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IN THE SUPREME COURT
OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	CASE NO: SC19-96
GEOVANI JOHNSON,	)	
	)	
Respondent.	)	
_____	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Discretionary Review from the District Court
of Appeal, Fourth District

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1. Kimberly Acuna----appellate counsel for Petitioner;
2. Richard G. Bartmon ---- appellate counsel for Respondent;
3. The Honorable Martin Bidwill ---- Circuit Judge, Broward County;
4. Geovanni Johnson ---- Respondent;
5. Tonya Johnson ---- Assistant State Attorney, Broward County;
6. Edward Lopez ---- trial counsel for Defendant/Respondent; and
7. The Honorable Kathleen McHugh ---- Circuit Judge, Broward County.

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INTRODUCTION

References in this Brief to the Record ("R") and the transcript of jury selection and the trial ("T") will be the same as before the Fourth District. The State will be referred to as "Petitioner" or the State and Geovani Johnson by name or as Respondent. The appellate record submitted by the Fourth District will be "AR"; the symbol "e. a." will mean emphasis added and "i. c. o." will mean internal citations omitted. "IB" will refer to the State's Initial Brief on the merits.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement but makes the following additions, clarifications and corrections:

Mr. Johnson was charged with three counts of robbery with a firearm and possession of a firearm by a convicted felon. R, 205, 206. During her *voir dire* inquiries, the prosecutor asked if any of the jurors were a "fan" of "CSI". T, 105. Juror Fountain replied that "I like that they show you the different parts of the crime. They show you the whole aspect of it, from beginning to end…sometimes what you think is going to happen isn't always what ends up happening." T, 105. The State explained that this was not necessary and then asked Ms. Fountain "…knowing that I don't have to have CSI evidence to prove my case, are you comfortable with that?" T, 106. Fountain replied "it would depend on what type of case it is. You say that

you have testimony or anything at all?" T, 107. When the prosecutor responded affirmatively, Ms. Fountain said she would be comfortable. T, 107.

Prospective juror Peirce said she would "prefer" that the State show her CSI-type evidence but would not "require" it. T, 107. Immediately thereafter, the prosecutor anticipated that juror Ojo would also prefer such evidence when she told him: "I'm going to guess at what your answer is…Now, I know that you would like it but would you require the State to have it?" T, 108. Ojo replied: "I don't think so." T, 108.

After asking Ojo other questions, the State then asked juror Garvin about his view of CSI evidence. T, 109, 110; IB, p. 2. Garvin ultimately responded that if there was no such evidence in the State's case, he would not "require it". T, 110. Right after this response, juror Almendarez said she would prefer that the State "have a lot of evidence" before saying she would "believe it" if the State proved their case "with one witness." T, 111. Other jurors expressed hesitation or concerns if the State's evidence consisted of "one witness". T, 113-114, 116 (juror Cheval); 117 (juror Fieberg); 121 (juror Bradley); 122-123 (juror Roberts White); 124 (juror Jason Rodriguez); 124-125 (juror Logan); 125-127 (juror Campos); 130 (juror Ramon); 131 (juror Hansen); 132-133 (juror Almendarez); 133, 134 (juror Cox); 135 (juror Hanin).

The State exercised peremptory challenges on Ojo, T, 210, Bradley, T, 213, and on Jason Rodriguez as the alternate, T, 217. Fountain and Roberts White were part of the jury and Campos was the alternate. T, 220, 221.

When the State struck Garvin, defense counsel specifically observed that his client was African-American and asked for a race-neutral explanation from the State. T, 210-211. The Judge confirmed Mr. Garvin "appeared to be" a black male. T, 211. The State began by saying Garvin preferred to see CSI evidence as proof of guilt. T, 211. The State primarily responded that defense counsel had previously struck two black females and/or other prospective black jurors. T, 211. While the State was still giving its reasons, Judge McHugh interrupted the prosecutor and said: "All right. I find that to be race-neutral. I'm going to uphold the State's use of a peremptory on Mr. Garvin." T, 211. No further inquiry, comment or mention was made of Garvin's exclusion by the judge or parties. T, 211-219.

Before the jury was sworn, Respondent's counsel renewed his objection to the Garvin strike: "…for the purposes of the---the appellate record---And I've explained to [the prosecutor] that I can't accept the panel specifically…because the Court…denied my Melbourne v. State objection in the State striking Mr. Garvin." T, 219.

Respondent appealed his robbery convictions to the Fourth District. AR, 5. Mr. Johnson argued that the trial judge failed to conduct any "genuineness" inquiry as

required under Step 3 of *Melbourne*. AR, 57-60. Respondent's counsel acknowledged that other courts such as the Second District in *Spencer v. State,* 196 S. 2nd 400 (Fla. 2nd DCA 2016) ("*Spencer I*") had concluded that "a party's lawyer must ……specify any Step 3 deficiencies beyond an initial objection under Step 1 of the *Melbourne* process, to satisfy preservation requirements." AR, 58. Respondent noted that this Court had determined that a trial judge's compliance with all *Melbourne* stages was mandatory and that the Record gave "no indication" that the trial judge "considered or weighed any relevant circumstances in deciding whether the State's [peremptory] strike was discriminatory." AR, 59.

The State maintained that Respondent never specifically objected before the trial judge that it had not conducted a genuineness analysis and therefore had not preserved this issue. AR, 88-92. Petitioner additionally claimed the trial judge performed such an inquiry concerning juror Garvin. AR, 92-96.

Respondent replied that he had timely objected to the State's strike under Step 1 of *Melbourne* and had renewed this objection before the jury was sworn, preserving his claim under *Joiner v. State*, 618 S. 2nd 174 (Fla. 1993) and its progeny. AR, 136-141. Mr. Johnson asserted that acceptance of *Spencer I* to add procedural requirements to Step 2 and 3 would "impose needless barriers to consideration on the merits of the serious questions of fairness…embodied by the *Melbourne* procedure: eradicating discrimination in jury

selection." AR, 137, 138, 139. Respondent reiterated that the trial judge's "summary ratification" of the State's explanation of its Garvin peremptory strike did not meet the requirements of this Court's precedent and mandated reversal. AR, 140.

The Fourth District reversed Respondent's robbery convictions and sentence. AR, 147-173. The State moved for certification of conflict. AR, 174-191. The Fourth District agreed to certify conflict between its ruling on the required "procedure for a *Melbourne* challenge" with several decisions which "continue to adhere to the analysis of the Second District in Spencer I." *Johnson v. State*, 268 S. 3rd 729, 743 (Fla. 4th DCA 2018); AR, 743. In all other respects, the Fourth District issued the same opinion on the merits as its original ruling. [1]

In a 2-1 ruling, the majority rejected the approach in *Spencer I* and determined that the "true scope" of the *Melbourne* procedure required compliance with all 3 steps without the necessity to object separately at each stage. *Johnson,* 268 S. 3rd *supra* at 733; 736, 737, 738. The Fourth District's ruling specifically rejected the approach in *Spencer I* that a Step 3 inquiry be conducted only "if requested" and/or objected to by a party. *Johnson* at 734, 736, 737-738. The majority found that *Melbourne* "impose[s] a duty on trial courts, separate and apart from the duties of the advocate." *Id*.

[1] References in this Answer Brief to the Fourth District's ruling will be to the opinion issued December 19, 2018 on the State's motions for clarification and certification of conflict. *Johnson*, 268 S. 3rd *supra*; AR, 225-251. Citation to this case in the Argument part of this Brief will refer to the Appellate Record ("AR").

Judge Connor's opinion concluded that the procedures established in *Melbourne* and *Batson v. Kentucky*, 476 U. S. 79 (1984) served "multiple ends" including due process, equal protection and the Sixth Amendment guarantee of a right to a trial by a fair and impartial jury. *Johnson* at 741 (i. c. o.). The majority wrote that the presence of racial discrimination in jury selection compromised the integrity of the courts and harmed the interests of the community at large. *Supra*. Judge Connor and Judge Warner concluded that a judge who ignored such discrimination became a "willing participant" in a system that would undermine public confidence. *Johnson* at 742 (i. c. o.). The majority determined that the *Spencer I* approach would make Step 3 non-mandatory and could lead to its erosion as "protection against an improper discriminatory peremptory" challenge. *Johnson* at 737, 738.

The majority followed this Court's precedent that when a trial court record was "devoid of any indication" that a trial judge performed its independent obligation to determine "genuineness", an appellate court must reverse for a new trial because it could not assume such an inquiry was done or defer to non-existent findings. *Johnson* at 737; 742-743. The Fourth District found that the Record contained no indication that the trial judge conducted a Step 3 evaluation of all relevant circumstances surrounding the strike and had interrupted the State's Step 2 proffered reasons for its strike of Garvin. *Johnson* at 742, 743.

In his dissent, Judge Kuntz agreed with *Spencer I* that an objection by the opponent of a peremptory strike was required at each stage of the *Melbourne* inquiry to preserve a claim. *Johnson* at 744, 745 (Kuntz, Judge, dissenting opinion). Judge Kuntz determined that Judge Connor and Warner's ruling "imposes a new obligation" on trial judges "to act as an advocate" for a peremptory strike-opponent. *Johnson* at 744, 747, 748 (Kuntz, Judge, dissenting opinion).

STANDARD OF REVIEW

Point I: Whether the trial judge's responsibility to conduct an inquiry into the "genuineness" of the prosecutor's reasons for its peremptory challenge of an African-American prospective juror is mandatory or whether a new additional objection is required at every one of the three steps to preserve *Melbourne* claims. *Spencer v. State*, 238 S. 3rd 708 (Fla. 2018) (plurality opinion); *Hayes v. State*, 94 S. 3rd 452 (Fla. 2012); *Melbourne*, *supra; Johnson*, *supra*.

Point II: Whether the Fourth District correctly concluded that the trial judge complied with Step 3 of the *Melbourne* inquiry. *Hayes, supra; Melbourne*.

SUMMARY OF THE ARGUMENT

The Fourth District and Second District reached different resolutions of the question of whether a trial judge has an independent obligation to conduct all components of the procedure established by this Court in *Melbourne v. State*, 679 S. 2nd 759 (Fla. 1996) or whether a party has the responsibility to object or "request" such a step to

preserve a claim relating to it. This Court should adopt the Fourth District's conclusion that the trial judge is responsible for compliance with all three steps without the necessity of an objection at each stage to preserve a claim.

The trial judge summarily ratified the State's peremptory challenge of a prospective black juror without conducting any inquiry into the "genuineness" of the prosecutor's reasons for the challenge. The Judge conducted no assessment or analysis as required in Step 3 of the *Melbourne* analysis. The Fourth District correctly reversed Respondent's convictions because the judge's conclusory approval of the State's strike of prospective juror Galvin was insufficient under Step 3.

ARGUMENT

I. SIGNIFICANCE OF FUNDAMENTAL RIGHTS IMPLICATED BY SCOURGE OF DISCRIMINATION IN JURY SELECTION PROCESS DEMANDS THAT TRIAL JUDGES BE RESPONSIBLE FOR COMPREHENSIVE INDEPENDENT BATSON-MELBOURNE INQUIRY WITHOUT IMPOSING MORE PROCEDURAL HURDLES TO PRESERVE SUCH CLAIMS

The State devotes a single paragraph in a nearly 50 page brief to say that discrimination is "intolerable." IB, 24. While this statement is welcome, it minimizes the far-reaching extent and significance of the rights affected by claims under *Batson v. Kentucky*, 476 U. S. 79 (1986) and *Melbourne v. State*, 679 S. 2nd 759 (1996). The State's bare mention of these interests downplays

the evil that the *Batson* and *Melbourne* procedures were intended to eradicate. The pernicious history of discrimination in this country, and the evolution of efforts by Federal and Florida courts to tackle this problem as it affects peremptory challenges, emphasizes the need to give *Batson* and *Melbourne* the most vigorous enforcement. The importance of the Constitutional rights at stake and the nefariousness to be eliminated requires a *Batson-Melbourne* procedure which favors substance over form and resists imposition of new procedural hurdles.

The significance of the rights at stake in a *Batson-Melbourne* claim must be viewed against the backdrop of **centuries** of brutal battles over racial discrimination in American life. In the Supreme Court's latest pronouncement two months ago, Justice Kavanaugh described this country's history and experience with racial discrimination up to the ruling in *Batson. Flowers v. Mississippi*, 204 L. Ed. 2nd 638, 650-653 (2019). The 7-2 opinion began this recitation with the Civil War fought over the future of slavery, the ultimate form of racial discrimination. *Flowers, supra* at 650. *Flowers* recounted the passage of the Fourteenth Amendment in 1868 and its safeguard against violations of equal protection, intended to protect "the freedom of the slave race" against "oppression" by those who "formerly exercised unlimited dominion over [African-American slaves]." *Supra*; i. c. o. This was followed

by the Civil Rights Act of 1875 which made it a crime for a state to exclude individuals from jury service because of race. *Id.* The Court's opinion in *Strauder v. West Virginia*, 100 U. S. 303 (1880) invalidated a state statute that permitted whites only to serve as jurors, labeling this law an illegal "brand" upon African Americans in the administration of "equal justice." *Flowers* at 651.

Justice Kavanaugh recalled that despite these efforts, discrimination "persisted" in jury selection and spread to peremptory strikes because peremptories were unlimited. *Id*. Justice Kavanaugh stated that the State "could routinely exercise peremptories ..to ensure all-white juries" because the numbers of such strikes exceeded the number of black veniremen. *Flowers* at 652.

This ultimately led to *Swain v. Alabama,* 380 U. S. 202 (1965), 85 years after *Stauder, supra*. For the first time, the Supreme Court in *Swain* allowed claims of racial discrimination in jury selection if a defendant could establish a "history" of such discrimination as a threshold matter. *Flowers* at 652, 653, *quoting and citing Stauder,* 380 U. S. *supra* at 223.

The *Flowers* ruling documented a ***century*** of resistance to accepting the reality of equal protection and legislative and judicial efforts to eradicate this ugliness from jury selection. This malignant history and experience provides

critical context to the ultimate question in this case: whether to add new procedural requirements to preserve a *Melbourne* claim.

Discrimination in the judicial system is "most pernicious" and is "especially reprehensible given it is the complete antitheses of the courts' reason for being---to insure equality of treatment and even-handed justice." *State v. Slappy*, 522 S. 2nd 18, 20 (Fla. 1988), *quoting in part Batson* at 97-98. A judge gives "official sanction to….prejudice" when failing to follow *Melbourne*, which "influences bigotry in the society at large." *Slappy*, *supra.* Avoiding and eliminating such state-sanctioned prejudice makes it vital that *Melbourne* retain the necessary teeth to successfully facilitate these goals.

The scope of the Constitutional interests and policy concerns implicated by *Batson-Melbourne* reach far beyond Fourteenth Amendment equal protection. The *Batson-Melbourne* procedures were intended "to serve multiple ends." *Powers v. Ohio*, 499 U. S. 400, 406 (1991) (i. c. o.); *Johnson v. State*, 268 S. 3rd 729, 741 (Fla. 4th DCA 2018). Racial discrimination in jury selection also offends a defendant's right to a fair and impartial jury under the Sixth Amendment and Art. I, Section 16, *Florida Constitution*. AR, 240; *Miller-El v. Dretke*, 545 U. S. 231, 238 (2006); *Melbourne* at 765; *Slappy* at 20. It further diminishes the rights of racial minorities in general and racially excluded jurors in particular by imposing a "brand" of inferior status that

retains the ugliest vestige of historical discrimination. *Miller-El* at 238; *J. E. B. v. Alabama ex rel. T. R.,* 511 U. S. 127, 128, 141, 142 (1994). Racially-motivated peremptory strikes harm prospective jurors by wrongfully preventing them from participation in the "administration of justice" and from "making a significant contribution to governance." *Johnson v. California*, 545 U. S. 162, 172 (2005) *J. E. B.,* 511 U. S. *supra* at 140, 141, 142, 146; *Powers, supra*; *Batson* at 87.

Discrimination in jury selection hurts the community by undermining confidence in whether all participants will follow the law and whether the jury is truly neutral, sowing doubts about the integrity and fairness of the process. *Flowers* at 655; *Miller-El* at 238; *J. E. B.* at 140; *Powers* at 412, 413; *Batson* at 87, 99. Such a violation "oppresses" the public because it represents an arbitrary exercise of power by the proponent of a peremptory and makes the judge a "willing participant" in a proceeding that erodes confidence in the justice system. AR, 742. *Powers*, 499 U. S. at 411.

A. ADDITION OF MORE PROCEDURAL HURDLES TO CONSIDERATION AND PRESERVATION OF BATSON-MELBOURNE CLAIMS IS CONTRADICTED BY LEGAL HISTORY OF BROADENING, NOT LIMITING PROTECTION OF RIGHTS

If this Court adopts the reasoning, rationale and result of *Spencer I* and other cases certified as conflict with *Johnson*, a peremptory strike-opponent's

failure to meet these new hurdles will lead to much looser, limited examination of whether a peremptory strike is authentic. This result is contradicted by the history of *Batson-Melbourne* jurisprudence which ***does the exact opposite*** by broadening judicial scrutiny of possible discrimination in jury selection.

The widening of this scrutiny is reflected by the extension of *Batson-Melbourne* protections beyond race to encompass other groups based on gender and ethnicity as well as private parties in civil cases. i. e. *J. E. B.*, 511 U. S. *supra* at 129 (gender); *Georgia v. McCollum*, 505 U. S. 42, 46, 47, 50 (1992) (private civil litigants); *Hernandez v. New York*, 500 U. S. 352, 358 (1991) (ethnicity, Latin Americans); *Welch v. State*, 992 S. 2nd 206, 211 (Fla. 2008) (gender); *State v. Alen*, 616 S. 2nd 452, 455 (Fla. 1993) (Hispanics). This augmentation of the scope of those covered reflects the need to reject the *Spencer I* approach in the interest of enforcing a "**vigorously** impartial system of jury selection." *Slappy* at 21 (e. a.).

Federal and Florida courts have also enlarged the thresholds of the *Batson* and *Melbourne* steps where they have proven too difficult to meet. In *Swain, supra*, the U. S. Supreme Court required an opponent of a peremptory strike to demonstrate a pattern or history that such discrimination had taken place. In *Batson*, the Court determined that Step I under *Swain* was an

"insurmountable burden" that was too difficult to meet. *Batson* at 92. The Court relaxed this "crippling…burden of proof" and required that the strike-opponent raise only an "inference of discrimination." *Batson* at 92, 93, 97. This modification was mandated by the equal protection rights at stake. *Batson* at 92, 93. The *Batson* court created this change because of the original broad goal that trial courts "be sensitive to the discriminatory use of peremptories." *Batson* at 99.

In *Johnson,* the Supreme Court invalidated a state law which required a *Batson* objector to establish in Step 1 that it was "more likely than not" that the proponent's strike were based on racial bias. *Johnson, supra* at 164. The Supreme Court concluded that while a state could use "flexibility" in its application of *Batson,* a state could not impose a burden "more onerous" than *Batson*. *Johnson* at 168, 170, 173. In *Flowers*, the majority observed that since *Batson,* the United States Supreme Court has "guarded against any ***backsliding***" in its extension of *Batson* to other forms of discrimination. *Flowers* at 655 (e. a.).

Florida courts altered their procedure for similar reasons, such as those addressed in *Batson* in overruling *Swain.* In *State v. Johans*, 613 S. 2nd 1319, 1321 (Fla. 1993), this Court evaluated the existing test requiring the objector to demonstrate in Step 1 that there was a "strong likelihood" that a peremptory

strike was exercised for racial reasons. This Court noted that case law had not adequately defined what "strong likelihood" meant. *Supra.* This Court thus receded from *State v. Neil,* 457 S. 2nd 481 (Fla. 1984) to require a defendant to show that a peremptory was being used in a racially discriminatory way. *Supra.* This standard was relaxed to only require that the venireperson struck was a "member of a distinct racial group". *Melbourne* at 764. This was designed to help trial courts "conform" to the State constitutional provisions on the right to an impartial jury trial as well as state and Federal equal protection. *Supra.*

In reviewing some of this history, this Court observed that the intent was "*not to obscure* the issue in *procedural rules*…but to provide leeway" in allowing a party to show the discriminatory use of a peremptory challenge. *Slappy* at 21-22, e. a.; *see also State v. Whitby*, 975 S. 2nd 1124, 1125-1126 (Fla. 2008) (Pariente, Justice, concurring opinion) (hereafter "Pariente concurrence"). Doubts in applying the standard were to be resolved in a way "***least likely*** to ***allow*** discrimination." *Slappy* at 22. (e. a.).

This Court has said that the overall intent of these standards is to "encourage inquiry" when a peremptory "is called to a trial court's attention because the overall value is to eliminate invidious discrimination in jury selection." *Whitby* at 1128 (Pariente concurrence) (e. a.). This Court held that while "little

is required" at a Step 1 stage, "**too much is lost** if discrimination is permitted to remain **undetected**." *Welch*, 992 S. 2nd *supra* at 212, 213 (e. a.)(majority of Florida Supreme Court adopted Pariente concurrence in *Whitby*); AR, 235 (where majority determined that if Florida courts "limit the reach" of *Melbourne* and make Step 3 non-mandatory, "the protection against an improper discriminatory peremptory…is lost"); *Helfrich v. State*, 272 S. 3rd 454, 2019 Fla. App. LEXIS 4072, * 4-5 (Fla. 3rd DCA, March 20, 2019) (Emas, Chief Judge, dissenting opinion) (3rd DCA's Chief Judge agreed with the *Johnson* majority that "Without Step 3, the protection against an improper discriminatory peremptory challenge is lost", *quoting Johnson* at 738).

These rulings strongly indicate that imposing the limits on *Melbourne's* Step 3 espoused in *Spencer I* and similar decisions contravenes the historical intention of Federal and Florida courts to **reduce** limitations, **not heighten them**.

B. BATSON, MELBOURNE AND PROGENY HAVE EXPRESSED STRONG PREFERENCE FOR TRIAL JUDGE TO CONDUCT INDEPENDENT INQUIRY AND ANALYSIS IN STEP 3 WITHOUT NEW REQUIREMENT OF SEPARATE OBJECTION TO TRIGGER IT OR TO PRESERVE STEP 3 CLAIM

The essence of *Spencer I* is that the objecting party must specifically object to a deficiency in a *Melbourne* Step 3 analysis by the trial court to preserve that claim. *Spencer I,* 196 S. 2nd at 406-409. *Spencer I* further holds that a Step

3 inquiry need not be conducted in every case unless the peremptory strike-opponent objects to the State's facially race-neutral explanation. *Spencer I.* Federal and Florida courts have consistently promoted the contrary view that a trial judge's **independent** Step 3 inquiry is an easy, practical and effective procedure that must be **universally** enforced.

Most recently, Justice Kavanaugh unequivocally wrote that the responsibility for enforcing *Batson* "*rests first and foremost* with the trial judge." *Flowers* at 656, e. a.; *Batson* at 97; 99, n. 22. The *Flowers* majority stated that the trial judge was "at the front lines of American justice" and has "primary responsibility" to keep discrimination from "seeping into the jury selection process." *Flowers* at 656. In *Batson,* the Supreme Court determined that the trial judge's "experience in supervising voir dire" justified imposing the duty on him or her to determine whether discrimination was established. *Batson,* 476 U. S. at 98. The Court has also observed that because a Step 3 inquiry is so fact-intensive and often turns on evaluations of credibility, the trial judge is uniquely qualified and positioned to exercise an "affirmative duty" to enforce *Batson* and its underlying rationales and principles. *Hernandez* at 365(i. c. o.); see also *Morgan v. City of Chicago,* 822 F. 3rd 317, 327 (7th Cir. 2016).

Florida courts have also promoted the independent nature of a trial judge's duty to conduct a Step 3 inquiry. The language of *Melbourne* itself places this obligation on the trial judge. *Melbourne* at 764; 764, n. 8. In *Whitby,* a three-judge concurring opinion applauded the other four judges for deciding not to "recede" from the *Melbourne* procedure. *Whitby* at 1125 (Pariente concurrence). Tracing the history of this process, Justice Pariente characterized Step 3 as "the critical one" and maintained that "the thrust of our case law is to encourage an inquiry whenever a suspect peremptory challenge is called to a trial court's attention." *Whitby* at 1128.

Justice Pariente responded to concerns that *Melbourne* produced too many reversals for "technical reasons." *Whitby* at 1129. Justice Pariente relied on the history of this Court's early efforts to combat discrimination in jury selection, reiterating that *Melbourne* was a "simple, precise and easy to administer procedure" where "little is required" but "too much is lost if discrimination is permitted to remain undetected." *Whitby* at 1129, 1130 (Pariente concurrence); see also *Hayes* at 461, *quoting Whitby* at 1130. This "viab[ility]" and "value" of *Melbourne* was further promoted in *Welch* where a majority of this Court adopted the *Whitby* viewpoint. *Welch* at 212, 213. This became the backdrop for the ruling in *Hayes.*

Citing to *Whitby* and *Welch*, this Court expressly stated that each step of *Melbourne*, including Step 3, was mandatory and that a trial judge's failure to comply with each step would require a new trial. *Hayes* at 461. The *Spencer II* plurality rejected the *Spencer I* imposition of a "preservation by new objection" requirement, finding this was "contrary" to this "plain language" of *Hayes. Spencer II* at 716. The plurality amplified this holding by stating that the *Hayes* ruling "provides…[that]..a trial court has a duty to perform the correct legal analysis independent of trial counsel's duty." *Spencer II* at 716, *citing Hayes* at 465. (e. a.). The *Johnson* majority recited this *Spencer II* holding, applying this key *Hayes* language that the independent judicial Step 3 inquiry and analysis was mandatory regardless of whether it was "requested." AR, 231-232, 235, *citing in part Welch* at 212. This *Hayes* edict has otherwise been faithfully applied. i. e., *City of Orlando v. Haymes*, 263 S. 3rd 285 (Fla. 5th DCA 2019); *West v. State*, 168 S. 3rd 1282, 1284-1285 (Fla. 4th DCA 2015); *Wynn v. State*, 99 S. 3rd 986, 989 (Fla. 3rd DCA 2012).

The State's response is to label *Hayes* mere dicta, adopting from the *Spencer II* concurrence. IB, 30-35; *Spencer II* at 719, 720 (Lawson concurrence). This disparagement of *Hayes* ignores its consistency with Federal and Florida decisions which importantly impose the Step 3 obligation on a trial judge.

Supra. Furthermore, this argument erroneously characterizes the relevant *Hayes* language as unnecessary to the issues raised in that case.

In *Hayes*, defense counsel explained that his peremptory strike of a female juror was because she had relatives in law enforcement. *Hayes* at 456. The trial judge sustained the State's gender-discrimination challenge because that juror had said that this situation "created no problem" in her ability to be fair. *Id.* The State did not challenge defense counsel's explanation as pretext. *Hayes* at 456-457. Even when the State conceded on appeal that the trial judge mistakenly treated the defense challenge as "cause", the First District deferred to the trial judge's ruling even though no Step 3 inquiry was conducted. *Hayes* at 458.

This Court addressed how the First District misapplied *Melbourne*. *Hayes* at 464. The 6-1 majority found that the trial judge wrongly interpreted the challenge as cause; that the judge erred in not engaging in a Step 3 inquiry and that the First District wrongfully deferred to a Step 3 inquiry that did not take place. *Hayes* at 461. This Court drew conclusions about the nature and scope of *Melbourne;* the status of the *Melbourne* inquiry when no Step 3 inquiry is conducted by a trial judge; the inability of an appeals court to defer to a trial judge's ruling in such circumstances and the reasons why enforcement of the *Melbourne* steps is mandatory. *Hayes* at 461-467. These

conclusions were not *dicta* because they were germane to the facts and issues and were not immaterial to the outcome. *Throutman v. Junior*, 2019 Fla. App. LEXIS 9133, *24-25 (Fla. 3rd DCA, June 12, 2019); *Mills v. State*, 772 S. 2nd 650, 652 (Fla. 1st DCA 2000). While two justices characterized much of *Hayes* as dicta, there were five justices who did not join this view in *Spencer II.*

The more crucial question is whether *Hayes* is a better safeguard of the rights at stake in *Melbourne* and more strongly promotes the vigilance required to guard against the destructive force of discrimination in jury selection. Justice Lawson has called upon this Court to resolve any conflict between *Hayes* and *Floyd v. State*, 569 S. 2nd 1225, 1229, 1230 (Fla. 1990). *Spencer II* at 720, 721 (Lawson concurrence). The *Hayes* ruling, rationale and result that was endorsed by *Johnson* promotes the Constitutional interests and anti-discriminatory goals of *Batson* and *Melbourne* more rigorously than the additional "super objection"-preservation requirements in *Spencer I*. *supra; infra*.

The *Johnson* majority likened the trial judge's duty to independently examine and evaluate a *Melbourne* objection in Step 3 to a judge's obligation to decide whether a discovery violation prejudices preparation by an opposing party or whether an accused is competent to stand trial. AR, 233. In a discovery violation scenario, the trial judge conducts a *Richardson* hearing to

determine if the violation is inadvertent or willful and trivial or substantial and whether it prejudiced the other side's ability to prepare for trial. *Richardson v. State,* 246 S. 2nd 771, 775 (Fla. 1971); *see also Lowe v. State,* 259 S. 3rd 23, 46 (Fla. 2018). This full inquiry must be conducted by a trial judge when he is made aware that a discovery request was not met. *Lowe*, *supra; Smith v. State*, 7 S. 3rd 473, 506 (Fla. 2009); *Ferrari v. State*, 260 S. 3rd 295, 309 (Fla. 4th DCA 2018). This mandatory inquiry must take place when the trial judge "has notice of a possible discovery violation", **whether or not** a party specifically asks for a *Richardson* hearing. AR, 234. *Robinson v. State*, 198 S. 3rd 1088, 1093 (Fla. 4th DCA 2016); *Cliff Berry, Inc. v. State*, 114 S. 3rd 394, 414 (Fla. 3rd DCA 2012) (where Justice Lagoa wrote the majority opinion); *Jones v. State*, 32 S. 3rd 706, 711 (Fla. 4th DCA 2010).

The *Richardson* procedure is an apt analogy. Just as the *Melbourne* inquiry is triggered by the suggestion that a venireperson belongs to an identifiable minority group, the *Richardson* hearing is an integrated multi-step procedure initiated by the suggestion of a possible discovery violation. *Supra*. It would not be reasonable to suggest that anything short of a full and independent analysis by a trial judge of the *Richardson* multi-part test is appropriate. It is further unreasonable that the objecting party could only trigger the "prejudice" prong of the *Richardson* analysis or preserve a claim **if and only**

if that party specifically requested the trial judge to examine procedural prejudice.

An independent *Richardson* inquiry by the trial court is warranted because the trial judge has a duty to insure the integrity and fairness of the trial. *Johnson* at 236. A mandatory independent Step 1, 2, and 3 *Melbourne* procedure is warranted for the same reasons. Point IB, *supra*. An independent evaluation without a "request" should be mandatory in determining a claim of racial discrimination in jury selection, which is just as consequential as a discovery violation or trying an incompetent defendant. AR, 233. *supra; Dougherty v. State*, 149 S. 3rd 672, 678 (Fla. 2014); *Sutton v. State*, 264 S. 3rd 261, 263 (Fla. 2nd DCA 2019); *Boren v. State*, 262 S. 3rd 243, 244 (Fla. 1st DCA 2018) (once trial judge has reasonable grounds to question competency of an accused to stand trial, judge must hold competency hearing and is **"duty-**bound" to make "independent determination"). (e. a.).

As in these analogous settings, a trial judge's role in a *Melbourne* inquiry should not be allowed to descend to nothing more than a passive responder to affirmative objections by one side or the other. The trial judge is the presiding "agent" of the Government in the courtroom and the vanguard against the invidiousness of discrimination which can taint the foundational core of a trial. Without the trial judge's active **and independent** consideration and

adjudication of a *Melbourne* claim, such claims will go undetected or unpreserved. *Spencer I*. The inevitable result would be "backsliding" of the very rights *Batson* and *Melbourne* were created to vindicate. AR, 235. *Flowers; Hayes* at 467; *Welch* at 213; *Whitby* at 1130 (Pariente concurrence).

Adoption of the *Spencer I/Spencer II* concurrence means that pretextual challenges could go unreviewable because a Step 3 inquiry was not triggered or preserved. AR, 235. The lack of "unpreserved" review would create an intolerable risk that discrimination goes "undetected", *Welch; Whitby* (Pariente concurrence), slipping through the cracks to produce a contaminated verdict. This undercuts the public interest in the integrity and fairness of the judicial system, free from discriminatory impact that the independent "judicial assessment" is designed to avoid. AR, 240. *Batson; Melbourne*; *Hayes.* Discriminatory strikes would likely become more commonplace, increasing and not abrogating the existence and impact of discrimination.

This would wreak havoc on appellate review of *Melbourne* claims. As analyzed in *Hayes*, a reviewing court must reverse a conviction resulting from a Record "devoid of any indication" that the trial judge considered any relevant circumstances or conducted a meaningful Step 3 inquiry. *Hayes* at 463. An appellate court faced with this situation cannot defer to or meaningfully apply the clear error standard of review to an evaluation and

process **which did not happen**. *Id*. Without an effective mandatory Step 3 inquiry, the resulting inability to effectively review challenges or defer to a trial judge's proper exercise of discretion would be more prevalent. This deleterious impact on appellate review of *Melbourne* claims and trial records would be another undesirable consequence of new procedural impediments.

The *Batson-Melbourne* interests extend well beyond the interests of a proponent or opponent of a peremptory strike in a criminal case. *Supra,* Point I. The *Bates-Melbourne* inquiry should not be contingent on more procedural hoops to jump through. Rooting out discrimination to assure equal protection and a fair and impartial jury trial should be part of a trial judge's independent responsibility to avoid such intolerable fissures in the foundational pillars of the justice system.

The real problem is not whether a Step 3 inquiry should be mandatory whether "requested" or not. *Spencer I.* The practical problems stem from trial judges' failure to comply with the *Melbourne* test i. e., *Spencer II* (plurality); *Hayes; Welch; Whitby* (Pariente, Justice, concurring). The solution to this difficulty is to re-commit to vigilant enforcement of all *Melbourne* steps, not discard them because Step 3 is considered an "inconvenience." *Spencer I.*

Concerns have been expressed that the *Batson-Melbourne* inquiry has turned from being a "side show" to an unwelcome "main event." AR, 248 (Kuntz,

Judge, dissenting opinion), *citing J. E. B.* at 147 (O'Connor, concurring opinion). This is a "Chicken Little" fear. The *Batson* case itself recognized that this test is not overly onerous. *Batson* at 99. In upholding the continuing vitality of *Melbourne,* this Court said in *Welch* that the exercise of this inquiry by a trial judge was not burdensome. *Welch* at 212, 213.

A *Melbourne* inquiry is not a substantially more taxing hardship or time-consuming procedure than a *Richardson* hearing. *Welch; Whitby* (Pariente concurrence). The criteria of *Melbourne* have been known to the legal community for nearly a quarter-century. The benefits *Melbourne* and *Batson* provide and the evil it purges far outweigh any inconvenience described in *Spencer I*. Maintaining an independent judicial inquiry in Step 3 without the increased procedural hindrance advocated in *Spencer I* is a more robust and comprehensive approach than making this inquiry contingent on more arduous preservation.

Making Step 3 contingent on meeting new procedural requirements beyond *Joiner* will multiply ineffective assistance of counsel claims by defendants whose lawyers did not properly preserve them. This will increase the resources that the State, defense and judiciary would need to deal with this fallout. This would amplify a lack of public confidence in the integrity and

fairness of the criminal justice system, undercutting a primary interest advanced by *Batson* and *Melbourne.*

In *Melbourne,* this Court determined that the right to a fair and impartial jury trial should not be burdened by "reversible error traps" but governed by "reason and common sense." *Melbourne* at 765; IB at 17. It defies "reason and common sense" to cripple the crux of *Melbourne* for a process that promotes form over substance. The substance of an independent judicial inquiry is too important to saddle with "super" procedural objections.

C. RESPONDENT PROPERLY PRESERVED MELBOURNE CLAIM BY OBJECTION TO STATE'S PEREMPTORY STRIKE OF BLACK JUROR BASED ON RACE AND RENEWAL OF OBJECTION BEFORE JURY WAS SWORN

During jury selection, Respondent objected to the State's peremptory challenge of potential juror Garvin, asking for a race-neutral reason. T, 210, 211; AR, 226. Defense counsel renewed this objection before the jury was sworn. T, 219, 221; AR, 226. Thus, Respondent's *Melbourne* claim that there was no Step 3 inquiry or analysis was properly preserved under *Joiner.*

This precedent has been maintained by this Court for 26 years in cases involving preservation of jury selection issues, including *Melbourne* itself. *Joiner*. *supra* at 176; *Melbourne* at 765; 765, n. 14 (defendant failed to preserve *Melbourne* claim because counsel failed to renew objection before jury sworn); i. e., *Salazar v. State,* 188 S. 3rd 799, 821 (Fla. 2016) (cause

challenge not preserved under *Joiner* because not renewed before jury sworn); *Mattaranz v. State,* 133 S. 3rd 473, 484 (Fla. 2013) (defendant preserved cause challenge by complying with *Joiner)*; *Carratelli v. State*, 961 S. 2nd 312, 318, 319; 319, n. 3 (Fla. 2007) (*Joiner* controls preservation of claims involving jury selection challenges, including peremptory strikes); *Zack v. State*, 911 S. 2nd 1190, 1204 (Fla. 2005) (*Melbourne* claim not preserved by renewal of objection before jury sworn). It is this "objection/re-objection process" **which Mr. Johnson's counsel complied with** that this Court has viewed as the "decisive element in a juror-objection preservation analysis." *Mattaranz*, 133 S. 3rd *supra* at 482.

Joiner fulfills the underlying rationale behind the contemporaneous objection rule: informing the trial judge of the existence of possible reversible error and affording the judge the chance to correct i. *Joiner* at 176; *Castor v. State*, 365 S. 2nd 701, 703 (Fla. 1978). This Court observed that when a party does not "re-object", the trial court can "reasonably assume" that the party abandoned his claim out of "satisfaction" with the jury since the initial objection. *Joiner* at 176; see also *Carratelli,* 961 S. 2nd *supra* at 318; *Zack, supra*. When a party *does* "re-object" before the jury is sworn it places the trial judge on notice that the party still believes there is reversible error. *Mattaranz* at 482; *Carratelli* at 318; *Joiner* at 176. Once on notice, the trial

judge has a final opportunity before trial starts to "redress the situation" by recalling the improperly stricken juror, striking the panel or standing by its earlier ruling. *Mattaranz* at 483; *Carratelli* at 319; *Joiner* at 176. This "re-objection" prevents a "gotcha" where a party accepts the jury without any reservations and then wants to use uses *Melbourne* error as a "trump card" on appeal if he loses at trial. *Carratelli* at 312.

The Fourth District followed this Court's plurality ruling that preservation of a *Batson* claim *did not require "more"* than meeting the *Joiner* standard. AR, 230, 233. *Spencer II*, 238 S. 3rd at 711 (plurality). Judge Connor's ruling rejected the suggestion in *Spencer I* and the *Spencer II* concurrence that a party has to make an additional objection when the proponent of a strike gives face-neutral reasons to trigger or preserve a Step 3 claim. AR, 233, 234. The majority concluded in *Johnson* that no additional "super objection" beyond *Joiner* was necessary because the trial judge has a "duty" to conduct the appropriate "judicial assessment" under *Melbourne*, independent of a lawyer's obligation. AR, 233, 235, *citing in part Hayes at* 465 and *Batson* at 98. The majority observed that imposing such a new super-objection hurdle to trigger a Step 3 inquiry was contrary to this Court's pronouncements that each of the three-step procedure is mandatory. AR, 231, 232, *quoting in part Spencer II* at 716 (plurality) (*quoting Hayes* at 461). The Fourth District

further determined that the *Melbourne* procedure was established by this Court with the intent that all steps be followed and that none of these steps require a prior "request" or additional objection by counsel as a prerequisite. AR, 233.

The Fourth District's rejection of the *Spencer I* "super objection" requirement is the better view based on history, public policy and precedent. *Supra*. Adherence to *Melbourne* and *Batson* without having to further trigger or preserve Step 3 provides the best assurance that the vestiges of racial discrimination in jury selection will be eliminated and that no "backsliding" will undermine the rights of litigants, jurors, the community and the justice system. AR, 233-235; 240-243. *Flowers*; *Batson; Welch at* 212, 213; *Melbourne*.

The State insists that Respondent's counsel had plenty of time and opportunity to contest the prosecution's explanation of his strike of juror Garvin. IB, 35-38. The trial judge interrupted the State's unfinished explanation of his strike, overruled defense objections in a very cursory way and moved on with peremptories of other potential jurors. T, 210, 211. Defense counsel would have had to interrupt the proceedings and run the risk that trying to re-address the Garvin strike would draw the ire of the presiding judge. A trial lawyer faces this and many other pressures in jury selection,

including the courtroom protocols of a particular trial judge; time pressures; nerves and an imperfect memory of what occurred earlier. Under these pressures, even a seasoned trial lawyer may not be able to fully communicate a basis for disputing a facially neutral reason for a strike.

In light of these realities, the *Joiner* requirements are a concise, well-defined easy to remember process at logical stages---when a juror is stricken and when a jury is sworn to begin trial—to alert the judge to possible reversible error and a final chance to correct it. *Supra*. The Step 3 process favors a judicial examination of all circumstances surrounding the strike that informs a more thorough assessment, unburdened by in-the-moment tensions and stress. *Batson; Hayes; Melbourne*. Having a judge ask a strike-opponent for a response to the proponent's facially neutral reasons, AR, 234, 242 will better assist a trial judge in its Step 3 decision-making process by enabling a lawyer to collect thoughts and reasonably argue facts and law to prove discriminatory intent.

The State contends that by not requiring a *Spencer I* objection to a proponent's facially neutral explanation, an appeals court can reach a claim not specifically preserved. IB, 30. This is contradicted by the steady adherence of Florida courts to *Joiner* as the established preservation procedure for *Melbourne* claims. *Supra*. The reversal of convictions ordered by Florida

appellate courts is necessary because the absence of a clear "judicial assessment" leaves an appellate court unable to conduct meaningful appellate review or extend deference to a Step 3 inquiry that was not performed. AR, 234, 242; *Hayes* at 463, 464; 464, n. 7 *and cases cited*. It is the failure of trial judges to comply with Step 3, not the failure of lawyers to sufficiently object that is responsible for this circumstance. *supra*.

The approach favored by *Spencer I*, the concurring opinion in *Spencer II* and the dissent here would impose substantially new modifications to the *Melbourne-Joiner* preservation rules. Such change from a rule consistently applied for the 23 years *Melbourne* has existed would require this Court to reject the "strong" presumption favoring *stare decisis*. *Roughton v. State*, 185 S. 3rd 1207, 1210 (Fla. 2016); *Brown v. Nagelhout*, 84 S. 3rd 304, 309 (Fla. 2012) (i. c. o.); *Dorsey v. State*, 868 S. 2nd 1192, 1199 (Fla. 2003). There is no reason to "bend" the "reliable" and "established" *Joiner* rule. *Id.* There has been no epic change of circumstances since *Joiner* or grave error in the "legal analysis" supporting the *Joiner* preservation rule in *Melbourne* situations. *Robertson v. State*, 143 S. 3rd 907, 910 (Fla. 2014); *Puryear v. State*, 810 S. 2nd 901, 905 (Fla. 2002). There has been no suggestion by a majority of this Court that the *Joiner-Melbourne* rule is "unsound in principle" or

"unworkable in practice." *Roughton, supra; Robertson, supra; Brown*, 84 S. 3rd *supra* at 310. [2]

This precedent should be not be altered because the makeup of this Court has changed.

D. REASONS GIVEN IN CONFLICT CASES FOR REQUIRING "SUPER OBJECTIONS" TO TRIGGER STEP 3 INQUIRY OR PRESERVE IT FOR APPEAL ARE NOT JUSTIFIED BY LAW OR POLICY

In *Johnson,* the majority certified conflict between its ruling and several other post-*Spencer I,* pre-*Spencer II* decisions that "continue to adhere to" *Spencer I.* AR, 243. The rulings in *Brown v. State*, 204 S. 3rd 546, 547 (Fla. 5th DCA 2016); *Hannah v. State*, 194 S. 3rd 424 (Fla. 3rd DCA 2016), and *Ivy v. State*, 196 S. 3rd 394 (Fla. 2nd DCA 2016) were based on *Spencer I.* Judge Altenbernd offered several rationales for imposing a brand new "super objection" requirement to trigger a Step 3 inquiry or preserve a Step 3 claim. Each of these justifications minimize the fundamental and foundational significance of *Melbourne* and *Batson* procedures.

The "justification" primarily espoused by Petitioner is that requiring a judge to independently conduct a Step 3 inquiry without more qualifying objections

[2] The *Joiner* objection/re-objection requirement has proven very effective in barring the consideration of *Melbourne* claims on the merits. *Supra*, text, p. 28 *and cases cited*. It would not be fair to Mr. Johnson or his counsel to penalize them because counsel specifically and properly preserved his Melbourne claim under *Joiner* on October 12, 2015, before *Spencer I* was even issued and without a uniform adoption of *Spencer I* by a majority of this Court.

will turn the trial judge into an advocate. IB, 29; AR, 249, 250 (Kuntz, Judge, dissenting opinion); *Spencer I* at 408; *Spencer II* at 721, 722 (Lawson concurrence). This mischaracterizes what a trial judge does at a Step 3 stage.

Step 3 has long been characterized by state and Federal courts as the critical and essential stage where the judge determines whether a peremptory is authentic or pretext for discrimination. AR, 235. *Flowers* at 656; *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016); *Johnson*, 545 U. S. at 171; *Purkett v. Elem*, 514 U. S. 765, 768(1995); *Slappy at* 22; *Hayes* at 461, 462; *Melbourne*. In Step 3, it is the trial judge who must consider all relevant circumstances surrounding the strike in question; evaluate the credibility of the reasons offered and the proponent offering them; make a "judicial assessment" of the "persuasiveness" of these reasons and get the "actual answers" to the suspicions raised about a strike. *Flowers* at 656; *Miller-El*, at 239; *Johnson* at 172; *Purkett, supra*; *Batson* at 98; 98, n. 21; *Spencer II* at 714 (plurality opinion); *Hayes* at 461, 462; *Melbourne* at 764; 764, n. 8.

None of these functions requires a trial judge to "develop" the case for the opponent of the strike. i. e., *Spencer I* at 409. This role does not require the trial judge to depart from neutrality or promote or champion any particular view for or against genuineness. Making the ultimate determination and providing the "actual answers" for the suspicions raised by the parties,

Johnson, 545 U. S. at 172, is not advocating a particular outcome. As Judge Connor declared, asking questions or conducting an inquiry to decide the "truth" of the discrimination claim, "clarify issues" or "test the strength of an argument" does not make the judge an advocate. AR, 242.

A discovery or competency inquiry is not contingent on a defense counsel request or objection. AR, 233 *and cases cited*. These inquiries are seen as part of a judge's duty to protect the integrity and fairness of the relevant proceedings by preventing trial by ambush and foreclosing an incompetent defendant from trial and conviction. AR, 234. *Dougherty, supra*; *Richardson.* Similarly, carrying out a Step 3 *Melbourne* inquiry is furthering the integrity and fairness interests to remove the dark corruption of racism.

The State's lone reference to Judge Connor's analogy to *Richardson* and *Dougherty* hearings is a short footnote maintaining these are "ill-suited" comparisons because of "foundational principles….. unique" to *Melbourne*. IB, p. 25, n. 9. The State misses the point. In discovery and competency contexts, a trial court addresses these issues as part of its duty to promote fairness and integrity. *Id*. The *Melbourne* process fosters the same kind of interests by broadly addressing them, not imposing more restrictive thresholds.

Another rationale put forth for modifying preservation requirements is that the remedy of a new trial is too "drastic." *Spencer I* at 408; *Spencer II* at 723 (Lawson concurrence)(observing that the resources of staffing a trial, having a crime victim relive their trauma and the "sacrifice" of jurors would all have to be repeated simply because defense counsel "trapped" a trial judge by not objecting to Step 2 reasons). The remedy of a new trial is not new and was applied before *Melbourne* itself was the iteration in Florida for such claims. i. e., *Johans* at 1322; see also *Hayes* at 461, *citing Welch* at 211-213. This remedy reflects the importance of the rights at stake and the overarching purpose of abolishing discriminatory jury selection. Point IA, IB, *supra*. There is no more effective way to enforce compliance with *Melbourne*, especially its "raison d'etre" of Step 3. AR, 235.

The new trial remedy provides accountability by the parties and trial judge alike. If a judge realizes that an insufficient Step 3 inquiry will continue to threaten the validity of a conviction, he or she will be more sensitive to conducting the vigilant examination Step 3 demands. The parties, judge and community have a significant stake in eliminating the evil of discrimination-tainted convictions. *Supra*. A judge who places his or her imprimatur on a conviction infected by discrimination has "elected to place [the court's] power ..and prestige behind" the discrimination, undermining confidence in the

system. *McCollum*, 505 U. S. at 49, 50, 52. It is critically important to actively enforce the trial judge's independent duty to comply with Step 3 requirements.

The *Spencer I* opinion and *Spencer II* concurrence expressed alarm that this drastic remedy is the result of a "trap or trick" by a non-objecting lawyer and that such unobjected-to *Melbourne* reversals should not be "a matter of inadvertence" by a trial judge. *Spencer I* at 408; *Spencer II* at 723 (Lawson, concurring opinion). *Joiner* preservation requirements address these "gotcha" concerns. *Supra*. *Melbourne* is "well-defined" and has been "repeatedly reaffirmed" as a "simple, precise and easy-to-administer" inquiry for challenges to peremptories as discriminatory. i. e. *Hayes* at 461; *Welch* at 212, 213; *Whitby at* 1127; 1127, n. 2, 3; 1130 (Pariente concurrence). All participants in criminal trials in this state, especially trial judges, have long been aware of *Melbourne'*s existence and components. The failure of a trial judge to comply with this inquiry can thus not be considered "inadvertent."

If a trial judge is relieved of the independent obligation to conduct a proper Step 3 analysis, there may be the kind of "backsliding" condemned by *Flowers*. Under *Spencer I/ Spencer II* concurrence analysis, two scenarios are created: 1) no Step 3 is done because not "requested" by a challenge to a proponent's reasons; or 2) a defect in a Step 3 inquiry will not be considered on its merits on appeal because not preserved by a specific-enough objection.

The inevitable result under either alternative is that Step 3 dies. *Helfrich* at *5 (Emas, Chief Judge, dissenting opinion). Step 3 is where the persuasiveness of the State's reasons and the defense objections are measured and resolved. *Supra*. Without this step, the *Batson* and *Melbourne* tests will become meaningless. Protection of equal protection and due process rights, the right to trial by an impartial jury; the rights of excluded jurors to serve and the interests of integrity, fairness and confidence in the outcome of trials will become more illusory. This will create an atmosphere for discrimination to "seep" back into the trial process. AR, 235, 240. *Flowers; Helfrich* at *5 (Emas, Chief Judge, dissenting opinion).

Without Step 3, it is quite possible that convictions may be tinged by a racially-compromised jury, increasing "cynicism" about the composition of the jury and the integrity of the result. *Batson* at 87; *J. E. B* at 140; *Powers* at 411, 412. While "little is lost" **with** such an inquiry, much would be undermined if *Spencer I* becomes binding throughout Florida. AR, 235. *Hayes* at 467; *Welch* at 212, 213; *Whitby* (Pariente concurrence).

This conclusion is fortified by recognizing the nature of a Step 2 explanation. The proponent's burden of production is merely to state a reason not facially racial. *Purkett* at 768, 769; *Morgan* at 328; *Melbourne* at 764; 764, n. 6. This explanation need not be "persuasive" or even "plausible" as long as it is not

discriminatory on its face. *Id*. The net effect of no Step 3 makes the trial judge a passive observer who accepts the proponent's reasons, which by definition need not be "plausible", at face value. There is too great a risk that stopping at the water's edge of a Step 2 facially-neutral, non-persuasive explanation for a peremptory will infect the process with race-motivated exclusions of jurors. *Miller-El* at 240 (where Supreme Court concluded that such a scenario would "not amount to much more than [the] *Swain* [scenario]."). The courts, parties and community at large will not get "actual answers" to the suspicions and inferences of discrimination raised by the pre-Step 3 process. *Johnson* at 172. Without Step 3 vigilance, the anti-discrimination purposes of *Batson* and *Melbourne* will lose vigor. AR, 235; *Helfrich* at *4, 5 (Emas, Chief Judge, dissenting opinion).[3]

The State argues that if an opponent stands mute when a facially neutral explanation is given, this leaves the presumption of non-discrimination intact. IB, 26. This ignores the fact that such an explanation need not be persuasive to meet the proponent's burden of production. *supra*. The State's view

[3] The nature and scope of the Step 2 explanation by the strike-proponent inherently defies the requirement in *Spencer I* that the opponent must contest the explanation to trigger Step 3 or preserve his *Melbourne* objections. The case law expressly concedes that such an explanation need not be "convincing", "credible" or "conceivable." Text, *supra*; see also thesaurus.com (synonyms for "persuasive" and "plausible"). It serves no logical purpose that the opponent must contest the proponent's reasons ***which by definition*** need not even be "conceivable." It is ***Step 3 where the judge*** must determine whether the justification for the strike is pretextual or credible. The requirement that an opponent must contest the facial explanation for a strike **at the Step 2** stage improperly conflates Step 2 and 3. *Spencer*, 238 S. 3rd at 716 (plurality).

improperly conflates Step 2 with Step 3, where the trial judge actually determines "persuasiveness." *Supra*. The Fourth District correctly recognized that there **IS** a difference between evaluating a proponent's face-neutral reasons in Step 2 and a comprehensive assessment of the intent behind those reasons in Step 3. *Hernandez; Morgan.* IB, 28. This difference appropriately elevates substance over form and avoids the conflation of Steps 2 and 3 that the State invites. IB, 29; *supra,* p. 40, fn. 3.

A further rationale advanced is that it is not a pleasant task for a judge to call out a lawyer as disingenuous or deceptive in their Step 2 explanation, so the objecting lawyer should be prepared to do it. *Spencer I* at 406. This task is no more "unpleasant" than finding that a lawyer failed to provide discovery, finding a lawyer in contempt or any other situation where a party or lawyer commits misconduct or fails to comply with rules. Such "unpleasantness" has always been part of a judge's supervisory role in controlling the courtroom and the process. Requiring that a judge meet traditional obligations does not justify creating more procedural hoops which will hamper *Melbourne*.

The final rationale in *Spencer I* to abolish an independent Step 3 inquiry in all cases is that it is "difficult" and "complex" to figure out a proponent's true peremptory strike motivations. *Spencer I* at 407. This is something a trial judge does every day: evaluate the persuasiveness of a fact or argument by

examining a list of appropriate factors and assessing credibility. i. e., *Batson; Hayes; Melbourne; Johnson*. Judges perform these functions in other areas such as hearings and rulings on a motion to suppress or determining a challenge of a juror for cause. It is because the nature of these inquiries are fact-intensive and credibility-driven that trial judges are considered uniquely positioned and well-suited to adjudicate them. *Hernandez* at 354, 355; *Morgan.*

Even while calling for new preservation thresholds, the Second District ironically conceded that "the better practice" in a *Melbourne* situation would be for the trial judge to ask a peremptory-strike opponent to respond to a proponent's justifications. *Spencer I* at 407. This view is shared by the majority in *Johnson*; the *Spencer II* plurality and *Hayes*. This is more in line with the *Melbourne* test with *Joiner* preservation requirements. The *Melbourne-Joiner* structure is a sounder approach to removing discrimination from jury selection and upholding the various constitutional rights and policy interests it serves. *Batson; Welch; Whitby* (Pariente concurrence).

The State maintains that not requiring the new *Spencer I* preservation objections to pretext relieves a strike-opponent from the burden of persuasion. IB, 29. These requirements come at Step 2 where a proponent is merely obligated to state a facially race-neutral explanation that need not be tenable.

*Supra***.** If a judge stops the inquiry at the Step 2 stage or a Step 3 claim is not preserved because of waiver under *Spencer I,* a judge's acceptance of a facially neutral strike comes at the expense of any meaningful analysis whatsoever. The opponent's burden is heightened without such a step. A mandatory Step 3 inquiry will insure that claims of discrimination are fully aired and will facilitate appellate review. Nothing about that minimizes an opponent's burden of proof.

The State's position favors the erection of new layers of procedural roadblocks that would emasculate the straightforward simplicity of *Melbourne,* contradict the *Joiner* line of precedent and create the very "confusion" which led to the creation of the *Melbourne* inquiry in the first place. *Melbourne* at 763.

II. FOURTH DISTRICT CORRECTLY RULED ON THE MERITS THAT TRIAL JUDGE'S SUMMARY RATIFICATION OF STATE'S EXPLANANTION FOR PEREMPTORY STRIKE OF BLACK JUROR WAS NOT IN COMPLIANCE WITH MELBOURNE, REQUIRING REVERSAL OF RESPONDENT'S CONVICTIONS.

The trial record indicates that Judge McHugh summarily ratified the State's strike of juror Garvin. T, 211. As the Fourth District correctly observed, Judge McHugh interrupted the State's Step 2 explanation of its reasons for its strike to conclude **without any Step 3 inquiry** that the State's explanation was "race-neutral" and uphold its strike. *Supra*, p. 3, 4.; AR, 242. The Judge did not consider the relevant

circumstances surrounding the strike, engage in any analysis of factors or assess the credibility of the prosecutor or his reasons. T, 210, 211. *Hayes; Melbourne*. The Fourth DCA accurately concluded that the trial record was "devoid of any circumstance" that the trial judge considered "circumstances relevant to whether the peremptory challenge was exercised for a discriminatory purpose." AR, 242. Under these circumstances, reversal is required. [4]

The State points to its allegation before Judge McHugh that defense counsel struck black jurors that the State accepted. IB, 42,43. Whether or not this is true, this was irrelevant to whether juror Garvin was specifically struck for discriminatory reasons. *Abshire v. State*, 642 S. 2nd 542, 544 (Fla. 1994); *Stroia v. State*, 119 S. 3rd 1274, 1279, 1280 (Fla. 4th DCA 2013). As the Supreme Court recently reaffirmed, the discriminatory strike of even one juror is "one juror too many." *Flowers* at 653; *Foster* at 1747. Pointing to strikes by the defense that the State did not challenge as discriminatory is immaterial to whether its strike of Garvin was so motivated.

The State's citation of these defense strikes does not indicate that the trial judge conducted any analysis of relevant circumstances surrounding the Garvin strike. IB, 44, 45. Judge McHugh's general awareness of such circumstances does not indicate

[4] Respondent has detailed portions of jury selection to demonstrate that the trial record is not as pristine for *Melbourne* purposes as the State suggests. The circumstances cited show that other jurors not stricken by the State expressed reservations similar to Mr. Garvin about the lack of CSI evidence and/or the related prospect that the State could adequately prove its case with "one witness." *Supra*, text, p. 2-3. Mr. Johnson includes these references to indicate that if Judge McHugh ***had*** conducted a true Step 3 analysis of factors such as "a strike based on a reason equally applicable to an unchallenged juror", *Melbourne* at 764, n. 8, the Record **raises questions** which should have been examined ***as part of an authentic*** genuineness inquiry.

that she did any assessment of whether that strike was pretextual or genuine. *Hayes; Melbourne*. The Judge's cutoff of the State's rendition of immaterial facts was not an adequate substitute or tacit analysis of circumstances.

Petitioner maintains that the Judge's curtailing of any further *Melbourne* inquiry after the State's interrupted Step 2 explanation shows the trial judge implicitly considered and analyzed genuineness. IB, 45. Besides the irrelevant references to defense strikes, all the Record reveals is the State's CSI-related reason for striking Garvin. T, 211. While magic words or an express statement may not be necessary, the trial judge must do "something" to indicate to an appeals court that some Step 3 analysis actually took place. *Hayes* at 463; see also *Foster* at 1748 ("all relevant circumstances that bear on the issue must be consulted", i. c. o.); *Morgan*, 822 F. 3rd at 329. No such indication, implicit or otherwise, is contained in the trial record. AR, 242. *Spencer II* at 715 (plurality); *Hayes* at 463; *Helfrich* at *4 (Emas, Chief Judge, dissenting opinion) (if there is no evidence that trial court conducted genuineness analysis or looked at "any of the factors to inform a genuineness analysis", reviewing court "simply…cannot" conclude that such analysis was implicitly done).

CONCLUSION

Based on these arguments and authorities, Appellant respectfully asks this Court to REVERSE Appellant's robbery convictions and sentence and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a correct copy of this **Answer Brief** was electronically filed with this Court and emailed this 9th day of August, 2019 to **Kimberly Acuna, Florida Attorney General's Office**[**CrimAppWPB@MyFloridaLegal.com**], 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, and mailed this same day to **GEOVANNI JOHNSON, DC# L93775,** Wakulla Correctional Institution, 110 Melaleuca Drive, Crawfordville, FL 32327.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Answer Brief complies with the font requirements of Rule 9.210 (a) (2), *Fla. R. App. P.*

/s/ Richard G. Bartmon
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