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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.

PETITIONER'S BRIEF ON JURISDICTION

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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.

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". The opinion of the Fourth District Court of Appeal is attached as an appendix and will be referred to as such.

STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court's discretionary jurisdiction under Art. V, § 3(b)(3), Fla. Const. are those set forth in the opinion (Appendix).

SUMMARY OF THE ARGUMENT

This Court has clear authority to accept discretionary review pursuant to Rule 9.030(a)(2)(A)9ii0 and(iv), Fla. R. App. P., and Article V, Section 3(b)(4) of the Constitution of the State of Florida since the instant decision expressly and directly conflicts with the decisions of this Court in Joiner v. State, 618 So. 2d 174 (Fla. 1993) and Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996), and the Court expressly construed the State and Federal Constitutions.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION SINCE THE DECISION OF THE FOURTH DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE Joiner v. State, 618 So. 2d 174 (Fla. 1993) AND Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996)AND EXPRESSLY CONSTRUES THE STATE AND FEDERAL CONSITITUTIONS.

On February 14, 2018, the Fourth District Court of Appeal issued an opinion reversing the Respondent's conviction for first-degree murder. The Court ruled that the trial court improperly granted a peremptory challenge against an African American prospective juror based upon the fact that she was a Jehovah's Witness. The Court found members of a religion constitute a cognizable class of people, who are protected from being systematically struck from a jury.

The State respectfully submits that jurisdiction lies with this Court for two reasons. First, the Fourth District Court of Appeal improperly found the error was preserved. This finding, conflicts with this Court's decisions in Joiner v. State, 618 So. 2d 174 (Fla. 1993) and Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996). Secondly, the Fourth District Court of Appeal improperly expanded the holding of Batson v. Kentucky, 476 U.S 79 (1986), to religion, and in doing so expressly construed the State and Federal Constitutions, as it reasoned that challenging a prospective juror based upon membership in a religion, is an improper religious test that violates United States and Florida Constitutions.

A. Conflict Jurisdiction

This Court has clear authority to accept discretionary review pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., and Article V, Section 3(b)(4) of the Constitution of the State of Florida since the instant decision expressly and directly conflicts with the decisions of this Court in Joiner v. State, 618 So. 2d 174 (Fla. 1993) and Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996).

In this case, at the time of the peremptory challenge, the defense requested a **race-neutral** reason for the challenge of this prospective African American juror. At no time prior to the juror being excused did counsel request a religious neutral reason. The Fourth District Court of Appeal noted that defense counsel commented that this was a religious based strike. However, trial counsel never requested a religious neutral reason at the time of the challenge.

In fact, as explained by Judge Gerber in his concurring opinion, at the time the prospective juror was excused, defense counsel only requested that the court make a record finding that the reasons provided were race neutral. Pacchiana v. State, 43 Fla. L. Weekly D367, *12-13 (Fla. 4th DCA, February 14, 2018). Judge Gerber, further explained that such a religion-based reason was both facially race-neutral (because religion and race are obviously two different things facially) and genuinely race-neutral (because the defendant did not satisfy his burden of persuasion to

show that the state was using its religion-based reason as a pretext to strike the prospective juror because of her race). Id. at *13.

However, Judge Gerber joined the majority opinion because he found that a motion filed five days after the juror was excused, which for the first time included a religious based objection, was sufficient to preserve the issue. However, this analysis is also contrary to longstanding precedent. Thus, **any finding** that the claim was properly preserved conflicts with this Court's caselaw.

It has long been the law that a party concerned about the other side's use of peremptory challenges must make a **timely objection** and demonstrate on the record that the challenged persons are members of a protected class and that there is a strong likelihood that they have been challenged solely because of their membership in this class. State v. Slappy, 522 So. 2d 18, 21 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 10 L.Ed.2d 909 (1988).

Assuming, but not conceding, that the above is applicable to religion as opposed to race, gender, or ethnicity, Appellant failed to meet his initial burden as he never timely requested a religious neutral reason for the challenge. This Court's decision in Melbourne v. State, 679 So.2d 759, 764(Fla. 1996), provided as follows:

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.

In addition to the **initial objection**, and ensuring that any factual dispute is noted for the record, this Court has also held that the opponent of a peremptory strike has a duty to **renew the objection** in order to preserve the issue for appellate review. Joiner v. State, 618 So.2d 174, 176 (Fla. 1993) (holding that to properly preserve the issue, an opponent of a peremptory strike must renew his or her objection or accept the jury subject to his or her earlier objection); see also Melbourne, 679 So.2d at 765 ("Melbourne failed to preserve this issue for review because she did not renew her objection before the jury was sworn." (citing Joiner, 618 So.2d at 176)).

Here, the Respondent's initial objection, requesting a race-neutral reason for the challenge, was insufficient to preserve the argument regarding religion which was raised on appeal. Here, the state explained that the juror was a Jehovah's Witness, and based upon the prosecutor's experience, Jehovah's Witnesses have always said that they can't sit in judgment. Pacchiana, 43 Fla. L. Weekly D367, *2. After the juror was further questioned the prosecutor reiterated that his reason was unchanged, and argued that he did

not believe he could meet the prosepective juror's burden. Id. Defense counsel argued that this was an **insufficient race neutral reason**, and asked the Court to "follow the law and to tell us what that **race neutral reason** is that's already affected your decision". Id. at *12.(Emphasis Added).

Defense counsel never requested a religious neutral reason and waited until 5 days after the juror had been excused to raise the issue with respect to religion in a written motion. Such a motion filed after the juror had been released cannot preserve a claim which was never raised at the time of the challenge. Thus, the opinion of the Fourth District Court of Appeal conflicts with this Court's decisions in Melbourne and Joiner, and this Court should exercise jurisdiction to resolve this conflict.

B. Expressly Construed the Equal Protection Clauses of the State and Federal Constitutions.

This Court has clear authority to accept discretionary review pursuant to Rule 9.030(a)(2)(A)(ii), Fla. R. App. P., since the instant decision expressly construes the Equal Protection provisions of the State and Federal Constitutions.

In 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. Pacchiana, 43 Fla.

L. Weekly D367, * 8. The Fourth District Court of Appeal, for the first time in Florida, expanded the holding of Batson to include religion, and further found that striking a potential juror from jury service based solely on membership in a religion, no matter what the juror says during voir dire, is an impermissible "religious test" in violation of the United States and Florida Constitutions. Thus, this Court should exercise jurisdiction because, the Fourth District Court of Appeal has expressly construed the State and Federal Constitutions and found that a peremptory strike may not be based upon religion, as it is a cognizable class under Batson.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court accept discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Petitioner's Brief on Jurisdiction" has been furnished electronically Fred Haddad, Esquire,

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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 12-point Courier New Type.

/s/ Melanie Dale Surber
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