

Peremptory Strike: Preserving Every Error During a Peremptory Challenge

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The Florida Supreme Court recently reminded us of an adage of trial practice: Do not depend on a perceived mistake by the trial court to preserve an issue for appeal. A lawyer must fulfill his or her obligation to spell out the specific legal basis of an error in order to raise the error on appeal.

The Florida Supreme Court made this point recently in *State v. Johnson*, in the context of a peremptory challenge to a prospective juror. In Florida, as in most states, a party can use a limited number of peremptory strikes to remove a person from a jury pool for almost any nondiscriminatory reason, but cannot use peremptory challenges just to exclude members of a "distinctive group."

Challenging a peremptory strike as improper in Florida state court involves a three-step process. First, a party must make a timely objection to the peremptory strike, show that the prospective juror belongs to a distinct racial group, and ask the trial court to request the reason for the strike. Next, the party who exercised the peremptory strike must provide a race-neutral explanation for it. Finally, the court must assess the genuineness of the explanation and decide whether the explanation is a pretext for discrimination.

In *Johnson*, the prosecutor in a robbery case proposed a peremptory strike of an African American member of the venire. The defendant's lawyer requested a race-neutral reason for the strike, and the prosecutor pointed to the venireperson's response that he would prefer "CSI evidence," referring to scientific evidence commonly used on the "Crime Scene Investigation" television show. Before the defense lawyer could challenge the explanation, the trial judge cut the prosecutor off and concluded that the reason was race-neutral. Although the defense lawyer renewed the objection to the peremptory strike, the defense never argued that the prosecutor's explanation lacked record support or explained why it was not genuine.

The district court of appeal reversed, finding that the trial court had failed to complete the required third step in the analysis, which required it to assess whether the prosecutor's purported reason for the strike was genuine and had record support. It also found that the defendant had preserved the error for appeal by challenging the peremptory strike in the first instance and then re-raising that challenge later.

The Florida Supreme Court disagreed, holding that the defense could not rely on the trial court's error to preserve the issue for appeal. Rather, it was the defense's "obligation to place the trial court on notice of the basis for the challenge and create a record supporting that objection." The court held that the defense "cannot simply sit silent - failing to respond to a proffered facially race-neutral reason and failing to object as to why the trial court should not accept that explanation - yet challenge that reason as a pretext for discrimination and the trial court's ruling as insufficient for the first time on appeal." In short, the party opposing the peremptory strike **always** bears the burden to provide specific grounds for its objections - at each step in the process - to preserve its objection for appeal.

Tips:

1. To challenge a peremptory strike as discriminatory, the party must offer a specific basis to challenge a race-neutral explanation for the strike. It is not sufficient to timely object and ask for a race-neutral basis for the strike.
2. An attorney should never assume that the trial court's error, real or perceived, is sufficient to preserve an issue for appeal. Instead, the attorney should object and offer specific reasons why there is, in fact, error.

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