IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC19-96

STATE OF FLORIDA,

Petitioner,

vs.

GEOVANI JOHNSON,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

ASHLEY MOODY
Attorney General
Tallahassee, Florida

CELIA TERENZIO
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.

In this brief, citations to "A" refer to the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

When determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion. Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1998). Petitioner presents the facts as they appear in the opinion below:

> In Case Nos. 13011816CF10A and 13012248CF10A, [Respondent] was charged with violating probation, based in part on three counts of robbery with a firearm and possession of a firearm by a convicted felon filed in Case No. 14013212CF10A. The new charges proceeded to a jury trial.
>
> During jury selection, the State exercised a peremptory challenge on Juror No. 10, an African-American male. At [Respondent's] request, the trial court asked the state for a race-neutral reason for the strike. The State responded:
>
> > The State does have a race-neutral reason. [Juror No. 10] 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 –
>
> Cutting off the State, the trial court stated: "All right. Okay. I find that to be [a] race-neutral reason. I'm going to uphold State's use of a peremptory on [Juror No. 10]." [Respondent] did not make any further objection or argument at that time. However, at the conclusion of the jury selection process, when asked if each side accepted the panel of jurors, the defense advised the panel was not acceptable, in part because the trial court "denied my Melbourne vs. State objection to the State striking [Juror No. 10]."
>
> The jury found [Respondent] guilty of three counts of robbery with a weapon, lesser-included offenses, and not guilty of possession of a firearm by a convicted felon. The court entered judgment and sentenced [Respondent] to concurrent prison terms for the three robberies. The trial court revoked [Respondent's] probation in the other two cases and imposed sentences in those cases. [Respondent] gave notice of appeal.

Johnson v. State, 2018 WL 6719724 at *1 (Fla. 4th DCA Dec. 19, 2018) (internal footnote omitted) (See A).

As to Respondent's new law violations charged in Case No. 14013212CF10A, Respondent asserted that the trial court erred by: (1) failing to conduct a proper Melbourne[1] 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. Id. The Fourth District Court of Appeal ("Fourth District") affirmed on the Sixth Amendment issue without discussion. Id.

[1] Melbourne v. State, 679 So. 2d 759 (Fla. 1996).

However, as to the first issue, a majority of the Fourth District determined that the trial court did not comply with Melbourne. Id. Consequently, Respondent's convictions and sentences for robbery with a firearm (three counts) and possession of a firearm by a convicted felon were reversed and remanded for a new trial. Id.

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 *3. The majority rejected the State's preservation argument, holding that the Melbourne procedure is always a three-step process. Id. at *1.

The majority set forth the Melbourne procedure to be followed when a party objects to the exercise of a peremptory challenge on the ground that it was made on an improper discriminatory basis:

> Step 1: Objection and Prima Facie Case
>
> 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 protected group; and c) request that the court ask the striking party its reason for the strike.
>
> Step 2: Race-Neutral Explanation
>
> The court must then 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 3: Determination of Genuineness
>
> 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. The court's focus here is not on the reasonableness of the explanation but rather its genuineness.

Johnson at *2, citing Melbourne at 763-64 and Hayes v. State, 94 So. 3d 452, 461 (Fla. 2012).

The majority noted that, twenty-two years after Melbourne, "courts still struggle with its proper application" with case law increasingly focused on Step 3 of the Melbourne procedure. Id. at *3.[2] The "unresolved troublesome aspects of Step 3" were exemplified in Spencer v. State, 238 So. 3d 708 (Fla. 2018) ("Spencer II"). Id. The majority observed that Spencer II revealed "a divided court on the issue of the preservation requirements for a Melbourne noncompliance claim." Id.

In Spencer v. State, 196 So. 3d 400, 401 (Fla. 2d DCA 2016) ("Spencer I"), the Second District upheld the defendant's conviction, determining that his claim that the trial court did not comply with Step 3 of Melbourne was not preserved. In Spencer II, all justices agreed with the Second District that Spencer's conviction should not be reversed for noncompliance with Melbourne. In a plurality opinion,

[2] The panel of the Fourth District also struggled with this issue and one member of the panel dissented, as discussed further below.

three justices agreed the Melbourne noncompliance claim was preserved. Spencer II at 718. Two justices concurred in result, with an opinion disagreeing that the claim was preserved, suggesting that the court recede from language in Hayes, and readopt the court's prior preservation reasoning in Floyd v. State, 569 So. 2d 1225 (Fla. 1990). Id. at 719-20 (Lawson, J., concurring in result). Two justices concurred in result without an opinion. Id. at 718.

In this case, the majority rejected the reasoning of the Second District in 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 and Floyd. 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."

Johnson at *5.

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." Id. at *6.

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]."

Id. at *12.

The State had asked the district court to infer that the trial court complied with Step 3 because it pointed out to the trial court, in providing its race-neutral reason for striking Juror No. 10, that the defense had stricken two black females in the defense's first round of strikes, after the State had twice accepted the jury panel with those jurors. Id. 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 Juror No. 10 was true and went unchallenged by Respondent. Id. at *13. 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." Id. at *14.[3]

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)[4], because those cases continue to adhere to the analysis of the Second District in Spencer I. The Fourth District certified conflict with those decisions. Johnson at *12.

SUMMARY OF THE ARGUMENT

This Court has clear authority to accept discretionary review based on the Fourth District's certification that its decision conflicts with Brown v. State, 204 So. 3d 546 (Fla. 5th DCA 2016), Ivy v. State, 196 So. 3d 394 (Fla. 2d DCA 2016), and

[3] Batson v. Kentucky, 476 U.S. 79 (1986).

[4] 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).

Hanna v. State, 194 So. 3d 424 (Fla. 3d DCA 2016). Furthermore, the issue presented is significant. As noted in Spencer I, "[t]he process of jury selection occurs daily in our courts and there should be no confusion about the relative burdens of the parties and of the court during a Melbourne hearing when the hearing reaches step 3." Spencer I at 410. This Court had the opportunity to resolve this confusion in Spencer II but did not do so. In light of the need for clear guidance to Florida's courts on this significant issue, this Court should accept review.

ARGUMENT

THIS COURT HAS JURISDICTION TO GRANT REVIEW BASED ON THE CERTIFIED CONFLICT.

Article V, Section 3(b)(4), Fla. Const., provides the basis for the Supreme Court's jurisdiction, stating: "[t]he supreme court . . . [m]ay review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal." This provision is the basis for Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi), which states: "The discretionary jurisdiction of the supreme court may be sought to review …. decisions of district courts of appeal that … are certified to be in direct conflict with decisions of other district courts of appeal."

The Fourth District certified that its opinion in this case regarding the procedure for a Melbourne challenge conflicts with the opinions in Brown, Ivy, and Hanna because those cases continue to adhere to the analysis of the Second District in Spencer I. Johnson at *12.

Brown states in pertinent part:

> We further conclude that Appellant 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. See, e.g., Spencer v. State, 196 So. 3d 400, 406 (Fla. 2d DCA 2016) (holding that opponent of peremptory challenge, which was made pursuant to Melbourne, must object to any deficiency, including pretext, at time of challenge); Ivy v. State, 196 So. 3d 394, 398–99 (Fla. 2d DCA 2016) (holding that defendant failed to preserve issue of whether trial court erred in failing to make separate finding on issue of pretext after finding exercise of peremptory challenge to be race-neutral); Hanna v. State, 194 So. 3d 424 (Fla. 3d DCA 2016) (joining the decisions of Spencer and Ivy).

Brown, 204 So. 3d at 547 (internal footnote omitted).

Ivy states in pertinent part:

> For the reasons explained in Spencer [I], we conclude that Mr. Ivy did not adequately preserve a Melbourne issue in this case and cannot demonstrate on this record that the trial court abused its discretion or clearly erred in allowing the strike.

Ivy, 196 So. 3d at 399.

Hanna states in pertinent part:

> We find no merit in any of [the defendant's] claims but note that in

> rejecting Hanna's claim as to the Melbourne issue, we join in the decisions in Spencer [I] … and Ivy … in doing so.

Hanna, 194 So. 3d at 424.

One established rule of the Melbourne process for which there is no confusion is that "the burden of persuasion never leaves the opponent of the strike to prove purposeful discrimination." Hayes, 94 So. 3d at 461, citing Melbourne, 679 So. 2d at 764. Spencer I, Brown, Ivy, and Hanna properly applied the applicable law and found that, after making a Melbourne objection, the opponent's burden of persuasion includes an obligation to object to deficiencies in Melbourne's Step 3 process. The Fourth District not only found to the contrary but also went further to add another requirement to the Melbourne procedure, opining 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 the peremptory challenge once Step 2 has been completed." Johnson at *6. Thus, this Court should accept discretionary review, resolve the conflict, and quash the contrary decision of the Fourth District.

CONCLUSION

Based on the foregoing, this Court has discretionary jurisdiction to review the decision below. Petitioner respectfully requests that this Court exercise its discretion, accept review of this case, and quash the Fourth District's decision.

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 a true and accurate copy of the foregoing has been furnished by electronic mail to Richard G. Bartmon, Assistant Regional Counsel, Counsel for Appellant, 401 S. Dixie Highway, Second Floor, West Palm Beach, Florida 33401 at RC4Appellatefilings@rc-4.com and rbartmon@rc-4.com on January 28, 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