IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

JAMES WILLIAM HAYES, JR.,:

Appellant, :

v. : **Case No. SC10-_____**
First DCA No. 1D08-4011

STATE OF FLORIDA, :

Appellee. :

_____/

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner seeks review of the decision in Hayes v. State, ___ So. 3d ___ (Fla. 1st DCA September 23, 2010) (attached). Petitioner was the Appellant and the Respondent was the Appellee in the proceedings in the First District Court of Appeal. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

In the First District Court of Appeal, Petitioner challenged the trial court's denial of the defense peremptory challenge to juror Haupt. During voir dire, juror Haupt stated that she had two family members in law enforcement, but that those relationships would not create an bias towards law enforcement. Hayes, slip op. at 2. Later, defense counsel sought to exercise a peremptory strike on Haupt, and the following exchange occurred:

> MR. GORDON [prosecutor]: Your Honor, is it out of line if the State requests a gender neutral reason?
>
> MR. PFEIFFER [defense counsel]: A what?
>
> MR. GORDON: A gender neutral reason for using a strike against this female.
>
> THE COURT: Counsel?
>
> MR. PFEIFFER: I don't have a gender neutral reason. She has some relatives or whatnot in law enforcement. She really didn't answer many questions, at all. She didn't say much of anything. To me, she's somewhat of an unknown quantity.

THE COURT: Counsel, anything else.

MR. PFIEFFER: Nothing.

MR. GORDON: Your Honor, she did indicate that she knew law enforcement officers, but she indicated affirmatively that that would have no bearing on her potential as a juror.

THE COURT: All right. Counsel, while you've identified, we talked about –- and I'm not sure that it applies as to a gender neutral reason to strike a potential juror in this manner. She did indicate she knew two law enforcement officers, but it created no problem for her. Otherwise, she had no other comments relating to this case. . . .

. . . .

MR. GORDON [prosecutor]: Your Honor, not to be difficult, but to go back to the gender neutral reason. If we strike that juror, the next juror in line was a woman, anyway. So it wouldn't change the gender makeup of the jury.

THE COURT: I'm aware of that, but each juror has the right to serve at their own right.

MR. GORDON: What?

THE COURT: I'm aware of that, but each juror has the right to serve, at their own right, absent a sufficient basis to exclude them.

Hayes, slip op. at 3-4.

Before the jury was sworn, defense counsel renewed the objection to the court's denial of the peremptory strike of juror Haupt. Hayes, slip op. at 4. Counsel argued that the court had not followed the correct procedure in addressing the issue, citing the three-step procedure set out in Melbourne v.

State, 679 So. 2d 759 (Fla. 1996). Hayes, slip op. at 4. Counsel stated that the first two steps had been followed, but did not recall whether or not the court addressed the third step, in which the court is required to decide whether or not the reason was a pretext or was genuine. Id. The court responded:

> I concluded that your reason was not genuine under the circumstances, which presumes that it was gender –- or excuse me, a gender neutral reason –- explanation.
>
> Now that does not address your client's issue about wanting other people, but on the basis that was stated as the general ground, that's presumed in that –- going to the next step.

Id. at 5. The State said all of defense counsel's arguments were made during jury selection and the court had ruled on them. Id. The court responded, "Not all of them, but I've made my observations and rulings. They stand." Id.

In addressing Petitioner's argument on direct appeal that the trial court erred in denying the defense peremptory challenge to juror Haupt, the First District cited and discussed Melbourne. Hayes, slip op. at 5-6. The court concluded that the first two steps of the Melbourne procedure had been followed: "the prosecutor requested a gender-neutral reason for the peremptory strike of juror Haupt, and defense counsel

offered an explanation which satisfied the court as being gender neutral." Hayes, slip op. at 6.

The First District then addressed the third step of the Melbourne procedure, concluding:

> We cannot definitively say the trial court's ruling is clearly erroneous and wholly unsupported by the record. The transcript of *voir dire* reveals nothing about the jurors the defense successfully removed by peremptory challenge prior to the attempted strike of juror Haupt. Thus Mr. Hayes cannot demonstrate, for example, the prior strikes included few or no women. But the transcript does show defense counsel's initial response to the request for a gender-neutral justification for removing juror Haupt was "I don't have a gender-neutral reason." And although counsel recovered with "She has some relatives or whatnot in law enforcement," two other individuals with family in law enforcement remained on the jury. These circumstances, together with the court's assessment of defense counsel's credibility (which we are not in a position to second guess) tend to support the denial of the peremptory challenge. Because we see no clear error here, we are constrained to uphold the lower court's ruling.

Hayes, slip op. at 8. The court affirmed Petitioner's conviction, with one judge dissenting. Hayes, slip op. at 9-10 (Kahn, J., dissenting).

SUMMARY OF ARGUMENT

In Hayes, the First District applied the standard of review for a trial court's ruling on the genuineness of a peremptory strike with such great deference as to render the trial court's ruling unreviewable. Although peremptory strikes are presumed to be exercised in a nondiscriminatory manner, although the opponent of a strike carries the burden to show purposeful, invidious discrimination, and although something in the record must show discriminatory intent, the First District did not apply these principles of law and ignored what the record in Petitioner's case actually reflects.

Under Article V, §3(b)(3), Florida Constitution, this Court has jurisdiction and the discretion to exercise that jurisdiction to review the First District's decision in Hayes. The decision expressly cites and discusses as controlling authority this Court's decision in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), and reaches a conclusion in conflict with Melbourne. The First District erroneously interpreted and applied Melbourne, and this Court should exercise its jurisdiction to address this conflict.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE EXPRESS AND DIRECT CONFLICT BETWEEN HAYES AND MELBOURNE AND ITS PROGENY.

This Court has jurisdiction to review the First District's decision in Hayes under Article V, §3(b)(3) of the Florida Constitution. In Hayes, the First District expressly relied upon this Court's decision in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), as establishing the rule of law applicable to Petitioner's argument but applied Melbourne in a manner conflicting with that decision.

The issue raised by the First District's decision is the standard of review applicable to a trial court's ruling on the third step of the Melbourne procedure. This Court has explained the standard of review as follows:

> [T]he appropriate standard of appellate review for determining the threshold question of whether there is a likelihood of racial discrimination in the use of peremptory challenges is abuse of discretion. Hoskins v. State, 965 So. 2d 1, 7 (Fla. 2007) (quoting Jones v. State, 923 So. 2d 486, 490 (Fla. 2006), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1112, 169 L.Ed.2d 827 (2008); *accord* Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992). Generally, the trial court is in the best position to assess the genuineness of the reason advanced, and the decision will be affirmed unless clearly erroneous. *See* Jones, 923 So. 2d at 490. However, this Court has also confirmed that "deference does not imply abandonment or abdication of judicial review," Dorsey v. State, 868 So. 2d 1192, 1200 (Fla. 2003) (quoting Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003), because

> "[d]eference does not by definition preclude relief." Miller-El, 537 U.S. at 340, 123 S. Ct. 1029.

Nowell v. State, 998 So. 2d 597, 602 (Fla. 2008).

The First District's decision in Hayes epitomizes "abandonment or abdication of judicial review." The First District's application of the clearly erroneous standard has rendered a trial court's ruling on step three of the Melbourne procedure unreviewable on appeal and thus not only conflicts with Melbourne, but also conflicts with numerous decisions of other District Courts of Appeal.

Under Melbourne, peremptory challenges "are presumed to be exercised in a nondiscriminatory manner." 679 So. 2d at 764. Thus, "the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination." Id.; Ratliff v. State, 679 So. 2d 1183, 1184 (Fla. 1996). In order to sustain the trial court's denial of a peremptory strike, the record must "overcome the presumption that the peremptory challenge was exercised in a nondiscriminatory manner" and must "justify a finding of discriminatory intent." Porter v. State, 708 So. 2d 338, 339 (Fla. 3rd DCA 1998) (citing Windom v. State, 656 So. 2d 432 (Fla. 1995), and quoting Smith v. State, 662 So. 2d 1336 (Fla. 2nd DCA 1995)). Once a party provides a neutral reason for a peremptory strike, "the trial court then has the

duty to determine whether the party opposing the challenge has shown purposeful, invidious discrimination." Chambers v. State, 682 So. 2d 615, 616 (Fla. 4th DCA 1996). *See also* Senatus v. State, 40 So. 3d 878 (Fla. 3d DCA 2010) ("There is nothing in the record to suggest that defense counsel's concededly race-neutral reasons for striking the prospective juror were not genuine. . . . [T]he absence of record support for the trial court's 'genuineness' finding requires reversal"); Smith v. State, 662 So. 2d 1336, 1338 (Fla. 2d DCA 1995) (record contains "nothing to overcome the [*State v.*] *Neil*[, 457 So. 2d 481, 486 (Fla. 1984),] presumption or to justify a finding of discriminatory intent"). When the proponent of a the strike meets the burden of production of providing a neutral reason, "the proponent is entitled to the presumption that the reason is genuine." Dorsey v. State, 868 So. 2d 1192, 1199 (Fla. 2003).

In Petitioner's case, the First District ignored these principles of law, applying the clearly erroneous standard arbitrarily and ignoring what the record actually reflected. For example, in denying the peremptory challenge, the trial court stated:

> Counsel, while you've identified, we talked about –- and I'm not sure that it applies as to a gender neutral reason to strike a potential juror in this manner. She did indicate she knew two law enforcement officers, but it created no problem for her.

> Otherwise, she had no other comments relating to this case. . . .

Hayes, slip op. at 3. When defense counsel later returned to the issue, arguing that the court had not addressed the third step of the Melbourne procedure, the court referred to its previous ruling as being a finding that the strike was not genuine:

> I concluded that your reason was not genuine under the circumstances, which presumes that it was gender –- or excuse me, a gender neutral reason –- explanation.
>
> Now that does not address your client's issue about wanting other people, but on the basis that was stated as the general ground, that's presumed in that –- going to the next step.

Hayes, slip op. at 5. Thus, the actual bases of the trial court's finding that the strike was not genuine was the trial court's uncertainty that defense counsel's reason (Haupt's relationship to law enforcement officers) applied as a gender neutral reason, Haupt's statement that her relationship to law enforcement officers "created no problem for her," and Petitioner's desire for a different juror.

All of these bases for the trial court's ruling were errors of law. First, a prospective juror's relationship with law enforcement is a facially gender-neutral basis for a peremptory strike. Russell v. State, 879 So. 2d 1261, 1263 (Fla. 3rd DCA 2004); Chambers v. State, 682 So. 2d 615 (Fla. 4th DCA 1996).

Second, Haupt's statement that her relationship with law enforcement officers would not affect her ability to serve is not applicable to peremptory challenges, but to cause challenges.[1] "In making its ruling [on a peremptory challenge] the trial court needs to keep in mind that it is dealing with a peremptory strike, not one for cause." Rojas v. State, 790 So. 2d 1219, 1220 (Fla. 3d DCA 2001). Third, the fact that Petitioner himself wanted to excuse Haupt is not evidence of purposeful discrimination. The trial court alluded to Mr. Hayes "wanting other people," but nothing about that fact alone is evidence of purposeful discrimination. "There is nothing in [State v.] Neil, [457 So. 2d 481 (Fla. 1984),] or its progeny, that forbids choosing among available jurors, even for capricious reasons, so long as the reasons are not . . . discriminatory." Davis v. State, 691 So. 2d 1180, 1182 (Fla. 3rd DCA 1997); Robinson v. State, 832 So. 2d 944, 944 (Fla. 3rd DCA 2002).

Rather than address the trial court's actual reasons for denying the strike, the First District arbitrarily chose to rely upon defense counsel's initial statement that he did not have a gender neutral reason. Hayes, slip op. at 8. In so doing, the

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[1] *See generally* Busby v. State, 894 So. 2d 88, 95-96 (Fla. 2004).

First District turned the standard of review on its head: instead of looking at the record to determine whether the opponent of the strike had demonstrated purposeful, invidious discrimination, the First District searched the record for evidence that Petitioner had demonstrated the strike was *not* motivated by discriminatory intent.

In another example of its arbitrary application of the standard of review, the First District noted that two persons with family in law enforcement served on the jury, Hayes, slip op. at 8, but disregarded the fact that six women served on the jury, id. at 5, a fact indicating a lack of purposeful, invidious discrimination. In Melbourne, the Court provided a nonexclusive list of circumstances the trial court could consider in determining whether the reason given for a strike is genuine: "the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment." 679 So. 2d at 764 n.8. The fact that six women served on the jury demonstrates that the defense was not exercising strikes with discriminatory intent. *See* Murray v. State, 3 So. 3d 1108, 1121 (Fla. 2009) (upholding prosecution's strike of black juror where trial court stated that because prosecution had not moved to strike two other black

jurors, "I don't believe there is a racial pattern"); Young v. State, 744 So. 2d 1077, 1083 (Fla. 4th DCA 1999) (upholding prosecution's strike of Hispanic juror because "the trial court could have relied heavily on the presence of two Hispanic members of the jury and concluded that the prosecutor's proffered reason for the strike was nonracial").

The First District never applied the presumption that peremptory strikes are exercised in a nondiscriminatory manner, never determined whether the opponent of the strike had proved purposeful, invidious discrimination and never examined the record for evidence of discriminatory intent. The First District's application of the standard of review thus conflicts with Melbourne and with the other decisions of this Court and the district courts cited above.

The First District's express reliance upon Melbourne and its decision conflicting with Melbourne provide this Court with jurisdiction and with the discretion to exercise that jurisdiction. The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988); Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). The Court has jurisdiction "over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself." The Florida Star, 530 So. 2d at 288. The Court has discretion to exercise that

jurisdiction because the First District's decision in Hayes conflicts with Melbourne, The Florida Star, 530 So. 2d at 288-89, regardless of the fact that the First District did not itself identify the conflict. Ford Motor Co. v. Kikis, 401 So. 2d at 1342. This Court should accept jurisdiction and address the First District's erroneous interpretation and application of Melbourne.

CONCLUSION

Petitioner requests the Court to accept this case for discretionary review and order briefing on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Jurisdictional Brief of Petitioner was furnished by U.S. Mail to **Trisha Meggs Pate**, Assistant Attorney General, Counsel for the State of Florida, The Capitol PL01, Tallahassee, Florida 32399-1050, and to **Mr. James W. Hayes, Jr.**, DOC# P37534, New River-East Unit, 7819 N.W. 228th Street, Raiford, FL 32026-3000, on this 27th day of October, 2010.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

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