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IN THE SUPREME COURT OF FLORIDA

TAVARES W. SPENCER, JR., :

Petitioner, :

vs. : Case No. SC16-1599

STATE OF FLORIDA, :

Respondent. :

_______________________________:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TOPICAL INDEX TO BRIEF

STATEMENT OF THE CASE AND FACTS 1

(a) The Jury Selection Proceedings 1

(1) The Prosecutor's Voir Dire 1

(2) The Defense Attorney's Voir Dire 5

(3) Selection of the Jury 7

(b) The Direct Appeal 12

SUMMARY OF THE ARGUMENT 14

ARGUMENT 15

ISSUE

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND QUASH THE OPINION BELOW BECAUSE PRESERVATION OF A BATSON ISSUE IS GOVERNED BY SETTLED LAW FROM THIS COURT AND THE U.S. SUPREME COURT. 15

(a) Preservation of Batson/Melbourne Claims 15

(b) The Second District's Twelve-Component Analysis 20

(c) What the Second District Considers Adequate Preservation for Batson Error Remains an Open Question 23

(d) The Second District Exceeded its Authority by Imposing New Preservation Requirements 25

(e) Preservation of a Violation of the U.S. Constitution is a Federal Issue 26

(f) Any New Requirements Must be Prospective Only 27

(g) This Court Should Direct the Second DCA to Reverse for a New Trial 28

CONCLUSION 35

TABLE OF CITATIONS

Batson v. Kentucky,
476 U.S. 79 (1986) *passim*

Boykin v. Alabama,
395 U.S. 238 (1969) 26

Brown v. State,
41 Fla. L. Weekly D2421 (Fla. 5th DCA Oct. 28, 2016) 23

Douglas v. Alabama,
380 U.S. 415 (1965) 26

Ford v. Georgia,
498 U.S. 411 (1991) 26, 27

Foster v. Chatman,
136 S. Ct. 1737 (2016) 19, 22

Hanna v. State,
194 So. 3d 424 (Fla. 3d DCA 2016) 23

Hayes v. State,
94 So. 3d 452 (Fla. 2012) 13, 31, 34

Hernandez v. New York,
500 U.S. 352 (1991) 19, 21, 32

In re Seaton's Estate,
18 So. 2d 20 (Fla. 1944) 25

Ivy v. State,
196 So. 3d 394 (Fla. 2d DCA 2016) 12, 13, 23, 24

Johnson v. California,
545 U.S. 162 (2005) 17, 18, 19, 21, 22, 26

Joiner v. State,
618 So. 2d 174 (Fla. 1993) 15, 16, 21, 25

Lee v. Kemna,
534 U.S. 362 (2002) 27

McCants v. State,
41 Fla. L. Weekly D2152 (Fla. 2d DCA Sept. 16, 2016) 23

Melbourne v. State,
679 So. 2d 759 (Fla. 1996) *passim*

Miller-El v. Dretke,
545 U.S. 231 (2005) 20, 22, 29

Miller-El v. Cockrell,
537 U.S. 322 (2003) 17

Morgan v. City of Chicago,
822 F. 3d 317 (7th Cir. May 6, 2016) 31, 32

Old Plantation Corp. v. Maule Indus., Inc.,
68 So. 2d 180 (Fla. 1953) 26

Powers v. Ohio,
499 U.S. 400 (1991) 15, 22

Purkett v. Elem,
514 U.S. 765 (1995) 19

Spencer v. State,
196 So. 3d 400 (Fla. 2d DCA 2016) *passim*

State v. Alen,
616 So. 2d 452 (Fla. 1993) 15

State v. Johans,
613 So. 2d 1319 (Fla. 1993) 17, 18

State v. Neil,
457 So. 2d 481 (Fla. 1984) 17

State v. Whitby,
975 So. 2d 1124 (Fla. 2008) 18

Swain v. Alabama,
380 U.S. 202 (1965) 20

United States v. Perez,
35 F.3d 632 (1st Cir. 1994) 32

United States v. Stephens,
514 F.3d 703 (7th Cir. 2008) 32

Williams v. Louisiana,
136 S. Ct. 2156 (2016) 18, 26

Statutes

28 U.S.C. § 2254 22

Constitutional Provisions

Art. I, § 16, Fla. Const. 12, 15
Art. I, § 2, Fla. Const. 12, 15

U.S. Const., Amend. 6 12, 15
U.S. Const., Amend. 14 12, 15

STATEMENT OF THE CASE AND FACTS

Petitioner Tavares Spencer was charged by direct information with: (1) attempted first-degree felony murder, (2) robbery, (3) aggravated battery, (4) attempted second-degree murder, and (5) aggravated assault. R19-26 The offenses occurred on April 9, 2013, when Spencer was sixteen years old. R21-25 The case was originally filed in the juvenile division, but the State Attorney elected to upgrade the charges and prosecute Spencer as an adult. R20,25 In each count, the State named Terrience McDonald as the victim and alleged that Spencer discharged a firearm. R21-23 Judge Emmett Battles presided over a four-day jury trial in October 2013, and Spencer, who is African-American, was found guilty as charged. R46-48,84-89,T162

Following the verdict, the judge dismissed count four (attempted second-degree murder) because it was based on the same acts that supported the attempted first-degree felony murder conviction in count one. R90-92,112,161-162 The judge sentenced Spencer to 25 years in prison as a mandatory minimum on each of counts 1, 2, 3, and 5, to be served concurrently, followed by a total of 10 years' probation. R115-125,137

(a) The Jury Selection Proceedings

Fifty prospective jurors were assembled. T3 The judge administered an oath to the venire and posed a variety of questions concerning principles of criminal and constitutional law to the group, with the group as a whole responding affirmatively to the questions posed. T12,18-21

(1) The Prosecutor's Voir Dire

The prosecutor, Mr. Falcone, first addressed scheduling conflicts, and then asked whether any jurors knew him or others in the State

Attorney's office. T22-33 The judge took a break, during which Falcone challenged two jurors for cause, and without objection, the judge excused them. T36-37

After the break, the prosecutor told the jurors that "this is a case that obviously is a crime of violence," and he asked the jurors if they or a friend or a family member had been a victim of a crime of violence. T43 Fourteen jurors[1] responded, and follow up questions were asked of each. T43-59

The prosecutor then asked whether any jurors had pre-existing medical conditions that may need accommodation, to which sixteen jurors[2] responded. T59-66 The prosecutor then returned to discussing whether the jurors knew anyone who had been a victim of a crime of violence, and juror Rauch (43) also responded. T67-68 The prosecutor then asked whether English was a second language for anyone, and jurors Edassery and Howell responded, and each were asked a follow-up question. T68-69. Then, jurors Pericles (19), Greene (1), and Sasse (3) addressed the court with individual issues before the court recessed for lunch. (T69-71). When the court reconvened, the prosecutor moved to excuse Juror Williams for cause due to her medical condition. The defense did not object, and the judge excused her. T81

The prosecutor then asked the jurors if they or a friend or a family member might have been a law enforcement officer, to which twenty-one jurors[3] responded, and follow up questions were asked of

---

[1] Greene (1), Sasse (3), Greco (5), Titcomb (9), Overdorff (21), Salzer (23), Adkins (28), Baker (25), Tillman (30), Tate (31), Knickerbocker (32), Malchick (33), Bartlo (35), Sessums (39), Ogun (42)

[2] Sasse (3), Titcomb (9), Johnson (16), Howell (20), Baker (25), Fahey (24), Tillman (30), Collins (36), James (37), Williams (38), Sessums (39), Malchick (33), Edassery (41), Ogun (42), Rauch, and Brown (48).

[3] Sasse (3), Harrell (4), Greco (5), Lipp (17), Buyi (18), Pericles

each responding juror. T84-94 The prosecutor then asked who had heard about the case through pretrial publicity and one juror, Malchick (33), said she had heard about it. T95-96

Next, the prosecutor noted that the jury questionnaire touched upon "accused of crime, friend or family member accused of crime." T98 He asked if anyone had been arrested for a crime themselves, and eleven jurors[4] respond. T98-106,108 The prosecutor followed up by asking each what they were arrested for and whether they thought they were treated fairly. The following occurred when juror Carol Johnson responded:

> MR. FALCONE [the prosecutor]: . . . All right. Yes, go ahead. That's Miss Carol Johnson, juror number 16. Go ahead, ma'am.
>
> PROSPECTIVE JUROR: May I approach?
>
> MR. FALCONE: Your Honor?
>
> THE COURT: Yes ma'am.
>
> (A bench conference was held, as follows):
>
> THE COURT: Yes ma'am.
>
> PROSPECTIVE JUROR: I was arrested in 1996 on battery because it was me and my ex-husband, and I chose to go because if I didn't, then he was going to take both and my children would have went to the state.
>
> THE COURT: Okay. Do you have any questions?
>
> MR. FALCONE: Do you feel that you were treated fairly or unfairly?
>
> PROSPECTIVE JUROR: Fairly.
>
> MR. FALCONE: Anything in that experience that might affect your ability to be impartial towards the state?

(..continued)
(19), Ewell (22), Fahey (24), Kelly-White (26), Tillman (30), Adkins (28), Malchick (33), Bartlo (35), James (37), Sessums (39), Feaster (40), Rauch (43), Hewitt, Longwell (49), Dorman (50), Titcomb (9)

[4] Shoemaker (2), Harrell (4), Wallace (6), Duncan (7), Nelson (8), Titcomb, Clendening (12), Howard (14), Carol Johnson (16), Tillman (3), and Malchick.

PROSPECTIVE JUROR: No.

MR. FIGUEROA: I have nothing else.

THE COURT: Thank you, ma'am.

T104-05

Juror Howell (20) volunteered that her daughter had been arrested, and the prosecutor broadened his inquiry to ask all about whether they have friends or family members who had been arrested. T105-06. Fourteen jurors[5] respond. T106-115 Each was questioned by the prosecutor as to the nature of the arrest and asked if the individual involved was treated fairly and whether anything about the event would affect the juror's ability to be fair and impartial for the state in this case. T105-113 The following occurred with regard to Mr. Thermidor:

MR. FALCONE: Juror number 11. Go ahead, Mr. Thermidor.

> PROSPECTIVE JUROR: First, I thought you meant the person individually. I had a friend 13 years ago that was arrested for trespassing on state property and possession.
>
> MR. FALCONE: Anything in that experience that might affect your ability to be a fair juror for the state in this case?
>
> PROSPECTIVE JUROR: No.
>
> MR. FALCONE: And did you, yourself, have anything?
>
> PROSPECTIVE JUROR: No. It was same situation [as a prior responding juror]. My stepson, breaking and entering and burglary, felt he was treated fairly, and I can be fair and impartial.
>
> MR. FALCONE: Thank you.

T113

The prosecutor asked if anyone was familiar with a specific neighborhood in Tampa, and no one was. He then said that "the victim

---

[5] Adkins, Salzer (23), Czerwik (34), Malchick (33), Collins (36), Feaster, Rauch (43), Crowley, Hearn (47), Longwell (49), Thermidor (11), Wallace (6), Greene (1), and Dorman (50).

was transgender, also known as transvestite; and there may be some reference to the fact that he was in woman's attire at the time the charges occurred." T116 He asked the venire if they would have an issue being fair in a case "involving a person of that particular type of category." T117 No one responded.

Next, the prosecutor said, "Mr. Spencer is of a relatively younger age," and the court would instruct "that sympathy does not factor in," so would anybody "feel that they might be concerned listening to a case involving a person of that age group?" T117-18 Jurors Greene, Salzer, James, and Titcomb responded affirmatively. T118-120 The prosecutor then asked if any juror felt they could not sit in judgment of another person, and no one responded. That ended the State's questioning of the venire. T121

(2) The Defense Attorney's Voir Dire

The defense attorney, Mr. Figueroa, read a list of witnesses and asked the jurors if any of the names sounded familiar. T124 He then asked the group if anyone would feel sorry for or have strong feelings against a transgender, transvestite individual. Juror Fahey (24) responded (at the bench) that she could not say she will be completely unbiased. T126 Jurors Titcomb, Salzer, Nelson, and Rauch also indicated strong feelings. T126-28. The defense attorney next asked the group whether there were strong opinions on guns. Juror Thermidor (11) responded: "It's not necessarily the use of them, just the location, such as school or church or any place like that." T129 Juror Titcomb (9) also responded to the gun question. T129 The defense attorney then discussed the respective burdens of proof of the State and defense, and asked the group if everyone understood. T130 He asked what the verdict

would be if the State has not proved the case, and one juror answered that he should be acquitted. T130

He then explained that Spencer had a right to not testify and asked the group if they would hold it against him if he did not testify. One juror said, "no," while others shook their heads. T132 He called on Jurors Adkins, Galley, and Duncan, and each agreed that Spencer did not have to testify. T132-33 He then spoke of the elements of an offense, compared the elements to parts of a chair, and asked if the State could prove its case without including all the elements. Juror Cafaro agreed to find Spencer not guilty if the elements were not proven, and she agreed to be comfortable looking at lesser-included offenses. T134-35 Jurors Howard, Riley, and Buyi also agreed.

Attorney Figueroa then pressed Buyi on not giving sympathy to Spencer for his young age, and she agreed not to do that. T136-37 He discussed with Buyi and another juror, Galley, their jobs as science teachers. T138,143 He addressed Juror Ewell, who agreed to follow the law as the judge instructs, T139, and he addressed Juror Kelly-White about working as a law enforcement officer and about people making mistakes. T141-42 He talked about judging people's credibility by what they say and how they present themselves. T142 He addressed Jurors Galley, Feaster, James, Collins, Czerwik, Greco, Shoemaker, Harrell, and Pericles on judging witness credibility and holding the State to its burden. T143-148 When questioned, Juror Longwell said she could be fair and impartial, and Brown said she had no doubt she could give either side a fair trial, as could Hearn and Hewitt. T149-51 Tate and Bartlo expressed some concern about missing work. T151-52 Wallace agreed that he could be fair and impartial. T152-53 That ended the

defense attorney's voir dire. The judge sent the jurors to the lobby. T153

(3) Selection of the Jury

The judge explained to the attorneys the procedure he expected them to follow in selecting the six jurors. Each side was allotted six peremptory challenges, and the attorneys were instructed as to how they were to make objections:

> When I return, I'll turn to the state first so you may propose challenges for cause, if any. For example, . . . if the state were going to move to strike prospective juror number 1 . . ., I would turn to defense. If you have no objection, say no objection. Absent something unusual or extraordinary, I will probably grant that.
>
> If the defense has objection to that motion to strike that individual, you simple say, objection. I turn to the state. You give a full and complete basis for your motion. I turn to the defense. You respond in full. And then the court decides.
>
> In that fashion, we go through motions to strike individuals for cause, if any, proposed by the state.
>
> We will turn – once we completed that, I will announce those, if any, that are indeed struck for cause on motion of the state.
>
> Once we completed that, I'll turn to the defense for your additional strikes for cause. Go through it in exactly the same fashion.
>
> Once that's completed, I will announce those, if any, that are indeed struck for cause on motion of state and defense.
>
> We will then move to the exercise of peremptory challenges, six in a case such as this per side, in the selection of our six jurors.
>
> And we will go in numeric, sequential order of remaining, available prospective jurors.
>
> So . . . if the only prospective juror struck for cause was number 1, I would say 2 through 7. Turn to the state. If for example, the state were to exercise a peremptory challenge as to number 2, subject to any objections and rulings by the court, if that were to stand, I would say 3 through 8. We would go through any appropriate objections

> and rulings by the court. If that were to stand, I would say 4 through 9, so on back and forth until we've selected our six jurors either through exhaustion of peremptory challenges or acceptance by both parties.
>
> Once we selected the six jurors, we will move to the selection of alternate 1 and alternate 2 to be used in that order should it become necessary. We'll select alternate 1 and 2 by giving each side one peremptory per side to use in the selection of the alternate.

T155-56

The process began with the prosecutor moving to strike for cause fifteen potential jurors, identified only by number: 1, 3, 8, 9, 12, 19, 23, 24, 25, 30, 31, 32, 33, 35, 37. In each case, the defense had no objection to the cause challenge, and the judge allowed the challenge without any explanation appearing in the record as to the basis for it. However, when the State struck juror 37, the defense attorney asked the prosecutor, "That's because working the night shift and not being able to concentrate; is that correct?" T160 The prosecutor responded: "In addition to there was one matter that was raised with regard to bias towards one side or the other during the course of these questions." The defense attorney addressed the judge to say, "And, judge, I only asked for that qualification <u>because he is an African American male</u>. I just wanted to make sure." T160 (emphasis added).

The prosecutor continued to move for cause challenges, and struck seven more jurors for cause without objection: 39, 41, 42, 43, 45, 47, and 50. When the prosecutor moved to strike juror 47 for cause, the following occurred:

> MR. FALCONE: Juror number 47.
>
> MR. FIGUEROA: No objection.
>
> THE COURT: 47 without objection. Next.

MR. FIGUEROA: And I believe that was because of health issues, and other statements made she is an African female. I want to make sure there is a basis on that as well.

THE COURT: Counsel, when you say that, you're communicating with counsel on the other side. If you have an objection, you need to indicate an objection. If you have an objection, you need to indicate. Or if you have no objection or if you just wish to hear an explanation, ask for an explanation and a basis for the cause challenge and I will have that put on the record.

MR. FIGUEROA: Thank you, Judge. And solely, I just want to have that because Mr. Spencer is African male. So if Mr. Falcone could just state for the record I don't believe I'm going to have any objection.

THE COURT: Which one?

MR. FALCONE: Juror 47 is actually a Caucasian female.

MR. FIGUEROA: She is. I did the wrong one. I apologize, and I'll withdraw the request.

T162

After the prosecutor announced he was finished with his cause challenges, T162, the defense attorney move to strike juror 20 for cause, due to that juror's hearing problems. The State agreed, and that juror was struck. T163 The judge then listed the numbers of the 26 prospective jurors[6] that were struck for cause and then turned to the exercise of peremptory challenges. T164

The prosecutor exercised five peremptory challenges to strike jurors 2, 6, 7, 4, 14. After each strike, the defense accepted the panel. T164-166 The prosecutor used his sixth peremptory strike (which should have been his last) on juror 16, after which the defense lodged an objection:

MR. FIGUEROA: Judge, Miss Johnson, I believe was an African American female. This is the second African American stricken by the state for peremptory. I would ask for a race-neutral reason.

[6] "Struck for cause on motion of the state and/or defense: 1, 3, 8, 9, 12, 19, 20, 23, 24, 25, 29, 30, 31, 32, 33, 35, 37, 38, 39, 41, 42, 43, 45, 46, 47 and 50." T164

THE COURT: Is that as to number 16?

MR. FIGUEROA: It is.

THE COURT: There's an objection. The burden shifts to the state.

MR. FALCONE: During individual voir dire at the bench, juror indicated that she had been arrested for battery, battery, domestic violence, specifically.

THE COURT: Just a moment. Let me look at my notes.

MR. FIGUEROA: Judge, that is correct.

THE COURT: You may respond.

MR. FIGUEROA: I have no response.

THE COURT: The state has indicated a race-neutral reason. The court finds no pretext in the exercise of this peremptory challenge. The objection to the exercise of a peremptory as to number 6 is overruled.

You once again have: 5, 10, 11, 13, 15 and 17.

We're at the defense.

T166-167

The defense attorney then struck number 13. The prosecutor accepted the panel. The defense then struck number 5. The judge then said, "State," and then without any apparent recognition that the State had exhausted its peremptories, the prosecutor used a seventh peremptory strike on juror 17. The defense attorney accepted the panel, but the prosecutor continued, and again without anyone mentioning that the State had exhausted its permeptories, he used an eighth peremptory strike on juror 11. The defense attorney asked for a race-neutral reason:

THE COURT: And the state exercises a peremptory as to number 17.

You now have: 10, 11, 15, 18, 21 and 22.

Defense.

MR. FIGUEROA: Accept.

THE COURT: 10, 11, 15, 18, 21, 22.

State.

MR. FALCONE: Your Honor may I have a moment to check my notes on this one juror?

State would exercise a peremptory on juror number 11.

THE COURT: State exercises a peremptory as to number 11.

MR. FIGUEROA: Judge, I'm sorry to interrupt, but I would ask for a race-neutral reason, him being an African American male.

THE COURT: Burden shifts. Go ahead.

MR. FALCONE: During individual voir dire, the juror did indicate that he had a friend who was arrested for breaking and entering, B and E.

MR. FIGUEROA: He also indicated that he had a friend that was killed, and I would also say he did say numerous times he could be fair and impartial.

THE COURT: Okay. I note that the standard here is whether or not the state has indicated a race-neutral reason, whether the court sees or finds or perceives a pretext in the exercise of the peremptory challenge. The court finds no such pretext, finds that you've stated a race-neutral reason. The objection is overruled as to the exercise that peremptory challenge.

T169

After that, the defense struck juror 15, and both sides accepted the panel of six jurors, consisting of: Hill (10), Buyi (18), Overdorff (21), Ewell (22), Kelly-White (26), and Galley (27). T169-70 The judge turned to selecting the alternates and the prosecutor struck juror 28, leaving juror Czerwik as alternate 1. The state next struck juror 36, leaving juror Feaster (40) as alternate 2. T170-171 The judge asked the state and defense if they accepted the panel and the defense attorney

stated: "Subject to prior objections, Judge." T171 The judge announced the panel to the venire and swore in the jury. T176-178

(b) The Direct Appeal

Spencer raised one issue in his direct appeal to the Second District regarding the State's use of peremptory strikes on two African-American potential jurors. He argued that the trial court failed to undertake an on-the-record genuineness inquiry of the circumstances relevant to whether the strikes were exercised for a discriminatory purpose, which deprived Spencer of meaningful appellate review of his claims. He asserted that the issue was preserved and the trial court's rulings denied him the right to an impartial jury under the Sixth Amendment to the U.S. Constitution and Article I, Section 16 of the Florida Constitution, and to the equal protection provisions of the Fourteenth Amendment of the U.S. Constitution and Article I, section 2, of the Florida Constitution. (Spencer v. State, 2D14-316, Initial Brief at 26-27).

The Second District issued companion opinions on the same day in Spencer's case and another case, Ivy v. State, 196 So. 3d 394 (Fla. 2d DCA 2016), announcing new appellate preservation requirements for claims arising under Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996). The court affirmed both Spencer and Ivy's appeals after applying its new preservation requirements to both cases and concluding that the defendants did not adequately preserve their claims for appellate review.

> If an opponent wants the trial court to determine whether a facially neutral reason is a pretext, the opponent must expressly make a claim of pretext and at least attempt to proffer the circumstances that support its claim. Because the defendant did not preserve a Melbourne issue in this manner, we affirm.

Spencer v. State, 196 So. 3d 400, 401 (Fla. 2d DCA 2016); Ivy, 196 So.

3d at 399 (“we conclude that Mr. Ivy did not adequately preserve a Melbourne issue in this case”).

In the instant case, the court opined that it was required “to consider the actions” a defendant must take “to preserve” an issue for review during the third step of Melbourne.

> The only issue that [Spencer] raises on appeal is whether the trial court properly ruled upon his objections to the State's exercise of two peremptory challenges of African-American members of the venire. This case requires this court to consider the actions that must be taken by the opponent of a peremptory challenge to preserve a claim under Melbourne v. State, 679 So. 2d 759 (Fla. 1996), after the proponent of the challenge provides a race-neutral reason. In other words, it requires us to consider the actions the opponent must take to preserve a claim of error during step 3 of the Melbourne procedure.

196 So. 3d at 401. It concluded that step three of the Melbourne analysis did not place an “automatic” burden on the trial judge “to perform a full genuineness analysis”:

> We conclude that the supreme court in Hayes v. State, 94 So. 3d 452 (Fla. 2012), has not placed an automatic burden on the trial court to perform a full genuineness analysis on the record in every instance in which a party objects to a peremptory challenge and the proponent provides a facially neutral reason.

Id.

The Second District certified the same question of great public importance in both the instant case and Ivy:

> DURING A MELBOURNE HEARING, WHEN A TRIAL COURT FINDS THAT THE PROPONENT'S REASON FOR A PEREMPTORY CHALLENGE IS FACIALLY NEUTRAL, IS IT THE BURDEN OF THE OPPONENT (1) TO CLAIM THE REASON IS A PRETEXT, (2) TO PLACE INTO THE RECORD THE CIRCUMSTANCES SUPPORTING ITS POSITION, AND (3) TO OBJECT IF THE TRIAL COURT'S RULING DOES NOT CONTAIN ADEQUATE FINDINGS ON THE ISSUE OF GENUINENESS?

Spencer, 196 So. 3d at 411; Ivy, 196 So. 3d at 399. After the Second District denied Spencer’s motion for rehearing and motion for rehearing en banc on August 9, 2016, he filed a notice to invoke the jurisdiction of this Court, and this Court granted review.

SUMMARY OF THE ARGUMENT

The Second District exceeded its authority and violated Spencer's constitutional rights when it promulgated and simultaneously enforced a new procedural bar to appellate review of constitutional error arising under Batson v. Kentucky, 476 U.S. 79 (1986). Judge Altenbernd's opinion creates a heavier procedural burden on a defendant who attempts to raise a Batson claim during jury selection than is permitted by the controlling case law from the U.S. Supreme Court and this Court.

The jury selection proceedings were conducted in a cursory fashion, and the trial judge failed to put on the record any relevant circumstances he considered when he denied the Batson objections. The judge should have considered that the prosecutor gave an inadequate response in step two of the Melbourne procedure. The record demonstrates that the judge was simply responding in a boilerplate fashion when he denied the defense objections. If the judge had been at all attentive to the proceedings, he would have realized that the prosecutor had exhausted his strikes before he got to Juror Thermidor. Because an inadequate effort was put forth by the judge in step three, and there is no record of what the trial judge considered or found for the appellate court to review, the Second District was required to reverse. This Court should reaffirm its commitment to the principles underlying Batson and Melbourne by quashing the opinion below and granting Spencer a new trial.

ARGUMENT

ISSUE

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND QUASH THE OPINION BELOW BECAUSE PRESERVATION OF A BATSON ISSUE IS GOVERNED BY SETTLED LAW FROM THIS COURT AND THE U.S. SUPREME COURT.

The issue in this case concerns the exclusion of two African-American jurors, Ms. Carol Johnson and Mr. Thermidor, through the exercise of peremptory strikes by the prosecutor, which Spencer challenged as racially motivated. The proper legal analysis for the claims is an issue governed by federal and state constitutional provisions, specifically the equal protection clauses of the Fourteenth Amendment and Article 1, §2 of the Florida Constitution and the guarantee of trial by an impartial jury in the Sixth Amendment and Article I, § 16 of the Florida Constitution. See State v. Alen, 616 So. 2d 452, 453 (Fla. 1993) (citing Powers v. Ohio, 499 U.S. 400 (1991), and Batson v. Kentucky, 476 U.S. 79 (1986)).

(a) Preservation of Batson/Melbourne Claims

This Court should answer the certified question in the negative because step three of Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996), like step three of Batson, is a decisional step. In step three, the trial judge evaluates the parties on their persuasiveness after considering all relevant circumstances. The preservation of a Batson claim occurs in step one, when the defendant makes his objection. However, a preserved Batson objection can be subsequently waived by a defendant after the judge rules in step three. See Joiner v. State, 618 So. 2d 174 (Fla. 1993); Melbourne. But no waiver occurred here.

In Joiner, the defendant was found to have waived his Batson objection when he “accepted” the jury. This Court required that future defendants renew their objections or accept the jury subject to the

prior objections. The purpose for the renewal of the objection is to apprise the trial judge that the defendant still believes that reversible error has occurred.

> We therefore approve the district court to the extent that the court held that Joiner waived his Neil objection when he accepted the jury. Had Joiner renewed his objection or accepted the jury subject to his earlier Neil objection, we would rule otherwise. Such action would have apprised the trial judge that Joiner still believed reversible error had occurred. At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.

Joiner, 618 So. 2d at 176 (emphasis added). Citing Joiner, this Court again found waiver of a Batson claim in Melbourne: "we conclude that Melbourne failed to preserve this issue for review because she did not renew her objection before the jury was sworn. Any error could have been corrected easily at that point without compromising the whole trial at the outset." Melbourne, 679 So. 2d 765 (footnote omitted).

Under Batson, Joiner, and Melbourne, the opponent of the strike preserves the claim for review on appeal by taking the actions required by step one and making an additional objection before the jury is sworn. Spencer complied with these preservation requirements. But the Second District found that his claim was not preserved, and it outlined other procedural hurdles that a defendant must navigate during step three of a Batson/Melbourne proceeding in order to preserve for appellate review a claim that a prosecutor had exercised peremptory challenges in a discriminatory manner. No longer is it enough for a defendant to comply with step one of Melbourne and follow that with a Joiner objection.

The certified question posed by the Second District shows a fundamental misunderstanding of the Batson and Melbourne three-step framework, under which the Batson issue is preserved in step one unless

the defense later waives the objection by failing to renew it before the jury is sworn. In Batson, the Supreme Court lowered the threshold showing required for a criminal defendant to establish a prima facie case of purposeful discrimination in jury selection. In the first step of the Batson three-step process, "a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." Miller-El v. Cockrell, 537 U.S. 322, 328–329 (2003).

The Supreme Court expounded on a defendant's step-one burden in Johnson v. California, 545 U.S. 162 (2005), rejecting the standard by which California measured the sufficiency of a prima facie case. California required a defendant to present evidence that it was more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. 545 U.S. at 167. The Supreme Court reversed, explaining that "a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Id. at 170.

Florida law has evolved to require less of a defendant objecting to the State's use of a peremptory strike in step one than the federal courts have required. This Court first lowered the threshold showing required for step one of a Batson claim in State v. Johans, 613 So. 2d 1319 (Fla. 1993), receding from State v. Neil, 457 So. 2d 481 (Fla. 1984). Johans did away with the requirement that a defendant challenging the prosecutor's use of a peremptory strike show a strong likelihood that individuals had been challenged solely because of their race. This Court further simplified step one in Melbourne, setting forth guidelines "to assist courts in conforming with article I, section 16, Florida Constitution, and the equal protection provisions

of our state and federal constitutions," with the goal of eliminating racial discrimination in the exercise of peremptory challenges. The Melbourne guidelines, this Court said, "encapsulate existing law and are to be used whenever a race-based objection to a peremptory challenge is made."

> 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.

Melbourne, 679 So. 2d at 764 (footnotes omitted). Johans and Melbourne reduced the evidentiary burden in step one beyond what the U.S. Supreme Court required, ensuring that the inquiry proceeded to step two more easily. See State v. Whitby, 975 So. 2d 1124, 1127 (Fla. 2008) (Pariente, J., concurring) ("Florida law requires much less of the objecting party to mandate a Neil inquiry," the result of which is "requiring race-neutral explanations more often than federal law.").

Under the federal framework, the first two steps are evidentiary. "The first two Batson steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim." Johnson, 545 U.S. at 171. Justice Ginsburg addressed the second step recently in her concurring opinion in Williams v. Louisiana, 136 S. Ct. 2156, (Mem)–2157 (2016):

At Batson's second step, "the trial court [must] demand an

> explanation from the prosecutor." Johnson, 545 U.S., at 170, 125 S.Ct. 2410; see id., at 172, 125 S.Ct. 2410 ("The Batson framework is designed to produce actual answers [from a prosecutor] to suspicions and inferences that discrimination may have infected the jury selection process.... It does not matter that the prosecutor might have had good reasons; what matters is the real reason [jurors] were stricken." (internal quotation marks and alterations omitted)); id., at 173, 125 S.Ct. 2410 (improper to "rel[y] on judicial speculation to resolve plausible claims of discrimination").

In step three, the trial judge makes a factual determination: "'[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.'" Johnson, 545 U.S. at 168 (quoting Purkett v. Elem, 514 U.S. 765, 767 (1995)). The Supreme Court addressed the third step of Batson in Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016).

> Both parties agree that Foster has demonstrated a prima facie case, and that the prosecutors have offered race-neutral reasons for their strikes. We therefore address only Batson's third step. That step turns on factual determinations . . . .

The Supreme Court has explained that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." Hernandez v. New York, 500 U.S. 352, 359 (1991).

If a trial court determines that the proponent's reason for a peremptory challenge is facially neutral, the trial judge proceeds to consider all relevant circumstances to decide whether the reason for the strike is genuine in step three. In order to assess credibility in the third step, the trial court must "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Batson, 476 U.S. at 93 (internal quotation marks omitted).

> If any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much more than Swain [v. Alabama, 380 U.S. 202 (1965)]. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence Batson's explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. 476 U.S., at 96–97, 106 S.Ct. 1712.

Miller-El v. Dretke, 545 U.S. 231, 240 (2005).

(b) The Second District's Twelve-Component Analysis

In his opinion in this case, Judge Altenbernd broke down each step of the three-step Melbourne analysis into components and presented a scripted dialogue between the parties and the court that encompasses twelve components. He reframes step three into five components that require two defense objections, including requiring the defendant to ask the trial judge for clarity in the court's adverse ruling "to preserve the issue for appeal."

> (a) The court asks the defendant if he wishes to make a genuineness objection.
>
> (b) If the defendant chooses to make that objection, the defendant is permitted to make an argument and explain the facts and circumstances that support the defendant's claim that the facially neutral reason is a pretext.
>
> (c) The State is given an opportunity to respond.
>
> (d) The court makes its ruling that the facially neutral reason for the peremptory strike is genuine, explaining as necessary the basis for that ruling.
>
> (e) Finally, if necessary, the defendant asks the court to provide any additional finding or clarity in the ruling to preserve the issue for appeal.

Spencer, 196 So. 3d at 406. The Second District puts the burden of adherence to the script squarely on the defendant, as it did here when it affirmed Spencer's case.[7]

[7] Judge Battles certainly did not follow the script that Judge Altenbernd has now promulgated. The judge told the attorneys how he

Judge Altenbernd's opinion is based on the mistaken assumption that preservation of a Batson claim remains an unsettled issue when the trial judge undertakes his role in step three of Batson. This assumption indicates failure to appreciate the significance of the Joiner objection. When Judge Altenbernd wrote that "the outcome of this case depends on whether the defendant, as the opponent of the challenge, had a burden to object to the step 3 deficiencies and to call upon the trial court to correct them before the conclusion of jury selection," Spencer, 196 So. 3d at 406, he described exactly the purpose of a Joiner objection.

Requiring a defendant to jump through two additional hoops in step three to preserve a Batson objection in addition to making a Joiner objection violates both the letter and spirit of Batson. Judge Altenbernd's five-components that make up the third step serve to undermine the simplicity of the Batson framework, which is designed to encourage "'prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.'" Johnson, 545 U.S. at 172-73 (quoting Hernandez v. New York, 500 U.S. 352, 358-59 (1991)(op. of Kennedy, J.)). In Melbourne, this Court recognized that "[v]oir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case." 679 So. 2d at 764 (emphasis added).

By enlarging preservation requirements in step three, the Second District erected a barrier to achievement of the purpose that the simplified process created in Batson and Melbourne was designed for: to vindicate the harm from discriminatory jury selection. "[H]arm from

(..continued)
expected them to make objections and his instructions did not contemplate that the defense would continue to contest his rulings after he made them.

discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.'" Johnson, 545 U.S. at 172 (quoting Batson, 476 U.S. at 87)).

> When the government's choice of jurors is tainted with racial bias, that "overt wrong ... casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial ... ." Powers v. Ohio, 499 U.S. 400, 412, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," ibid., and undermines public confidence in adjudication[.]

Miller-El v. Dretke, 545 U.S. at 240.

The installation of procedural roadblocks that deny merit review of a Batson claim on direct appeal smacks of indifference to the harms recognized by the Supreme Court. The Second District's employment of procedural bars to deny review of Batson claims on direct appeal stands in sharp contrast with the U.S. Supreme Court's commitment to defending the principles underlying Batson in the face of even more daunting procedural hurdles. That commitment was displayed in Miller-El v. Dretke, and more recently in Foster v. Chatman, 136 S.Ct. 1737 (2016), both federal habeas cases, brought under 28 U.S.C. § 2254, which followed state court determinations that the prosecutions' race-neutral explanations were true. In both cases, the Supreme Court rejected the state courts' factual findings. See Miller-El v. Dretke, 545 U.S. at 266: "The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous."; and Foster v. Chatman, 136 S.Ct. at 1755: "The State's new argument today does not

dissuade us from the conclusion that its prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows."

In contrast, at least five appellants[8] have now been denied a merit review of their Batson claims on direct appeal because they failed to navigate the procedural hurdles set out in the opinion below. Consider too that there is no easy way to discern how many other appellants have or will receive per curiam affirmances based on these new preservation requirements.

(c) What the Second District Considers Adequate Preservation for Batson Error Remains an Open Question

Judge Altenbernd's framework for step three leaves open the question of how much debate a defendant or his attorney must engage in with the trial judge to obtain clarity from the judge before the appellate court will consider the equal protection claim preserved for review. The facts of the Ivy case must be considered here too because that case speaks to what the Second District deems adequate preservation, and it muddies the waters even more. Ivy's attorney spoke up and tried to alert the trial judge that the ruling in step three required a determination of genuineness, yet the Second District considered Ivy's claim unpreserved.

In Ivy, when the prosecutor exercised a peremptory strike of juror 126, the defense attorney asked for a race-neutral reason, noting that the juror was African American. The prosecutor responded that the

[8] See Spencer; Ivy; Hanna v. State, 194 So. 3d 424 (Fla. 3d DCA), reh'g denied (May 31, 2016) (adopting Spencer and Ivy); Brown v. State, 41 Fla. L. Weekly D2421 (Fla. 5th DCA Oct. 28, 2016)(citing Spencer in finding Melbourne issue unpreserved); and McCants v. State, 41 Fla. L. Weekly D2152 (Fla. 2d DCA Sept. 16, 2016) (affirming "for the reasons set forth in Ivy").

juror’s son was previously a member of law enforcement, and the defense attorney asserted that the reason was not genuine because it would make sense for the defense to strike a juror for that reason, but not the State.

> Mr. Ivy's attorney then argued that the reason must be “genuinely race neutral,” and suggested that the circumstance of a venireperson having a family member that had been a law enforcement officer seemed to be a valid reason for a peremptory challenge by a defendant but not by the State. Mr. Ivy's counsel thus appears to have been moving on to step 3 by suggesting that even if a proffered reason is facially race neutral, it must be “genuinely” race neutral. But he did not make this explicit, and the trial court does not appear to have understood that Mr. Ivy's counsel had moved on to step 3.

Ivy, 196 So. 3d at 398. After the trial judge indicated that the State’s reason for the strike did not have to make sense, the judge denied Ivy’s objection and allowed the strike because the reason given by the State was race neutral. The Second District faulted Ivy’s attorney for not “clarifying” the judge’s “confusion.”

> Instead of clarifying the confusion, explaining to the trial court that there is a third step in Melbourne, or objecting to the State's facially race-neutral reason as a pretext, Mr. Ivy's counsel simply responded: “Genuineness.”

Id. The Second District determined that the trial judge never reached the issue of whether the strike was genuine:

> Apparently the trial court still did not understand that it needed to make a separate determination on the issue of pretext, and it allowed the peremptory challenge “as race neutral.” Thus, the trial court never made a finding on whether the facially race-neutral reason was pretextual.

Id. In concluding that Ivy did not preserve the objection for appellate review, the Second District faulted the defense for not providing the trial court “with adequate notice that [the trial court] was not following the decision-making process necessary for a Melbourne hearing.” Id. at 399. The conclusion that Ivy, like Spencer, was not entitled to a review of his claim on the merits leaves open the

question of what a defendant must say to ensure preservation of a Batson objection.

With its companion opinions, the Second District has failed to appreciate what it means to establish a prima facie case under step one of Batson, and what it means to make a Joiner objection, and it has undone this Court's simplified process promulgated in Melbourne, creating confusion in what has been settled law governing the preservation of Batson error. Whatever the Second District now requires of defendants (and that is still unclear), the new procedural hoops fly in the face of Batson and Melbourne's simplified burden of making out a prima facie case of racial discrimination. Furthermore, the now required procedure burdens a defendant with the task of questioning the opponent and arguing with a trial judge in a way that will likely be interpreted as disrespect for opposing counsel and the trial judge.

(d) The Second District Exceeded its Authority by Imposing New Preservation Requirements

The Second District exceeded its authority by imposing preservation requirements on Spencer that are more onerous than have been required by the U.S. Supreme Court and this Court. This Court proscribed the state process for preserving Batson claims in Melbourne, and the district court had no authority to amend the process by enhancing Spencer's procedural burden beyond that required in Melbourne.

The Second District violated the principle of stare decisis when it promulgated new preservation requirements that enlarge the established preservation requirements beyond that which the U.S. Supreme Court and this Court have previously established. See In re Seaton's Estate, 18 So. 2d 20, 22 (Fla. 1944) ("[W]hen a point of law has been settled by judicial decision it forms a precedent which may

not be departed from no matter what may be the personal predilections of the individual justices."); Old Plantation Corp. v. Maule Indus., Inc., 68 So. 2d 180, 183 (Fla. 1953)("Respect for the rule of *stare decisis* impels us to follow the precedents we find to have governed this question for so long.").

Johnson v. California instructs that while States are free to set their own procedures to comply with Batson, those procedures cannot exceed the bar set in Batson. See Johnson, 545 U.S. at 168 ("Although we recognize that States do have flexibility in formulating appropriate procedures to comply with Batson, we conclude that California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case."); see also Williams v. Louisiana, 136 S. Ct. 2156, 2157 (2016) (Ginsburg, J., concurring) (procedural rule that permits trial court, rather than prosecutor to supply race-neutral reason "does not comply with this Court's Batson jurisprudence.").

(e) Preservation of a Violation of the U.S. Constitution is a Federal Issue

Whether the preservation requirements announced by the Second District are an adequate bar to consideration of Spencer's constitutional claim is itself a constitutional question. See Ford v. Georgia, 498 U.S. 411, 423 (1991) ("[I]mposition of this rule is nevertheless subject to our standards for assessing the adequacy of independent state procedural grounds to bar all consideration of claims under the national Constitution."); see also Douglas v. Alabama, 380 U.S. 415, 422 (1965) ("the adequacy of state procedural bars to the assertion of federal questions is itself a federal question"); Boykin v. Alabama, 395 U.S. 238, 243 (1969) ("The question of an effective waiver of a federal constitutional right in a proceeding is of course

governed by federal standards."); Lee v. Kemna, 534 U.S. 362, 381 (2002) (concluding that case "falls within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim").

In Ford, the Supreme Court addressed a Georgia state court's procedural bar to review of a Batson claim, finding it untimely. "We granted certiorari to decide whether the rule of procedure laid down by the Supreme Court of Georgia in Sparks was an adequate and independent state procedural ground that would bar review of petitioner's Batson claim." Ford, 498 U.S. at 418. Ford is instructive here for two reasons. First, that case explains that whether a state court's procedural bar is adequate to defeat review of a Batson equal protection claim is itself a federal question. Second, the case makes clear that no procedural bar can be applied to a defendant who was not "'deemed to have been apprised of its existence.'"

(f) Any New Requirements Must be Prospective Only

The Second District could not promulgate new procedures for the preservation of Batson issues and, at the same time, apply the rule to bar review of Spencer's Batson claim. "[A]n adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied." Ford, 498 U.S. at 424. The new procedural requirements the Second District promulgated here were not firmly established and regularly followed at the time of Spencer's trial; therefore, that court violated Spencer's right to due process when it applied a procedural bar to a review of his claim on the merits. Whatever this Court decides about the use of Judge Alternbernd's new twelve-step formula going forward, one thing is clear: Spencer cannot

be penalized for not adhering to procedures that were not articulated and firmly established when his trial occurred. The Second District's opinion must be quashed because it failed to exempt Spencer from its new requirements when it denied him merit review of his Batson claims.

(g) This Court Should Direct the Second DCA to Reverse for a New Trial

The Second District should have reversed this case for a new trial because the prosecutor did not provide credible race-neutral reasons for his strikes of the two black jurors and the judge did not fulfill his obligation under step three. The prosecutor posed four broad questions to the venire that are pertinent here: (1) has the juror or a family member been a victim of a crime of violence; (2) has the juror or a family member been a law enforcement officer; (3) has the juror ever been arrested; and (4) has any of the juror's family members or friends ever been arrested. For each of the challenged strikes, the prosecutor gave as his race-neutral reason for the strike what was actually only the simple observation that the juror had responded to either question (3) or (4) in a positive manner. For instance, the fact that Carol Johnson had been arrested for battery 17 years earlier is an observation which itself is not a "reason" for the strike. A reason would be something that shed light on the prosecutor's thought process, like: "I don't believe her when she says that she does not harbor a grudge against the State because of that arrest," or "I don't want any juror who has ever been arrested."

With regard to Juror Thermidor and his response to question (4), Judge Altenbernd even recognized that "the State's explanation for its peremptory challenge would seem to apply to many people who are subpoenaed for jury duty." Spencer, 196 So. 3d 410. Indeed, what exactly does it say about Juror Thermidor that he has a family member

and a friend who has ever been arrested? It actually says nothing of Juror Thermidor's bias for or against the prosecution. And, again, the prosecutor's proffered reason for striking Thermidor is not a "race-neutral reason," because the prosecutor has not revealed his thought process. Even if a trial or appellate judge could infer that prosecutor's thought process and credit him with a race-neutral reason, it may not properly do so. A judge must not be in the business of inferring the prosecutor's race-neutral reasoning when all that is proffered is a simple observation, i.e., that Mr. Thermidor "did indicate that he had a friend who was arrested for breaking and entering, B and E."[9]

Judge Altenbernd was correct in observing that Judge Battles conflated steps two and three. With regard to Carol Johnson, the Second District noted: "It is frankly unclear whether the trial court thought it was ruling that the reason was facially race neutral and merely used the wrong language, or whether it simply jumped to step 3 without making an express ruling on step 2." 196 So. 3d at 409. The Second District allowed that the trial judge could read between the lines of the prosecutor's statement to get past step two with regard to Ms. Johnson, but this was improper.

> A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

Miller-El v. Dretke, 545 U.S. 231, 252 (2005).

[9] In fact, the prosecutor got that wrong because Thermidor said he had a friend who had been arrested for trespass and possession and a step-son who had been arrested for breaking and entering.

Because a trial judge cannot speculate or supply the race-neutral reasons for a challenged strike, Judge Battles should not have proceeded to step three because the prosecutor never disclosed his thought process and it is not possible to discern the prosecutor's thought process without engaging in speculation.[10] A Batson/Melbourne analysis requires that the prosecutor's "reason" be taken at face value, and the prosecutor does not have a very tough burden to overcome in providing a race-neutral reason, but the process does require candor. Here, the prosecutor did not meet his step-two burden because he did not provide a reason for which his credibility could be judged unless one assumes his reasons from the observations that he made about the jurors.

Judge Alternbernd termed the strike of Mr. Thermidor "a somewhat closer question." And he showed a surprising lack of imagination when he professed confusion over why the defense responded the way it did to the prosecutor's proffered reason for the strike.

> The record as to venireperson 11 presents a somewhat closer question. . . . Both the lawyers and the trial court seemed to intermingle the Melbourne step 2 and step 3 determinations into a combined ruling. For example, defense counsel's response to the State's description of its neutral reason was to state that venireperson 11 had a friend who was killed and that venireperson 11 had claimed that he could still be fair and impartial. The response does not seem to have anything to do with whether the fact that venireperson 11 had a friend who was arrested for a breaking and entering was a facially neutral reason for the State to exercise a peremptory challenge. It seems instead to raise a circumstance that defense counsel believed may have affected

[10] One can speculate that the prosecutor thought that any person who knew someone who had ever been arrested would be an unfair juror for the state. But, if that is what the prosecutor was thinking, then the trial judge had to speculate to reach that conclusion because the prosecutor did not actually say that. So, the prosecutor did not technically give a race-neutral reason to justify his striking or either Carol Johnson or Mr. Thermidor, and this Court should therefore address the question of how much leeway should a reviewing court give to a trial judge who necessarily intuited the race-neutral reason proffered when the prosecutor stated only his observation as to the jurors' answers.

> whether the State's explanation was pretextual. It frankly is not clear to this court why the circumstance of the killed friend would support a theory of pretext. In its ruling, the trial court provided a reasonable summary of steps 2 and 3 from *Melbourne* and then made its findings related to those steps in reverse: It found that the State's explanation was not a pretext before it concluded that it was facially race neutral.

196 So. 3d at 410.

Assuming for the sake of argument that the prosecutor adequately explained why he decided to strike Carol Johnson and Mr. Thermidor, the trial judge was tasked with determining if the prosecutor’s reasons were genuine. When Judge Altenbernd says it is not clear why the circumstance of Thermidor having a friend who was killed would support a theory of pretext, he fails to see that the defense attorney was pointing out that Juror Thermidor should be considered favorable to the prosecution because he fell into a category similar to that of a violent crime victim (like Juror Overdorff (21), who sat on the jury and who related that she had a friend who was killed in college. T46-47). The prosecutor had asked all the jurors whether they or people close to them had been a victim of a crime of violence. T43 Presumably that question was designed to ferret out jurors who would be sympathetic to the victim in this case, who was the State’s star witness (see T271-315). If Juror Thermidor had a friend who was killed, he should have fallen into the category of jurors expected to be sensitive to victims of violent crime, in which case, the prosecutor’s proffered reason for striking him for knowing someone who had ever been arrested is more likely to be a pretext for striking an African-American juror.

The trial judge’s mechanical denial of the Batson objection is antithetical to an engaged on-the-record genuineness inquiry that this Court and federal courts have required. See Hayes v. State, 94 So. 3d

452, 463 (Fla. 2012); Morgan v. City of Chicago, 822 F. 3d 317, 328-29 (7th Cir. 2016). Addressing the necessity of credibility findings, the Seventh Circuit U.S. Court of Appeals stated in Morgan:

> Although our cases do not mandate an evidentiary hearing [in step three] in all situations, the trial court is required to provide more than a conclusory estimation of counsel's credibility. Batson's third step represents the culmination of a framework "designed to produce *actual answers* to suspicions and inferences that discrimination may have infected the jury selection process," Johnson v. California, 545 U.S. 162, 172, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) (emphasis added). Distinguishing the genuine from the racially pretextual constitutes the "decisive question" in the analysis. Hernandez, 500 U.S. at 365, 111 S.Ct. 1859. The trial court must, therefore, provide us with something to review. Taylor, 509 F.3d at 845 ("Without the court's explanation for upholding the strike ... we have nothing to review."); see also United States v. Stephens ("Stephens II"), 514 F.3d 703, 712 (7th Cir. 2008) ("[D]eference is due only when a district court properly performs its task in the first instance."). Indeed, as our colleagues on the First Circuit have recognized,
>
> > [i]ndicating [credibility] findings on the record has several salutary effects. First, it fosters confidence in the administration of justice without racial animus. Second, it eases appellate review of a trial court's Batson ruling. Most importantly, it ensures that the trial court has indeed made the crucial credibility determination that is afforded such great respect on appeal.
>
> United States v. Perez, 35 F.3d 632, 636 (1st Cir. 1994).

Morgan, 822 F. 3d at 328-29.

The record here does not enable any meaningful appellate review of the judge's considerations or findings. With regard to both objected to strikes, the judge proceeded to step three and simply made a mechanical ruling using what appears to have been adherence to boilerplate formality. A reliable assessment of the prosecutor's credibility would require some thought as to the broad questions that he asked of the jurors. Furthermore, any probing of this issue might have alerted the judge to the realization that the strike of Mr. Thermidor was impermissible because the prosecution had exceeded its allotment of

peremptory challenges.[11]

It is clear that the trial court failed to undertake the genuineness analysis mandated by the third step of the Batson/Melbourne procedure. Considering the voir dire as a whole, including the questions that the prosecutor posed to the jurors, it is likely that the prosecutor engaged in purposeful racial discrimination. To ask whether anyone had ever been arrested is understandable if the prosecutor wished to cull out jurors who harbored hostility toward the State. This question snared eleven jurors. T98-106,108 Carol Johnson was struck by the prosecutor because she answered that question affirmatively, even though she was embarrassed enough about her arrest for a domestic dispute years earlier that she asked to answer privately at the bench. But it was the prosecutor's next question about knowing anyone else who had even been arrested that seems unusual as a disqualifier. That question snared Mr. Thermidor, as well as a thirteen others, T106-115, and Juror Thermidor's answer was used as the reason to justify the strike on him. And this is where the trial court should have discerned that the race-neutral reason was not genuine, but a pretext. The question is so broad that it is obviously intended to draw responses that can be used to disqualify minorities, and in this case, the answer that Juror Thermidor gave says nothing about him. Just because juror Thermidor knew someone who had ever been arrested is not a distinction that makes a difference in evaluating him as a potential juror. Or if it is, one must engage in speculation to discern how that

[11] The fact that this went unnoticed by the defense attorney can be explained by the pace of the proceedings and obvious confusion of the attorney, as shown by his objection to the strike of a black juror who was actually a Caucasian female. T162

fact was a disqualifier.[12]

The defense attorney argued with the State's reason for striking Juror Thermidor. There is not record support for what the defense attorney said about Thermidor having a friend who was killed, but he was probably referring to information that came from the juror's questionnaire, which is not in the record, but was in the hands of the attorneys and the judge. (See T10, where judge refers to the sheets that would be given to counsel to prepare for jury selection, and T20 where judge tells venire that he looked at the questionnaires they filled out and noted that some indicated knowing members of law enforcement.) Again, one can only speculate because the judge never clarified or made any indication what he considered. In fact, "the record is completely devoid of any indication that the trial court considered circumstances relevant to whether" the strike of Juror Thermidor "was exercised for a discriminatory purpose," and therefore, the Second District, "confined to the cold record before it," could not "assume that a genuineness inquiry was actually conducted in order to defer to the trial court." Hayes v. State, 94 So. 3d 452, 463 (Fla. 2012).

Before the parties began selecting jurors, Judge Battles gave the attorneys specific instructions as to how he expected the selection to proceed, and when the Batson objections were raised, Judge Battles mechanistically denied them. Judge Battles' cursory statements were insufficient to show that he fulfilled his duty under Batson and Melbourne to assess the genuineness of the prosecutor's explanations

[12] The Second District was left to speculate as to what the trial court considered relevant. Realizing that such speculation is impossible and finding the prospect of reversing for a new trial to be "a drastic" remedy, the Second District opted to install its new preservation requirements and affirm on procedural grounds.

for striking the black jurors.

By upholding the convictions in light of the glaring deficiencies in the Batson proceedings, the Second District contravened established constitutional law, which was designed to simplify the process by which a party can bring a claim of discriminatory use of a peremptory strike during jury selection. The opinion reflects a regression to a time when procedural requirements for challenging discriminatory jury selection practices impeded such claims. This Court should quash the opinion below, restore the simplified process that this Court articulated in Melbourne, and direct that Spencer be granted a new trial.

CONCLUSION

Petitioner, Tavares Spencer, respectfully asks this Court to quash the opinion of the Second District Court of Appeal and remand with directions to grant him a new trial.

APPENDIX

1. Spencer v. State, 196 So. 3d 400 (Fla. 2d DCA 2016) 37-45

2. Ivy v. State, 196 So. 3d 394 (Fla. 2d DCA 2016) 46-50

196 So.3d 400
District Court of Appeal of Florida,
Second District.

Tavares Wayntel SPENCER, Jr., Appellant,
v.
STATE of Florida, Appellee.

No. 2D14–316.
|
March 18, 2016.
|
Rehearing Denied Aug. 9, 2016.

Synopsis
Background: Defendant was convicted in the Circuit Court, Hillsborough County, Emmett L. Battles, J., of attempted first-degree murder, robbery with a firearm, aggravated battery with great bodily harm, and aggravated assault with a deadly weapon. Defendant appealed.

Holdings: The District Court of Appeal, Altenbernd, J., held that:

[1] the burden of persuasion on an opponent of a peremptory challenge, in a *Melbourne* challenge asserting discrimination in use of peremptory challenges, includes an obligation to object to deficiencies in stage of court's analysis in which court considers whether proffered explanation for challenge is a pretext, and

[2] trial court acted within its discretion in finding that State's proffered race-neutral explanation for use of peremptory challenge on African-American veniremember was not pretextual.

Affirmed; questions certified.

***401** Appeal from the Circuit Court for Hillsborough County; Emmett L. Battles, Judge.

Attorneys and Law Firms

Howard L. Dimmig, II, Public Defender, and Dan Hallenberg, Special Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Marilyn Muir Beccue, Assistant Attorney General, Tampa, for Appellee.

Opinion

ALTENBERND, Judge.

Tavares Wayntel Spencer, Jr., appeals his judgments and sentences for attempted first-degree murder, robbery with a firearm, aggravated battery with great bodily harm, and aggravated assault with a deadly weapon. The only issue that he raises on appeal is whether the trial court properly ruled upon his objections to the State's exercise of two peremptory challenges of African–American members of the venire. This case requires this court to consider the actions that must be taken by the opponent of a peremptory challenge to preserve a claim under *Melbourne v. State,* 679 So.2d 759 (Fla.1996), after the proponent of the challenge provides a race-neutral reason. In other words, it requires us to consider the actions the opponent must take to preserve a claim of error during step 3 of the *Melbourne* procedure. We conclude that the supreme court in *Hayes v. State,* 94 So.3d 452 (Fla.2012), has not placed an automatic burden on the trial court to perform a full genuineness analysis on the record in every instance in which a party objects to a peremptory challenge and the proponent provides a facially neutral reason. If an opponent wants the trial court to determine whether a facially neutral reason is a pretext, the opponent must expressly make a claim of pretext and at least attempt to proffer the circumstances that support its claim. Because the defendant did not preserve a *Melbourne* issue in this manner, we affirm.

I. THE UNDERLYING FACTS

Although the issue on appeal is limited to events during jury selection, the legal analysis used to test the propriety of a peremptory challenge can be based to some degree on the nature of the case and the factual issues that will confront the jury. Thus, we briefly explain the evidence at the trial in this case.

When Mr. Spencer was sixteen years old, he met the victim, who was a few years older than Mr. Spencer. Both Mr. Spencer and the victim are African–American. On the day that they met, they texted extensively about the possibility of a sexual encounter. The victim was hoping to be compensated for this encounter. Only after a number of communications did the victim disclose her transgender status. This complication did not end the communications, and the two ultimately met in person the following day. Mr. Spencer led the victim into a secluded area. At this point in the story, the victim's recollection of the incident

and Mr. Spencer's are in complete conflict.

The victim testified that Mr. Spencer pointed a handgun at her and ordered her to the ground. She gave him her cellphone, and he took her purse. He emptied her purse and ultimately took both her cellphone and her wallet, which contained a small amount of money. While she was still on the ground, he fired the gun twice, striking her in the hip with one shot. She got up and ran, jumping a fence. Mr. Spencer was running behind her, and he fired the gun another three or four times. She believed one bullet grazed her back. She ran to an occupied home, and Mr. Spencer did not pursue her further.

***402** Mr. Spencer testified at trial. He claimed that the victim was actually the one who cornered him in the secluded area. He retreated to the fence. According to Mr. Spencer, the victim was making unwanted sexual advances and would not stop. To defend himself, Mr. Spencer pulled out a .22 caliber handgun that he had gotten from a friend the night before for protection. He pulled out the gun because he was afraid. He testified that the victim told him the handgun was unloaded, and she tried to take the gun from him when it accidentally discharged. He then fired another warning shot in the air. He fled without taking any property from the victim.

The victim's testimony was more consistent with the physical evidence and the text messages from both cellphones, which were obtained from the wireless providers and introduced into evidence. The jury apparently accepted the victim's version and found Mr. Spencer guilty. Due to the handgun, Mr. Spencer was sentenced to four concurrent twenty-five-year terms of imprisonment.

II. THE *MELBOURNE* CHALLENGES DURING VOIR DIRE

During voir dire, the State used peremptory challenges to strike at least two African–American members of the venire. When the State used a peremptory challenge on venireperson 16, the transcript reflects the following:

> [DEFENSE COUNSEL]: Judge, [venireperson 16], I believe was an African American female. This is the second African American stricken by the state for peremptory.[1] I would ask for a race-neutral reason.
>
> [THE COURT]: Is that as to number 16?
>
> [DEFENSE COUNSEL]: It is.
>
> THE COURT: There's an objection. The burden shifts to the state.
>
> [ASSISTANT STATE ATTORNEY]: During individual voir dire at the bench, [venireperson 16] indicated that she had been arrested for battery, battery, domestic violence, specifically.
>
> THE COURT: Just a moment. Let me look at my notes.
>
> [DEFENSE COUNSEL]: Judge, that is correct.
>
> THE COURT: You may respond.
>
> [DEFENSE COUNSEL]: I have no response.
>
> THE COURT: The state has indicated a race-neutral reason. The court finds no pretext in the exercise of this peremptory challenge. The objection to the exercise of a peremptory as to [venireperson] 16 is overruled.

Shortly thereafter, the State used a peremptory challenge to strike venireperson 11, who was also African–American. As to this strike, the transcript reflects the following:

> THE COURT: State exercises a peremptory as to [venireperson] 11.
>
> [DEFENSE COUNSEL]: Judge, I'm sorry to interrupt, but I would ask for a race-neutral reason, him being an African American male.
>
> THE COURT: Burden shifts. Go ahead.
>
> ***403** [ASSISTANT STATE ATTORNEY]: During individual voir dire, [venireperson 11] did indicate that he had a friend who was arrested for breaking and entering, B and E.
>
> [DEFENSE COUNSEL]: He also indicated that he had a friend that was killed, and I would also say he did say numerous times he could be fair and impartial.
>
> THE COURT: Okay. I note that the standard here is whether or not the state has indicated a race-neutral reason, whether the court sees or finds or perceives a pretext in the exercise of that peremptory challenge. The court finds no such pretext, finds that you've stated a race-neutral reason. The objection is overruled as to the exercise [of] that peremptory challenge.

At the end of the selection process when accepting the jury, Mr. Spencer's attorney made a proper *Joiner* objection concerning these two peremptory challenges. *See Joiner v. State,* 618 So.2d 174, 176 (Fla.1993). Following entry of the judgments and sentences, Mr. Spencer appealed to this court.

III. A BRIEF OVERVIEW OF THE PROCEDURE FOR OBJECTIONS TO PEREMPTORY CHALLENGES

The legal literature addressing methods to avoid discrimination in peremptory challenges is extensive. In this opinion, we will not address the developments before *Melbourne v. State,* 679 So.2d 759 (Fla.1996), but the earlier cases warrant study. *See, e.g., State v. Johans,* 613 So.2d 1319 (Fla.1993); *State v. Slappy,* 522 So.2d 18 (Fla.1988), *receded from by Melbourne,* 679 So.2d at 765; *State v. Neil,* 457 So.2d 481 (Fla.1984), *receded from in part by Johans,* 613 So.2d at 1321.

After the U.S. Supreme Court adopted a three-step process in *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), to clarify the procedures for handling a *Batson*[2] challenge in federal court, the Florida Supreme Court adopted a comparable three-step procedure for use in Florida. *See Melbourne,* 679 So.2d at 763–65. In *Hayes v. State,* 94 So.3d 452 (Fla.2012), the supreme court extensively discussed and clarified the procedure articulated in *Melbourne,* but it did not actually change the procedure.

In both the trial courts and the appellate courts, two important rules set the backdrop for this process: (1) peremptory challenges are presumed to be exercised in a nondiscriminatory manner and (2) throughout the process, the burden of persuasion never leaves the opponent of the strike to prove purposeful discrimination. *See Hayes,* 94 So.3d at 461.

The supreme court articulated the three-step process in *Melbourne* as follows:

> 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 ***404** 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.

Melbourne, 679 So.2d at 764 (footnotes omitted).

The trial court's decision is reviewed on appeal with a rather deferential standard of review. As the supreme court recently summarized in *Poole v. State,* 151 So.3d 402, 409 (Fla.2014):

> A trial court's decision to allow a peremptory strike of a juror is based primarily on an assessment of credibility. *King v. State,* 89 So.3d 209, 229 (Fla.2012) (citing *Melbourne v. State,* 679 So.2d 759, 764 (Fla.1996)), *cert. denied,* ––– U.S. ––––, 133 S.Ct. 478, 184 L.Ed.2d 300 (2012). As a reviewing court, this Court must "acknowledge that peremptory challenges are presumed to be exercised in a nondiscriminatory manner." *Nowell v. State,* 998 So.2d 597, 602 (Fla.2008). On appeal, the appropriate standard to determine the likelihood that a peremptory challenge was used discriminatorily is abuse of discretion. *Id.* As the trial court is generally in the best position to assess the genuineness of the reason advanced, the decision will be affirmed unless clearly erroneous. *Id.* Although appellate courts need to defer to a trial court's credibility assessment, this Court has recognized that this deference does not require this Court to "rubber-stamp" a trial court's ruling, which is not supported by the record. *See Hayes v. State,* 94 So.3d 452, 462 (Fla.2012); *Nowell,* 998 So.2d at 602.

Such a deferential standard of review can leave the judicial system open to abuse when the record from the trial court is inadequate. This problem was discussed at some length in *Hayes,* a case in which the trial court denied the defendant's request for a peremptory challenge while placing the burden of persuasion on the defendant. *See Hayes,* 94 So.3d at 456–58, 462–64. The district court of appeal affirmed despite the State's concession of error on appeal. *Id.* at 458. In reversing the district court, the supreme court stated: "Compliance with each step is not discretionary, and the proper remedy when the trial court fails to abide by its duty under the *Melbourne* procedure is to reverse and remand for a new trial." *Hayes,* 94 So.3d at 461 (citing *Welch v. State,* 992 So.2d 206, 211–13 (Fla.2008)). Mr. Spencer maintains that this statement entitles him to a reversal in this case. We do not agree.

IV. A CLARIFICATION OF THE THREE STEPS IN *MELBOURNE*

[1] In reading both case law and transcripts, it seems to this court that some confusion exists about the three steps explained in *Melbourne.* We believe that the confusion

arises from the combination of two of those steps in the following description in *Melbourne:*

> 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).

Melbourne, 679 So.2d at 764 (footnote omitted).

It is helpful to think of the three "steps" as three decisions made by the trial judge during the *Melbourne* hearing. Phrased as questions, those decisions are:

1. Has the opponent properly invoked the *Melbourne* procedure by (a) objecting, (b) demonstrating the venireperson's protected classification, and (c) requesting the court to have the proponent ***405** of the challenge state a neutral reason for it?

2. Has the proponent of the peremptory challenge provided a facially neutral explanation for the challenge?

3. Has the opponent of the challenge, following the facially neutral explanation, met its burden of persuasion to establish that the facially neutral reason is a prextext?

In a case where the State's peremptory challenge is ultimately granted and the defendant's objection is overruled at the end of a full *Melbourne* hearing, the actual decision-making process involves more than three components. The three decisions seem to involve the following components:

In step 1:

(a) The State moves to exercise a peremptory challenge for venireperson X.

(b) The defendant objects, showing that venireperson X falls within a protected class and requesting a neutral reason for the peremptory challenge.

(c) The court finds the defendant's objection to be sufficient.

In step 2:

(a) The court asks the State for a neutral reason for the peremptory challenge.

(b) The State provides the reason or reasons that it claims are neutral.

(c) The defendant is given an opportunity to respond.

(d) The court determines that the reason is facially neutral.

In step 3:

(a) The court asks the defendant if he wishes to make a genuineness objection.

(b) If the defendant chooses to make that objection, the defendant is permitted to make an argument and explain the facts and circumstances that support the defendant's claim that the facially neutral reason is a pretext.

(c) The State is given an opportunity to respond.

(d) The court makes its ruling that the facially neutral reason for the peremptory strike is genuine, explaining as necessary the basis for that ruling.

(e) Finally, if necessary, the defendant asks the court to provide any additional finding or clarity in the ruling to preserve the issue for appeal.

Courts have had a tendency to intermingle steps 2 and 3 of the *Melbourne* analysis.[3] Indeed, the transcript in this case as to venireperson 11 demonstrates that the trial court announced the judicial decision for step 3 before it announced the decision for step 2. In most cases, the attorneys and the trial court manage to complete the steps required for the first two judicial decisions without much difficulty. The difficulty arises during the five components of the step 3 decision under the *Melbourne* analysis.

*406 V. THE OPPONENT'S BURDEN OF PERSUASION INCLUDES AN OBLIGATION TO OBJECT TO DEFICIENCIES IN *MELBOURNE'S* STEP 3 PROCESS

[2] There is little question that the five components of the step 3 decision described in the preceding section are sometimes not fully performed in the trial court. Trial courts sometimes rule on the issue of "genuineness" even when the opponent has not suggested that the neutral reason was a pretext. Judges sometimes reject a claim of pretext without giving the opponent a full opportunity to argue the issue. The trial court ruling is often more of a legal conclusion than a series of findings about the circumstances surrounding the challenge. But many times these deficiencies in step 3 are not the subject of any specific objection by the party opposing the peremptory challenge. This case involves such deficiencies at least as to venireperson 11, and the outcome of this case depends

on whether the defendant, as the opponent of the challenge, had a burden to object to the step 3 deficiencies and to call upon the trial court to correct them before the conclusion of jury selection. For the reasons explained below, we conclude that the opponent of a peremptory challenge has such a burden.

A. *The Essence of Pretext Is Deception*

There is no question that the process of performing the step 3 analysis in the trial court and reviewing that step in an appellate court is the most difficult part of the *Melbourne* process. Courts have tended to be indirect in explaining why this part of the process is so difficult. In addressing the question of "pretext," we explain that the issue is not "reasonableness" but "genuineness." *Murray v. State,* 3 So.3d 1108, 1120 (Fla.2009).

But a common definition of "pretext" near the time *Purkett* and *Melbourne* were written was "a false reason or motive put forth to hide the real one; excuse." *Webster's New World Dictionary, Third College Edition* 1067 (1988). Another was "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." *Webster's Third New Int'l Dictionary* 1797 (1986).

Thus, the decision the trial court is called upon to make in step 3 has little to do with the substance of the reason given by the lawyer that requests to strike the venireperson; it has to do with the lawyer's intent. The trial court is called upon to determine whether the lawyer presenting the explanation for the peremptory challenge, as an officer of the court, is concealing an improper motive. Ultimately, the question the trial court must answer is whether the lawyer has truthfully provided a neutral reason or whether the lawyer is either deceiving himself as a matter of subconscious prejudice or, even worse, simply lying to the court. "Genuineness," thus, is really a question of whether a lawyer is being disingenuous.

It is not a pleasant task for one attorney to insist that the trial court determine whether another officer of the court is relying on a pretext. It is an even less pleasant task for the trial court to make an affirmative finding of pretext. One of the reasons the case law has not required trial courts to "recite a perfect script or incant 'magic' words," *see Hayes,* 94 So.3d at 464, is that appellate courts understand the reluctance of trial courts to make this finding. "Nevertheless, '*Melbourne* does not relieve a trial court from weighing the genuineness of a reason just as it would any other disputed fact.' " *Hayes,* 94 So.3d at 463 (quoting *Dorsey v. State,* 868 So.2d 1192, 1202 (Fla.2003)).

***407** A lawyer should not lightly claim that another lawyer's explanation for his peremptory challenge is pretextual. But when the circumstances and the interest of the client require this claim, the lawyer objecting to the peremptory challenge should be prepared to make this claim and should expect to make a complete argument demonstrating both to the trial court and, if need be, to the appellate court that the proponent of the peremptory challenge is engaging in impermissible discrimination.

If it is truly presumed that lawyers exercise peremptory challenges in a nondiscriminatory manner, then the trial court should not be expected to initiate on its own a genuineness challenge of every facially neutral reason. This is particularly true when no party has responded to the neutral reason with a claim that it is a pretext. Given the seriousness of a charge that a lawyer is providing a pretextual reason for a challenge, the opponent should be expected to object to the facially neutral reason as a pretext. It is unquestionably the better practice for a trial court, having made a determination of neutrality under step 2 of the *Melbourne* analysis, to ask the opponent whether he or she wishes to challenge the genuineness of the proponent's reason, but we see no reason to reverse a judgment and sentence following an entire trial when the trial court omits this step without objection from anyone.

B. *The Circumstances Supporting a Claim of Pretext Are Often Factually Complex*

As Justice Pariente explained for the court in *Hayes:*

> It has been observed that "[t]he genuineness of the explanation is the yardstick with which the trial court will determine whether or not the proffered reason is pretextual." *Davis v. State,* 691 So.2d 1180, 1183 (Fla. 3d DCA 1997). *Melbourne* teaches that to assess genuineness, the trial court must consider all relevant circumstances surrounding the strike in determining whether the proffered reason for the strike is genuine. *Melbourne,* 679 So.2d at 764 n. 8. This Court explained in *Murray v. State,* 3 So.3d 1108 (Fla.2009), that
>
>> [i]n determining whether or not a proffered race-neutral reason for a peremptory strike is a pretext, the court should focus on the genuineness of the race-neutral explanation as opposed to its reasonableness.
>>
>> In making a genuineness determination, the court may consider all relevant circumstances surrounding the strike. "Relevant circumstances may include—but are not limited to—the following: 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." [*Melbourne,* 679

> So.2d at 764 n. 8] (citing *State v. Slappy,* 522 So.2d 18 (Fla.1988)); *see also Booker v. State,* 773 So.2d 1079, 1088 (Fla.2000) ("[W]e provided a nonexclusive list of factors a trial court may consider in determining whether the reason given for exercising a peremptory challenge is genuine ...." (citing *Melbourne,* 679 So.2d at 764 n. 8)).
>
> *Murray,* 3 So.3d at 1120 (citations omitted).

Hayes, 94 So.3d at 461–62 (alterations in original).

The circumstances described in *Hayes* and *Murray* are not an independent basis to establish pretext. Rather, they are circumstances used to determine the intent of the lawyer presenting the peremptory ***408** challenge. Intent is always a difficult factual issue; it is usually established with circumstantial evidence. It is no different in this context.

Again, it is the better practice for a trial court to affirmatively ask an opponent to state all of the circumstances the opponent believes support a claim of pretext, but if the trial court omits this step, it should be incumbent upon the opponent to object and ask to place into the record the circumstances that it wishes the trial court to consider and the appellate court to review. Often it may seem apparent to the trial court that the neutral reason is not a pretext. If the court jumps ahead because of the judge's own thought process, it should be the opponent who has an obligation to slow the decision-making process and to make certain the record is adequate.

Under *Melbourne,* it is the opponent of the challenge that has the burden of persuasion from the beginning to the end. We recognize that in step 3 it might be feasible to place a burden on the proponent of the peremptory challenge to demonstrate "genuineness," but we are not authorized to make that change in the law.

C. *The Remedy Required for Any Error in a Melbourne Hearing Is Drastic*

[3] An error in this process generally requires a new trial even if the rest of the trial is flawless. *See Hayes,* 94 So.3d at 461 ("[W]e hold that the proper remedy in all cases where the trial court errs in failing to hold a [peremptory challenge] inquiry [on the basis of alleged discrimination] is to reverse and remand for a new trial." (alterations in original) (quoting *Johans,* 613 So.2d at 1322)). When an error results in this type of drastic relief, it is important that litigants not be allowed to trap or trick the trial judge into reversible error by failing to make objections or by making inadequate objections. Such an error should not be a matter of inadvertence. The trial court needs a full and fair opportunity to correct or avoid an error in the procedure before the jury is sworn. *Cf. Trotter v. State,* 576 So.2d 691, 693 (Fla.1990) (describing the complex steps required to preserve as reversible error the denial of a challenge for cause).

Thus, as we stated at the beginning of this opinion, we see no basis to believe that the supreme court was abandoning requirements for full preservation in *Hayes* when it stated that "[c]ompliance with each step is not discretionary, and the proper remedy when the trial court fails to abide by its duty under the *Melbourne* procedure is to reverse and remand for a new trial." *See Hayes,* 94 So.3d at 461. Compliance with the steps in *Melbourne* may not be discretionary with the trial court, but that does not relieve the opponent of the peremptory challenge of the obligation to object when steps are omitted or of the need to present the information necessary to carry the opponent's burden of persuasion.

D. *The Process Should Not Require the Trial Judge to Become an Advocate for a Venireperson or to Step Outside His or Her Neutral Role*

In *Powers v. Ohio,* 499 U.S. 400, 409, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the U.S. Supreme Court held that a venireperson has an equal protection right "not to be excluded from [a petit jury] on account of race." The court was quite aware that a venireperson would have limited ability to enforce this right. *Id.* at 413–14, 111 S.Ct. 1364. It held that a criminal defendant has standing to raise this third-party equal protection claim for a venireperson. *Id.* at 415, 111 S.Ct. 1364.

The U.S. Supreme Court does not seem to have expected the trial judge to play the ***409** role of a venireperson's attorney. Since the Florida Supreme Court decided *Hayes,* parties now argue on appeal that *Melbourne* requires the trial court to demonstrate the circumstances of "genuineness" when the parties have not made arguments on the record as to those circumstances. *See, e.g., Cook v. State,* 104 So.3d 1187, 1189–90 (Fla. 4th DCA 2012) (concluding that the defendant, as the opponent of the strike, met his burden of persuasion in step 3 "by asking 'the state [to] explain why being a nurse ... would make her unfit to be a juror on this case or have any bearing at all on whether she could be a juror' " (first alteration in original)). They rely on both the above-quoted language from *Hayes* as well as on the following language from that opinion:

> Therefore, where the record is completely devoid of any indication that the trial court considered circumstances relevant to whether a strike was exercised for a

> discriminatory purpose, the reviewing court, which is confined to the cold record before it, cannot assume that a genuineness inquiry was actually conducted in order to defer to the trial court.

Hayes, 94 So.3d at 463.

We believe that this language is being taken out of context. It is true that the trial courts must make the three decisions required by *Melbourne* if requested, but the parties are not entitled to sit back and have the court go through this process for them. It simply is not the job of the trial court to develop the circumstances that may weigh against the genuineness of a proposed peremptory challenge. The trial court has an obligation to maintain its neutrality. *See, e.g., Livingston v. State,* 441 So.2d 1083, 1086 (Fla.1983) ("Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge," and a court has the duty "to scrupulously guard this right." (quoting *State ex rel. Mickle v. Rowe,* 100 Fla. 1382, 1385, 131 So. 331 (1930))); *J.L.D. v. State,* 4 So.3d 24, 26 (Fla. 2d DCA 2009) ("The requirement of judicial impartiality is at the core of our system of justice." (quoting *McFadden v. State,* 732 So.2d 1180, 1184 (Fla. 4th DCA 1999))). If the trial court is to maintain its position of neutrality, its job is merely to rule on this delicate and fact-intensive issue when the opponent has presented the issue for ruling under its burden of persuasion.

VI. APPLICATION OF THE LAW TO THE FACTS IN THIS CASE

[4] Reviewing the transcript concerning the challenge to venireperson 16, the trial court properly commenced the *Melbourne* hearing. Defense counsel had "no response" when the State provided venireperson 16's prior arrest for domestic violence as its neutral reason for the challenge. The trial court then expressly found that there was "no pretext" in the State's exercise of this peremptory challenge. It is frankly unclear whether the trial court thought it was ruling that the reason was facially race neutral and merely used the wrong language, or whether it simply jumped to step 3 without making an express ruling on step 2. Defense counsel never claimed that the State's reason was a pretext. Defense counsel never even attempted to offer any circumstance that might indicate that the State's reason for its peremptory challenge was pretextual. Even on appeal, the defendant has not argued that anything in the record suggests that the State's reason for this peremptory challenge supports a theory that it was a pretext. The record simply does not support any preserved error as to the decision to allow a peremptory challenge of venireperson 16.

***410** The record as to venireperson 11 presents a somewhat closer question. The trial court again properly commenced the hearing. Both the lawyers and the trial court seemed to intermingle the *Melbourne* step 2 and step 3 determinations into a combined ruling. For example, defense counsel's response to the State's description of its neutral reason was to state that venireperson 11 had a friend who was killed and that venireperson 11 had claimed that he could still be fair and impartial. The response does not seem to have anything to do with whether the fact that venireperson 11 had a friend who was arrested for a breaking and entering was a facially neutral reason for the State to exercise a peremptory challenge. It seems instead to raise a circumstance that defense counsel believed may have affected whether the State's explanation was pretextual. It frankly is not clear to this court why the circumstance of the killed friend would support a theory of pretext. In its ruling, the trial court provided a reasonable summary of steps 2 and 3 from *Melbourne* and then made its findings related to those steps in reverse: It found that the State's explanation was not a pretext before it concluded that it was facially race neutral. Defense counsel did not object to this process, did not ask to state the defendant's position with greater specificity, and did not ask either the court or the State to provide further information. If defense counsel had pointed out, for example, that other remaining members of the venire were white and had friends who had committed felonies, then that would have been important information.

[5] Although the State's explanation for its peremptory challenge would seem to apply to many people who are subpoenaed for jury duty, from the content of this record we cannot hold that the trial court abused its discretion or that its finding was clearly erroneous when it determined that the neutral reason was not pretextual. The record demonstrates that the trial court was aware that it needed to consider the issue of genuineness and that the parties had an opportunity to present information on that issue. Even if defense counsel had properly objected to genuineness and presented the issue for ruling, this is not a situation where the record is "completely devoid" of any indication that the trial court considered this issue. *See Hayes,* 94 So.3d at 463, 465. Accordingly, we find no reversible error in the trial court's decision to permit the State to exercise a peremptory strike of venireperson 11.

VII. A CERTIFIED QUESTION

Many of the decisions discussing *Melbourne* do not

expressly consider the burden on the opponent of a peremptory challenge to create a record establishing the basis for a claim of pretext. Nevertheless, we are inclined to believe that the analysis in this decision and in the decision in *Ivy v. State,* case No. 2D14–289, 196 So.3d 394, 2016 WL 1066180 (Fla. 2d DCA Mar. 18, 2016), which we release on this same day, conflict with the First District's decision in *Simmons v. State,* 940 So.2d 580 (Fla. 1st DCA 2006). There is at least tension between our analysis and that in other cases, including *Smith v. State,* 143 So.3d 1194, 1196–97 (Fla. 1st DCA 2014), *Collier v. State,* 134 So.3d 1042, 1043–44 (Fla. 1st DCA 2013), and *Cook,* 104 So.3d at 1189–90.

The process of jury selection occurs daily in our courts, and there should be no confusion about the relative burdens of the parties and of the court during a *Melbourne* hearing when the hearing reaches step 3. Accordingly, we certify the following dispositive question as one of great public importance:

> ***411** DURING A *MELBOURNE* HEARING, WHEN A TRIAL COURT FINDS THAT THE PROPONENT'S REASON FOR A PEREMPTORY CHALLENGE IS FACIALLY NEUTRAL, IS IT THE BURDEN OF THE OPPONENT (1) TO CLAIM THE REASON IS A PRETEXT, (2) TO PLACE INTO THE RECORD THE CIRCUMSTANCES SUPPORTING ITS POSITION, AND (3) TO OBJECT IF THE TRIAL COURT'S RULING DOES NOT CONTAIN ADEQUATE FINDINGS ON THE ISSUE OF GENUINENESS?

Affirmed.

NORTHCUTT and CRENSHAW, JJ., Concur.

All Citations

196 So.3d 400, 41 Fla. L. Weekly D700

Footnotes

1 The record does not support defense counsel's claim that the State's requested peremptory strike was the second such request involving an African–American. Perhaps the race of an earlier challenged venireperson is not revealed by the record. We note that the State did challenge without opposition an earlier African–American venireperson for

cause. Although it was not necessary, the State provided a neutral reason for that unopposed challenge for cause. Perhaps that is the challenge that defense counsel recalled.

[2] *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[3] *See, e.g., Daniel v. State,* 697 So.2d 959, 960 (Fla. 2d DCA 1997) (when the defense objected to the State's reasons for its peremptory challenges as racially motivated, the trial court concluded that the State's reasons were "race neutral"); *Landis v. State,* 143 So.3d 974, 976–77 (Fla. 4th DCA 2014) (the trial court made a finding that the State's reason for its peremptory was "genuine," which actually appears to have been a finding that the reason was facially race neutral); *Cook v. State,* 104 So.3d 1187 (Fla. 4th DCA 2012) (the trial court and the parties all appear to have intermingled steps 2 and 3); *Sharp v. State,* 789 So.2d 1211, 1212 (Fla. 5th DCA 2001) (the trial court appears to have skipped to a determination of pretext before deciding whether the reason proffered by the defense as the proponent was facially race neutral).

196 So.3d 394
District Court of Appeal of Florida,
Second District.

Aaron Rhashaud IVY, DOC # W01913, Appellant,
v.
STATE of Florida, Appellee.

No. 2D14–289.
|
March 18, 2016.
|
Rehearing Denied May 20, 2016.

Synopsis
Background: Defendant was convicted in the Circuit Court, Hendry County, James D. Sloan, J., of robbery with a firearm, two counts of false imprisonment with a firearm, grand theft, and felon in possession of a firearm. Defendant appealed.

Holdings: The District Court of Appeal, Altenbernd, J., held that:

[1] defendant failed to preserve issue of whether trial court erred in failing to make a separate finding on the issue of pretext after finding exercise of peremptory challenge to be race-neutral, and

[2] prosecutor's reason for striking African-American juror, that she was related to a former law enforcement officer, was sufficiently race-neutral.

Affirmed.

***395** Appeal from the Circuit Court for Hendry County; James D. Sloan, Judge.

Attorneys and Law Firms

Howard L. Dimmig, II, Public Defender, and Deana K. Marshall, Special Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Bilal A. Faruqui, Assistant Attorney General, Tampa, for Appellee.

Opinion

ALTENBERND, Judge.

Aaron Rhashaud Ivy appeals his judgments and sentences for robbery with a firearm, two counts of false imprisonment with a firearm, grand theft, and felon in possession of a firearm. We affirm, writing only to discuss his claim that the trial court did not conduct an adequate step 3 genuineness inquiry under *Melbourne v. State,* 679 So.2d 759 (Fla.1996), when he opposed the State's peremptory challenge of an African–American venireperson. Relying on our decision in *Spencer v. State,* No. 2D14–316, 196 So.3d. 400, 2016 WL 1066189 (Fla. 2d DCA Mar. 18, 2016), we conclude that Mr. Ivy did not create a record preserving and establishing that he is entitled to a new trial due to the trial court's grant of the State's peremptory challenge. Accordingly, we affirm.

I. THE FACTS

Mr. Ivy, along with two codefendants, robbed a jewelry store during business hours on August 6, 2010. The robbery was recorded on surveillance cameras. ***396** Mr. Ivy sustained a significant cut on his leg when he jumped over a glass counter to assault one of two store employees who were present, causing the glass to break. He cleaned his wound in the store's bathroom. He and his codefendant restrained the two employees in the bathroom by taping their hands together. The police arrived while the robbery was in progress because the police station was just around the corner from the store. The police arrested the three perpetrators as they fled the scene. Both employees identified Mr. Ivy as the robber who had carried the handgun. Thus, the evidence against Mr. Ivy in this case was very strong.

The State charged all three defendants in a single information, charging Mr. Ivy with two counts of kidnapping with a firearm, possession of a firearm by a convicted felon, first-degree grand theft, and armed robbery. The three defendants were tried together. Mr. Ivy was convicted on all five counts, but the jury returned lesser convictions of false imprisonment instead of kidnapping, with special findings that Mr. Ivy possessed a firearm. He was sentenced as a habitual felony offender to concurrent sentences, the longest of which is forty-five years in prison for the armed robbery.

II. JURY SELECTION

The transcript of jury selection in this case reflects a process different from that in *Spencer.* The trial occurred in a rural county where many people know one another.

Several members of the venire were friends or relatives. The judge recognized at the inception of the process that some members of the venire had pending criminal cases. Some disclosed that they had relatives represented by the public defender or that they knew the victim or witnesses in this case. The court reporter identified each member of the venire by name in the transcript. In an era when neighbors in large metropolitan cities do not even know one another's names, the transcript is a refreshing reminder of the value of community. But it is also an environment in which jury selection is perhaps more casual.

During jury selection, one of the venirepersons revealed that she had a son-in-law who had once been a law enforcement officer but was no longer. Neither the State nor the defense inquired further on this subject. After a large number of venirepersons were stricken for cause, the State and the defense attorneys exercised peremptory challenges and initially reached an agreement on the first six jurors. As they were about to select the alternates, the State decided to exercise a back strike. The record reflects the following:

THE COURT: I thought you accepted the panel?

[ASSISTANT STATE ATTORNEY]: State of Florida, any party can use back strikes or peremptories until such time as a jury panel is sworn. That's Florida rules of criminal procedure[ ].

THE COURT: What do you want?

[ASSISTANT STATE ATTORNEY]: State of Florida would strike [venireperson] 126....

[COUNSEL FOR MR. IVY]: We would like a race-neutral[1] reason for the peremptory. [Venireperson 126] is an African American juror.

[ASSISTANT STATE ATTORNEY]: Her son was previously a member of law enforcement. For that reason the State would move to strike her for peremptory.

***397** [COUNSEL FOR CODEFENDANT ONE]: There's no indication that she said she would be less likely to believe the testimony of a law enforcement officer.

[ASSISTANT STATE ATTORNEY]: That's not one of the requirements of the race-neutral reason.

THE COURT: It's just that, to be race neutral.

[COUNSEL FOR MR. IVY]: It has to be genuinely race neutral. And the fact that a juror has a relative who was a police officer seems to be good reason for the defense to get rid of her, but not the State.

THE COURT: Any other reason you know of you can provide?

[ASSISTANT STATE ATTORNEY]: If it's good for defense counsel to use as a race-neutral reason, as [counsel for Mr. Ivy] just argued, it would be a reason that would be valid for the State of Florida as well.

[COUNSEL FOR CODEFENDANT ONE]: Just for the record, on behalf of [codefendant 1] we object and ask for a race-neutral reason for the record.

[COUNSEL FOR CODEFENDANT TWO]: We join in.

THE COURT: Understood. However, I think the State has argued adequate[ly] its race-neutral reason. If it's good for one side then it's good—

[COUNSEL FOR MR. IVY]: It would make sense I use it obviously.

THE COURT: Who said it has to make sense?

[COUNSEL FOR MR. IVY]: Genuineness.

THE COURT: It means if we look at it on its face, if that would be a race-neutral reason for exercising, just because it might make more sense for one side than the other does not remove it from being race neutral. I note your objection for the record, I'm going to allow it—

[COUNSEL FOR MR. IVY]: Thank you, judge.

THE COURT: (Continuing)—as race neutral....

Prior to this exercise of a peremptory challenge, three other potential jurors who had connections to law enforcement had been dismissed. One had been dismissed for cause and the other two were peremptorily stricken by a defendant. At the end of the selection process when accepting the jury, Mr. Ivy's attorney made a proper *Joiner* objection concerning these two peremptory challenges. *See Joiner v. State,* 618 So.2d 174 (Fla.1993).

III. APPLYING THE SPENCER ANALYSIS IN THIS CASE

We will not repeat the legal discussion contained in sections III through V of *Spencer.* In section IV of that opinion, we described each step of the three-step procedure established in *Melbourne*[2] and suggested the

components necessary to accomplish those steps. *See Spencer,* 196 So.3d at 405 – 06, slip. op. at 8–10, 2016 WL 1066189 at *4–5. Applying that analysis to the State's peremptory challenge of venireperson 126 in this case, the trial court adequately resolved the questions required for step 1 and properly began step 2.

When Mr. Ivy's counsel asked the State for a race-neutral reason, the State explained that venireperson 126 had a son-in-law who had previously been a law enforcement officer. Counsel for one of Mr. Ivy's codefendants responded, but only to suggest that venireperson 126 did not indicate ***398** that she was less likely to believe a law enforcement officer. That response seems directed at the issue of genuineness and not facial race neutrality. The State immediately pointed this out, responding "[t]hat's not one of the requirements of the race-neutral reason." The court echoed this by stating that "[i]t's just that, to be race neutral."

Mr. Ivy's attorney then argued that the reason must be "genuinely race neutral," and suggested that the circumstance of a venireperson having a family member that had been a law enforcement officer seemed to be a valid reason for a peremptory challenge by a defendant but not by the State. Mr. Ivy's counsel thus appears to have been moving on to step 3 by suggesting that even if a proffered reason is facially race neutral, it must be "genuinely" race neutral. But he did not make this explicit, and the trial court does not appear to have understood that Mr. Ivy's counsel had moved on to step 3. Instead, the trial court remained at step 2 and asked why a race-neutral reason had "to make sense." Instead of clarifying the confusion, explaining to the trial court that there is a third step in *Melbourne,* or objecting to the State's facially race-neutral reason as a pretext, Mr. Ivy's counsel simply responded: "Genuineness." Apparently the trial court still did not understand that it needed to make a separate determination on the issue of pretext, and it allowed the peremptory challenge "as race neutral." Thus, the trial court never made a finding on whether the facially race-neutral reason was pretextual.

[1] We conclude that the word "genuineness" with nothing more is not an adequate objection informing the trial court that it must make two separate determinations, facial neutrality and genuineness, and not merely one. Perhaps more critically, no defense attorney explained or even asked to explain the "circumstances" discussed in *Hayes v. State,* 94 So.3d 452, 461–62 (Fla.2012), and *Murray v. State,* 3 So.3d 1108, 1120 (Fla.2009), that might support a determination that the assistant state attorney was using the stated neutral reason when her true reason involved impermissible discrimination. Most of the components required for a proper step 2 and step 3 *Melbourne* hearing as described in *Spencer* simply did not take place in this case, but the trial court did not prevent those steps from occurring. After the trial court responded to defense counsel's word "genuineness" with a ruling that was clearly on race neutrality, defense counsel merely responded, "Thank you, judge."

[2] Because the trial court never actually reached the issue of genuineness, the assistant state attorney was never asked to respond to the defense attorneys' argument that only defendants can use peremptory challenges on venirepersons whose relatives are former law enforcement officers or to any claim that she was being disingenuous in asking for this challenge. We do not think that Mr. Ivy, as the opponent of the peremptory challenge, met his burden of persuasion to overcome the presumption that the State's proffered reason was genuine or that its challenge was proper. *See Hayes,* 94 So.3d at 461 (citing *Melbourne,* 679 So.2d at 764). This is not a case in which it is difficult to understand what the response would have been. The circumstances surrounding the son-in-law's exit from a law enforcement career were unknown. Those circumstances could possibly have caused venireperson 126 to feel strongly against law enforcement. Any experienced trial attorney would understand that asking about those circumstances in open court in front of the entire venire involved risks and could be embarrassing to the challenged venireperson. A decision to forego the ***399** questions and simply use a peremptory challenge on this venireperson for this reason is both race neutral and arguably a sensible trial strategy.

We are less certain whether the holding in *Hayes* may require a reversal under the facts in this case as compared to the facts in *Spencer.* But the three defense attorneys did not provide the trial court with adequate notice that it was not following the decision-making process necessary for a *Melbourne* hearing. For the reasons explained in *Spencer,* we conclude that Mr. Ivy did not adequately preserve a *Melbourne* issue in this case and cannot demonstrate on this record that the trial court abused its discretion or clearly erred in allowing the strike. We find no reversible error in the trial court's decision to permit the State to exercise a peremptory challenge of venireperson 126.

In *Spencer,* we expressed concern that our analysis may conflict with the First District's decision in *Simmons v. State,* 940 So.2d 580 (Fla. 1st DCA 2006). In *Simmons,* the State exercised peremptory challenges on several African–American members of the venire. *Id.* at 581. When defense counsel asked for a race-neutral reason for one of them, the State responded that the venireperson's husband was currently a law enforcement officer. *Id.* The subsequent objection made by defense counsel and the ruling by the trial court in that case were almost identical to what occurred in this case. Defense counsel in *Simmons* argued that the State's reason might be good for defense

counsel but not for the State, and the court ruled: “I will allow the challenge. That is a race-neutral reason. Whether or not we view it favorable for the State or favorable for the Defense, it is a race-neutral reason.” *Id.* The district court reversed for a new trial because based on the court’s explanation in its ruling, “it appear[ed] that the trial court bypassed the genuineness inquiry required in the *Melbourne* analysis.” *Id.* 582–83.

As we read the facts in *Simmons,* we are unconvinced that defense counsel in that case adequately objected to the trial court’s failure to make the step 3 genuineness determination from *Melbourne.* However, it appears that the First District treated the circumstance of a venireperson with a relative who was an active law enforcement officer differently from how this court is treating a venireperson related to a former law enforcement officer. Whether this factual difference is sufficient to prevent this case from conflicting with *Simmons* is debatable. To avoid the necessity of resolving that debate, we certify the same dispositive question of great public importance in this case that we certified in *Spencer:*

> DURING A *MELBOURNE* HEARING, WHEN A TRIAL COURT FINDS THAT THE PROPONENT’S REASON FOR A PEREMPTORY CHALLENGE IS FACIALLY NEUTRAL, IS IT THE BURDEN OF THE OPPONENT (1) TO CLAIM THE REASON IS A PRETEXT, (2) TO PLACE INTO THE RECORD THE CIRCUMSTANCES SUPPORTING ITS POSITION, AND (3) TO OBJECT IF THE TRIAL COURT’S RULING DOES NOT CONTAIN ADEQUATE FINDINGS ON THE ISSUE OF GENUINENESS?

Affirmed.

VILLANTI, C.J., and KELLY, J., Concur.

All Citations

196 So.3d 394, 41 Fla. L. Weekly D704

Footnotes

[1] The court reporter used the word “res” rather than “race” in this portion of the transcript. We have substituted the correct word throughout.

[2] *Melbourne v. State,* 679 So.2d 759, 763–65 (Fla.1996).

CERTIFICATE OF SERVICE

I certify that a copy has been emailed through the portal to Bilal Faruqui at the Office of the Attorney General at Bilal.Faruqui@myfloridalegal.com and CrimappTPA@myfloridalegal.com, on this 28th day of November, 2016.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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