

May 2003

GENDER NEUTRAL JURY SELECTION
by Ted Babbitt

State v Neil, 457 So.2d 481 (Fla. 1984) is often cited as the landmark case in Florida for the procedure to be used in order to determine the basis for peremptory challenges which appear to be race or gender based. The case which actually lists the procedure in Florida is Melbourne v State, 679 So.2d 759 (Fla. 1996). There the Florida Supreme Court set forth the procedure to be utilized by parties and the trial court to assure that jury selection is gender and race neutral.

That procedure was recently analyzed in the case of Murray v Haley, 28 F.L.W. D184 (Fla. 1st DCA, Jan. 8, 2003). That case was a medical malpractice action which resulted in a verdict for the defendant. On appeal, the plaintiff challenged the trial court's failure to require the defense attorney to articulate gender neutral reasons for the peremptory challenge of three female prospective jurors. The appellate court reviewed the procedure set forth in Melbourne, supra, as follows:

First, the party objecting to another party's use of a peremptory challenge on the basis of race or gender must (a) make a timely objection on that basis, (b) show that the prospective juror is a member of a distinct racial or gender group, and (c) request that the court ask the other party its reason for the challenge. Melbourne, 679 So.2d at 764; Jones v State, 787 So.2d at 156. If these

initial requirements are met (step 1), the Court must ask the proponent of the challenge to come forward with a race or gender-neutral reason (step 2). Melbourne, 679 So.2d at 764; Jones, 787 So.2d at 156. If the explanation is facially race or gender-neutral and the court believes that, given all of the circumstances surrounding the challenge, the explanation is not a pretext, the challenge will be sustained (step 3). Melbourne, 679 So.2d at 764; Jones, 787 So.2d at 156.

In Murray after the defense challenged three females, plaintiff's attorney indicated to the Court that he "needed to make a Neil challenge." The Court denied the challenge without requiring the defense attorney to articulate any gender neutral reason for striking the females. The appellate court reversed. In doing so, it reiterated the law that any time a Neil challenge is made, it is the trial court's responsibility to hold a Neil hearing under the procedure set forth in Melbourne, supra. There doesn't need to be any special language used in raising the Neil issue and any doubt as to whether the objecting party has made an appropriate predicate for requiring a gender or race neutral explanation has to be resolved in favor of the objecting party. See State v Holiday, 682 So.2d 1092, 1093 (Fla. 1996). The First District stopped short of holding that it is per se reversible error for a trial judge to fail to require a party to articulate a gender neutral reason for a preemptory challenge once Neil is mentioned but the Court cites with approval State v Johans, 613 So.2d 1319 (Fla. 1993) for the following proposition:

In Johans, the trial court had failed to require the

state to give a race-neutral reason for an objected-to challenge of a prospective juror. The supreme court said that '[a] race-neutral justification for a peremptory challenge cannot be inferred merely from circumstances The burden imposed on the party required to provide a race-neutral justification is, at worst, minimal.' Id. at 1321. It then held that, upon a proper objection, 'the trial judge must conduct a Neil inquiry,' and 'that the proper remedy in all cases where the trial court errs in failing to hold a Neil inquiry is to reverse and remand for a new trial.' Id. at 1322.

Thus, it is apparent that when a party raises gender or race as the basis for a peremptory challenge, the trial court has little choice but to require a gender and race neutral explanation from the challenging party. Failure to do that will inevitably result in reversal.

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