IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-420

THE STATE OF FLORIDA,

Petitioner,

vs.

EDGAR SYLVESTER WHITBY,

Respondent.

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

I. THE PARTY OBJECTING TO A PEREMPTORY CHALLENGE UNDER MELBOURNE V. STATE, SHOULD BE REQUIRED TO EXPRESSLY ALLEGE THAT THE CHALLENGE WAS RACIALLY (OR OTHERWISE IMPERMISSIBLY MOTIVATED).

Just as impermissible racial or gender discrimination in our jury selection process is unconscionable, so too, allegations that an opposing attorney is engaging in such discrimination, when not supported by any factual basis, are unconscionable. It is for that reason, that the requirement of an express allegation of discrimination should remain a requirement under Melbourne v. State, 679 So. 2d 759 (Fla. 1996). The express allegation serves to remind the objecting attorney of the serious, offensive and repugnant nature of the objection when it is not grounded in facts. That reminder serves as a deterrent against objections for which the factual basis does not exist. As the requirement of a prima facie showing of discrimination has been eliminated, this express allegation is all that remains for the purpose of retaining a good faith basis for the objection and for the purpose of deterring those heinous objections which have no basis.

While both parties' briefs argue regarding the effect of post-Melbourne decisions on this requirement, it is clear that this Court has never expressly abandoned the requirement of an express allegation of discrimination. That was never at issue

in any of the post-Melbourne cases upon which the Respondent relies.

The Respondent argues that the allegation remains implicit and is typically understood by the trial court. Given the offensiveness of the objection, that simply is not enough for the purpose of mandating an inquiry.[1] The charts in the Respondents' Appendix reflect large numbers of cases, since 1984, when some form of claim of discrimination in the jury selection process has been raised on appeal. Those numbers do not include the undoubtedly large number of cases in which such claims have resulted in affirmances without written opinions, or cases in which appellate counsel abandoned claims raised at the trial court level based on appellate counsels' determinations that the claims lacked merit. Judging from the extremely large number of objections that are raised at the trial court level on the basis of Melbourne or its antecedents, the only reasonable conclusions that can be reached are that many attorneys believe that discrimination runs rampant in our jury selection process or that many of the objections are clearly without basis. The former of those conclusions is belied by the outcomes of the appeals. Some form of a significant deterrent remains essential.

[1] The State does not dispute that the trial court retains discretion to conduct non-mandated inquiries.

The Brief of Respondent contains several responses to this argument. The Respondent asserts that it is enough that the trial court understand the nature of the objection. For the above reasons, that is insufficient.

The Respondent further argues, on the basis of Reynolds v. State, 576 So. 2d 1300, 1302 (Fla. 1991), that "[o]rdering the state to justify its use of the peremptory challenge in no sense impugns the state or suggests an accusation of racism. Its sole purpose is to apply the principle of accountability to the peremptory challenge." The Respondent's argument confuses the distinctly different purposes of the objecting party's objection and the court's request for race- or gender-neutral reasons. The court, in requesting the reasons, is merely adhering to what is required of the court when sufficient allegations have been made; the request is not accompanied by any findings by the court.

On the contrary, under Melbourne, the objection from counsel must be an allegation that opposing counsel appears to be engaging in unconscionable, offensive, repugnant, immoral, unethical and possibly illegal conduct. Such allegations, when made beyond the four-walls of the courtroom, could support an action for defamation when not supported by facts. As the Respondent's own brief notes, at p. 4, "[d]iscrimination within the judicial system is [the] most pernicious," citing State v.

Slappy, 522 So. 2d 18, 18 (Fla. 1988), quoting Batson v. Kentucky, 476 U.S. 79, 87-88 (1986). Likewise, the amici brief in support of the Respondent, at p. 18, refers to such discrimination as an "evil." Indeed, the first requirement of Melbourne is that a party must make a timely objection on the "basis" that the other side's peremptory challenge is on "racial grounds." 659 So. 2d at 764. Thus, by all accounts, the objection accuses opposing counsel of a pernicious evil. The reminder of the seriousness of this objection is imperative.

The Respondent further suggests that the existence of Florida Bar disciplinary proceedings and appellate court opinions reprimanding offending attorneys suffices as a deterrent against baseless objections. Given that the Respondent has found just a single appellate court opinion admonishing an attorney, Brief of Respondent, p. 31, and the clearly large number of baseless objections which have been made over the past 20 years, such remedies are not realistic, as they are clearly not being utilized in any significant manner.

Lastly, the Respondent makes much of this Court's decisions in State v. Holiday, 682 So. 2d 1092 (Fla. 1996), and Franqui v. State, 699 So. 2d 1322 (Fla. 1997). Those decisions stand only for the proposition that a trial court has the discretion to conduct an inquiry when the objection is otherwise insufficient;

they do not mandate an inquiry when the objection is insufficient.

It should also be noted that amici in support of the Respondent have not addressed this issue and either have no position or do not disagree with the State.

For the above reasons, the Melbourne requirement of an express allegation of discrimination through the use of a peremptory challenge should remain a requirement.

II. THIS COURT SHOULD RECONSIDER THE PEREMPTORY CHALLENGE ISSUE IN LIGHT OF THE SERIOUS PROBLEMS WITH THE CURRENT STANDARD.

III. FLORIDA SHOULD FOLLOW FEDERAL CONSTITUTIONAL LAW AND THE STANDARD EMPLOYED IN FEDERAL CASES, WHICH REQUIRES THE DEMONSTRATION OF A PRIMA FACIE CASE.

The second and third certified questions both revolve around the question of whether a requirement for the demonstration of a prima facie case should be reinstated in light of continued difficulties Florida trial courts are experiencing under Melbourne, and they are therefore addressed together.

The Respondent's arguments are based primarily on an extensive categorization of the various classes of affirmances and reversals under Melbourne and its antecedents. Those charts and categorizations do not support the Respondent's positions.

First, they rest on highly flawed premises. Second, they rest on insufficient data.

The first contention of the Respondent is that Melbourne is working well. This is based on the premise that a smaller percentage of cases are being reversed under Melbourne than under Neil and Johans. This argument compares the numbers of reported reversals on jury discrimination claims to the numbers of reported affirmances. The argument does not take into account the per curiam affirmances or written opinions which did not address Melbourne/Neil claims. Absent knowledge of those numbers, there is no way that any meaningful statistical comparison can be undertaken. If the per curiam affirmances in the district courts of appeal were much lower in the Neil era than in the Melbourne era, the percentages of problem cases would be much different from the portrait conveyed by the Respondent. Absent such data, the comparison is meaningless.

Next, the Respondent argues that reversals attributable to the first-step burden under Melbourne are low. As this first step corresponds to the decision of whether to impose a prima facie case burden, the Respondent argues that the imposition of that burden is not necessary. Thus, the Respondent argues that "only 6 were reversed due to a trial court's error in evaluating the *Neil* objector's showing." Brief of Respondent, p. 27. As the dozens of other reversals were largely attributable to

determinations of the genuineness or existence of a race- or gender-neutral reason, the Respondent argues that the prima facie case requirement will not have any effect on such reversals.[2]

The Respondent's argument ignores the clear connection that a prima facie case requirement has on the subsequent steps under Melbourne. In many of the cases in which a defense attorney's peremptory challenge has been disallowed, a prima facie case may not have existed, and the inquiry and disallowance would never have been at issue. Likewise, in many of the cases in which a prosecutor's (or civil party's) challenge was found by an appellate court to have been improperly upheld, the absence of a demonstration of a prima facie case would have barred the trial court from conducting an inquiry and would have barred a reversal. Given that Florida courts no longer look for a prima facie case, Florida appellate opinions generally do not set forth the types of facts that other jurisdictions look to – patterns of discrimination, percentages of strikes used on members of particular groups, percentages of members of groups in the venire and jury, numbers of members of the group that attorneys accepted prior to the objection at issue, etc. Absent knowledge of such facts, it can not be said how many of the

[2] See, Brief of Respondent, p. 27 ("Therefore, only 6 cases could possibly be remedied by reverting to the *prima facie* burden.").

reversals would have lacked a prima facie case and thus been unnecessary reversals. Given the lack of a need to make such a showing, it should readily be assumed that a substantial number of cases would fall into that category.

The experience of the Eleventh Circuit Court of Appeals, over the 20 years since Batson, suggests that the prima facie case requirement does make a difference in avoiding unnecessary and costly reversals on appeal. In the Appendix to this brief, the State has included a LEXIS printout of Eleventh Circuit opinions which have cited Batson. Of the 104 cases, the undersigned identified 43 which involved Batson issues and trials in criminal or civil cases in federal district courts.[3]

Of those 43 cases, not a single one could be found in which the Eleventh Circuit reversed a federal district court conviction or verdict for any error under Batson. Three remanded cases for post-appeal inquiries under Batson. A small number of those 43 which cited Batson did not involve any Batson issue.[4] Thus, unless one is prepared to say that the federal

[3] The undersigned excluded cases reviewed in federal court as habeas corpus cases under 28 U.S.C. § 2254, for two reasons. First, many of those are Florida state trial court cases, where the Batson prima facie case requirement was never employed in the first place. Second, federal habeas review of state court proceedings is highly constrained and deferential to state courts, and thus does not reflect the manner in which the federal judiciary is employing Batson and the experience of the federal judiciary with the Batson test.

11th Circuit is countenancing or condoning discrimination, the inevitable conclusion is that Batson has been employed without difficulties by the federal trial courts. Unless one is prepared to say that there is a significant qualitative difference among practitioners and/or judges in state and federal courts, a similar result should be expected in state courts that employ Batson.

The State noted in its Initial Brief, pp. 39-40, that application of Batson analysis in state courts should be required due to concerns regarding federal habeas corpus review of state court convictions. That point was corroborated by the recent decision in Atwater v. Crosby, 451 F. 3d 799, 807 (11th Cir. 2006), as the Eleventh Circuit "strongly caution[ed] [the state] courts that the failure to address each of *Batson's* steps creates the risk of serious constitutional error." Deviating from Batson increases the possibility that the federal court will find errors in the manner in which the state courts handled the issue.

By way of example, although a plurality opinion of the Supreme Court, in Hernandez v. New York, 500 U.S. 352, 359 (1991), stated that the proffering of a reason renders the prima facie case determination moot, the Eleventh Circuit subsequently noted that this was merely a plurality opinion and dicta, and

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[4] See, Appendix to Reply Brief, pp. 1-17.

did not apply when the judge directed counsel to proffer a reason. United States v. Stewart, 65 F. 3d 918, 924 (11th Cir. 1995). The prima facie case requirement remains an "absolute precondition." United States v. Ochoa-Vasquez, 428 F. 3d 1015, 1038 (11th Cir. 2005). Thus, for purposes of federal habeas review in the Eleventh Circuit, it can be expected that a proffered reason, in response to a court directive, will not constitute an abandonment of the prima facie case requirement, and any attorney who fails to make that demonstration will not be presenting a viable federal constitutional claim and will likely be waiving the defendant's rights under Batson; defense counsel can preserve a client's rights under Batson only by adhering to it.

The Atwater opinion highlights another problem with Melbourne, and a problem with the Respondent's argument. As Atwater demonstrates, the ultimate question in any given case is whether there has been impermissible discrimination. The Respondent argues that "the factors examined under the *prima facie* burden . . . are examined under Florida's third-step genuineness inquiry." Brief of Respondent, p. 39. Unfortunately, that does not appear to be true. The "genuineness" inquiry, as evidenced by Florida appellate court opinions, has become divorced from the question of whether discrimination exists. The "genuineness" inquiry has become the be-all and end-all. If

genuineness does not exist, discrimination has become presumed, without any consideration of factors such as jury or venire composition, strikes used on members of the group in question, the nature of the case, the respective races or genders of parties, victims, and witnesses, etc. Thus, many of the cases resulting in reversals under Melbourne contain absolutely no discussion of the other factors which tend to prove or disprove discrimination; they look only to the genuineness or the race-neutral nature of the reason.[5]

As many of our trial and appellate courts are clearly not considering the factors regarding a prima facie case at any stage of the Melbourne analysis, they are clearly losing sight of the ultimate goal – proscribing discrimination – by divorcing the second and third steps of the analysis from the ultimate question of whether discrimination exists. While the genuineness analysis is clearly highly probative of that question, it must still be seen as just an important tool in analyzing the question. The ultimate burden and goal, as recognized in cases following Batson, is for the objecting party

[5] See, e.g., Rojas v. State, 790 So. 2d 1219 (Fla. 3d DCA 2001); Perez v. State, 890 So. 2d 371 (Fla. 3d DCA 2004); Anderson v. State, 873 So. 2d 1278 (Fla. 4th DCA 2004); Dean v. State, 703 So. 2d 1180 (Fla. 3d DCA 1997); Georges v. State,723 So. 2d 399 (Fla. 4th DCA 1999); Brown v. State, 733 So. 2d 1128 (Fla. 4th DCA 1999); Douglas v. State, 841 So. 2d 697 (Fla. 3d DCA 2003); English v. State, 740 So. 2d 589 (Fla. 3d DCA 1999). The same point can be seen in other post-Melbourne cases; these are just examples of it.

to carry "its burden of proving purposeful discrimination." Ochoa-Vasquez, 428 F. 3d at 1038-39.

While this Court's decision in Melbourne recognizes that a genuineness analysis should consider the totality of the circumstances, including the make-up of the venire, strikes on other members of the same group, and similar factors, 679 So. 2d at 764, n. 8, the post-Melbourne opinions compel the conclusion that these factors are being ignored. These factors are being ignored because they are no longer being developed at the trial court level. They are no longer developed at the trial court level because the logical time for developing them – during the prima facie case demonstration at the inception – has been removed.

In addition to the federal judiciary, at least 46 state court jurisdictions deem the Batson standards sufficient and workable. All four of the jurisdictions, other than Florida, which have abandoned the prima facie case demonstration, are uniform in permitting post-trial, post-appeal, evidentiary inquiries into the genuineness and race-neutral basis of the reasons when sufficient inquiries were not held during the trial. State v. Jones, 358 S.E. 2d 701, 703-04(S.C. 1987); State v. Chapman, 454 S.E. 2d 317 (S.C. 1995); State v. Parker, 836 S.W. 2d 930, 940-41 (Mo. 1992); In the Case of United States v. Hurn, 55 M.J. 446, 450 (U.S. Ct. App. Armed Forces 2001); State

v. Rigual, 771 A. 2d 939, 947 (Ct. 2001). Those jurisdictions do not countenance reversals of trials absent a demonstration of a likelihood of discrimination. Florida, through its per se rule of reversal when an inquiry is not conducted, remains unique in that regard, as the sole jurisdiction in this country to place form over substance and tolerate reversals of convictions which have no link to discrimination when an inquiry has wrongfully been denied by the trial court.

Lastly, amici assert that "[t]he state and the FPAA essentially advocate a scheme that is designed to safeguard the very evil that *Neil* and its progeny have sought to eliminate." Brief of Amici in Support of Respondent, p. 18. The test that the State and the FPAA are advocating is the test that is utilized by the Supreme Court of the United States and 46 states. The prima facie case requirement is the one which this Court, in Neil, had utilized for several years. Amici are thus suggesting that the Supreme Court of the United States, 46 state judiciaries, and this Court during the Neil era, all advocated a scheme to safeguard discriminatory practices in jury selection.

There are multiple legitimate concerns which must be balanced during the criminal trial. Just as our courts must be concerned about prohibiting impermissible discrimination during jury selection, so, too, our courts must be concerned about upholding convictions which are in no way tainted by

discrimination, when no showing or allegation of discrimination has even been made. Any test administered during jury selection will, at best, be an imperfect vehicle for combating discrimination. Attorneys for the parties base their jury selection challenges on their clients' perceived needs, not on those of the prospective jurors. While the judge may retain discretion to inquire when the parties have not objected, the judge does so only at the peril of being accused of departing from his or her detached, neutral role, and at the risk of creating reversible error beyond the control of any party. Thus, no "test" will attain perfection; any "test" must strive to balance all of the legitimate interests at stake at a trial. The current test fails when it permits reversals of fair trials which have not been shown to have been tainted by any discrimination and for which discrimination has not even been alleged.

CONCLUSION

This Court should reverse the decision of the lower court and either uphold the requirement for an express allegation of discrimination, implement a prima facie case requirement, permit post-appeal evidentiary inquiries, and/or apply limited harmless

error analysis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this ___ day of September, 2006 to SHANNON PATRICIA McKENNA, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, FL 33131; KAREN M. GOTTLIEB, Esq., P.O. Box 1388, Coconut Grove, FL 33233; BENJAMIN S. WAXMAN, Esq., 2250 S.W. 3rd Ave., 4th Floor, Miami, FL 33129; ELLIOT H. SCHERKER, Esq., Greenberg Traurig, P.A., 1221 Brickell Ave., 23rd Floor, Miami, FL 33131; and RODOLFO SORONDO, JR. Esq., Holland & Knight, 701 Brickell Ave., Suite 3000, Miami, FL 33131.

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CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing brief has been typed in Courier New, 12-point type.

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