

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC19-96

STATE OF FLORIDA,

Petitioner,

vs.

GEOVANI JOHNSON,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ASHLEY MOODY
Attorney General
Tallahassee, Florida

CELIA TERENCE
Senior Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 0656879

KIMBERLY T. ACUÑA
Assistant Attorney General
Florida Bar No. 0846619
1515 North Flagler Drive, Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 837-5016
crimappwpb@myfloridalegal.com

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the Fourth District Court of Appeal, and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Geovani Johnson, the Appellant in the Fourth District Court of Appeal and the defendant in the trial court will be referenced in this brief as Respondent or by proper name. Citations to the record before the trial court will be referenced as “R” and to the appellate record as “AR” followed by the appropriate page number: (R 1-1325; AR 1-272).

STATEMENT OF THE CASE AND FACTS

In Case No. 14013212CF10A, Respondent was charged by information with four counts: 1) armed robbery while in actual possession of a firearm; 2) armed robbery while in actual possession of a firearm; 3) armed robbery while in actual possession of a firearm; and 4) possession of a firearm by a convicted felon (R 231-233).¹ The new charges proceeded to a jury trial (R 580-1325).

¹ In Case Nos. 13011816CF10A and 13012248CF10A, Respondent was charged with violating probation based in part on the new law violations alleged in Case No. 14013212CF10A (R 57-58, 155-156). The violation of probation proceedings were tried without a jury and thus the Fourth District’s decision regarding an error in jury selection did not affect the adjudication that Respondent violated probation in those cases. (See AR 225-251 at 243). The Fourth District affirmed the adjudications and sentences imposed in those cases. Id.

Fifty prospective jurors were questioned during jury selection (R 598, 622). During voir dire, the prosecutor asked prospective juror Garvin whether he would require the State to have “CSI” evidence, such as DNA or fingerprints or other forensic evidence, in order to prove its case (R 685, 688).² Mr. Garvin responded that it would depend on the case (R 688). When the prosecutor inquired as to what it would depend on, Mr. Garvin gave an example about a suspect leaving footprints in the blood at a murder scene and investigators “DNA’d” the footprints (R 688-689). When the prosecutor asked Mr. Garvin if he would require the State to present something that didn’t exist, he said no (R 689).

Defense counsel asked Mr. Garvin if he could be fair and impartial if Appellant did not testify (R 759). Mr. Garvin responded:

Honestly - - Honestly, in my opinion, like if - - if he just honestly don’t (sic) want to testify, then I feel like he don’t want - - He don’t want to say anything that’ll probably get him - - get him locked up behind bar, or like - -

Honestly, I don’t think he’ll - - Rather be hiding anything - - I think he’ll just - - he’ll just like - - He’ll like just, you know - - you know, like keep it to hisself (sic) because what he might say might hurt him in bad a way or - - or get him locked up or - -

(R 759).

² “CSI” refers to the television show Crime Scene Investigation. (See AR 226; R 684-685). Prospective juror Garvin is referred to interchangeably as Mr. Garvin or Juror No. 10.

Defense counsel moved on to another potential juror and did not have Mr. Garvin clarify his answer (R 759-760).

After addressing most of the cause challenges, the jury selection process moved to the exercise of peremptory challenges (R 789). The initial panel consisted of prospective jurors Ellis, Thomas, Debesa, Ricketts, Edwards, and Predvil (R 789). The State accepted the initial panel (R 789). Respondent exercised his first peremptory challenge to remove Ms. Ellis (R 789).

At that point, the panel consisted of Thomas, Debesa, Ricketts, Edwards, Predvil, and Lachs (R 789). The State again accepted the panel (R 789). Appellant exercised his second peremptory challenge to remove Ms. Thomas (R789-790).

Eventually the proposed panel included Ricketts, Edwards, Predvil, Lachs, Garvin, and Raymond (R 790). The State struck Mr. Garvin with its second peremptory challenge (R 790). As the trial court announced the new proposed panel, defense counsel interjected: “For the record, my client is a member of the African American class and we want, pursuant to Melbourne vs. State [679 So. 2d 759 (Fla. 1996)] the State to offer a race neutral reason for” the strike (R 790-791).

The trial court noted for the record that Mr. Garvin appeared to be an African American male and asked the State if it had a race neutral reason for the strike (R 791). The prosecutor responded:

The State does have a race neutral reason. Mr. Garvin indicated that he would prefer CSI evidence. Additionally, the Defense has stricken two black females in their first round of strikes. They've also stricken black individuals for cause. And this is - -

(R 791).

The trial court found the State's reason to be race neutral and upheld the State's peremptory strike of Mr. Garvin (R 791). Respondent did not object to the State's reason, did not challenge the State's reason as to the facts or as a pretext for discrimination, and did not request that the trial court conduct any further inquiry.

At the time that Mr. Garvin was struck, Respondent had used three of his peremptory strikes (R 789, 790). The selection process continued and Respondent used his remaining seven peremptory strikes (R 791, 792, 793, 794).

Respondent eventually requested, and the trial court granted, one additional peremptory strike (his 11th peremptory strike) that he used on potential juror Vathauer (R 796). Defense counsel's stated reason for an additional peremptory strike was that the trial court had denied his cause challenges of Ms. Thomas and Mr. Espinosa and he had used two peremptory strikes to remove them from the jury panel (R 796). Defense counsel also stated that the trial court had also denied his cause challenge of Ms. Falcon, but she had not yet been reached in the selection process (R 796).

At the conclusion of the jury selection process, defense counsel stated that “just for the purposes of the - - the appellate record” he had explained to Respondent that counsel could not accept the panel because the trial court denied his cause challenges of Ms. Thomas, denied his Melbourne objection to the State’s striking of Mr. Garvin, and his cause challenges of Mr. Espinosa and Ms. Falcon (R 799). Respondent indicated that he accepted the panel and did not need more time to speak with his attorney (R 800). The jury was then sworn (R 801).

As to the first three counts, the jury found Respondent guilty of the lesser included offense of robbery with a weapon (R 370-375). As to count four, the jury found Respondent not guilty (R 376). He was sentenced to 15 years in prison, to run concurrently, on counts one, two, and three (R 406-414, 575).³

Respondent appealed, asserting that the trial court erred by: (1) failing to conduct a proper Melbourne analysis to a peremptory challenge by the State; and (2) violating Respondent’s Sixth Amendment confrontation right by allowing the State to introduce a 911 call (AR 225-226). The Fourth District Court of Appeal (“Fourth District”) affirmed on the Sixth Amendment issue without discussion. Id. at 226. However, as to the first issue, a majority of the Fourth District determined that the

³ The scoresheet correctly states robbery with weapon and the sentence is correct; the judgment states counts 1-3 as “Robbery w/ Firearm”. (R 396, 398-399, 406-414).

trial court did not comply with Melbourne. Id. Consequently, Respondent's convictions and sentences for robbery with a weapon were reversed and the robbery counts were remanded for a new trial. Id. at 243.

The State had argued that Respondent failed to preserve an issue of noncompliance with Melbourne and that, even if preserved, the record showed compliance with Melbourne. Id. at 228. The majority rejected the State's preservation argument, holding that the Melbourne procedure is always a three-step process. Id. at 226. The majority rejected the reasoning of the Second District in Spencer v. State, 196 So. 3d 400 (Fla. 2d DCA 2016) ("Spencer I") and found that, when a Melbourne objection is made, the trial court in every case must comply with all three steps of the analysis:

Until a majority opinion by our supreme court says otherwise, in this District, we contend there arguably is no conflict between Hayes[v. State], 94 So. 3d 452 (Fla. 2012)] and Floyd[v. State], 569 So. 2d 1225 (Fla. 1990)]. We further hold that the Melbourne procedure is indeed a three-step process, and the intent of our supreme court, in adopting the procedure, was to require that all the steps be followed. We reject the notion that the three-steps are required only "if requested."

(See AR at 233).

The majority further concluded that "at a minimum, Melbourne imposes a duty on trial courts at Step 3 to request a response to the proffered explanation from the opponent of a peremptory challenge once Step 2 has been completed." (AR 234).

Applying its analysis to the case at bar, the majority concluded that the trial court failed to comply with Step 3:

In the instant case, the cold record is devoid of any indication that the trial court considered circumstances relevant to whether the peremptory challenge was exercised for a discriminatory purpose. Unlike Spencer II, it is clear that the trial court did not request a response by [Respondent] to the explanation proffered by the State for the peremptory challenge. Instead, the trial court cut off the State while it was proffering its explanation for the strike and justification for its genuineness, and brought the analysis to an end with the statement, “All right. Okay. I find that to be race-neutral reason. I’m going to uphold State’s use of a peremptory on [Juror No. 10].”

(AR 242).

The State had asked the district court to infer that the trial court complied with Step 3 because the prosecutor, in addition to providing its race-neutral reason for striking Mr. Garvin, pointed out that the defense had stricken two black females in the defense’s first round of strikes, which was after the State had twice accepted the jury panel with those jurors. (AR 243). The State had also asserted that the record reflected the trial court was aware of and considered the circumstances relevant to determining if the strike was improperly discriminatory and implicitly found there was no pretext in the strike. Id. However, the majority rejected these arguments, noting that “the trial court cut off the State before it could point out that it had twice accepted the jury panel with those jurors when it exercised two peremptory

challenges.” Id.

Judge Kuntz dissented, noting that the State’s stated reason for striking Mr. Garvin was true and went unchallenged by Respondent (AR 244). Judge Kuntz would conclude that Respondent’s “silence in response to the State’s facially sound reason for striking Juror No. 10 constituted a waiver of the challenge.” Id. According to the dissent, based on the applicable law, “a party challenging the use of the other’s peremptory strike must object during the Batson-Melbourne analysis at each of the three steps to preserve the objection.” (AR 245).⁴

The Fourth District determined that its opinion in this case regarding the procedure for a Melbourne challenge conflicts with the opinions in Brown v. State, 204 So. 3d 546 (Fla. 5th DCA 2016), Ivy v. State, 196 So. 3d 394 (Fla. 2d DCA 2016), and Hanna v. State, 194 So. 3d 424 (Fla. 3d DCA 2016)⁵, because those cases continue to adhere to the analysis of the Second District in Spencer I. (AR 243). The Fourth District certified conflict with those decisions. Id.

By order dated April 8, 2019, this Court accepted jurisdiction.

⁴ Batson v. Kentucky, 476 U.S. 79 (1986).

⁵ Following issuance of the Fourth’s District’s decision below, this Court denied review in Ivy and Hanna. See Ivy v. State, 196 So. 3d 394 (Fla. 2d DCA 2016), review denied, 2018 WL 6721516 (Fla. Dec. 21, 2018); Hanna v. State, 194 So. 3d 424 (Fla. 3d DCA 2016), review denied, 2018 WL 6721514 (Fla. Dec. 21, 2018).

SUMMARY OF THE ARGUMENT

The Fourth District erred in finding that Respondent preserved the argument that the trial court failed to fully comply with step 3 of the Melbourne procedure. The Fourth District's decision is contrary to well-settled law that a party must present a specific legal argument to the trial court in order to raise that same argument on appeal. The Fourth District's decision is contrary to decisions of this Court and other district courts that an opponent of a peremptory challenge must challenge a stated neutral reason before the trial court to preserve an objection to the challenge. The Fourth District's decision is contrary to two rules of law regarding peremptory challenges that have continuously been affirmed by this Court: 1) peremptory challenges are presumed to be exercised in a nondiscriminatory manner and 2) an objector to a peremptory challenge has the entire burden of persuasion from beginning until end to show purposeful discrimination.

Under a proper application of the law, Respondent did not preserve his claim that the trial court failed to assess whether the State's strike of prospective juror Garvin was genuine. After the State articulated a race-neutral explanation for striking Mr. Garvin – that was plausible and supported by the record – Respondent was mute and offered no response. After the trial court expressly found the State's reason to be race-neutral and upheld the strike, Respondent was mute and did not

object to the trial court's ruling as not in compliance with Melbourne. Throughout the entire jury selection process, Respondent never challenged the State's reason in any manner (whether factually or as a pretext) and never asserted that the trial court had failed to assess whether the State's proffered reason was genuine. Thus, the Fourth District erred in finding that his claim regarding an inadequate genuineness assessment was preserved for review.

The Fourth District also erred in finding that Melbourne imposed a "duty" on trial courts to "at a minimum" turn to the opponent of the strike and request a response to the proponent's proffered reason. Melbourne imposes no such requirement.

Relying in part on its improper modification of Melbourne, the Fourth District reversed the trial court's ruling upholding the State's strike. This was also error. The State's proffered reason was neutral, plausible, and supported by the record. In addition to articulating a neutral reason, the prosecutor expressly advised the trial court that the defense had stricken two other African-American jurors in the first round of strikes. The State had accepted these jurors and the record conclusively shows that the trial court was aware that the State had accepted these jurors. Thus, in upholding the State's peremptory strike, the trial court considered the racial makeup of the venire and implicitly found the strike was genuine.

Respondent had ample opportunity to challenge both the State's proffered neutral reason and the trial court's ruling upholding the strike but did not do so. Yet, the Fourth District incorrectly found that the trial court had a "duty" to request a response from Respondent and did not do so here. Consequently, even though Respondent did not expressly state a claim of pretext throughout the entire jury selection process and did not present any facts or arguments to support a claim of pretext, the Fourth District granted him a new trial. Respondent did not carry his burden of persuasion to show purposeful race discrimination. As such, the Fourth District erred in reversing the trial court's ruling upholding the State's use of the peremptory strike.

ARGUMENT

THE FOURTH DISTRICT ERRED IN FINDING RESPONDENT PRESERVED HIS OBJECTION TO THE STATE'S EXERCISE OF A PEREMPTORY CHALLENGE ON PROSPECTIVE JUROR GARVIN.

A. Standard of review.

On appeal, the appropriate standard to determine the likelihood that a peremptory challenge was used discriminatorily is abuse of discretion. Poole v. State, 151 So. 3d 402, 409 (Fla. 2014). As the trial court is generally in the best position to assess the genuineness of the reason advanced, the decision will be affirmed unless clearly erroneous. Id.

B. Discussion.

On appeal in the Fourth District, Respondent argued for the first time that the trial court erred in failing to conduct a “genuineness” inquiry under Melbourne, after he objected to the State’s peremptory strike of prospective juror Mr. Garvin, an African American, and the State proffered a race-neutral reason for the strike. There was no dispute that this argument had not been raised before the trial court. Respondent maintained that his timely objection under step 1 of Melbourne and his renewal of this objection before the jury was sworn preserved his argument before the Fourth District (AR 58-59, 136-137). A majority of the Fourth District agreed with Respondent. This was error. The State submits that the Fourth District improperly found that the issue was preserved, improperly modified the Melbourne procedure to add another “duty” for the trial court, and improperly reversed the trial court’s ruling upholding the State’s exercise of the peremptory strike of Mr. Garvin.

1. The Fourth District improperly found that the Melbourne issue was preserved for review.

Based on Melbourne, Floyd, black letter law on preservation, and the conflict cases, any error in the trial court’s decision to uphold the State’s exercise of a peremptory challenge on Mr. Garvin was not preserved for review. Rather, under Florida law, after the proponent of a peremptory challenge provides a facially neutral

reason, to preserve any error in a trial court’s ruling on the challenge, the opponent of the peremptory challenge must put the trial court on notice that it is challenging the stated reason as a pretext for discrimination. The opponent must also specifically object if the trial court’s ruling does not contain an adequate finding on the issue of genuineness. Otherwise, this argument is not preserved.

An overview of the law on preservation

“In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.” Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (“in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below”); F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003) (same).

An overview of the law on peremptory challenges

“The central function of peremptory challenges is to ‘enabl[e] each side to exclude those jurors it believes will be most partial toward the other side.’” Hayes v. State, 94 So. 3d 452, 459 (Fla. 2012), citing Holland v. Illinois, 493 U.S. 474, 484 (1990) (citing Batson v. Kentucky, 476 U.S. 79, 91 (1986)). The only limitation to a

party's discretion in the use of peremptory challenges is that they may not be used to discriminate against a protected class of venireperson. Busby v. State, 894 So. 2d 88, 99 (Fla. 2004). See also Batson, 476 U.S. at 89.⁶

In Melbourne this Court set forth “guidelines” that are to be used whenever there is an objection that a peremptory challenge is being used in a discriminatory manner. Id. at 764. Melbourne was triggered in part by the United States Supreme Court's decision in Purkett v. Elem, 514 U.S. 765 (1995). Id. The majority below relied in part on Purkett (AR 235-238). Thus, a review of Purkett is helpful.

In Purkett, the State used peremptory strikes to remove two black men from the jury panel primarily because both men had facial hair. Id. at 766. These were the only two people on the panel with facial hair and the prosecutor thought the facial hair made them look suspicious. Id. at 766. Notably, the state trial court had “**without explanation**” overruled the defendant's objection to the State's peremptory challenges and empaneled the jury. Id. (emphasis added). The United States Supreme Court upheld the trial court's ruling and did not comment on this

⁶ Batson is the landmark case where the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the use of peremptory challenges in a discriminatory manner to exclude potential jurors solely because of their race. Batson outlined a three-step procedure for determining whether a party's use of a peremptory challenge is racially motivated.

unelaborated ruling or otherwise require any “on-the-record” genuineness analysis.

The Court summarized its holding in Batson and explained steps 2 and 3:

Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett, 514 U.S. at 767 (citations omitted).

The Court elaborated on step 2:

The second step of this process does not demand an explanation that is persuasive, or even plausible. “At this [second] step of the inquiry, the issue is the facial validity of the prosecutor’s explanation. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”

Id. at 767–68.

As to step 3, the Court explained that the “whole focus” is not on the reasonableness of the asserted nonracial motive but on the genuineness of the motive - a finding which turns primarily on an assessment of credibility. Id. at 769.

In light of Purkett and the difficulty some Florida courts had in applying Florida law, this Court set forth “guidelines” “encapsulate[ing] existing law” to assist courts in conforming with Article I, Section 16, Florida Constitution, and the equal protection provisions of the Florida and federal constitutions. Melbourne at

764. Melbourne provides:

A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.

At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.

Id. at 764 (internal footnotes omitted).

In making a "genuineness" determination, a court should consider all relevant circumstances surrounding the strike, which may include, but are not limited to "the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment." Id. at 764 n.8.

Melbourne urged reviewing courts to keep in mind two principles when enforcing the above guidelines: 1) peremptory challenges are presumed to be exercised in a nondiscriminatory manner; and 2) the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless

clearly erroneous. Id. at 764-65.

Melbourne further noted that “[t]hroughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination” and “[t]he right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense.” Id.

Melbourne expressly receded from State v. Slappy, 522 So. 2d 18 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988), and its progeny to the extent that they required a “reasonable” rather than a “genuine” nonracial basis for a peremptory strike. Id.

A case existing at the time of Melbourne – that was not receded from in Melbourne or since Melbourne – is Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991).⁷ In Floyd, when the State exercised a peremptory challenge on the sole black prospective juror remaining on the panel, the defense timely objected. Id. at 1229. The prosecutor’s proffered reason was that, when asked about the propriety of the death penalty, the juror had said that 25 years’ imprisonment was sufficient punishment. Id. Although the trial court acknowledged that it did not recall what the juror had said on the subject, the trial court accepted

⁷ Thus, Floyd came after Batson, which was issued in 1986, and before Purkett and Melbourne, which were issued in 1995 and 1996, respectively.

the State's reason and noted that the juror's answer was "on the record." Id.

However, it turned out that the proffered reason was not supported by the record and the juror had not made such a statement. Id. Yet, the defense never disputed the State's proffered reason. Id. Because defense counsel failed to object to the prosecutor's explanation, the issue was not properly preserved for review. Id. at 1230. This Court explained:

It is the state's obligation to advance a facially race-neutral reason that is supported in the record. **If the explanation is challenged by opposing counsel, the trial court must review the record to establish record support for the reason advanced.** However, when the state asserts a fact as existing in the record, the trial court cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged. **Once the state has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason.** Here, the error was easily correctable. Had defense counsel disputed the state's statement, the court would have been compelled to ascertain from the record if the state's assertion was true. Had the court determined that there was no factual basis for the challenge, the state's explanation no longer could have been considered a race-neutral explanation, and Juror Edmonds could not have been peremptorily excused. **Because defense counsel failed to object to the prosecutor's explanation, the Neil⁸ issue was not properly preserved for review.**

Floyd at 1229–30 (emphasis added).

Also, while this Court issued Melbourne in part because of Purkett's

⁸ State v. Neil, 457 So. 2d 481 (Fla. 1984).

substantive change in the law, the United States Supreme Court has repeatedly emphasized that it is for the states to formulate appropriate procedures for implementing Batson and its progeny. See State v. Whitby, 975 So. 2d 1124, 1125 (Fla. 2008) (Pariente, J., concurring), citing Johnson v. California, 545 U.S. 162, 168 (2005); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 631 (1991); Powers v. Ohio, 499 U.S. 400, 416 (1991); Batson, 476 U.S. at 99.

Sixteen years after Melbourne, this Court issued Hayes v. State, 94 So. 3d 452 (Fla. 2012). In discussing the Melbourne procedure, the majority opinion makes several statements that go beyond the facts of Hayes and were relied on by the majority of the Fourth District below. The State maintains any such statements are dicta and discusses Hayes in further detail below. (See pp. 29-33 below).

Six years after Hayes, Spencer v. State, 238 So. 3d 708 (Fla. 2018), cert. denied sub nom., Spencer v. Florida, 138 S. Ct. 2637 (2018) (“Spencer II”) was issued. Spencer II addressed the following certified question:

DURING A MELBOURNE HEARING, WHEN A TRIAL COURT FINDS THAT THE PROPONENT’S REASON FOR A PEREMPTORY CHALLENGE IS FACIALLY NEUTRAL, IS IT THE BURDEN OF THE OPPONENT (1) TO CLAIM THE REASON IS A PRETEXT, (2) TO PLACE INTO THE RECORD THE CIRCUMSTANCES SUPPORTING ITS POSITION, AND (3) TO OBJECT IF THE TRIAL COURT’S RULING DOES NOT CONTAIN ADEQUATE FINDINGS ON THE ISSUE OF GENUINENESS?

Id. at 711. (internal footnote omitted).

There was no majority opinion on the certified question. While all seven justices agreed that the defendant's conviction should be affirmed, a majority did not agree as to the correct analysis. Three justices signed the plurality opinion authored by Justice Quince; two justices concurred in the result without a written opinion; and two justices concurred in the result with an opinion. Id. at 718.

The plurality agreed with the defendant that preservation occurs in step one that can only be waived as articulated in Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993), by failing to renew objections before the jury is empaneled. Id. at 715. The plurality also agreed with the State that, because the opponent of a peremptory strike bears the burden of persuasion, that burden should include **expressly** stating a claim of pretext and presenting facts and argument to support such a claim. Id.

Justice Lawson concurred in the result with an opinion in which Justice Canady concurred. Id. at 718. Justice Lawson indicated that he “would answer each part of the certified question in the affirmative and bring needed clarity to this area of the law pitched into confusion by dicta in Hayes.” Id.

The conflict cases support that Respondent's Melbourne claim is not preserved

The Fourth District certified conflict with Brown v. State, 204 So. 3d 546 (Fla. 5th DCA 2016), Ivy v. State, 196 So. 3d 394 (Fla. 2d DCA 2016), and Hanna v.

State, 194 So. 3d 424 (Fla. 3d DCA 2016) (AR 243). Brown, Ivy, and Hanna agree with the reasoning set forth in Spencer I and support the State's position that Respondent's Melbourne claim is not preserved.

On appeal, Ivy, like Respondent here, claimed that the trial court did not conduct an adequate step 3 genuineness inquiry under Melbourne. Ivy at 395. The Second District rejected this claim for the reasons explained in Spencer I. Id. at 399. The Second District observed that the three defense attorneys did not provide the trial court with adequate notice that it was not following the decision-making process necessary for a Melbourne hearing and thus did not preserve a Melbourne issue. Id.

Hanna rejected the defendant's claim as to the Melbourne issue, citing Spencer I and Ivy. Brown concluded that the defendant failed to preserve the issue of whether the trial court erred in failing to make a separate finding as to whether the State provided genuine race-neutral reasons in support of its exercise of two peremptory challenges, citing Spencer I, Ivy, and Hanna.

The Fourth District's ruling is contrary to Florida law

The Fourth District's ruling that Respondent preserved his objection that the trial court failed to conduct an adequate genuineness assessment is contrary to Florida law. Once the proponent of a peremptory proffers an explanation for the strike, the trial court must determine two things: 1) whether the proffered reason is

facially neutral and 2) whether the proffered reason is a pretext. Melbourne at 764. If a trial court upholds a peremptory strike without specifically ruling on these two determinations, then it is incumbent upon the opponent of the peremptory strike – as the party bearing the entire burden of persuasion – to make its record and obtain a more specific ruling from the trial court.

As Justice Lawson aptly noted in his concurrence in Spencer II, the analysis begins with and is always subject to the following rules of law: 1) “peremptories are presumed to be exercised in a nondiscriminatory manner”; and 2) “the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike,” Spencer II at 720, citing Melbourne, 679 So. 2d at 764, and Purkett, 514 U.S. at 768.

In addition to these foundational principles, as noted above, Floyd provides: “If the explanation is challenged by opposing counsel, the trial court must review the record to establish record support for the reason advanced ... Once the state has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason.” Floyd at 1229. If defense counsel fails to object to the prosecutor’s explanation, the issue is not properly preserved for review. Id. at 1230.

Floyd has never been receded from or limited in any way. If Melbourne or

Hayes had intended to recede from Floyd, or limit Floyd, then they could have done so, just as Melbourne expressly receded from Slappy and its progeny to the extent that they required a “reasonable” rather than a “genuine” nonracial basis for a peremptory strike. Id. at 765.

Also, as discussed above, it is black letter law that, to be preserved for further review by a higher court, an issue must be presented to the lower court and the **specific** legal argument to be argued on appeal must be part of that presentation if it is to be considered preserved. Tillman, *supra*; Steinhorst, *supra*; F.B., *supra*. This Court has explained the importance of these preservation principles:

[t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

The requirement of contemporaneous objection thus not only affords trial judges the opportunity to address and possibly redress a claimed error, it also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client’s tactical advantage.

F.B., 852 So. 2d at 229 (internal citation omitted).

Based on the foregoing rules of law, it follows that – once the proponent of a peremptory challenge provides a facially neutral reason – then:

- The opponent of a peremptory strike must expressly challenge the proffered reason as a pretext and explain the basis for its challenge. Otherwise, any error in the trial court’s ruling on the Melbourne issue is not preserved.
- The opponent of a peremptory strike must put the trial court on notice that the trial court did not make an adequate genuineness finding or did not make a genuineness finding at all. Otherwise, this issue is not preserved.

Eliminating discrimination in the jury selection process is the primary goal of a Batson/Melbourne objection. See Powers v. Ohio, 499 U.S. 400, 406 (1991) (“Batson ‘was designed ‘to serve multiple ends,’ only one of which was to protect individual defendants from discrimination in the selection of jurors. Batson recognized that a prosecutor’s discriminatory use of peremptory challenges harms the excluded jurors and the community at large.”) (internal citations omitted). The State is in complete agreement that discrimination in the jury selection process cannot be tolerated.

However, for the Fourth District to find a trial court’s ruling deficient when the opponent of the strike offers no response to a proffered neutral reason, never even alleges that the proponent’s stated reason is a pretext for discrimination, and never notifies the trial court that it is claiming an inadequate genuineness inquiry is to go beyond the requirements of Melbourne and Floyd and is not required by Batson

and its progeny. As noted above, the United States Supreme Court has repeatedly conveyed that it is for the states to formulate appropriate procedures for implementing Batson and its progeny. Whitby, 975 So. 2d at 1125. (Pariente, J. concurring). The majority below overlooks this in its analysis (AR 225-251).

In addition to overlooking this key principle, the two post-Purkett opinions that the majority below relies on – Johnson v. California, 545 U.S. 162 (2005) and Foster v. Chatham, 136 S. Ct. 1737 (2016) – are not helpful here (AR 236). Neither Johnson or Foster addressed preservation. Despite this, the majority below relied on what was **absent** from these decisions to support its reasoning. Johnson by its own language is “narrow”, concerned only the scope of step 1 of Batson under California state law, and found that the standard applied in California was too high. Johnson at 168. In Foster, a Georgia death penalty case, the Court re-examined the State’s proffered reasons for several peremptory challenges based on newly discovered evidence - a cache of damaging evidence from the prosecutor’s file on the venire that was revealed in a public records request. Id. at 1754.⁹

⁹ The Fourth District’s analogy to the procedures used in competency hearings and claims of discovery violations is similarly ill-suited (AR 233). Such comparison overlooks the foundational principles which are unique to a Melbourne objection – the presumption of nondiscrimination and the entire burden of persuasion on the objecting party – and consequently renders these principles meaningless.

The opponent of a peremptory strike bears the entire burden of persuasion. Melbourne at 764. This burden includes an obligation to object to deficiencies in Melbourne's step 3 process. The opponent – as the party making the objection and having the entire burden of persuasion – must convey to the trial court that it is challenging the proponent's proffered reason because it is not the "real" reason for the strike – that the "real" reason is impermissible discrimination. The objecting party cannot simply stand mute. Standing mute in the face of a facially neutral reason means that the presumption of **nondiscrimination** remains intact.

As Justice Lawson observed in Spencer II:

In short, after the proponent of the strike announces a facially race-neutral reason for the strike (step 2), **there is no practical way for the opponent of the strike to meet his or her burden of persuasion without challenging the facially race-neutral reason as a pretext**—which is exactly what the Second District suggested that the opponent must do to preserve any error that arises in step 3. **If the opponent of the strike does not challenge the race-neutral reason after its proffer, the trial court will usually be left with nothing but a presumption that the peremptory strike was exercised for a genuine, race-neutral reason.** At that juncture, the proper legal ruling would be to overrule the objection and allow the strike. I say "usually" because there may be some cases in which the trial judge does not believe the proffered reason to be genuine, despite the contrary presumption, in which case the correct legal ruling would be to sustain the objection and disallow the strike. Either way, "the trial court's decision turns primarily on an assessment of [the] credibility [of the proponent of the strike] and will be affirmed on appeal unless clearly erroneous." Melbourne, 679 So. 2d at 764–65.

Spencer II at 720–21 (emphasis added).

Spencer I articulated similar reasoning:

If it is truly presumed that lawyers exercise peremptory challenges in a nondiscriminatory manner, then the trial court should not be expected to initiate on its own a genuineness challenge of every facially neutral reason. This is particularly true when no party has responded to the neutral reason with a claim that it is a pretext. **Given the seriousness of a charge that a lawyer is providing a pretextual reason for a challenge, the opponent should be expected to object to the facially neutral reason as a pretext.**

Spencer I at 407 (emphasis added).

Requiring an opponent of a peremptory strike to object in the trial court to any deficiencies in a Melbourne inquiry in order to raise the same argument on appeal is consistent with other decisions of this Court and other appellate courts. See King v. State, 89 So. 3d 209, 230 (Fla. 2012) (defendant’s claim that there were other jurors on the panel who were similarly situated was waived where defense counsel did not raise that challenge before the trial court); Hoskins v. State, 965 So. 2d 1, 11 (Fla. 2007) (defendant’s claim that the State singled out juror for more questioning was not preserved because was not raised before the trial court); Rimmer v. State, 825 So. 2d 304, 321 (Fla. 2002) (“The trial court ... cannot be faulted for accepting the facial reason offered by the State, especially where the State’s factual assertion went unchallenged by the defense.”); Hall v. State, 768 So. 2d 1212 (Fla. 4th DCA 2000)

(defendant's objection not preserved because he did not contest the genuineness of the State's proffered explanation); Austin v. State, 679 So. 2d 1197, 1199 (Fla. 3d DCA 1996) (defendants failed to preserve pretext arguments by failing to raise them below), review denied, 689 So. 2d 1068 (Fla. 1997); Davis v. State, 691 So. 2d 1180 (Fla. 3d DCA 1997) (defendant failed to preserve pretext argument by failing to raise below); Spencer I, *supra*; Hanna, *supra*; Brown, *supra*; Ivy, *supra*; Mobley, *infra*.

In the instant case, while Judge Kuntz dissented, a majority of the Fourth District found that Melbourne imposes procedural requirements as a duty on trial courts – separate and apart from the duties of trial counsel – and thus trial counsel is not required to object at each step to preserve a Melbourne objection for review (AR 234). However, the majority found that “with regards to *factual accuracy of assertions by the proponent* of a peremptory strike, the standard preservation requirements apply.” Id. (italics in original).

In other words, the Fourth District found a dichotomy between an opponent's challenge as to factual accuracy and an opponent's challenge as to motive. According to the Fourth District's majority opinion, the former must be specifically argued to be preserved, while the latter is preserved simply by making the initial objection to the peremptory challenge. For example, if the State's proffered reason was that a prospective juror indicated he/she had a relative in prison, but in fact the

juror never made such a response, then the defense could not challenge the factual accuracy of the State's reason on appeal if it had not challenged the same at trial.

However, under this same reasoning, a party who stood mute and offered no response to a proponent's neutral reason and who made no objection to the trial court's ruling, could for the first time on appeal challenge the State's proffered reason as a pretext for discrimination and the trial court's ruling as insufficient. For numerous reasons, this Court should reject the reasoning of the Fourth District.

Such reasoning is not consistent with Floyd, Melbourne, their progeny, or the principle of *stare decisis*. Such reasoning elevates the execution of a procedural step over the foundational principles that peremptory challenges are presumed to be executed in a nondiscriminatory manner and the opponent has the entire burden of persuasion from beginning to end.

Such reasoning not only alleviates the opponent of a peremptory strike from carrying its burden to establish purposeful discrimination, but improperly asks the trial court to depart from its neutral role and be an advocate assisting the opponent of the strike in meeting his/her burden of persuasion, as discerned by Justice Lawson in Spencer II, Judge Altenbernd in Spencer I, and Judge Kuntz below. See Spencer II at 721-722; Spencer I at 408-407; (AR at 250).

Furthermore, such reasoning conflicts with well-settled preservation law and

allows an appellate court to review and order a new trial on an argument raised for the first time on appeal that is not fundamental error. Such reasoning encourages trial counsel to save certain arguments for appeal – to play the trump card in the event of an unfavorable verdict. For all these reasons, the State asks this Court to quash the Fourth District’s decision and find a litigant challenging a trial court’s ruling upholding a peremptory strike must make its record and raise any deficiencies below in order to raise these same alleged deficiencies on appeal.

The Fourth District erroneously relied on dicta in Hayes

In reaching its conclusion below, the majority relied in part on Hayes (See AR 234: “Also relying on Hayes, we have said that “[c]ompliance with each step [of the Melbourne procedure] is not discretionary, and the proper remedy when the trial court fails to abide by its duty under the Melbourne procedure is to reverse and remand for a new trial.”, citing King v. State, 106 So. 3d 966, 968 (Fla. 4th DCA 2013) (quoting Hayes, 94 So. 3d at 461)). Hayes also states: “where the opponent of the strike fails to provide the trial court with an explanation as to why the reasons given were pretextual, and the trial court thereafter fails to undertake an **on-the-record genuineness inquiry**, the reviewing court is unable to engage in meaningful appellate review.” Hayes, 94 So. 3d at 463 (emphasis added). These statements in

Hayes go beyond Melbourne and are dicta.¹⁰

A more in-depth review of the facts and procedural history in Hayes is necessary to show that Hayes contains dicta. In Hayes, when the defense sought to use a peremptory challenge on a female juror, the State requested a gender-neutral reason. Id. at 456. Defense counsel initially stated, “I don’t have a gender neutral reason” and then added that the prospective juror had relationship to law enforcement officers. Id. The defense also pointed out that, if the juror in question was stricken, the next juror was also female. Id. Comments by the trial court indicated that the trial court mistakenly assessed defense counsel’s reason as if it were assessing a challenge for cause rather than as a peremptory challenge. Id.

The State – although the opponent of the peremptory strike – did not attempt to demonstrate that the reason given was not gender-neutral or was pretextual. Id. The trial court did not conduct any inquiry as to the genuineness of defense counsel’s reason and denied his request to use a peremptory challenge on the female juror. Id.

¹⁰ In distinguishing Hopson v. Fredericksen, 961 F.2d 1374 (8th Cir. 1992), a case cited by the dissent below, the majority below indicated that “Hopson is not helpful to the analysis because the issue was the failure of the judge to articulate the reason for overruling the Batson objection. **Neither the United States Supreme Court nor the Florida Supreme Court has ever imposed such a requirement.**” (AR 238) (emphasis added). Thus, the majority below recognized that Hayes’s reference to an on-the-record genuineness inquiry went beyond Melbourne.

The next day, before the jury was sworn, defense counsel raised the issue again asserting that the trial court had not used the correct procedure. Id. at 457. The defense argued that it had proffered a facially gender-neutral reason. The trial court responded that it had concluded the proffered reason “was not genuine under the circumstances, which presumes that it was ... a gender neutral reason.” Id.

The defense maintained that based on all the circumstances the proffered reason was genuine. Id. The defense noted that the next juror was female and he believed the next ten jurors were all females, so there was no possibility that the strike was a pretext for gender discrimination. Id. The State did not offer any response to indicate defense counsel’s given reason was pretextual. Id. The trial court stood by its original ruling. Id.

On appeal, Hayes argued that the trial court erred in denying his peremptory challenge of the female juror, asserting that the trial court had applied the wrong standard and the record did not support the trial court’s finding that his stated gender-neutral reason was pretextual. Id. at 457-458. The State conceded error, agreeing with Hayes that the trial court engaged in the wrong inquiry and remand for a new trial was appropriate. Id. at 458. The First District rejected the State’s concession of error and affirmed the trial court’s decision to disallow defense counsel’s challenge since, in the district court’s view, it was not clearly erroneous under the Melbourne

standard of review. Id. This Court quashed the First District’s decision because it misapplied Melbourne. Id. at 467.

In Hayes, the trial court applied the wrong standard – the cause standard. Then, at the prompting of defense counsel – who was the **proponent** of the challenge – the trial court made a genuineness finding that was not supported by the record. Preservation of a Melbourne objection was not the issue in Hayes.

Accordingly, the statements in Hayes relied on by the Fourth District below are dicta. Justice Lawson, in his concurrence in Spencer II, pointed out that, “[c]ontrary to Floyd and the many cases following it, Hayes states, in dicta, that the opponent of a peremptory strike need not challenge the proponent’s race-neutral reason to fully preserve a Batson challenge for review.” Spencer II at 719 (Lawson, J. concurring). Justice Lawson found that the Second District in Spencer I properly treated the above-quoted language in Hayes as dicta. Id. at fn 7. The State fully agrees with Justice Lawson’s assessment:

The issue presented in Hayes was not whether the trial court erred in failing to ask the opponent of the strike, on its own initiative, to provide reasons to find pretext. The issue was whether the trial court erred, first, in expressly applying the for-cause standard—rather than the “genuineness” standard—to its evaluation of the neutral reason the proponent gave for the strike and, later, in making an after-the-fact finding of pretext in the face of ironclad genuineness arguments by the proponent, essentially no advocacy by the opponent for a finding of pretext, and an ignored request by the proponent for an explanation of

the court's finding. Hayes, 94 So.3d at 456–57. Although this Court’s opinion refers to the difficulties that allegedly arise when there is no on-the-record genuineness inquiry following the proffer of a neutral reason, id. at 463, **the facts of Hayes did not involve those circumstances. Therefore, the suggestion that the trial court is required to initiate a genuineness inquiry on the record when no party has invited such probing is dicta**—which the plurality opinion in this case gives undue weight. See State v. Yule, 905 So.2d 251, 259 n.10 (Fla. 2d DCA 2005) (Canady, J., concurring specially) (“A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.” (quoting Michael Abromowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 1065 (2005)); New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1500 n.7 (11th Cir. 1993) (Edmonson, J., concurring specially) (explaining that even a statement labeled as a holding is not a holding unless it decides a matter that “was squarely presented by the facts of the case and was a proposition that absolutely must have been decided to decide the concrete case then before the court”).

Spencer II, 238 So. 3d at 720, n 7 (Lawson, J., concurring) (emphasis added).

Hayes did not change or recede from Melbourne or Floyd. See Spencer I, 196 So. 3d at 403 (Hayes discussed and clarified the Melbourne procedure “but it did not actually change the procedure.”); F.B., 852 So. 2d at 228-29 (supreme court does not intentionally overrule itself sub silentio; when lower court encounters express holding from supreme court on specific issue, followed by later contrary dicta statement on same issue, court should apply supreme court’s express holding in former decision until supreme court itself explicitly recedes from express holding).

Hayes simply did not present the issues of who must initiate the genuineness inquiry and whether the lack of an on-the-record genuineness finding precludes appellate review. Thus, its statements on these specific issues are dicta.

Application of law to this case

In the instant case, when the prosecutor exercised a peremptory strike on Mr. Garvin, defense counsel noted that Respondent was African-American and requested the State offer a race-neutral reason for the strike (R 790-791). The trial court noted that Mr. Garvin appeared to be African-American and asked if the State had a race-neutral reason for the strike (R 791). The prosecutor responded:

The State does have a race neutral reason. Mr. Garvin indicated that he would prefer CSI evidence. Additionally, the Defense has stricken two black females in their first round of strikes. They've also stricken black individuals for cause. And this is - -

(R 791).

After the State's response, the defense was silent. The trial court found the State's reason to be race neutral and upheld the State's peremptory strike of Mr. Garvin (R 791). After the trial court's ruling, the defense was silent. Respondent did not object to the State's reason, did not challenge the State's reason as to the facts or as a pretext for discrimination, did not request that the trial court conduct any further inquiry, and did not object to the trial court's ruling as inadequate under Melbourne.

Just as in Ivy, defense counsel here did not explain or even attempt to explain the circumstances surrounding the strike that might support a determination that the prosecutor's stated neutral reason was a pretext for impermissible discrimination. The record shows that the defense had ample opportunity to challenge the State's stated reason. At the time that Mr. Garvin was struck, Respondent had used three of his peremptory strikes (R 789, 790). The selection process continued for several pages of transcript and Respondent used his remaining seven peremptory strikes (R 791, 792, 793, 794).

Moreover, defense counsel eventually requested, and the trial court granted, one additional peremptory strike (his 11th peremptory strike) that he used on potential juror Vathauer (R 796). Thus, the defense was fully capable of asserting claims and making arguments when it suited. The trial court did not in any way prevent or interfere with the defense asserting that the State's strike of Mr. Garvin was a pretext for purposeful race discrimination.

At the conclusion of the jury selection process, defense counsel indicated that "just for the purposes of the - - the appellate record" he could not accept the panel in part because the trial court denied his Melbourne objection to the State's striking of Mr. Garvin (R 799). Defense counsel did not indicate that the State's proffered reason was not true or was a pretext, did not indicate that the trial court's ruling or

analysis was inadequate, and did not put the trial court on notice of any deficiencies in the Melbourne procedure prior to the jury being sworn (T 801).

Based on the foregoing, the Fourth District erred in finding that Respondent preserved a claim of error in the trial court's ruling on the Melbourne issue, including that the trial court failed to fully comply with step 3 of Melbourne by failing to assess whether the proffered reason was genuine. Respondent never challenged the State's proffered reason in any way – not factually and not as a pretext. Moreover, the record supports that the State's proffered reason was true. During voir dire, Mr. Garvin verbally indicated a preference for CSI type evidence (R 688). The reason was related to the case and was not frivolous or nonsensical. The trial court found the reason to be race-neutral (R 791). The fact that the trial court allowed the peremptory challenge clearly indicates that it did not find the State's reason to be pretextual. Davis, 691 So. 2d at 1183. Respondent never requested the trial court make a finding of genuineness or claimed that the trial court's ruling was deficient.

While Respondent made a perfunctory renewal of his objection prior to the jury being sworn, this was insufficient to preserve the claim that he raised for the first time on appeal (R 799). In renewing his objection, he made no attempt to alert the trial court to any deficiencies or rebut the presumption that the peremptory challenge was exercised in a nondiscriminatory manner. The presumption of

nondiscrimination remained intact. **The presumption was never even tested.**

Mobley v. State, 100 So. 3d 1170 (Fla. 1st DCA 2012) illustrates this point. In Mobley, after the State gave its race-neutral reason for using a peremptory challenge on an African-American prospective juror, the trial court allowed the strike, to which the prosecutor commented “[s]o it was a race-neutral reason.” Id. at 1171. Prior to the jury being sworn, the defense renewed its objection to the State’s peremptory strike. Id. at 1172. The defense then made a perfunctory renewal of its objection at the close of the evidence, when the jury retired to deliberate, and in a motion for new trial. Id.

On appeal, Mobley challenged the trial court’s failure to explicitly rule on the genuineness element of the Melbourne procedure. Id. The First District found that this claim was not preserved for review. Id. The First District explained that, while defense counsel renewed a general objection to the State’s peremptory challenge at every opportunity, defense counsel never asserted that the State’s reasons, which the trial court found to be race-neutral, were not genuine or a pretext. Id. at 1172. Defense counsel’s perfunctory renewal did not alert the trial court that the defense was claiming pretext. Id. The First District elaborated:

Upon the court’s determination that a reason is racially neutral, the burden of moving forward with evidence of purposeful discrimination remains with the opponent of the strike. See Bowden v. State, 787 So.

2d 185, 188 (Fla. 1st DCA 2001). Absent proof to the contrary, peremptory challenges are still presumed to be exercised in a non-discriminatory manner. **In other words, the opponent who seeks to continue with its challenge to the strike after the court has found the reason race-neutral must rebut the presumption that the peremptory strike is being used in a nondiscriminatory manner by voicing a specific objection that the reason is not genuine or is a pretext.** Davis v. State, 691 So. 2d 1180 (Fla. 3d DCA 1997) (defendant objected to trial court's ruling that State's reason was race-neutral but did not articulate reason for objecting; issue of "genuineness" not argued to trial judge and thus not preserved for appeal).

The opponent of the strike cannot generally object to the trial court's determination that the reason is race-neutral without any request or other notice to the court that it seeks a more specific determination of genuineness, and then appeal the trial court's ruling for failure to further specify its ruling. As stated in Melbourne v. State, 679 So.2d at 765, "[t]he right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense." The State's reasons for striking the potential juror in this case were determined by the trial court to be race-neutral. **The defense's general renewal of its objection was insufficient to rebut the presumption that the peremptory challenge was exercised in a nondiscriminatory manner.**

Id. at 1172–73 (emphasis added).

Based on the foregoing arguments and authorities, the Fourth District erred in finding that Respondent's claim that the trial court's ruling was deficient was preserved for review where the trial court found the State's proffered reason to be race-neutral and Respondent never challenged the State's reason or the trial court's ruling, or sought a more specific determination of genuineness before the trial court.

2. The Fourth District improperly modified the Melbourne procedure to add another “duty” for the trial court.

Below, the majority of the Fourth District not only rejected the State’s preservation argument but went even further to add a new requirement to the Melbourne procedure. The majority opinion concluded that “at a **minimum**, Melbourne imposes a **duty** on trial courts at Step 3 [of the Melbourne procedure] to request a response to the proffered explanation from the opponent of the peremptory challenge once Step 2 has been completed.” (AR 234) (emphasis added).

Melbourne provides that when the requirements of step 1 are met, then the trial court “must” ask the proponent of the strike to explain the reason for the strike. Melbourne, 679 So. 2d at 764. At that point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). Id. However, when step 2 is satisfied, Melbourne does not set forth any requirement – or duty – that the trial court must “at a minimum” turn to the opponent of the strike and “request a response to the proffered explanation.” (AR 234).

If this Court had wanted to impose such a duty, then it could have included such language – just as it included language on what the trial court “must” do if step 1 is satisfied. The Fourth District majority opinion imposes a duty on trial courts that is not contained in Melbourne. Thus, this Court should clarify that Melbourne does

not impose such a duty. See Melbourne, 679 So. 2d at 765 (“The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense.”).

3. The Fourth District improperly reversed the trial court’s ruling upholding the State’s exercise of the peremptory strike of Mr. Garvin.

Relying in part on its improper modification of Melbourne to require a trial court to request a response to a proffered neutral reason, the Fourth District reversed the trial court’s ruling upholding the State’s strike of Mr. Garvin. This was error. The record shows that the trial court’s decision to uphold the strike was not clearly erroneous and Respondent failed to carry his burden to demonstrate purposeful discrimination.

Here, the State struck Mr. Garvin because he indicated a preference for “CSI” evidence in some cases (R 685, 688, 791). Acknowledgment by a potential juror of a preference for “CSI” type evidence in order for the State to prove its case is a legitimate, race-neutral reason for using a peremptory challenge. See League v. State, 381 P. 3d 633 (Nev. 2012) (trial court did not err in the denial of Batson challenge where the race-neutral explanation provided was that the potential juror had a strong preference for “CSI” type evidence).

Respondent never argued at trial or an appeal that the State’s proffered reason

was not true, was not race-neutral, or was a pretext for race discrimination.

There is no requirement that the trial court specifically use the word “genuine” or any specific words to satisfy step 3 of Melbourne. See Hoskins, 965 So. 2d at 12; Murray v. State, 3 So. 3d 1108 (Fla. 2009) (“There are no specific words which the court must state to satisfy step three of the Melbourne analysis.”).

Nor is the trial court required to orally perform its genuineness analysis or to articulate the basis for its ruling. Lidiano v. State, 967 So. 2d 972, 975 (Fla. 3d DCA 2008). See also Sharp v. State, 789 So. 2d 1211, 1213 (Fla. 5th DCA 2001) (“There is no requirement for the trial court to articulate the thought process used in concluding that the reason given for the strike was pretextual. An appellate court is compelled to affirm a trial court’s finding of a pretext unless it is clearly erroneous.”); Alonzo v. State, 46 So.3d 1081, 1084 (Fla. 3d DCA 2010) (explaining that a trial court’s genuineness analysis under Melbourne may be implicit), review denied, 70 So. 3d 586 (Fla. 2011), and cases cited therein.

In the instant case, in addition to providing its race-neutral reason for striking Mr. Garvin, the prosecutor expressly advised the trial court that the defense had stricken two African-American females (Ms. Thomas and Ms. Ellis) in their first round of strikes (R 791). The record shows that, after the State had accepted the jury panel with these two African-American jurors, the defense struck them with a

peremptory (R 789-790). Such record evidence undermines any claim that the State's peremptory strike of Mr. Garvin was motivated by race.

The State's acceptance of these jurors was apparent to the trial judge who witnessed the entire jury selection process. The transcript shows that the trial court read out the proposed panel by name at each step of the selection process:

THE COURT: All right. So, the panel at this time consists of: Ellis, Thomas, Debesa, Ricketts, Edwards and Predvil.

Does the State accept the panel?

[The prosecutor]: State accepts.

THE COURT: Does the Defense accept?

[Defense counsel]: No, Your Honor. If I can use a peremptory on Juror No. 1, Ms. Ellis.

THE COURT: All right. Panel consists of: Thomas, Debesa, Ricketts, Edwards, Predvil and Lachs.

Does the State accept the panel?

[The prosecutor]: Accept.

THE COURT: Does the Defense accept?

[Defense counsel]: Your Honor, the Defense would exercise a peremptory on Juror No. 2, Belinda Thomas.

(R 789-790).

The State's acceptance of Ms. Ellis and Ms. Thomas, both African-American,

occurred within moments of the State’s strike of Mr. Garvin (R 790). When the prosecutor provided her race-neutral reason for striking Mr. Garvin, she placed sufficient information in the record as to Ms. Ellis and Ms. Thomas so that it can be discerned that the trial court considered the racial makeup of the panel in ruling on the strike.

The majority of the Fourth District rejected this argument because the trial court did not request a response from Respondent to the State’s proffered reason (which is not required by Melbourne as discussed in detail above) and the trial court “cut off” the State before it could point out that it had twice accepted the jury panel with those jurors (AR 242). The majority opined that, based on the record, it could not “assume that a genuineness inquiry was actually conducted in order to defer to the trial court.” (AR 242).

Respectfully, the Fourth District overlooks that there was no “duty” to request a response from Respondent to the State’s proffered reason and the prosecutor sufficiently identified Ms. Ellis and Ms. Thomas and their race (See R 791: “the Defense has stricken two black females in their first round of strikes”). The trial court was present throughout, was aware of the strikes, and announced the new panel every time a strike was used. The record demonstrates that the trial court was aware of and considered circumstances relevant to whether the strike was exercised for a

discriminatory purpose, such as the racial makeup of the venire, and implicitly found there was no pretext. See Melbourne at 764 n. 8; Watson v. State, 841 So. 2d 659, 661 (Fla. 4th DCA 2003) (rejecting defendant’s argument that trial court failed to conduct a genuineness inquiry where the record showed that trial court considering makeup of the venire in determining whether strike was proper).

The majority below also overlooked that Respondent had the entire burden of persuasion and never alleged pretext or purposeful discrimination. In Spencer II, while the plurality found that the Melbourne objection was fully preserved, it also found that the opponent of a peremptory strike bears the burden of persuasion and this burden “should include **expressly** stating a claim of pretext and presenting facts and argument to support such a claim.” Spencer II, 238 So. 3d at 715 (emphasis added). Because the burden of persuasion was on defense counsel, as the opponent of the strike, and defense counsel was asked to respond to the State’s reason and had no response, the plurality found that the trial court properly overruled the objections. Id. at 717.

Here, the same rationale applies. The State provided a race-neutral reason based on Mr. Garvin’s verbal response to questioning in *voir dire*. His response was not only witnessed by the trial court but captured by the court reporter and available for review. Likewise, the prosecutor’s representations as to the defense’s striking of

two African-American jurors, which the State had accepted and the trial court had witnessed the State accepting, was captured by the court reporter and available for review. Respondent bore the entire burden of persuasion, which included expressly stating a claim of pretext and presenting facts and argument to support such a claim. The record conclusively shows he did not do this.

While the trial court here did not expressly ask defense counsel to respond to the State's race-neutral reason, the record shows defense counsel had ample opportunity to assert a response if he so desired, exercised numerous more challenges after the State's strike of Mr. Garvin, and even requested, and was granted, an additional peremptory strike. Defense counsel also made a perfunctory renewal of his Melbourne objection, but again omitted any facts or arguments to support his objection. Thus, if the reviewing court's focus is truly "on the opportunity provided to the opponent of the strike to be heard and make argument" then this was satisfied. Spencer II at 718. Respondent simply did not meet his burden in establishing purposeful race discrimination.

Further, the State notes that Spencer involved peremptory challenges as to two jurors, No. 16 and No. 11. As to juror No. 16, the trial court requested the defense to respond to the State's race-neutral reason and the defense stated: "I have no response.". Spencer II at 717. As to juror No. 11, when the State provided a race-

neutral reason, the defense made a comment, which as Spencer I noted did not seem to have anything to do with the reason articulated by the State and it was not clear to the Second District why this information would support a theory of pretext. Spencer I at 410. The trial court did not solicit this response from the defense.

Thus, as to juror No. 11, the trial court did **not** specifically request the defense to respond to the State's race-neutral reason, albeit the defense interjected a response anyway. Such supports the State's position that, even though a trial court does not affirmatively request a response to the State's proffered reason, this is not dispositive. If the record shows that defense counsel had an opportunity to respond and make argument, but did not do so, then – even under the plurality of Spencer II – the requirements of Melbourne are met. Accordingly, the requirements of Melbourne were met in the instant case. Respondent did not carry his burden to show purposeful discrimination and the trial court properly upheld the State's strike.

CONCLUSION

In the face of a plausible race-neutral reason for a peremptory strike, Respondent stood mute. Respondent never challenged the State's proffered reason, never claimed the State's reason was a pretext for discrimination, and never put the trial court on notice that its ruling upholding the strike was not in compliance with

Melbourne. As such, Respondent did not preserve any error in the trial court’s ruling, including any deficiencies in the Melbourne step 3 process for appeal.

Even if preserved, the record conclusively shows that Respondent did not carry his burden of persuasion to establish purposeful race discrimination. Thus, the trial court did not clearly err in upholding the State’s peremptory strike.

Yet, under the Fourth District’s majority ruling, Respondent receives a new trial. To require a new trial under these circumstances does nothing to further the principles underlying Batson/Melbourne, “but rather would erode the legitimacy of [those] decisions.” Melbourne at 765. Based on the foregoing arguments and authorities, the State respectfully requests that this Court quash the decision of the Fourth District Court of Appeal.

Respectfully submitted,

ASHLEY MOODY
Attorney General
Tallahassee, Florida

/s/Celia Terenzio
CELIA TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

/s/ Kimberly T. Acuña
KIMBERLY T. ACUÑA
Assistant Attorney General

Florida Bar No. 0846619
1515 North Flagler Drive, Suite 900
West Palm Beach, FL 33401-3432
Tel: (561) 837-5016
Fax: (561) 837-5108
E-Mail: crimappwpb@myfloridalegal.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by electronic mail to Richard G. Bartmon, Assistant Regional Counsel, Counsel for Respondent, 401 S. Dixie Highway, Second Floor, West Palm Beach, Florida 33401 at RC4Appellatefilings@rc-4.com and rbartmon@rc-4.com on May 29, 2019.

/s/ Kimberly T. Acuña
KIMBERLY T. ACUÑA
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210(a)(2), Appellee hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

/s/ Kimberly T. Acuña
KIMBERLY T. ACUÑA
Assistant Attorney General