

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC18-655

STATE OF FLORIDA,

Petitioner,

vs.

JOHN PACCHIANA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT.....3

ARGUMENT4

THE TRIAL COURT PROPERLY GRANTED THE
PEREMPTORY CHALLENGE.

CONCLUSION.....15

CERTIFICATE OF SERVICE.....16

CERTIFICATE OF TYPE SIZE AND STYLE.....16

TABLE OF AUTHORITIES

Cases

<u>Abshire v. State</u> , 642 So.2d 542 (Fla.1994)	7
<u>Arnold v. State</u> , 778 So. 2d 1015 (Fla. 3d DCA 2000)	7
<u>Batson v. Kentucky</u> , 476 U.S 79 (1986)	3, 7
<u>Carter v. State</u> , 762 So.2d 1024 (Fla. 3d DCA 2000)	7
<u>Casarez v. State</u> , 913 S.W. 2d 468 (Court of Crim. App. Tex. 1994)	8
<u>Crews v. State</u> , 921 So. 2d 864, (Fla. 2006).....	10
<u>Dobbert v. State</u> , 409 So. 2d 1053 (Fla. 1983).....	10
<u>Dorsey v. State</u> , 868 So. 2d 1192(Fla. 2003)	7
<u>Farina v. State</u> , 801 So. 2d 44 (Fla. 2001).....	10
<u>Floyd v. State</u> , 569 So.2d 1225 (Fla.1990).....	7
<u>Harper v. State</u> , 549 So. 2d 1121 (Fla. 1st DCA 1989).....	6
<u>Johnson v. State</u> , 235 so. 3d 1054 (Fla. 3d DCA 2018).....	5
<u>Joseph v. State</u> , 636 So. 2d 777 (Fla. 3d DCA 1994).....	12
<u>Lockhart v. McCree</u> , 476 U.S. 162, 106 S. Ct. 1758 (1986).....	8
<u>Muhammad v. State</u> , 782 So.2d 343 (Fla.2001).....	7
<u>Olibrices v. State</u> , 929 So. 2d 1176 (Fla. 4th DCA 2006).....	13

<u>Pacchiana v. State</u> , 240 So. 3d 803 (Fla. 4th DCA 2018)	4
<u>People v. Martin</u> , 64 Cal.App.4th 378, 75 Cal.Rptr.2d 147 (1998)	9
<u>Smith v. State</u> , 59 So. 3d 1107 (Fla. 2011)	5
<u>Spencer v. State</u> , 238 So. 3d 708 (Fla. 2018)	5
<u>State v. Alen</u> , 616 So.2d 452 (Fla.1993)	7, 12, 13
<u>State v. Davis</u> , 504 N.W.2d 767 (Minn.1993).....	7, 9, 10
<u>State v. Neil</u> , 457 So. 2d 481 (Fla. 1984)	13
<u>State v. Slappy</u> , 522 So.2d 18 (Fla. 1988).....	13
<u>U.S. v. Prince</u> , 647 F. 3d 1257 (10th Cir. 2011)	8
<u>U.S. v. Villareal</u> , 963 F. 2nd 725 (5th Cir. 1992).....	8
 Rules	
Fla. R. App. P. 9.210.....	16

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

Undersigned relies upon the statement of case and facts as set forth in the Initial Brief on the Merits.

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 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, the Respondent has argued that the trial court was aware of the religious based nature of the race objection. Respondent claims that besides making a race-based objection, trial counsel also made a religious based objection. However, this claim completely belies the record, as it is clear that trial counsel never sought a religious neutral reason for the peremptory strike. Here, trial counsel consistently argued that the fact that the prospective juror was a Jehovah's Witness was an insufficient race-neutral reason and specifically asked the trial court to explain why it was finding the prosecutor's explanation race-neutral (T. pp. 1827 - 1833, PDF pp. 2327-2332). Moreover, both Judge Gerber and Judge May found that the fact that the prospective juror was a Jehovah's Witness, was properly race neutral and genuine. Pacchiana v. State, 240 So. 3d 803, 817-819, 822-823 (Fla. 4th DCA 2018).

Turning to the issue at hand, it has long been the law that :

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.

Smith v. State, 59 So. 3d 1107, 1112 (Fla. 2011); Spencer v. State, 238 So. 3d 708, 717-718 (Fla. 2018) . Moreover, in Smith v. State, 59 So. 3d 1107, 1115 (Fla. 2011), this Court determined that because the opponent of the strike never demonstrated that the venireperson was a member of a protected class, the **initial step** of Melbourne was not satisfied, and the trial court erred when it denied the use of a peremptory challenge.

Respondent relies upon Johnson v. State, 235 so. 3d 1054, 1056 (Fla. 3d DCA 2018), however in that case, the prosecutor was objecting to the systematic strike of men from the jury, and it was clear from the context of the objection that the attorney was asking for a gender-neutral reason. However, the case is distinguishable because here defense counsel requested a **race-neutral reason** for the state's challenge of this prospective African American juror, he did not ask for a religious-neutral reason, and then he reiterated that he wanted the Court to explain why the reason given was **race-neutral** (T. 1831-1832, PDF 2331-2332). At no time prior to the juror being excused did counsel ask for a religious neutral reason for the challenge.

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.

Consequently, the decision in Harper v. State, 549 So. 2d 1121 (Fla. 1st DCA 1989) is akin to the circumstances of this case. In Harper, the First District Court of Appeal explained that defense counsel's objection to peremptory challenges on the basis of race **did not preserve** for appellate review the issue of whether peremptory challenges were used to systematically exclude women from jury. Id. The Court reasoned that this was because counsel failed to articulate an objection that the state was exercising its challenges in a manner to unconstitutionally exclude women from the jury, the issue was not properly before the appellate court.

Similarly, here trial counsel never asked for a religious neutral reason, nor did he argue that the state was exercising its challenges in a manner to unconstitutionally exclude Jehovah's witnesses from the jury. Rather, at the time the juror was released from the panel, counsel consistently maintained that the peremptory challenge was based upon her race, and that is how the trial court addressed the issue. Thus, because counsel never satisfied the initial step of Melbourne, the Fourth District Court of

Appeal erred when it found the claim to be preserved. 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.”); Arnold v. State, 778 So. 2d 1015 (Fla. 3d DCA 2000); Carter v. State, 762 So.2d 1024, 1026 (Fla. 3d DCA 2000).

(b) Expansion of Batson v. Kentucky

Neither this Court, nor the United States Supreme Court has expanded Batson beyond race, gender and ethnicity. State v. Davis, 504 N.W.2d 767, 771–72 (Minn.1993), cert. denied sub nom., Davis v. Minnesota, 511 U.S. 1115, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994); 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 Respondent does not dispute that Batson has not been expanded to religion in general, instead, the Respondent has quoted varying decisions and argued that expanding Batson is a natural evolution of the law with respect to the peremptory challenge. However the presumption that extending Batson to religion is simply the natural progression of the law ignores that race, gender, and ethnicity are immutable or

observable characteristics, whereas religion, is based upon a person's subscription, devout or not, to a set of ideological beliefs. Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758 (1986)(explaining that the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an "appearance of unfairness."); U.S. v. Villareal, 963 F. 2nd 725, 729 (5th Cir. 1992)(explaining that political belief is not the overt and immutable characteristic that race is in declining to extend Batson)

Instructive is U.S. v. Prince, 647 F. 3d 1257, 1262-1263 (10th Cir. 2011)

wherein the Court explained as follows:

Equal Protection Clause jurisprudence dictates that jurors should not be stricken solely on account of race, ethnicity, or sex. Allowing status-based strikes of jurors in classes receiving heightened protection under the Fourteenth Amendment interferes inextricably with a defendant's constitutional right to an impartial jury. The fact that a prospective juror is a certain race or sex is not determinative of his ability to be a dispassionate fact-finder. On the other hand, **a person's policy views or ideological perspectives on a particular issue may introduce bias and impair a juror's ability to be impartial.** In this vein, there are times when striking jurors based on their prejudicial beliefs facilitates disinterested factfinding.

(Emphasis Added). See also 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); State v. Davis, 504 N.W.2d 767 (Minn.1993) cert denied, Davis v. Minnesota, 511 U.S. 1115 (1994), (the federal constitution does not prohibit a party from exercising a peremptory challenge on the basis of religion); People v. Martin, 64 Cal.App.4th 378, 384-385, 75 Cal.Rptr.2d 147 (1998)(finding that a peremptory challenge was properly granted with respect to a Jehovah's Witness because, the 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 juror's suitability for jury service).

Moreover, in Davis, the Minnesota Supreme Court declined to extend Batson to religious affiliation, in part because religious affiliation (or lack thereof) is not as self-evident as race or gender. Davis, 504 N.W.2d at 771. The Minnesota Court explained that:

Then, too, the nature of the bias sought to be eliminated by a Batson challenge is particularly illusive in the case of religion. Presumably, the bias sought to be eliminated in jury deliberations is intolerance for the doctrinal beliefs and practices of the adherents of a particular religious group. Yet when religious beliefs translate into judgments on the merits of the cause to be judged, it is difficult to distinguish, in challenging a juror, between an impermissible bias on the basis of religious affiliation and a permissible religion-neutral explanation. In the case before us, for example, would the explanation that the juror was "reluctant to exercise authority over their fellow human beings" be sufficient to overcome a

prima facie case of religious bias? A juror's religious beliefs are inviolate, but when they are the basis for a person's moral values and produce societal views on such matters as the use of intoxicating liquor, cohabitation, necessity of medical treatment, civil disobedience, and the like, it would not seem that a peremptory strike based on these societal views should be attributed to a pernicious religious bias.

Id.

It is notable that this Court, with respect to death qualification of a jury, found that peremptory challenges to **ideological groups**, in this case persons who were opposed to the imposition of the death penalty, were proper. Dobbert v. State, 409 So. 2d 1053 (Fla. 1983). This same precedent applies to exercising peremptory challenges in light of a juror's personal or ideological beliefs.

In Farina v. State, 801 So. 2d 44 (Fla. 2001), this Court found that a prosecutor proffered adequate non-pretextual race-neutral reasons for exercise of peremptory challenges African-American jurors where one juror expressed concern over her son's guilt for a drug conviction and voiced hesitancy about imposing the death penalty. Whereas the other prospective juror had been 30 minutes late in arriving for voir dire, was tentative in her support of the death penalty, was member of a church that was involved in a prison ministry program, and might have allowed feelings of Christian forgiveness to creep into her decision. Id. Furthermore, in Crews v. State, 921 So. 2d 864, (Fla. 2006), this Court found that a prospective juror's indication that he might not follow a law if he found it immoral was proper as it was based upon the juror's

subjective belief. Thus, under this Court's precedent, it is clear that personal concerns and ideological beliefs are proper reasons to peremptorily challenge a juror.

Therefore, the Fourth District Court of Appeal improperly expanded Batson to religion, which is not the type of immutable or observable characteristic contemplated by Batson and its progeny.

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

Finally, the Respondent does not address whether or not the Fourth District Court of Appeal improperly found that challenging a juror based upon religious beliefs constitutes an improper religious test. Rather the Respondent simply argues that the Fourth District properly granted greater constitutional protections under the State Constitution. The Respondent claims that the prejudice is apparent because the trial court commented that it would be malpractice to keep a Jehovah's Witness.

However, the trial judge's comments, made with respect to the motion for mistrial filed five days after the juror had been excused, when viewed in the proper context, had nothing to do with prejudice against religion. The trial court explained as follows:

It's sort of analogous if we had an African-American FBI agent who was on the panel and said, "I can be fair and impartial, I can assess police officers just as well as anyone else," but you strike him anyway. So I think they're pretty analogous.

A Jehovah's Witness, that as a religion, it would almost be malpractice for a prosecutor to let someone on the jury like that.

(PDF 2360). These comments are completely irrelevant as they were made after the juror had already been excused and were in response to the belated motion¹ filed by the defense. The comments do not underscore some perceived prejudice against religion, instead the Court was explaining why the reason was race-neutral.

Additionally, the Respondent cites extensively to the lower Court's opinion, which relied 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, this is a misinterpretation of the holding of the Third District Court of Appeal. In Joseph, the state challenged a juror, who was perceived to be Jewish based upon her last name.² Id. at 779. The Third District found that the Jewish community was part of a protected **ethnic group**, protected under the Florida Constitution. Id. at 780-781 In determining whether a Jewish venireperson was a member of protected **ethnic group**, the Third District conducted the cognizability test approved by this Court in Alen, 616 So.2d at 454-456 and reviewed multiple

1 This motion was obviously made in an effort to preserve this issue as it was the first time the defense argued that religion was a protected class.

2 In Smith v. State, 59. So. 3d 1107 (Fla. 2011), this Court found that a juror's surname, without more, is insufficient to trigger an inquiry as to whether the strike was exercised for a discriminatory reason.

characteristics to determine if members of the Jewish community qualified as a protected ethnicity, religion was simply one characteristic the Court considered. Id. In fact, no Florida court has found that religion, on its own, constitutes a cognizable class subject to Neil/Slappy protections.³

Moreover, Respondent cites to the decision in Olibrices v. State, 929 So. 2d 1176 (Fla. 4th DCA 2006), for the proposition that striking a juror due to his or her religious faith is unconstitutional. Again, such an analysis misconstrues the reasoning and the holding in Olibrices. In that case, the Fourth District addressed whether Pakistani/Muslim jurors had been peremptorily challenged for invidious reasons. The Court recognized, just as the Third District did, that in Florida, “the protection of Neil Slappy applies when a prospective juror is being barred from service because of membership in an objectively discernible **ethnic group**”. Olibrices, 929 So. 2d at 1180 (emphasis added). In Olibrices, religion was **one of the factors** considered in determining whether or not a Pakistani/Muslim person was a member of a cognizable group. Id. at 1179.

In this case, no such analysis was conducted by the Fourth District Court of Appeal, instead the Court made a blanket determination that Equal Protection, as it

³ State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So.2d 18 (Fla. 1988).

relates to peremptory challenges, should be expanded to include religion. This is simply incorrect in light of the framework approved by this Court in Alen.

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.

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., 315 SE 7th St., Ste 301, Fort Lauderdale, FL 33301, at dee@fredhaddadlaw.com this 8th day of April 2019.

/s/ Melanie Dale Surber
Melanie Dale Surber

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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