IN THE SUPREME COURT OF FLORIDA

TAVARES W. SPENCER, JR., :

Petitioner, :

vs. : Case No. SC16-1599

STATE OF FLORIDA, :

Respondent. :

:

MOTION FOR REHEARING AND CLARIFICATION

Petitioner, TAVARES W. SPENCER, JR., through counsel, moves for rehearing and clarification pursuant to Florida Rule of Appellate Procedure 9.330, and states:

- 1. Because the issue of procedural default for a <u>Batson</u>¹ claim potentially impacts every jury trial in Florida's trial courts, the decision in this case has broad ramifications. Yet, this Court's decision reduces the law governing such claims to a state of utter confusion. Petitioner respectfully requests clarification.
- 2. This Court's decision affirms the Second District's opinion, ostensibly making it binding precedent, even though Justice Quince's plurality opinion disagrees with the procedural default holding of the Second District. Because only three justices signed Justice Quince's plurality opinion, this court's unanimous affirmance is a binding decision without a binding precedential opinion. See Santos v. State, 629 So. 2d 838, 840 (Fla. 1994) ("Under the Florida Constitution, both a binding

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

decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision." (citing Art. V, § 3(a), Fla. Const.) (footnotes omitted); Caruthers v. State, 42 Fla. L. Weekly D2616, 2017 WL 6368614 (Fla. 4th DCA Dec. 13, 2017) (recognizing that a concurring supreme court opinion signed by three justices was not precedential).

- 3. The Second District's opinion changes the prevailing law to require more verbal objections from a party attempting to preserve a Batson issue than this Court required under Melbourne and the U.S. Supreme Court has required under its precedent. E.g., Snyder v. Louisiana, 552 U.S. 472 (2008). The Second District enforced its new preservation rules by procedurally defaulting Spencer's Batson claims even though his attorney complied with the three steps set out in Batson and Melbourne and additionally complied with the renewal of objection before the jury was sworn, as mandated in Joiner. Spencer v. State, 196 So. 3d 400, 401 (Fla. 2d DCA 2016) ("Because the defendant did not preserve a Melbourne issue in this manner, we affirm.").
- 4. This Court's affirmance of the Second District without a majority opinion creates such uncertainty that it is now impossible for a lawyer or a judge to know what is required to preserve a Batson objection for review in this state.
- 5. This Court has not addressed the entire record of the jury selection in this case, which is necessary to put Spencer's

² <u>Melbourne v. State</u>, 679 So. 2d 759 (Fla. 1996).

claims into the appropriate context. <u>See Snyder</u>. It is only through examining the entire record of the questions posed by the prosecutor to the venire and the responses given that it becomes obvious that the prosecutor gave disingenuous reasons for his strikes of the two black jurors.

- Justice Quince's plurality opinion notes "that on appeal the defendant has not argued that the record supports a finding of pretext for the challenged strikes and our review of the record uncovered none." (Slip op. at 16) This statement overlooks that part of Spencer's Initial Brief where he argued that "the prosecutor did not provide credible race-neutral reasons for his strikes of the two black jurors." (Initial Brief at 28). With regard to Mr. Thermidor, in particular, even Judge Altenbernd acknowledged below that "the State's explanation for its peremptory challenge would seem to apply to many people who are subpoenaed for jury duty." Spencer v. State, 196 So. 3d 400, 410 (Fla. 2d DCA 2016). In short, Spencer did indeed argue that the record supports a finding of pretext for the challenged strike of Juror Thermidor. That the reason given was pretextual is revealed only through an examination of the prosecutor's questions posed to the venire.
- 7. This Court should grant rehearing and render a majority opinion that clarifies the preservation requirements for a $\underline{\text{Batson}}$ claim and reverses for a new trial for Tavares Spencer.

CERTIFICATE OF SERVICE

I certify that a copy has been electronically served on Assistant Attorney General Bilal A. Faruqui at crimapptpa@myfloridalegal.com on this __1st___ day of February, 2018.

Respectfully submitted,

/S/Karen Kinney

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