IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-420

STATE OF FLORIDA,

Petitioner,

v.

EDGAR SYLVESTER WHITBY,

Respondent.

AMICUS BRIEF OF FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

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

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CERTIFIED QUESTIONS

Should the Florida Supreme Court reconsider the peremptory challenge issue in light of the serious problems with the current standard?

In light of the serious nature of the objection to a challenge (that opposing counsel is claiming that the proponent of the challenge is attempting to remove a juror based upon the juror's race, ethnicity, or gender in violation of the United States and Florida Constitutions) and the seriousness of the consequences, should the objecting party be required to at least *allege* that the challenge was racially (or otherwise impermissibly motivated) [*sic*]?

Should Florida follow federal constitutional law and the standard employed in federal cases which requires the demonstration of a prima facie case of discrimination?

Should we continue to require reversals due to procedural errors regarding peremptory challenges when the record leaves no doubt that the challenges were not motivated by racial prejudice and where there is no indication that any such prejudice infected the jury which tried the defendant?

STATEMENT OF THE CASE AND FACTS

The undersigned accepts and adopts the statement of the case and facts as set forth in the State's brief.

SUMMARY OF THE ARGUMENT

As this Court did in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), it should again bring Florida's jurisprudence on the subject of discrimination in the exercise of peremptory challenges closer to that of the federal courts and require the party objecting to the exercise of a peremptory challenge to make a prima facie showing of discrimination as a necessary part of the first step of the Melbourne analysis. Additionally, although a party making a Melbourne objection should be allowed to protest the peremptory exclusion of prospective jurors from more than one racial, ethnic or gender group, the abuse of such objections should be a factor to be considered in determining whether a prima facie case of discrimination has been made such as to compel the trial court to proceed to step two of the analysis.

ARGUMENT

THE COURT SHOULD REVISIT MELBOURNE AND ALIGN FLORIDA JURISPRUDENCE CONCERNING DISCRIMINATORY PEREMPTORY STRIKES WITH FEDERAL CASE LAW.

I. INTRODUCTION

By way of four certified questions, the Third District Court of Appeal invites this Court to revisit its decision in Melbourne in light of the many difficulties that have afflicted innumerable cases which have required reversals due to errors in jury selection. These reversals, the Third District asserts, have been necessary

despite the fact that the record on appeal revealed no real evidence of discrimination and that the defendant received an otherwise immaculately fair trial.

Should this Court decide to reconsider Melbourne, it is respectfully suggested that the certified questions be consolidated into the single question: "Should the Florida Supreme Court reconsider and modify its decision in Melbourne v. State?"

In 1984, this Court boldly joined a small number of states seeking to establish a meaningful mechanism to eliminate racial discrimination in the jury-selection process. See State v. Neil, 457 So. 2d 481 (Fla. 1984). The Court based its decision on Article I, Section 16 of the Florida Constitution which guarantees a right to a fair and impartial jury trial. In 1986, the United States Supreme Court took the same step when it decided Batson v. Kentucky, 476 U.S. 79 (1986). In establishing the federal counterpart of the Neil decision, the United States Supreme Court relied on the equal-protection clause of the United States Constitution. Accordingly, although this Court is free to afford litigants greater protection than that afforded by Batson, it cannot afford less.

The mechanics devised for the implementation of the principles and goals set forth in Neil have proven to be more challenging than expected. In this regard, the confusion that followed Neil was clarified twelve years later in Melbourne, when this Court attempted to align Florida's jurisprudence concerning objections to

peremptory challenges with the United States Supreme Court's then most recent pronouncement on the subject in Purkett v. Elem, 514 U.S. 765 (1995).

II. THE MELBOURNE ANALYSIS

In Melbourne, this Court restructured the analysis established in Neil by creating a three-part mechanism, similar to that used in federal courts:

> 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. *Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination*.

679 So. 2d at 764 (emphasis added). Although the application of the first step has proven disastrous, as suggested by the Third District, steps two and three have proven somewhat easier to apply. Because of the phrasing of the certified questions, and because the bulk of the problems in the application of these principles lie primarily with step one, this brief will only address those problems.

Before moving on to a discussion of the problems in this area, it is important to stress that in Melbourne, this Court held, as it had in Neil, that "peremptories are

presumed to be exercised in a nondiscriminatory manner" and that "throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination." Id.

III. THE PROBLEMS

Although this Court went a long way towards reconciling Florida law with federal law in this area in Melbourne, it did not go all the way. Relying on its decision in State v. Johans, 613 So. 2d 1319 (Fla. 1993), the Court refused to require the party objecting to the exercise of a peremptory challenge to establish a prima facie case of discrimination as a prerequisite to proceeding to step two of the analysis. 679 So. 2d at 764. In Johans, the Court eliminated the requirement that a prima facie showing of racial discrimination be made and instead held "that from this time forward a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." 613 So. 2d at 1321. This Court in Melbourne followed Johans and noted that beyond identifying the "distinct racial group" of the prospective juror in question and asking for an inquiry, all that was required to satisfy step 1 was "a simple objection and allegation of racial discrimination . . . , e.g., 'I object. The strike is racially motivated.'" 679 So. 2d at 764 n.2.

The elimination of the need to establish a prima facie case of discrimination when objecting to the exercise of a peremptory challenge has proven problematic

in two ways. First, it is inconsistent with this Court's holding in Melbourne that peremptories are presumed to be exercised in a non-discriminatory manner. Second, it has resulted in the proliferation of totally frivolous Melbourne objections in situations where it is clear that no discrimination is taking place. [1] These frivolous objections have been particularly egregious in criminal cases.

The current application of Melbourne has eviscerated the purpose of the legal presumption long recognized by this Court that peremptory strikes are presumed to be exercised in a non-discriminatory manner. Legal presumptions are creatures that find their genesis in specific public policy concerns. Although public policy may favor them, most legal presumptions are rebutable because the law acknowledges the possibility that a given set of circumstances might render the presumption inapplicable. In Melbourne, this Court sought to maintain the integrity of the peremptory challenge and to that end emphasized that the burden of proving discrimination would always rest with the party opposing the challenge. Despite this apparent intent, the Court decided to stick with its decision in Johans and refused to require the prima facie showing of discriminatory intent required by Batson. This decision rendered the presumption articulated in Neil and Melbourne

[1] See Plaza v. State, 699 So. 2d 289, 294 (Fla. 3d DCA 1997) (Sorondo, J., concurring) ("The practical use of this tool, however, is rapidly degenerating into a strategic way for attorneys to pollute the trial record with baseless objections, alleging racial, ethnic and gender discrimination, which are completely unsubstantiated by the record.").

meaningless and opened the door to innumerable objections that required nothing more than a conclusory, and very often frivolous, allegation that the peremptory was being exercised in a discriminatory manner.

By effectively nullifying this presumption, the Court unintentionally set the stage for the use of Melbourne challenges to thoroughly pollute the trial record with whimsical objections that automatically require Melbourne inquiries and carry the risk of per se reversible error. Thus, every Melbourne challenge becomes a land mine in the appellate record, since any ruling by the trial court that results in the erroneous inclusion or exclusion of a prospective juror constitutes per se reversible error and is not subject to a harmless-error analysis.[2] As even a cursory review of the case law in this area will establish, this abuse of the Melbourne ideals manifests itself predominantly in the criminal arena. It has not manifested itself as prominently in civil cases because civil litigants, like prosecutors, must answer to appellate courts for their trial victories. Criminal defendants do not. They are,

[2] Like this Court, many federal circuit courts have held that errors that result in the improper inclusion or exclusion of prospective jurors in violation of Batson are not subject to a harmless-error analysis. Tankleff v. Senkowski, 135 F. 3d 235, 248 (2d Cir. 1998); Ford v. Norris, 67 F. 3d 162, 170-71 (8th Cir. 1995); Rosa v. Peters, 36 F. 3d 625, 634 (7th Cir. 1994); United States v. Thompson, 827 F. 2d 1254, 1261 (9th Cir. 1987). Although the United States Supreme Court has not specifically so held, it has decided that discrimination in the selection of a grand jury is not subject to a harmless-error analysis. Vasquez v. Hillery, 474 U.S. 254, 261-62 (1986). In another case, Justice Blackmun spoke under the assumption that Batson errors were not subject to harmless-error analysis. Dawson v. Delaware, 503 U.S. 159, 169 (1992) (Blackmun, J., concurring).

therefore, free to object to the exercise of state peremptory challenges with impunity, knowing that each and every objection will trigger an inquiry which, if erroneously ruled upon by the judge, assures the reversal of even an immaculately fair trial on the merits.

The clearest example of such abuse is manifested in objections raised to protest the peremptory exclusion of prospective jurors from more than one racial group.[3] The present case contains such an example. The defense objected to the state's exercise of a peremptory challenge against prospective juror Appleton alleging that she was being excused because she was an African-American female.[4] Moments later, the defense objected to the exercise of the state's peremptory challenge against prospective juror Lynn (the subject of this appeal), alleging that he was being stricken because he was a white male. It appears that the defense's argument was that for reasons still known only to defense counsel, the prosecutor was launching a discriminatory assault on African-American females and white males for no reason other than their race and/or gender. At no time was defense counsel required to articulate a reason why the prosecutor might single out these

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[3] A prima facie Batson claim can be raised to protest the peremptory exclusion of prospective jurors from more than one racial group. Burks v. Borg, 27 F. 3d 1424, 1426-27 (9th Cir. 1994) (Blacks and Hispanic prospective jurors); United States v. Moreno, 878 F.2d 817, 820-22 (5th Cir. 1989) (Black and Hispanic prospective jurors).

[4] Although the trial judge overruled defendant's objection, the state ultimately withdrew its peremptory challenge on Ms. Appleton.

two groups for discriminatory treatment. Nor does Melbourne require counsel to explain why the prosecutor would seek to exclude such a substantial portion of the American population from this particular jury.

As absurd as this scenario may sound, defense counsel's use of Melbourne objections in this case is a model of restraint in comparison to the usual jury-selection process in criminal cases. Indeed, it is not unusual to see Melbourne objections to each of the prosecutor's six or ten peremptory challenges, as the case may be. Repeated objections seeking Melbourne inquiries are often raised on grounds of race, ethnicity and gender in the same case with no proffer as to why a prosecutor might want to exclude virtually every group from any jury. A thorough review of these cases, as in this case, reveals absolutely no suggestion of discrimination.

Plaza illustrates this recurring problem well. There, the defendant was charged with first degree murder, a specific intent crime. 699 So. 2d at 290. At the time, voluntary intoxication was a defense to specific intent crimes and the defendant was going to use that defense at trial. As a result, the lawyers dedicated a significant amount of time to this issue during voir dire examination of the venire. During jury selection, the prosecutor struck every prospective juror who had a personal history of alcoholism and/or drug addiction, and every prospective juror who had a relative, personal friend or acquaintance with the same problem. The

defense lawyer recorded Neil challenges (Melbourne had not been decided at the time the case was tried), to five such strikes which were exercised against female jurors. Defense counsel argued that these prospective jurors were being stricken because of their gender.

In response to one such strike, rather than asking the prosecutor for a gender-neutral explanation that the judge felt was obvious, the judge recognized that the juror in question - like others questioned by the prosecutor - had a personal history of addiction and proffered that reason into the record herself. Defendant was convicted. On appeal, he argued that the trial judge's failure to ask the prosecutor to proffer a gender-neutral reason required reversal. The Third District disagreed and held that the trial judge's failure to ask the state to articulate its reason was not reversible error. Specifically, the court said:

> We see no reason to shackle the court in its conduct of voir dire by requiring that it first ask for, and then await the State's explanation for a strike. If the record clearly supports the gender-neutral reason for a peremptory strike, and the trial court properly articulates that reason, there is no error in allowing the strike.

Id. at 290.

Plaza's specially concurring opinion set forth a detailed account of the jury-selection process and concluded that although the failure to conduct the step 2 inquiry was error, it was harmless. As the opinion noted:

> Every peremptory challenge exercised by the state was justified by valid gender-neutral reasons (one of which was common to all of the

> stricken potential female jurors) and completely consistent with each other, thus eliminating the possibility of pretext and the suggestion that the state was exercising its strikes in a discriminatory manner. In short, this case was tried by a female prosecutor and a female defense attorney, before a female judge, and to a jury of 12 people, 8 of whom were females. This record is devoid of even the slightest evidence of gender discrimination.

Id. at 293 (Sorondo, J., concurring). Similarly, there is no evidence whatsoever of racial discrimination in the present case. The single, isolated strike of an African-American female or of a white male is in no way indicative of a discriminatory intent on the part of the prosecutor.

The abuse of Melbourne objections is such that trial courts are being prompted to conduct inquiries in the absence of any basis upon which to infer a discriminatory intent in the exercise of peremptory challenges. This cannot be what the Court intended in Melbourne when it emphasized that the legal presumption concerning peremptory challenges remained valid and that the burden of persuasion to prove otherwise rested with the objecting party at all times. The abuse of Melbourne objections by an attorney should also be a part, though not dispositive of, the determination of whether a prima facie case has been established.

IV. THE SOLUTIONS

Because there is no room for a harmless-error analysis in appellate review of a trial court's erroneous inclusion or exclusion of a prospective juror, and because

of the repeated misuse of the Melbourne principles, this Court should adopt the only part of Batson it rejected in Melbourne. Consistent with the presumption that peremptory challenges are exercised in a non-discriminatory manner, and that the burden of proof to show purposeful discrimination rests with the party opposing the challenge, this Court should require as part of Melbourne's first step that the objecting party establish a prima facie showing of discrimination. This is not as difficult as one might think, and neither federal nor other state courts have had problems applying it.[5]

In United States v. Clemons, for example, the Third Circuit provided guidance on what trial judges were to look for in determining whether a party objecting on Batson grounds had established a prima facie showing of discrimination:

> When assessing the existence of a prima facie case, trial judges should examine all relevant factors, such as: how many members of the 'cognizable racial group' . . . are in the panel; the nature of the crime; and the race of the defendant and the victim.

[5] The transition from step 1 of Melbourne to the Batson equivalent will be made with abundant guidance. The federal courts have repeatedly defined Batson's step 1 analysis and this court can, as it did in Kinney Systems, Inc. v. Continental Insurance Co., 674 So. 2d 86 (Fla. 1996), when it adopted the federal test for forum non conveniens issues in civil cases, instruct the Bench and Bar that federal cases will be persuasive though not necessarily binding in the interpretation of that step of the analysis. Should this court later wish to afford greater protections than Batson, it will be free to do so.

843 F. 2d 741, 748 (3d Cir. 1988). In Bush v. Pliler, the Ninth Circuit emphasized that a prima facie showing is made only when an inference of discrimination arises from the relevant facts and circumstances:

> Under Batson (citation omitted), a prosecutor is required to provide a race-neutral explanation once the defendant has shown that the 'totality of relevant facts' surrounding the peremptory challenge at issue 'gives rise to an inference of discriminatory purpose.'
>
> [T]he mere fact that a prosecutor uses a peremptory challenge to strike a sole prospective African-American juror is not enough on its own to raise such an inference.

162 Fed. App'x 689, 690 (9th Cir. 2005); see also Luckett v. Kemna, 203 F. 3d 1052, 1054 (8th Cir. 2000) ("A prima facie Batson violation can be established by relevant facts and circumstances that raise an inference that the prosecutor used peremptory challenges in a racially discriminatory manner.").

Under this analysis, the trial judge in this case would not have had to conduct a Melbourne inquiry since the defense offered no facts that gave rise to an inference that the strike of the prospective white male juror was racially motivated. Indeed, the record of jury selection is devoid of any reference to any specific facts in the case that would suggest any reason why the prosecutor would want to exclude white males from sitting as jurors – let alone African-American females. Although it was never mentioned during jury selection, the record reflects that the defendant is an African-American male but does not reveal the race of the male victim. Other factors, such as the race, ethnicity and gender of the witnesses, the

nature of the defense being presented, or whether there are genuine racial, ethnic or gender issues that are integral to the case, might raise an inference of discrimination necessary to make a prima facie showing. But no such facts or circumstances are present here. No female witnesses – white or black – testified for the state or the defendant, and the record does not indicate the race of the victim. It is therefore impossible to even speculate as to what factors African-American females and white males might have in common as concerns this case that would motivate the prosecutor to selectively discriminate against them.

The federal courts also acknowledge that even multiple strikes against prospective jurors of a particular racial group may not be sufficient to establish a prima facie case of discrimination. See Luckett, 203 F. 3d at 1054 ("Although the number of African-Americans struck is relevant to determining whether a defendant has made a prima facie case, that evidence alone is insufficient to negate or create such a case."); see also Moran v. Clarke, 443 F. 3d 646, 652 (8th Cir. 2005) ("By finding that this pattern [of strikes] established a prima facie case, we do not suggest that numbers alone create or negate a prima facie case under Batson."); Bronshtein v. Horn, 404 F. 3d 700, 724 (3d Cir. 2005) ("We do not hold that a prima facie case always requires more than one contested strike, but the absence of a pattern of strikes is a factor to be considered."). In the present case, the defendant objected on Melbourne grounds to the exercise of a single

peremptory challenge against a white male. He offered no factual basis to indicate a discriminatory motivation for the strike, and could not argue that the prosecutor was systematically excluding white males from the jury. In the absence of either, there is no reason to believe that the prosecutor was acting with the intent to discriminate and no reason to believe that the presumption of nondiscriminatory use of peremptories had been rebutted. In short, the present case exemplifies how meaningless the presumption has become and how easily this court could give it new life.

V. HARMLESS-ERROR ANALYSIS

As indicated above, both this Court and the majority of federal courts have determined that there can be no harmless-error analysis where a prospective juror has been erroneously excluded from or included in a jury as a result of a Melbourne/Batson error. We do not challenge this principle. We do suggest, however, that where - as in Plaza - a trial judge has erred only in the application of the Melbourne test and the record conclusively refutes - to the exclusion of and beyond a reasonable doubt - the suggestion that a juror was erroneously excluded or included, the reviewing court should be allowed to find the error to have been harmless. See Moran v. Clarke, 443 F.3d at 653 (affirming the trial court's Batson ruling despite the fact that the trial court "departed from the script of the typical Batson play" by failing to follow the specific three-part test); see also Paschal v.

Flagstar Bank, FSB, 295 F. 3d 565, 576 (6th Cir. 2002) (affirming the trial court's Batson ruling even though its "application of the Batson test was less than ideal."). In short, a non-prejudicial error in the implementation of any one of Melbourne's three-step analysis that does not result in the erroneous exclusion or inclusion of a prospective juror should not require the reversal of a verdict that is the product of an otherwise fair trial, particularly where the record reveals no evidence of the racial, ethnic or gender discrimination Melbourne was intended to correct.[6]

CONCLUSION

As this Court stated in Melbourne, "[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." 679 So. 2d at 765. The noble purpose of Neil and its progeny is the elimination of racial, ethnic and gender discrimination in the jury-selection process. This goal is not furthered by distracting the very important process of jury selection with baseless and frivolous objections that allege discrimination where no such evil can objectively be found to exist. It is respectfully suggested that this Court revisit and modify its decision in Melbourne.

[6] We note also that Section 924.051(3), Florida Statutes, forbids appellate relief from a conviction and sentence absent a finding of prejudicial error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that on May _____, 2006 we mailed copies of Amicus Brief of Florida Prosecuting Attorneys Association to: Shannon P. McKenna, Assistant Public Defender, *counsel for respondent,* Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125; Charles J. Crist, Jr., Attorney General, Richard L. Polin, Bureau Chief and Valentina M. Tejera, Assistant Attorney General, Office of the Attorney General, *counsel for petitioner*, Department of Legal Affairs, 444 Brickell Ave., Suite 650, Miami, Florida 33131.

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CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure. We have used 14-point Times New Roman type.

Rodolfo Sorondo, Jr.

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