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

REPLY BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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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 State insists that no court can recognize Batson[1] error unless the defendant contests the reason provided by the proponent of the strike. But if this is the case, then why does Batson set forth a three-step procedure, rather than a four-step? The answer is certainly that the U.S. Supreme Court saw no point in requiring a defendant to declare, "Liar!" after the prosecutor proffered a reason for the strike. The Supreme Court has observed that, when discerning the prosecutor's state of mind for the third step, "[t]here will seldom be much evidence bearing on that issue." Hernandez v. New York, 500 U.S. 352, 365 (1991). Nevertheless, the Second District insists that trial judge need not even make a ruling unless a defendant makes that declaration and tries to prove the prosecutor's state of mind.

To justify the need for requiring the defendant to dispute the prosecutor's veracity, the Second District and the State conflate "a burden of persuasion" with the new preservation requirement. This Court should not be swayed by an argument that requires changing "persuasion" into a verb meaning "to make a claim of pretext." The State also relies on a waiver argument and cites Joiner waiver cases and cases where a defendant failed to

[1] Batson v. Kentucky, 476 U.S. 79 (1986)

dispute a prosecutor's factually inaccurate assertion. But these cases are not on point. The Second District's holding that Spencer failed to preserve his claims for appellate review does not turn on either of these situations; rather, it turns on the new requirement that a defense attorney must explicitly assert that the prosecutor is lying and "make a complete argument demonstrating" that the prosecutor is lying. Spencer v. State, 196 So. 3d 400, 407 (Fla. 2d DCA 2016).

This Court should distinguish between the failure to preserve a claim and the waiver of a claim that has been properly raised. The State's waiver cases are not well-taken because Spencer reasserted his objections before the jury was sworn and after the judge had rejected his Batson claims. (T171) No waiver occurred here because Spencer complied with Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993).

Spencer disagrees with the State's position that he was required to contest the proffered reasons given for the strikes in order to preserve his Batson objections for appellate review, but for the sake of argument will assume that such is required. In such case, this Court should conclude that Spencer satisfied the requirement because he spoke up with a response after the State proffered its reason for striking Mr. Thermidor.

In response to the judge saying, "Burden shifts. Go ahead," the prosecutor stated: "During voir dire, the juror did indicate that he had a friend who was arrested for breaking and entering, a B and E." (T168) The defense attorney challenged that proffered reason, with a statement that directly challenged its genuineness

and called for specific findings by the judge, saying: "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." (T169) By voicing this rebuttal, the defense put the trial judge on notice that he should not accept the State's proffered reason. So even under the State's desired four-step process, the Batson objection was preserved.

The State's contrary argument is based on a false narrative invented for the purpose of defending the trial judge's abrogation of duty in Batson's third step. For instance, the State says, "A trial court cannot be expected to evaluate a claim of impropriety when it has not been placed on notice that such a claim exists or may be supported by the facts." (AB at 10). Which leaves one to wonder, what case is the State talking about? There is no doubt that the trial judge here was on notice that Spencer was concerned about the State making racially-targeted strikes of black jurors even before the judge began entertaining peremptory strikes.

The defense attorney first mentioned his concern over the State's strike of an African-American male during the cause challenges. (T160) He expressed concern again over the State striking an "African female" during the cause challenges. (T161) This provoked the judge to chastise the defense counsel for "communicating with counsel for the other side." (Id.) The defense attorney explained that his concern arose because "Mr. Spencer is African male." (T162)

When Ms. Johnson was struck by a State peremptory, the defense attorney remarked, "This is the second African American

stricken by the state for peremptory." (T166) That statement stands unrefuted in the record. When the State struck Mr. Thermidor, it was the third peremptory strike of a black juror by the State. Without a doubt, the trial judge knew that Spencer was "claiming an impropriety," and the State's suggestion otherwise must be considered disingenuous. In fact, the State acknowledges that Spencer made a rebuttal argument with respect to the strike of Mr. Thermidor, but it characterizes the argument as not "a proper genuineness argument." (AB at 13) The State does not explain exactly what distinguishes a proper genuineness argument from an improper one.

The State writes that by absolving opponents of any requirement to claim discriminatory intent, "the Melbourne procedure would be *further* reduced to simple gamesmanship." (AB at 10, emphasis added) With this observation, the State ironically touches on a sad truth about the way the prosecutor conducted the voir dire. The prosecutor "designed tangential questions" about past arrests of potential jurors, their friends, and their family members "to elicit responses from potential black jurors, which the State later held against them when selecting the final jury panel." Turnbull v. State, 959 So. 2d 275, 277 (Fla. 3d DCA 2006). This record demonstrates that an adroit prosecutor can easily game the jury selection process by posing a broad question to the venire about having ever been arrested or knowing someone who was ever arrested and then using potential jurors' honest responses to justify striking black jurors with impunity.

This Court should require more of trial judges than a

prattling of boilerplate rulings when Batson claims are made. Pro forma statements like the ones made by the trial judge in response to Spencer's objections in this case do not allow for meaningful appellate review, and because such rulings must not be rubber stamped by the reviewing court, the Second District was required to reverse for a new trial.

CONCLUSION

This Court should quash the opinion of the Second District Court of Appeal and remand with directions to grant Spencer a new trial.

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 6th day of January, 2017.

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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