IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC19-96

STATE OF FLORIDA,

Petitioner,

vs.

GEOVANI JOHNSON,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Prospective juror Fountain was a fan of the television show "CSI." (R 684).[1] When the prosecutor asked Ms. Fountain if she was comfortable with the State not having CSI evidence to prove its case, she initially said, "it would depend on what type of case it is" and asked if there was testimony or other evidence (R 685-686). When the prosecutor responded yes, then Ms. Fountain replied yes (R 685-686). Ms. Fountain sat on the jury (R 797). Her race is not in the record.

When the prosecutor asked prospective juror Peirce whether she would "require" the State to have CSI evidence, Ms. Peirce responded that she would "prefer" to have CSI evidence but would not "require" it (R 686). Ms. Peirce was struck by the defense (R 792). Her race is not in the record.

When the prosecutor asked prospective juror Ojo if he would "require" the State to have CSI evidence, Mr. Ojo responded, "I don't think so." (R 687). Mr. Ojo was struck by the State (R 790). His race is not in the record.

When the prosecutor asked prospective juror Almendarez "[w]hat about you?" in reference to CSI evidence, Ms. Almendarez stated she would "prefer" for

[1] 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). Citations to the Answer Brief will be referenced as "AB".

the State "to have a lot of evidence" and if the State proved all the elements of the crime with one witness, then Ms. Almendarez "would believe it." (R 690). Ms. Almendarez later indicated that she was confused by the question, thought the prosecutor had said she "would have one witness but more evidence", and stated she would "really feel insecure" "about giving the verdict of guilty to a person in that way." (R 711-712). She also had a sister in Honduras who had been the victim of an armed robbery and she could "not completely" set aside what had happened to her sister (R 640-641). The defense struck Ms. Almendarez for cause, without objection by the State (R 778). Her race is not in the record.

Regarding the other prospective jurors that Respondent alleged expressed hesitation or concern if the State's evidence consisted of "one witness" (AB 2), the race is unknown on all these jurors. Further, many of these potential jurors were struck by the defense. The defense struck Ms. Cheval and Mr. Fierberg with peremptories and Ms. Logan and Mr. Ramon for cause (R 783-784, 793, 794).

Prospective juror Bradley had a brother who had been arrested for possession of a firearm and was struck by the State without objection (R 647-648, 793). Prospective juror Rodriguez had been convicted of carrying a concealed weapon, had a sister with a conviction for assault on a law enforcement officer, and was struck by the State as the jury alternate without objection by the defense (R 654, 797).

Prospective juror Whites Robert sat on the jury (R 797). Prospective juror Campos was the alternate on the jury (R 797). Hanson, Cox, and Hanin were potential jurors number 44, 45, and 47 in the order of seating and were not reached in the strike portion of jury selection (R 666-667, 797-799).

REPLY ARGUMENT

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

In arguing that Respondent's Melbourne[2] objection was preserved by his initial objection and renewal of same prior to the swearing of the jury, Respondent asserts that this Court should not add "new" procedural requirements to preserve a Melbourne claim (AB 11), Melbourne inquiries are comparable to Richardson[3] inquiries for discovery violations (AB 22), Melbourne inquiries are comparable to the procedure for competency hearings (AB 23), discriminatory strikes will increase if this Court finds his claim unpreserved (AB 24), appellate review in general will be negatively affected if his claim is found to be unpreserved (AB 25), and "new" procedural requirements will multiply ineffective assistance of counsel claims (AB

[2] Melbourne v. State, 679 So. 2d 759 (Fla. 1996).
[3] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

26). Respondent asks this Court to reject "super" procedural objections and "re-commit" to "vigilant enforcement" of all Melbourne steps (AB 25, 27).

The State is not asking for "new" preservation requirements. Rather, the State is seeking enforcement of existing preservation requirements. Requiring a party to preserve an alleged error for appeal by raising that specific legal argument at trial is not new law. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Requiring an opponent of a peremptory strike to challenge the proponent's proffered reason as a pretext for discrimination in order to preserve a Melbourne objection is not new law.

In Hall v. State, 768 So. 2d 1212 (Fla. 4th DCA 2000), almost 20 years ago, the Fourth District concluded that the defendant's objection was not preserved for appeal because, when the State offered a race neutral explanation, the defendant did not challenge it as a pretext. Id. The Fourth District relied on Melbourne and noted that the defendant did not contest the genuineness of the explanation. Id.

In Davis v. State, 691 So. 2d 1180 (Fla. 3d DCA 1997), over 20 years ago, the defendant argued that the State's proffered reason for a peremptory strike was pretextual and the trial court did not specifically find that the proffered reason was "genuine", which he claimed was mandatory under Melbourne. The Third District found that the defendant's argument was waived where the defendant did not challenge the State's proffered reason as pretextual. Id. at 1181.

Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991), is even older. Floyd held that, because defense counsel failed to object to the prosecutor's explanation for a peremptory strike, the issue was not properly preserved for review. Id. at 1230. Floyd, while pre-Melbourne, remains good law.

Thus, contrary to Respondent's assertions, requiring an objecting party to challenge a proffered reason as a pretext or to contest the adequacy of the trial court's ruling in order to preserve the objection for appeal is not "new", nor is it novel. Other state and federal courts to address this issue have found a Batson[4] objection waived where the opponent failed to challenge a proffered reason as pretextual. See Davis v. Baltimore Gas & Elec. Co., 160 F.3d 1023, 1027 (4th Cir. 1998) ("[T]he movant's failure to argue pretext constitutes a waiver of the initial [Batson] objection."); Hopson v. Fredericksen, 961 F.2d 1374, 1376 (8th Cir. 1992) (Batson issue not preserved where opponent did not object nor request trial judge articulate reasons on record for overruling Batson objection, nor did opponent make any attempt to rebut proponent's proffered reasons); United States v. Rudas, 905 F.2d 38 (2d Cir. 1990) ("Once the Government has offered reasons for its peremptory challenges, defense counsel must expressly indicate an intention to pursue the Batson claim. Here

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

defense counsel did nothing.... By failing to dispute the Government's explanations, she appeared to acquiesce to them. As a result, there was no need for the district judge to make a ruling."); United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (by failing to dispute prosecutor's explanation for strike in the trial court, defendants waived their right to object to it on appeal); People v. Jones, 784 N.E.2d 1152, 1157 (N.Y. Ct. App. 2002) ("By accepting the People's explanation without any additional objection at a time that it could have been addressed, defendant failed to preserve a challenge to (a panelist's peremptory exclusion)".); State v. Nylon, 311 S.W.3d 869, 882 (Mo. Ct. App. 2010) (because defendant failed to challenge the State's proffered reason, defendant did not make an effective Batson challenge and failed to preserve issue for appeal).

Respondent contends that adopting the reasoning of Spencer I/Spencer II[5] concurrence "means that **pretextual challenges** could go unreviewable because a Step 3 inquiry was not triggered or preserved." (AB 24) (emphasis added). Respondent is mistaken. To the contrary, Spencer I/Spencer II concurrence agree that pretextual challenges are reviewable at Step 3 – the point is that the pretextual challenge must be made for it to be reviewed at Step 3. **Pretext is not presumed.**

[5] Spencer v. State, 196 So. 3d 400 (Fla. 2d DCA 2016) ("Spencer I"); Spencer v. State, 238 So. 3d 708 (Fla. 2018) ("Spencer II").

Rather, **the presumption is of non-discrimination.** Melbourne at 764. The onus is on the objecting party – not the trial court – to overcome this presumption. Inherent in overcoming this presumption is claiming that a proffered reason is pretextual – that discrimination is the real reason for the strike. If there are no facts or argument asserted to support pretext, then there is nothing to show purposeful discrimination.

By ruling on the objection, the trial court completes the 3-step process. See Davis, 691 So. 2d at 1183. If the trial allows the strike, then the trial court has found, given all the circumstances surrounding the strike, that the proffered reason was not a pretext. See Melbourne at 764; Davis at 1183. See also Bowden v. State, 787 So. 2d 185, 188 (Fla. 1st DCA 2001) (trial judge's decision to allow State's peremptory challenge would indicate that he found the strike to be genuine).

The State is not advocating that Step 3 be eliminated or limited. Step 3 is alive and well, but whether that life is long or short depends on the efforts of the objector. Proper application of Melbourne recognizes that a trial court's Step 3 genuineness determination does not occur in a vacuum and is dependent on "the parties' submissions." Trial courts do not create or assist a party in making their submissions. The trial court's role is to **rule** based on a party's submissions. See Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (at the third step, "in light of the parties' submissions", the trial court must determine whether the defendant has shown

purposeful discrimination"). If a party submits nothing to support its objection, then the trial court, applying the presumption of non-discrimination and the burden of persuasion, generally has but one option – to uphold the strike.

The preservation requirements espoused in Floyd, Hall, Davis, Spencer I, and the conflict cases are in keeping with the overarching principle that the party who raises a Melbourne objection has the burden of persuasion, from beginning to end, to establish purposeful discrimination. That this burden rests on the objector is not a "new" procedural hurdle, but established law. See Purkett v. Elem, 514 U.S. 765, 768 (1995) ("the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."); Melbourne, 679 So. 2d at 764 ("Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination."), citing Purkett, *supra*.

Another well-established principle – also all but ignored by Respondent – is that peremptory challenges are presumed to be exercised in a nondiscriminatory manner. Melbourne at 764, citing State v. Neil, 457 So. 2d 481, 486 (Fla. 1984). Such a presumption of non-discrimination is not new but has been the law in Florida for about 35 years.

These two principles – the presumption of nondiscrimination and the entire burden of persuasion resting on the objecting party from beginning to end – are

established law and must inform the analysis of the issue presented here. Yet, Respondent has reduced them to a "bare mention" to achieve a desired result.

In Respondent's 46-page brief, he does not mention the burden of persuasion placed on the objecting party until page 41, and then only to assert that the burden on the objecting party is "heightened" without the trial judge engaging in a "mandatory" Step 3 inquiry (AB 41-42). Contrary to Respondent's assertions, the State is not advocating that trial courts abdicate making Step 3 genuineness determinations. Rather, the State is advocating that objecting parties make a pretextual challenge to preserve a Melbourne objection. This does not "heighten" the burden on the objecting party. This is part and parcel of their burden.

Finding a Melbourne objection to be unpreserved where an opponent has **never** challenged the proponent's stated reason as a pretext is not going to allow discrimination, encourage discrimination, or leave discrimination undetected. An objecting party's failure to allege pretext – that discrimination is the real reason for the strike – negates any claim of discrimination.

Respondent's comparison of a Melbourne inquiry to a Richardson inquiry and a competency inquiry is not well-taken. Such a comparison overlooks and essentially nullifies the guiding principles that there is a presumption of non-discrimination and the objecting party has the entire burden of persuasion from beginning to end.

Such a comparison also overlooks that these inquiries are not comparable as to the relief available. If a trial court fails to hold an adequate Richardson hearing on a discovery violation, the error does not automatically require reversal and is subject to a harmless error analysis. See Durrance v. State, 44 So. 3d 217, 221 (Fla. 4th DCA 2010) ("Where a discovery violation has occurred, the failure to conduct a Richardson hearing is not per se reversible error, but rather is subject to a harmless error analysis."). Likewise, where the trial court fails to follow all requirements to determine a defendant's competency, the case can be remanded for a retroactive determination of competency. See Dougherty v. State, 149 So. 3d 672, 679 (Fla. 2014) (new trial not always necessary where competency was inadequately determined prior to trial; a retroactive determination of competency is possible).

However, the remedy required for any error on a Melbourne objection is drastic. As noted in Spencer I, such an "error generally requires a new trial, even if the rest of the trial is flawless." Spencer I, 196 So. 3d at 408. Consequently, "[w]hen an error results in this type of drastic relief, it is important that litigants not be allowed to trap or trick the trial judge into reversible error by failing to make objections or by making inadequate objections. **Such an error should not be a matter of inadvertence**. The trial court needs a full and fair opportunity to correct or avoid an error in the procedure before the jury is sworn." Id. (emphasis added).

Comparison with other jury selection procedures is helpful. For example, a party must maintain a Melbourne objection by renewing the objection before the jury is sworn or otherwise the objection is waived, commonly called a "Joiner" objection.[6] The trial court, however, has no duty to turn to counsel before the jury is sworn and request if counsel is maintaining the objection. The responsibility falls to the party making the objection – not to the trial court.

Likewise, to preserve a claim of error for the denial of a cause challenge, a party must satisfy multiple steps. A party must "object to the jurors, show that he or she has exhausted all peremptory challenges and requested more that were denied, and identify a specific juror that he or she would have excused if possible." Matarranz v. State, 133 So. 3d 473, 482 (Fla. 2013). Then, before the swearing of the jury, the party must make a Joiner objection so that the trial court will have one last opportunity to take action. The trial court has no duty to assist a party in satisfying these steps. The burden is on the party pursuing the claim to satisfy each step. Similarly, when a Melbourne objection is made, the trial court has no duty to assist the objecting party in making or preserving its own objection. See Davis, 160

[6] Joiner v. State, 618 So. 2d 174 (Fla. 1993).

F.3d at 1028 ("The court has no obligation to guide the movant, step-by-step, through the requirements of his own [Batson] objection.").

Respondent's assertion that the Melbourne procedure should be construed like the procedure used for discovery violations and competency determinations because all are to insure the defendant's right to a fair trial is overbroad. As Justice Lawson has explained, the right at issue here is not so much more important than other rights that it justifies "having a trial judge step outside his or her neutral role to search for a violation presumed not to exist." Spencer II at 722, (Lawson, J., concurring), citing Williams v. State, 967 So. 2d 735, 747 n.11 (Fla. 2007) (recognizing that a defendant is required to preserve a Confrontation Clause argument and that a mere hearsay objection is insufficient); State v. DiGuilio, 491 So. 2d 1129, 1134–35, 1137 (Fla. 1986) (holding that a comment on post-arrest silence is not per se reversible error, even though it is a "constitutional error" carrying a high risk of depriving the defendant of a fair trial).

Respondent's claims that discriminatory strikes will increase if this Court finds his claim unpreserved (AB 24), appellate review in general will be negatively affected if his claim is found to be unpreserved (AB 25), and "new" procedural requirements will multiply ineffective assistance of counsel claims (AB 26) are pure speculation and hyperbole. Again, these are not new procedural requirements.

Moreover, requiring that a party challenge a proffered reason as pretextual and challenge a trial court's ruling as inadequate will advance the desired goal of ferreting out impermissible discrimination. In addition, where a party has made its record, then appellate review will be meaningful.

Here, the record conclusively shows that Respondent never challenged the State's reason for striking Mr. Garvin in any way. The record conclusively shows that Respondent never claimed that the State's strike of Mr. Garvin was discriminatory, pretextual, not the "real" reason, or any words to suggest pretext. The record conclusively shows that Respondent never challenged the trial court's ruling as inadequate under Melbourne. Respondent stood mute. Consequently, Respondent's Melbourne objection was not preserved. See Davis, 160 F.3d at 1027 (when faced with defendant's race-neutral explanation, plaintiff stood mute—effectively abandoning his Batson objection).

That Respondent made a Joiner objection prior to the jury being sworn did not cure his failure to challenge the State's proffered reason or the trial court's ruling. His Joiner objection was perfunctory and did not put the trial court on notice of any deficiencies, much less the deficiencies later claimed for the first time on appeal.

Respondent's contention here that, after the trial court ruled and upheld the State's strike, 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" is nonsensical (AB 30). Nothing in the record suggests that the trial court or the State stopped or deterred Respondent from challenging the State's reason. Part of any trial attorney's job is to make objections. If the defense had a good faith basis for challenging the State's proffered reason of Mr. Garvin, then the defense could have, and should have, said so. It did not.

Also, Respondent's contention that the record here is not as "pristine" for Melbourne purposes as the State suggests is not supported by the record (AB 43). Before this Court for the first time, Respondent alleges other prospective jurors not challenged by the State expressed the same or similar view as Mr. Garvin as to CSI evidence (AB 1-3, 43). The record does not indicate the race of any of these prospective jurors. Also, as set forth above, almost all the prospective jurors referred to by Respondent did not sit on the jury. Most were struck by Respondent. Thus, the record does not "raise questions" as to genuineness. See King v. State, 89 So. 3d 209, 231 (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; defendant failed to identify race of similarly situated jurors who were seated on the jury and thus cannot show that State's peremptory strike was racially motivated). Alonzo v. State, 46 So. 3d 1081, 1084 n. 2 (Fla. 3d

DCA 2010) ("If the record fails to identify the respective race of the challenged and unchallenged jurors, the appellate court cannot determine if pretext exists."), rev. denied, 70 So. 3d 586 (Fla. 2011); Davis, 691 So. 2d at 1182 (appellate review on question of pretext not possible due to failure to identify race of venireperson).

CONCLUSION

The goal of the Melbourne guidelines is the elimination of impermissible discrimination in the exercise of peremptory challenges. Without question, excluding a person from jury service because of their race or because of any other protected trait is constitutionally offensive. Accordingly, the threshold for Step 1 of a Melbourne objection is exceedingly low. A simple objection with reference to a venireperson's protected characteristic is enough. However, once a Melbourne objection is made and the objecting party is confronted with a facially neutral reason for the exclusion, the opponent must claim that the stated reason is a pretext – that impermissible discrimination is the real reason for the exclusion. If there is no claim of pretext, then the Melbourne objection is not preserved for appeal. If there is no claim of pretext, then the "evil" sought to be eradicated is admittedly not present.

Respectfully submitted,

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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 September 24, 2019.

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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.

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