted by Lee County authorities and convicted of DUI twenty-four years earlier. *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). During voir dire, the trial judge asked prospective Juror Q if he had ever been convicted of a crime or charged with a crime, to which he answered, "No, sir." Juror Q did serve on the jury. Foster contends the prejudice which flowed from this nondisclosure was that Juror Q may have decided to sentence Foster to death based on the

juror's past experiences with Lee County authorities, which were unknown to counsel. Foster contends that the State had actual or constructive knowledge of this fact and failure to disclose it was a violation under *Brady.* He also contends that the State knowingly presented or failed to correct Juror Q's false testimony in violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

We explained in *Lebron v. State,* 799 So.2d 997 (Fla.2001), that "[a] juror's nondisclosure of information during voir dire warrants a new trial if it is established that the information is relevant and material to jury service in the case, the juror concealed the information during questioning, and failure to disclose the information was not attributable to counsel's lack of diligence." *Id.* at 1014. *See also De La Rosa v. Zequeira,* 659 So.2d 239, 241 (Fla.1995) (same). More recently, we held that the movant must at least allege facts establishing a prima facie basis for prejudice. *See Hampton v. State,* 103 So.3d 98, 112–13 (Fla.2012), *cert. denied,* ––– U.S. ––––, 133 S.Ct. 2027, 185 L.Ed.2d 892 (2013). In *Hampton,* we reiterated that the complaining party must establish "not only that the non-disclosed matter was 'relevant' ... but also that it is 'material to jury service in the case.' " *Hampton,* 103 So.3d at 112 (quoting *Roberts v. Tejada,* 814 So.2d 334, 339 (Fla.2002) (quoting *De La Rosa,* 659 So.2d at 241)).

In *Johnston v. State,* 63 So.3d 730 (Fla.2011), we explained, "There is no per se rule that [a juror's] involvement in any particular prior legal matter is or is not material. Factors that may be considered in evaluating materiality include the remoteness in time of a juror's prior exposure, the character and

extensiveness of the experience, and the juror's posture in the litigation." *Id.* at 738 (citations omitted) (quoting *Roberts,* 814 So.2d at 345). Again, in this postconviction context, the movant must establish that the undisclosed information was relevant and material to jury service. *Id.*

The claim filed by Foster failed to allege a prima facie basis for concluding that the undisclosed twenty-four-year-old DUI conviction, even if verified, was relevant or material to Juror Q's jury service. Just as we noted in *Johnston,* "nothing about the character and extensiveness of [the juror's] own experience" in being convicted of a nonviolent offense "suggests [the juror] would be biased against a defendant pleading not guilty in a death penalty case." *Johnston,* 63 So.3d at 739.

To the extent that Foster was denied a hearing on his *Brady* claim that the State knowingly failed to disclose this juror information resulting in prejudice, the claim was correctly summarily denied. In order to establish a *Brady* violation, the defendant must show that (1) favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) that because the evidence was material, the defendant was prejudiced.

Hampton v. State, 103 So.3d 98 (Fla. 2012)

Potential juror who had been arrested, but not yet formally charged by a prosecutor for a crime, was not "under prosecution" and, thus, was not statutorily disqualified from serving as a juror.

Defendant failed to preserve for appellate review his argument that

juror engaged in misconduct by concealing his arrest and potential prosecution during voir dire, where defendant did not present to the trial court any argument based on those portions of the voir dire transcript that he argued on appeal constituted juror concealment or misconduct.

Defendant failed to establish that juror's failure to disclose that he was arrested approximately two weeks before jury selection in response to trial court's question to the venire regarding whether the members of the venire or a family member had been accused of a crime, was relevant and material to jury service, or was not due to defendant's own lack of diligence, and thus defendant failed to establish a prima facie showing of a basis for a new trial; because defendant did not engage in any meaningful inquiry to determine the details regarding the many crimes reported by the venire members, there was no reasonable basis to conclude that defendant viewed that line of questioning as an exploration of whether any of the venire members or their family members were currently amenable to prosecution.

The party complaining that a juror's nondisclosure of information during voir dire warrants a new trial must establish not only that the non-disclosed matter was relevant but also that it is material to jury service in the case.

A juror's nondisclosure of information during voir dire is considered "material," as required to warrant a new trial, where the omission of the information prevented counsel from making an informed judgment which would in all likelihood have resulted in a peremptory challenge.

Villalobos v. State, 143 So.3d 1042 (Fla. 3d DCA 2014)

Information that a juror failed to disclose during voir dire was "material to jury service" in the case, such that its nondisclosure could warrant a new trial, where nondisclosure prevented defense counsel from making an informed judgment which would, in all likelihood, have resulted in a peremptory challenge of the juror.

Villalobos was charged with two counts of DUI manslaughter following a car accident in Monroe County. During voir dire, the court read a list of potential witnesses to the jury venire and specifically inquired whether any of the venire members knew of, or had a prior business or social relationship with, anyone on the witness list. The list included blood analyst "Jody Gyokeres of Marathon." Venire members James Stelzer and John Arvidson remained silent in response to the court's question and did not acknowledge that they knew Ms. Gyokeres. Stelzer and Arvidson were both eventually selected as jurors.

During a break in the trooper's testimony, and outside the presence of the other jurors, juror Stelzer revealed to the court and counsel that he knew witness Gyokeres. During the questioning that followed, Stelzer explained that he believed he used to live in the same building as Gyokeres' boyfriend, that Stelzer and Stelzer's wife had known the couple for a few years, they had dinner together a couple of times, and that a few days before the trial, Stelzer's wife attempted to make plans with Gyokeres. In response to further questioning, Stelzer said he did not believe his relationship with Gyokeres

would affect his ability to render a fair and impartial decision. Nonetheless, and at the defense's request, the trial court dismissed Stelzer due to his relationship with the witness.

The court, the State and the defense inquired as to Arvidson's ability to be fair and impartial in deciding this case despite Arvidson's relationship with Gyokeres. Arvidson consistently answered that he could be fair and impartial, and that "she's just another person testifying to me."

The defense moved to dismiss Arvidson, contending that despite his claim that he could be impartial, Arvidson was employed *1045 by Gyokeres, had social interaction with her, and was sympathetic to Gyokeres' medical condition.[2] The State, on the other hand, believed this situation was different from the prior juror (Stelzer), since Arvidson did not have an ongoing social relationship with Gyokeres, the relationship was limited to some random repair work, and Arvidson would weigh her credibility in the same manner as any other witness. The trial court reasoned as follows:

> **THE COURT: I agree. Mr. Stelzer indicated that he had a social relationship with that witness, that his wife spoke with her, that they were in more frequent contact on a social basis, that he did offer an opinion about her veracity.**

At the conclusion of the evidence, the defense renewed its objection to juror Arvidson remaining on the jury and moved for a mistrial

In *De La Rosa,* the Supreme Court of Florida outlined the three-prong

test to be utilized in determining whether a juror's nondisclosure of information during voir dire warrants a new trial[5]:

> **First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.**

We agree with Villalobos that this nondisclosure "prevented counsel from making an informed judgment-which would in all likelihood have resulted in a peremptory challenge."

Because the trial court erred in denying the motion to dismiss juror Arvidson, and in denying the subsequent motion for mistrial, we reverse and remand for a new trial.

CIVIL CASE*: Duong v. Zaidie*, 125 So.3d 225 (Fla. 4th DCA 2013)

Juror M was arrested for theft when he attempted to return a pair of shoes he did not purchase. Ziadie's counsel declined to ask questions about the situation, commenting it was "not a big deal." Dr. Duong's counsel did not ask Juror M any questions about any litigation resulting from the arrest and did not exercise a challenge for cause or a preemptory challenge, despite Juror M's admission of attempting to steal.

Despite the rather brief inquiries by Ziadie's counsel, Dr. Duong's counsel did not ask prospective Juror S or Juror F any follow-up questions about their litigation experiences and failed to ask Juror M any questions

about any litigation resulting from his arrest. Ziadie argues that the failure to ask questions about litigation histories demonstrates Dr. Duong was not concerned with having jurors with past litigation experience on the panel. In reply, Dr. Duong points out that no juror had litigation histories as extensive as Jurors One and Two, and prospective Juror S, Juror F, and Juror M were all forthcoming about their litigation histories. After reviewing the transcripts of voir dire, we are not persuaded by Dr. Duong's counter-argument.

The trial court did not abuse its discretion in determining the undisclosed lawsuits were not material. None of the undisclosed lawsuits are similar to a medical malpractice action, or involve personal injury at all, and several of Juror One's prior lawsuits were decades before her jury service in this case. All of the recent civil lawsuits involved collection actions, but experience as a defendant in a collection action would not imply a bias or sympathy for or against a medical malpractice victim. Dr. Duong's assertion that he would have stricken a person convicted of welfare fraud does not seem genuine given that he did not challenge or strike a juror who admitted to attempting to steal money from a store. We do not agree Dr. Duong has demonstrated that his knowledge of the undisclosed lawsuits "would in all likelihood have resulted in a peremptory challenge" of Jurors One and Two.

Dr. Duong also argues that the trial court's reliance on whether Jurors One and Two were biased or sympathetic is misplaced because the Florida Supreme Court has directly stated that prejudice is not a factor in the *De La Rosa* test. *State Farm,* 837 So.2d at 365. It is true that whether or not a challenged juror was actually biased is not relevant to materiality. *Fine v.*

Shands Teaching Hosp. & Clinics, **994 So.2d 426 (Fla. 1st DCA 2008). However, prejudice is relevant to determine whether the undisclosed information would imply that the juror would be biased toward an opposing party or litigation in general, such that counsel would in all likelihood use a preemptory challenge to strike the juror. *See De La Rosa,* 659 So.2d at 241; *McCauslin v. O'Conner,* 985 So.2d 558 (Fla. 5th DCA 2008).**

Having determined the trial court did not abuse its discretion in finding that Dr. Duong did not meet the first prong of the *De La Rosa* test, we affirm. We also affirm without discussion the issue regarding jury instructions.

CIVIL CASE: *Morgan v. Milton,* 105 So.3d 545 (Fla. 1st DCA 2012)

The supreme court has adopted a three-part test for determining whether a juror's concealment of information during voir dire warrants a new trial: "First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence." *De La Rosa v. Zequeira,* 659 So.2d 239, 241 (Fla.1995); *Bolling v. State,* 61 So.3d 419, 419–20 (Fla. 1st DCA 2011).

Here, the second and third prongs are readily established: it is undisputed that Ms. Poppell concealed information, and it would be unreasonable to charge Ms. Morgan with failing to elicit such information given the prospective juror's unequivocal but false statements about her litigation history. The first prong, relevance and materiality, is more nuanced

and subjective to some degree. Past litigation experience is per se relevant to jury service. *Roberts ex rel. Roberts v. Tejada,* 814 So.2d 334, 339 (Fla.2002). To show materiality, however, the proponent of the new trial must show that the concealed information was material to jury service in the context of the specific case at hand. *De La Rosa,* 659 So.2d at 241. Moreover, it must be shown that the concealed information, if it had been disclosed, "would in all likelihood have resulted in a peremptory challenge." *Id.* at 242 (citation omitted); *Roberts,* 814 So.2d at 340 n. 9. Materiality involves a matter to which counsel reasonably would have given "substantial weight" in the exercise of peremptory challenges. *Mitchell v. State,* 458 So.2d 819, 821 (Fla. 1st DCA 1984).

We find persuasive in this case that Ms. Morgan failed to exercise peremptory challenges to strike two other members of the venire who had disclosed involvement in litigation activities. Her strikes focused primarily on other factors, not litigation experience; admittedly, she did strike the alternate juror who, among other areas of questioning, was asked about an arbitration proceeding with her bank. But Ms. Morgan did not question any of the other jurors about their litigation experience, leaving little upon which to conclude that she would have questioned Ms. Poppell further had she disclosed her pending litigation. Instead, it appears from the record that Ms. Morgan did not find past litigation experience so material that she would "in all likelihood" have exercised a peremptory challenge against Ms. Poppell had she told the truth.

The majority opinion suggests that Ms. Poppel's concealment of her pending litigation before this judge is not material because the appellant's counsel did not question two other jurors about their litigation experience. However, those jurors did reveal their litigation history during the questioning by the court on voir dire. In wrongly concealing her pending litigation, Ms. Poppel precluded any inquiry about her situation and what impact her situation might have on her ability to render a fair and impartial verdict.

In my view, being a party in another proceeding pending before the same judge is material—especially where the other proceeding was being litigated at the same time this trial was being litigated. Ms. Poppel's pending proceeding was something which "counsel may reasonably be expected to give substantial weight in the exercise of his peremptory challenges...." See *Mitchell v. State,* 458 So.2d 819 (Fla. 1st DCA 1984). The concealment of material information prevented counsel from "making an informed judgment" which may have influenced counsel's decision regarding peremptory challenges. Ms. Poppel's candor and truthfulness may have "in all likelihood resulted in a peremptory challenge." See *Roberts v. Tejada,* 814 So.2d 334 (Fla.2002).

Lawyers are entitled to make informed decisions about peremptory and cause challenges at voir dire, and should be able to base those informed decisions on truthful responses to inquiries on voir dire. Ms. Poppel's concealment of a matter counsel may have reasonably accorded substantial weight raises concern as to the legitimacy of the jury verdict. As pointed out

in *State Farm Mutual Auto. Ins. v. Lawrence,* 65 So.3d 52 (Fla. 2d DCA 2011), the juror's concealment of a material fact casts doubt upon any confidence in the fairness of the verdict, and the integrity of the process.

XIV. JURY SELECTION/PROSECUTORIAL COMMENTS

FAILURE TO OBJECT TO MISSTATEMENTS OF THE LAW MADE BY PROSECUTOR DURING JURY SELECTION

Anderson v. State, 18 So.3d 501 (Fla. 2009)

Defendant was convicted of first-degree murder and sentenced to death. He filed a motion for postconviction relief asserting that Defense Counsel was ineffective when he failed to object to misstatements of the law on the issue of aggravating and mitigating circumstances made by the prosecutor during jury selection.

As an example, the Defendant noted the following statement was made by the prosecutor during jury selection: "You weigh the aggravating evidence versus the mitigating evidence, and which ever way your personal scale tips, that, under the law, is supposed to be the recommendation you make."

The Florida Supreme Court agreed with the Defendant that the prosecutor's statement was a misstatement of the law and that Counsel's failure to object to those statements was deficient performance. However, the Trial Court properly instructed the jury that it must first determine whether there were aggravating circumstances sufficient to justify the death penalty, and then, proceed to determine whether sufficient mitigating circumstances exist that outweigh the aggravating circumstances. As a result

of the Trial Court's proper instruction regarding the applicable law, the Florida Supreme Court ruled that the Defendant was not able to establish prejudice as required under *Strickland*.

Jean v. State, 41 So.3d 1078 (Fla. 4th DCA 2010)

Defendant was convicted of drug trafficking and on direct appeal alleged ineffective assistance of Counsel on several grounds including failure of Counsel to object to prosecutor's comments during voir dire.

The Appellate Court held that the prosecutor improperly asked prospective jurors whether sympathy should a play a role in his job as a prosecutor. The Appellate Court pointed out that even if this question was simply asked by the prosecutor to set up his next point to the jury that sympathy should play no role in their deliberations, the prosecutor's questions about sympathy conveyed the message that the State only charges those who are guilty.

Although the Appellate Court indicated that it was troubled by the number of issues with Counsel's performance, it noted that Trial Counsel's actions are strongly presumed to be adequate. It denied the appeal without prejudice and held that a motion for postconviction relief was the proper vehicle to raise claims of ineffective assistance of Counsel.

Geralds v. State, 2010 WL 3582955 (Fla. 2010)

Defendant was convicted of first-degree murder and sentenced to death. He appealed and filed a petition for writ of habeas corpus. Among his claims, the Defendant alleged that the prosecutor made inappropriate comments

during voir dire and that Appellate Counsel was ineffective for not raising the issue on appeal.

Specifically, Defendant argued that the State inappropriately listed the aggravators and mitigators applicable to his case. Defense Counsel objected and the Trial Court held a sidebar. At sidebar, the judge instructed the State it could only comment on the applicable aggravators and mitigators the evidence would show. After sidebar, the State continued to comment on other aggravating and mitigating circumstances. Defense Counsel objected and moved to strike the panel for deliberate misconduct by the State. The Trial Court overruled the objection and denied Defense motion to discharge the panel.

In reviewing the petition for writ of habeas corpus, the Florida Supreme Court relied on its earlier holding in *Vining v. State*, 637 So.2d 921, 926 (Fla. 1994) wherein it stated that, "the scope of voir dire questioning rests in the sound discretion of the Court and will not be interfered with unless that discretion is clearly abused."

In analyzing the prosecutor's comments and the Trial Court's ruling, the Florida Supreme Court applied the precedent that "where a juror's attitude about a particular legal doctrine...is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of voir dire properly includes questions about and references to the legal doctrine even if stated in the form of hypothetical questions." *See Walker v. State*, 724 So.2d 1232, 1233 (Fla. 4th DCA 1999)(quoting *Lavado v. State*, 469 So.2d 917, 919-20 (Fla. 3d DCA 1985)).

Based on this reasoning, the Florida Supreme Court found that the prosecutor's questions were aimed at exploring the jurors' views regarding legal doctrines and the death penalty in the abstract. The State did not tell the jury that those were the aggravators or mitigators in the case, but instead phrased it as these aggravators "possibly could be some of the aggravating circumstances that the Court would give you."

Also, the Florida Supreme Court noted that the State did not ask the jurors what they thought about the aggravators and did not identify any facts in the case. Thus, the Florida Supreme Court held that "when read in context the State's comments served only to explain the possible aggravating factors based on what the law permits."

Therefore, the Florida Supreme Court concluded that the State did not make inappropriate comments during voir dire, that the Trial Court did not abuse its discretion in denying Defense Counsel's objections to the comments, and Appellate Counsel did not render ineffective assistance of Counsel for failing to raise this claim on appeal.

FAILURE TO GIVE CURATIVE INSTRUCTION WAS NOT AN ABUSE OF DISCRETION

Marston v. State, 79 So.3d 72 (Fla. 2d DCA 2012)

Defendant appealed his convictions based upon a claim of prosecutorial misconduct. During jury selection, the following exchange occurred:

[PROSECUTOR]:.... You can't hold it against Mr. Marston or his attorneys if

they sit there and play dominoes the whole time. Do you understand that?

[VENIRE MEMBER]: Kind of. So you will be talking the whole time to prove that he's guilty?

[PROSECUTOR]: Exactly. Exactly. Because it is the State of Florida's burden and everybody has this right. You are presumed innocent until I prove that you are guilty.

So like I said, Mr. Marston can sit there and not say a word. He can read magazines. He could bring in a laptop and play on Facebook all day long if he wanted to, and you cannot hold that against him. Do you understand? Does everyone understand that?

Although the trial judge declined to give a formal curative instruction, he directed the prosecutor to make it clear to the jurors that the defense had no burden of proof. And, the trial judge instructed the jury before deliberating that they must not be influenced in any way by Mr. Martson's decision not to testify. We must assume that the jury followed these instructions. *See Crain v. State,* 894 So.2d 59, 70 (Fla.2004) (citing *Burnette v. State,* 157 So.2d 65, 70 (Fla.1963)). Under these circumstances, we cannot say that the trial court abused its discretion in denying a curative instruction.

BRIEF & ISOLATED COMMENT BY PROSECUTOR, COUPLED WITH CURATIVE INSTRUCTION, DID NOT WARRANT MISTRIAL

Edwards v. State, 145 So.3d 174 (Fla. 1st DCA 2014)

During jury selection, the prosecutor informed the potential jurors that appellant's sanity would be an issue at trial and asked if they understood

that a mental defect alone did not satisfy the legal definition of insanity if the defendant knew the consequences of his actions or knew what he was doing was wrong. As part of this inquiry, the prosecutor commented:

> **You know, my wife, she always reads crime novels and stuff and it drives me crazy because she always asks questions. And she knows what I do for a living so she thinks I always have the answer. Sometimes I don't, but I can just give her a guess. But she was asking me, all right—and it was some serial killer. I want to say it was Jeffrey Dahmer, but I don't know who, that kidnapped a bunch of people and cut them up and even ate some of them, I think.**

Defense counsel objected and moved for a mistrial on the ground the prosecutor's reference to a notorious mass murderer was improper, inflammatory, and tainted the jury. The prosecutor responded that he referenced Jeffrey Dahmer to make the point that "[i]f somebody does something very crazy and very unusual, they can still be found guilty."

Concluding the reference was inflammatory and brought up associations that had no place in appellant's trial, the trial court sustained the objection, denied the motion for mistrial, and offered to give a curative instruction. At defense counsel's request, the trial court instructed the jury to disregard the prosecutor's reference to Jeffrey Dahmer. At the conclusion of voir dire, six jurors and two alternates were accepted and sworn without objection. Appellant did not renew the motion for mistrial until the

conclusion of the state's case-in-chief and, again, at the conclusion of all the evidence.

Appellant's renewal of the motion for mistrial after the state had presented its case-in-chief was untimely. Even if appellant's claim was preserved, the trial court did not abuse its discretion by denying the motion for mistrial because the prosecutor's comment was brief and isolated and the trial court immediately sustained appellant's objection and gave a curative instruction. *See Mignotte v. State,* 576 So.2d 809, 810 (Fla. 3d DCA 1991) (affirming the trial court's denial of murder defendant's motion for mistrial based on the prosecutor's reference to Ted Bundy during closing argument on the issue of whether defendant was legally sane at the time of the murder).

XV. JURY SELECTION/NUMBER OF JURORS

FAILURE TO OBJECT TO NUMBER OF JURORS NOT FUNDAMENTAL ERROR ON APPEAL

Jimenez v. State, 167 So.3d 497 (Fla. 3d DCA 2015)

Jimenez was charged with first-degree murder and armed robbery. During the pendency of the case, the State waived the death penalty. Prior to jury selection, the trial court discussed with the State and defense that, since the State had announced its intention not to seek the death penalty, a six-person jury would be empaneled. Jimenez was present during this discussion. Neither the State nor the defense objected to a six-person jury, and the jury was thereafter selected and empaneled.

In this petition, Jimenez asserts that appellate counsel provided constitutionally ineffective assistance in failing to raise this claim.

Appellate counsel will not be deemed ineffective for failing to challenge an unpreserved error on direct appeal, unless such a claim rises to the level of fundamental error. *Hendrix v. State,* 908 So.2d 412, 426 (Fla.2005); *Rutherford v. Moore,* 774 So.2d 637, 646 (Fla.2000). Thus, given the failure to object or otherwise preserve this error in the trial court, appellate counsel could not have been ineffective in failing to raise such a claim on appeal, unless it can be said that the failure to provide a twelve-person jury constitutes fundamental error, which has been described as an error "so prejudicial as to vitiate the entire trial." *Chandler v. State,* 702 So.2d 186, 191 n. 5 (Fla.1997).

However, the right to a jury *of twelve persons* is not of constitutional dimension. Rather, it is a right provided by state statute and in the corresponding Florida Rule of Criminal Procedure. *See* Art. I, § 22, Fla. Const. (expressly providing: "The right of trial by jury shall be secure to all and remain inviolate. *The qualifications and the number of jurors, not fewer than six, shall be fixed by law* ") (emphasis added); § 913.10, Fla. Stat. (2010) ("Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases."); Fla. R.Crim. P. 3.270 (providing same).[1] Jimenez was not denied his constitutional right to a trial by jury. Rather, he was provided with a trial by jury, but consisting of six rather than twelve persons. While this failed to comply with the statutory requirement, it was not fundamental error such that it could have

been raised for the first time on appeal. *Smith v. State,* 857 So.2d 268 (Fla. 5th DCA 2003); *Howell v. State,* 687 So.2d 1339 (Fla. 1st DCA 1997).

XVI. JURY SELECTION/RULES APPLICABLE IMMEDIATELY BEFORE AND DURING JURY DELIBERATIONS

RULE 3.390 JURY INSTRUCTIONS

(a) *Subject of Instructions*. The presiding judge shall charge the jury only on the law of the case before or after the argument of Counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations. Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.

(b) *Form of Instructions*. The instruction to a jury shall be orally delivered and shall also be in writing. All written instructions shall also be filed in the cause.

(c) *Written Request*. At the close of the evidence, or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. The Court shall inform Counsel of its proposed action on the request and of the instructions that will be given prior to their argument to the jury.

(d) *Objections*. No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the presence of the jury.

(e) *Transcript and Review*. When an objection is made to the giving of or failure to give an instruction, no exception need be made to the Court's ruling thereon in order to have the ruling reviewed, and the grounds of objection and ruling thereon shall be taken by the court reporter and, if the jury returns a verdict of guilty, transcribed by the court reporter and filed in the cause.

APPLICABLE CASES

Gonzalez v. State, 617 So.2d 847 (Fla. 4th DCA 1993)

Defendant was charged with trafficking in cocaine. Defendant and State agreed to the amount of cocaine involved. Nevertheless, Defendant requested instruction on lesser included offenses. The Trial Court refused to give Defendant's requested instruction on lesser included offenses of trafficking in cocaine in lesser quantities.

The Appellate Court held that Trial Court erred in denying request, reasoning that trafficking in lesser amounts of cocaine is necessarily lesser included offense of charge of trafficking in greater amount, and therefore, Defendant was entitled to instruction on lesser amounts even though parties had stipulated to amount of cocaine in question. It was up to the jury to determine from the evidence adduced at trial the quantity of contraband involved, thereby, advising the Court as to the appropriate minimum penalty.

Ramsaran v. State, 664 So.2d 1106 (Fla. 4th DCA 1995)

Even though Defendant had waived his right to have alibi witnesses at trial by not responding to the State's demand for notice of alibi, Defendant was entitled to an alibi instruction to the jury where he testified to an alibi and timely requested the alibi instruction under Fla. R. Crim. P. 3.390(d).

Truett v. State,105 So.3d 656 (FLA. 1st DCA 2013)

Truett's counsel filed a notice of intention to claim alibi and submitted a specific, timely request to the trial judge to instruct the jury on the alibi

defense. It was clear what Truett was asking for, as well as the grounds for the request, namely, the defense witnesses' testimonies that Truett was not at the party where McDonald's car was damaged.

Based on the above authority, we hold that Truett preserved this issue for appeal. Therefore, we apply the three-part *Alderman* test to determine whether the error constitutes reversible error. 486 So.2d at 877. First, Truett's requested alibi instruction accurately reflects the law, because he was requesting the Florida Supreme Court approved standard alibi instruction. Second, the facts in the case support giving the instruction because Truett presented ample testimony that he was at another location when McDonald's car was damaged. Third, the instruction was necessary to allow the jury to properly evaluate the issues in the case because Truett had introduced evidence that he was not present where and when the crime occurred. Therefore, under the *Alderman* test, we hold that it was harmful error for the trial court to refuse to give Truett's requested alibi instruction to the jury.

Legette v. State, 718 So.2d 878 (Fla. 4th DCA 1998)

Prosecutor committed harmless error when he violated Fla. R. Crim. P. 3.390(a) by telling the jury at closing that battery, one of the lesser included offenses on the charge of second degree murder against Defendant, was a misdemeanor, where Defendant was convicted of the lesser included offense of manslaughter and the evidence was sufficient to support the verdict.

Limose v. State, 656 So.2d 947 (Fla. 5th DCA 1995)

Trial Court did not err when it refused to instruct the jury on the minimum mandatory penalties for the possession of cocaine and for lesser included offenses because Fla. R. Crim. P. 3.390(a) expressly provided that juries should be charged only on the law of the case and not on the sentence that might be imposed if Defendant was convicted.

Pittman v. State, 440 So.2d 657 (Fla. 1st DCA 1983)

When Counsel requests a jury instruction that is not part of the Florida Standard Jury Instructions under Fla. R. Crim. P. 3.390, the requested instruction must be submitted in writing to the Trial Court if the issue is to be preserved for appellate review.

RULE 3.400 MATERIALS TO THE JURY ROOM

(a) ***Discretionary Materials*****. The Court may permit the jury, upon retiring for deliberation, to take to the jury room:**

- **(1) a copy of the charges against the Defendant;**
- **(2) forms of verdict approved by the Court, after being first submitted to Counsel;**
- **(3) all things received in evidence other than depositions. If the thing received in evidence is a public record or a private document which, in the opinion of the Court, ought not to be taken from the person having it in custody, a copy shall be taken or sent instead of the original.**

(b) ***Mandatory Materials*****. The Court must provide the jury, upon retiring for deliberation, with a written copy of all instructions given to take to the jury room.**

APPLICABLE CASES

Greenfield v. State, 739 So.2d 1197 (Fla. 2d DCA 1999)

A new trial was required after the Trial Court, in response to the jury's request, provided the jury with a dictionary without notice to Counsel; a dictionary was not one of the materials permitted to be taken in the jury room pursuant to Fla. R. Crim. P. 3.400.

Janson v. State, 730 So.2d 734 (Fla. 5th DCA 1999), *review denied*, 767 So.2d 457 (Fla. 2000)

Although it was error to allow a jury to have the transcript of the testimony of two witnesses in the jury room over Defendant's objection, the error was not per se reversible and was harmless beyond a reasonable doubt where the evidence of the Defendant's guilt was overwhelming.

Simmons v. State, 541 So.2d 171 (Fla. 4th DCA 1989)

In a prosecution for possession of cocaine, the Trial Court erred under Fla. R. Crim. P. 3.400 by providing the jury in writing the instruction for constructive possession because the rule requires that if any instruction is taken into the jury room, all instructions must be taken.

Wilson v. State, 746 So.2d 1209 (Fla. 5th DCA 1999)

Permitting jury upon retiring for deliberations to take written definitions of crimes charged, without also providing it with copy of all instructions, was reversible error as it violated Fla. R. Crim. P. 3.400.

RULE 3.410 JURY REQUEST TO REVIEW EVIDENCE OR FOR

ADDITIONAL INSTRUCTIONS

After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the Court may give them the additional instruction or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the Prosecuting Attorney and to Counsel for the Defendant.

APPLICABLE CASES

Key v. State, 760 So.2d 278 (Fla. 4th DCA 2000); *review denied*, 779 So.2d 271 (Fla. 2000)

Where the judge responded to a question posed by the jury, his actions were not a violation of Fla. R. Crim. P. 3.410 because the actual conversation between the judge and jury outside of the presence of the attorneys and the Defendant was not encompassed by the rule. Moreover, the judge told them that he would hear their request at a later time and Defendant's Attorney had the opportunity to pose any objections, but elected not to do so.

Faulk v. State, 296 So.2d 614 (Fla. 1st DCA 1974)

Defendant was granted a new trial where the Trial Court erred by giving an additional instruction in response to a question from the jury, without repeating the complete instructions on the subject involved, and by permitting that portion of the instructions to be taken into the jury room without the entire instructions.

Vasquez v. State, 830 So.2d 929 (Fla. 4th DCA 2002)

Denial of jury's request to read back the security chief's testimony was reversible error as the testimony was crucial in establishing Defendant's alibi; it was critical for the jury to clarify the time Defendant was at work, the time

the break-in occurred, and the time the suspects were apprehended by the police.

Greenfield v. State, 739 So.2d 1197 (Fla. 2d DCA 1999)

A new trial was required after the Trial Court, in response to the jury's request, provided the jury with a dictionary without notice to Counsel; the trial judge could not respond to a jury question without following the procedure set out in Fla. R. Crim. P. 3.410, including notice to Counsel.

Cole v. State, 701 So.2d 845 (Fla. 1997), *cert. denied*, 140 L. Ed. 2d 519 (1998)

In penalty phase, jury's request to have the surviving victim's testimony reread to them beginning with her brother, the murder victim's apology to her before his death for introducing hikers to her during their camping trip, who turned out to be killers, rapists, and thieves, and including vomit sounds she recalled that turned out to be throat slashes, was within the Trial Court's discretion under Fla. R. Crim. P. 3.410 that permitted testimony to be read back to jurors because the testimony was not misleading and did not place undue emphasis on any particular statements prejudicial to Defendant.

Sanders v. State, 638 So.2d 569 (Fla. 3d DCA 1994)

Trial judge committed harmless error in responding to the jury's request for additional instructions during deliberations, where Fla. R. Crim. P. 3.410 requires that a trial judge give requested additional instruction to the jury in open court rather than in writing.

Woods v. State, 634 So.2d 767 (Fla. 1st DCA 1994)

Trial Court committed reversible error in violation of Fla. R. Crim. P. 3.410 when it responded to a jury request for read back of portion of witness testimony. The Appellate Court found that the Trial Court should have given Counsel prior notice of the jury's request so as to allow discussion of the action the Court would take and for any objections to be placed on the record.

***Mills v. State*, 620 So.2d 1006 (Fla. 1993)**

Trial Court committed reversible error when it failed to give Counsel the opportunity to be heard before judge answered question on law during deliberations.

***State v. Barrow*, 91 So.3d 826 (Fla. 2012)**

The issue before us is whether the trial court abused its discretion in failing to inform the jury of the possibility of a read-back when it denied the jury's request for transcripts. We recently decided *Hazuri v. State,* 91 So.3d 836 (Fla.2012), which involved a jury's general request for trial transcripts during deliberations; the jury did not expressly request a "read-back." *Id.,* 91 So.3d at 840. In response to the jury's request, the trial court instructed the jury to rely on its own collective recollection of the evidence.

In deciding whether the trial court's response to the jury's request constituted error, we noted that physical transcripts are prohibited in the jury room as *834 it is omitted from the list of items specified in Florida Rule of Criminal Procedure 3.400,[5] whereas read-backs are authorized pursuant to Florida Rule of Criminal Procedure 3.410, which provides as follows:

After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Hazuri, **91 So.3d at 840–41. Trial courts have broad discretion in deciding whether to allow a read-back request. *Id.,* 91 So.3d at 840–41 (citing *In re Amends. to Fla. Rules of Civil Proc.,* 967 So.2d 178, 183 (Fla.2007)).**

In the instant case, during deliberations, the jury requested transcripts pertaining to the testimonies of Zack, Rasmussen, Peggy, Jones, and Barrow. In response, the trial court told the jury that there were no transcripts available and instructed the jury to "rely on the evidence presented during the proceedings." In light of our decision in *Hazuri,* the trial court improperly (1) used language that may have misled the jury into believing read-backs were prohibited; and (2) informed the jury that there were no transcripts *835 available without informing the jury of the availability of a read-back request. Notwithstanding that this Court decided *Hazuri* years after Barrow was tried for murder, the trial court abused its discretion as it was bound to follow the Fourth District's decision in *Avila. See Avila,* 781 So.2d at 415–16 (finding the trial court's instruction to the jurors that there were no transcripts and for them to rely upon their collective recollection without informing them about the potential availability of a read-back was an abuse

of discretion because it "may have confused the jury as to whether a readback of testimony was permissible"). Because Barrow's defense counsel had requested the trial court to inform the jury of the availability of a read-back, this error was preserved for review.

Bannister v. State, 2014 WL 52659 (Fla. 4th DCA 2014)

Bannister contends that the successor judge who presided at the trial abused his discretion by failing to instruct the jury in two instances that it could request a read-back of trial testimony. We hold that no instruction on a read-back was necessary because the jury did not pose a question about hearing any of the in-court testimony again.

While "[t]here is no rule of criminal procedure providing that a jury may view a transcript of the proceedings,"[5] Florida Rule of Criminal Procedure 3.410 "provides that a trial court may, in its discretion, have portions of the trial testimony read back to the jury upon request." *Adams v. State,* 122 So.3d 976, 979 (Fla. 2d DCA 2013). Rule 3.410 imparts upon trial courts "wide latitude in the area of the reading of testimony to the jury." *Avila v. State,* 781 So.2d 413, 415 (Fla. 4th DCA 2001). However, where a jury requests transcripts or a "read-back" of *trial testimony,* the trial court "may not, over objection, simply instruct the jurors to rely on their own collective recollection of the evidence so as to possibly mislead the jurors into believing that read-backs are prohibited." *Delestre v. State,* 103 So.3d 1026, 1027–28 (Fla. 5th DCA 2012) (citation omitted). Rather, the trial court must abide by two rules:

(1) [the] trial court should not use any language that would mislead a jury into believing read-backs are prohibited, and (2) when a jury requests *trial transcripts,* the trial judge should deny the request, but inform the jury of the possibility of a read-back.

In this case, during deliberations, the jury submitted the following question to the trial judge: "Can we get any of the deposition[?] Can we get the pictures[?]" In response, the trial judge engaged in the following dialogue with one of the jurors:

Juror: Judge, the question was based on a question in the room pertaining to witness testimony. In the process of the questioning, they read from the transcript.

The Court: Correct, but that transcript is not in evidence, okay.

Juror: Got you.

The Court: To the extent that it was referred to, there may have been some language that was quoted. The evidence that you have before you is the oral recitation of the portions of the depositions, okay.

As can be seen from the juror's specific question, the jury was not requesting a read-back of the witness's *testimony,* but rather hard copies of the depositions read by the attorneys and witnesses on the stand during trial. Such witness depositions are never permitted to travel into the jury room for use during deliberations. *See Young v. State,* 645 So.2d 965, 967 (Fla.1994) (recognizing the "prejudicial effect" of "submitting depositions to the jury during deliberations").

In those cases holding that a read-back instruction was warranted, the

jury either requested trial transcripts or identified specific witness testimony they desired to have recounted. *See, e.g., State v. Barrow,* 91 So.3d 826, 831 (Fla.2012) (read-back required where ten minutes into deliberations, the jury submitted a request for "all the transcripts of the witnesses' testimonies"); *Avila,* 781 So.2d at 414 (jury requested to "review the timing of specific events set forth by the testimonies of four named alibi witnesses"); *Roper v. State,* 608 So.2d 533, 533–34 (Fla. 5th DCA 1992) (jury requested to "see" the victim's cross examination). Here, by contrast, the jurors requested not to hear specific testimony, but to review the actual depositions read by the witnesses on the stand. Since such request did not concern trial testimony, the trial court did not err by failing to provide the jury with the option of a read-back.

Francois v. State, 65 So.3d 632 (Fla. 4th DCA 2011)

As in *Barrow*, the jury in this case requested to "see" the transcripts. The state agreed that the trial court should inform the jury it could not see them, but that the court should "read it back." Defense counsel agreed with this, but the court simply told the jury, "I'm not able to grant your request. Please continue with your deliberations." Unlike the trial court in *Barrow*, the trial court here did not announce any policy of not doing read backs. Nonetheless, based on *Barrow*, the court's failure to inform the jury that a "readback" of trial testimony could be available upon request was error. Further, as in *Barrow*, we do not find this error to be harmless. *See Barrow,* 27 So.3d at 219. The jury requested to see Nathan McKinney's testimony.

McKinney's testimony concerning the defendant's alleged confession was the crux of the state's evidence against the defendant. Thus, it cannot be said beyond a reasonable doubt that the error was harmless.

***Hazuri v. State*, 91 So.3d 836 (Fla. 2012)**

In this case, the trial court instructed the jury, in response to the jury's request for trial transcripts, to rely on its own collective recollection of the evidence, contrary to defense counsel's suggestion that the trial court should inform the jury of the availability of read-backs. We conclude that the trial court erred in two respects. First, the court erred in failing to inform the jury of its right to request a read-back in response to its request for trial transcripts. Second, because the jury made a general request for transcripts, the court erred in failing to instruct the jury to clarify which portion of the testimony the jury wished to review. Here, the trial court's actions are subject to the standard pronounced in *Johnson v. State,* 53 So.3d 1003 (Fla.2010).

Similarly, in this case, we cannot ascertain which testimony. The jury was interested in reviewing. Unlike *Barrow, Avila, Roper, Hendricks,* and *Francois,* where the juries requested the testimony of a specific witness or witnesses, the jury in this case merely asked for trial transcripts. Because the trial judge did not instruct the jury to clarify which portion of the transcript the jury wanted to review, we cannot determine whether the jury was confused regarding specific testimony in the case. Although the record indicates that the jury had difficulty reaching a verdict in this case, it is

unclear whether this difficulty was caused by the jury's confusion as to the facts or testimony in this case. As in *Johnson,* this Court would have to engage in pure speculation as to the effect of the trial court's failure to inform the jury of the possibility of a read-back or the trial court's failure to ask which portion of the testimony it wanted to review. Therefore, the trial court committed reversible error, and accordingly, Hazuri is entitled to a new trial.

Nunez v. State, 109 So.3d 890 (Fla. 3d DCA 2013)

Jury should not have been allowed to view entire unredacted recording of interview of victim, including evidence of additional uncharged incidents involving the defendant and victim, in prosecution for sexual battery on a person less than 12 years old and one count of lewd and lascivious molestation on a person less than 12 years old; unredacted recording constituted evidence of collateral crimes neither charged in the information nor properly noticed and determined to be admissible pursuant to rule governing admission of other crimes, wrongs or acts.

XVII. JURY SELECTION/ALLEN CHARGE

WHEN THE JURY CANNOT REACH A VERDICT/THE *ALLEN* CHARGE

In jury deadlocks, Supplemental Jury Instruction §4.1 (called the "*Allen* Charge") provides:

I know that all of you have worked hard to try to find a verdict in this case. It apparently has been impossible for you so far. Sometimes an early

vote before discussion can make it hard to reach an agreement about the case later. The vote, not the discussion, might make it hard to see all sides of the case.

We are all aware that it is legally permissible for a jury to disagree. There are two things a jury can lawfully do: agree on a verdict or disagree on what the facts of the case may truly be.

There is nothing to disagree about on the law. The law is as I told you. If you have any disagreements about the law, I should clear them for you now- That should be my problem, not yours.

If you disagree over what you believe the evidence showed, then only you can resolve that conflict, if it is to be resolved.

I have only one request of you. By law, I cannot demand this of you, but I want you to go back into the jury room. Then, taking turns, tell each of the other jurors about any weakness of your own position. You should not interrupt each other or comment on each other's views until each of you has had a chance to talk. After you have done that, if you simply cannot reach a verdict, then return to the courtroom and I will declare this case mistried, and will discharge you with my sincere appreciation for your services.

You may now retire to continue with your deliberations.

APPLICABLE CASELAW

Young v. State, 711 So.2d 1379 (Fla. 2d DCA 1998)

The *Allen* charge should be given as written or it is fundamental error.

Scoggins v. State, 726 So.2d 762 (Fla. 1999)

Trial judge erred in inquiring into jury's numerical division when, during deliberations, jury notified Court that it could not reach a verdict. However, the error was not fundamental, where inquiry was conducted not only without objection, but with apparent concurrence of Defense Counsel, judge's inquiry related more to issue of whether jury should return the following day to continue deliberations than it did to nature or extent of jury's position on guilt or innocence, and judge did not give supplemental instructions urging a verdict; abrogating *Rodriguez v. State*, 559 So.2d 678 (Fla. 1990).

Roberts v. State, 616 So.2d 79 (Fla. 2d DCA 1993)

After six hours of deliberations, the judge's comments that it was very important, yet not essential to reach a verdict on that day did not cause error.

Warren v. State, 498 So.2d 472 (Fla. 3d DCA 1986)

Trial Court committed fundamental error when it deviated from the standard *Allen* charge and made improper comment that a re-trial would be costly and hoped they would return a verdict.

Thomas v. State, 748 So.2d 970 (Fla. 1999)

Capital murder conviction had to be reversed in light of cumulative nature of trial judge's actions and comments under extreme prevailing circumstances under which jury deliberated and decided guilt, which created

substantial risk of coercion or at least constituted undue pressure upon lone holdout juror to change his or her vote, where trial judge repeatedly failed and refused to give balanced *Allen* charge, judge repeatedly gave informal instructions urging jury to render a decision, jury's deliberations continued into early morning hours of the following day, and jury announced in open court their split vote indicating a lone holdout. The Court considered this latter factor as integral to the reversal.

The Appellate Court stated that the "better practice" (as stated in *Scoggins*) is for the Trial Court to admonish the jury "at the onset of their deliberations that they should not indicate how they stand during their deliberations." *See Scoggins v. State*, 726 So.2d 762 (Fla. 1999); *Nelson v. State,* 438 So.2d 1060 (Fla. 4th DCA 1983).

Tomlinson v. State, 584 So.2d 43 (Fla. 4th DCA 1991)

Appellate Court ruled that it was reversible error for Trial Court to give second deadlock instruction informing jury that they should "pray for guidance" and suggesting that it could take as long as six days to reach a decision.

XVIII. JURY SELECTION/TRANSCRIPTS OF APPEAL

VIDEO TRANSCRIPT OF JURY SELECTION FOR APPEAL PURPOSES

McKenzie v. State, 754 So.2d 851 (Fla. 4th DCA 2000)

Trial of Defendant was videotaped (which became the appellate record of the jury selection). It was riddled with gaps and inaudible notations and

"at least eight bench conferences were unrecorded" during jury selection. The Defense challenged a State peremptory of an African-American juror who had a family drug problem when white jurors were not similarly excused by the State.

The Appellate Court found that the videotape was unclear as to which juror had made certain representations, and reversed for a new trial. The Appellate Court held that unavailability of full and accurate transcript of trial precluded appellate review of claim that State improperly exercised a race-based peremptory challenge.

Jones v. State, 923 So.2d 486 (Fla. 2006) (Jones II)

Florida Supreme Court rejected line of authority which held that reversal of conviction was *ipso facto* required if, through no fault of Defendant, transcript of criminal trial was unavailable for review to Appellate Counsel. Instead, the Defendant must demonstrate that there is a basis for a claim that missing transcript would reflect matters which would prejudice him.

Morgan v. State, 117 So.3d 79 (Fla. 2d DCA 2013)

When a portion of the trial transcript is missing through no fault of the defendant and when that missing portion is necessary for a complete review of the issues raised by the defendant, a new trial is required.

Bodie v. State, 959 So.2d 1216 (Fla. 3d DCA 2007)

Appellate Court ruled that the Defendant was not entitled to new trial on the ground that voir dire transcript was unavailable.

Rozier v. State, 669 So.2d 353 (Fla. 5th DCA 1996)

Appellate Court held that trial minutes were not a sufficient substitute for voir dire review of peremptory challenge.

N.B. – Implied overruling recognized in *Bodie*.

Velez v. State, 645 So.2d 42 (Fla. 4th DCA 1994)

Appellate Court held that missing voir dire transcripts did not require a new murder trial since alleged errors in jury selection were harmless as a matter of law.

VIDEO TRANSCRIPT OF IN CAMERA HEARING FOR APPEAL PURPOSES

Brown v. State, 65 So.3d 629 (Fla. 4th DCA 2011)

Absence of a transcript or other recording of ex parte, in camera hearing on defendant's motion to disclose a confidential informant required reversal of his convictions for sale or delivery of cocaine and possession of cocaine and remand for new trial; rule governing such hearings required a record to be made, and exclusion of defendant and defense counsel from the hearing made reconstruction of the record impossible.

The trial court held an *in camera* hearing on Brown's motion to disclose. Present were the prosecutor, the CI, and the judge. After the *in camera* hearing, the trial court denied the motion, ruling that "[t]here was nothing about the CI's testimony that would be exculpatory or tend to favor the Defendant's position on misidentification or give credence to any other defense the Defendant would have." After a jury trial, Brown was convicted of both the sale and possession charges.

This case is controlled by Florida Rule of Criminal Procedure 3.220(m), which sets forth requirements for *in camera, ex parte* hearings. Subsection (3) of the rule provides:

> ***A record shall be made of proceedings authorized under this subdivision.*** **If the court enters an order granting relief after an in camera inspection or ex parte showing, the entire record of the proceeding shall be sealed and preserved and be made available to the appellate court in the event of an appeal.**

Although that rule does not define what constitutes a "record," Florida Rule of Appellate Procedure 9.200(a)(1) provides that "the record shall consist of the original documents, all exhibits that are not physical evidence, and any transcript(s) of proceedings filed in the lower tribunal."

This court read rules 9.200(a)(1) and 3.220(m)(3) together in *Garcia v. State,* 578 So.2d 325 (Fla. 4th DCA 1991). In *Garcia,* a defendant charged with drug offenses moved before trial to disclose a confidential informant. *Id.* at 326. The trial court ordered an *in camera* hearing with the CI, after which the court denied the defendant's motion. *Id.*

XVIV. JURY QUESTIONING OF WITNESSES/ JURY NOTE TAKING

JURY QUESTIONING

Jimenez v. State, 928 So.2d 508 (Fla. 3d DCA 2006)

Defendant challenged the judgments entered against him. The Appellate Court first found that the procedure used by the trial judge for jurors to ask questions, including the judge asking the jurors after each witness if the jurors had any questions, was not an abuse of discretion.

Defendant did not object to the procedure for juror questioning at trial and did not object to the questions asked by the jurors at trial.

N.B. In *Jimenez* , the Trial Court instructed the jury that the testifying Defendant was subject to the same rules and question by the jury as any other witness.

Two areas involving juries which have been part of jury involvement in trials are 1) note-taking by the jurors; and 2) question submission by jurors. I believe Counsel should inquire as to whether either or both will become part of the trial. Clearly, the issue of juror submitting questions to be asked of the witnesses is more critical. Counsel must be aware of the practice (of submitting questions to the Court which both State and Defense may argue) but also, that the Defendant who takes the stand would be subject to the same rule. *See Jimenez*.

The problem inherent in allowing this practice is that questions may be lacking in the knowledge of the rules of evidence and constitutional parameters. However, the questions submitted to be asked of a testifying Defendant may be particularly prejudicial. For example, suppose a question propounded by a juror in writing is found to be not answerable by the Defendant due to irrelevancy, previous redaction or motion in limine, etc. The failure to respond to that question (although not a Fifth Amendment violation) may draw inferences from the jury which may be difficult or impossible to overcome.

Respectfully Submitted

Eugene F. Zenobi

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