IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-531

DWAYNE CURTIS DORSEY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE(S)**

CONSTITUTIONS

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INTRODUCTION

This cause is before the Court on a petition for discretionary review on the grounds of express and direct conflict of decisions. References to the record transmitted by the Third District Court of Appeal are indicated parenthetically by the letter "R" followed by the page number. References to the separately bound transcripts are indicated by the letter "T."

STATEMENT OF THE CASE AND FACTS

The State of Florida charged Dwayne Curtis Dorsey with battery on a law enforcement officer and resisting an officer with violence. (R. 2-3). Mr. Dorsey plead not guilty and the matter proceeded to trial. (R. 6-7, 43-46).

Among the prospective jurors was Tamika George, a black woman. (R. 42; T. 135). The trial judge, apparently satisfied with the answers Ms. George gave on her questionnaire, elected not to ask her any questions. (T. 62). When the prosecutor asked if there was anyone who felt he or she had been wrongly stopped by a police officer, Ms. George volunteered that she had such an experience. (T. 89). Other than a few follow-up questions about this incident, the state asked Ms. George no questions.[1] When defense counsel asked the panel if anyone had been excited about being summoned as a juror, one juror indicated she did. (T. 115). During jury selection, defense counsel pointed out that the juror was Ms. George – an assertion the state did not dispute. (T. 135).

The state exercised its second peremptory challenge against Ms. George. (T. 134-35). The sole reason the state offered for the strike was the prosecutor's impression that Ms. George was inattentive. (T. 135). Defense counsel objected

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[1]The prosecutor did **not** proffer Ms. George's experience as a reason for exercising a permptory strike against her.

that this reason was not supported by the record:

> [Prosecutor]: The State would exercise a peremptory challenge on Ms. George. She appeared disinterested throughout. I was looking at her. She was sort of staring at the wall.
>
> [Defense]: Your Honor, we would ask for a race neutral reason one for several reasons — Ms. George has four golds on the bottom — I know that because she smiled the whole time I was up there talking — I also noticed when you were doing your voir dire, I also saw that it wasn't that she was disinterested, she listened.
>
> She was very attentive, smiled in a lighthearted manner. She is also African-American. Dwayne Dorsey is African-American.
>
> THE COURT: State is that the only reason?
>
> [Prosecutor]: That's the reason. To me, she appeared disinterested. She did not — wasn't listening to anything.
>
> [Defense]: Also, say this — when [co-counsel] asked who was happy to be here on jury duty, she was the only person who affirmatively respond [sic] she was happy. We are objecting to the State peremptory. It doesn't agree to be any reason [sic].
>
> THE COURT: Well, I just must make a finding. It is not contextual. Her first challenge was against a Hispanic female. Now, we are talking a African American female. It is not as if she is trying to single out any particular group.
>
> [Defense]: Well, Your Honor especially the test is the genuineness of the reason provided by the State.
>
> THE COURT: Absolutely. And a pattern is not controlling.
>
> [Defense]: Right. And here, because the reason it's been produced by the State and what [the prosecutor] says, her only reason, is simply not supported by the record.
>
> Her statement that the juror is disinterested affirmatively rebutted

> by the fact that this is the only juror who actually said she wanted — I'm sorry what she said, she was happy when she got her jury document notice. I mean —
>
> THE COURT: [Prosecutor], I didn't notice it but are you telling me as Officer of the Court that that was your observation of this juror and that is why you wish to have her excused?
>
> [Prosecutor]: Exactly.
>
> THE COURT: I'm going to take [the prosecutor] at her word. I'm going to allow the challenge.

(T. 135-36). The State went on to strike two more African-American women over defense objection. (T. 138-42)

At the conclusion of jury selection, defense counsel accepted the panel subject to previously-raised objections. (T. 145). The defense again renewed Mr. Dorsey's objections to the jury selection immediately prior to the swearing of the jury. (T. 147).

The jury acquitted Mr. Dorsey of battery on a law enforcement officer, but convicted him of resisting an officer with violence. (T. 311-312). The court sentenced Mr. Dorsey to five years prison with a five year minimum mandatory term. (R. 59-60).

The district court affirmed Mr. Dorsey's conviction and sentence on January 15, 2002. *Dorsey v. State*, 806 So. 2d 559 (Fla. 3d DCA 2002). With regard to the peremptory strike of Tamika George, the court wrote:

> Relying on *Wright v. State*, 586 So. 2d 1024 (Fla. 1991), Dorsey argues that the trial court's decision permitting the State to exercise a peremptory strike against George mandates reversal. In *Wright*, the Supreme Court ruled that a peremptory challenge based on body language would be unacceptable unless observed by the trial judge and confirmed by the judge on the record.
>
> We believe that Dorsey's reliance on *Wright* is misplaced. Our opinion in *English v. State*, 740 So. 2d 589 (Fla. 3d DCA 1999), indicates that the analysis applicable to such a question has changed with the Supreme Court's decision in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996). In *English*, the defendant had unsuccessfully challenged a venireperson whom the defense claimed to have observed rolling his eyes and giving the appearance of not understanding or liking defense counsel questions. We concluded that post Melbourne, the trial judge erred in precluding such a challenge based on the trial judge's failure to personally observe the objectionable behavior. *See Washington v. State*, 773 So. 2d 1202 (Fla. 3d DCA 2000). The First District reached this same conclusion in *Bowden v. State*, 787 So. 2d 185, 189 (Fla. 1st DCA 2001).

(A. 6).

While the case was pending rehearing, the court denied the appellant's notice of voluntary dismissal. The district court denied Mr. Dorsey's timely motion for rehearing on February 15, 2002, and a notice invoking this Court's discretionary jurisdiction was filed on February 28, 2002.

SUMMARY OF ARGUMENT

The district court's opinion finds this Court's opinion in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), permits peremptory strikes on "neutral" reasons that are without support in the record. In this case, the prosecution struck juror Tamika George because she "appeared disinterested." In fact, the record discloses that Ms. George was an alert and active participant in voir dire. Confronted by the lack of a record basis for the strike, the trial judge permitted Ms. George to be excluded from the jury based on the prosecutor's assurance that her reason was genuine.

The district court's decision is contrary to well-settled law requiring a record basis to support a finding of no pretext. Nothing in *Melbourne* itself supports the district court's conclusion. *Melbourne* receded from *State v. Slappy*, 522 So. 2d 18 (Fla. 1988), and its progeny only to the extent that they required that a reason be "reasonable." The record basis requirement is part of the genuineness determination, and it remains a vital feature of Florida law.

ARGUMENT

AN ATTORNEY'S "NEUTRAL" REASON FOR STRIKING A JUROR CANNOT BE DEEMED NON-PRETEXTUAL WHERE THE REASON IS NOT SUPPORTED BY THE RECORD.

The Third District Court of Appeal's opinion sanctions a peremptory strike based on a prosecutor's extra-record impression that the juror appeared "disinterested." It approves this reason even though the defense pointed out that the record showed the juror in question had listened attentively and was the only one who indicated that she had been happy to be called for jury service. Indeed, while the prosecutor claimed Tamika George "wasn't listening to anything," Ms. George had in fact volunteered a response when the panel was asked if "anyone else" shared an experience with another juror. (T. 89). The district court approves this result because it believes that this Court's opinion in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996) eliminated the requirement that "neutral" reasons for peremptory strikes have a basis in the record.This conclusion is wrong. The Court has never receded from the record-basis requirement. Florida court's have continued to recognize and apply that requirement after *Melbourne*. There is no basis for untethering jury selection from the record now.

A. Discrimination In Peremptory Challenges In Florida.

The use of peremptory challenges to eliminate jurors based on race or gender violates the constitutional guarantees of trial by a fair and impartial jury, equal protection, and due process. Art. I, §§ 2, 9, 16, Fla. Const., U.S. CONST. AMENDS. 8, 14; *see Melbourne*, 679 So. 2d 759; *Batson v. Kentucky*, 476 U.S. 79 (1986). In *State v. Neil*, 457 So. 2d 481 (Fla. 1984), this Court held that where a party's reasons for exercising a strike are put in issue, article I, section 16 of the Florida Constitution requires a court to examine the party's reasons for exercising the strike. The United States Supreme Court reached the same conclusion under the federal equal protection clause two years later in Batson. The Batson court required a "neutral explanation" for questionable peremptory strikes. 476 U.S. 97.

In *State v. Slappy*, 522 So. 2d 18 (Fla. 1988), *receded from in part, Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), this Court explained the proper analysis for *Neil* objections. Upon a proper objection, the striking party must provide a "'clear and reasonably specific'" racially neutral explanation of 'legitimate reasons.'" 522 So. 2d 22, *quoting Batson*, 476 U.S. 96-98 n. 20. The trial court could not "accept the proffered reasons at face value." *Id.* Instead, it must "evaluate those reasons as he or she would weigh any disputed fact." *Id.*

Under *Slappy*, the trial court looked to two factors in evaluating a proffered reason. First, the court would ask whether the reason was "neutral and reasonable." *Id.* Second, the judge would determine whether the reason was supported by the record or was a pretext. 522 So. 2d 22-23. The Court explained: "[R]easonableness alone is not enough, since the state must demonstrate a second factor - record support and the absence of pretext." 522 So. 2d at 23. The Court explained:

> Part of the trial judge's role is to evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons. These must be weighed in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record.

522 So. 2d 22. The decision identified a non-exclusive list of five factors that will tend to establish pretext. *Id.*[2]

The Court eliminated the "reasonableness" requirement of *Slappy's* first factor in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996). Under *Melbourne*, the striking party must provide a reason that is "facially race neutral." 679 So. 2d at

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[2]"(1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror who were not challenged."

764. The trial court then determines whether, given all the circumstances surrounding the strike, the reason is pretextual. *Id.* The court is to focus "not on the reasonableness of the explanation but rather its genuineness." *Id., citing Purkett v. Elem*, 514 U.S. 79 (1986). In evaluating the reason for pretext, a judge is to look to circumstances like those identified in *Slappy*. See *Melbourne*, 679 So. 2d at 764. The *Melbourne* court receded from *Slappy* "To the extent that *Slappy* and its progeny require a "reasonable" rather than a "genuine" non-racial basis for a peremptory strike …" 679 So. 2d at 765.

B. Where Challenged, "Neutral" Reasons Must Be Supported By The Record.

If the reasons supporting a peremptory strike are to be deemed neutral and genuine, they must be supported by the record. *See, e.g. State v. Fox*, 587 So. 2d 464 (Fla. 1991); *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990). Before and after *Melbourne*, Florida courts have recognized that where the reason is without record support, the strike cannot stand. *Floyd*, 569 So. 2d 1229-30. The Court has 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 *Neil* issue was not properly preserved for review.

Floyd, 569 So. 2d 1129-30 (emphasis supplied), *quoted with approval in Rimmer v. State*, 825 So. 2d 304, 320-21 (Fla. 2002); *see, e.g., Georges v. State*, 723 So. 2d 399 (Fla. 4th DCA 1999).

A related line of cases requires record support where the proffered reason is based on looks, feelings, or gestures. *See Wright v. State*, 586 So. 2d 1024, 1029 (Fla. 1991); *Daniel v. State*, 697 So. 2d 959 (Fla. 1997) (Quince, J.) ("The case law is clear that a 'feeling' about a juror is not a valid, neutral reason to exercise a strike, absent support in the record."), *citing Nunez v. State*, 664 So. 2d 1109 (Fla. 3d DCA 1995); *Bernard v. State*, 659 So. 2d 1346 (Fla. 5th DCA 1995); *Suggs v. State*, 624 So. 2d 833 (Fla. 5th DCA 1993). When not tied to the record, a "gut-feeling" about a juror or a feeling that a juror will not be impartial may actually

be race based. *See Stanford v. State*, 706 So. 2d 900 (Fla. 1st DCA 1998); *State v. Holiday*, 682 So. 2d 1092 (Fla. 1996). Such "reasons" leave open the question of whether or not the feeling itself was race or gender neutral.

Without record support, a party's perception that a juror appears bored or inattentive may likewise be the product of racism. *See Wright*, 586 So. 2d at 1029 (rejecting peremptory strike based on lack of eye contact between juror and prosecutor). Moreover, "[A] judge cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact." *Wright*, 586 So. 2d at 1028, *quoting Slappy*, 522 So. 2d at 22. Consistent with *Wright*, the district courts have rejected peremptory challenges based on reasons indistinguishable from those relied on here. *See Bullock v. State*, 670 So. 2d 1171 (Fla. 3d DCA 1996) (reversing where State's claim that juror was reluctant or non-responsive was not supported by the record); *Brown v. State*, 597 So. 2d 369 (Fla. 3d DCA 1992) (finding pretext where record did not support claim that juror lacked understanding or was unable to hear); *Givens v. State*, 619 So. 2d 500, 502 (Fla. 3d DCA 1993) (state's claim that juror was inattentive not supported where "the record demonstrates she provided adequate verbal responses to the questions addressed to her").

C. *Melbourne* Did Not Eliminate The Record-Basis Requirement

This Court's opinion in *Melbourne* did not eliminate the record-basis requirement of *Wright* and *Floyd*. The Court recently announced: "We take this opportunity to expressly state that this Court does not intentionally overrule itself *sub silentio*." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). In *Melbourne*, the Court overruled *Slappy* and its progeny only to the extent they require a "reasonable" rather than a "genuine" non-racial basis for a peremptory strike …" 679 So. 2d at 765. Whether a juror exhibited a certain behavior or gave a particular answer has nothing to do with the "reasonableness" of the reason. But the question of whether or not the proffered reason has some basis in reality has everything to do with that reason's "genuineness." Indeed, *Slappy* makes it clear that the record-basis requirement is an element of the pretext analysis, setting it in contradistinction to "reasonableness." *Slappy*, 522 So. 2d at 23 ("[R]easonableness alone is not enough, since the state must demonstrate a second factor – record support and the absence of pretext."). This Court was undoubtedly aware of this distinction when it announced the limited extent to which it receded from *Slappy*.

Florida courts have continued to recognize the record-basis requirement after

Melbourne. See *Rimmer v. State*, 825 So. 2d 304, 320-21 (Fla. 2002), quoting with approval *Floyd*, 569 So. 2d 1229-30. In a recent decision, this Court affirmed where the State had struck a prospective juror (Rios) because both his answers and his body language indicated an equivocal stance on the death penalty. *Floyd v. State*, 27 Fla. L. Weekly S697 (Fla. August 22, 2002). The Court wrote:

> Floyd's assertion that the State's comments concerning Rios's body language demonstrate an intent to engage in purposeful discrimination is unavailing. The State's comments regarding Rios's body language were made within the context of commenting on the oral equivocation voiced by Rios concerning the death penalty. In the cases upon which Floyd relies, unlike in his own, the State relied completely on a prospective juror's body language or on unelaborated bad feelings by the State toward a prospective juror, or the trial judge failed to examine the genuineness of the State's proferred [sic] reasons for striking a member of a protected group. Thus, those cases are all distinguishable.

The Court's opinion thus turned on the existence of a reason that was supported by the record: Equivocation on the death penalty.

The Court reasoned similarly in *Francis v. State*, 808 So. 2d 1110 (Fla. 2001). Juror Bennett told the prosecution that she felt "Nothing … nothing at all," upon hearing that the case involved a double-homicide. The prosecution sought to strike Bennett, stating that she had laughed at the accusation that two people had been killed. This Court explained:

> While the transcript does not explicitly indicate that Ms. Bennett

> laughed, it does indicate that she thought "nothing at all" about the accusation that an individual had killed two people. Given her light-hearted response to such a serious question, it is understandable that the trial court would be particularly attuned to the surrounding circumstances.

808 So. 2d at 124. The Court also pointed to the more thoughtful responses of other jurors as support for the prosecution's reason. *Id.*

The district courts have recognized the continued viability of the record-basis requirement as well. In *Daniel v. State*, 697 So. 2d 959 (Fla. 2d DCA 1997) (Quince, J.), the district court reversed a strike based on the prosecutor's feeling that the juror had an "amicable relation" with defense counsel. The court could find no support for this reason in the record concluded the trial court erred in accepting the reason. In *Georges v. State*, 723 So. 2d 399 (Fla. 4th DCA 1999) (opinion on rehearing), the State justified its strike by claiming the juror, like Georges, had been fired. The district court reversed, explaining:

> Nothing in the record supports the prosecutor's stated reasons for excusing the juror. The jurors were never asked if they had ever been fired from a job. They were asked a related question about whether anyone had ever had to fire someone or might not be able to fire someone. Contrary to the state's contention in its brief, we find nothing in the record to indicate that the black juror non-verbally responded to relevant questions. Where non-verbal responses might be inferred, each was followed by questioning of the juror making the response. This was not a case where the judge acknowledged or described the non-record behavior which could form the basis for a racially neutral reason for a challenge.

In *Randall v. State*, 718 So. 2d 230 (Fla. 3d DCA 1998), the Court reversed where the State's reason for distinguishing between the responses of a black juror and an unstricken white juror was unsupported by the record. *See also Sharp v. State*, 789 So. 2d 1211 (Fla. 5th DCA 2001) (approving disallowance of defense peremptories where record did not support reasons given); *Carter v. State*, 762 So. 2d 1024 (Fla. 3d DCA 2000) (quoting *Floyd*); *Ratliff v. State*, 666 So. 2d 1008 (Fla. 1st DCA 1996).

D. The Third District Court Of Appeal's Decision Is Without Support In Florida Law.

The Third District Court of Appeal has now found that *Melbourne* eliminated the record basis requirement, approving the State's strike against juror George because she "appeared disinterested" where the only record evidence contradicted this reason. The district court found support for this conclusion in *English v. State*, 740 So. 2d 589 (Fla. 3d DCA 1999), and *Bowden v. State*, 787 So. 2d 185 (Fla. 1st DCA 2001). Neither case supports the decision now before the court. Properly understood, *English* and *Bowden* stand for a much more limited proposition: The record-basis requirement expressed in *Wright* does not make judicial observation a precondition in the absence of a dispute.

English involved a defense peremptory challenge where the juror "rolled his eyes." The trial judge denied the strike because, "I didn't see any of the things that you say you saw, not that you didn't see them. I just didn't see them." **Nothing in the opinion suggests that the State disputed whether the eye-rolling had occurred.** Instead, it appears that the trial believed that the reasons were never viable without judicial confirmation. In reversing, the district court wrote:

> In effect, the court acknowledged that the venireperson exhibited the objected behaviors, but denied the strike because he did not personally observe the behavior. If the venireperson did exhibit the complained of behavior, defense counsel's reason was race-neutral and was not pretextual. The strike should have been permitted.

740 So. 2d 589.

Bowden rejected a claim that a reference to unrecorded gestures invalidated a peremptory strike. The allegations in *Bowden* involved a burglary to a pharmacy, and the State anticipated a voluntary intoxication defense. 787 So. 2d at 187. The strike was made at an unrecorded bench conference, but the parties arrived at a stipulated record. The prosecution said it struck the juror because it feared that she would more sympathetic to the defendant based on "the history of drug charges against the juror's relatives and her body language responding to his questions." *Id.* The defense claimed pretext because the juror claimed to know little about her relatives' charges. *Id.* Defense counsel did not assert that this reason

misrepresented the record. The trial court found an absence of pretext. 522 So. 2d at 188.

On appeal, *Bowden* argued that the record was inadequate because body language was not an acceptable reason unless observed by the judge on the record. 522 So. 2d at 189. The district court rejected this argument, noting that "[T]he Florida Supreme Court in *Melbourne* has advised us on review to use common sense and not create traps of reversible error." *Id.* The court explained:

> Common sense indicates that the trial judge is in the best posture to determine whether a party is genuinely striking a potential juror for using body language, regardless of whether a notation is placed on the record by the judge or not. For example, if in response to a question a potential juror makes an obscene hand gesture back at the questioning attorney, the judge is in an excellent posture to see the gesture and make the determination that the party's strike is genuine. It does not make sense in that instance for us to find error and reverse the case just because when challenged, the questioner responded that he did not like the juror's body language, and the judge permitted the strike without noting the body language on the record.
>
> Likewise in this case, the State's attorney explained that the body language of the juror concerned him. It is not necessary that the judge made a record of what the body language was.

522 So. 2d 188-89. *Bowden* dealt with the use of looks and gestures in the absence of a dispute. Indeed, the court went on to rely on *Floyd's* requirement that the party opposing a strike must bring a lack of record basis to the judge's attention. 522 So. 2d 190-91, *citing Carter v. State*, 762 So. 2d 1024 (Fla. 3d

DCA 2000).

Neither *English* nor *Bowden* permit a strike based on a reason which is disputed and without support in the record. Both cases stand for the proposition that *Wright* should not be used as a "reversible error trap" to require rejection of neutral reasons whose factual basis is not in question. While the decisions may invoke *Melbourne's* injunction to eschew an "arcane maze of reversible error traps," neither they, nor *Melbourne*, support the district court's decision in this case.

E. The Trial Court Failed To Rule On The Issue Before It.

Melbourne requires the trial judge to determine if the neutral reason is a pretext. 679 So. 2d 764. This determination must be made in light of all the circumstances surrounding the strikes. *Id.; see Jones v. State*, 787 So. 2d 154 (Fla. 4th DCA (2001) (reversing denial of peremptory where court failed to undertake genuineness analysis). An attorney may not merely affirm his or her good faith. *See Batson*, 476 U.S. 97-98. A court must weigh the genuineness of a reason just as it would any other disputed fact. *Slappy*, 522 So. 2d 22.

The trial judge failed to carry out this duty. Faced with a record that negated

the prosecutor's claimed neutral reason, the judge declined to resolve the disputed fact. Instead, the judge simply asked the prosecutor to promise the reason was genuine:

> [Defense]: … what [the prosecutor] says, her only reason, is simply not supported by the record.
>
> Her statement that the juror is disinterested affirmatively rebutted by the fact that this is the only juror who actually said she wanted — I'm sorry what she said, she was happy when she got her jury document notice. I mean —
>
> THE COURT: [Prosecutor], **I didn't notice it but are you telling me as Officer of the Court that that was your observation of this juror and that is why you wish to have her excused?**
>
> [Prosecutor]: Exactly.
>
> THE COURT: **I'm going to take [the prosecutor] at her word.** I'm going to allow the challenge.

(T. 136) (emphasis supplied).

This "scout's honor" approach to resolving genuineness is inadequate to protect the constitutional rights of litigants and jurors. The judge declined to resolve the issue before it, and instead deferred to the prosecutor. Having received the prosecutor's assurance as an "officer of the court,"[3] the judge took at her

[3]This representation adds nothing to the genuineness of the State's reason. It is difficult to imagine what other response the prosecutor might have given.

word. The record basis requirement of *Floyd* and *Wright* serves to ensure that judges will resolve the factual issues before them.

F. Eliminating the Record-Basis Requirement Would Render Melbourne Meaningless

The opinion on review creates an effectively unreviewable category of strikes: Strikes based on an attorney's claimed subjective "impressions" of jurors. If such strikes may stand despite the fact that opposing counsel objects and demonstrates that the reason is contradicted by the record, peremptories based on looks and gestures will be impervious to appellate review. Review of peremptory challenges necessarily turns on the record of jurors' responses in voir dire. *See, e.g.*, *Hamdeh v. State*, 762 So. 2d 1030 (Fla. 2000) (reversing where "[t]here is no record support for the trial court's finding of pretext); *Washington v. State*, 766 So. 2d 325 (Fla. 4th DCA 2000). Appellate courts often reverse where a party's "neutral" reason applies with equal force to unstricken jurors of a different race or gender. *Fleming v. State*, 27 Fla. L. Weekly D2041 (Fla. 1st DCA Sept. 12, 2002); *Schuler v. State*, 816 So. 2d 257 (Fla. 2d DCA 2002) ("Where Ms. Johnson's response was similar to the responses of other jurors who were not challenged by

the prosecutor, the trial court erred in failing to reject the State's explanation as pretextual."); *Daniel v. State*, 697 So. 2d 959 (Fla. 2d DCA 1997).

Where the reason is a subjective impression unsupported by the record, however, review becomes impossible. A party can easily point out that other venirepersons gave the same response as the stricken juror. He or she can hardly claim, however, that other jurors gave opposing counsel the same subjective impression. Real reasons with a basis in the record would be subject to review. Imagined or fabricated reasons would not. Indeed, reliance on extra-record reasons may prevent the trial court from performing its duty of examining the reason for pretext, as happened in this case. *See* Argument E, *supra*.

This result will have an unhealthy effect on Florida jury proceedings. Attorneys, whether of a mind to discriminate or not, will know that they can avoid review by relying on subjective factors. Like the prosecutor here, they would be well advised not to ask the juror any questions which might confirm or dispel their impressions. *Compare Slappy*, 522 So. 2d 23 n. 3 ("Similarly, the state excused another black juror at least partly because of purported ill health, although the record is far from clear that any such characteristic existed. A single question posed to the juror could have established the existence or nonexistence of illness." Where an attorney forms an "impression," she or he should use Florida's

permissive voir dire system to confirm whether or not that impression is true. Where counsel sees troubling looks, gestures, or body language, she or he should make a record of them in order to ensure that any dispute is put to rest then and there. The district court's opinion discourages meaningful review of peremptory challenges by appellate courts as well as trial judges.

CONCLUSION

The prosecution was permitted to strike Ms. George because she appeared "disinterested." The record reveals that, far from being inattentive, she responded appropriately and alertly during voir dire. The district court's opinion approving the peremptory challenge where the proffered "neutral" reason was was without record support, is contrary to the Florida and federal constitutions, as well as the decisions of this Court. For the foregoing reasons, the Court should reverse the decision of the Third District Court of Appeal.

Respectfully submitted,

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BY:_____

ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Paulette Taylor, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on October 17, 2002.

_____

ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____

ANDREW STANTON
Assistant Public Defender