PLAINTIFF'S MEMORANDUM OF LAW ON JUROR CHALLENGES

A. Introduction

"The purpose of conducting *voir dire* is to secure an impartial jury," *Davis v. State*, 461 So. 2d 67, 70-71 (Fla. 1984), which is a fundamental right guaranteed by both the United States and Florida Constitutions. *See* U.S. Const. amend. VII; *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."); Fla. Const., Declaration of Rights, art. 1, §§ 16, 22; *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *City of Miami v. Cornett*, 463 So. 2d 399, 400 (Fla. 3d DCA 1985). "'[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality,' and . . . '[i]f there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused.'" *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985) (quoting *O'Connor v. State*, 9 Fla. 215, 222 (1860); *Johnson v. Reynolds*, 97 Fla. 591, 598 (1929), respectively).

The test for determining juror competency and the discretion of the trial court in making that determination is set forth by the Florida Supreme Court in *Barnhill v. State*, 834 So. 2d 836, 844 (Fla. 2002):

> The test for determining juror competency is whether the 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. *See Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995). A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency. *See Pentecost v. State*, 545 So. 2d 861 (Fla. 1989). . . . It is the trial court's duty to determine whether a challenge for cause is proper. [*See Smith v. State*, 699 So. 2d 629, 635-36 (Fla. 1997); *Taylor v. State*, 638 So. 2d 30, 32 (Fla.1994).]

"[C]lose 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." *Bell v. Greissman*, 902 So. 2d 846, 847 (Fla. 4th DCA 2005); *see also Four Wood Consulting, LLC v. Fyne*, 981 So. 2d 2, 5 (Fla. 4th DCA 2007) ("[C]lose issues as to juror bias are resolved in favor of excusing the juror, rather than leaving doubt.").

B. <u>Permissible Areas of Inquiry</u>

Florida Rule of Civil Procedure 1.431(b) provides that parties have the right to conduct a reasonable oral examination of each of prospective juror. The length and extent 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." *Barker v. Randolph*, 239 So. 2d 110 (Fla. 1st DCA 1970) (citations omitted); *Ritter v. Jiminez*, 343 So. 2d 659 (Fla. 3d DCA 1977) ("Trial attorneys should be accorded ample opportunity to elicit pertinent information from prospective jurors on *voir dire* examination."). Furthermore, if the Court decides to limit the amount of time the parties have for *voir dire*, the Court must give the parties reasonable notice of those time constraints. *Roberts v. State*, 937 So. 2d 781, 784 (Fla. 2d DCA 2006) (finding the trial court's failure to "give the parties reasonable notice of the time constraints [on *voir dire*] so that they can pace the timing of their questioning as they see fit" constitutes reversible error); *Carver v. Niedermayer*, 920 So. 2d 123, 124-25 (Fla. 4th DCA 2006) (reversing for new trial where trial court failed to notify parties of time limitations on *voir dire* prior to the beginning of trial and placed arbitrary time limitations on questioning that was not repetitive or cumulative).

In order to explore potential bases for exclusion, counsel has the right to inquire about a prospective juror's feelings and opinions about points of law or issues in the case. *See Lavado v. State*, 492 So. 2d 1322 (Fla. 1986); *see also* Fla. R. Civ. P.

1.431(c)(1) ("[T]he court shall examine any prospective juror to determine whether that person . . . has formed or expressed any opinion, or is sensible of any bias or prejudice concerning [the action]. . . ."). Counsel may also ask whether a juror has formed an opinion about any issue in the case based on what the juror has heard or read about the case. *See Hill v. State*, 477 So. 2d 553 (Fla. 1985).

More specific areas of permissible inquiry include (a) matters affecting a prospective juror's personal life, including whether he feels that verdicts will raise his insurance premiums, *see Purdy v. Gulf Breeze Enterprises*, 403 So. 2d 1325 (Fla. 1981); (b) a juror's prior litigation history and feelings toward the legal system, *see Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002); (c) a juror's feelings on awarding non-economic damages, *see Sisto v. Aetna Cas. & Surety Co.*, 689 So. 2d 438 (Fla. 4th DCA 1997); and (d) whether the juror can consider the evidence and apply the law free from influence of what he has read or heard, *see Smith v. State*, 463 So. 2d 542 (Fla. 5th DCA 1985).

C. Valid Bases for Challenges for Cause

1. Generally

A juror should be excused for cause if there is any reasonable doubt that the juror "stand[s] indifferent to the action" and can render an impartial verdict. FLA. R. CIV. P. 1.431(c)(1); *Kearse v. State*, 770 So. 2d 1119, 1128 (Fla. 2000) (trial court must excuse a juror for cause "if any reasonable doubt exists as to whether the juror possesses an impartial state of mind"); *Farias v. State*, 540 So. 2d 201, 202 (Fla. 3rd DCA 1989) ("If there is a basis for a reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict solely on the evidence submitted and the law announced at the trial, he should be excused."). "'A juror is not impartial when one side must overcome a preconceived opinion in order to prevail.'" *Slater v. State*, 910 So. 2d 347, 348

(Fla. 4th DCA 2005) (quoting *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985)). In essence, "[t]he test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). "[C]lose 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." *Bell v. Greissman*, 902 So. 2d 846, 847 (Fla. 4th DCA 2005); *see also Four Wood Consulting, LLC v. Fyne*, 981 So. 2d 2, 5 (Fla. 4th DCA 2007) ("[C]lose issues as to juror bias are resolved in favor of excusing the juror, rather than leaving doubt."). "A new trial is required where the trial court denies a challenge for cause based on a juror's 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." *Id*, 902 So. 2d at 847 (citing *Salgado v. State*, 829 So. 2d 342, 344 (Fla. 3d DCA 2002)). "[R]easonable doubt is not overcome by a juror's silence as to a question asked of the entire panel." *Four Wood Consulting, LLC v. Fyne*, 981 So. 2d 2, 5 (Fla. 4th DCA 2007).

2. Application

Lack of impartiality, preconceived notions, and general biases require juror exclusion and can arise in numerous contexts, including (a) when a juror has a personal relationship with a party or a party's attorney, *see Price v. State*, 538 So. 2d 486 (Fla. 3d DCA 1989); (b) when a juror has experienced similar circumstances involved in the case that "could cloud [his] judgment," *see Hall v. State*, 682 So. 2d 208, 209 (Fla. 3d DCA 1996); or (c) when a juror "harbor[s] certain prejudices against personal injury lawsuits," *Nash v. General Motors Corp.*, 734 So. 2d 437,

439 (Fla. 3d DCA 1999). The following judicial determinations are instructive in showing when jurors must be excused for cause:

a. Error to refuse to strike for cause: a) juror whose wife had been involved in automobile accident causing their insurance rates to double, even though juror stated that he would not favor either the plaintiff or defendant; and b) juror who stated that he believes there should be caps on damages and this belief could possibly affect his deliberations. *See Rodriguez v. Lagomasino*, 33 Fla. L. Weekly D310 (Jan. 23, 2008).

b. Error to refuse to strike for cause a juror who stated belief that any person that trips and falls is partially at fault and that plaintiff was starting case a little behind, but stated on rehabilitation that he could be fair and follow the law given by the judge. *Algie v. Lennar Corp.*, 969 So. 2d 1135 (Fla. 4th DCA 2007).

c. Error to refuse to strike for cause a juror who held non-party specific negative feelings about prior personal lawsuit and it was unclear from her voir dire responses whether she could set aside those negative feelings and follow the law because juror merely remained silent when questions were asked of entire panel. *Four Wood Consulting, LLC v. Fyne*, 981 So. 2d 2, 5 (Fla. 4th DCA 2007).

d. Error to refuse to strike for cause juror who expressed distaste for lawyers and plaintiffs. *Frazier v. Wesch*, 913 So. 2d 1216, 1216-17 (Fla. 4th DCA 2005).

e. Error to refuse to strike for cause juror who expressed a "tiny bit" of prejudice in favor of defendant doctor, but stated that she didn't believe her feelings would affect her ability to evaluate the evidence. *Somerville v. Ahuja*, 902 So. 2d 930, 936 (Fla. 5th DCA 2005).

f. Error to refuse to strike for cause juror who believed damage awards should be capped. *Bell v. Greissman*, 902 So. 2d 846, 847 (Fla. 4th DCA 2005).

g. Error to refuse to strike for cause juror who believed "the testimony of a police officer carries a little more weight" than other witnesses. *Slater v. State*, 910 So. 2d 347, 348 (Fla. 4th DCA 2005).

h. Error to refuse to strike for cause juror who expressed she would not be able to place a dollar amount on the loss of the plaintiff's wife. *Gootee v. Clevinger*, 778 So. 2d 1005 (Fla. 5th DCA 2000).

i. Error to refuse to strike for cause juror who expressed bias against individuals with minor injuries seeking damages for pain and suffering. *Goldenberg v. Regional Import and Export Trucking Co., Inc.*, 674 So. 2d 761 (Fla. 4th DCA 1996).

j. Error to refuse to strike for cause jurors that indicated "negative attitudes toward the legal system due to previous unfavorable experiences with lawsuits filed against themselves or members of their families." *Levy v. Hawk's Cay, Inc.*, 543 So. 2d 1299, 1300 (Fla. 3d DCA 1989).

k. Error to refuse to strike for cause juror who knew one of party's attorneys, but expressed that she did not think she would be partial to one side and would "try to be fair." *Sikes v. Seaboard Coast Line R. Co.*, 487 So. 2d 1118 (Fla. 1st DCA 1986).

l. Error to refuse to strike for cause juror who stated he would find it "difficult" to follow law on defendant's defense but "guessed" he could be fair. *Kerestesy v. State*, 760 So. 2d 989 (Fla. 2d DCA 2002).

m. Error to refuse to strike juror for cause who "admitted that she 'probably' would be prejudiced but 'probably' could follow the judge's

instructions." *Imbimbo v. State*, 555 So. 2d 954, 955 (Fla. 4th DCA 1990).

n. Error to refuse to strike juror for cause who gave equivocal answers about her ability to remain impartial. *Jefferson v. State,* 489 So. 2d 211 (Fla. 3rd DCA 1986).

o. Error to refuse to strike for cause jurors who "indicated . . . that they would have difficulty following the law regarding compensation for pain and suffering." *Pacot v. Wheeler,* 758 So. 2d 1141 (Fla. 4th DCA 2000).

p. Error to allow party to use all peremptory strikes against one distinct racial group when only quickly-contrived excuses for the strikes were made because "cumulative effect or 'ratio of exclusion' . . . warrant[ed] increasingly careful attention by a trial judge as the series of strikes begins to seem systematic." *Sparks v. Allstate Const., Inc.*, 34 Fla. L. Weekly D1388 n.1 (Fla. 3d DCA July 8, 2009).

3. Juror Rehabilitation

"The rehabilitation of prospective jurors is a tricky business that often leads to reversal." *Martinez v. State,* 795 So. 2d 279, 283 (Fla. 3d DCA 2001). Although it is permissible, rehabilitation is rarely possible, especially when a juror exhibits bias, prejudice, or a preconceived notion about the case. *See Scott v. State*, 825 So. 2d 1067 (Fla. 4th DCA 2002) (reversing conviction where reasonable doubt existed as to juror's ability to be impartial after juror indicated she would find police officers to be more credible and subsequent attempts at rehabilitation were insufficient); *Carratelli v. State,* 832 So. 2d 850 (Fla. 4th DCA 2002) (trial court erred in failing to grant cause challenges where reasonable doubts were created as to juror's ability to be fair and impartial and attempted rehabilitation was not

sufficient to overcome doubts); *Rodas v. State*, 821 So. 2d 1150, 1153 (Fla. 4th DCA 2002) ("A juror's subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes.). In regard to juror rehabilitation, the Florida Supreme Court has observed:

> 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?

Martinez, 795 So. 2d at 283 (quoting *Johnson v. Reynolds*, 97 Fla. 591, 599, 121 So. 793, 796 (1929)).

As a result, courts and counsel should tread carefully in attempting to rehabilitate witnesses who display partiality or prejudice. *See Price*, 538 So. 2d at 489 ("We have no doubt but that a juror who is being asked leading questions is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented."); *Tenon v. State*, 545 So. 2d 382 (Fla. 1st DCA 1989) (error for trial court not to excuse admittedly biased jurors and instead seeking to rehabilitate them with questions that they could "follow the law" notwithstanding their biases). Consequently, any "back-peddling" by jurors in response to rehabilitative questions should be viewed with caution. *Club West, Inc. v. Tropigas of Fla., Inc.*, 514 So. 2d 426, 427 (Fla. 3d DCA 1987) ("Where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from

impartially reaching a verdict, a subsequent change in that opinion, arrived at after further questioning by the parties' attorneys or the judge, is properly viewed with some skepticism."). A juror who remains silent when questions are asked of the entire panel is not rehabilitated. *Four Wood Consulting, LLC v. Fyne*, 981 So. 2d 2, 5 (Fla. 4th DCA 2007) ("[R]easonable doubt is not overcome by a juror's silence as to a question asked of the entire panel.").

4. Error to Force "Waste" of Preemptory Challenge on Objectionable Juror

It is error for a trial court to force a party to exhaust its peremptory challenges on jurors who should be excused for cause. Doing so violates the right to exercise peremptory challenges. *See Kopsho v. State*, 2007 WL 1499007, *4 (Fla. 2007) ("[E]xpenditure of a peremptory challenge to cure the trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury.") (quoting *Busby v. State*, 894 So. 2d 88, 96-97 (Fla. 2004), citing *Trotter v. State*, 576 So. 2d 691 (Fla. 1991)); *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985) ("Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause"); *Farias v. State*, 540 So. 2d 201, 203 (Fla. 3rd DCA 1989) ("It is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges."); *Rodriguez v. Lagomasino*, 972 So. 2d 1050, 1053 (Fla. 3d DCA 2008) ("'[I]t is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges.'") (quoting *Tizon v. Royal Caribbean Cruise Line*, 645 So. 2d 504, 506 (Fla. 3d DCA

1994); *Diaz v. State*, 608 So. 2d 888, 890 (Fla. 3d DCA 1992); *Jefferson v. State*, 489 So. 2d 211 (Fla. 3d DCA 1986); *Anderson v. State*, 463 So. 2d 276 (Fla. 3d DCA 1984)).

5. Improper Use of Peremptory Strike

"Peremptory challenges are presumed to be exercised in a nondiscriminatory manner" and that a ruling on such a challenge "turns primarily on an assessment of credibility." *Cobb v. State*, 825 So.2d 1080, 1086 (Fla. 4th DCA 2002).

When an objection is made to the assertion of a peremptory challenge, and the objection asserts that the peremptory challenge was made on a discriminatory basis, the Florida Supreme Court has clearly delineated a three step procedure that must be followed:

1. First, the objecting party must make a timely objection, show that the venireperson is a member of a distinct protected group, and request that the trial court ask the striking party to provide a reason for the strike.

2. Second, if these initial requirements are met, the court must ask the proponent of the strike to explain the reason for the strike, and the burden shifts to the proponent to come forward with a race-, ethnicity-, or gender-neutral explanation.

3. Third, if the explanation is facially race-, ethnicity-, or gender-neutral, the court must determine whether the explanation is a pretext "given all the circumstances surrounding the strike," with the focus of this inquiry being the genuineness of the explanation.

Hayes v. State, 94 So.3d 452, 461 (Fla.2012) (citing *Melbourne v. State*, 679 So.2d 759, 764 (Fla.1996)).

D. Conclusion

Jury selection and *voir dire* is aimed solely at obtaining fair, impartial, and unbiased jurors. In doing so, the parties and the Court should "engage in an elegantly simple test: Would we, if we were in the [the parties'] shoes, want this person to sit in judgment of us?" *James v. State*, 731 So. 2d 781, 783 (Fla. 3d DCA 1999). If "any reasonable doubt exists as to whether the juror possesses an impartial state of mind," the juror "must be excused for cause." *Kopsho v. State*, 959 So.2d 168, 170 (Fla. 2007).

COHEN & KUVIN, LLC
955 N.W. 17TH Ave.
Bldg. D
Delray Beach, FL 33445
Phone: 561-665-8020
Fax: 561-665-8021
stk@cohenkuvin.com

LEOPOLD~LAW, P.A.
2925 PGA Blvd.
Suite 200
Palm Beach Gardens, FL 33410
Phone: 561-515-1400
Fax: 561-515-1401
dmartin@leopold-law.com