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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 18-655

STATE OF FLORIDA,
Petitioner,

vs.

JOHN PACCHIANA,
Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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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

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). 7,8

Harrell v. State, 894 So.2d 935, 940 (Fla. 2005). 3

Ivey v. State, 43 Fla.L.Weekly D.413d (Fla. 1st DCA 2018).. 5

Jackson v. State, 464 So. 2d 1181 (Fla. 1985). 6

Johnson v. State, 43 Fla.L.Weekly D.205 (Fla. 1st DCA 2018). 4

Joiner v. State, 618 So.2d 174 (Fla. 1993) 1,5

Joseph v. State, 636 So.2d 777 (Fla. 3rd DCA 1994).. 8

Laidler v. State, 627 So.2d 1263 (Fla. 4th DCA 1993). 9

Love v. State, 43 Fla.L.Weekly D.1016 (Fla. 3rd DCA, May 11, 2018) 2

Martin v. State, 43 Fla.L.Weekly D1016c (Fla. 2nd DCA, May 4, 2018). 2

Melbourne v. State, 679 So.2d 759 (Fla. 1996).. 1,5

O'Connor v. State, 9 Fla. 215 (1860).. 6

Olibrices v. State, 929 So.2d 1176 (Fla. 4th DCA 2006).. 8

Shelby v. State, 301 So. 2d 461 (Fla. 1st DCA 1974).. 6

State v. Alen, 616 So.2d 452 (Fla.1993), approving,
596 So.2d 1083 (Fla. 3rd DCA 1992). 8,9

State v. Neil, 457 So.2d 481 (Fla. 1984). 8,9

State v. Slappy, 522 So.2d 18 (Fla. 1988), *cert. denied*, 487 U.S. 1219 (1988). . . . 9

Swain v. Alabama, 380 U.S. 202 (1965). 7

SUMMARY OF THE CASE AND FACTS

The lengthy opinion of the Fourth District Court of Appeals contains the relevant facts necessary to this Court's jurisdiction and is attached to the State's Brief in Support of Jurisdiction.

SUMMARY OF THE ARGUMENT

The Court ought to decline to accept discretionary review under all applicable authority since the decision does not expressly nor directly conflict with *Joiner v. State*, 618 So.2d 174 (Fla. 1993), nor *Melbourne v. State*, 679 So.2d 759 (Fla. 1996) and the decision does not construe the Constitution of either the United States or Florida in any manner inconsistent than what has been held before or in such a way as to mandate issuance of the Writ of Certiorari.

ARGUMENT

> THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION OF THIS MATTER AS THERE IS NO BASIS THAT WAS ESTABLISHED BY THE PETITIONER TO SO DO.

Rule 9.030(2) of the Florida Rules of Appellate Procedure "Discretionary Review" provides as follows:

> The discretionary jurisdiction of the Supreme Court may be sought to review
>
> A. Decisions of district courts of appeal that

(ii) expressly construe a provision of the state or federal constitution;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;

Article V, Section 3 of the Florida Constitution provides similarly. This obviously is not a situation of certified conflict such as recently occurred when the Third District Court of Appeals in *Love v. State*, 43 Fla.L.Weekly D.1016 (Fla. 3rd DCA, May 11, 2018) expressly certified conflict with the Second District Court of Appeals and its decision in *Martin v. State*, 43 Fla.L.Weekly D1016c (Fla. 2nd DCA, May 4, 2018) on the issue of the retroactivity of the "Stand Your Ground" Amendment on burden of the State. The State of course is questioning in the opening argument for jurisdiction the ultimate unanimous holding of the Court, despite a dissent on a different aspect of the case, that the issues were preserved for appeal. The dissenting judge agreed with Judge Levine that the initial objections preserved the issue.

Judge Levine observed that the original objection "can we get a race neutral reason", coupled with the statement of co-counsel after the prosecutor stated "she's a Jehovah witness", that "that's a religious based strike" was sufficient to preserve the objection, particularly considering the entire inquiry of the Court of the juror and the

statements of the prosecution. As Judge Levine found:

> Regardless, even though it was not required, the defense did put the court on notice that it was objecting to the legitimacy of the reason given by the state for the strike. Specifically, in response to the state's proffered reason that the prospective juror was a Jehovah's Witness, counsel for one of the co-defendants stated, "That's a religious based strike." The fact that this objection was made by counsel for a co-defendant rather than appellant's defense counsel is of no importance. The purpose of the rule requiring a timely contemporaneous objection is to "place the trial judge on notice that error may have been committed, and provide him an opportunity to correct it at an early stage of the proceedings." *Harrell v. State*, 894 So.2d 935, 940 (Fla. 2005). The objection by the co-defendant's counsel achieved the objective of this rule. The court clearly understood the alleged error and brought the prospective juror in for further questioning.

Chief Judge Gerber, dissenting as to this initial finding did note that, although he disagreed:

> I recognize that my colleague Judge May, in her articulate dissent below, agrees with Judge Levine that the co-defendant's counsel's statement, "That's a religious based strike," when added to the ensuing discussion regarding the prospective juror's religion, amounted to preserving the defendant's religion-based objection. Respectfully, I disagree with both of my colleagues. Although the defendant ultimately preserved his religion-based objection through his later-filed motion for mistrial and to select a new jury, which he filed before the jury was sworn, the portion of the record which I have quoted above clearly demonstrates that the defendant did not preserve his religion-based objection until he filed that motion later. [Emphasis supplied]

The Petitioner failed to present any basis for the granting of certiorari review on the issue and two recent cases should also be considered by the Court on the issue of whether any conflict exists on the preservation issue: In *Johnson v. State*, 43 Fla.L.Weekly D.205 (Fla. 1st DCA 2018) decided January 22, 2018, the First District Court of Appeals discussed an issue quite akin to the issue at bench. To quote from the opinion 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 of *Melbourne* . . . [Emphasis supplied].

At bench, the Co-Defendant [and an objection by one was an objection by all by agreement] stated it was a religious based challenge and the entirety of the

conversation was solely about that reason, that is the juror's religion.

The second case that supports the finding of preservation by all judges of the panel is the decision, again of the First District Court of Appeals on February 20, 2018 is titled *Ivey v. State*, 43 Fla.L.Weekly D.413d (Fla. 1st DCA 2018), wherein the Court certified the following question to this Court:

> Has a defendant who accepts a jury, but renewed a previously-raised objection to a state peremptory challenge after the challenged juror has been excused but before the jury is sworn, waived that objection?

Of course, the Respondent at bench never accepted the jury before renewing his objection by motion but importantly, in its ruling the First District Court of Appeals held the objection was not waived despite acceptance by Mr. Ivey, citing to *Joiner v. State*, 618 So.2d 174 (Fla. 1993).

The *Ivey* Court observed:

> We view this important question as unanswered, or at least left open, under the decision in *Joiner v. State*, 618 So. 2d 174, 176 (Fla. 1993). In that case, the defendant "affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection." *Id.* The Court said that "counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection." *Id.* It noted, however, that:
>
> > Had [defendant] renewed his objection or accepted the jury subject to his earlier [peremptory] objection, we would rule

> otherwise. Such action would have apprised the trial judge that [defendant] still believed reversible error had occurred. *At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.*

> Id. (emphasis added). As the italicized language reflects, the Court envisioned three options at the time of the renewed objection: recall the challenged juror, strike the panel and start over, or stand pat.
>
> But once a jury is accepted and a challenged juror is dismissed and unavailable, as in this case, only two options remain: strike the panel or stand by the prior ruling. That only two of these three options remain after jurors are *dismissed*, however, does not strike us as a basis to alter the long-standing principle that a defendant has a right to lodge an objection up until the jury is *sworn*, as Ivey did in this case. *See, e.g.*, *Jackson v. State*, 464 So. 2d 1181, 1183 (Fla. 1985); *O'Connor v. State*, 9 Fla. 215, 229 (1860); *Shelby v. State*, 301 So. 2d 461, 462 (Fla. 1st DCA 1974). Drawing the line at this point makes the most sense because it is the final step before the jury selection process ends and trial begins. As such, we pass upon the certified question and answer it in the negative.

Petitioner, based upon the above two recent cases as well as the unanimous ultimate finding of the Fourth District Court of Appeals on preservation by objections and motions, submits there is no "preservation" issue for this Court to consider; the standard necessary for certiorari review, express or direct conflict has not been met and the Court should resolve this issue against Petitioner.

Similarly, there is no basis for a certiorari being granted on the ultimate decision of the Court. The majority decision is detailed, fully reasoned, analyzed and supported by case law. The Petitioner urges this Court to accept, as Chief Judge Gerber said, "an articulate dissent", and seeks to have the matter considered on certiorari review where no basis for jurisdiction exists.

Judge May began her dissent with the statement "the future of the peremptory challenge is tested in this appeal from a premeditated murder conviction", echoing the opening of the dissent in *Batson v. Kentucky*, 476 U.S. 79 (1986), authored by Chief Justice Burger, joined by Justice Rehnquist:

> Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain v. Alabama*, 380 U.S. 202 (1965).

The Petitioner in a one paragraph presentation seeks to have jurisdiction invoked because, "[i]n this case, the Fourth District Court of Appeal expressly found that under *Batson*, members of a religion constitute cognizable class, who are entitled to Equal Protection, under the United States and Florida Constitutions from being systematically struck from juries solely based on their faith". The key word, it is submitted, is <u>State</u> Constitution.

The Third District Court of Appeals and the Fourth District Court of Appeals

have previously extended the same protections under the State Constitution and hence it is suggested whether the United States Supreme Court has is of no particular moment, although that seems the logical extension, see *Joseph v. State*, 636 So.2d 777 (Fla. 3rd DCA 1994).

In *Joseph v. State*, *supra*, the Court authored the following based upon the decision of this Court in *State v. Neil*, 457 So.2d 481 (Fla. 1984):

> This brings us to the narrow question which we today address: Do Jews constitute a cognizable class under Alen [*State v. Alen*, 616 So.2d 452 (Fla.1993)], rendering the peremptory challenge of a Jewish venireperson, based solely upon the venireperson being Jewish, unconstitutional under the Florida Constitution and Neil? We answer this question in the affirmative.

The Third District Court of Appeals stated most clearly, which rather defeats the greater part of the Petitioner's one paragraph presentation that:

> We are careful to point out that our decision is grounded upon principles of state constitutional law. See Art. I, Sec. 16, Fla. Const.; Alen; Neil. Having concluded that the Florida Constitution prohibits the kind of discrimination involved in this case, we do not analyze this issue under the federal constitution or caselaw. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). [Emphasis supplied]

Instructive also, and again a basis to deny certiorari is the Fourth District Court of Appeals decision in *Olibrices v. State*, 929 So.2d 1176 (Fla. 4th DCA 2006), cited by both the majority and the minority, and in that decision the Court, with no dissent,

held:

> We conclude 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. [Emphasis supplied]
>
> [*State v. Neil*, 457 So.2d 481 (Fla. 1984), *State v. Slappy*, 522 So.2d 18 (Fla. 1988), *cert. denied*, 487 U.S. 1219 (1988)].

The majority opinion follows existing law, the Appellate Court found the facts support the adherence to the existing law, and ordered as is required by such a finding, a new trial. The dissent, Judge May, had a different application of the facts. That does not provide a basis for the granting of a writ of certiorari.

CONCLUSION

WHEREFORE the Petition for Writ of Certiorari should be denied.

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 June, 2018.

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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.

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