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Pushing New Frontiers: Extending Neil to Peremptory Challenges Based on Religious Affiliations

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PUSHING NEW FRONTIERS: EXTENDING *NEIL* TO PEREMPTORY CHALLENGES BASED ON RELIGIOUS AFFILIATIONS

*Shirley A. Miranda**

ABSTRACT

Today, when it comes to peremptory challenges during jury selection in Florida, it is impermissible to strike a venireperson on the basis of their race, ethnicity, or gender. However, as recent as January 2020, the Florida Supreme Court has declined to adjudge whether it is also impermissible to strike a venireperson on the basis of their religious affiliation. This comment will address the aspect of religion and its impact on persons sitting in judgment against others generally and whether religious affiliation qualifies as a valid ground for a peremptory challenge as both the Florida and federal standards for disqualifications are silent as to religious based peremptory challenges. Particularly, this comment proposes that the Florida Supreme Court should extend its *Neil/Slappy* line of cases to bar peremptory challenges on the basis of religious affiliation but not religious belief. Religious affiliation, which is defined as a distinct, socially recognized group of citizens, is distinct from religious belief, which is defined as a subscription to a set of beliefs and convictions. Stemming from this difference, the comment argues that striking a juror for religious affiliation violates Article 1, § 16 of the Florida Constitution because religious affiliation is not reflective of a potential juror’s beliefs, attitudes, biases, or competency.

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I. INTRODUCTION

For more than thirty years, the Florida Supreme Court’s promise that it would prohibit the use of peremptory challenges on the basis of religious affiliation has been unfulfilled. Nowhere is the promise to extend the holding in *State v. Neil*—which barred the use of peremptory challenges on the basis of one’s race—more important and needed than in the area of religion. That is because religion generally permeates all aspects of society, and more specifically, is considered an integral part of many people’s lives.¹ To ignore the impact of religion, would mean that the Florida judiciary would continue to ignore the fact that individuals structure their lives, morals, and ethics around their religious beliefs. As such, one cannot ignore the reality that religion also affects the legal system. Particularly relevant to the issue plaguing the Florida judiciary is that “religion affects the way jurors, as representatives of society, treat defendants.”²

In fact, the impact of religion generally can be seen during the jury selection process as religion is one of the means or channels through which attorneys use their prejudices to compose a jury favorable to their case. During voir dire, attorneys rely on a venireperson’s characteristics, which includes religion, to impanel a jury.³ However, in the context of religion, attorneys assume that there is no distinction between religious belief and affiliation when conducting voir dire—the process through which the attorneys inquire into the venire’s attitudes, beliefs, and prejudices. Attorneys instead proceed to question jurors and believe that an individual wearing a “cross” equates to that individual being a fervent believer in Christianity. Rather than distinguish between one’s mere affiliation to a religion, the current practice is to assume affiliation is embedded with belief.

While on the surface it may seem permissible to strike a juror in reliance that one’s religion is detrimental to a juror’s capacity to make an unbiased decision,⁴ the reality is that the use of religious-based peremptory challenges results in either the underrepresentation of members of a religious group in the jury, or in the overrepresentation of members of a particular group in the

¹ Monica K. Miller, Julie A. Singer & Alayna Jehle, *Identification of Circumstances Under Which Religion Affects Each Stage of the Trial Process*, 4(1) APPLIED PSYCH. IN CRIM. JUST. 135, 135 (2008).

² *Id.* at 137.

³ *Id.*

⁴ *Id.* at 140.

jury.⁵ Moreover, the lack of a distinction between religious affiliation and belief based peremptories also results in lawyers' "profiling" veniremen on the basis of their affiliation alone.⁶

This distinction can no longer be ignored by the Florida judiciary. In fact, while religious affiliation is characterized by a person's self-identified association with a particular religion, religious belief is characterized by a person's subscription to a defined set of beliefs.⁷ The two concepts are distinct. The Florida Supreme Court should thus develop new jurisprudence that would draw the line of distinction between the effects, or lack of effect, that a venireperson's religious *affiliation* has on decision-making abilities, and the pronounce effect that a venireperson's religious belief has on decision-making. Without such a distinction, the current law in Florida would continue to allow attorneys to stereotype venirepersons on account of their religious affiliation, even if a venireperson's religious affiliation has no effect on their competency or ability to be and remain impartial. This distinction is thus crucial as religious belief has an effect on a juror's decision-making; meanwhile, a juror's religious affiliation does not affect decision-making in a significant way.⁸

A new rule and practice that prohibits the use of the peremptory challenge on the basis of religious affiliation would only promote public confidence in the legal system. This change would also calm concerns that the legal system is targeting particular members of a religion, and thus perpetuating negative stereotypes that systematically plagued members of religious groups in America.⁹ Moreover, a new rule would further the goals of the *Neil* court that held that peremptory challenges on the basis of race are unconstitutional.¹⁰ Thus, new jurisprudence prohibiting the use of peremptory challenges grounded on a venireperson's religious affiliation, not belief, would propel the Court to continue the momentum it had when it held that peremptories exercised on the basis of sex or ethnicity were impermissible.¹¹

Section II of this comment provides the historical background of the use of peremptory challenges. Part A examines the implications of landmark

⁵ *Id.*

⁶ April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 STAN. J. C.R. & C.L. 1, 35 (2020).

⁷ See *State v. Davis*, 504 N.W. 2d 767, 771 (Minn. 1993).

⁸ See *infra* Section III.

⁹ Courtney A. Waggoner, *Peremptory Challenges and Religion: The Unanswered Prayer for a Supreme Court Opinion*, 36 LOY. U. CHI. L.J. 285, 294–96 (2004).

¹⁰ *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

¹¹ See generally *Abshire v. State*, 642 So. 2d 542 (Fla. 1994); *State v. Alen*, 616 So. 2d 452 (Fla. 1993).

United States Supreme Court opinions. Part B provides an in-depth examination of the Florida Supreme Court cases that evaluate the use of the peremptory challenges and tracks the Florida Supreme Court's transformation of the peremptory challenge. Section III, Part A identifies the issue with grouping religious affiliation with religious belief. Part B argues that religious belief negatively impacts a venireperson's competency. Meanwhile, Part C argues religious affiliation is not an accurate predictor of a venireperson's competency and should not be the grounds for a peremptory challenge. Moreover, Section IV addresses the legal and practical concerns related to the extension of *Neil* to yet another category—religious affiliation.

II. BACKGROUND

A. Peremptory Challenge in American History

The peremptory challenge¹² is widely accepted and used in federal and state trials.¹³ The peremptory challenge only became a staple of the American judicial system due to the expansion of the voir dire.¹⁴ The peremptory in a sense emboldened or encouraged lawyers during voir dire to probe into a venireman's biases and prejudices while at the same time ensuring that lawyers would not deal with the complexities of challenging jurors for cause.¹⁵ It was only through the voir dire that the peremptory challenge became a tool to alter the jury's composition.¹⁶ Hence, voir dire became the vehicle through which lawyers could draw upon their own inherent or implicit biases or prejudices to strike veniremen to the benefit of their clients.¹⁷

In spite of the peremptory challenge's common use, the Sixth Amendment¹⁸ does not guarantee the right to exercise a peremptory challenge, but the challenge is nonetheless considered an integral part of a criminal¹⁹ defendant's right to trial by jury.²⁰ The Supreme Court in *Swain v.*

¹² Defined as "the right of a disputant to veto an otherwise qualified juror." Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 814 (1997).

¹³ *Swain v. Alabama*, 380 U.S. 202, 218 (1965).

¹⁴ Anderson, *supra*, note 6 at 118.

¹⁵ *Swain*, 380 U.S. at 219–20.

¹⁶ *Id.*

¹⁷ *Id.* at 23–24.

¹⁸ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." U.S. CONST. amend. VI; *Swain*, 380 U.S. at 219.

¹⁹ While peremptories are used in criminal and civil trials, this Comment predominantly addresses the peremptory challenge in criminal cases or contexts.

²⁰ *Swain*, 380 U.S. at 217–18.

Alabama substantiated claims by the state of Alabama that the use of peremptory challenges “affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial.”²¹ In an effort to validate the use of the peremptory, the *Swain* Court traced the origin of the peremptory from its use in common law trials to federal trials to the States conferring the right to a peremptory challenge by statute.²² While the Court recognized the peremptory’s several shortcomings—causing delays in the trial process, expense, and elimination of otherwise qualified jurors²³—the Court also found that its continued use is demonstrative of how ingrained the challenge is in the constitution’s guarantee of trial by jury.²⁴

The persistence of the peremptory challenge seems grounded in the notion that the peremptory is supposed to “eliminate extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”²⁵ Peremptories, in theory, function (1) to ensure fairness by allowing parties to actively participate in jury selection, (2) to supplement the challenge for cause by allowing parties to continue screening potential biased jurors from the jury pool, and (3) to protect the *voir dire* process by eliminating the risk of intrusive questions to weed out biased jurors.²⁶ However, since attorneys manipulate the jury selection process with their express and implicit biases to remove specific individuals based not only individual characteristics like religion, race, and gender, but also group affiliations,²⁷ the peremptory challenge actually subverts the goals it seeks to promote. In fact, if community participation in the criminal system is a goal of the jury selection process, then striking jurors on account of religious affiliation—a characteristic that does not denote belief—erodes public confidence.²⁸ Thus in practice, peremptories are exercised based upon impressions and biases gathered from a party’s interaction with a potential juror, upon a juror’s associations or simply based on a feeling.²⁹ Particularly, it is crucial to note that peremptories are exercised based on limited knowledge that includes assumptions based on a juror’s group affiliations.³⁰

²¹ *Id.* at 212.

²² *Id.* at 212–16.

²³ *Id.* at 216–17.

²⁴ *Id.* at 219.

²⁵ *Id.*

²⁶ Patricia Henley, *Improving the Jury System: Peremptory Challenges*, PUB. L. RSCH. INST., <https://fliphtml5.com/vput/qbla/basic> (last visited Jan. 31, 2022).

²⁷ *Swain*, 380 U.S. at 221 (finding that when exercising peremptory challenges, veniremen are not always judged as individuals but also based on group affiliations).

²⁸ See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

²⁹ *Swain*, 380 U.S. at 220.

³⁰ *Id.* at 221.

Although considered integral to the right to an impartial jury, in 1986 the Supreme Court began to limit the latitude that parties were given to exercise peremptory challenges.³¹ In *Batson v. Kentucky*, after numerous States like Florida revisited the Court's ruling in *Swain*,³² the Supreme Court held that it was unconstitutional under the Fourteenth Amendment for the parties to exercise peremptory challenges to strike veniremen on account of their race.³³ Relying on precedent, the Court stated that the Fourteenth Amendment's Equal Protection Clause guaranteed a defendant that the State would not exclude jurors on account of race or "on the false assumption that members of his race as a *group* are not qualified to serve as jurors."³⁴

The Court then reasoned that excluding jurors on account of race contradicted the foundation upon which the right to an impartial jury is founded on—that "a jury is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine."³⁵ Moreover, the *Batson* Court found that exercising peremptories on account of race negatively impacted three classes of people: (1) the accused because it infringed on his right to equal protection; (2) the jury as race-based peremptory challenge also cast doubt on the potential jurors' competency because it assumed that race was inextricably tied to one's fitness as a juror; and (3) the community by undermining the public's confidence in the fairness of the judicial system.³⁶ Based on its findings, the Court set forth a new standard that allowed defendants to make a *prima facie* showing of racial discrimination which would then shift the burden to the State to provide a race neutral reason for striking the venireperson.³⁷

Moreover, in its ruling, the Court recognized the dangers that the unfettered exercise of peremptories caused by stating that "the reality of practice . . . shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors."³⁸ Although in his concurrence, Justice Marshall advocated to eradicate the peremptory challenge as the sole means through which to eliminate racial discrimination

31 See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

32 See generally *State v. Neil*, 457 So. 2d 481, 482 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 463 (Mass. 1979); *People v. Wheeler*, 22 Cal. 3d 258, 287 (Cal. 1978).

33 See *Batson*, 476 U.S. at 89.

34 *Id.* at 86 (citing *Norris v. Alabama*, 294 U.S. 587 (1935) and *Neal v. Delaware*, 103 U.S. 370 (1881)) (emphasis added).

35 *Id.*

36 *Id.* at 87.

37 *Id.* at 97–98.

38 *Id.* at 99.

in jury selection,³⁹ the Court in subsequent cases declined to ban peremptories but still continued to limit its use.

The Court extended *Batson* to prohibit the exercise of peremptories to strike jurors on the basis of gender.⁴⁰ While the Court recognized that *Batson* was meant to ensure that potential jurors and litigants have the equal protection right to procedures that are “free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice,” the Court’s objection to extend *Batson* to religious affiliation continues to allow group stereotypes to dominate the jury selection process.⁴¹ However, the Court attempted to justify its objection to extend *Batson* to religion on grounds that religious affiliation is not as “self-evident” as race or gender and inquiring into a juror’s religious affiliation is “irrelevant and prejudicial.”⁴²

In finding that only because religious affiliation is not as distinctive as race or gender, the Court has declined to face the ramifications of its decision in *J.E.B. v. Alabama*. The reality that *J.E.B.* questioned the validity of the use of peremptories in classes other than race⁴³ should have pushed the Court towards accepting that religious affiliation is a characteristic that does not affect a juror’s competency. However, the Court has only limited *Batson* to race, gender, and ethnicity. In what may be considered an attempt to force the Court to develop new jurisprudence on the importance of religious affiliation in the exercise of peremptory challenges, federal courts⁴⁴ and states have also undertaken the task of imposing further limits on the government’s

39 See *Batson v. Kentucky*, 476 U.S. 79, 129 (1986) (Marshall J., concurring).

40 *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (holding that it is unconstitutional under the Fourteenth Amendment to strike a juror on the basis of gender).

41 *Id.* at 128.

42 *Davis v. Minnesota*, 511 U.S. 1115, 1115–16 (1994) (Ginsburg, J., concurring).

43 *J.E.B.*, 511 U.S. at 157–163 (dissent).

44 In *DeJesus*, the Third Circuit found that the district court correctly drew a distinction between a peremptory strike motivated by a venireperson’s religious beliefs and a strike motivated by religious affiliation, and that the latter strike would be unconstitutional. *United States v. DeJesus*, 347 F.3d 500, 510–11 (3d Cir. 2003). Similarly, in *Stafford*, the Seventh Circuit was tasked with deciding whether *Batson* extended to religion in a case where the State challenged a juror based on the juror’s involvement with her church, and preference for gospel television programs. The Seventh Circuit acknowledged that it is necessary to distinguish between religious affiliation, which was defined as a religion’s general tenants, and a specific religious belief. The Circuit Court went, what appeared to be, one step further and stated that it would be improper to strike a juror for being a Muslim, Jew or Christian but proper to exercise a peremptory on the basis of a belief that would prevent the juror from basing his decision in the case on evidence and instruction, *even if the belief had a religious backing*. Nonetheless, the Court held that there was no need to decide whether *Batson* extended to religion. *United States v. Stafford*, 136 F.3d 1109, 1114 (1998). In *Somerstein*, the District Court held that *Batson* extends to prohibit peremptory challenges on the basis of religious affiliation even though such a ruling would result in disputes as to whether a particular juror is of a particular faith. *United States v. Somerstein*, 959 F. Supp. 592, 594–97 (E.D.N.Y. 1997).

use of peremptory challenges under their respective state constitutions or statutes.⁴⁵

B. Florida Case Law

Florida is one such state that began reevaluating the negative implications that the unrestricted use of peremptory challenges had on the Florida criminal justice system prior to the Supreme Court's *Batson* decision. In fact, the Florida Supreme Court acted based on the recognition that the peremptory challenge was "uniquely suited to masking discriminatory motives."⁴⁶

The break with *Swain* came in the Florida Supreme Court's decision in 1984. In *State v. Neil*, the defendant, a Black man, challenged the State's use of its peremptory challenges to strike three black jurors—which effectively struck all the Black jurors in the thirty-five-person jury pool.⁴⁷ The defendant claimed that the state violated his Sixth Amendment right to an impartial jury.⁴⁸ However, the Florida Supreme Court decided the case under the Florida constitution rather than the federal constitution, and recognized the failure of *Swain* to combat racial discrimination in the jury selection process.⁴⁹ The Court thus ruled that it was unconstitutional under Article 1, § 16⁵⁰ of the Florida Constitution to exercise peremptory challenges to strike jurors on the basis of race.⁵¹

In reaching its decision, the Court relied on *People v. Wheeler* and *Commonwealth v. Soares*—California and Massachusetts cases that held that it was improper to dismiss a juror "solely on the basis of bias presumed to derive from that individual's membership in the group."⁵² *Wheeler* and *Soares* focused on group bias and the impropriety of allowing group

⁴⁵ *State v. Purcell*, 199 Ariz. 319, 326 (Ct. App. Ariz. 2001) (holding that *Batson* applies to peremptory challenges exercised on the basis of religious affiliation or membership); *State v. Hodge*, 726 A.2d 531, 550–53 (Conn. 1999) (holding that a peremptory challenge based on a venireperson's religious affiliation is unconstitutional because religious affiliation, like one's race, or gender, bears no relation to that person's ability to serve as a juror); *Thorson v. State*, 721 So.2d 590, 594 (Miss. 1998) (holding that state law prohibits the exercise of peremptory challenges on the basis of a person's religion).

⁴⁶ *State v. Slappy*, 522 So. 2d 18, 20 (Fla. 1988).

⁴⁷ *Neil*, 457 So. 2d at 482–83.

⁴⁸ *Id.*

⁴⁹ *Id.* at 483.

⁵⁰ In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. FLA. CONST. art. I, § 16 (emphasis added).

⁵¹ *Neil*, 457 So. 2d at 486.

⁵² *Id.* at 485.

membership in a religious, racial, sexual, or ethnic group to be the determinative feature that results in a venireperson's dismissal.⁵³ The *Wheeler* court asserted that peremptories should be exercised on the basis of a "broad spectrum of evidence suggestive of juror impartiality."⁵⁴ As the *Wheeler* Court suggested, the Defense and State in Florida criminal trials should ground their peremptories on a juror's prior arrest records, past interactions with the law or criminal justice system, or impressions gleaned from conversations or questions that result in answers which cast doubt on a juror's competency.⁵⁵ While it would be incorrect to say that attorneys ignore these factors all together when deciding whether to strike a juror, it is also incorrect to assume that attorneys do not rely on improper biases based on a juror's group affiliation.

Although the adoption of the standard in *Wheeler* would have steered the Florida Supreme Court towards abolishing peremptories on the basis of group bias in religious groups, the Court limited *Neil* to apply solely to race and turned towards New York's *People v. Thompson* decision.⁵⁶ In fact, the *Neil* court also created a new test⁵⁷ to control the procedures the state courts must apply when confronted with allegations of the discriminatory use of peremptory challenges by the state or defendant.⁵⁸

The Court established that there was an initial presumption that the peremptory challenges were exercised in a nondiscriminatory manner.⁵⁹ However, if a party was concerned that the other side exercised a peremptory challenge in a discriminatory manner, then the party had to make a timely objection.⁶⁰ The objecting party then had to show that the potential jurors challenged are members of a distinct racial group, and that there is a strong likelihood that the potential jurors were challenged because of their race.⁶¹ If the state court found a likelihood of discrimination to exist, then the burden

⁵³ *Wheeler*, 22 Cal. 3d at 275–76 (holding that peremptory challenges based on an assumption that potential jurors are biased only because of their membership in an "identifiable group distinguished on racial, religious, ethnic or similar grounds" are improper); see also *Commonwealth v. Soares*, 377 Mass. 461, 477–78 (Mass. 1978).

⁵⁴ *Wheeler*, 22 Cal. 3d at 275–76.

⁵⁵ *Id.*

⁵⁶ *Neil*, 457 So. 2d at 487; *People v. Thompson*, 435 N.Y.S.2d 739, 753–54 (N.Y. App. Div. 1981) (holding that peremptory challenges on the basis of race, *not group bias*, was impermissible under the New York constitution).

⁵⁷ The test was meant to further the objective of peremptories in light of Article 1, § 16 of the Florida constitution—to aid and assist in the selection of an impartial jury. *Neil*, 457 So. 2d at 486.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

shifts to the party that exercised the peremptories.⁶² At that point, the party had to provide a race-neutral reason for the challenges, and if a race-neutral reason was provided then the inquiry into the party's motives ended.⁶³ But if the party failed to provide a race-neutral reason, then the state court was obligated to dismiss the jury pool and restart the voir dire with a new pool of potential jurors.⁶⁴ In the alternative, if the state court did not find a likelihood of discrimination, then the inquiry into the party's motives ended.⁶⁵ The new test went beyond the U.S. Supreme Court's test in *Swain* but failed to address discrimination based on religious affiliation. However, the Court did not foreclose the possibility that *Neil* could not apply to other groups like religion as it still recognized that it was wholly improper to exercise peremptories as a means to excise a *group* from a representative cross-section of society.⁶⁶

After *Neil*, the Florida Supreme Court in *State v. Slappy* set forth the appropriate procedure to follow when a party raises a claim of racial discrimination through the exercise of a peremptory challenge.⁶⁷ In *Slappy*, the defendant, a Black man, objected to the State's use of four of its six peremptory challenges to strike Black individuals from the panel even though each indicated an ability to remain impartial.⁶⁸ In response to the objection, the State provided its explanations for each strike, which the trial court accepted.⁶⁹ On appeal, the Florida Supreme Court undertook the task of crafting a test to address the ambiguity in *Neil*, which left open to interpretation the question of what constituted a likelihood of discrimination.⁷⁰ The Court changed the burden imposed on the complaining party. Under the new *Slappy* rule, any doubt about whether the complaining party met the burden of showing that the other party used peremptories in a discriminatory manner had to be resolved in favor of the complaining party.⁷¹ Once the burden was met, the burden shifted to the other party to rebut the inference that it exercised its peremptory challenges in a discriminatory manner.⁷² The party then had to provide a race-neutral reason, one that is not pretextual, for its challenge and the judge had to then evaluate the reasons

62 *Id.* at 486–87.

63 *Id.*

64 *Id.* at 487.

65 *Id.*

66 *Id.*

67 *State v. Slappy*, 522 So. 2d 18, 19 (Fla. 1988).

68 *Id.*

69 *Id.* at 20.

70 *Id.* at 21.

71 *Id.* at 22.

72 *Id.*

provided.⁷³ Seeking to remove the difficulty in ascertaining whether an explanation was legitimate or not, the court provided five⁷⁴ non-exhaustive factors that weigh against finding a legitimate race-neutral explanation.⁷⁵ The court's inclusion of group bias as part of the five factors shows that group bias is not an adequate vehicle by which to determine a potential juror's predispositions and attitudes.⁷⁶ Even though the opinion dealt with race, as did *Neil*, the five factors enumerated in *Slappy* are reflective of the notion that group bias is not tolerated as the sole basis for a peremptory.

A scramble ensued in the Florida judiciary after *Neil/Slappy* as the lower state courts were charged with sorting through various appeals that asserted that it was unconstitutional to strike jurors on the basis of religion as well as sex and ethnicity. In response to the varying district court of appeals' opinions, the Florida Supreme Court in *State v. Alen* held that it was unconstitutional under Article 1, § 16 to strike a juror on the basis of their ethnicity.⁷⁷ In *Alen*, the state exercised its peremptory challenge to strike a Hispanic juror without objection, but when the state attempted to strike another Hispanic juror, the defense objected on the grounds that the strike violated *Neil*.⁷⁸ The court found that the state failed to provide a race-neutral reason for the peremptory strike and therefore the state exercised its peremptory challenge based on the juror's membership in an ethnic group, and was thus unconstitutional.⁷⁹

Particularly enlightening from *Alen* and consequential to advocating for the extension of *Neil* to religious affiliation alone, is the fact that the Florida Supreme Court undertook the task of defining a "cognizable class." To meet *Alen*'s definition of a cognizable class:

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

⁷³ *Id.*

⁷⁴ The five factors include: "(1) alleged group bias not shown to be shared by the challenged juror, (2) failure to examine the juror or perfunctory examination, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to a juror who were not challenged." *Slappy*, 522 So. 2d at 22.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *State v. Alen*, 616 So. 2d 452, 454 (Fla. 1993) (holding that it was also unconstitutional to strike jurors on the basis of ethnicity under the United States Constitution Equal Protection Clause, and the Florida Constitution Article 1, §2 Equal Protection Clause).

⁷⁸ *Id.* at 453.

⁷⁹ *Id.* at 456.

attitudes, ideas, or experiences that may not be adequately represented by other segments of society.⁸⁰

The court's definition in effect includes groups⁸¹ that do not share physically distinct characteristics like race or gender,⁸² and hence leaves open the possibility that members of a religious group can also be considered a cognizable class protected from the discriminate use of peremptories. In doing away with the requirement of "physically distinctive characteristics," the *Alen* court moved closer to including religious affiliation as not all members of a religious group have distinct features. In fact, while there is no one singular physical characteristic that makes all Catholics, Pentecostals, Muslims, or Jehovah Witnesses look alike, there is also no one religious item that could set members of one religious group apart from others.⁸³

However, the unwillingness of the Court to enumerate a list of cognizable groups that include members of particular religious organizations has resulted in inconsistent lower court opinions, some of which extend *Neil* to protect members of a religious group from being stricken.⁸⁴ In fact, in *Fernandez v. State*, the Third District Court of Appeal held that religious-based peremptory challenges are subject to the same standard set forth in *Neil* and are thus unconstitutional under the Florida Constitution if the party does not offer a race-neutral reason for the strike.⁸⁵ However, the Third District did not provide its rationale for reaching such a conclusion.⁸⁶ Moreover, failing to specify whether peremptories based on religious beliefs or affiliation are impermissible has led to criticism and increased the confusion among the lower courts.⁸⁷

⁸⁰ *Id.* at 454.

⁸¹ *Joseph v. State*, 636 So. 2d 777, 780 (Fla. Dist. Ct. App. 1994) (holding that a peremptory challenge used to strike a Jewish juror is unconstitutional under the Florida Constitution and *Neil*. The court reasoned that Jews are a cognizable class as defined in *State v. Alen* because the group's population is large enough that the general population recognizes it as an identifiable group, and the group shares similar religious beliefs, attitudes, and common experiences that distinguish the group from others).

⁸² *Abshire v. State*, 642 So. 2d 542, 544 (Fla. 1994) (adopting the United States Supreme Court decision in *J.E.B. v. Alabama* and holding that it is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to strike a juror on the basis of gender alone).

⁸³ While *Alen's* definition of a cognizable class seems to provide hope that religious groups will eventually be considered cognizable groups, recent opinions like *Joseph v. State* indicate that *Alen* would only be applicable to religions like Judaism, which traditionally is considered an ethnic group as well as a religious group. Such a conclusion by the court in *Joseph* leaves little room for members of religions other than Judaism to be considered a cognizable class and thus subject to *Neil* protections.

⁸⁴ *Fernandez v. State*, 639 So. 2d 658, 660 (Fla. Dist. Ct. App. 1994).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Kelly L. Kuljol, *Where Did Florida Go Wrong? Why Religion-Based Peremptory Challenges Withstand Constitutional Scrutiny*, 32 STETSON L. REV. 171, 180 (2002).

i. *Pacchiana v. State*: The Florida Supreme Court's Missed Opportunity

In addition to *Fernandez*, the Florida Supreme Court has allowed opportunities to address the discriminatory nature of peremptories based on religious affiliation to slip through its chambers. The most notable and recent case is *Pacchiana v. State*.⁸⁸ John Pacchiana was charged with first-degree murder and conspiracy to commit first-degree murder.⁸⁹ During voir dire, the veniremen completed a questionnaire with basic questions.⁹⁰ The juror at issue in the case listed that her hobbies included “reading, witnessing a Jehovah Witness.”⁹¹ Afterwards, the court, prosecutor, and defense attorney inquired on whether the potential juror wanted to serve on the jury, her familiarity with the judicial system, and asked her a series of hypotheticals in an attempt to assess her ability to apply law to fact, and impartiality.⁹² In response, the potential juror reassured the state that she was able to set aside her past experiences with the judicial system to serve as a juror, and correctly answered every hypothetical question by insisting that she would give the appropriate weight to evidence introduced.⁹³ The potential juror did not assert that her religious affiliation would negatively affect or impact her role as a juror. The state, nonetheless, exercised its peremptory challenge to strike the prospective juror.⁹⁴

Based on the procedure set forth in *Neill/Slappy*, defense counsel objected to the peremptory strike, demanded a race- neutral reason, and the following exchange ensued:

[THE STATE]: *She's a Jehovah Witness. I've never had one say, and I highlighted it, they've always said they can't sit in judgment. She never brought it up.*

[DEFENSE COUNSEL]: *She did.*

[THE STATE]: *No, but she put at the bottom that she's a Jehovah Witness, that gives me pause.*

[DEFENSE COUNSEL FOR CO-DEFENDANT]: *That's a religious-based strike.*

[THE STATE]: *You can say that but that's—for 20 years, [defense counsel for co-defendant] knows, any one of them*

⁸⁸ *Pacchiana v. State*, 240 So. 3d 803, 815 (Fla. Dist. Ct. App. 2018), *rev'd*, *State v. Pacchiana*, 289 So. 3d 857 (Fla. 2020).

⁸⁹ *Id.* at 805.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 805–06.

⁹³ *Id.*

⁹⁴ *Id.* at 806.

that's been practicing they've always said that. Now maybe she's less—

[DEFENSE COUNSEL FOR CO-DEFENDANT]: She reads Jehovah stuff, she doesn't say she's a practicing Jehovah Witness.⁹⁵

Following this exchange, the potential juror stated that her religious beliefs would not prevent her from being fair and impartial.⁹⁶ However, the court found that the state's reliance on her religious affiliation was a race-neutral reason, and the potential juror was stricken from the pool.⁹⁷

On appeal, the Fourth District held that the state did not provide a legitimate race-neutral reason for the strike, and it was impermissibly based on the potential juror's religious affiliation.⁹⁸ The court recognized that the state struck the juror before even questioning her about her religion, and without actually determining whether she shared or believed any "group bias" that would prevent her from being an unbiased juror.⁹⁹ The court thus recognized that the state did not base their peremptory on the juror's religious belief, as that would be permissible. Rather, the state made an assumption based on the potential juror's membership in the Jehovah's Witness—precisely what the court feared in *Neil*. The court further acknowledged that in the "absence of questioning regarding the juror's [actual] adherence to any claimed group bias, the genuineness of the strike was called into doubt."¹⁰⁰ In fact, the court found that the prosecutor only questioned the juror about the effect of her group membership on her belief system until after the defense counsel objected.¹⁰¹ However, even those questions only elicited answers that demonstrated that the potential witness would follow the evidentiary standard to determine whether the defendant was guilty.¹⁰²

The Fourth District went beyond finding that the state did not provide a legitimate race-neutral reason and held that members of the Jehovah's Witnesses met the *Alen* test, and thus were a cognizable class.¹⁰³ The court concluded that:

the state's strike was either pretextual and entirely based on race, or the state's strike was not pretextual and entirely

⁹⁵ *Id.*

⁹⁶ *Id.* at 806–07.

⁹⁷ *Id.* at 807–08.

⁹⁸ *Id.* at 810–11.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 811.

¹⁰¹ *Id.* at 812.

¹⁰² *Id.*

¹⁰³ *Id.* at 813–14.

based on religion despite the lack of competent evidence that the prospective juror's religion would influence her decision-making as a juror. Either way, it violates the . . . Florida Constitution.¹⁰⁴

Pacchiana is an enlightening case that demonstrates that not only is religious affiliation not an accurate predictor of one's beliefs or belief system, but it also does not inherently influence a person as one might assume. *Pacchiana* provides reassurance that a venireperson's beliefs and competency can be gleaned once probed or questioned during voir dire. While the voir dire might be extended in an effort to glean whether a venireperson can in fact act as an impartial decisionmaker, it is a necessary extension that advances the principals the peremptory challenge was designed to promote—to secure a fair and impartial jury.

Moreover, *Pacchiana* also opens the door to classifying more religious groups as cognizable groups under *Alen* as the lower courts have asserted that similar religious beliefs distinguish one group from another.¹⁰⁵ For example, Catholics would be considered a cognizable class since Catholics make up 21% of the Floridian population,¹⁰⁶ and are represented by cohesiveness in their belief in one God, transubstantiation, and a shared past of religious intimidation.¹⁰⁷ This inclusion of particular religious groups as a cognizable group would effectively bar the use of peremptories on the basis of one's religious affiliation.

However, the Florida Supreme Court rejected these principles found in the Fourth District's holding on grounds that the defense failed to preserve the error for appeal.¹⁰⁸ In this case, the Florida Supreme Court opted to ignore sound reasoning and law rather than address the issue of religious based peremptory challenges.¹⁰⁹ The Court chose the easiest way out.

¹⁰⁴ *Id.* at 815.

¹⁰⁵ *Joseph v. State*, 636 So. 2d 777, 780 (Fla. Dist. Ct. App. 1994).

¹⁰⁶ PEW RSCH. CTR., *Religious Landscape: Catholics*, <https://www.pewforum.org/religious-landscape-study/religious-tradition/catholic/> (last visited Feb. 3, 2022).

¹⁰⁷ Rory Carroll, *America's Dark and Not-Very-Distant History of Hating Catholics*, THE GUARDIAN (July 14, 2017), <https://www.theguardian.com/world/2015/sep/12/america-history-of-hating-catholics>.

¹⁰⁸ *Pacchiana*, 289 So. 3d at 861–62 (finding that defense counsel failed to comply with Florida law, which required a contemporaneous objection to the peremptory strike and the renewal of the objection before the jury is sworn to properly preserve the error for appeal under *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996)).

¹⁰⁹ *Id.* at 858 (“But we do not decide the issue of the constitutionality of a religion-based strike. Instead, we conclude that the issue was not properly preserved in the trial court and the district court erred in reversing on the basis of an unpreserved argument.”).

III. ANALYSIS

A. *What is the Problem with Religion-based Peremptory Challenges?*

Religious-based peremptory challenges create a unique problem in the Florida judiciary as the challenges are commonplace in spite of the lack of clarity surrounding what is a religious-based peremptory and whether such challenges are legal or not.¹¹⁰ The following hypothetical exemplifies the current dilemma.

Suppose that Thomas is charged with misdemeanor battery in the City of Miami for battering his girlfriend. Thomas's case is set for a jury trial and the State intends to seek a term of imprisonment for up to 364 days based on the facts of the case. Prior to trial, the jury pool is selected, and questionnaires issued to each juror that contain basic questions such as their name, occupation, age, and religion, if any. After and on the day of trial, both parties begin their examination to determine which would be more sympathetic and less likely to convict Thomas, and which would be more likely to convict him. On examination, the State uses one of its three¹¹¹ peremptory challenges to strike Martha, a juror who marked that she was Christian on her questionnaire.¹¹² Defense counsel objects on grounds that the State exercised an impermissible peremptory on the basis of Martha's religion and requested a race-neutral explanation for the strike per *Neil*. The State explains that by mere virtue of claiming to be associated with Christianity, Martha was not capable of sitting in judgment.

This strike should be impermissible and unconstitutional under the Florida Constitution¹¹³ as the State exercised the strike under the assumption that Martha's affiliation alone was determinative of her ability to be an

¹¹⁰ *Wimberly v. State*, 118 So. 3d 816, 824, 826–27 (Fla. Dist. Ct. App. 2012) (affirming the trial court's ruling striking a juror on religious grounds based on the juror's assertion that "if the law is against my biblical belief, then my biblical belief would take precedence," and the juror's subsequent affirmation that "if the rules of the land is such that they contradict the rules that I live by, then I have an obligation to live according to the rules of my God"); *Olibrices v. State*, 929 So. 2d 1176, 1180 (Fla. Dist. Ct. App. 2006) (holding that it would be a *Neill/Slappy* violation to exercise a peremptory challenge to strike a juror because of his ethnicity or religious belief as a Muslim); *Rodriguez v. State*, 826 So. 2d 494, 495 (Fla. Dist. Ct. App. 2002) (affirming the trial judge's ruling that the State provided a genuine race neutral reason for striking a Black church pastor as religious-based professions like pastors, ministers, and rabbis, tend to be more sympathetic to defendants and less likely to set their feelings aside when sitting in judgment).

¹¹¹ FLA. R. CRIM. P. 3.350(a)(3).

¹¹² The hypothetical is not based on any actual people but is mirrored from the fact pattern in *Stake v. Pacchiana*, 289 So. 3d 857, 858–59 (Fla. 2020).

¹¹³ FLA. CONST. art. I, § 16.

impartial juror.¹¹⁴ Without further inquiry, the State cannot adequately assess whether Martha's group membership would affect her ability to weigh evidence, be impartial, and render a verdict free of any religious restraints.

Now, suppose that the State approaches Martha, who as stated above marked that she was Christian on her questionnaire, and proceeds to examine her. The State begins its examination by asking whether she attends church, reads the bible, or prays regularly.¹¹⁵ Next, the State asks Martha if she will be able to apply the law to the facts and evidence when deliberating. To this, Martha responds that she is guided by the bible when making any decision in her daily life and will do the same when sitting in judgment but will nonetheless attempt to be impartial.¹¹⁶ After this exchange, the State exercises one of its peremptory challenges and strikes Martha from the venire. The Defense objects and requests a race-neutral explanation per *Neil*. The State asserts that it struck Martha based on her religion because it was evident that she was incapable of excluding her biases, attitudes, beliefs, and customs from her role as a juror. This strike is permissible and does not violate the Florida Constitution nor the opinion in *Neil*.¹¹⁷ The State's peremptory strike in this scenario is the equivalent of a challenge for cause.¹¹⁸

These hypothetical situations highlight the confusion created by stating that a peremptory challenge was exercised on the basis of religion. The Third District Court's mere inclusion of "religion" as an impermissible ground for a peremptory challenge without explanation regarding what constitutes a religious-based strike, does not provide sufficient protections for those individuals affiliated with a religious group. The ruling also potentially extends *Neil* to a group of potential jurors with a deeply rooted religious belief system that may be biased towards or against a party. In fact, *Fernandez* fails to recognize the distinction that exists between religious affiliation and religious beliefs. The opinion does not account for the reality

¹¹⁴ See Lori Krafte-Jacobs, *What Is "Religion" in Religion-Based Peremptory Challenges?*, 65 U. CIN. L. REV. 1291, 1291 (1997).

¹¹⁵ Regularly is defined as at least once a day. According to Pew Research Center, frequency of prayer, worship service attendance, belief in God, and importance of religion are factors indicative of a highly religious person. A highly religious person is more involved with their community. *Religion in Everyday Life*, PEW RSCH. CTR. n.1 (Apr. 12, 2016), <https://www.pewforum.org/2016/04/12/religion-in-everyday-life/#fn-25540-1>.

¹¹⁶ Approximately 68% of Christians assert that the Bible should have at least some influence on U.S. laws. Michael Lipka, *Half of Americans Say Bible Should Influence U.S. Laws, Including 28% Who Favor It over the Will of the People*, PEW RSCH. CTR. (Apr. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/04/13/half-of-americans-say-bible-should-influence-u-s-laws-including-28-who-favor-it-over-the-will-of-the-people/>.

¹¹⁷ *Symonette v. State*, 778 So. 2d 500, 503 (Fla. Dist. Ct. App. 2001) (holding that although a juror asserts that he or she can remain impartial in spite of their own beliefs does not mean that the State must be satisfied with that response and can proceed to challenge the juror).

¹¹⁸ See Krafte-Jacobs, *supra* note 114, at 1321.

that a person may be affiliated with a Christian, Muslim, Jewish, Hindu, or Jehovah Witness group while not subscribing to the religious tenants or convictions that the religion claims. Moreover, the opinion also does not account for those individuals who do not consider themselves affiliated with a religion but do in fact subscribe to a set of “religious” beliefs that highly inform their daily practices and decision-making process.¹¹⁹

However, *Fernandez* only falls short of adequately defining religion due to the complexities present in distinguishing religious belief from religious affiliation. The complex nature of this task is evident in the vast array of law review comments and state court opinions that interchangeably use religious belief and affiliation when determining whether it is permissible or not to strike a juror on the basis of “religion.” For instance, an article advocates that peremptories based on “religion” are permissible because religious beliefs are an accurate predictor of a person’s belief system and thus an accurate indicator of how a potential juror would interpret evidence presented at trial.¹²⁰ However, what the author is in fact referring to when she writes “religion” is religious belief and not affiliation.

Moreover, some state courts equate religion with specific tenants of a belief system while other state courts equate religion with group affiliation.¹²¹ The disparity and lack of clarification in the use of the word “religion” has led to a peremptory challenge based on religion meaning one of two things: an assumption about the potential juror’s beliefs or an assumption about the potential juror’s abilities based on the potential juror’s affiliation with a religious group.¹²²

B. *Religious Belief & Its Impact on a Juror*

Religious belief has seldom been defined. In fact, religion has acquired multiple meanings throughout the years and religious scholars have had difficulty in selecting one definition that captures the varying degrees of belief, attitudes, and customs.¹²³ State courts have also faced similar difficulties in defining religion, and, particularly, Florida has declined in district court opinions and supreme court opinions to delve into the complex

¹¹⁹ See generally “Nones” on the Rise, PEW RSCH. CTR. (Oct. 9, 2012), <https://www.pewforum.org/2012/10/09/nones-on-the-rise/>.

¹²⁰ Kuljol, *supra* note 87, at 181–82.

¹²¹ Krafte-Jacobs, *supra* note 114, at 1306.

¹²² See *id.* at 1306–07.

¹²³ See generally DANIEL L. PALS, NINE THEORIES OF RELIGION (3rd ed. 2015) (surveying nine scholars’ definitions of religion and assessing each definitions’ flaws and shortcomings).

nature of religion-based peremptories.¹²⁴ However, in cases where state courts have equated religion-based peremptories with strikes based on a potential juror's belief system, the courts have considered that an individual juror's subscription to a set of convictions, doctrinal beliefs, and practices are the distinctive characteristics of religious belief.¹²⁵ Even the adoption of this definition is overly broad and fails to account for the fact that a belief in the sacred is the unifying characteristic of any religious belief.¹²⁶ So crucial is the belief in a "higher power" or the sacred that the U.S. Supreme Court, albeit in cases related to the First Amendment challenges, also included adherence to either a Creator or Supreme Being that imposes moral obligations on believers.¹²⁷ Hence, although difficult to define, the Florida Supreme Court should still adopt a definition of religious belief in the context of peremptory challenges that—at a minimum—includes the subscription to a set of convictions, beliefs and practices relative to the "sacred."

Furthermore, the impact of clarifying the difference between religious belief and affiliation is that a potential juror that is a member of a religious group would not be scrutinized in the same manner as a potential juror that shows partiality based on his/her belief system. Religious beliefs negatively influence a venireman's ability to set aside his own beliefs and biases to sit in judgment of others.¹²⁸ Particularly, religious beliefs that "espouse a view concerning the rule of law in society and the authority of people to judge their fellow men and women" have a detrimental effect on the parties to the case and to the juror himself.¹²⁹

Religious beliefs do interfere with a juror's role and ability to apply law to facts without reservations, and as a result can be the basis for a party's peremptory strike.¹³⁰ For example, in those cases where a juror's religion teaches that crimes should only be punished by God,¹³¹ a peremptory strike

¹²⁴ See *State v. Pacchiana*, 289 So. 3d 857, 858 (Fla. 2020); *Joseph v. State*, 636 So. 2d 777, 781 (Fla. Dist. Ct. App. 1994).

¹²⁵ See *Devoe v. State*, 354 S.W.3d 457, 472 (Tex. Crim. App. 2011); *Casarez v. State*, 913 S.W.2d 468, 479 n.15 (Tex. Crim. App. 1995) (finding that a key component in religious faith is the belief in certain principles, doctrines or rules); *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993).

¹²⁶ Melford E. Spiro, *Religion: Problems of Definition and Explanation*, in *ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION* 85–126 (Michael Banton ed., 1966) (belief in sacred is the core variable in defining religion and religious belief since the existence of the sacred—either as a being or object—is perceived as a means or ends by believers to achieve their worldly or otherworldly goals, informs their daily decisions, and affects their interactions with their community).

¹²⁷ *United States v. Seeger*, 380 U.S. 163, 165–66 (1965); *Davis v. Beason*, 133 U.S. 333, 342 (1890).

¹²⁸ J. Suzanne Bell Chambers, *Applying the Break: Religion and the Peremptory Challenge*, 70 *IND. L.J.* 569, 596–97 (1995).

¹²⁹ *Id.*

¹³⁰ See *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998).

¹³¹ *Id.*

would further the goals of the Florida constitution. The peremptory challenge in that case would ensure impartiality, eliminate unfairness in the verdict, and protect the voir dire by preventing counsel from engaging in intrusive questioning to attempt to superficially gauge the extent of the juror's belief system.

Research suggests that certain religious beliefs or traits such as religious ideology, devotionism, evangelism, a belief in a literal interpretation of the Bible, and fundamentalism impact a juror's ability to remain fair and impartial.¹³² A person's religious ideology—meaning, an individual's understanding of her religious teachings concerning punishment—will likely affect that person's sentencing decisions as a juror.¹³³ For example, if a juror believes that her religious ideology endorses the death penalty, that juror is more likely than a person who does not subscribe to this particular ideology to vote for the imposition of the death penalty.¹³⁴

A juror's devotion¹³⁵ to his/her religious beliefs impacts decision-making since it indicates that a particular juror may harbor feelings of vengeance towards wrongdoers or may favor the imposition of severe sentences like the death penalty.¹³⁶ In fact, studies indicate that while religious affiliation with particular religions or denominations—Catholic, Baptist, and Muslim—do not influence juror's in death penalty cases, a juror's degree of religious practices does strongly correlate with support for imposition of the death penalty.¹³⁷ Persistent and consistent church attendance in particular is highly indicative of a person's predisposition to sit in judgment against others,¹³⁸ and thus could be grounds to strike a venireperson. Similarly, jurors who interpret the Bible literally are heavily influenced by their religious beliefs or teachings and are consistently more punitive than their counterparts.¹³⁹

Studies indicate that evangelism—the desire to convert others to Christianity through proselytizing—tends to make jurors more sympathetic to the plight of defendants.¹⁴⁰ Particularly, a person's desire to help others find salvation correlates with a juror's inability to convict as a conviction

132 Miller, *supra* note 1, at 140.

133 *Id.*

134 *Id.*

135 Devotionism is defined as how often a person attends religious services, prays, and reads the Bible. *Id.* at 142; *see also infra* note at 17; *supra* note 98.

136 Miller, *supra* note 1, at 142.

137 Margaret Gonzalez-Perez, *A Model of Decision-making in Capital Juries*, 76 INT'L SOC. SCI. R. 79, 83 (2001).

138 *Id.*

139 Miller, *supra* note 1, at 143.

140 BRIAN H. BORNSTEIN & MONICA K. MILLER, *GOD IN THE COURTROOM: RELIGION'S ROLE AT TRIAL* 56 (2009).

would not allow the defendant to find said salvation.¹⁴¹ In stark contrast, research suggests that subscription to fundamentalist beliefs—which promote the idea that individuals have free will, yet have a sinful nature and views the bible as the ultimate authority—impact a juror’s ability to remain impartial as these jurors have punitive goals in mind when deliberating.¹⁴² Generally, jurors with fundamentalist beliefs believe that offenders “should receive payback, even if the punishment does not rehabilitate criminals or deter crime.”¹⁴³

In *State v. Davis*, the Minnesota Supreme Court perfectly captured the obligation to maintain the status quo, which allows peremptories based on religious belief to be exercised.¹⁴⁴ The *Davis* court stated that:

[a] juror’s religious beliefs are inviolate, but when they are the basis for a person’s moral values and produce societal views on such matters as the use of intoxicating liquor, cohabitation, necessity of medical treatment, civil disobedience, and the like, it would not seem that a peremptory strike based on these societal views should be attributed to a pernicious religious bias.¹⁴⁵

Therefore, the Florida Supreme Court should distinguish belief from affiliation. In doing so, Florida should also adopt a new definition of religious belief that would guide parties when exercising their peremptory challenges in civil and criminal trials. The definition would inform how counsel approaches a juror and how counsel analyzes a potential juror’s responses to their questions during voir dire. Consequently, distinguishing belief from affiliation would allow parties to exercise their peremptory challenges on the basis of belief, and thus would not erode the privilege.

C. Religious Affiliation

In the context of religious-based peremptories, religious affiliation is not an accurate predictor of the existence of a person’s beliefs and says nothing about a person’s competence to serve as a juror.¹⁴⁶ Because religious affiliation alone is a faulty indicator of a potential juror’s competence, when a party challenges a juror on this basis alone, the challenge is based on

¹⁴¹ *Id.*

¹⁴² *Id.* at 57.

¹⁴³ *Id.*

¹⁴⁴ *See State v. Davis*, 504 N.W. 2d 767 (Minn. 1993).

¹⁴⁵ *Id.* at 771.

¹⁴⁶ Krafte-Jacobs, *supra* note 114, at 1322.

prejudice rather than intuition.¹⁴⁷ Moreover, the challenge is prejudicial because the challenge is not based on the party's impression of an individual potential juror, but rather on an impression or assumption about every other member of the religious group.¹⁴⁸ Challenges exercised to eliminate a distinct group, whether racial or religious, violate *Neil* because those challenges rely upon preconceived biases that all members of a group have the same attitudes, behaviors, biases, and are incapable of being unaffected by the group membership when in their role as jurors.¹⁴⁹ Challenges based on religious affiliation alone subvert the goal to eradicate prejudice from the jury selection process.

The prevalence of these stereotypes or prejudices is evident in the “common folklores” that exist in the legal community. These folklores include the notions that “a Catholic makes a good defense juror because he ‘loves music and art; he must be emotional’ and thus will side with defense,” and that criminal defendants should seek to impanel Jews because Jews respond most naturally to emotional appeals in trials.¹⁵⁰ Moreover, religious affiliation can only be understood in light of group bias. Although in *Joseph v. State*, the Third District Court asserted that other state court cases pertaining to religious affiliation were unenlightening,¹⁵¹ the cases offer a glimpse into the similarities between peremptories used to discriminate based on race or gender and those used to discriminate based on religious affiliation.

For instance, in *People v. Wheeler*, the California Supreme Court asserted that “when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds—we may call this group bias.”¹⁵² Group bias impedes the creation of an impartial jury because it frustrates the goal of achieving a jury representative of the cross-section of society.¹⁵³ Group bias also thwarts the stated purpose of allowing the use of peremptories, which is to impanel an impartial jury by “allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences.”¹⁵⁴ In fact, the attitudes and tendencies that individuals derive from group membership and experiences—including religious membership—and bring with them when they step into their roles as jurors is precisely what the right to an impartial

147 *Id.*

148 *Id.*

149 *See generally* *State v. Neil*, 457 So. 2d 481, 486–87 (Fla. 1984).

150 BORNSTEIN, *supra* note 140, at 35.

151 *Joseph v. State*, 636 So. 2d 777, 781 (1994).

152 *People v. Wheeler*, 583 P.2d 748, 761–62 (1978).

153 *Id.*

154 *Id.* at 761.

jury envisioned.¹⁵⁵ While the impartial jury must be free from bias towards the parties or the particular case, it cannot be expected that the jurors will not have biases formed from their experiences, affiliations, and practices in their everyday lives. Hence, when a party exercises a peremptory to strike on the basis of group affiliation alone, the party is eroding constitutional protections.

IV. CONCERNS: WILL THE FLORIDA COURTS EFFECTIVELY APPLY A RELIGIOUS AFFILIATION PEREMPTORY BAN?

Ideally, the Florida courts would be able to distinguish between religious belief and affiliation when determining whether the state or defendant exercised a permissible peremptory challenge. However, in reality, the courts may face substantial obstacles to extending *Neil* to religious affiliation. Namely extending *Neil* to religious affiliation would complicate the voir dire, and it might result in counsel engaging in an intrusive line of questioning to ascertain the effect that a potential juror's religious affiliation has on his/her ability to sit in judgment.¹⁵⁶ However, as recent as 2020, the Florida Supreme Court has calmed these concerns and held that it is permissible for counsel during voir dire to ask whether any potential juror held any religious beliefs that would preclude them from following the court's instructions on the law.¹⁵⁷ In other instances, the Court found a judge's comments about the Biblical commandment—"thou shall not kill"—which were designed to determine the potential juror's belief system and reactions, as proper in light of their context.¹⁵⁸

Additionally, extending *Neil* might prove to be inconsequential as lawyers could transform a religious affiliation strike to a religious belief strike depending on the trial judge presiding over voir dire. For example, if during voir dire, defense counsel objects to the State's use of a peremptory based on religious affiliation, but the State explains that its strike was actually grounded on the belief that all members of Jehovah's Witness are reluctant to sit in judgment over others, the strike might be considered permissible.¹⁵⁹ In situations like the one described above, a strike is transformed if lawyers are willing to articulate their stereotype and ground it in a religious group's belief system. Consequently, this likely transformation would only serve to

¹⁵⁵ *Id.* at 762, n.17.

¹⁵⁶ *State v. Davis*, 504 N.W. 2d 767, 771 (1993).

¹⁵⁷ *Cannon v. State*, 310 So. 3d 1259, 1267 (Fla. 2020).

¹⁵⁸ *Ferrell v. State*, 686 So. 2d 1324, 1328 (Fla. 1996).

¹⁵⁹ *Davis*, 504 N.W. 2d at 772 (finding that where the prosecutor explained that it struck a juror that identified as a Jehovah's Witness because Jehovah's Witness are "reluctant to exercise civil authority over other people," the strike was not based on affiliation but on religious belief and was thus permissible).

further muddy the waters when courts attempt to draw a distinction between religious affiliation and belief.

Another concern is that extending the voir dire might also delay the trial process. This delay might result in court backlogs in order to allow counsel to have ample time to gather information that could be used to justify any objections that may arise to the use of a peremptory challenge.¹⁶⁰ Alternatively, extending *Neil* might result in parties exercising fewer peremptory challenges¹⁶¹ because by challenging a juror the party opens itself up to a *Neil/Slappy* objection and the risk of not meeting their race-neutral burden. Fewer questions could then result in impaneling jurors with biases that could detrimentally affect the verdict.¹⁶² Perhaps more taxing is the reality that extending *Neil* to religious affiliation would point the Florida Supreme Court closer to abolishing peremptories. However, the Florida Supreme Court has repeatedly underscored the importance of peremptories in meeting the constitutional goals of ensuring the right to an impartial jury.¹⁶³

In spite of these concerns, limiting peremptories in Florida to prohibit challenges based on religious affiliation would result in a jury that actually represents a cross-section of the community and that is impartial. While complicating the voir dire is a valid concern, extending *Neil* would ensure that the Florida courts are actively placing constitutional guarantees above prejudicial peremptories.¹⁶⁴ Moreover, imposing further restrictions on the use of peremptories would improve the public's perception of the Florida justice system.¹⁶⁵ Fewer peremptories exercised based on group bias would result in the public abandoning the view that the judicial system treats certain groups, and persons unfavorably. Consequently, the Florida judiciary should not abolish peremptory challenges but should limit their use to avoid the further exclusion of unbiased members of religious groups.

V. CONCLUSION

Due to the heightened importance that the use of peremptory challenges has acquired in the Florida legal system, the Florida Supreme Court has been

¹⁶⁰ Henley, *supra* note 26, at 6.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See *Hooper v. State*, 476 So. 2d 1253, 1255 (Fla. 1985) (quoting *Francis v. State*, 413 So. 2d 1175 (Fla. 1982)) (“The exercise of peremptory challenges has been held to be *essential* to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant”) (emphasis added).

¹⁶⁴ *Davis*, 504 N.W 2d at 773 (Wahl, J., dissenting).

¹⁶⁵ See generally Henley, *supra* note 26, at 4.

reluctant to prohibit its use. In recent years, the Court has been plagued by inaction and has stalled its move forward by failing to expand its *Neil* line of cases to bar the use of peremptories on the basis of religious affiliation. The Court has failed to see the distinction between religious affiliation and belief, and in doing so, has allowed affiliated religious members to suffer the consequences even where there is no evidence that affiliation affects decision-making.

Extending *Neil* to prohibit peremptory challenges on the basis of religious affiliation is the next logical move. Religious affiliation is not an accurate indicator of one's beliefs, and the exercise of peremptories on such basis only further perpetuates a stigma that members of one religious group are incapable of being impartial decisionmakers. More importantly, religious affiliation also does not speak to a person's competence to serve as a juror. Contrary to religious affiliation, religious belief is an accurate predictor of one's competence and tells an attorney and the court much about whether a venireperson can be impartial in their role as a juror. Although the distinction is difficult to make, the Florida courts should adopt a new rule and prohibit the use of peremptories on the basis of religious affiliation. This new rule would not only ensure that people are not discriminated against for group membership, and but also the constitutional guarantee of having a jury representative of the cross-section of society.