

# Second District Clarifies Preservation Test for Race-Based Peremptory Challenges

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## Trial Tips for Trial Attorneys

On March 18, Florida's Second District Court of Appeal issued a decision discussing, in some detail, the actions that must be taken during jury selection to preserve an objection to a peremptory challenge that purportedly is based solely on race. *See Spencer v. State*, No. 2D14-316 (Fla. 2d DCA Mar. 18, 2016). In doing so, the court made clear that there is a burden on the opponent of a peremptory challenge to ensure the court makes specific findings regarding the *genuineness* of the facially neutral reason given by the party making the challenge. This inquiry, which is often overlooked by the trial courts, has little to do with the substance of the reason given by the lawyer seeking to strike the venireperson; *it has to do with the lawyer's intent*. The trial court consequently must determine whether the lawyer presenting an explanation for the challenge has an improper motive. If no objection is made to the pretextual nature of the facially neutral reason for the challenge, the opponent cannot assert such a claim on appeal. The Second District thus concluded that the better practice is for the trial court to affirmatively ask the opponent to state all circumstances the opponent believes support a claim of pretext, but if the trial court omits this step, it should be incumbent on the opponent to object and ask to place in the record the circumstances that it wants the trial court to consider – the opponent of the challenge has the burden of persuasion from the beginning to the end. To assist courts and counsel in properly preserving these challenges, the court set forth these steps to follow: **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.

Because many appellate decisions do not expressly consider the burden of creating a record to establish a claim for pretext, the Second District certified a question to the Florida Supreme Court, asking whether the opponent to a race-based peremptory challenge has the affirmative burden to establish the facially neutral reason is pretext. As it stands, however, this decision will bind all trial courts, absent a contrary decision in a particular district.

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