IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 18-655

STATE OF FLORIDA,
Petitioner,

vs.

JOHN PACCHIANA,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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NOTICE OF CORRESPONDING CASE

The instant case was argued in the District Court of Appeals in tandem with the matter now before this Court in *State of Florida v. Michael Bilotti*, Case No: SC18-673, which has been stayed pending disposition of this matter. The third person affected by this decision is Christin Bilotti, Case No: SC18-965.

TABLE OF CITATIONS

NOTICE OF PENDING CASE WITH RELATED ISSUES

One of the issues involved in this matter, raised by the Petitioner, is the preservation of the objection to the exercise of a juror challenge to an African American Jehovah's Witness.

Respondent cited in his Brief in Opposition to Jurisdiction the decision of the First District Court of Appeal in *Ivey v. State*, 43 Fla.L.Weekly D.413d (Fla. 1st DCA 2018) and noted that Court held an objection to a race based challenge preserved despite that Defendant accepted the jury, and certified that decision to this Court. Accepting of the jury is not the issue at bench as the Respondent objected to the jury being seated, however other aspects of the decision may have some importance to the matter. This Court has received the briefs and otherwise has the matter under consideration, *State v. Ivey*, Florida Supreme Court Case Number: SC18-372.

STATEMENT OF THE CASE AND FACTS

While the history of the case and the factual issues are somewhat detailed in both the opinion of the Fourth District Court of Appeals under review and the State's Brief on the Merits, the Respondent would point out certain matters of importance, ie, the trial judge's comments, noted in the District Court's opinion, including a judicial comment "A Jehovah Witness, that as a religion, it would almost be malpractice for a prosecutor to let someone on the jury like that" which will be

addressed below. The opinion outlines much of the judge and prosecutor's comments as well as the history of what occurred in the voir dire as well as the lack of any meaningful questioning by the prosecutor, and also addresses the Motion for Mistrial [which the trial judge correctly realized was a Motion to Strike the Jury Panel] and the subsequent seeking of a Writ of Prohibition in the Fourth District Court of Appeals before the jury was sworn [see footnote 2 of Judge May's dissent].

Any other factually matters necessary for the resolution of the case from Respondent's point of view will be addressed in the argument section of the brief to avoid redundancy.

SUMMARY OF ARGUMENT

The Respondent will urge this Court to find, as did the entire panel of the Fourth District Court of Appeals that the Respondent preserved his challenge to the State striking juror Beech and that it was properly presented to that Court for its review.

The Respondent will further argue that the majority finding that the properly presented issue for review is framed by what the opinion of Judge Levine held:

> In sum, the strike was pretextual and based on race. Even if the strike was not a pretext, then it was based on religion, which is also impermissible. Finally, the strike imposed an unconstitutional religious test.

Judge Gerber in a separate opinion concurred in the result, and the Respondent will urge the Court to affirm the majority.

The Petitioner seeks to have the Court, in essence, adopt the dissent of Judge May on the propriety of the strike and the Judge's expressions on the office of peremptory strikes.

ISSUES ON THE MERITS

WHETHER THE APPELLATE COURT PROPERLY FOUND PRESERVATION OF THE ERROR, AND CORRECTLY REVERSED THE TRIAL COURT

ARGUMENT

A. The Respondent properly preserved his objections to the challenge to Juror Beech.

The entire panel of the Fourth District found that the Respondent properly preserved his objections to the challenge of the juror.

Judge Levin, in his opinion, finds as follows:

> During jury selection, the state used a peremptory challenge to strike the prospective juror. The following then transpired:
>
> > [DEFENSE COUNSEL]: Can we get a race neutral reason?
> >
> > [THE STATE]: She's a Jehovah Witness. I've never had one say, and I highlighted it,

> they've always said they can't sit in judgment. She never brought it up.
>
> [DEFENSE COUNSEL]: She did.
>
> [THE STATE]: No, but she put at the bottom that she's a Jehovah Witness, that gives me pause.
>
> [DEFENSE COUNSEL FOR CO-DEFENDANT]: That's a religious based strike. [Emphasis supplied].
>
> [THE STATE]: You can say that but that's - - for 20 years, [defense counsel for co-defendant] knows, any one of them that's been practicing they've always said that. Now maybe she's less –
>
> [DEFENSE COUNSEL FOR CO-DEFENDANT]: She reads Jehovah stuff, she doesn't say she's a practicing Jehovah Witness.
>
> THE COURT: Let's bring in [the prospective juror] . . .[1]
>
> [Prospective juror], if you wouldn't mind having a seat in the front row, we have a question I want to ask you. You indicated in your questionnaire that you're a Witness, Jehovah Witness.

Further inquiry occurred, but there can be no doubt that the trial court was

[1]The jury panel had been excused from the courtroom to conduct the actual selection.

aware of the religious based nature of the "race" objection and stated, "Listen, she is a Jehovah Witness", which led to the later comments by the trial judge outlined by Judge Levine.

Judge May, in her dissent, opined:

> The preservation issue relates to whether defense counsel preserved the religious-based objection, for it is clear that defense counsel preserved the race-based objection, and the State provided a reason other than race. I agree with the majority that both the race and religious based objections for the strike were preserved.

The Petitioner in its argument on preservation fails to address the fact that was acknowledged in the statement of the case, to wit that co-counsel alerted the Court that besides a race-based strike, the prosecutor was also making a religious based strike [Brief of Respondent, page 3], and indeed the entirety of the argument continued mostly on religion. The trial judge was acutely aware of the basis of the objection on both race and religion and heard extensive argument thereon and ruled, as he did again when the later Motion for Mistrial was presented, with comments about the juror highlighted in the opinion.

While the State suggests that the procedures set out by the Courts in *Melbourne v. State*, 679 So.2d 759 (Fla. 1996), *Willacy v. State*, 640 So.2d 1079 (Fla. 1994) and *Joiner v. State*, 618 So.2d 174 (Fla. 1993), were not followed; Respondent

submits they were on both objections to the strike. As noted, in the first instance, counsel objected to the strike seeking a race neutral reason and when the prosecutor stated her status as a Jehovah's Witness co-counsel advised that was a religious based reason. *Melbourne*, *supra* and *Joiner*, *supra* require a contemporaneous objection, which quite obviously occurred, and certainly there were objections before the jury was sworn, as evidenced by the Motion for Mistrial, recognized by the trial judge as a Motion to Strike the Panel, and the subsequent seeking of a Writ of Prohibition on the denial. The Petitioner quotes this Court from the opinion in *Spencer v. State*, 238 So.3d 708 (Fla. 208) at page 10 of its brief:

> Simply put, in the context of challenges to the use of a peremptory strike, we reaffirm the holding of *Melbourne*, where we provided the following procedure:
>
> > 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).

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

Thus, the preservation requirements were indeed met, and Petitioner's argument fails.

Respondent would also cite to the Court, as he did in his brief on jurisdiction, the recent decision of the First District Court of Appeals in *Johnson v. State*, 43 Fla.L.Weekly D.205 (Fla. 1st DCA 2018).

To quote from the opinion on the issue of objections to a prospective juror during jury selection:

> . . . after defense counsel used peremptory challenge on prospective juror 14, the prosecutor asked for a 'race neutral reason' because 'the defense has used a strike on all four males that have been available for the panel', and due to reasons raised by the defense counsel's response, or lack thereof, the Court disallowed the challenge and that juror sat and that seating of the juror was the subject of appeal.
>
> The *Johnson* Court, in its opinion, relevant to the issues at bench found:
>
> > Here, although the prosecutor asked for a race-neutral reason for defense counsel's use of a peremptory challenge on prospective juror 14, it is clear from the context of the request that he was actually seeking a gender-neutral reason because he pointed out that

> defense counsel had used peremptory challenges on all of the prospective male jurors on the panel. This objection was sufficient to satisfy step 1 or *Melbourne* . . . [Emphasis supplied]

Respondent thus urges the Court to find that the objections were preserved; indeed it would be difficult to find, respectfully, that an issue that resulted in a 31 page three judge separate opinion decision who all found preservation failed to meet the preservation requirement.

The purpose of a timely objection is to ensure that the Court is aware of the content and context of the objection so that the Court can rule conclusively on the issue. Certainly a lengthy discussion on the issue of race and religion both before the overruling of the defense objection to the prosecutor's exercise of a peremptory challenge to Juror Beech and what occurred thereafter emphasis that the required preservation occurred.

B. The Appellate Court properly reversed the matter and remanded for a new trial, and the majority opinion of the Court should be affirmed.

The State opens its argument on this point [Brief, page 13] as follows:

> Turning to the expansion of *Batson*, the majority, Judge Levine and Judge Gerber, have improperly ruled that members of <u>any</u> religion are a cognizable class <u>protected under the United States and Florida Constitutions from being systematically</u> struck from juries solely based on

> their faith [emphasis supplied]. The majority reasoned that the defendant has a right to a fair and impartial jury panel where the state does not exclude members of a religion, in the absence of competent substantial evidence that the potential juror cannot be fair and impartial, due to her views related to her membership in that religion.

The Petitioner continued:

> The United States Supreme Court has not yet extended *Batson* to peremptory challenges based on religion. *See State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (Fl994). Nor has the Florida Supreme Court extended *Batson* to include religion as a protected class. *Dorsey v. State*, 868 So.2d 1192, n 8 (Fla. 2003) (explaining that this Court has not extended *Neil's* protections beyond peremptory challenges based on race, gender, and ethnicity) citing *Muhammad v. State*, 782 So.2d 343, 352 n. 4 (Fla. 2001); *Abshire v. State*, 642 So.2d 542, 543-44 (Fla. 1994); *State v. Alen*, 616 So.2d 452, 454 (Fla. 1993). [Emphasis supplied]

The Petitioner further argues, inter alia:

> The Fourth District Court of Appeal has improperly found that striking a prospective juror based upon their religion is an impermissible "religious test" in violation of the United States and Florida Constitution [Emphasis supplied]. The system according to which jurors are selected for service in the courts by allowing litigants to exercise peremptory challenges against individual venire members is a government practice subject to these equal protections rules. *Edmonson v. Leesville Concrete Co*., 500 U.S. 614, 618-28, 111 S.Ct. 2077, 2081-87, 114 L.Ed.2d 660, 672-78 (1991). No party may exclude a prospective juror from service if the basis for exclusion is offense to the United States Constitution. *Georgia v.*

McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

The brief continues:

> However, because peremptory challenges are an established and valuable part of the adversary system, preserving the right to this method of jury selection is a legitimate interest of the government. *Batson*, 476 U.S. at 98-99, 106 S.Ct. at 1723-24. Accordingly, most peremptory challenges are not constitutionally exceptionable. But the government's interest in a system of peremptory challenges is generally not great enough to support exclusion of persons from jury service based on a classification which is subject to strict or heightened scrutiny under the Equal Protection Clause. It is for this reason that peremptory challenges based race or sex violate the United States Constitution. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Batson*, 476 U.S. 79, 106 S.Ct. 1712; *Swan v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

The "Equal Protection Clause" reference is interesting in that the dissent in *Batson*, authored by Chief Justice Burger and joined by Justice Rehnquist, authored the following:

> That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge on the basis of race; the Court's opinion clearly contains such a limitation. See ante, at 96 (to establish a prima facie case, "the defendant first must show that he is a member of a cognizable racial group") (emphasis added); *ibid*. ("[F]inally, the defendant must show that these facts and any other relevant circumstances raise an inference that the

> prosecutor used that practice to exclude the veniremen from the petit jury on account of their race") (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, *Craig v. Boren*, 429 U.S. 190 (1976); age, *Massachusetts Bd. v. Murgia*, 427 U.S. 307 (1976); religious or political affiliation, *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens J., concurring); mental capacity, *Clebume v. Clebume Living Center, Inc*., 473 U.S. 432 (1985); number of children, *Dandridge v. Williams*, 397 U.S. 471 (1970); living arrangements, *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); and employment in a particular industry, *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981), or progression, *Williams v. Lee Optical Co.,* 348 U.S. 483 (1955). [Emphasis supplied]

And of course in 1994, the Court condemned gender discrimination in *J.E.B. v. Alabama*, *supra*.

It is submitted the Petitioner's recognition of the "Equal Protection Clause" and in fact noted that it is a proper basis for the expansion of *Batson*, *supra*, which indeed has already happened, the State agrees, at the least with its recognition "that peremptory challenges based on race or sex violate the United States Constitution", see *J.E.B., supra*.

The crux of the holding of *Batson* was:

> Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although

> a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States v. Robinson*, 421 F. Supp. 467, 473 (Conn. 1976), mandamus granted sub nom. *United States v. Newman*, 549 F. 2d 240 (CA2 1977), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

But, in *J.E.B. v. Alabama*, *supra*, the Court held:

> In *Batson v. Kentucky*, 476 U. S. 79 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that although a defendant has "no right to a `petit jury composed in whole or in part of persons of his own race,' " id. , at 85, quoting *Strauder v. West Virginia*, 100 U. S. 303, 305 (1880), the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," 476 U. S., at 85-86. Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. See *Powers v. Ohio*, 499 U. S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U. S. 614 (1991); *Georgia v. McCollum*, 505 U. S. 42 (1992).

The Court gave a synopsis of the facts:

> Before the jury was empaneled, petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause of the Fourteenth Amendment. App. 22. Petitioner argued that the logic and reasoning of *Batson v. Kentucky*, which prohibits peremptory strikes solely on the basis of race, similarly forbids intentional discrimination on the basis of gender. The court rejected petitioner's claim and empaneled the all-female jury. App. 23. The jury found petitioner to be the father of the child, and the court entered an order directing him to pay child support. On postjudgment motion, the court reaffirmed its ruling that Batson does not extend to genderbased peremptory challenges. App. 33. The Alabama Court of Civil Appeals affirmed, 606 So. 2d 156 (1992), relying on Alabama precedent, see, e. g., *Murphy v.State*, 596 So. 2d 42 (Ala. Crim. App. 1991), cert. denied, 506 U. S. 827 (1992), and *Ex parte Murphy*, 596 So. 2d 45 (Ala. 1992). The Supreme Court of Alabama denied certiorari, No. 1911717 (Oct. 23, 1992).

The Court reversed the Alabama Supreme Court and cogent to the arguments made in this brief opined:

> In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures. See *Powers, supra*, *Edmonson, supra*, and *Georgia v. McCollum*, 505 U. S. 42 (1992). Contrary to respondent's suggestion, this right extends to both men and women. See *Mississippi Univ. for Women v. Hogan*, 458 U. S, at 723 (that a state practice "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review"); cf. Brief for Respondent 9 (arguing that men deserve no protection from gender discrimination in jury selection because they are not victims of historical

> discrimination). All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder v. West Virginia*, 100 U. S., at 308. It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.

The Court continued:

> Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to "rational basis" review. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S., at 439 - 442; *Clark v. Jeter*, 486 U. S. 456, 461 (1988). Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext.

The entirety of the *J.E.B., supra* decision including the concurrences of Justice

O'Connor and Justice Kennedy illustrate the natural continuum of *Batson*, *supra*.

Even the dissent of Chief Justice Rehnquist in this 24 year old decision shines light of what he perceived:

> Even if the line of our later cases guaranteed by today's decision limits the theoretically boundless Batson principle to race, sex, and perhaps other classifications subject to heightened scrutiny (which presumably would include religious belief, see *Larson v. Valente*, 456 U. S. 228, 244-246 (1982)), much damage has been done.

Interestingly *Larson, supra* refers to *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) where the Supreme Court held invalid a municipal ordinance that required the licensing of Jehovah's Witnesses who solicited donations in exchange for religious literature. A reading of *Murdock, supra* presents an interesting perspective of Jehovah's Witnesses.

Thus, to say the least the decision of the Fourth District Court of Appeals is grounded in well researched analysis of *Batson*, *supra*.

The State cites, as did the Appeals Court, to the split decision of the Minnesota Supreme Court in *State of Minnesota v. Davis*, 504 N.W.2d 767 (1993), but the Appeals Court noted:

> Although those who argue against extending *Batson* often cite to *Davis*, as noted above, the Minnesota Supreme Court actually recognized that striking a juror based solely on his affiliation with the Jehovah's Witnesses would not

rebut the prima facie case of racial bias. *See Davis*, 504 N.W. 2d at 772. This is the exact situation presented in the instant case.

The Fourth District continued:

> Interestingly, although the United States Supreme Court denied the petition for review by certiorari in *Davis*, Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari. *Davis v. Minnesota*, 511 U.S. 1115 (1994). Justice Thomas, citing to *J.E.B.*, disputed the Minnesota Supreme Court's conclusion that "Batson's equal protection analysis applies solely to racially based peremptory strikes". *Id*. at 2121. Responding to the majority's denial of the writ of certiorari, the dissent stated:
>
> > Indeed, given the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause . . . *J.E.B.* would seem to have extended *Batson's* equal protection analysis to all strikes based on the latter category of classifications-a category which presumably would include classifications based on religion.
>
> *Id*.
>
> Justice Thomas correctly suggested that the rationale of *Batson* and *J.E.B.* should be extended. Based on *Alen*, *Joseph* and this court's decision in *Olbrices*, the trial court clearly erred in allowing the prospective juror to be struck from service based on her membership in a religious group.
>
> Thus, the state's strike was either pretextual and entirely based on race, or the state's trike was not

> pretextual and entirely based on religion despite the lack of competent substantial evidence that the prospective juror's religion would influence her decision-making as a juror. Either way, it violates the United States and Florida Constitutions.

The Petitioner employs various out of state cases that touch upon the Jehovah Witness issue, however, the State really does not address the very important and overriding issue: the Florida Constitution.

The Appeals Court in every instance found the actions of the State and the ruling of the trial court also violated the Florida Constitution, which can have a greater impact on a decision by this Court. As we know, the Florida Constitution can well provide greater constitutional protections than the United States Constitution; for example, see *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996), where this Court observed:

> On November 4, 1980, the citizens of Florida amended the Florida Constitution by approving the addition of a strong privacy provision. The specific language of the privacy amendment is as follows:
>
> > Every natural person has the right to be let alone and *free from government intrusion* into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

> Art. I, § 23, Fla. Const. (emphasis added). Only Alaska, California, Florida, Hawaii, and Montana have specifically, through distinct provisions, guaranteed the right to privacy in their state constitutions. In Florida, we have found that our constitutional privacy provision is a guarantee of greater protection than is afforded by the federal constitution. To that end, Justice Adkins has written:
>
> > The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution. [Footnotes omitted]

And of course, the citizens of Florida voted to limit the broad search and seizure protections of Article I§12 that were then existent to that which the Federal Constitution allowed under the Fourth Amendment, as Florida provided its citizens greater protections until the Amendment was approved by the voters. As an aside this

Court decided *State v. Neil*, 457 So.2d 481 (Fla. 1984), two years before the Supreme Court decided *Batson, supra*.

Thus, this case, as the Fourth District observed, can be decided on Florida Constitutional issues notwithstanding the out of state cases cited by Petitioner. Several Florida cases, as cited in the quoted opinion, have already broached the issue, with apologies for quoting again, but, its so instructive, the Appellate opinion states:

> Similarly, the Florida Supreme Court previously found that Hispanics were a "cognizable class" of people, requiring an ethnic-neutral reason before excusing a juror. *State v. Alen*, 616 So. 2d 452, 454 (Fla. 1993). That court applied a two-part test to determine if a group constitutes a cognizable class: whether the group's population is large enough to be recognized as an identifiable group and whether that group has internal group cohesiveness. *Id.*
>
> The Third District, following the same line of cases, held that a preemptory challenge of a Jewish venireperson based solely upon her religion was unconstitutional. *Joseph v. State*, 636 So. 2d 777 (Fla. 3d DCA 1994). The court found that members of the Jewish religion were a cognizable class under the standard articulated in *Alen*. The *Joseph* court determined that members of the Jewish faith met the two-prong test and concluded that striking members of the Jewish faith violated Article 1, Section 16 of the Florida Constitution, which guarantees the defendant an impartial jury. *Id.* at 781.
>
> In the present case, as in *Joseph*, members of the Jehovah's Witnesses would also appear to meet the two-prong test as a recognizable group with internal group cohesiveness. *See also State v. Gilmore*, 511 A.2d 1150,

> 1159 n.3 (1986) ("[A]t minimum, cognizable groups include those defined on the basis of religious principles, race, color, ancestry, national origin, and sex (all of which are suspect or semi-suspect classifications triggering strict or intermediate scrutiny under federal equal protection analysis[.)]") (citing *Cleburne v. Cleburne Living Centers*, 473 U.S. 3249 (1985)).
>
> This court has also found that striking a potential juror due to his or her religious faith is unconstitutional. In *Olibrices v. State*, 929 So. 2d 1176, 1180 (Fla. 4th DCA 2006), our court found that the potential juror's "membership within the objectively discernible group of Pakistani Muslims" was the basis of the exercise of a peremptory challenge. We concluded that "whether the juror was challenged because he is of Pakistani origin or because his religious belief is Muslim, it would be a *Neil Slappy* violation to exercise a peremptory challenge of him on either account." *Id.* Similarly, in the present case, the potential juror is a member of an "objectively discernible group," that being the Jehovah's Witnesses.

Whether Jehovah's Witnesses met the "cognizable class of people" or the discernable groups, the trial judge's comments that it would be malpractice to keep a Jehovah's Witness certainly rises to that level of prejudice against a religious belief of a discernable group of people.

That there has been a historical appellation or cognition one need only read the opinion of one of the greatest liberal minds of the United States Supreme Court Justice Douglas, in *Murdock, supra* and the dissent of Justice Reed.

This Court recognized Hispanics as a cognizable "class", *State v. Alen*, *supra*,

the Third District applied that the Jewish religion, *Joseph v. State*, *supra* and the Fourth District to a Pakistani Muslim, *Olibrices v. State*, *supra*.

The Fourth District's natural extension to a black Jehovah's Witness, who stated she was otherwise completely qualified, and that is beyond question, should be upheld.

CONCLUSION

For this as well as the forgoing the decision of the Fourth District Court of Appeals should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically to Melanie Dale Surber, Esq., CrimAppWPB@myfloridalegal.com, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, this 20th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

In accordance with Florida Rules of Appellate Procedure 9.210, the undersigned hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

By: */s/FredHaddad*
FRED HADDAD