

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC18-655

STATE OF FLORIDA,

Petitioner,

vs.

JOHN PACCHIANA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant, and Respondent was the Appellee in the Fourth District Court of Appeal (“Fourth District”).

The parties will be referenced as they appear before this Court. The Petitioner may also be referenced as the “State”, and the Respondent may also be referenced as “Pacchiana”.

STATEMENT OF THE CASE AND FACTS

The defendant and his codefendants, Michael and Christin Bilotti were charged with first degree murder and conspiracy to commit first degree murder. They were tried together, and the defendant was found guilty as charged and was sentenced to life in prison.

Turning to the facts related to the disposition by the Fourth District Court of Appeal, Prospective Juror Beech stated on the jury questionnaire that one of her hobbies was “Witnessing a Jehovah Witness” (Appendix to Initial Brief filed in the Fourth District Court of Appeal). During jury selection it was determined that Ms. Beech had previously served on a civil jury (T. p. 1367, PDF p. 1861), she had been the victim of a burglary, and her brother was presently in jail for a crime involving a gun (T. p. 1368, PDF p. 1862). Ms. Beech had no opinion regarding whether her brother had been treated fairly or not (T. p. 1369, PDF p. 1362). The state also discussed with Ms. Beech, the fact that the burden of proof lies with the state (T. pp. 1554-1555, PDF pp. 2052-2053). After the defense questioned the panel, the state moved to use a peremptory strike on Prospective Juror Beech (T. p. 1827, PDF p. 2327). The following exchange occurred below:

MR. ROSSMAN: I'll strike Ms. Beech, No. 8 on the seating chart.

MR. WILLIAMS: Can we get a race neutral reason?

MR. ROSSMAN: 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.

MR. WILLIAMS: She did.

MR. ROSSMAN: No, but she put at the bottom that she's a Jehovah's Witness, that gives me pause.

MR. BOGENSCHUTZ: That's a religious based strike

MR. ROSSMAN: You can say that but that's You can say that but that's -
-For 20 years, Mr. Haddad knows, any one of them that's been practicing they've always said that. Now maybe she's less –

MR. HADDAD: She reads Jehovah stuff, she doesn't say she's a practicing Jehovah Witness.

THE COURT: Let's bring in Ms. Beech.

MR. WILLIAMS: I'm very familiar with the witnesses.

THE COURT: You're familiar with lot of things.

MR. WILLIAMS: One of my friend's mother is a witness, she's been trying to convert me for the last five years.

THE COURT: How's she doing?

Ms. Beech, 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.

MS. BEECH: Yes.

THE COURT: How would that affect your ability to be fair in this case?

We've had them before. Do you have any religious beliefs that would prevent you from being fair and impartial in this case?

MS. BEECH: If the evidence that's provided to me is clear cut and concise I would be able to. If my ruling wouldn't—

THE COURT: In light of my questions, Mr. Rossman?

MR. ROSSMAN: So there's no prohibition, and honestly I don't know enough about religion, and I don't mean that disrespectfully, but I want to make sure that you as an individual, whatever your beliefs are, there's nothing preventing you from sitting in judgment of a case, because that's really what you're doing, you're judging whether we've proven our case or not. You can do that?

MS. BEECH: I can, and before I believe it was Judge Levenson who said that we would not be making the sentencing.

THE COURT: How do you feel about that?

MS. BEECH: I'm okay with that.

THE COURT: Okay.

MR. ROSSMAN: The fact that you said that, if you were involved -- I'm taking it to mean, and maybe I'm wrong, if you're involved in sentencing then you are saying you wouldn't be sitting?

MS. BEECH: Then I would say no.

MR. ROSSMAN: You realize your decision here if, in fact, you're to vote –

MR. Bogenschutz: I object to any further questions with this juror.

THE COURT: Overruled.

MR. ROSSMAN: If, in fact, you know, you vote that it's proven, you

have nothing to do with sentencing but the Judge would based on your decision saying it's proven.

MS. BEECH: If the State gives me all the evidence that I can see where you can show me that these individuals did this act, then I- can make a decision on that and based on the decision that you provide me.

MR. ROSSMAN: Well, we don't provide you with a decision.

MS. BEECH: Well, the evidence that I'm given.

MR. ROSSMAN: Yes, ma'am. You said all the evidence. You can do that beyond a reasonable doubt?

MS. BEECH: Yes.

MR. ROSSMAN: The reason I'm asking, I want to make sure – whatever the judge says the law is –

MS. BEECH: Right.

MR. ROSSMAN: Okay

THE COURT: Any questions from the Defense?

MR. HADDAD: None

THE COURT: Thank you, ma' am, I appreciate it.

MS. BEECH: Do I go home?

THE COURT: You got a lot of stuff in that bag.

MS. BEECH: My lunch and my snack.

THE COURT: Thank you, ma' am. Record reflect that the -juror's have left the Courtroom and the door is closed. What say you, Mr. Rossman?

MR. ROSSMAN: My reason is unchanged, I don't believe I can meet her burden. I can meet my burden beyond a reasonable doubt but I cannot meet her burden and that's a concern to me and it has nothing to do with religion or anything else.

THE COURT: Let me hear from the Defense.

MR. WILLIAMS: We object to her being challenged for cause, then he's going to have to come up with a race neutral reason.

MR. ROSSMAN: This is a peremptory.

THE COURT: Over the Defense objection I find that the record sufficiently supports a race neutral reason because of the concern about her responses to the questions. So over your objection it'll be granted.

MR. WILLIAMS: You need to, I think the law requires you to put on the record what the race and reason is.

THE COURT: Well, he –

MR. ROSSMAN: I believe I did that.

THE COURT: Tell me.

MR. BOGENSCHUTZ: If the Court is making the ruling -- so the Court has already made the statement, you find a race neutral reason. We're asking the Court to follow the law and to tell us what that race neutral reason is that's already affected your decision, that's all.

THE COURT: Okay, that's fair enough. Listen, she's a Jehovah Witness, I think there was some discussion about her and the issue of the sentencing part of it, she did waiver along the way there. Look, if it were me making a decision, me perceiving it differently, but out of deference to the person who is the moving party, as long as there's some reason, or suggestion based on her responses and overall nature of her -- and plus I think alternatively, additionally I want to point out I know it's a blind record but there's a number of other African

Americans on the jury, I think that based on the totality of the circumstances I think it rises to the legal of a non biased reason. I understand your point though, it is well taken.

(T. pp. 1827 -1833, PDF pp. 2327-2332).

The defendant appealed the granting of the peremptory strike, and the Fourth District Court of Appeal reversed the convictions finding that the trial court improperly granted the peremptory challenge against the African American prospective juror. The majority, Judge Levine and Judge Gerber, pursuant to parts II and III of the opinion found that this was an improper religious based strike. Pacchiana v. State, 240 So. 3d 803 (Fla. 4th DCA 2018). The majority ruled that members of a religion constitute a cognizable class of people, who are protected from being systematically struck from a jury solely based on their religious beliefs. Id. This Court accepted jurisdiction on December 17, 2018.

SUMMARY OF THE ARGUMENT

The defendant's claim that this was an improper religious based strike was never preserved for review because at the time of the challenge, defense counsel never asked for a religious neutral reason for the challenge. This is contrary to longstanding precedent requiring a contemporaneous objection to **initiate** the Melbourne inquiry.

Additionally, the majority improperly expanded Batson v. Kentucky, 476 U.S 79 (1986) by including members of a religion as a cognizable class of people who are protected from being systematically struck from a jury. By equating religion to race, gender, and ethnicity, the Fourth District Court of Appeal fails to recognize that religion is more than just an affiliation with a generalized group, rather each religion is based upon a set of beliefs.

Finally, the Fourth District Court of Appeal has improperly found that striking a prospective juror based upon their religion is an impermissible "religious test" . However, because a person's religion is based upon a set of beliefs, which may affect his/her suitability to serve as a juror, allowing such challenges serves a legitimate government interest and does not violate the United States nor Florida Constitutions.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED THE PEREMPTORY CHALLENGE.

In this case, the majority, Judge Levine and Judge Gerber, pursuant to parts II and III of the opinion found that the trial court improperly allowed the peremptory challenge to an African American juror, finding that it was an improper religious based strike. The majority ruled that members of a religion constitute a cognizable class of people, who are protected from being systematically struck from a jury solely based on their religious beliefs. This finding expands the holding of Batson v. Kentucky, 476 U.S 79 (1986), and requires the proponent of a peremptory challenge to provide a religious neutral reason for a strike. The State submits that the Fourth District Court of Appeal (a) improperly found that the issue was preserved; (b) improperly expanded Batson; and (c) improperly ruled that striking a juror based upon membership in a religion is an improper religious test in violation of the United States and Florida Constitutions.

(a) Preservation

With respect to preservation, although for different reasons, all three judges found that the defendant's claim that this was an improper religious based strike was preserved for review. This is contrary to longstanding precedent requiring a contemporaneous objection to initiate the Melbourne inquiry, because in this case, at the time the peremptory challenge was made defense counsel never asked for a religious neutral reason for the strike. Instead, counsel maintained that the state had

failed to provide a sufficient race-neutral reason¹.

Melbourne v. State, 679 So.2d 759 (Fla.1996) requires a contemporaneous objection to preserve a claim of racially motivated peremptory challenge. See also Willacy v. State, 640 So.2d 1079 (Fla.1994) (requiring a contemporaneous objection to preserve a claim of unqualified juror); Joiner v. State, 618 So.2d 174 (Fla.1993) (requiring a contemporaneous objection to preserve a claim of improperly selected jury). Preservation of an objection to the use of a peremptory strike requires more than one objection: an objection to initiate a Melbourne inquiry and another objection before the jury is sworn in. See Carratelli v. State, 961 So.2d 312, 318 (Fla.2007); Burgess v. State, 117 So.3d 889, 892 (Fla. 4th DCA 2013). In Spencer v. State, 238 So. 3d 708, 717-718 (Fla. 2018) this Court explained as follows:

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

¹ Part I of the opinion, written by Judge Levine, is not the majority with respect to whether the peremptory challenge was an improper race-based strike, however it is significant because both Judge Gerber and Judge May found that the reason given was race neutral and genuine. Pacchiana v. State, 240 So. 3d 803, 817-819, 822-823 (Fla. 4th DCA 2018).

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).

In Smith v. State, 59 So. 3d 1107 (Fla. 2011), this Court explained that the burden is on the opponent to the strike to prove purposeful discrimination. This includes first determining if the venireperson is a member of a protected class. Id. at 1115. In Smith, the opponent of the strike never demonstrated that the venireperson was a member of a protected class, thus the **initial step** of Melbourne was not satisfied, and the trial court erred when it denied the use of a peremptory challenge.

Here, at the time of the challenge, defense counsel requested a **race-neutral reason** for the state's challenge of this prospective African American juror (T. 1831-1832, PDF 2331-2332). When the trial court issued its final ruling, defense counsel reiterated his objection as follows:

If the Court is making the ruling – so the Court has already made the statement, you find a **race neutral reason**. We're asking the Court to follow the law and to tell us what that **race neutral reason** is that's already affected your decision, that's all.

(T. 1832, PDF 2332). This objection does not preserve the issue that was raised on

appeal, that the venireperson was improperly struck based upon her religion.

Similarly, in Harper v. State, 549 So. 2d 1121 (Fla. 1st DCA 1989), the First District Court of Appeal explained that defense counsel's objection based on State's use of peremptory challenges on the basis of race did not preserve for appellate review the issue of whether the State used its peremptory challenges to systematically exclude women from jury.

The same analysis must be applied here, because the record is clear that at no time during this hearing, nor when the trial judge issued its final ruling, did counsel alert the trial court that he was arguing that religion was a protected class. Instead, five days after the prospective juror was excused, counsel filed a motion for mistrial and to select a new jury, arguing for the first time that the prospective juror was improperly struck based upon her religious beliefs (R. 240, PDF. 254). Arguably, said motion was filed in an effort to preserve the issue, however no such argument was made when the juror was released five days earlier.

Thus, because this argument was not presented to the trial court at the time of the challenge, the claim was not preserved because the defendant failed to satisfy the initial step of Melbourne. (See also Floyd v. State, 569 So.2d 1225, 1229–30 (Fla.1990) (stating that: “a defendant must place the [trial] court on notice that he or she contests the factual existence of the [racially neutral] reason.”). See also Arnold v.

State, 778 So. 2d 1015 (Fla. 3d DCA 2000); Carter v. State, 762 So.2d 1024, 1026 (Fla. 3d DCA 2000).

Moreover, the defense is prohibited from raising a new objection after a prospective juror has been struck. “Joiner rests on the idea that it is a severe step to overturn an otherwise error-free trial based solely on a jury selection error, and particularly on an error involving peremptory challenges. Joiner thus mandates that the claimed error be called to the trial court's attention once more prior to the swearing of the jury, so that the court will be made aware that the objecting party is insisting on the objection, and so that the court will have a last clear chance to take corrective action if needed.” Milstein v. Mutual Sec. Life Ins. Co., 705 So. 2d 639, 640(Fla. 3d DCA 1998).

These tactics amount to nothing more than a catch-22 situation for the state. Here, the defense knew that the race-neutral reason was based upon the prospective juror’s religious beliefs at the time of the strike, yet counsel for the defense never asked for a religious neutral reason until after the juror had been excused, thereby precluding any corrective action by the state or the trial court.

(b) Expansion of Batson v. Kentucky

Turning to the expansion of Batson, the majority, Judge Levine and Judge

Gerber, have improperly ruled that members of any religion are a cognizable class protected under the United States and Florida Constitutions from being systematically struck from juries solely based on their faith. 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 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 (1994). 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).

The majority below relies upon the decision in Joseph v. State, 636 So. 2d 777 (Fla. 3d DCA 1994), for the proposition that it is improper to peremptorily challenge a juror based solely upon his/her religion. However, the majority has wholly misinterpreted and misapplied the holding of the Third District Court of Appeal. The

Third District Court of Appeal determined that the Jewish community was part of a protected **ethnic group**. The Court did not find that religion was a protected class. Moreover, in determining whether a Jewish venireperson was a member of protected ethnic group, the court conducted the following analysis, which was not done in this case:

Applying the two-pronged test for cognizability, we conclude that Jews are a cognizable class. The first prong of the test is whether the **group's population is large enough that the general community recognizes it as an identifiable group**. Alen, 616 So.2d at 454. The Jewish population of Dade County, the county from which this venire was drawn, meets this element. The Jewish population of Dade County in 1990 was approximately 202,000 people. See Ira M. Sheskin, The Jews of South Florida, in South Florida: The Winds of Change 163, 177 (Thomas D. Boswell ed., 1991). The 1990 U.S. Census reported the total Dade County population as 1,937,094.3 Florida Statistical Abstract 15 (Anne H. Shermeyen ed., 26th ed., 1992). Consequently, Jews make up approximately 10% of Dade County's population. We conclude that both the percentage and absolute number of Jews in the Dade County population satisfies the first prong of the Alen cognizability test.

The second prong of the cognizability test, **internal group cohesiveness, is also satisfied. Shared religious beliefs are one characteristic of an ethnic group**. Alen v. State, 596 So.2d 1083, 1085 (Fla. 3d DCA 1992) (en banc), approved, 616 So.2d 452 (Fla.1993). **Jews share a large core of attitudes and ideas which stem from their common religious beliefs**. It is common knowledge that Jews celebrate their sabbath on Saturday, not Sunday, and do not celebrate Christmas. These two facts alone significantly distinguish Jews from other segments of society. Jews also celebrate their own important religious holidays. **Finally, Jews share a common experience of persecution which distinguishes them from other segments of society**, such as the attempted genocide of Jews, for reasons based solely upon their religion, at the hands of the Nazis. This internal cohesiveness of beliefs and experiences more than meets the

second element of the Alen test.

Finally, **Jews are sufficiently objectively discernible from the rest of the community in order to be classified as a cognizable class.** A person's surname is a recognized characteristic of membership in a cognizable class. Alen, 616 So.2d at 455. From the record before us, **Ms. Friedman's name appears to have been the only indicia that she was possibly Jewish**, and was properly considered in raising a Neil objection. Other objective criteria which indicate that a person is Jewish, such as the wearing of a yarmulke, a six-pointed star, or the distinctive attire of Hassidic Jews, may be present in other cases. Therefore, since **Jews are objectively discernible**, we conclude that Jews are a cognizable class under Alen. See Alen, 596 So.2d 1083, 1087 n. 2 (Fla. 3d DCA 1992) (en banc) (Phillip Hubbart, J., concurring) (“Jewish Americans might also qualify for Neil protection as a protected religious group.”), approved, 616 So.2d 452 (Fla.1993); see also Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 107 S.Ct. 2019, 95 L.Ed.2d 594 (1987) (holding that Jews are a protected group under 42 U.S.C. § 1982); Bachman v. St. Monica's Congregation, 902 F.2d 1259 (7th Cir.1990) (holding that Jews are a “race” for purposes of 42 U.S.C. §§ 1981, 1982); United States v. Gelb, 881 F.2d 1155, 1161 (2d Cir.) (holding that Jews are a cognizable group for purposes of sixth amendment fair cross-section analysis), cert. denied, 493 U.S. 994, 110 S.Ct. 544, 107 L.Ed.2d 541 (1989). A peremptory challenge exercised against a potential juror solely because the juror is Jewish violates the Florida Constitution.

Joseph, 636 So. 2d 777, 780-781(Footnotes omitted).

The protection afforded to Jewish venire members was not based on religious beliefs and/or affiliation, rather the Third District Court of Appeal explained that religion is one characteristic used to determine if the Jewish Community was a protected **ethnic group**, thus the majority’s reliance on Joseph is wholly misplaced. Joseph did not find that in general all religious faiths are protected under Batson, rather

the Court conducted a specific analysis to determine if members of the Jewish Community in Miami were a protected ethnic group².

In this case, the issue was not whether the venire member was part of a protected ethnic group. Below, the majority failed to conduct the analysis required by Joseph to determine if a Jehovah Witness is a member of a protected class. The Fourth District Court of Appeal did not find that the Jehovah's Witness population is large enough that the general community recognizes it as an identifiable group. Nor did the majority find that Jehovah's Witnesses share an internal cohesiveness, other than religious beliefs. Finally, the majority failed to address if Jehovah's Witnesses are objectively discernible from the rest of the community. Because it is impossible to conduct such an analysis in this case, as the record is devoid of any evidence that a Jehovah Witness would qualify for the same protection as a Jewish venireperson, this Court must find that the Fourth District erred when it when it expanded Batson to religion in general.

The Fourth District Court of Appeal instead made a blanket determination that Batson should be expanded to religion. By equating religion to race, gender and ethnicity, the Fourth District Court of Appeal fails to recognize that religion is more than just an affiliation with a generalized group, rather each religion is based upon a set

² Peremptory challenges may not be used to exclude prospective jurors because of their race, ethnicity, or gender. Busby v. State, 894 So.2d 88, 98 (Fla.2004).

of beliefs. Logic dictates that if a person is a member of a specific religion they subscribe to those religious beliefs. See Casarez v. State, 913 S.W. 2d 468, 494-495 (Court of Crim. App. Tex. 1994) (En Banc)(declining to extend Batson to peremptory strikes based upon religion because holding that a venire member may not be excluded on account of his/her religious preference, means that he/she may not be struck on account of personal beliefs, and therefore undercuts the essential features of our jury selection system). Additionally, in State v. Davis, 504 N.W.2d 767 (Minn.1993) cert denied, Davis v. Minnesota, 511 U.S. 1115 (1994), the Supreme Court of Minnesota concluded that the federal constitution does not prohibit a party from exercising a peremptory challenge on the basis of religion.

Moreover, in People v. Martin, 64 Cal.App.4th 378, 385, 75 Cal.Rptr.2d 147 (1998), the court found that the peremptory challenge of a juror on the basis of the juror's relevant personal views is not improper even though those views may be founded in the juror's religious beliefs. There, the prosecutor struck a Jehovah's Witness because, in his experience, they had a hard time with criminal trials as "they couldn't judge anybody at all." (Id. at p. 381, 75 Cal.Rptr.2d 147.) Although the prospective juror "did not express actual reservations about her ability to deliberate," the court nevertheless found that "[t]he prosecutor's perception that the juror's religious views might render her uncomfortable with sitting in judgment of a fellow

human being was a specific bias related to the individual juror's suitability for jury service" sufficient to support the strike. (Id. at p. 384, 75 Cal.Rptr.2d 147.)

Comparably in this case, the prosecutor explained that based upon his experience Jehovah's Witnesses have said that they can't sit in judgment based upon their beliefs (T. 1827, PDF 2327). Thus, the prospective juror was properly struck based upon her beliefs, which would influence how she would consider the case. This is apparent from her responses to the prosecutor's questions wherein she explained she would have an issue with sentencing and that the state would have to prove the case with concise and clear-cut evidence (T. 1830-1831, PDF 2330-2331). Moreover, the prosecutors experience with Jehovah's Witnesses plus his concern that he could not meet her burden (T. 1831, PDF 2331), provided proper reasons for the challenge³.

The majority ignores longstanding precedent that a peremptory challenge is presumed to be exercised in a non-discriminatory manner. Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996).

³ Undersigned would also argue that should this Court find that the peremptory challenge against the African American Juror was based upon religion rather than race, the prosecutor's reasons were religious neutral, because the prosecutor explained that he could not meet her burden to provide clear cut and concise evidence, thus the trial court properly denied relief under the tipsy coachmen doctrine. See, e.g., Robertson v. State, 829 So.2d 901, 906 (Fla. 2002) (recognizing that the "tipsy coachman" doctrine is a longstanding principle of appellate law that allows an appellate court to affirm a trial court that reaches the right result but for the wrong reason so long as there is any basis which would support the judgment in the record).

In his concurring opinion in Jones v. State, 229 So. 3d 834 (Fla. 4th DCA 2017), Judge Klingensmith, in expressing his dismay as to the erosion of the peremptory challenge, reasoned as follows:

Sometimes, prospective jurors will give an experienced attorney nothing more than a “bad vibe” that cannot be reduced to the record. **Experienced trial lawyers develop gut feelings about jurors that are often difficult to articulate to a judge and may not rise to a level supporting a “for cause” strike. This does not mean that such an attorney is not being “genuine” regarding his or her reasons for exercising a “neutral” strike in the ordinary sense of the word; it simply means that our case law requires trial judges to accept or reject the proffered reason as a permissible use of the peremptory, often based on little more than their experience, judgment and intuition.**

(Emphasis added).

This reasoning underscores the fact that in this case the Fourth District Court of Appeal has declined to presume that the peremptory challenge was exercised in a non-discriminatory manner, and expanded Batson to religion in general, without ever determining how religion is a cognizable class. See Joseph, supra. The majority has improperly deemed the prosecutor’s reason, which was based upon his experience, as a stereotype, however there is nothing in the record to support such a finding. Thus, the Fourth District Court of Appeal improperly expanded Batson to religion and this Court must reverse the decision of the Fourth District Court of Appeal and affirm the convictions and sentences.

Additionally, the Fourth District Court of Appeal found that a juror cannot be struck based upon his or her religious beliefs unless it can be shown that the juror cannot be fair and impartial based upon said juror's religious beliefs. This finding improperly conflates a peremptory challenge to a challenge for cause. It has long been the law that the reasons given for exercising a peremptory challenge need not be equivalent to a challenge for cause. Happ v. State 596 So. 2d 991, 998 (Fla. 1991), rev'd on other grounds, 506 U.S. 949 (1992); Rodriguez v. State, 826 So.2d 494 (Fla. 4th DCA 2002). Indeed, where a prospective juror is challenged for a race-neutral reason, the fact that the juror asserts that he or she can nevertheless be fair and impartial does not mean that the challenging party must be satisfied with the response. See Symonette v. State, 778 So.2d 500, 503 (Fla. 3d DCA), rev. denied, 794 So.2d 606 (Fla.2001); see also Rodriguez.

Rather, as reasoned by Judge May in her dissent, “[r]equiring the defendant to show actual bias-the standard applicable to cause challenges-for the forced expenditure of a peremptory challenge renders the separate statutory grant of peremptory challenges totally meaningless.” Busby v. State, 894 So. 2d 88, 100 (Fla. 2004). “The fact that some unbiased juror may be excused in the process is an affordable price to pay for removing doubts about a particular juror's impartiality and competence, especially when the vote of one biased juror can make a critical difference.” Davis, 504

N.W.2d at 770. Thus, because the Fourth District Court of Appeal has improperly required the state to establish actual bias based upon the juror's religious beliefs, it has rendered the statutory grant of peremptory challenges totally meaningless.

(c) Challenging a Prospective Juror Based upon Religious Beliefs is not an Improper Religious Test

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 Constitutions. 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 protection 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 offensive to the United States Constitution. Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

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 on 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; Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

Again, in Casarez, 913 S.W. 2d at 494-495, the Texas Court of Criminal Appeals, sitting en banc, found that peremptorily striking a person based upon his/her religious beliefs does not violate United States Constitution. Instructive is the following reasoning:

Supreme Court precedent makes it clear that religious classifications are constitutionally impermissible unless there is an unusually persuasive, perhaps even a compelling, justification for them. Id. at 246–47, 102 S.Ct. at 1684–85. In the present context, of course, that justification begins with the now well-known and generally accepted proposition that peremptory challenges promote selection of a jury that will be fair and impartial to both parties. This objective is, of course, fundamental to the jury system as presently conceived. So long as our method of litigation is adversarial, it is essential not only that the triers of fact be neutral and objective, but that the parties perceive them to be so. Implementing the unarticulated individual preferences of the parties achieves this purpose in a way no other method can, because it permits them to evaluate the desirability of prospective jurors according to their own subjective criteria.

But it is not ultimately the value of peremptory challenges “as an institution” that must be balanced against the evil of invidious discrimination. **Rather, it is the extent to which peremptory challenges**

based on a particular classification actually make a significant contribution to securing a fair and impartial jury. J.E.B., 511 U.S. at ———, 114 S.Ct. at 1425–26. The use of peremptory challenges to exclude persons of a certain race or sex does not make such a contribution because the implication that such persons cannot be fair or will not be impartial implicitly attributes to them beliefs or attitudes on account of their race or sex which they may not actually hold. “Striking individual jurors on the assumption that they hold particular views simply because of their [race or] gender ... [therefore] denigrates the dignity of the excluded juror” without significantly improving the chances of fairness and impartiality on the jury. *Id.* at ———, 114 S.Ct. at 1428.

But excluding prospective jurors on the basis of their religious affiliation does promote fairness and impartiality on the jury. And it does so without denigrating the dignity of any individual veniremembers. **With few exceptions, the only significant thing that members of a religious faith have in common is their belief in certain principles, doctrines, or rules. To the extent that they have historically been the objects of discrimination, it is on account of these beliefs and not on account of anything else. Yet discrimination on the basis of personal belief has always been considered appropriate in the jury selection context because a veniremember's beliefs reveal an especially important bit of information about his suitability for jury service.** They tell us what some of his sympathies and prejudices are.

(Emphasis added)

Instructive is caselaw regarding prospective jurors who voice objections to the death penalty based upon religious beliefs. In *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court held that jurors in a death penalty case may not be excluded merely “because they voiced general objections to the death penalty or express conscientious or religious scruples against its

infliction.” The proper standard for evaluating such a claim is “whether a juror's views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’ ” Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1985)). The United States Supreme Court has held that persons whose religious beliefs prevent them from considering the death penalty are **not a distinctive group** for the purpose of determining whether a jury was chosen from a representative cross section of the community. Buchanan v. Kentucky, 483 U.S. 402, 415 (1987); Lockhart v. McCree, 476 U.S. 162, 175–176(1986).

The same analysis should be applied to a peremptory challenge made by the prosecutor based upon his experience coupled with the juror’s answers to the questions posed. Instead, the majority below has reasoned that when the state decides to strike a juror before discussing if her faith would influence her decision, it becomes the state’s de facto position that a member of that religion can effectively never sit on a jury. This is not what happened in this case and ignores the fact that the prospective juror was not struck solely based upon religion. Here, the state’s reason was not limited to the prospective juror’s religious beliefs, rather it was also based upon the fact that after questioning, the prosecutor believed he could not meet her burden of providing clear and concise evidence of guilt, based upon his experience.

Because a person's religion is wholly based upon a set of beliefs and principles, which may affect his/her suitability to serve on a jury, and directly impacts if a jury will be fair and impartial, allowing such challenges serves a legitimate government interest and therefore does not violate the United States nor Florida Constitutions. Thus, peremptorily challenging a juror based upon her religious beliefs is not an impermissible religious test.

Alternatively, even if this Court finds that the prospective juror was improperly challenged, there has been no showing in this case that not having prospective juror Beech on the panel prejudiced the defense. It has long been the law that defendant has no right to any particular juror or jurors, only a fair and impartial jury. Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988) (“So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.”); Lambrix v. Dugger, 5299 So. 2d 1110 (Fla. 1988); Piccott v. State, 116 So.2d 626 (Fla.1959), cert. denied, 364 U.S. 293, 81 S.Ct. 106, 5 L.Ed.2d 83 (1960); Dunaway v. State, 90 Fla. 142, 143, 105 So. 816, 816 (1925) (“As a matter of right, defendant was entitled to no particular jury or jurors to try his case. He was entitled to a fair and impartial jury, and it is not claimed or intimated that the jury finally selected and sworn and by whom defendant was tried was not all that the law required.”). In this case, the

defense has never argued nor established that the jury that sat was not fair and impartial. Thus, because the defendant cannot establish prejudice, the decision of the Fourth District Court of Appeal must be reversed, and the convictions and sentences must be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court reverse the opinion of the Fourth District Court of Appeal,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically to this Court and to Fred Haddad, Esq. at dee@fredhaddadlaw.com this 7th Day of February 2019.

/s/ Melanie Dale Surber
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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 14-point Times New Roman Type.

/s/ Melanie Dale Surber
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