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THE LAW OF VOIR DIRE

Outline

by

William E. Hahn

The purpose of voir dire is to "obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice." *Pope v. State*, 94 So. 865, 869 (Fla. 1922)

I. GETTING THE PROCESS STARTED

In most Circuits, prospective jurors are placed under oath and examined in a preliminary manner by a Circuit Judge who makes an initial determination on the competency of those summoned for jury duty. When the panel comes to your courtroom attention must be paid to insure that court official that brings the prospective jurors to your courtroom announces on the record that they have been venire has been deemed competent to serve. In addition, before the lawyers start their voir dire, the trial Judge must swear the venire again. If the Judge fails to automatically swear the jurors then you have the right under Rule 1.431 to insist that they be sworn before the actual start of any questioning pertinent to your case. The failure to have the jury sworn probably acts as a waiver of any later irregularities that might occur during the jury selection process.

When do you actually make your challenge for cause?

Before the start of jury selection, it is appropriate to discuss the "timing" of challenges for cause with the trial judge. Some judges may expect the attorney conducting the questioning to approach the bench before the completion of voir dire in order to exercise a challenge for cause. Others expect all challenges for cause to be made at the conclusion of jury selection. The decision about whether to exercise challenges for cause at the bench or in the chambers is an important one and should be discussed with the judge before you are required to make your first challenge for cause.

What happens when you have exercised your challenges for cause and have used several of your peremptory challenges? Can you, at this point, make another challenge for cause? This question was recently answered in *RJ Reynolds v. Grossman*, 209 So. 3rd 75 (Fla. 4th DCA 2017). The plaintiff sought to exercise two cause challenges after the defendant had already used two of its peremptory strikes. The trial court allowed it and the 4th District affirmed, recognizing that the trial court does not have the right to infringe on a party's right to challenge any juror, citing the case of *Jackson v. State*, 464 So. 2nd 1181 (Fla. 1985). The 4th District also affirmed the trial court's decision to proceed with jury selection, rather than starting all over as the defense urged.

II. CHALLENGES FOR CAUSE

Rule 1.431(c) the Florida Rules of Civil Procedure

1. On motion of any party the court shall examine any prospective juror on oath to determine whether that person is related to any party or to the attorney of any party within the third degree or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called or has any interest in the action or has formed or expressed any opinion or is sensible of any bias or prejudice concerning it or is an employee or has been an employee of any party within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand

indifferent to the action or any of the foregoing grounds of objection exists or that the juror is otherwise incompetent, another shall be called in that juror's place (emphasis supplied).

2. The fact that any person selected for jury duty from bystanders or the body of the county and not from a jury list lawfully selected has served as a juror in the court in which that person is called at any other time within 1 year is a ground of challenge for cause.

3. When the nature of any civil action requires knowledge of reading, writing, and arithmetic, or any of them, to enable a juror to understand the evidence to be offered, the fact that any prospective juror does not possess the qualifications is a ground of challenge for cause.

III. THE TESTS FOR DETERMINING JUROR COMPETENCY

1. Trial courts have broad discretion in determining whether to grant or deny a challenge for cause based on juror incompetency and the decision in general will not be overturned on appeal, absent manifest error. *VanPoyck, v. Singletary,* 715 So. 2d 930,931 (Fla. 1998).

2. The test to determine a juror's competency is whether that juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *Kearse v. State,* 770 So. 2d 1119, 1128 (Fla. 2000). Further, prospective jurors must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *Bryant v. State,* 656 So. 2d 426, 428 (Fla. 1995); *see also, e.g., Nash v. General Motors Corp.,* 734 So. 2d 437, 439 (Fla. 3d DCA 1999) (applying reasonable doubt standard in civil case; stating, "When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the instructions on the law given to her by the court, she should be excused.").

3. In *Gore v. State of Florida,* 706 So. 2d 1328 (Fla. 1997), the Florida Supreme Court held "we conclude that the trial court did not abuse its discretion in declining to excuse the challenged venire members. We have carefully examined the voir dire of each of these jurors. Although they expressed certain biases and prejudices, each of them also stated that they could set aside their personal views and follow the law via the evidence presented. The trial court was in a better position to assess the credibility of these venire members. Consequently we will not substitute our judgment for that of the trial court."

4. In *Ferrell v. State of Florida,* 697 So. 2d 198 (Fla. 2d DCA 1997), the 2d District Court of Appeal stated "the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions of the law given by the court. The juror should be excused if there is any reasonable doubt about the juror's ability to render an impartial verdict. See also *Vega v. State of Florida,* 781 So. 2d 1165 (Fla. 3d DCA 2001).

5. The 4th District Court of Appeal in *Longshore v. Fronrath Chevrolet, Inc.,* 527 So. 2d 922 (Fla. 4th DCA 1998), held "close cases involving challenge to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality." In the *Longshore* case, the appellate court looked to

the prospective jurors' actual statements in response to the questioning. The court found that her initial response that "she would try to be impartial" was the primary reason for excusing her rather than looking to her subsequent statements that she could be fair. *See also Kochalka v. Burgeois*, 162 So. 3d 1122 (Fla. 2d DCA 2015); *Williams v. State*, 638 So. 2d 976 (Fla. 4th DCA 1994).

6. It is error to deny a challenge for cause to a juror who indicated that she had a preconceived opinion about the Defendant's guilt even though the juror ultimately stated that she would base her verdict on the evidence and the law. *Hamilton v. State*, 547 So. 2d 630 (Fla. 1989).

7. In the case of *Imbimbo v. State*, 555 So. 2d 954 (Fla. 4th DCA 1990), the Fourth District Court of Appeal decided that where a juror who first stated that she "probably" would be prejudiced but later on further questioning stated that she "probably" could follow the judge's instructions on the law, created enough reasonable doubt to warrant being excused for cause.

8. Where a prospective juror's responses to questions were sufficiently equivocal to cast any doubt about their ability to be impartial and fair, it is error to deny a challenge for cause by the *Bryant v. State*, 656 So. 2d 426 (Fla. 1995).

9. In the case of *Somerville v. Ahuja*, 902 So. 2d 930 (Fla. 5th DCA 2005), the Fifth District stated:

> The right to have a case decided by an impartial jury has been equated to the constitutional right to a fair trial. Use of peremptory challenges and challenges for cause are two of the tools afforded parties and judges, in the context of a jury trial, to obtain a fair and impartial panel of jurors. The ultimate test is whether a juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions on the law given by the court. A juror should be able to set aside any bias or prejudice and assure the court and the parties that they can render an impartial verdict based on the evidence submitted and the law announced by the court.

10. A "reasonable doubt" standard should be applied in the attempt to resolve the question of a prospective juror's ability to be fair and impartial. *Goldenberg v. Reg'l Import & Export Trucking Co.*, 674 So. 2d 761 (Fla. 4th DCA 1996).

11. Where the trial court denies a challenge for cause based on a potential jurors equivocal or conditional responses that are not rehabilitated and where a reasonable doubt exists as to whether the juror possessed the requisite state of mind necessary to render an impartial decision, a new trial is required. *Salgado v. State*, 829 So. 2d 342 (Fla. 3d DCA 2002).

12. A prospective juror is not impartial where one side must overcome a pre-conceived opinion in order to prevail. *Hill v. State*, 839 So. 2d 883 (Fla.3d DCA 2003).

13. Where a potential juror responds that "I'd try not to" and "I would give it my best shot" referencing a previously announced bias, it is error not to excuse that potential juror on a challenge for cause. *Bell v. State*, 870 So. 2d 893 (Fla. 4th DCA 2004).

14. It is error to deny a challenge for cause where the potential juror stated that although he brought certain preconceived feelings to court about negligence claims in general, that he "would try to keep an open mind, but I am definitely of the opinion that [damage awards] need[s] to be capped and it has gone [sic] detrimental to the healthcare system". He further declared that his beliefs would "probably" interfere with his obligations as a juror. In response to an attempt to rehabilitate him, he also stated that "I would do what I believe is the fair thing, yes..." and that his decision would be based on his "personal beliefs". *Bell v Greissman*, 902 So. 2d (Fla. 4th DCA 2005).

15. "A juror who initially expresses bias may be rehabilitated during the course of questioning. Nevertheless, doubts raised by initial statements are not necessarily dispelled simply because a juror later acquiesces and states that he can be fair." *Lewis v State*, 931 So. 2d (Fla. 4th DCA 2006), *Carratelli v State*, 832 So. 2d 850, 854 (Fla. 4th DCA 2002).
    A review of the law on "rehabilitation" of a prospective juror is found in *Algie v Lennar Corporation*, 969 So. 2d 1135 (Fla. 4th DCA 2007). Once again, the court emphasizes how doubts raised by initial expressions of bias are not necessarily dispelled simply because the prospective juror later states that he can be fair. Any ambiguity or uncertainty must be resolved in favor of excluding the juror. See also *Kopsho v. State*, 959 So. 2d 168 (Fla. 2007).
    If you look hard enough you can find courts from all districts taking the opposite side of rehabilitation vs. failure to rehabilitate. Because there is so much support for each side of this question we need to ask ourselves whether it is really worth taking a chance on rehabilitation. The Second District in *Rodriguez v. State*, 42 FLW d1065 (Fla. 2nd DCA 2017) reviewed the law on rehabilitation recognizing that all parties have the right to try to rehabilitate prospective jurors. As a practical matter what then happens is that the appellate court reviews the questions that were asked; speculates on what could or should have been asked, and the result of the litigation is in jeopardy because equivocal responses were simply not left alone so that the juror could be excused.

16. In *Reyes vs. State*, 56 So. 3d 814 (Fla. 2d DCA 2011), the 2d District Court of Appeal stated that in order to avoid reasonable doubt about a prospective juror's impartiality, they must state their opinions must have a "final, neutral, and detached determination to sit as a fair and impartial juror".

17. Jurors are not required to be devoid of feelings, opinions or even preconceived notions about particular kinds of cases, as long as they can set aside those feelings, opinions or preconceived notions and render their verdict based on the evidence. *Embleton v Senatus,* 993 So. 2d 593 (4th DCA 2008).

18. Where the trial judge brought a single juror back into the courtroom by himself and proceeded to ask leading and compound questions about his ability to set aside his previously announced views, and where the juror finally relented and agreed with the judge that he could be fair, the trial court committed reversible error in denying the challenge for cause. The juror's responses to the courts questing were insufficient to erase the reasonable doubt created by his earlier answers. *Rimes v State*, 993 So. 2d 1132 (5th DCA 2008.)

19. In a criminal case where a prospective juror repeatedly stated that he felt that there was a presumption that the defendant was guilty until proven innocent, even though he stated that he could be fair and make his decision based on the evidence, it was an abuse of

discretion not to excuse that juror for cause. *Joseph v. State*, 983 So. 2d 781 (4th DCA 2008.)

20. The Florida Supreme Court in *Matarranz v. State*, 133 So. 3d 473 (Fla. 2013), reviewed the decisional law on challenges for cause. In that case, a prospective juror told the Court multiple times that she did not think that she could be fair in the case because of past personal experiences. Repeated "rehabilitation of the juror over two days resulted in the trial court allowing her to sit. The Supreme Court reversed.

21. The Third District, in *Gonzalez v. State*, 143 So. 3d 1171 (3d DCA 2014), rev. denied, 157 So.3d 1043 (Fla. 2014), reviewed *Matarranz* and concluded that it did not establish a "bright line" test for juror competency regarding past experiences. Unlike in *Matarranz,* in *Gonzalez,* the prospective juror raised her hand and volunteered to the court that she had been a victim of child abuse (the case involved similar claims). On questioning, she made it clear that she could be fair and impartial. After his conviction, the defendant challenged it by arguing that the Supreme Court in *Matarranz* had established a clear test and those jurors who had had similar past experiences should have been excused for cause. The *Gonzalez* court reasoned: "*Matarranz* does not establish a bright line rule that a juror who has had a personal experience relating to the case must necessarily be stricken for cause…" *Gonzalez v. State*, 143 So. 3d 1171 (Fla. 3d DCA 2014) stands for the same proposition.

22. In *Kochalka v. Bourgeois*, 162 So. 3rd 1122 (2nd DCA 2015), the positive response to the question "who feels like one side or the other starts out ahead because of your life experiences" – even though the prospective juror did not identify which side she favored – should have been enough to cause disqualification. The Court cited *Four Woods Consulting, LLC v. Fyne*, 981 So. 2nd 2 (4th DCA 2007), holding that "the mere implication of bias should have led to dismissal." Further, an expressed negative attitude towards the jury system, or an expression of "no faith" in the jury system should also lead to disqualification. *Levy v. Hawk's Cay, Inc.* 543 So. 2nd 1299 (Fla. 3d DCA 1989).

23. Where a prospective juror vacillates or equivocates about whether they can set aside bias, that is always grounds for a challenge for cause. *Okafor v. State*, 42 FLW S639 (Fla. 2017).

24. The real inquiry for the cause challenge is about bias. As pointed out recently in *Jones v. State*, 42 FLW D813 (Fla.4th DCA 2017) "To obtain a fair and impartial jury , and for 'voir dire examination of jurors…to have any meaning, counsel must be allowed to probe attitudes, beliefs and philosophies for the hidden biases and prejudices designed to be elicited by such examination"…As such, 'a court may not preclude a party from inquiry into bias bearing on a matter that is at the heart of the defendant's case."

Most of the instructive Florida cases on jury selection arise from criminal cases, and it makes sense to consider Fla. Stat. 913.03 titled "Grounds for challenge to individual jurors for cause." Among the "Grounds" listed in the statute:

(1)The juror doesn't have the necessary qualifications

(2)The juror has an "unsound mind" or bodily defect (but not deafness).

(3)The juror has conscientious beliefs(that would prevent him from

finding guilt)

(4) (The other 9 statutory provisions arguably only pertain to criminal cases).

IV. PRESERVING YOUR CAUSE OBJECTIONS

The manner in which you exercise challenges for cause is critical. Simply put, if you fail to adhere to the following rules, you will not preserve your cause objections for later appellate review.

1. The case which establishes the procedure for challenges for cause is ***Joiner v. State,* 618 So. 2d 174 (Fla. 1993)***. The Florida Supreme Court in *Joiner* held that you must:

   a. Make your challenge for cause.
   b. The trial court refuses to strike the juror.
   c. You use a peremptory challenge against the juror.
   d. After exhausting all remaining peremptory challenges, you request an additional peremptory challenge to strike a specifically named juror.
   e. Your request for an additional peremptory challenge is refused.
   f. Prior to the actual swearing of the jury, you must again renew your objection so that the trial court will have one last clear opportunity to take the appropriate corrective action. See also *Milstein v. Mutual Security Life Insurance Co.,* 705 So. 2d 639 (Fla. 3d DCA 1998).

2. In other words, "[t]o preserve for appellate review the denial of a for-cause challenge of a juror, [a party] must "object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible." *Gonzalez v. State,* 143 So. 3d 1171, 1174 n.1 (Fla. 3d DCA 2014) (internal quotations omitted) (quoting *Kearse v. State,* 770 So.2d 1119, 1128 (Fla.2000)).

3. In addition, you must be able to demonstrate to the appellate court that the objectionable juror actually was seated on the jury, and not merely as an alternate. *Frazier v. Welch,* 913 So. 2d 1216 (Fla. 4th DCA 2005)*; Jenkins v. State,* 824 So 2d. 977 (Fla. 4th DCA 2002); *Joseph v. State,* 983 So. 2d 781 (Fla.4th DCA 2008).

4. Assuming the above procedure is followed, the appellate court then undertakes the task of determining whether or not the trial court made an error. in failing to excuse the challenged juror. Interestingly, there is no requirement that the objecting party demonstrate any prejudice in the failure to excuse the challenged juror. See *Gootee v. Clevinger,* 778 So. 2d 1005 (Fla. 5th DCA 2000) (dissenting opinion by Judge Harris). For additional cases supporting this same proposition, see *Johnson v. State of Florida,* 763 So. 2d 1214 (Fla. 2d DCA 2000)*; Kerestesy v. State,* 760 So. 2d 989 (Fla. 2d DCA 2000)*; Geibel v. State,* 795 So. 2d 285 (Fla. 3d DCA 2001)*; Shannon v. State,* 770 So. 2d 714 (Fla. 4th DCA 2000).

5. After all challenges for cause and all peremptory challenges are used, and assuming the above proves has been followed, when the additional requested challenge is once again refused, there is no requirement that a proffer by made of the reason for the additional peremptory challenge. In other words, there is no requirement that the objecting party state the basis for his desire to exercise an additional peremptory challenge. Trotter v. State, 576 So. 2d 691 (Fla. 1990); Shannon v. State of Florida, 770 So. 2d 714 (Fla. 4th DCA 2000).

6. The case of Coe v. State of Florida, 100 So. 3d 1152, (Fla. 3d DCA 2012) case of *Coe v. State of Florida*, 100 So. 3d 1152, (Fla. 3d DCA 2012) emphasized just how hard it is to overturn the trial court's decision to deny a challenge for cause:

> "There is hardly any area of the law in which the trial judge is given more discretion than in ruing on challenges of jurors for cause"
>
> "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 record."
>
> "It is within the trial court's province to determine whether a challenge for cause should be granted…and such a determination will not be disturbed on appeal absent manifest error."
>
> "A finding of manifest error is possible only when the record shows no basis for the decision".

7. The Florida Supreme Court in *Cozzie vs. State*, 42 FLW S579 just re-stated the procedure that must be followed: "…the defendant must "object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible."…"it is the objection/re-objection process…that is the decisive element in a juror-objection –preservation analysis".

V. PEREMPTORY CHALLENGES

1. Rule 1.430(d) of the Florida Rules of Civil Procedure, provides "Each party is entitled to three peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties is entitled to the same aggregate number of peremptory challenges to be determined on the basis of three peremptory challenges to each party on the side with the greater number of parties. The additional peremptory challenges accruing to multiple parties on the opposite side shall be divided equally among them. Any additional peremptory challenges not capable of equal division shall be exercised separately or jointly as determined by the court."

2. Although the above quoted provision is the only time in the civil procedure rules that peremptory challenges are mentioned, suffice it to say that use and misuse of peremptory challenges has recently have been examined by a number of appellate courts on race, gender and ethnicity issues. Most of the law on jury selection arises from criminal cases but the same principles apply equally to civil and criminal

jury trials.

3. Historically, use of peremptory challenges was something not controlled by the court. Reasons for the challenge were not required, and literally for any reason or for no reason, the challenge was just that, an unfettered challenge.

4. Happily, times changed and the evolution was such that "It is no….impermissible to exercise cgHappily, times changed and the evolution was such that "It is now...impermissible to exercise challenges on the basis of race, gender, or ethnicity." ***Abshire v State*, 642 So. 2d. 542, 543-44 (Fla. 1994).***

The constitutional basis for the rule?

Federal:

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the defendant claimed that the state discriminated by systematically excluding blacks from trial juries. The Supreme Court stated that "purposeful discrimination may not be assumed or merely asserted," but must be proved. 380 U.S. at 205, 85 S.Ct. at 827. The Court found

> no reason...why the defendant attacking the prosecutor's systematic use of challenges against Negroes should not be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter.

Id. at 227-28, 85 S.Ct. at 839-40 (footnote omitted). In support of its holding the court reasoned that if peremptory challenges could be examined they would no longer be peremptory. The Court went on to say that

> we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. *Id*. at 222, 85 S.Ct. at 836.

Batson v. Kentucky, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69 (1986), overturned *Swain* and held that systematic exclusion of venire members from jury on basis of race violates Equal Protection Clause of Fourteenth Amendment.

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), defendant in criminal case may raise argument even if not a member of the defined group (i.e., defendant has third party standing to raise equal protection argument).

Fludd v. Dykes, 863 F.2d 822, 829 (11th Cir. 1989) (Batson applies in civil rights cases through Equal Protection Clause of Fourteenth Amendment).

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616, 111 S. Ct. 2077, 2080, 114 L. Ed. 2d 660 (1991) (the equal protection component of the Fifth Amendment's Due Process Clause requires the same result as Batson in civil cases in federal court).

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 1420, 128 L. Ed. 2d 89 (1994)
(The Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man).

Florida:

Before *Batson* was decided, Florida Supreme Court had to decide whether it would still be guided by *Swain v. Alabama*.

> As did the New York, California, and Massachusetts courts, we find that adhering to the Swain test of evaluating peremptory challenges impedes, rather than furthers, [Florida Constitution's] article I, section 16's guarantee. We therefore hold that the test set out in Swain is no longer to be used by this state's courts when confronted with the allegedly discriminatory use of peremptory challenges.

State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (based upon the constitutional guarantee in the state constitution of a speedy trial by an impartial jury to all criminal defendants).

The Third DCA extended Neil to civil cases, relying upon Article I, section 22 of the Florida Constitution:

> We now turn to the question of whether Neil applies to civil cases. *Neil* focused on Article I, Section 16 of the Florida Constitution, which guarantees to an accused in a criminal case the right to a trial by an impartial jury. The civil analogue applicable to this case is Article I, Section 22 of the Florida Constitution, which provides that "[t]he right of trial by jury shall be secure to all and remain inviolate." While Section 22 does not expressly grant civil litigants the right of trial by an impartial jury, we believe that anything less than an impartial jury is the functional equivalent of no jury at all.

City of Miami v. Cornett, 463 So. 2d 399, 402 (Fla. Dist. Ct. App.), *dismissed*, 469 So. 2d 748 (Fla. 1985)

Hall v. Daee, 602 So. 2d 512, 515 (Fla. 1992) ([i]n the third district, *Neil* was extended to civil cases in *City of Miami v. Cornett*, 463 So.2d 399 (Fla. 3d DCA), *dismissed*, 469 So.2d 748 (Fla.1985). Since then, the United States Supreme Court has settled the issue by holding that civil litigants may not use peremptory challenges in a racially discriminatory manner. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)).

Left unaddressed by the Court in *Hall* was the fact that *Edmonson* was based upon the equal protection component of the Due Process Clause of the Fifth Amendment to the federal constitution, while *Cornett* was based upon Article I, section 22 of the Florida constitution.

The rule has consistently been applied in Florida state courts, but without a great deal of discriminating analysis of the constitutional basis. *See, e.g., King v. Byrd*, 716 So.2d 831, 833 (Fla. 4th DCA 1999) (quoting citation to guarantee of speedy criminal trial in state constitution,

then applying those principles to civil case).

For example, the rule has been summarized this broadly in a civil case (with respect to gender, but the same analysis will apply to all other protected classes):

> Gender-based peremptory challenges are prohibited by both the federal and state constitutions. The prohibition applies in both criminal and civil trials.

Murray v. Haley, 833 So. 2d 877, 879 (Fla 1st DCA 2003) (citations omitted).

The reason it matters? To the extent that the rule is based upon equal protection guarantees for civil litigants (and jurors) in the federal and state constitutions (and it is), then the parameters of equal protection law will define the groups of venire members who may not be peremptorily challenged for membership in those groups.

5. As the Florida Supreme Court stated in *State v. Neil*, 457 So. 2d 481 (Fla. 1984): **"The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury."**

6. In 1996, the Florida Supreme Court in ***Melbourne v. State*, 679 So. 2d 759 (Fla. 1996)*,** created what the Court would later describe as **"a simple, precise, and easy-to- administer procedure for challenging a litigant's suspected use of a peremptory challenge to discriminate based on race, or other impermissible factors.."** *Hayes v. State*, 94 So. 3d 452 (Fla. 2012). The test is: [step 1] "A party objecting to the other side's use of peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group, and
c) request that the court ask the striking party's reason for the strike." [Step 2] "At this point the burden shifts to the proponent of the strike to come forward with a race neutral explanation." [Step 3] "If the explanation is facially race-neutral and the court believes that given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained."

<u>Step 1</u>: Even though the original language in *Melbourne* had to do with a challenge on the basis of race, it is fair to say that the appellate decisions since 1996 have vastly expanded the issue. Therefore, whenever a peremptory challenge is contested whether it is the basis of race, gender, ethnicity, or anything else, the Step 1, 2 and 3 analyses all come into play. *See, e.g., Guevara v. State*, 164 So. 3d 1254 (Fla. 2d DCA 2015) (reversing because prosecutor erroneously convinced trial court that the *Melbourne* steps did not apply to peremptories used to strike male jurors).

a) Timely and proper objection: The objection may be made at any point prior to the jury being sworn. If the objection is not sustained, it must be made again prior to the jury's being impaneled. *See Watson v. Gulf Power*, 695 So. 2d 904 (Fla. 1st DCA 1997). Further, the Florida Supreme Court in *Mitchell v.*

State, 620 So. 2d 1008 (Fla. 1993) stated "... in order to preserve a Neil issue for review it is necessary to call to the court's attention before the jury is sworn, by renewed motion or by accepting the jury subject to the earlier objection, the desire to preserve the issue."

By failing to renew the objection, trial courts have uniformly held that the objections were waived. *Joiner v. State*, 618 So. 2d 174 (Fla. 1993). *See also Couch v. Shell*, 803 So. 2d 803 (Fla. 1st DCA 2001).

The objection must be a specific objection and not a general objection in order to put the trial court on notice of the reason you are making the objection. In *Mobely v. State of Florida*, 37, FLW D384 (Fla. 1st DCA 2012) the court held that "The opponent of the strike cannot generally object to the trial court's determination that the reason is race-neutral without an request or other notice to the court that it seeks a more specific determination of genuineness, and then appeal the trial court's ruling for failure to further specify its ruling".

There are no magic words that need to be used as long as the party making the objection timely communicates to the court and to opposing counsel an objection to the alleged improper use of a peremptory challenge. *Harrison v. Emanuel*, 694 So. 2d 759 (Fla. 4th DCA 1997).

b) The second part of Step 1 is the requirement that the record reflects that the venire person is a member of a distinct group under the federal or state Equal Protection Clause. Obviously no testimony needs to be given on this issue, but the lawyer making the challenge or trial court must identify either by <u>race, gender or ethnicity</u> the prospective juror that is the subject of the inquiry.

Recognized classes for these purposes include:

<u>Race</u>. See, e.g., *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996).

<u>Gender</u>. *See Abshire v. State*, 642 So.2d 542 (Fla. 1994); *Murray v. Haley*, 833 So.2d 877 (Fla. 1st DCA 2003).

<u>Ethnicity</u>. *State v. Alen*, 616 So.2d 452 (Fla. 1993) (Hispanics are cognizable group for purposes of precluding peremptory challenges based solely on group membership). *Olibrices v State*, 929 So. 2d 1176 (Fla. 4th DCA 2006) (people who practice the Muslim religion and who are Pakistani are within the protection afforded by this line of decisional authority).

[Arguably/presumably] <u>Sexual orientation</u>. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (right of same-sex couples to marry is fundamental right protected by Equal Protection Clause of

Fourteenth Amendment).

[Arguably/presumably] Religion. *See, e.g., Bush v. Holmes*, 886 So. 2d 340, 390 (1st DCA 2004*), aff'd in part*, 919 So. 2d 392 (Fla. 2006) (Equal Protection Clause of the Fourteenth Amendment prohibits unlawful intent to discriminate against individuals for an invalid reason, such as their religion). *But see Dorsey v. State*, 868 So. 2d 1192, 1202 n.8 (Fla. 2003) ("In response to the dissent's suggestion that this holding applies to jurors of a 'particular gender, occupation or profession or other economic, social, religious, political, or geographic group,' dissenting op. at 1204 n. 11, we note that this Court has not extended *Neil's* protections beyond peremptory challenges based on race, gender, and ethnicity.")

Race and gender are easy to determine as protected. Ethnicity is more complex. The purported ethnic group must be "cognizable." *See State v. Alen*, 616 So.2d at 454 ("First, the group's population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.")

However, a juror's surname, without more, is insufficient to trigger an inquiry into whether a peremptory strike was exercised in a discriminatory manner. *Smith v. State*, 59 So. 3d 1107, 1111 (Fla. 2011) (a venire member's surname that "sounded like a German name" was not a sufficient basis upon which to initiate inquiry); *State v. Alen*, 616 So.2d 452 (Fla. 1993) (Hispanic or Latino surname, standing alone, not sufficient to require inquiry).

c) It is not necessary that the objecting party be a member of the class – in other words, e.g., white people can object to the discriminatory use of peremptory challenges against African Americans. *Powers v. Ohio*, 499 U.S. 400 (1991). *See also Abshire v. State*, 642 So.2d 542 (Fla. 1994) (upholding male defendant's challenge to systematic exclusion of women from jury).

d) The last part of Step 1 is simply that the person challenging the strike must ask that the court make inquiry of the striking party about the basis for the strike. Note that objecting party must request the trial court to make two separate determinations of (a) facial neutrality and (b) genuineness. *Ivy v. State*, 196 So.3d 394 (Fla. 2d DCA 2016), *stayed pending disposition in related appeal*, No. SC16-988 (Fla. Sept. 23, 2016).

Step 2: Once the requirements outlined in Step 1 are met, the burden of stating either a race, gender or ethnically neutral reason now shifts to the party making the strike. It is reversible error for the trial court not to require a

Step 2 inquiry once the requirements of Step 1 are met. *Streeter v. State*, 979 So. 2d 428 (Fla. 3d DCA 2008).

a) The party seeking to exercise the challenge must state on the record, a neutral reason for making the strike. The race, gender, or ethnically neutral explanation must be one where there is no predominant discriminatory intent which is apparent from the given explanation, taken at its face value. ***State v. Slappy*, 522 So. 2d 18 (Fla. 1988)***.

b) "A facially race-neutral reason is one that is not based on race at all." Russell v State, 879 So. 2d 1261 (Fla. 3d DCA 2004).

c) A stylistic note: "Objections to peremptory challenges of prospective jurors based on race, sex or ethnicity may actually involve more than one of these classifications. The term 'race neutral' is therefore under-inclusive by two-thirds and hence unsuitable. A better term would be *non-invidious*." *Olibrices v. State*, 929 So. 2d 1176, 1177 (Fla. 4th DCA 2006) (emphasis by the Court).

d) For example, a prospective juror's past involvement in car accidents has been determined to be a race neutral basis to exclude him in a car accident case. *Smellie v. Torres*, 570 So. 2d 314 (Fla. 3d DCA 1990). Similarly, a juror's past involvement in "similar incidents" as the one which was being tried may constitute a neutral explanation. *Adams v. State*, 559 So. 2d 1293 (Fla. 3d DCA 1990). In the case of *State of Florida v. Mitchel*, 768 So. 2d 1223 (Fla. 3d DCA 2000), a Hispanic female was the subject of a peremptory challenge. It was apparent through the questioning that she was a paralegal who had just completed law school and who had sat for the Florida Bar examination. Citing the latter matters as a reason for being gender and ethnically neutral, the trial court agreed to the challenge. However, it has been held that a prospective juror's occupation is not a valid reason for a challenge unless there is some connection between the occupation and the underlying facts of the case. *Johnson v. State*, 600 So. 2d 32 (Fla. 3d DCA 1992).

e) The issue before the trial court in the step two analysis is the facial neutrality of the proponent's reason for the strike. Courts should presume the reason for a peremptory strike is facially neutral and nondiscriminatory, and the opponent of a peremptory strike always bears the burden of persuasion to show discriminatory intent by the party exercising the strike. *Hayes v. State*, 94 So. 3d 452, 461 (Fla. 2012); *Harris v. State*, 183 So.3d 1086, 1088 (Fla. 4th DCA 2015).

f) In *Soto v. State*, 786 So. 2d 1218 (Fla. 4th DCA 2001), a strike against a Hispanic juror was sustained where the State's explanation for striking the juror was that the person did not appear to speak or understand English very well. *But see Despio v. State*, 895 So. 2d 1124, 1126 (Fla. 3d DCA 2005) (suggesting that an objection based solely on the fact that a jury speaks a certain language, without reference to why this fact matters, could be a proxy for a racial

objection and thus not permissible). *Cf. Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859 (1991) (upholding strike of Spanish-speaking jurors because prosecutor expressed concern such jurors would not defer to the official translation)

g) The fact the prospective jurors have been victims of a crime has regularly been determined to be a valid, race neutral and gender neutral reason for a peremptory strike. *Porter v. State*, 708 So. 2d 338 (Fla. 3d DCA 1998) and *Symonette v. State*, 778 So. 2d 500 (Fla. 3d DCA 2001).

h) An equivocal response to a prosecutor's questioning regarding views on the death penalty was determined to be a race neutral reason in *Floyd v. State,* 850 So. 2d 383 (Fla. 2002).

i) Further, when a black church pastor indicated to the prosecutor that he might have difficulty setting aside feelings of sympathy when he listened to the evidence, the court in *Rodriguez v. State*, 826 So. 2d 494 (Fla. 4th DCA 2002) found that that was a race neutral explanation for excusing the pastor.

j) Where a juror according to the attorney, was unwilling to look the attorney in the eye while answering questions; or while it seemed to the attorney that a particular juror was not paying attention to the proceedings; or where it seemed to the attorney that a prospective juror was unable to stay awake during the voir dire examination, or the prospective juror even seemed to have an unfriendly or hostile tone while answering questions, all of those reasons have been determined, at least facially, to be neutral reasons. *Dean v. State*, 703 So. 2d 1180 (Fla. 3d DCA 1997).

k) Concern for the young age of the potential juror, or concern that potential loss of income during jury service, might cause a lack of attention during the trial, were deemed to be race neutral reasons for using a peremptory challenge in *Saffold v. State,* 911 So. 2d 255 (Fla. 3d DCA 2005).

l) A juror's "non-verbal" actions which are disputed, and not observed by the Judge or otherwise supported in the record are an insufficient race-neutral reason for a peremptory challenge. *Brown v. State*, 995 So. 2d 1099 (3d DCA 2008); *see also Denis v. State*, 137 So. 3d 583 (Fla. DCA 2014) (reversing where trial court merely accepted the prosecutor's word that juror had been falling asleep and had not observed such conduct)

m) For the most recent review of the case law on "race neutral" reasons, see: *Guevara v. State*, 164 So. 3rd 1254 (2nd DCA 2015), and *Harris v. State*, 40 FLWD 1235, (4th DCA 2015).

Step 3: Once the trial court has completed inquiry into Steps 1 and 2, the last portion of the process is to determine whether or not the circumstances

given by the proponent of the strike are indeed "neutral" and are not "pretextual." The trial judge "must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext." *State v. Slappy*, 522 So. 2d 18, 22 (Fla. 1988). Note that the burden rests on the objecting party to require the trial court to make the two separate determinations of (a) facial neutrality and (b) genuineness. *Ivy v. State*, 196 So.3d 394 (Fla. 2d DCA 2016), *stayed pending disposition in related appeal*, No. SC16-988 (Fla. Sept. 23, 2016) ("the word 'genuineness' with nothing more is not an adequate objection informing the trial court ath it must make two separate determinations…")

a) In *Hayes v. State*, 94 So. 3d 452 (Fla. 2012) the Florida Supreme Court reviewed the Step 3 analysis from *Melbourne*. "The proper test under *Melbourne* requires the trial court's decision on the ultimate issue of pretext to turn on a judicial assessment of the credibility of the proffered reasons and the attorney or party proffering them, both of which "must be weighed in light of the circumstances of the case and the total course of the voir dire in question as reflected in the record**"… "Identifying the true nature of an attorney's motive behind a peremptory strike turns primarily on an assessment of the attorney's credibility."**

b) There have been a number of decisions on the Step 3 analysis: *Garcia v. State of Florida*, 75 So. 3d 871 (Fla. 3d DCA 2011); *Jones v. State of Florida*, 93 So. 3d 1189 (Fla. 1st DCA 2012); *Wimberly v. State of Florida*, 118 So. 3d 816 (Fla. 4th DCA 2012); *Victor v. State of Florida*, 126 So. 3d 1171 (Fla. 4th DCA 2012); *Wynn v. State of Florida*, 99 So. 3d 986 (Fla. 3d DCA 2012).

c) "A trial court's genuineness inquiry involves consideration of factors which tend to show whether the proffered reason is pre-textual." Braggs *v. State*, 13 So. 3d 505 (Fla. 3d DCA 2012).

d) The party opposing the explanation as pretextual MUST make a specific objection on that basis or it will be determined to be waived. *Hall v. State*, 768 So. 2d 1212 (Fla. 4th DCA 2000).

e) A pretextual and/or disingenuous reason for striking a prospective juror may be revealed where: there has been only a perfunctory examination of the juror; or the proffered explanation to strike a black juror is equally applicable to a white juror. *Overstreet v. State*, 712 So. 2d 1174 (Fla. 3d DCA 1998).

f) The analysis that must take place by the trial court under Step 3 is to determine whether the proffered explanation for the challenge is a pretext designed to conceal the attempt to discriminate on the basis of race, gender or ethnicity. In other words, the trial court is obligated to make an effort at identifying the true nature of the challenging attorney's motive behind the peremptory strike and this of course means that the trial court must make a determination of the attorney's credibility. *Young v. State of Florida*, 744 So. 2d 1077 (Fla. 4th DCA

1999). It is reversible error for the court to make a determination about the juror's credibility as opposed to the credibility of the attorney exercising the strike. *Allstate v. Thornton*, 781 So. 2d 416 (Fla. 4th DCA 2001).

g) While there are no magic words that must be utilized, it must be clear on the record that step number three as to the actual genuineness of the challenge was actually considered. *Simmons v State*, 940 So. 2d. 580 (Fla.1st DCA 2006).

h) The trial court must make its findings of genuineness in an explicit way or the findings must be implicit from the record. Burgess v. State, 117 So. 3d. 889 (Fla. 4th DCA 2013); *Smith v State*, 143 So. 3d 1194 (Fla. 1st DCA 2014). The Florida Supreme Court makes it clear in *Poole v. State*, 151 So. 3d 402 (Fla. 2014) by stating that "The trial court must make an indication on the record that it not only accepted the race-neutral explanation, but actually engaged in a 'genuineness' analysis." This concept was just re-affirmed in the case of *Ellis v. State*, 152 So. 3d 683 (Fla. 3d DCA 2014). "Thus, the trial court in this case erred in stating that the genuineness of the proffered reason for the challenge is not part of the analysis, contrary to the dictates of *Melbourne* and its progeny."

i) "Circumstances relevant to the 'genuineness' inquiry include the gender or racial make-up of the venire, prior strikes exercised against the same gender or racial group, or singling the juror out for special treatment." *Norona v. State*, 137 So. 3d 1096 (Fla. 3d DCA 2014).

j) Where the basis for the strike was the lawyers feeling that a prospective jurors "non-verbal indications" in response to some questions, "might" suggest that the juror would have certain expectations, during the trial, the lawyers explanation was appropriately determined to be disingenuous and the strike was not allowed. *Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003).

k) In order to preserve the issue for appellate review, the objecting party must clearly state the basis for their objection–that the proffered reason is pretextual and is not race neutral. Failure to do so waives the courts error on appeal. *Brown v. State*, 994 So. 2d 1191 (4th DCA 2008).

l) Further, in order to preserve the matter for appellate review, the objection must be an appropriate objection. In *Schummer v. State*, 654 So. 2d 1215 (Fla. 1st DCA 1995), when counsel was asked to state a race neutral reason for striking a potential member of the jury, he responded by stating that the prospective jury person had not looked him in the eye; that he did not care for the person; and because the person was a retired military person, that they were typically more conservative than others. After listening to the response by the State, the defense attorney replied "That's ridiculous. I mean you're following the law, but I think that is ridiculous." The appellate court determined that saying "that's ridiculous" did not constitute an objection to the judge's ruling but merely amounted to an exclamation

of the attorney's opinion that the law on this particular subject was "ridiculous." The court specifically found that such a response was not sufficient to put the trial judge on notice that defense counsel believed that reversible error had occurred in the denial of his use of a peremptory challenge and therefore the matter was waived on appeal.

m) In *Spencer v. State*, 196 So. 3rd 400 (Fla. 2nd DCA 2016) the 2nd District made it clear that there is no duty on the part of the trial court to initiate the "genuineness" finding. Rather, the burden is on the objecting party. The Court held that "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." The opinion also is a very good review of the above described *"Melbourne"* process.

7. Knowing that lawyers will try to constantly push the envelope to try and accomplish their goals, the Florida Supreme Court, in *State v. Slappy*, 522 So. 2d 18 (Fla. 1988), set forth a "non-exclusive" list of factors to guide trial judges in evaluating whether a proffered reason is nothing more than a pretext, and therefore inappropriate. The Court held: "…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:

   a. Alleged group bias not shown to be shared by the juror in question,
   b. Failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror,
   c. Singling the juror out for special questioning designed to evoke a certain response,
   d. The prosecutor's reason is unrelated to the facts of the case, and a challenge based on reasons equally applicable to juror's who were not challenged."

   The presence of one or more of these factors will tend to demonstrate that the proffered reason for the challenge is nothing more than an impermissible pretext. *See Welch v. State*, 992 So.2d 206 (Fla. 2008); *Harrison v. Emanuel*, 694 So.2d 759 (Fla. 4th DCA 1997).

8. In the decision by the Florida Supreme Court in *King v. State*, 89 So. 3d 209 (Fla. 2012), the Court re-emphasized that the race of the challenged juror must be clearly identified on the record. "…King failed to identify the race of the similarly situated jurors who were seated on King's jury. Since the race of the seated juror's is unclear, King cannot show that the strike of juror 111 was racially motivated."

9. As the appellate court pointed out in the case of *King v. Bird*, 716 So. 2d 831 (Fla. 4th DCA 1998), it's no longer the law where in the exercise of peremptory challenges you can strike anybody for any reason.

10. When the party striking a juror gives a factually erroneous reason for striking a juror, the appellate court will closely scrutinize the scope of the trial court's genuineness inquiry. *See West v. State*, 168 So. 3d 1282 (Fla. 4th DCA 2015). In *West*, the prosecutor initially stated he was striking a "Spanish" juror because she was unemployed. When defense counsel pointed out the juror was employed as a housekeeper and only her children were unemployed, the prosecutor then changed his reason for the strike, saying

"we don't want any housekeepers on the jury." The trial court accepted both the original "unemployed" reason and the new "housekeeper" reason as being race-neutral without engaging in any genuineness inquiry. The appellate court reversed.

11. It should be noted however that not every exercise of a peremptory challenge requires an explanation. In *Roberts v State*, 937 So. 2d 781 (Fla. 2d 2006) the accused chose to represent himself at trial. The trial judge, seemingly frustrated with the process, considered that the courts time was being wasted, instructed the accused that he needed to have a "good reason" to challenge a prospective juror, and that it must be "supported by the record". Since there had been no "challenge to the challenge", the Second District disagreed with the trial court. The court stated, "[t]hus, the essence of the peremptory challenge is that it may be used for any reason, and ordinarily the trial court may not require a party to provide a reason for the use of a peremptory challenge. Rather, in order to effectuate the right to be tried by an impartial jury, the defendant may use his peremptory challenges against potential jurors "without giving his reason for not wishing them to pass upon his guilt or innocence."

11. Comments made during Voir Dire that serve no purpose other than to ingratiate an attorney to the potential jurors and "focus their attention on irrelevant matters" (such as mentioning that the attorney has a child the same age as the decedent) are clearly improper. *Bocher v. Glass*, 874 So. 2d 701 (Fla. 1st DCA 2004).

12. For a nice, current review of the entire process, see *Landis v. State*, 143 So. 3d 974 (Fla. 4th DCA 2014).

VI. PRESERVING YOUR PEREMPTORY OBJECTIONS

1. As with challenges for cause, potential errors concerning improper use of peremptory challenges may be waived if not properly preserved. To preserve the point on appeal, **the objecting party must not accept the jury without renewing the objection to the challenged juror**. *Disla v. Blanco*, 129 So. 3d 398 (Fla. 4th DCA 2013); *Boswell v. State of Florida*, 92 So. 3d 883, (Fla. 4th DCA 2012); *Joiner v. State*, 618 So. 2d 174 (Fla. 1993). See also, *Baccari v. State*, 145 So. 3d 958 (Fla. 4th DCA 2014) holding: "We find that appellant abandoned his earlier objection when he affirmatively accepted the jury at the time the jury was sworn and impaneled without reference to his prior objection". Further one cannot later argue that to renew the objection before accepting the jury would have been "futile". As the court pointed out in *USAA Cas. Ins. Co. v. Allen*, 17 So. 3d (Fla. 4th DCA 2009), "Without restating the objection to the trial court, the court cannot know that the party still maintains the previously voiced objection." However, if the objection is made in close proximity to the end of jury selection, "it could" be considered preserved without renewing the objection. *Gootee v. Clevinger*, 778 So. 2d 1005 (Fla. 5th DCA 2000). *But see Spencer v. State*, 162 So. 3d 224 (Fla. 4th DCA 2015) (distinguishing *Gootee* and limiting its application).

2. In *McNeil v. State*, 158 So. 3d 626 (Fla. 5th DCA 2014), after the trial started, a juror informed the court that he recognized the defendant's son. He had not disclosed this during jury selection despite the jury being asked if they were acquainted with any

of the potential witnesses. The juror indicated that while he did not know the son personally, he did recognize him, and assured the court that he could still be fair and impartial. The State's motion to strike the juror was denied, but the State was allowed to use a preemptory challenge on the juror. In deciding that the trial court had overstepped its bounds, the appellate court held: "Allowing the exercise of preemptory challenges to continue into a trial would encourage tactical gamesmanship, a result that we are unwilling to condone and one for which we feel compelled to provide a remedy."

3. The timeliness of the objection is critical in a criminal case, and apparently it may be less critical in a civil case. In *Baccari v. State*, 145 So. 3d 958 (Fla. 4th DCA 2014) objections were made timely but not renewed before the jury was sworn. After the jury was sworn, they were discharged for the evening and the next morning, the objecting party renewed his objections before taking any testimony. Although the trial court did not find the objections untimely, the appellate court did emphasizing the jeopardy attaches in a criminal case at the time the jury is sworn. The defendant relied on a civil case to argue the timeliness of the objection to the jury. The case referenced was *Sparks v. Allstate Construction, Inc.*, 16 So. 3d 161 (Fla. 3d DCA 2009). In *Sparks*, the plaintiff did not renew his objection before the jury was sworn, but waited until the jury had returned from lunch and before there were any further proceedings. The appellate court allowed the late objection to stand because in that particular case, "there was no affirmative acceptance of the jury." This is a thin line and the better practice is to make your objections again before the jury is sworn.

VII. <u>ALTERNATE JURORS</u>

1. Rule 1.431 (g) of the Florida Rules of Civil Procedure provide for the selection of one to two alternate jurors. By rule they are subject to the same selection process as the main panel of jurors and of course serve only in the event of the incapacity or disqualification of one of the main jurors.

2. The order in which they are selected dictates the order in which they come to the main jury. That is to say that alternate juror number one is the first alternate to replace a member of the main jury, etc.

3. Rule 1.431 (g) (2) provides that each party has one peremptory challenge per "alternate juror or jurors". However if the number of the parties is unequal, then the plaintiff gets the same number of peremptory challenges as the aggregate number of defendant parties. Of note, the alternate challenges can only be used against prospective alternate jurors. Remaining peremptory challenges remaining from selection of the main jury cannot by rule, be used to challenge alternate jurors.

4. Alternate jurors should be dismissed before the jury retires for their deliberations. In *Boblitt*
v. State, 40 FLWD 2093, (1st DCA 2015), an alternate started deliberations after one of the
main jurors was wrongfully dismissed by mistake. When the error was noted the jury was instructed to stop deliberations and on questioning the alternate jury indicated that the jury had just started to discuss the case but had not gotten very far into it. Mistrial motions were denied and the case was reversed on appeal.

VIII. BACK STRIKING

1. Rule of Civil Procedure 1.431(f) provides, "No one shall be sworn as a juror until the jury has been accepted by the parties or until all challenges have been exhausted."

2. Can there ever be a time, *prior to a jury being sworn,* that a litigant could not exercise a "back strike"? The answer is no.

3. The Florida Supreme Court in ***Gilliam v. State,* 514 So. 2d 1098 (Fla.1987)***, determined that a trial judge cannot infringe upon a party's right to challenge any juror, whether for cause or a peremptory challenge, before the time that the jury is sworn. The Supreme Court went on to say that the denial of this right to challenge a juror at any time is reversible error per se. Although the *Gilliam* case is a criminal case, it has been adopted in several civil cases. *See Peacher v. Cohn*, 786 So. 2d 1282 (Fla. 5th DCA 2001). In the *Peacher* case, the Fifth District Court of Appeal held "We conclude that the right to exercise peremptory challenges is a fundamental part of a right to a fair trial and that the denial of that right should be treated as reversible error and the cause remanded for a new trial." In that case, the jury selection process took place without problem until the first six jurors were selected. The trial court asked if there were any more challenges and when none were voiced, then proceeded to select alternate jurors. At the time that the alternate jurors were being selected, the plaintiff attempted to exercise a strike against one of the original six. That was denied by the trial court and as mentioned, the appellate court reversed on that basis.

4. In *Van Sickle v. Zimmer*, 807 So. 2d 182 (Fla. 2d DCA 2002), the Second District Court of Appeal reiterated that while trial courts have discretion in determining the time and manner of challenging jurors and even the swearing of jurors, nonetheless, a party may exercise a peremptory challenge at any time until the juror is sworn.

5. The Fourth District Court of Appeal has reiterated the principle that back striking is permitted any time before the jury as a whole is sworn and the trial court may not circumvent this principle by swearing jurors in on an individual basis:

> 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." *Id.* at 535. *See also Lottimer v. N. Broward Hosp. Dist.*, 889 So.2d 165, 167 (Fla. 4th DCA 2004) (a party may exercise an unused peremptory challenge at any time prior to the jury being sworn; this is so even if the main panel has been accepted, the parties are selecting alternates, and one party chooses to exercise an unused peremptory to a juror on the main panel).

   Aquila v. Brisk Transp., L.P., 170 So. 3d 924, 925-26 (Fla. 4th DCA 2015).

6. If a trial court improperly denies a litigant her right to back strike, the litigant must identify a specific juror on the panel whom she would have struck had she been given the opportunity to back strike; otherwise her objection is not preserved for appeal. *Id.* at 926.

7. **"UNSTRIKING"**—a new term, "unstriking" has been adopted by the Florida Supreme Court in *McCray v State*, 42 FLW S618 (Fla.2017). In McCray, after going through cause challenges and after using all the defense peremptory challenges, the defense sought to "unstrike" one of the potential jurors against whom they had already used a peremptory challenge. The Court, reviewing past cases commented that the term "unstrike" had apparently never been used before. The Court stated: "…the term is best defined as the practice of withdrawing a peremptory challenge used on one juror and then using that same peremptory challenge to exclude another juror." The Court held that there cannot be a blanket rule that never permits an "unstrike". Worried that the practice of "unstriking" might lead to gamesmanship in the selection of a jury, the Court ruled that…"we emphasize that the rare instance when the withdrawal of a peremptory challenge is granted after a party has exhausted its peremptory challenges must not be the design of gamesmanship, as 'established case law rejects the proposition that a defendant is entitled to have a particular composition of jury'". The McCray decision relies heavily on the 3rd Districts decision in *McIntosh v. State*, 743 So. 2nd 155 (Fla 3rd DCA 1999). In McIntosh the trial court was trying to empanel a 12 person jury but came up one short. The trial court permitted the State to "unstrike" one of the previously stricken jurors so that the case could proceed with a full 12 person jury. In that very limited circumstance allowing an "unstrike" was within the trial courts authority.

IX. STRIKING THE ENTIRE VENIRE

1. When voir dire is conducted of a group, as opposed to questioning individual jurors out of the presence of the others, there is always a chance that the entire venire hears an answer that taints the entire group. The case of *Reppert v. State of Florida*, 86 So. 3d 525 (Fla. 2d DCA 2012) is illustrative. During voir dire one prospective juror responding to the court's questioning stated: "Most likely these individuals who go through the system have been doing some kind of criminal activity for a long time." Further questioning by the trial judge made clear that the juror had no personal knowledge of the defendant, but rather was just expressing a personal opinion. The motion to disqualify the entire panel was denied and on appeal, the district court made clear that, "When a prospective juror comments on a defendant's criminal history and expresses some knowledge of the defendant himself, it is an abuse of discretion not to strike the venire. However, when a prospective juror simply expresses a personal opinion of the criminal justice system, that opinion, without more, is usually insufficient to taint the remainder of the venire."

2. In order to preserve your Motion to Strike the entire Venire Panel, you must make the objection twice. Initially when the issue comes up for the first time, and again before the jury is sworn. The failure to do so, waive your right to later complain about the court's denial of your motion. See *Johnson v. State*, 141 So. 3d 698 (1st DCA Fla. 2014).

3. The Florida Supreme Court in *Morris v. State*, 42 FLW S502 (Fla.2017) restated its position on striking the entire panel. "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….Additionally, "a venire member's expression of an opinion before

the entire panel is not normally considered sufficient to taint the remainder of the panel".

X. RESTRICTIONS ON VOIR DIRE

1. Florida Rules of Civil Procedure 1.430(b) provides "The parties have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The court may ask such questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally shall be preserved."

2. The obvious intent of Rule 1.430(b) is to afford the trial court some discretion in asking questions of perspective jury members. The trial court's right to do so, however, is tempered by the right of each party to conduct a complete voir dire examination of each prospective juror and the failure of the trial court to permit such an examination is reversible error.

3. While a trial judge has the right to question prospective jurors, the judge's role in jury selection must not impair a counsel's right and duty to question prospective jurors. *Farrer v. State*, 718 So. 2d 822 (Fla. 4th DCA 1998). Even if the trial court questions prospective jurors on fundamental issues like burden of proof, presumption of interest, etc., it is error to prevent counsel from making similar inquiries on the basis that such an inquiry would be repetitive. *Sanders v. State*, 707 So. 2d 664 (Fla. 1998). The purpose of *voir dire* is to obtain a fair and impartial jury. *Hillsman v. State*, 159 So.3d 415, 420 (Fla. 4th DCA 2015).

   Although a trial court "has considerable discretion in determining the extent of counsel's examination of prospective jurors," it "must allow counsel the opportunity to ascertain latent or concealed prejudgments by prospective jurors." *Id.* at 419 (internal citations omitted). A trial court should also allow "questions on jurors' attitudes about issues where those attitudes are 'essential to a determination of whether challenges for cause or peremptory challenges are to be made...." *Id.* at 420.

4. Some courts have tried to impose arbitrary time limitations on voir dire examination and it has been widely held that such time limitations are inappropriate. *O'Hara v. State*, 642 So. 2d 592 (Fla. 4th DCA 1994); *Zitnick v. State*, 576 So. 2d 1381 (Fla. 3d DCA 1991).In the Second District case *Watson v. State*, 693 So. 2d (Fla. 2d DCA 1997) the trial court announced at the start of jury selection that each side would be limited to thirty minutes for jury selection. Importantly, neither side objected to the time limitation. The court held that there was no abuse of discretion. However the dissent by *Jd*. Schoonover, gives an exhaustive, and excellent review of the law on why the arbitrary time limit was an abuse of discretion. In *Rodriguez v State*, 675 So. 2d 189 (Fla. 3d DCA 1996) determined that the trial court had the discretion to set a time limitation on voir dire but reversed the trial court in this case since the time restriction was not announced before the start of the questioning. In the same vein, in *Roberts v State*, 937 So. 2d 781 (Fla. 2d 2006), the trial judge before trial, set no time limit on voir dire. The State took about an hour for its questioning. After the defendant, who was representing himself took about an hour, the State objected. The court proceeded to allow the defendant an additional ten minutes to complete his questioning. Because there was no announcement by the court of any intention to limit questioning to a certain amount of time, the Second District reversed the conviction.

5. In a civil case, *Carver v. Niedermayer*, 920 So. 2d 123 (4th DCA 2006), at the start of

the trial, the judge announced for the first time that once he completed his preliminary questions of the prospective jurors, that each side would be limited to thirty minutes each for their questions. After objection, the Judge increased the time limit to 45 minutes. There was further objection and counsel pointed out that the court was limiting each party to approximately two to three minutes per juror. The trial judge was reversed for an abuse of discretion in that although a reasonable time limit for questions would be appropriate, such a limitation must be announced in advance of trial so that each party can be adequately prepared.

6. The trial court does have the right of course to prevent inquiry which is repetitive, improper, or argumentative. *Stano v. State*, 473 So. 2d 1282 (Fla. 1985).

7. It is error to force trial counsel to start jury selection for the first time at 7:30 p.m. especially where the attorney represents that he got up early; has been in court all day; and that he is so exhausted, that his client will not be receiving competent representation, because of his fatigue. *Ferrer v. State*, 718 So2d 822 (Fla. 4th DCA 1998).

8. The trial court has the power to prevent the use of hypothetical questions during voir dire that attempt to extract commitments from prospective jurors on conclusions they would reach on certain "facts" in the case. *Jackson v. State,* 881 So. 2d 711 (Fla. 3d DCA 2004). However, it is perfectly appropriate for counsel to question the prospective jurors about their attitudes on particular legal theories which may be presented in the course of the trial. *Morris v State*, 951 So. 2d 1 (Fla. 3d DCA 2006) *Moore v State*, 939 So. 2d 1116 (Fla. 3d DCA 2006); *Williams v. State*, 931 So. 2d 999 (Fla. 3d DCA 2006); *Mosley v. State,* 842 So2d 279 (Fla. 3d DCA 2003).

   In the recent decision of Boyles v. Dillard's, 199 So. 3rd 315 (Fla. 1st. DCA 2016) the court re-emphasized that all parties have the right to explore legal theories and attitudes about them with prospective jurors, stating: "...where a juror's attitude about a particular legal doctrine...is essential to a determination of whether challenges for cause or peremptory challenges are made, it is well settled that the scope of the voir dire properly includes questions about and references to that legal doctrine.

   It is clear that the trial court has the absolute right to restrict questions that seek to get agreement from jurors on issues that will be litigated during the trial. The Florida Supreme Court recently in *Calloway v. State*, 210 So. 3rd 1160 (Fla. 2017) extensively reviewed the law in this area of the law, once again emphasizing that there is no right to try to get jurors to "precommit" to a proposition where facts of the case would need to be discussed. It is simply not appropriate to try the case during jury selection.

9. It is error to deny a party the "right" to question prospective jurors individually, rather than as a group. *Francis v. State*, 579 So. 2d 286 (Fla. 3d DCA 1991).

10. To preserve your objection to a restriction on voir dire you must object to the panel before they are sworn or the objection is waived. See *Blanco v. State*, 89 So. 3rd 933, (3rd DCA 2015), and *Wallace v. Holliday Isle Resort & Marina*, 706 So. 2d 346 (3rd DCA 1998).

XI. <u>YOU CAN AGREE TO A JURY IF YOU WANT TO DO SO!</u>

1. In *Hojan v. State*, 212 So. 3rd (Fla. 2017) the jury selection process was well under way

and both sides had exercised challenges for cause. Trial was recessed before any peremptory challenges were made and the lawyers for both sides simply agreed, out of the presence of the judge and the defendant, to a jury panel. When the trial resumed, the judge permitted ample time for defense counsel so speak with the defendant and then the judge extensively questioned the defendant about the prospective jury. Having been satisfied with the process, the court allowed the trial to continue with the agreed upon jury. After conviction the defendant objected to the process since he was not physically present when the agreement between counsel was reached. The Supreme Court held that the parties can agree to a jury and were satisfied that even though not present for the actual selection process, that the defendants' rights were not violated. Obviously the message here is that if you want to agree, that is fine, but have your clients involved in the process.

I. JUROR'S FAILURE TO DISCLOSE LITIGATION HISTORY

1. On occasion, despite all genuine attempts to have potential juror's honestly answer questions about their background, (especially their litigation background,) honesty sometimes eludes them for some reason. The Florida Supreme Court in ***De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995)***, and again in ***Roberts ex rel. Estate of Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002)***; the Third District Court of Appeal in *Pereda v. Parajon*, 957 So. 2d 1194 (Fla. 3d DCA 2007); the Fourth District Court of Appeal in *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 417 (Fla. 4th DCA 2014) set the following test to set aside a jury verdict based on juror non-disclosure: "Entitlement to a new trial on the basis of a juror's non-disclosure requires the complaining party to demonstrate that: (1) the information is relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information was not attributable to the complaining party's lack of diligence". See also, *R.J. Reynolds Tobacco Company v. Allen* 42 FLW D491 (Fla. 1st DCA 2017).

2. A case from the Third District Court of Appeal demonstrates how the trial lawyer's lack of diligence in asking questions, and doing a public records search on potential juror's, may lead to trial lawyer liability to his client and certainly won't lead to a new trial in the underlying case. In *Tricam Industries, Inc. v. Coba*, 100 So. 3d 105 (Fla. 3d DCA 2012), the trial court conducted part of the voir dire and questioned the venire and generally elicited responses about whether they had been sued. The responses to the questions were all in the personal injury context. There were no real follow-up questions by the plaintiff's attorney about non-personal injury litigation, such as collections, foreclosures, divorces, etc. Additionally, before the jury was sent out to deliberate, the trial judge suggested that the lawyers conduct a public records search on the juror's litigation history while the alternate juror was still available. After an unfavorable verdict, the plaintiff's attorney conducted a search of the juror's litigation history and found that one juror had not disclosed information about his divorce, foreclosure, and collection history. The Third District Court of Appeal held that while, under the *Roberts* decision, trial attorneys are not categorically required to obtain litigation histories on the venire, trial lawyers are "permitted" to do so, and because in this case, the lawyer was given the opportunity to do so by the trial court, but refused, it was determined that the plaintiff's attorney did not meet the "due diligence" component of *Roberts.* The court also found that the plaintiff's attorney did not exercise due diligence in his questioning of the jurors as he made no effort to ask litigation questions relating to matters other than personal injury lawsuits.

3. Other decisions on the same topic are: *Borroto v. Garcia* 103 So. 3d 186 (Fla. 3d DCA 2012), holding that the trial court abused its discretion in not permitting a jury interview when a juror failed to disclose his car accident litigation history when asked a direct question by the judge. Also, *Morgan v. Milton*, 105 So. 3d 545 (Fla. 1st DCA 2012), holding that although there was non-disclosure by a juror in response to a direct question by the judge, a new trial was not appropriate since defense counsel did not strike other jurors who were involved in the same type of litigation.

4. In another juror non-disclosure case, *Villalobos v. State*, 143 So. 3d 1042 (Fla. 3d DCA 2014) the court reviews the law on the subject and finds that the issues that need to be addressed are: is the information that was not disclosed, relevant and material to the jury service; whether the juror concealed the information during questioning; and whether the failure to disclose was the result of the complaining parties lack of due diligence?

5. The court in a recent medical malpractice case, *Weissman vs. Radiology Associates of Ocala, P.A.*, 152 So. 3d 754 (Fla. 5th DCA 2014) went out of its way to preserve a Plaintiff's verdict on the non-disclosure issue. There, the defendant's counsel asks the venire about lawsuits involving "credit issues." The appellate court held this was not precise enough to alert jurors to disclose bankruptcy filings. Clearly, from this opinion, unless precise questions are asked on very precise topics, appellate courts are not going to take away a jury's verdict pointing to the importance of discovering and reporting the data on non-disclosure prior to the completion of the trial.

6. The United States Supreme Court in a decision published in December, 2014 also weighed in on the non-disclosure issue. The Court in *Warger v. Shauers*, 135 S. Ct. 52 (2014) discussed Federal Rule of Evidence, 606 (b). In the *Warger* case, a juror had apparently lied during jury selection and ultimately was elected foreperson for the jury's deliberations. After a verdict in the case, another juror contacted one of the attorneys and provided an affidavit detailing disclosures made by the foreperson during deliberations. The Supreme Court explained that since the disclosure of the foreperson's misconduct occurred (and was therefore discovered) only during jury deliberations, that because this was "intrinsic" to the jury deliberations and not extrinsic to the deliberations, the verdict would not be disturbed.

7. In the recent case of *Westgate v. Parr*, 42 FLW D858 (Fla. 5th DCA 2017) where a juror failed to disclose twenty criminal cases, seven of which resulted in convictions and of which four resulted in the juror being incarcerated, together with the juror's expressed enthusiasm to sit on the jury, the 5th DCA held that the trial court abused its discretion in failing to grant a request to interview the juror.

II. EXTENSIVE PRE-TRIAL PUBLICITY

1. Extensive and prejudicial pre-trial publicity is most commonly a problem in criminal cases, but with some regularity now it seems in vogue to raise the specter of pre-trial publicity in civil cases as well. It is clear that where the venire has been exposed to prejudicial, inadmissible information in the press, that individual voir dire of the venire is the preferred way for the parties to discover if the publicity tainted the panel. The denial of a request for individual voir dire is likely to be reversed on appeal. The most important cases are: *Boggs v. State* 667 So. 2d. 765 (Fla. 2d DCA 1996); *Bolin v. State*, 736 So. 2d 1160 (Fla. 1999); and *Kessler. v. State*, 752 So. 2d 545, (Fla.

1999). For a review of the applicable law, see: *Dippolito v. State*, 143 So. 3d 1080(Fla. 4th DCA 2014). [A form for a motion for limited, individual sequestered voir dire is attached, courtesy of Rodney S. Margol, Esq.]

III. PREMATURE DELIBERATIONS

1. During a criminal trial an alternate juror reportedly spoke with a regular juror and told the juror how she would vote. The trial Judge made inquiry and the regular juror denied the conversation took place. The trial at that point had not been completed. The question for the trial court is whether there has been juror misconduct in the form of premature deliberations?

2. Where premature deliberations are shown, the burden shifts to the non-moving party to show that the moving party was not prejudiced. The first issue for the trial court is whether there has been enough of a showing to allow for an interview of the jury.

3. In *Williams v. State*, 793 So. 2d 1104 (Fla. 1st DCA 2001) and in *Ramirez v. State*, 992 So. 2d 386 (Fla. 1st DCA 2001) the court held that there must be a showing that multiple jurors were not only discussing the case, but discussing what would be a proper verdict, before the court should allow the jury to be interviewed. In *Reaves v. State*, 823 So. 2d 932 (Fla. 2002) and again in *Gray v. State*, 72 So. 3d 336 (Fla. 4th DCA 2011), it is clear that the efforts by one juror to discuss his opinions with other jurors is insufficient to require an interview of the jury.

4. The Florida Supreme Court in *Sheppard v. State*, 151 So. 3d 1154 (Fla. 2014) makes it clear that objections regarding premature deliberations are waived if not specifically raised with the trial court. Not all juror discussions amount to premature deliberations. In Shepard, the Supreme Court held, "Premature deliberations refers to discussions in which jurors have expressed opinions regarding a defendant's guilt before the close of evidence."

5. The 2nd DCA recently weighed in on this topic in *Dowd v. State*, 42 FLW D1192 (Fla. 2nd DCA 2017). In Dowd after an adverse verdict, an alternate juror approached the defense and reported that: before deliberations had begun, some members of the jury discussed the trial; and that the foreman was elected the first day of the trial". The trial Court did not permit a jury interview. The 2nd District, agreed with the trial court since there was no report by the alternate juror that any opinions were discussed.

IN THE CIRCUIT COURT OF THE [_____] JUDICIAL
CIRCUIT IN AND FOR [_____] COUNTY. FLORIDA

Plaintiff,

V.

Defendant.

MEMORANDUM OF LAW REGARDING VOIR DIRE

Plaintiff, _____, by and through his/her undersigned counsel, hereby files this Memorandum of Law regarding Voir Dire, and states as follows:

I. PARTIES ARE ENTITLED BY RIGHT, TO A FAIR AND IMPARTIAL JURY; IF THERE IS ANY REASONABLE DOUBT ABOUT A JUROR'S ABILITY TO BE FAIR. THE JUROR MUST BE STRUCK FOR CAUSE.

The fair and impartial jury, as guaranteed by the Sixth Amendment to the United States Constitution and Section 11 of the Florida Constitution, is crucial to the administration of justice under our legal system. Singer v. State, 109 So.2d 7 (Fla. 1959). Early Florida Supreme Court decisions heralded the necessity of a fair and impartial jury, as judges initiated an effort to safeguard the integrity of the jury trial. See O'Connor v. State, 9 Fla. 215, 222 (Fla. 1860) ("Jurors should, if possible, be not only impartial, but beyond even the suspicion of partiality.").

In Williams v. State, the court stated, "To render the right to an impartial jury meaningful, cause challenges must be granted if there is a basis for **any reasonable doubt** as to the juror's ability to be fair." 638 So.2d 976, 978 (Fla. 4th DCA 1994) (emphasis added) (citing Hill v. State, 477 So.2d 553 (Fla. 1985), cert. denied 485 U.S. 993 (1988); Singer v. State, 109 So.2d at 23). The Williams court went on to state:

> Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor-of excusing the juror rather than leaving doubt as to impartiality.

Williams, 638 So.2d at 978 see also, e.g., Nash v. General Motors Corp., 734 So.2d 437, 439 (Fla. 3rd DCA 1999) (applying reasonable doubt standard in civil case; stating,

"When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial verdict based solely on the evidence submitted and the instructions on the law given to her by the court, she should be excused.").

To ensure the impartiality of each juror, Rule 1.431(c) of the Florida Rules of Civil Procedure[1] provides that an individual juror may be challenged for cause for bias or prejudice. The juror's voir dire responses are the fundamental source for grounds of impartiality. The testimony or opinion derived from the potential juror is relevant, competent, and primary evidence on the issue of impartiality. 33 Fla. Jur.2d Juries § 68.

A. A juror's assurance that he or she "could be fair" or would "try to be fair" does not control.

A juror's sincere belief that he is "a fair person" or the juror's assurance that he or she is able to be impartial does not control. The Court, not the individual juror, is the judge of the juror's freedom from bias. See Gibbs v. State, 193 So.2d 460, 462 (Fla. 2d DCA 1967). In reversing a trial court's denial of a cause strike, the court in Williams v. State, 638 So.2d 976 (Fla. 4th DCA 43), acknowledged that, "Indeed, the juror in his own mind might even believe he could be 'fair and impartial'." Id. at 979. Likewise and because "most everyone considers themselves to be a 'fair person", such statements, even if sincere, do not control the analysis of a reasonable doubt as to such. Nash v. General Motors Corp., 734 So.2d 437, 440 (Fla. 3rd DCA 1999) (reversing refusal to grant cause strike). See also Sikes v. Seaboard Coast Line R.R., 487 So.2d 1118 (Fla.[1]Fla. Stat. § 913.03 governs cause challenges in criminal actions.1st DCA 1986) (prospective juror who admitted that she didn't think she would be fair but who promised the trial judge that she would "try to be fair" should be dismissed for cause); Leon v. State, 396 So.2d 203, 205 (Fla. 3rd DCA 1981) (juror who did not know if she could be fair should have been excused for cause).

If there is a chance that, because of feelings or opinions that a juror carries, he or she may not be totally fair and impartial, that juror should be excused for cause. Club West v. Tropigas of Fla., Inc., 514 So.2d 426 (Fla. 3rd DCA 1987) (juror who had preconceived opinion about a defendant in a civil case should have been excused for cause), cert. denied, 523 So.2d 579 (Fla. 1988). Moreover, "[A] close case should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality." Sydleman v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985).

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[1]Fla. Stat. §913.03 governs cause challenges in criminal actions.

B. Rehabilitation is often insufficient once a juror has expressed partiality.

Florida appellate courts have repeatedly held that "a juror is not impartial when one side must overcome preconceived opinions in order to prevail." Price v State, 538 So.2d 486, 489 (Fla. 3rd DCA 1989). A juror's statement that he can set aside his feelings or opinions and render a verdict based on the law and the evidence is not conclusive if it appears from other statements made by him that he is not possessed of a state of mind that will enable him to do so. Somerville v. Ahuia, 902 So. 2d 930 (Fla. 5th DCA 2005) "Potential jurors' responses to questions by the court or counsel in an effort to rehabilitate him or her, after having admitted to harboring some bias or prejudice, that they can set aside those prior admitted feelings is not determinative."); Singer v. State, 109 So.2d 7 (Fla. 1959); Longshore v. Fronrath Chevrolet, Inc., 527 So.2d 922, 924 (Fla. 4th DCA 1988) ("[Juror's] connections with the appellee, coupled with her initial statement that she would `try' to be impartial, were not overcome by her subsequent statements that she could be fair."); Ortiz v. State, 543 So.2d 377 (Fla. 3rd DCA 1989) Club West, Inc. v. Tropigas of Fla., Inc., 514 So.2d 426 (Fla. 3rd DCA 1987), cert. denied, 523 So.2d 579 (Fla. 1988) In Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, (Fla. 1929) the Florida Supreme Court stated:

> It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Id. at 796.

Thus, if a juror makes a statement sufficient to cause doubt as to his/her ability to render an impartial verdict, the fact that the trial judge or opposing counsel extracts a commitment that the juror will be fair or will try to be fair is insufficient. See Price v. State, 538 So.2d 486, 488-89 (Fla. 3rd DCA 1989) (it was error for trial court not to excuse a juror for cause because of uncertainty surrounding her impartiality). "A juror's later statement that she can be fair does not erase a doubt as to impartiality[.]" Peters v. State, 874 So.2d 677, 679 (Fla. 4th DCA 2004) (juror's rehabilitation was insufficient when, in response to court's leading question about whether she could set aside her prior experiences and be fair, juror said "I think I could"). See also Goldenberg v. Regional Import & Export Trucking Co., Inc., 674 So.2d 761, 764 (Fla. 4th DCA 1996) (juror's statement that she was a "fair person" was not an unequivocal statement that she could be fair and impartial; "[E]fforts at rehabilitating a prospective juror should always be considered in light of what the juror has freely said before the salvage efforts began."); Leon v. State, 396 So.2d 203, 205 (Fla. 3 DCA 1981) (statement that juror will return a verdict according to the evidence is not determinative); Plair v. State, 453 So.2d 917, 918 (Fla. 1st DCA 1985) (where the prospective juror vacillates between assertions of partiality and impartiality, a reasonable doubt has been created which would require that the juror be excused); Jaffe v.

Applebaum

, 830 So.2d 136 (Fla. 4th DCA 2002) (holding that, although no rehabilitation was actually done, any attempt to rehabilitate juror would have been futile in light of juror's responses to. prior questions that demonstrated his bias). In Fazzalan v City of West Palm Beach, the court held:

> The jurors' subsequent change in their answers, arrived at after further questioning by appellee's counsel, must be reviewed with some skepticism. The assurance of a prospective juror that the juror can decide the case on the facts and the law is not determinative of the issue of a challenge for cause[.]

608 So.2d 927, 929 (Fla. 4th DCA 1992) rev. denied, 620 So.2d 760 (Fla. 1993),disapproved on other grounds, Auto-Owners Ins. Co. v. Tompkins, 651 So.2d 89 (Fla.1995).

Appellate courts have repeatedly reversed trial courts' attempts to rehabilitate prospective jurors who initially expressed partiality, holding that such efforts were insufficient to remove reasonable doubt as to that prospective juror's impartiality. See Sikes v. Seaboard Coast Line R.R., 487 So.2d 1118 (Fla. 1st DCA 1986) (juror who said she would "try to be fair" was not sufficiently rehabilitated). There are no known cases reversing a trial judge's striking a venire person for cause, while there is abundant case law reversing a trial judge's refusal to strike.

Appellate courts are particularly concerned when the trial court attempts to rehabilitate the prospective juror, especially through the use of leading questions. A "juror who is being asked leading questions (by the court) is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions[.]" Price v. State, 538So.2d 486, 489 (Fla. 3rd DCA 1989) Thus, "It becomes even more difficult for a juror to admit partiality when the court conducts the questioning." Williams v. State, 638So.2d at 978. In Hagerman v. State, 613 So.2d 552, 553 (Fla. 4th DCA 1993) the court held that the trial judge erred in not excusing a potential juror for cause when the sole rehabilitation was from leading questions by the trial judge.

Although the process of rehabilitation is fraught with uncertainty, successful rehabilitation requires that—in response to questioning from counsel or to non-leading questions from the court—the juror make an unequivocal statement that he or she will set aside any bias or prejudice, start from a clean slate, and render an impartial verdict based on the evidence and the law in the case. Compare Overton v. State, 801 So. 2d 877, 894 (Fla. 2001) (upholding trial court's denial of a cause challenge to a juror who said he would "start from a clean slate" and follow the law) with Williams v. State, 638 So.2d 976 (Fla. 4th DCA 1994) (holding that juror should have been dismissed for cause; stating, "Despite the juror's subsequent statement that 'I'll be impartial because that's my character,' he never expressed unequivocally that he could be fair and impartial in this case. He stated only that he hoped he could." (emphasis added)). The court in Somerville v. Ahuja elaborated:

> The ultimate test is whether a juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions

> on the law given by the court. A juror should be able to set aside any bias or prejudice and assure the court and the parties that they can render an impartial verdict based on the evidence submitted and the law announced by the court.

902 So.2d 930, 935 (Fla. 5th DCA 2005). As discussed above, a simple statement that the juror will be fair or try to be fair is not enough. Additionally, a juror's silence to a question asked of the entire panel is insufficient rehabilitation. See Bell v. State, 870 So.2d 893, 895 (Fla. 4th DCA 2004).

Thus, in summary, any appearance of partiality is usually sufficient to strike a prospective juror for cause. Rehabilitation efforts are fraught with difficulty. Carratelli v State, 832 So.2d 850 (Fla. 4th DCA 2002) ("The rehabilitation of prospective juror is a tricky business that often leads to reversal.").

II. PARTIES HAVE WIDE LATITUDE TO EXAMINE JURORS, INCLUDING ASKING HYPOTHETICAL QUESTIONS ABOUT LEGAL DOCTRINE AND QUESTIONS RELATING TO PRECONCEIVED OPINIONS.

It has long been held in this state that parties have wide latitude to examine jurors for the purpose of ascertaining the qualifications of persons drawn as jurors and whether they would be absolutely impartial in their judgment. See Fla. R. Civ. P. 1.431(b) (1999); Cross v. State, 89 Fla. 212, 216 (Fla. 1925) ("a very wide latitude of examination ... is allowable and indeed often necessary to bring to light the mental attitude of the proposed juror[.]"). Therefore, the "length and extensiveness" of jury selection "should be controlled by the circumstances surrounding the jurors' attitudes in order to assure a fair and impartial trial by persons whose minds are free from all interest, bias or prejudice." Barker v. Randolph, 239 So.2d 110, 112 (Fla. 1st DCA 1970) see also Gibbs v. State, 193 So.2d 460, 462 (Fla. 2d DCA 1967) (stating that voir dire should be "so varied and elaborated as the circumstances surrounding" the potential jurors); Cross, 89 Fla. at 216 (stating that jurors should be "absolutely impartial in their judgment.").

In Lavado v. State, 492 So.2d 1322 (Fla. 1986), the Florida Supreme Court held that it was improper for the trial court to refuse the defendant's request to ask prospective jurors about their willingness to accept one of the defenses. The Court adopted the dissenting opinion of Judge Pearson of the Third District Court of Appeal in its entirety as its majority opinion. Judge Pearson had stated:

> The scope of voir dire, therefore, "should be so varied and elaborated as the circumstances surrounding the juror..." Thus, where a juror's attitude about a particular legal doctrine (in the words of the trial court, "the law") 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 that legal doctrine even if stated in the form of hypothetical questions.

Lavado v. State, 469 So.2d 917, (Fla. 3rd DCA 1985) (Pearson, J., dissenting) (internal citations omitted) (emphasis added). See also Moses v. State. 535 So.2d 350 (Fla. 4th DCA 1988) (recognizing that the rationale of Lavado is not limited to legal defenses but encompasses inquiry into bias that goes to the heart of defendant's case). Compare Williams v. State, 744 So.2d 1103 (Fla. 3d DCA 1999) (in a case in which eyewitness misidentification was the sole defense, the trial court's restriction of counsel's questioning jurors about their prior experiences in misidentifying people was upheld; the appeals court distinguished Lavado, because the Williams trial judge asked the panel about misidentification and because a juror's experience with misidentification was distinct from whether a juror could accept the defense).

Accordingly, hypothetical questions that correctly state the applicable law are proper. See. e.g.,Pait v. State, 112 So.2d 380, 383 (Fla. 1959) ("A hypothetical question making a correct reference to the law of the case to aid in determining the qualifications or acceptability of a prospective juror may be permitted[.]"). Hypothetical questions incorporating evidence at trial and asking how jurors would rule and questions regarding the types of verdicts under a given set of circumstances are not proper. Tampa Elec. Co. v. Bazemore, 85 Fla. 164, 96 So. 297 (Fla 1932), Smith v. State, 253 So.2d 465, 470-71 (Fla. 1st DCA 1971) (juror may not be asked about his attitude toward a witness, especially when it is the primary witness; however, it's proper to ask whether a juror can follow the court's instructions as to the credibility of witnesses); Hendrick v. State, 237 So.2d 555, 556 (Fla. 2 DCA 1971 (voir dire questions asking what a verdict would be based on a hypothetical set of facts are improper).

A. Areas of Inquiry on Voir Dire

Rule 1.431(c) of the Florida Rules of Civil Procedure governs cause challenges. The rule states, in pertinent part:

> On motion of any party the court shall examine any prospective juror on oath to determine whether that person is related to any party or to the attorney of any party within the third degree or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called or has any interest in the action or has formed or expressed any opinion or is sensible of any bias or prejudice concerning it or is an employee or has been an employee of any party within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action or any

of the foregoing grounds of objection exists or that the juror is otherwise incompetent, another shall be called in that juror's place.

Fla. R Civ. P. 1.431(c)(1).

In addition to the areas of questioning specifically enumerated in Rule 1.431, jurors can be questioned about the following areas and challenged for cause when appropriate:

1. Whether a juror has **reservations about awarding money damages** for the death of a loved one and **disapproves of personal injury or malpractice lawsuits**. Nash v. General Motors Corp., 34 So.2d 437 (Fla. 3rd DCA 1999) (reversing denial of cause strike for juror who had prejudices about personal injury lawsuits); Somerville v. Ahuja; 902 So.2d 930, 933 (Fla. 5th DCA 2005) (juror who had bad feelings about malpractice suits based on conversations with physician uncle and friend in medical school should have been excused for cause); Sisto v. Aetna Casualty & Surety Co., 689 So.2d 438 (Fla. 4th DCA 1997) (trial court abused its discretion by prohibiting counsel from asking questions about **jurors' views on damages**, including non-economic damages; court's generalquestions about whether jurors would follow the law did not cure prejudice).

2. Whether a juror can **follow the law** on pain and suffering. Pacot v. Wheeler; 458 So.2d 1141 (Fla. 4th DCA 2000) (reversing denial of cause strike for juror who said she would have "difficulty" following the law).

3. Whether a juror has **negative attitudes toward lawyers or the legal system.** Levy v. Hawk's Cay, Inc., 543 So.2d 1299 (Fla. 3rd DCA 1989) (jurors with negative attitudes toward the legal system resulting from unfavorable experiences due to lawsuits being filed against them or members of their family and that those predispositions would result in bias should have been excused for cause), rev. denied, 553 So.2d 1165 (Fla. 1989); Frazier v. Wesch, 913 So. 2d 1216 (Fla. 4th DCA 2005) (juror who stated, I don't care for lawyers much at all, who suggested that he would hold the plaintiff to a "clear and obvious" standard of proof, and who indicated that plaintiffs in general were "looking for easy money" and "trying to cheat the system" to "make an easy buck" should have been excused for cause).
4. Whether a juror has a **friendship or economic relationship with a party or its counsel.** Johnson v. Reynolds 97 Fla. 591, 121 So. 793, (Fla. 1929) holding that a friendly relationship with a party is grounds for a cause challenge); Canty v. State, 597 So.2d 927, 928 (Fla. 3 DCA 1992) ("Nothing can raise more doubts about a juror's impartiality than a previous contact with a party, or their attorney."); Sikes v. Seaboard Coast Line R.R., 487 So.2d 1118, 1119 (Fla. 1st DCA 1986) (refusal to excuse juror whose son was best friend of counsel for defendant and who said this might lead her to give more weight to the defense was reversible error); Longshore v. Fronrath Chevrolet, 527 So.2d 922 (Fla. 4th DCA 1988) (juror whose daughter worked for defendant and who thought defendant's owner was a "good guy" should be excused for cause despite fact that she said he would "try" to be impartial); Mitchell v. CAC-Ramsey Health Plans, Inc, 719 So.2d 930 (Fla. 3' DCA 1998) (juror who was member of defendant health care plan and who had been treated at two of its clinics could have been struck for cause).

5. Whether a juror is or was an **employee of one of the parties or works for the same employer** as one of the parties. Boca Teeca Corp, v.1 Palm Beach County, 291 So.2d 110

(Fla. 4th DCA 1974) (employee juror is subject to challenge for cause); Martin v. State Farm, 892 So.2d 11 (Fla. 5th DCA 1980) (juror employed by hospital where defendant doctor was president, and chief of staff should be dismissed for cause); Hagerman v. State, 613 So.2d 552 (Fla. 4th DCA 1993) (failure to exclude juror who worked in the state attorney's office and knew the assistant state attorney constituted an abuse of discretion).

6. Whether a juror believes that a rendition of a **verdict for one of the parties would have any influence on his/her personal life**, especially with regard to insurance and the premiums he/she has to pay. Purdy v. Gulf Breeze Enter., Inc. 403 So.2d 1325, 1330 (Fla. 1981) ("[T]he impact of monetary awards. in negligence cases upon automobile liability insurance rates may be proper subject for exploration upon voir dire examination of a jury panel." (internal citations omitted)).

7. Whether a juror **owned stock** in a defendant corporation. Club West, Inc. v. Tropigas 514 So.2d 426 (Fla, 3rd DCA 1987) (said juror is subject to a cause challenge), cert. denied, 523 So.2d 579 (Fla. 1988).

8. Whether something about the juror's **employment "may" affect her decision** in the case. Ortiz v. State 543 So.2d 377 (Fla. 3rd DCA 1989) (this is sufficient to disqualify a juror for cause).

9. Whether a juror has **life experiences that would influence her decision**. See Tizon v. Royal Caribbean Cruise Line, 645 So. 2d 504 (Fla. 3rd DCA 1994) (juror who stated she would be influenced by the fact hat her husband and others she knew had successfully recovered from the same surgery the plaintiff had undergone and she would be influenced by the fact that her husband was a physician who had been sued should have been excused for cause, despite fact that she later said she would try to be fair).

10. Whether a juror could put a **dollar value on loss of companionship**. Gootee v. Clevinger, 778 So.2d 1005, 1008-09 (Fla. 5th DCA 2000) (holding that juror who could not put dollar value on loss of companionship without "a lot more education and many more convictions about the worth of a human life" should have been removed for cause because she could not perform her juror's responsibility).

11. Whether a juror has **already formed or expressed an opinion on issues** involved in a case based on newspaper articles, hearsay, or other previous experience or information. See Singer v. State109 So.2d 7, 19 (Fla. 1959) (juror who had **preconceived opinion**, and prejudice should have been excused for cause); **see also Ortiz v. State** 543 So.2d 377,378 (Fla. 3rd DCA 1989) (holding that trial court abused its discretion in denying cause challenge to venireperson who had **read newspaper accounts and made conclusions**) Club West, Inc. v. Tropigas of Fla., Inc., 514 So.2d 426 (Fla. 3rd DCA 1987) (juror who had preconceived opinion about a defendant in a civil case should have been, excused for cause), cert. denied, 523 So.2d 579 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985) ("A juror is not impartial when one side must overcome a preconceived opinion in order to prevail"); Smith v. State 463 So.2d 542, 543 (Fla. 5th DCA 1985) (juror who was "not sure" she could listen to the evidence and court instructions free from the influence of what she had previously seen or heard should have been excused); Somerville v. Ahuja, 902 So.2d 930, 933 (Fla. 5th DCA 2005) (juror who had bad feelings about malpractice suits based on conversations with physician uncle and friend in medical school should have been excused for cause; juror could not unequivocally state she would set those feelings aside)

12. Whether a juror knows about claims concerning the **"insurance crisis" or "lawsuit crisis**". Bell v. Greissman, 902 So.2d 846 (Fla. 4th DCA 2005) (it was error to deny challenge for cause to juror who was skeptical about tort claims in general and who made comments reflecting strong bias arising out of previous personal experience); Sutherlin v. Fenenga, 810 P.2d 353, 361-62 (N.M. Ct. App. 1991) (party may inquire about juror's knowledge about the "insurance crisis" upon showing that members of jury may have been exposed to media

accounts about effect of jury awards on insurance costs); Babcock v. Northwest Memorial Hosp 767 S.W.2d 705 (Tex. 1989) (party should have been allowed to question jurors about a "lawsuit crisis").

Ill. IT IS REVERSIBLE ERROR TO FORCE A PARTY TO USE A PEREMPTORY CHALLENGE ON A PERSON WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE.

Florida and most other jurisdictions adhere to the general rule that "It is reversible error to force a party to use a peremptory challenge 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." Gootee v. Clevinge 778 So.2d 1005, 1009 (Fla. 5th DCA 2000). In Hill v. State, 477 So.2d 553 (Fla. 1985). The Florida Supreme Court noted that failure to dismiss a juror for cause when appropriate abridges a party's right to peremptory challenges by reducing the number of those challenges available to him or her. See id. at 556. Thus, it is "exceedingly important" that trial courts ensure that jurors are unbiased. Id. In order to preserve for appellate review the refusal to grant a challenge for cause, a party must do all of the following: (a) exhaust all remaining peremptory challenges; (b) make a request for additional peremptory challenges that is denied; and (c) identify to the trial court a particular juror who is ultimately empanelled whom the party would have also struck had peremptory challenges not been exhausted.[2]

IV. LANGUAGE SUGGESTING THE NEED FOR A CAUSE STRIKE.

The following cases illustrate statements by members of the venire which courts have held require they be excused for cause:

1. A venire person who **admits a party would start out with a strike or half strike against him** should be excused for cause. Club West, Inc. v

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[2] See, e.g., Grieferv. DePietro 625 So.2d 1226, 1228 (Fla. 4th DCA 1993) is necessary not only to exhaust all the remaining challenges and for request additional peremptory challenges, but to identify to the trial court a particular objectionable juror whom the party would have' also struck had peremptory challenges not been exhausted."); Hill v. State 477 So.2d 553 (Fla.1985) (stating that it is error to force a party to use peremptory challenges on a juror who should have been excused for cause where party exhausted all peremptory challenges and addition l challenges were sought and denied); Dardar v. Southard Distrib. of Tampa; 563 So.2d 1112 (Fla. 2d DCA1990) (stating that, if a party exhausts his peremptory challenges but does not request additional challenges, any error in the court's denial of that party's challenges for cause is not preserved); Metro, Dade County v. Sims Paving Corp., 576 So.2d 766, 767 (Fla. 3d DCA 1991) (holding that the trial court must empanel an objectionable juror in order to demonstrate. prejudice); Taylor v. Pub. Health Trust, '546 So.2d 733, 733 (Fla. 3rd DCA 1989) (holding there was no reversible error, because "counsel did not request an additional challenge nor indicate in any way that she was dissatisfied with any member of the jury which tried the case"). Compare Frazier v. Wesch, 913 So.2d 1216 (Fla. 4th DCA 2005) (no error where plaintiff requested peremptory strike to excuse juror who sat as alternate but who was excused before the jury retired to deliberate).

Tropigas of Fla., Inc.; 514 So.2d 426, 428 (Fla. 3d DCA 1987), cert. denied, 523 So.2d 579 (Fla. 1988) (holding that trial court abused its discretion in refusing to excuse for cause a juror who admitted that, because of her prior favorable and profitable experiences with a defendant, the plaintiff "may" be starting out with "one strike against him", despite her later statement she could be impartial); Jaffe v. Applebaum 830 So.2d 136 (Fla. 4th DCA 2002) (in medical malpractice action involving allegedly negligent cosmetic procedure, juror who admitted he owed his life to his surgeon and plastic surgeon, and because of such experience, plaintiff/patient would have started out with a half strike against her should have been struck for cause).

2. A venireman who **admits a potential bias**, or who admits he **probably would be prejudiced** or would probably **give a bit more weight to what opposing counsel or certain witnesses say** should be excused for cause. Bell v State; 870 So.2d 893 (Fla. 4th DCA 2004) (reversing trial court's refusal to grant defendant's cause challenge to venireman who admitted a potential bias by stating "If I had a bias it would be against the defendant," and later responded by saying "I'd try not to" and "I would give it my best shot" when the judge attempted to rehabilitate him); Sikes v. Seaboard Coast Line R.R. 487 So.2d 1118 (Fla. 1st DCA 1986) (reversing trial court's failure to strike for cause a venire person who admitted that he would "probably" "give a little bit more weight to what t y [opposing counsel] say as opposed to what I say"); Imbimbo v. State 555 So.2d 954 (Fla. 4th DCA 1990) (juror who admitted she "probably" would be prejudiced, even though she then asserted she "probably" could follow the judge's instructions should be struck for cause); Somerville v. Ahuja 902 So.2d 930, 933-34 (Fla. 5th DCA 2005) (juror who admitted that he "probably" would bring back a verdict for the defense should have been excused for cause, despite the fact that the court stated that counsel could "probably get anybody on that jury to say that"); Slater v. State 910 So.2d 347 (Fla. 4th DCA Sept. 14, 2005) (juror who stated during voir dire that he believed the testimony of a police officer carried a little more weight than that of a lay person should have been stricken for cause).

3. A venire person who states she could not say she would be strictly impartial, is not a hundred percent sure she could be fair, or cannot affirmatively say she would follow the court's instructions should be excused for cause. Gootee v. Clevinge, 778 So.2d 1005 (Fla. 5th DCA 2000) (reversing a trial court's failure to strike for cause a venire person who really could not say she would be strictly impartial despite her later statement that she "can be fair whether she likes it or not"); Williams v. State, 638 So.2d 976 (Fla. 4th DCA 1994) (reversing a trial court's refusal to excuse for cause a venire person who conceded by nodded head to counsel's question, "You're not a hundred percent sure that you could be fair and impartial, is that correct?" and who stated I hope that I can" in response to a question about whether could be fair, despite court's efforts at rehabilitation); Brown v. State 028 So.2d 758, 759 (Fla. 3d DCA 1999) ('Prospective juror Mercado's responses, including "**Yeah, I think so**, when asked whether he would be able to follow the trial court's instructions, are equivocations, and thus raise a reasonable doubt as to whether he could serve as a fair and impartial juror."); Marquez v. State, 721 So.2d 1206, 1207 (Fla. 3d DCA 1998) (juror who said, "I don't know," when asked whether she could presume the defendant to be innocent and who was not directly rehabilitated should have been struck for cause); Blye v. State 566 So.2d 877, 878 (Fla. 3d DCA 1990) (juror who acknowledged in objectivity because of crimes against her friends should have been excused for cause; juror stated "**I would have difficulty in being objective**," "**I cannot stay very objective**," and **"I think I would try to be objective.").**

4. A venire person who states he/she would have **"difficulty" or a problem," or "trouble" in following the law** regarding compensation for pain and suffering should be dismissed for cause. Pacot v. Wheeler 758 So.2d 1141, 1142 (Fla. 4th DCA 2000) See also Howard v. State, 698 So.2d 923 (Fla. 4th DCA 1997) (juror from Finland who expressed difficulty with the concept that accused defendants were presumed innocent and who stated, "Well if they can prove they're innocent, its okay," should have been excused for cause).

5. A venire person who admitted a bias against some personal injury claimants by admitting that the **Plaintiff would "have to overcome a burden and not be starting off even with the defense**", that she would "**have a little difficulty in being impartial** in this case," and that she felt that personal injury plaintiffs are "dishonest" should be excused for cause. Goldenburg v. Regional Import and Export Trucking Co., Inc. 674 So.2d 761 (Fla. 4th DCA 1996) (reversing trial court's failure to excuse said venire person for cause).

6. A venire person who has prior experiences that could **cloud his judgment or influence his verdict** should be excused for cause. Hall V. State, 682 So.2d 208, 209 (Fla. 3d DCA 1996) (juror's voir dire statement that his wife's victimization in armed home invasion "could cloud my judgment" raised reasonable doubt about his ability to render impartial verdict); Wilkins v. State 607 So.2d 500 (Fla. 3d DCA 1992) (juror who "couldn't definitely say" whether the fact that his five-year-old, niece was sexually attacked a year prior and the perpetrator was never prosecuted would influence his verdict should have been excused for cause); Gill v. State,

683 So.2d. 158 (Fla. 3d DCA 1996) (jurors who had been victims of burglaries could not unequivocally state they would be fair and should have been excused for cause; one juror could only state she would "try" to be fair and another stated he felt "very negative about people who do what this man is accused of doing."); Ferguson v. State, 693 So.2d 596 (Fla. 2d DCA 1997) (juror who had lost two friends because of alcohol and driving and whose **beliefs** about driving with alcohol in your system **might "possibly" prejudice him** should have been excused for cause).

Moreover, while a juror's individual comments may not give individual bases for a case challenge, the cumulative effect of the juror's comments may raise reasonable doubt sufficient to justify a cause challenge. See James v. State 731 So.2d 781 (Fla. 3d DCA 1999) (reversing denial of cause challenge); Jaffe v. Applebaum, 830 So.2d 136 (Fla. 4th DCA 2002) (reversing a trial court's denial of a cause strike).

A. Counsel should directly question jurors suspected of prejudice.

Counsel need to directly and thoroughly question jurors who may be suspected of prejudice; a recent case held that basing a cause challenge solely on a juror raising his hand in response to questions or on a series of "do you agree with what another juror said" questions is not enough. In Somerville v. Ahuja, 902 So.2d 930 (Fla. 5th DCA 2005) a prospective juror raised his hand in response to general questions concerning prejudice; this juror was not questioned beyond eliciting the fact that he shared a co-juror's feelings about bias against smokers and that he understood the questions posed to her. See id. at 934. The court held that the questioning of this juror was "so limited" that the plaintiff "failed to demonstrate that any bias or prejudice against smokers he admitted to, could not be set aside, and that he could not render an impartial verdict." Id. at 937. Accordingly, the court refused to reverse the case based on the trial court's failure to excuse this juror for cause.

V. PROCEDURAL MATTERS

A. Counsel must be given adequate time to conduct voir dire.

To be afforded the right "to conduct a reasonable examination of each juror," as prescribed by Florida Rule of Civil Procedure 1.431(b), counsel must be given adequate time to conduct voir dire. The general rule as to length of questioning was succinctly stated in Williams v. State 424 So.2d 148 (Fla. 5th DCA 1982) as follows:

> The purpose of voir dire is to obtain a "fair and impartial jury to try the issues in the cause." Time restriction or limits on number of questions can result in the loss of this fundamental right. They do not flex with the circumstances, such as when a response to one question evokes follow-up questions.

Id. at 149 (internal citations omitted). See also Barker v. Randolph, 239 So.2d 110, 112 (Fla. 1st DCA 1970) (the "length and extensiveness [of voir dire] should be controlled by the circumstances surrounding the juror's attitude in order to assure a fair and impartial trial by persons whose minds are free from all interest, bias or prejudice."); Cohn v. Julien 574 So.2d 1202 (Fla. 3d DCA 1991) (reversing verdict in medical malpractice wrongful death case, because the trial judge unreasonably restricted plaintiffs counsel to fifteen minutes for voir dire examination; citing Williams)[3]

Recently, in Somerville v. Ahuja, 902 So.2d 930 (Fla. 5th DCA 2005) the court chastised the trial judge for rushing to pick a jury. The court noted that, because the trial judge was frustrated with having to bring in a second panel of jurors and insisted on completing voir dire that day, the trial judge "did not accurately recall what [two jurors who should have been dismissed for cause] said on *voir dire*, nor did the court allow the court reporter to read back their testimony." Id. at 936. The court stated that, because the trial court improperly refused to grant the cause challenges, plaintiff was improperly deprived of a "needed peremptory challenge[.]" Id. at 937. Accordingly, the court reversed the verdict and remanded the case for a new trial.

B. Courts cannot limit or prohibit backstriking.

The trial court cannot limit or prohibit the use of backstriking and a party can use its peremptory challenges until the jury has been sworn. This process cannot be circumvented by the trial court's swearing of individual jurors. Tedder v. Video Elec. Inc 491 So.2d 533 (Fla. 1986) Van Sickle v. Zimmer 807 So.2d 182 (Fla. 2nd DCA 2002) ("the trial court's failure to allow a party to exercise a remaining peremptory challenge before the jury is sworn constitutes reversible error").

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[3] *But see Anderson v. State, 739 So.2d 642 (Fla. 4th DCA 1999) (holding that the trial judge did not abuse his discretion in trial for grand theft by limiting voir dire to 30 minutes for each party, where counsel were informed of limitation before commencement of voir dire, no objections were made at the time, trial judge asked background questions of each prospective juror and posed general questions to panel, defense counsel's line of questioning during allotted time was somewhat repetitious, and the charged offenses were not severe).*

C. Errors in allotting the number of peremptory challenges is grounds for reversal.

Rule 1.431(d) of the Florida Rules of Civil Procedure allocates three peremptory challenges to each party. The rule states, in pertinent part:

> Peremptory Challenges. Each party is entitled to three peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of three peremptory challenges to each party on the side with the greater number of parties[.]

Id. In St. Paul Fire and Marine Ins. Co. v. Welsh 501 So.2d 54 (Fla. 4th DCA 1987) the Court of Appeals held that the trial court committed reversible error when it allotted six peremptory challenges to the plaintiffs and three peremptory challenges to the intervenors, while only allowing three peremptory challenges to the defendant. See id. at 55-56. The Court of Appeals noted that the plaintiffs and defendant "should have had at least an equal number of challenges." Id. at 56.

D. Peremptory challenges based on race, ethnicity, or gender are prohibited.

In civil and criminal cases, the use of peremptory challenges based on the juror's race, ethnicity, or gender is prohibited. Dorsey v. State 868 So.2d 1192, 1202 n.8 (Fla. 2003) J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994) (holding that the Equal Protection Clause prohibits gender-based peremptory challenges); Abshire v. State 642 So.2d 542, 544 (Fla. 1994) (following J.E.B.; holding that attorney's comment that women were more emotional was not a gender-neutral reason for striking women); Joseph v. State 636 So.2d 777 (Fla. 3rd DCA 1994) (striking Jewish person in community where Jews made up ten percent of the population was impermissible discrimination based on ethnicity in violation of Florida constitution). However, it is presumed that peremptory challenges will be exercised in a nondiscriminatory manner. Melbourne v. State 679 So.2d 759, 764 (Fla. 1996) Melbourne, the Florida Supreme Court set forth the procedure for objecting to a peremptory strike based on race as follows:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but

> rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

Id. At 764 (internal citations omitted) (following Batson v. Kentucky 476 U.S. 79 (1986) , and its progeny); Johnson v. California, 125 S.Ct. 2410, 2417 (2005) (Ex. 82) (a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred); Portu v. State, 651 So.2d 791 (Fla. 3d DCA 1995) (merely "noting" that a juror being challenged is from a particular cognizable group does not suffice to trigger and inquiry). The Melbourne court emphasized that the trial court must evaluated the "genuineness" of an explanation for striking a juror" and determine whether the proffered explanation for a challenge is a

pretext *(i.e.*, whether it conceals an intent to discriminate based on race"). Young v. State, 744 So.2d 1077, 1082 (Fla. 4th DCA 1999) see also Henry v. State, 724 So.2d 657, 658 (Fla 3rd DCA 1991) ("A pretextual reason for a strike may exist when a juror is struck from the jury panel based on a reason equally applicable to an unchallenged juror."). The Melbourne analysis also applies in gender-based challenges.

"Florida law does not require the explanation for a strike to be objectively reasonable, only that it be truly nonracial." Young, 744 So.2d at 1084 (holding that the following were facially race-neutral reasons for striking three jurors: a heavy accent, being quiet, and having a sister-in-law whom the juror felt was treated unfairly when arrested for robbery). See also American Security v. Hettel 572 So.2d 1020 (Fla. 2d DCA 1991) that the following reasoning was not a racially neutral explanation: "I don't like the way that he responded to my questions, Your Honor ... And he doesn't appear to be interested in this case

or sitting on this jury."); Mitchell v. CAC-Ramsey Health Plans, Inc., 719 So.2d 930 (Fla. 3rd DCA 1998)

(in medical malpractice action against physician and health plan, the trial court erred in denying the plaintiffs' peremptory challenges of three jurors, because the reasons given for the challenges—that one juror was a hospital employee and her relative was a physician and another juror had been married to a neurologist—were race neutral); Baber v. State 776 So.2d 309 (Fla. 4th DCA 2000) (allowing the prosecutor's strike of a black juror because the prosecutor did not want an African American to evaluate a black-on-black crime was ineffective assistance of counsel);Haile v. State, 672 So.2d 555 (Fla. 2nd DCA 1996) (trial court erred when it accepted state's explanation that it was peremptorily striking the sole remaining African-American member of venire because she read the Bible; this juror was never questioned about her religious beliefs and their effect on her ability to serve as a juror)

The trial court's ruling "turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." King v. Byrd 716 So.2d 831 (Fla. 4th DC 1999) review denied, 779 So.2d 271 (Fla. 2000). See also Dorsey v. State, 868 So.2d 1192 (Fla.

2003) (holding that peremptory strike of African-American prospective juror because she appeared "disinterested" was not supported by the record; the proponent of a peremptory strike based on nonverbal behavior may satisfy its burden of production of a race-neutral reason for the strike only if the behavior is observed by the trial court or otherwise has record support).

To preserve the issue for appeal, counsel should renew her objection to a race or gender-based challenge before the jury is sworn. See Melbourne, 679 So.2d at 765 (holding that counsel did not preserve the race-based use of a peremptory challenge for review, because counsel did not renew her objection before the jury was sworn; noting that counsel never requested that the court ask the State for its reason for the strike); Mazzouccolo v. Gardner, McLain & Perlman, M.D., PA 714 So.2d 534 (Fla. 4th DCA 1998) (where plaintiffs' counsel makes a timely, gender-based objection to the defendant having stricken three female jurors and the defendant refuses to supply a gender-neutral reason for the strikes, to preserve error, plaintiffs' counsel must not accept the jury and must renew their gender-based objection or condition acceptance of the jury on their previous objection).

WHEREFORE, Plaintiffs respectfully requests that this Honorable Court apply the above and foregoing law at the time of jury selection in the instant case, and grant such other and further relief as is just and proper.

[CERTIFICATE OF SERVICE]

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, TN AND FOR DUYAL COUNTY, FLORIDA

CASE NO.: 16-2008-CA-000130-XXX
DIVISION: CV-8

MARTHA GARDNER,

Plaintiff,

vs.

ANTHONY NlOSO, M.D.; BAPTIST PRIMARY CARE, TNC.; and JACKSON VILLE NEUROLOGICAL CLINIC, P.A.,

Defendants.
_____/

PLAINTIFF'S MOTION FOR LIMITED INDIVIDUAL SEQUESTERED VOIR DIRE AND QUESTIONNAIRE

Pursuant to Rule 1.431, Florida Rules of Civil Procedure, the plaintiff respectfully moves this Court to permit a limited individual sequestered voir dire examination of the prospective jurors in this case. In support thereof, plaintiff shows:

1. This is a medical negligence action involving an alleged failure to timely diagnose the plaintiff s thyroid cancer.

2. The case is set for two weeks on the trial calendar, and as discussed below there is a reasonable probability that some jurors will be challenged for cause due to their personal opinions about medical malpractice cases in general and this case in particular because of the nature of the plaintiff s medical condition; and plaintiff

respectfully observes that, unless the Court utilizes the limited individual sequestered voir dire, there is a substantial likelihood that the entire venire could be prejudiced by one biased juror's comments made in front of the entire pool of prospective jurors. Such comments by a biased prospective juror would probably increase the number of challenges for cause (and potentially lead to a mistrial), and, in any event, would substantially increase the time required to select and impanel a jury.

3. Additionally, some jurors with a history of cancer may be reluctant or embarrassed to respond to questions about this subject and their own condition in front of the full venire.

4. In February, 1988, the Legislature adopted Ch. 88-1, Laws of Florida, in Special Session. In adopting this legislation, the Legislature's findings were indicative of the views held by some members of the public about medical malpractice litigation:

> WHEREAS, *the people of Florida are concerned with the increased cost of litigation and the need for review of the tort and insurance laws* . . . .

Ch.88-1, Laws of Florida, Preamble. (Emphasis added.)

5. Following the adoption of Ch.88-1, Laws of Florida, a statewide campaign was waged by the medical profession to adopt Amendment 10, a proposed constitutional amendment related to the subject of medical malpractice and limitations on jury awards in cases such as the instant case. Millions of dollars were spent on media advertising directed to this issue, thereby heightening the public's preoccupation with this subject. In 2004 the issue of medical malpractice litigation arose again and was the subject of a

ballot initiative. An extensive media campaign was waged resulting in additional statewide attention to U1is issue. As a result, many members of the public have developed strongly held views on the subject of medical malpractice litigation.

6. The plaintiff respectfully shows that U1e foregoing concerns are not speculative, because the problem has occurred in trials where individual sequestered questioning was not employed.

7. As a direct result of the problems which have arisen in the past in selecting a jury in a case of this type, other divisions of this Circuit Court and other Circuit Courts of this State have granted this same motion as it relates to questions about potential jurors' personal views toward medical malpractice litigation. See, e.g., *Dalgleish v. Walgrens.* Case No. 16-2010-CA-000176 (4'h Jud. Cir., Duval County, Fla.); *Thomas v. Baptist J\1edical Center,* Case No. 87-1734-CA (4th Jud. Cir., Duval County, Fla.); *Barbree v. Baptist Medical Center,* Case No. 87-649-CA and Case No. 87-1 1 120-CA (4th Jud. Cir., Duval County, Fla.); *Weiss v. Mei11, Joest & Hayes. M.D., P.A.*, Case No. 84-12821-CA (4th Jud. Cir., Duval County, Fla.); *Bums v. University Medical Center, inc.,* Case No. 85-12974-CA (4th Jud. Cir., Duval County, Fla.); *Beal v.Smith,* Case No. 88-18178-CA (4th Jud. Cir., Duval County, Fla.); *Jossey v. Si. Vi11cent's Medical Center. inc.,* Case No. 89-15834-CA (4th Jud. Ci r., Duval County, Fla.); *Robinson vs. University Medical Center. Inc., etc., et al.,* Case No. 89-5290-CA (4th Jud. Cir., Duval County, Fla.); *Smith vs. 1\1urray, et al.,* Case No. 89-12178-CA (4th Jud. Cir., Duval County, Fla.); *Morrell,* etc., vs. *Lakeland Regional Medical Ce11/er, Inc.,* et al., Case No. GC-G-

3161 (I0th Jud. Cir., Poll< County, Florida); *McGuire v. Buckingham, et al.,* Case No. 90-18467-CA (4th Jud. Cir.); *Putnam v. Joel, et al.,* Case No. 91-3720-CA (4th Jud. Cir.); *Montford v. Tallahassee Memorial Regional lvfedical Center. et a!.,* Case No. 91-656-CA (2d Jud. Cir., Leon County, Fla.); *Boutet v.Memorial Medical Center,* Case No. 90-20145-CA (4th Jud. Cir.); *Allen v. Baptist 1\tfedical Ce111er,* Case No. 90-14023-CA (4th Jud. Cir.); *England v. Katibah, et al.,* Case No. 92-12545 CA (4'11 Jud. Cir.); *Hanselman v. Mohamed H. Antar. M.D.. et al.,* Case No. 95-01774-CA (4111 Jud. Cir.), *Siedow v. Rasheed* A1ra11, *D.O.. et al.,* Case No. 99-05975 CA {4th Jud. Cir.) and *Peters v. Southern Baptist Hospital of Florida, Inc., ere.. er al..* Case No. 99-0I 193 CA (4'11 Jud. Cir.). *Craig v.Arn,* Case No. 2004-CA-002145 (4'11 Jud. Cir.)

8. Specifically, the plaintiff requests that a questionnaire be filled in by each member of the panel in accordance with Exhibit "A" attached. If a potential juror responds "yes" to any of the questions on tl1e questionnaire, then he or she would be questioned about the answer(s) outside the presence of the other potential jurors in the jury room during a recess in the voir dire.

9. If this procedure were to be employed, the time necessary to impanel a jury should be reduced because the potential for one biased member of the venire to prejudice other prospective jurors would be virtually eliminated; and the risk of a mistrial would be greatly reduced.

WHEREFORE, the plaintiff respectfully moves the Court to order tl1at a questionnaire of the type attached as Exhibit "A" be utilized and that a limited individual

sequestered voir dire examination be conducted under appropriate conditions as determined by the Court.

MARGOL & MARGOL, P.A.

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CERTCFICATE OF SERVICE

WE HEREBY CERTIFY that on this _____day of November, 2014, a copy hereof was electronically filed with the Clerk of The Court by using the ECF system with copies being furnished via Email to Clemente lnclan, Esquire, Clemente.inclan@saalfieldlaw.com and James Smith, Esquire, jsmith@smithschoder.com.

ATTORNEY

QUESTIONNAI RE

Juror number _____

1. Have you, or any member of your immediate family, or a close friend ever been diagnosed with cancer?

Yes_____ No _____

2. Do you have any strong views or strong feelings about medical malpractice cases?

Yes_____ No _____

3. Do you have any strong views or strong feelings on the subject of personal injury lawsuits that involve a claim for compensation for pain and suffering?

Yes__ No__

_____
Juror

PLEASE ANSWER EACH QUESTION ACCURATELY, NEATLY, AND COMPLETELY

Date:_____ Juror Number (the number is on your Summons):_____

Name (*please print*) _____
First Middle Initial Last Name

Address: City:_____ County:_____ State:_____ Zip Code:_____

Home Phone: Area Code: ( )_____

1. I am exempt from jury duty: Yes_____ No_____, If yes, please explain why:_____

2. Years of residence in United States?_____ State?_____ City?_____ County?_____

3. Place of Birth: City:_____ State:_____ Date of Birth:_____

4. Where have you resided most of your life? city:_____ State:_____

5. Please describe the neighborhood that you live in:_____

6. Where did you live before? Southeast____Southwest____Northeast____Midwest____Mountain States_____ West Coast____Alaska____Hawaii____Puerto Rico____ Other(*please specify*):_____

7. Is English your native language? Yes____No____ If not, do you speak and understand English? Yes____ No____, If not, please explain:_____

8. Can you read English? Yes____ No____

9. Do you have any vision, hearing, medical, memory, or concentration problems? Yes____ No____ If yes, please describe:_____

10. Are you currently taking any medication(s) that would impair your ability to sit as a juror? Yes____ No____ If yes, please explain:_____

11. Are you married, single, divorced, widowed, or separated?_____ Other:_____

12. How far did you go in school? Elementary____Junior High____ High School____ Technical School____Some College____ College graduate____Master's ____Doctorate____

13. Do you have any formal education, formal training, or work experience in the following areas? Legal Yes___ No___; Medical Yes___No___; Engineering Yes___ No___; Law Enforcement Yes___ No___; Teaching Yes___ No___; Accounting/Bookkeeping Yes___ No___; Economics Yes___ No___; Trades Yes___ No___; Technical Yes___ No___; Computers Yes___ No___; Secretarial/Clerical Yes___ No___; Manufacturing Yes___ No___; Sales Yes___ No___; General Contractor/Developer/Appraiser Yes___ No___; Psychology Yes___ No___; Chemistry/Biology/Sciences Yes___ No___; Other (*please specify*)_____

14. Does your spouse or significant other have any formal education, formal training, or work experience in the following areas? Legal Yes___ No___; Medical Yes___No___; Engineering Yes___ No___; Law Enforcement Yes___ No___; Teaching Yes___ No___; Accounting/Bookkeeping Yes___ No___; Economics Yes___ No___; Trades Yes___ No___; Technical Yes___ No___; Computers Yes___ No___; Secretarial/Clerical Yes___ No___; Manufacturing Yes___ No___; Sales Yes___ No___; General Contractor/Developer/Appraiser Yes___ No___; Psychology Yes___ No___; Chemistry/Biology/Sciences Yes___ No___; Other (*please specify*)_____

15. Employed full-time___Employed part-time____ Unemployed____ Student full-time____ Student part-time____ Homemaker____Disabled____Retired____ If retired, what was your occupation?_____

16. If employed, what kind of work do you do? Blue collar/Technical____Professional____Healthcare____ White Collar/Sales____Administrative/Management____Secretarial/Clerical____Other (*please specify*)_____

17. Please state your occupation for the last 10 years, beginning with your most current position. If you are retired or unemployed, please state the date of your retirement/unemployment, and indicate your occupation for the five years preceding your retirement/unemployment:

Employment: *Position:* *Dates:* *Reason for Leaving:*

_____
_____
_____
_____
_____
_____
_____

18. What did you do before this?_____

19. If working, please provide a brief description of your typical job duties, along with information concerning the knowledge required to carry out these functions:_____
_____
_____

20. Are you presently a full-time homemaker? Yes___ No___, If yes, how long have you been a full-time homemaker?_____ If yes, what type of employment did you engage in previously?_____

21. What type of work does your spouse or significant other do?_____

22. Please list the number, age, gender, education, and occupation of your children and whether they are living at home:_____

23. Have you or any member of your immediate family ever been in the US military services (including Reserves, National Guard, and/or ROTC)? Yes___ No___ If yes, what branch?_____Dates of Service:_____ What was your highest rank?_____ Were you involved in combat? Yes___ No___ Were you ever in the military police or shore patrol? Yes___ No___ Was you military experience Very enjoyable?___ Enjoyable___Somewhat enjoyable?___Not very enjoyable?___Have you ever been a jury member of a court martial? Yes___ No___

24. Have you served as a juror before? Yes___No___ Did you serve as a foreperson? Yes___ No___ What was the nature of the case(s)?_____ Please briefly describe your experience as a juror _____

25. Have you ever been a witness in a court case? Yes___No___ If yes, please state the nature of the case:_____

26. Have you ever been a plaintiff in a civil case? (*Have you ever sued for money damages?*)Yes___ No___ Unsure___ If yes, type of lawsuit?_____

27. Have you ever been a defendant in a civil case? (*Have you ever been sued for money damages?*) Yes___ No___ Unsure____ If yes, type of lawsuit?_____

28. Have you or anyone in your family ever worked for a lawyer, a law firm, or the court system? Yes___ No___, Person, organization, or court worked for:_____

29. Are you currently involved in or planning any legal proceedings? Yes___No___ If yes, as a plaintiff?___ Defendant?___ Witness?___ If yes, please describe the circumstances_____

30. What are your feelings, if any, regarding lawyers?_____

31. Do you feel you have been mistreated by the judicial process? Yes___ No____

32. What are your feelings about the jury system?_____

33. Please list the social, fraternal, professional, community, religious, and/or other organizations to which you belong:

34. What are your activities in these organizations?_____

35. Have you ever written your congressman or lobbied in any way to change a law? Yes___No___ If yes, please explain:

36. Do you carefully follow the news on either TV, radio, or through newspapers and magazines? Yes___ No__

37. What newspapers and magazines do you read on a regular basis?_____

38. Please describe your life-style:_____

39. Is there anything taking place in your life, either at home or at work, that might cause you to be distracted if you were selected to sit as a juror in this case? Yes___No___ If yes, please explain:_____

40. Is there anything you can think of that you should bring to the court's attention that might affect your service as a juror for this case? Yes___ No___ If yes, please explain:_____