IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-386
DCA CASE NO. 3D05-90

ANTHONY E. SMITH,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, Anthony Smith, was the defendant in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stand in this Court. In this brief, the symbols "R" and "S.R." designate the record on appeal and the supplemental record on appeal in lower court case number 3D05-90. The symbol "T" designates the transcript of the trial that commenced on November 30, 2004.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged, in trial court case number F03-36020, in a ten count information for offenses committed in Miami-Dade County on December 27, 2003. (R. 6-18). The information charged Petitioner with the following counts: one count of armed burglary of an occupied conveyance with an assault; one count of armed robbery; two counts of aggravated assault on a law enforcement officer; two counts of resisting an officer without violence; and four counts of resisting an officer with violence. (R. 6-18).

On November 30, 2004, Petitioner's trial by jury commenced. A jury venire of thirty-five (35) was called into the courtroom for voir dire. After initial introductions, the trial court had each member of the jury venire stand up and give basic information including date of birth, occupation, marital status, and number of children. Juror Earl Buchholz, Jr., identified himself as a resident of Dade County for seventeen years and employed as the chairman of the NASDAQ 100 Open, a tennis tournament located on Key Biscayne. (T. 94). He stated that while living in St. Louis, Missouri, he served on a criminal jury, but the case was settled pursuant to a plea bargain while the jury was deliberating. (T. 95). He did not have any members of his family employed in a law enforcement field, and had never been accused of a crime. He stated that when he lived in Boca, his house was robbed. (T. 95).

A number of the jurors had also previously been selected or served on a jury and were the victims of crime. These jurors included Lauren Christos, Rolando Colas, Nicole Yamshon, Nieves Torrens, and Shirley Smith. (T. 77-8, 80-6, 93, 105-06).

After the jury venire provided their basic personal information, the trial court afforded the state and Petitioner an opportunity to ask questions of the individual jurors. After all parties had questioned the jurors, the jury was selected. Several jurors were excused for cause: Lauren Christos; Nicole Yamshon; Madelin Alicea; Jose Figueroa; Alfredo Castaneda; and Ana Ulloa. (T. 200, 204-05, 208, 217, 222, 225). The state exercised peremptory challenges on Robert Calveiro, Khadijah Wallace, Eduardo Granda, Zandra Cue, Alicia Seay, and Oddette Adderly. (T. 200-01, 207-08, 212-13, 216-19). Petitioner raised a *Neil/Slappy* challenge on three of these peremptory challenges, alleging that the state was attempting to strike all of the Black females from the jury. (T. 216-19). After listening to the state's proffered reasons for the peremptory challenges, the trial court found that the state had provided a genuine race neutral reason. (T. 216-19).

The state also sought to exercise a peremptory challenge on Juror Rolando Colas. (T. 209). Petitioner raised a *Neil/Slappy* objection.

> [DEFENSE COUNSEL]: Judge, we are going to raise an objection as to a Neo [sic] Slappy. I believe Mr. Colas is a member of a minority group known as Latinos.

> [TRIAL COURT]: Since when is that a minority group?
> [DEFENSE COUNSEL]: Not in Dade County, I know.
> [TRIAL COURT]: I think under the present law I have to require that you explain it.
> [STATE]: Yes, Judge. Simply Mr. Colas has served on a jury before. And his fiancée's son has been arrested. He has also been a victim of a crime several times.
> [DEFENSE COUNSEL]: That would inure to the benefit of the defense. We are not objecting on those grounds.
> [STATE]: You chose to exercise a peremptory?
> [TRIAL COURT]: I don't think that is a genuine objection. I'm going to overrule you.

(T. 209-10). Juror Colas subsequently served on the jury.

Petitioner exercised peremptory challenges on Ingrid Benitez, Sharon Polinski, Nieves Torrens, Marlene Lorie, and Caridad Pena. (T. 201-07, 212, 214-16). Petitioner also sought to exercise a peremptory challenge on Juror Mara Alpizar. (T. 219). After the state raised a *Neil/Slappy* challenge the trial court conducted a *Melbourne* inquiry and found that the proffered reason was not genuine. (T. 219-21). Juror Alpizar subsequently served on the jury.

Petitioner also attempted to use a peremptory strike on Earl Buchholz, Jr. (T. 211). The state attempted to interject when the trial court interrupted,

> [DEFENSE COUNSEL]: We are going to ask for a peremptory on Mr. Buchholz, No. 12.
> [STATE]: Judge, I would - -
> [TRIAL COURT]: Wait a minute. What about Buchholz? You are peremptorily challenging him?
> [DEFENSE COUNSEL]: Yes, sir.
> [TRIAL COURT]: Are you requiring an explanation?
> [STATE]: Yes, Judge.

[DEFENSE COUNSEL]: Is he a member of a distinct minority group which would render him - -
[TRIAL COURT]: Buchholz?
[DEFENSE COUNSEL]: Yes.
[TRIAL COURT]: Sounds to me like a German name.
[DEFENSE COUNSEL]: This is a recognized minority group within the law, I believe. Mr. Buchholz - -
[TRIAL COURT]: I suppose there is - - anybody qualifies under our present great, deeply thought out appellate decisions.
[DEFENSE COUNSEL]: He is a victim of a house robbery which makes him a victim of a crime. And he can harbor bias or any difficult in this case - -
[TRIAL COURT]: The Court will rule that is not a genuine objection and it is overruled.
[DEFENSE COUNSEL]: We have several others.
[TRIAL COURT]: Go ahead.
[DEFENSE COUNSEL]: He served on a jury.
[TRIAL COURT]: He served on a jury in Ohio.
[DEFENSE COUNSEL]: St. Louis.
[DEFENSE COUNSEL]: In a criminal case.
[STATE]: Those were the same reasons I requested that juror No. 3 be excused.
[TRIAL COURT]: We are done with Juror No. 3.
[STATE]: The reasons they said were not the same reasons they are saying for Juror No. 12.
[TRIAL COURT]: I don't think that the objections to Buchholz are genuine. I'm going to overrule it.
[DEFENSE COUNSEL]: That is over our respectful objection.

(T. 211-12).

Petitioner renewed his objection prior to the jury being selected, and renewed the objection a second time after the jury was dismissed for the evening. When setting forth his objection for the record, Petitioner stated that all of the jurors were either White or White Hispanic. (T. 229).

After the presentation of evidence and argument, the trial court charged the jury. The jury returned a verdict finding Petitioner guilty as charged of armed burglary to an occupied conveyance, armed robbery, two counts of aggravated assault on a law enforcement officer, and two counts of resisting without violence. (R. 44-53, 92). Juror Buchholz was not the foreperson of the jury. (R. 44-53). Petitioner was sentenced to life in prison on counts one and two. (R. 92-9).

On January 10, 2005, Petitioner filed a notice of appeal. In the initial brief to the Third District, Petitioner raised one claim for relief (verbatim):

> The trial court abused its discretion by rejecting Defendant's peremptory challenge where the state failed to object on the ground that it was discriminatory, did not claim or show that the prospective juror was a member of any cognizable class, and there was nothing to suggest that the strike was discriminatory.

On January 31, 2007, the Third District Court of Appeal issued an opinion affirming Petitioner's conviction. The court found that there is no magical incantation required to satisfy the first step of the procedure set forth in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), only that the challenging party alert the trial court to the objection. Further, that any doubt concerning whether the first step is met must be resolved in the favor of the challenging party. The court found that the record clearly reflected that the state raised an objection, and that all parties accepted the proposition that the challenged juror, Mr. Buchholz, was of German descent and was the member of a distinct group or class sufficient to permit further

inquiry by the trial court. Additionally, that the record clearly supported the trial court's finding that Petitioner's reasons for striking the juror were not genuine.

Petitioner filed a timely notice of rehearing, and on January 28, 2009, the Third District Court of Appeal denied the motion for rehearing, however, they withdrew their previous opinion and issued a new opinion affirming Petitioner's conviction. In the new opinion, the court deleted the waiver argument, which stated that all parties agreed that Juror Buchholz was a member of a cognizable group, leaving the rest of the opinion the same. Thus, the court found, as in the first opinion, that no magical incantation was required to satisfy the first step of *Melbourne. Smith v. State,* 1 So. 3d 352, 353 (Fla. 3d DCA 2009). The court found that this case was similar to *Franqui v. State,* 699 So. 2d 1332 (Fla. 1997), where a distinction was drawn between cases where "reversal is being sought when the trial court failed to make a required inquiry and those in which an inquiry was made even though the objection levied did not require it to do so." *Smith*, 1 So. 3d at 354. Thus, "as long as the trial court understands the nature of the objection, an inquiry may be made." *Id.* The court concluded that the trial court did not abuse its discretion in requesting Petitioner to provide a race-neutral reason for the peremptory challenge of Juror Buchholz, and did not abuse its discretion in determining that the proffered reasons were not genuine. *Id.* at 355.

Petitioner filed a brief on jurisdiction arguing that the opinion was in direct and express conflict with *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997), and *State v. Alen*, 616 So. 2d 452 (Fla. 1993). On September 11, 2009, this Court accepted jurisdiction of this case.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal correctly followed this Court's decisions in *State v. Alen,* 616 So. 2d 452 (Fla. 1993), and *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997), when determining that the trial court properly conducted a *Melbourne* inquiry into Petitioner's reasons for exercising a peremptory challenge on Juror Buchholz. First, the state did raise an objection to the use of the peremptory challenge, however, prior to being able to elucidate the objection, the trial court interrupted the state. The state did confirm that they were requesting an inquiry. Further, prior to the trial court requesting a race neutral explanation, Petitioner proffered his reasons for utilizing the challenge, thereby waiving any argument that the state failed to delineate Juror Buchholz's ethnic classification. Second, pursuant to *Franqui,* the trial court recognized that Juror Buchholz was a member of an ethnic group, and even though that his ethnicity was not identified on the record, the *Melbourne* inquiry was proper. Third, the trial court has the ability to *sua sponte* raise a *Melbourne* inquiry.

Finally, the trial court did not abuse its discretion in determining that the proffered reasons for the use of the peremptory challenge on Juror Buchholz were not a genuine race-neutral explanation and was pretextual. The state properly informed the trial court that Juror Buchholz was similarly situated to Juror Colas, and any argument raised by Petitioner that they were not similarly situated was not

raised in the trial court. Thus, the argument that the jurors were not similarly situated is not preserved for appellate review. Thus, the Third District Court of Appeal correctly affirmed the trial court's denial of the peremptory, finding that the trial court did not abuse its discretion.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING A MELBOURNE INQUIRY INTO THE REASONS FOR PETITIONER'S PEREMPTORY CHALLENGE OF JUROR BUCHHOLZ, AND DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE PROFFERED REASONS WERE NOT GENUINE.

This case is in this Court for review as to whether the Third District Court of Appeal correctly determined that the trial court did not err in conducting a *Melbourne* inquiry for Juror Buchholz, even though there was no specific objection based on his race or ethnicity. The basis for this Court's jurisdiction is direct and express conflict with *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997), where this Court held that a general objection was sufficient to authorize a *Melbourne* hearing, and with *State v. Alen*, 616 So. 2d 452 (Fla. 1993), which sets forth a working definition of cognizable group.

Pursuant to Article I, section 16 of the Florida Constitution, a defendant is guaranteed the right to an impartial jury. To effectuate "'the constitutional guaranty of trial by an impartial jury,'" both parties are afforded peremptory challenges. *Busby v. State*, 894 So. 2d 88, 98 (Fla. 2004) (*quoting Meade v. State*, 85 So. 2d 613, 615 (Fla. 1956)). While a peremptory challenge is not a constitutional right, it cannot be used in a discriminatory manner. *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984).

> The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society.

Id. In order to "satisfy the state's constitutional guarantee of an impartial jury, citizens who are otherwise qualified to serve as impartial jurors cannot be peremptorily challenged based on their membership in a particular *ethnic* group." *State v. Alen,* 616 So. 2d at 454 (Fla. 1993) (emphasis supplied).

Thus, to ensure that a peremptory strike is not based on membership in an ethnic, racial or gender group, the Florida Supreme Court set forth a three step procedure that must be utilized when an opposing party challenges a peremptory strike. *Melbourne v. State,* 679 So. 2d 759 (Fla. 1996).

> The State of Florida has "recognized that discrimination could be based upon other factors, such as religious, ethnic, and sexual differences." *Joseph v. State*, 636 So. 2d 777, 789 (Fla. 3d DCA 1994). (1) the objecting party must make a timely objection, must show that the venireperson is a member of a distinct racial group, and must request that the court ask the striking party for reasons for the strike; (2) if step (1) is met, the court must ask the proponent of the strike to explain the reason for the strike; (3) if the reason given 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. In step (3), the court's focus is on the genuineness and not the reasonableness of the explanation.

Rodriguez v. State, 753 So. 2d 29, 40 (Fla. 2000) (*citing Melbourne,* 679 So. 2d at 759). Since this time, courts have recognized numerous other cognizable classes, based on ethnicity and gender, in addition to a cognizable group being based on

racial identity. *See Alen*, 616 So. 2d at 455 (finding that Hispanic is a cognizable class); *Frazier v. State,* 899 So. 2d 1169 (Fla. 4th DCA 2005) (finding Jamaican is a cognizable group); *Joseph v. State,* 636 So. 2d 777, 780 (Fla. 3d DCA 1994) ("we conclude that Jews are a cognizable class."); *Murray v. Haley,* 833 So. 2d 877, 879 (Fla. 1st DCA 2003) ("Gender-based peremptory challenges are prohibited by both the federal and state constitutions."); *Olibrices v. State,* 929 So. 2d 1176, 1179 (Fla. 4th DCA 2006) ("It is also not limited to oppressed minorities, for a party to litigation may also seek to use race, sex, or ethnicity to remove members of the dominant social group from a proposed jury.").

When determining whether a trial court properly conducted a *Melbourne* inquiry, "a trial court is vested with broad discretion in determining whether peremptory challenges are racially motivated." *Files v. State,* 613 So. 2d 1301, 1303 (Fla. 1993) (*quoting Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992)). "Within the limitations imposed by *State v. Neil,* the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved." *Reed v. State,* 560 So. 2d 203, 206 (Fla. 1990), *cert denied*, 498 U.S. 881 (1990). Thus, appellate courts "must rely on the superior vantage point of the trial judge, who is present, can

consider the demeanor of those involved, and can get a feel for what is going on in the jury selection process." *Id.* at 1305.

In the instant case, Petitioner alleges that the Third District Court of Appeal erred by affirming the trial court's decision to conduct a *Melbourne* inquiry into his reasons for exercising a peremptory challenge on Juror Earl Buchholz. Specifically, that the state failed to set forth the cognizable racial, gender, or ethnic group within which Juror Buchholz belonged. The Third District Court of Appeal found that no magical incantation is required when raising a *Melbourne* inquiry, and that the trial court understood the nature of the state's objection, thus the trial court did not abuse its discretion by conducting a *Melbourne* inquiry and making the determination that the proffered reasons were not genuine. *Smith,* 1 So. 3d at 355.

The sole basis for the direct and express conflict is the sufficiency of the objection pursuant to *Franqui v. State,* 699 So. 2d 1332 (Fla. 1997), and whether there was a cognizable class pursuant to *State v. Alen,* 616 So. 2d 452 (Fla. 1993).

A. The state properly raised an objection to Petitioner's use of a peremptory strike, and the trial court did not abuse its discretion in conducting a *Melbourne* inquiry based on the state's general objection.

For the first step, the requirement of a timely objection with a demonstration that the juror is a member of distinct racial or ethnic group, an opposing party does not have to delineate the specific reason for the objection and "there are no ritual incantations that must be made in order to call forth a striking party's reasons." *Pringle v. State*, 792 So. 2d 533, 535 (Fla. 3d DCA 2001). In *Foxx v. State*, 680 So. 2d 1064 (Fla. 3d DCA 1996), the defendant attempted to use a peremptory challenge on a Hispanic juror, at which time the state requested a "*Neil* inquiry." *Id.* at 1065. The Third District Court of Appeal found that while the state did not expressly state that the juror was a member of a cognizable racial or ethnic group, "it is clear from the record that such was the case and that the trial court was aware of this fact." *Id.*

In *Murray v. Haley*, 833 So. 2d 877 (Fla. 1st DCA 2003), the appellants argued that they were entitled to a new trial because the trial court overruled their objection to the appellee's use of peremptory challenges on three prospective female jurors. *Id.* at 878. The appellee argued that the appellants failed to satisfy the first step of *Melbourne* because while they objected, the objection did not

include a request for a gender neutral reason for the strike. *Id.* at 879. The First District Court of Appeal disagreed with this argument, finding that

> [I]t is apparent that the trial court understood the nature of the objections. It would elevate form over substance to conclude that, even though the trial court understood the nature of the objections, those objections were insufficient to preserve the issue for appellate review.

Id. Thus, when determining whether an objecting party has made an adequate showing of the likelihood of discrimination, "the objector must be given broad leeway and any doubts resolved in his or her favor." *Valentine v. State*, 616 So. 2d 971 (Fla. 1993). This Court has found that "[i]f we are to err at all, it must be in the way least likely to allow discrimination." *State v. Slappy*, 522 So. 2d 18, 21-22 (Fla. 1988), *cert denied*, 487 U.S. 1219 (1988).

Thus, the Third District Court of Appeal correctly found that *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997), was controlling precedent since the state raised a general objection prior to the trial court conducting a *Melbourne* inquiry. In *Franqui*, the defendant attempted to exercise a peremptory challenge on a juror named Aurelio Diaz. *Id.* at 1334. The state objected to the use of a peremptory challenge, stating "State would challenge that strike." *Id.* Based on this objection, the trial court inquired for the reason for challenging the juror, at which point, the defendant stated he did not like the juror. *Id.* The trial court denied the challenge, finding that the proffered reason was not race neutral. *Id.*

This Court, when affirming the trial court's denial, set forth a distinction between when a trial court refuses to conduct a *Melbourne* inquiry, and when the trial court determines that an inquiry is necessary. *Id.* at 1335. This Court found that

> [T]he trial court clearly understood that the objection to the challenge of a venireperson in Dade County, who was born and raised in Havanna, Cuba, and whose name was Aurelio Diaz, was being made on racial grounds. This is especially true because there was never any contention made to the trial court that prospective juror Diaz was not a member of a cognizable minority or that there should not be a *Neil* inquiry. Moreover, we have encouraged trial judges to err on the side of holding a *Neil* inquiry.

Franqui, 699 So. 2d at 1335.

In the instant case, numerous *Neil/Slappy* challenges were raised by both parties, citing to racial, ethnic, and/or gender discrimination. On all of the challenges, the trial court utilized the three step procedure set forth in *Melbourne,* and on three occasions, found that the challenge was not race neutral. One was the state's challenge of Juror Rolando Colas. (T. 209-10). The other two challenges were raised by Petitioner, Juror Earl Buchholz and Juror Mara Alpizar. (T. 211-12, 219-21). For Juror Alpizar, the trial court recalled her for additional questioning to establish her ethnic identity, after the court and attorneys discussed whether her last name was Hispanic or possibly Polish. (T. 219-20). After the additional

questioning, in which Juror Alpizar identified herself as Hispanic, the trial court denied Petitioner's peremptory challenge. (T. 221).

Thus, even though the state failed to establish the ethnic or racial identity of Juror Buchholz prior to the trial court requiring Petitioner to provide a race neutral reason, the record is clear that the trial court understood the reason for the challenge and that the state was requesting an inquiry. (T. 211-12). In fact, when discussing Juror Buchholz, the trial court found that "anybody qualifies under our present great, deeply thought out appellate decisions." (T. 211). Juror Buchholz, whether German-American or White, is a member of a cognizable class as set forth in *State v. Alen,* 616 So. 2d 452 (Fla. 1993).

> In *Alen,* this Court set forth a working definition of a cognizable class,
>
> > First the group's population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguishable from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.

Id. at 454. Examination of a person's native language and/or surname in determining whether someone can be classified as a member of an ethnic group is not strictly dispositive. *Id.* at 455. Since *Alen,* courts have found that even a person who is a member of a dominant social group can be a cognizable class and be

subject to discrimination through the use of peremptory challenges. *Olibrices,* 929 So. 2d at 1179.

In *Joseph v. State,* 636 So. 2d 777 (Fla. 3d DCA 1994), the Third District Court of Appeal utilized the definition provided in *Alen* to determine whether Jewish qualified as a cognizable class. *Id.* at 779-80. After looking at the two factors, the court found that Jewish was a cognizable class based on the size of the population and shared religious beliefs. *Id.* at 780. The court then commented on whether other groups would be considered a cognizable group and found that "in Dade County alone, there are many cognizable minority ethnic groups besides Hispanics: including Anglo Americans, Jewish Americans, native Americans, Arab Americans, Asian Americans, and other European Americans." *Joseph*, 636 So. 2d at 781 (*quoting Alen v. State*, 596 So. 2d 1083, 1087 (Fla. 3d DCA 1992) (en banc) (Hubbart, J., concurring)).

While the State of Florida has a slightly different three step procedure than the one set forth by the United States Supreme Court in *Batson v. Kentucky,* 476 U.S. 79 (1986), a review of federal precedent is relevant in determining that a party does not have to make a specific objection if the trial court clearly understands the objection is based on the challenged juror's membership in a racial, ethnic, or

gender group.[1] The United Supreme Court, in *Hernandez v. New York*, 500 U.S. 352 (1992), found that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.* at 359. In *Hernandez,* the state peremptorily struck two jurors, which resulted in the defendant raising a *Batson* challenge. *Id.* at 356. Without waiting for the defendant to establish a prima facie case of racial or ethnic discrimination, the state immediately offered a race neutral explanation. *Id.* The trial court concluded that the reason was genuine and denied the challenge. *Id.* at 357. The court found that

> The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us.

Id. at 359.

The Court's finding that the party waived an argument based on the failure to identify the ethnic group by providing reasons for the peremptory challenge, was followed in *United States v. Changco*, 1 F.3d 837 (9th Cir. 1993), where the

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[1] Florida does not require that the objecting party set forth a prima facie case of discrimination in the first step of *Melbourne*, only that the objecting party identify the challenged juror as a member of a distinct group. *State v. Whitby,* 975 So. 2d 1124, 1126 (Fla. 2008).

defendant challenged the prosecutor's use of two peremptory challenges, stating that the challenges were against "minority women." *Id.* at 839. The court found that

> Whether Changco made the requisite prima facie showing that the prosecutor exercised her peremptory challenges on the basis of race isn't at issue. The district court apparently thought a prima facie case had been made, and asked the prosecutor to articulate race-neutral explanations for striking [the prospective jurors].

Id. at 839-40.

Thus, following federal precedent this Court should find that Petitioner waived any argument based on the state's failure to identify Juror Buchholz's ethnic group. In the instant case, the trial court, upon hearing Petitioner's peremptory challenge of Juror Buchholz, inquired whether the state wanted an inquiry into the use of the challenge, and the state replied in the affirmative. (T. 211). After the trial court stated that anyone could qualify as a recognized ethnic group, Petitioner proffered reasons for the exercise of the peremptory challenge. Thus, the trial court did not have an opportunity to request race neutral reasons prior to Petitioner volunteering the reasons. (T. 211-12). Therefore, by volunteering reasons for his use of peremptory strike on Juror Buchholz without a request by the trial court for such reasons, Petitioner waived his argument that the state failed to properly object to the use of the strike and the sufficiency of the trial

court's findings as to Juror Buchholz's membership in a cognizable group.[2] Therefore, the preliminary issue of whether Juror Buchholz was a member of a racial or ethnic group is moot because the trial court ruled on the question of whether there was intentional discrimination.

[2] Additionally, the trial transcript demonstrates that after the trial court stated that Juror Buchholz's last name sounded German, Petitioner's counsel stated, "[t]his is a recognized minority group within the law I believe." (T. 211). After the trial transcript was transcribed, Petitioner contested the accuracy of the transcript, and a hearing was held in the trial court to determine whether Petitioner's counsel had in fact stated that it was not a recognized group. At this hearing, counsel for the State and Petitioner testified, along with the court reporter. The judge who presided over the trial did not testify, nor was an affidavit on his behalf filed with the trial court. At the end of the hearing, the trial court even acknowledged that the person "best placed to understand what occurred in reviewing this transcript would be the Presiding Judge who was not available to comment." (S.R. 76). The trial court then found that Petitioner failed to establish that the official transcript was incorrect. (S.R. 77). In the original opinion issued by the Third District Court of Appeal, the court found that Petitioner waived the argument based on the trial transcript. However, after Petitioner filed his motion for rehearing, arguing the inaccuracy of the trial transcript, the court withdrew the opinion, deleted all reference to a waiver, and reissued the opinion. Thus, the Third District Court of Appeal did not resolve the issue of whether the trial transcript was accurate. Petitioner, in all of the courts that have heard this case, has forced his interpretation of the trial transcript, despite the fact that the trial court clearly found that the official transcript was accurate. Thus, if this court finds that the trial court lacked authority to conduct a *Melbourne* hearing without first requiring the state to place the contested juror's ethnic group on the record, this Court should remand the case back to the Third District Court of Appeal to resolve the issue as to whether Petitioner waived the argument by agreeing that Juror Buchholz was a member of a cognizable group.

B. The trial court did not abuse its discretion in conducting a *Melbourne* inquiry, as the trial court can *sua sponte* raise a challenge to a peremptory strike.

Further, a trial court has the discretion and ability to *sua sponte* conduct a *Melbourne* hearing if the court determines that a peremptory strike is being used in a discriminatory manner. In *Richardson v. State,* 575 So. 2d 294 (Fla. 4th DCA 1991), the trial court conducted an examination on the validity of the race neutral reasons provided by the state after the trial court, and not the defendant, challenged the use of a peremptory strike. *Id.* at 295. In this case, the state used a peremptory challenge to strike the only Black juror on the venire. Immediately following the use of this strike, the trial court, not the defendant, initiated a *Melbourne* inquiry. *Id.* After the state provided race neutral reasons, the trial court determined the reasons were genuine and permitted the challenge. *Id.* Even though the defendant did not object to the use of the strike, he filed a direct appeal alleging the trial court erred in finding the reasons for the strike were genuine and race-neutral. *Id.* The Fourth District Court of Appeal did not find that the issue was not preserved for appeal because the inquiry was initiated by the trial court, holding that "when the trial court asks for justification, it is appropriate to examine the answers given." *Id.* (*citing Taylor v. State*, 491 So. 2d 1150, 1151 (Fla. 4th DCA 1986), *rev. denied,* 501 So. 2d 1284 (Fla. 1986)).

The trial court's ability to *sua sponte* raise a challenge to the use of a peremptory strike has been upheld in other jurisdictions across the country. In an unpublished decision from the Military Court of Appeals, *United States v. Huff*, 2009 WL 2997016 (A.F. Ct. App. Sept. 14, 2009), the court found that the trial court has the discretion to request a race-neutral reason for the use of a peremptory strike. In this case, the prosecutor exercised a peremptory strike, and without an objection being raised by the defendant, the military judge *sua sponte* requested a race neutral reason. *Id.* at 1. After the prosecutor articulated the reasons, the military judge permitted the juror to be stricken. *Id.* On appeal, the defendant challenged the trial court's decision that the reasons provided were race neutral and genuine. The Military Court of Appeals found that

> Ordinarily, the failure to object to the opposing party's challenge would result in a waiver of the issue because the defense must first establish a prima facie case of purposeful discrimination. Trial defense counsel did not have an opportunity to object because the military judge sua sponte raised the issue. Accordingly, we considered the issue as if the trial defense counsel had objected to the assistant trial counsel's peremptory challenge. The burden then shifted to the assistant trial counsel to provide a race-neutral and gender-neutral explanation.

Id. at 3 (internal citations omitted).

In *People v. Bell*, 675 N.W. 2d 894 (Mich. Ct. App. 2003), after the defendant attempted to exercise a peremptory strike on a White juror, the trial court *sua sponte* raised a challenge and concluded the challenge was based on race.

Id. at 896. Prior to determining that the trial court erred in denying the peremptory challenge, the Michigan Court of Appeals first examined whether the trial court has the right to *sua sponte* raise a *Batson* challenge. The court found that "it is clear from the reasoning of *Batson* and its progeny that the United States Supreme Court recognizes a trial court's authority to unilaterally raise such an issue to ensure the integrity of the judicial process." *Id.* After examining decisions from other jurisdictions, the court found that "it is within the discretion of the trial court to conduct a *Batson* hearing, even absent an objection." *Id.* at 897.

The Washington Court of Appeals also determined that the trial court has the ability to *sua sponte* raise a *Batson* challenge. *State v. Evans*, 998 P.2d 373 (Wash. App. 2000).

> Accordingly, when a trial judge presides over a trial where the peremptory challenge is being used in an invidiously discriminatory way, that judge may, in his or her discretion, act to protect the rights secured by the equal protection clause by raising a *Batson* issue. Failure to act in such a situation runs the substantial risk of casting doubt on the fairness of the judicial process. Taking appropriate action in such a situation promotes respect for the law. And taking such action is consistent with a court's considerable discretion in conducting judicial proceedings in a way that is fair to all. In short, a judge need not sit idly by while the right to participate in our judicial system, free of bias, is infringed by the discriminatory use of peremptory challenges.

Id. at 379-80. *See also Brogden v. State*, 649 A.2d 1196, 1200 (Md. App. 1994) ("A trial judge need not sit idly by when he or she observes what he perceives to be

racial discrimination in the exercise of peremptory challenges. He is clearly entitled to intervene."); *Lemley v. State,* 599 So. 2d 64 (Ala. Ct. App. 1991) ("a trial judge is authorized to conduct a *Batson* hearing, even in the absence of an objection by the State to defense counsel's exercise of his peremptory strikes.").[3]

Other jurisdictions have placed limitations on the right of a trial court to conduct a *sua sponte Batson* hearing. *Doe v. Burnham,* 6 F.3d 476, 481 (7th Cir. 1993) ("Judges should invade a party's discretion to strike potential jurors only in narrow circumstances."); *Hitchman v. Nagy,* 889 A.2d 1066 (N.J. App. 2006) ("Requiring the trial court to identify a prima facie case of discrimination before initiating a *Batson/Gilmore* inquiry will avoid a chilling effect on counsel's further exercise of peremptory challenges."); *Williams v. State*, 669 N.E. 2d 1372 (Ind. 1996) (holding that a trial court may conduct a *sua sponte* Batson hearing after a prima facie showing of discrimination has been met). However, even these jurisdictions do not prohibit a trial court from *sua sponte* raising a *Batson* challenge, only that the right is subject to limitations.

The practice, as discussed in case law from Alabama, Washington, Maryland, and Michigan is the better practice, and should be followed in the State

[3] Further, the Maryland Court of Appeals in *Brogden* found that "'the *Batson* analysis applies with equal force to the exercise of peremptory challenges in a manner discriminatory to blacks or whites.'" *Brogden,* 649 A.2d at 1201 (*quoting Gilchrist v. State*, 627 A.2d 44 (Md. App. 1993).

of Florida. This is because allowing a party to strike jurors based on discriminatory grounds, solely because the opposing party fails to make an objection, is not in accordance with the purpose of peremptory challenges.

> Whether a discriminatory challenge is invoked by the defense or the state, if a trial court allows prospective jurors to be precluded from jury service on the basis of race, "it is a willing participant in a scheme that could only undermine the very foundation our system of justice – our citizens' confidence in it."

Williams, 669 N.E. 2d at 1377 (*quoting Georgia v. McCollum,* 505 U.S. 42, 49-50 (1992)).

Further, since the State of Florida already determined that a prima facie case of discrimination is not required to satisfy the first step, there is no need to now impose this requirement on a trial court who determines that *Melbourne* inquiry is necessary. The trial court is uniquely situated to determine credibility, and an appellate court, based on a cold record, should not second guess credibility assessments made by the trial court. *Rodriguez v. State,* 753 So. 2d 29 (Fla. 2000). *See Hall v. Daee,* 602 So. 2d 512, 514 (Fla. 1992) ("It may well be that the challenges were properly exercised but that that fact would not be apparent to someone not in attendance at the trial. The propriety of the challenge, however, might be readily apparent to the judge presiding over the voir dire.").

In the instant case, prior to attempting to exercise a peremptory strike on Juror Buchholz, Petitioner peremptorily challenged Juror Ingrid Benitez, Juror

Sharon Polinski, Juror Nieves Torrens, and Juror Marlene Lorie. (T. 201-07, 212. 214-16). While the ethnic or racial groups of these jurors were not established in the record, Petitioner did name the stricken Black Jurors in an effort to demonstrate that the state was using peremptory challenges in a discriminatory manner. Those jurors named by Petitioner as being Black were Juror Khadijah Wallace, Juror Alicia Seay, Juror Odette Adderly, and Juror Zandra Cue. (T. 216-19). In fact, out of the seven peremptory challenges that the state attempted to use or did use, five were the subject of a *Melbourne* inquiry. For the seven jurors that Petitioner attempted to exercise peremptory challenges on, including Juror Buchholz, the state challenged three of the strikes under *Melbourne.* Thus, based on the numerous *Melbourne* inquiries that were made, the trial court was uniquely situated to determine whether the challenges raised the question of whether they were being exercised in a discriminatory manner, and his decision to conduct a *Melbourne* inquiry for Juror Buchholz, interrupting the state who did ultimately request an inquiry, should not be found to be error based on a review of the cold record.[4] This Court has stated that "[i]f we are to err at all, it must be in the way

[4] Three out of the five, Juror Buchholz, Juror Polinski, and Juror Lorie, peremptory challenges used by Petitioner appear to be against White Jurors, based on their last names. Additionally, this is based on the fact the parties identified the other jurors subject to peremptory challenges as Black or Hispanic, and based on the fact that Petitioner, a Black male, identified the seated jury as all White or White Hispanic. Thus, the trial court was uniquely positioned to determine and observe that

least likely to allow discrimination," *Slappy,* 522 So. 2d at 21-22, thus the trial court did not abuse its discretion in conducting a *Melbourne* inquiry and determining the reasons proffered by Petitioner were not genuine race-neutral reasons.

C. The trial court did not abuse its discretion in determining that the race-neutral reasons provided by Petitioner were not genuine, and thus correctly denied the peremptory challenge.

Thus, since the general objection raised by the state, prior to being interrupted by the trial court, was adequate to raise a *Melbourne* inquiry pursuant to *Franqui*, or in the alternative, the trial court properly exercised its ability to *sua sponte* raise a *Melbourne* inquiry, the Third District Court of Appeal correctly examined whether Petitioner failed to provide a genuine race-neutral reason. For step three in the three-step procedure set forth in *Melbourne,* the trial court must determine whether the race-neutral reasons provided by a defendant are genuine, or whether they are pre-textual. This examination is not based on the reasonableness of the explanation, only the genuineness. *Melbourne,* 679 So. 2d at 759. Relevant circumstances to consider "whether the explanation is pretextual include such factors as the racial makeup of the venire; prior strikes exercised against the same

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Petitioner was attempting to strike White and Hispanic jurors as a result of their ethnic group, and not for genuine, race-neutral reasons.

racial group; a strike based on a reason equally applicable to an unchallenged venireperson; or singling out the venireperson for special treatment." *Rodriguez*, 753 So. 2d at 40.

In the instant case, Petitioner objected to the state's use of a peremptory challenge against Juror Colas, and after listening to the state's race neutral reasons for the strike, the trial court found the reasons to be pretextual and denied the use of the peremptory challenge. (T. 209-10). Almost immediately after this inquiry, Petitioner exercised a peremptory challenge on Juror Buchholz and proceeded to provide the same race neutral reasons that were found to be pre-textual for Juror Colas. (T. 211-12). After Petitioner set forth his race-neutral reasons, the state brought to the trial court's attention that these were the same reasons that were found to be pretextual during the *Melbourne* inquiry concerning Juror Colas. (T. 212). In fact, an examination of the two jurors demonstrates they were similarly situated.

Juror Colas had previous served on one criminal jury and one civil jury. He served on a criminal jury six or seven years ago and the jury reached a verdict. (T. 80). He stated that his home had been burglarized three times. The most recent home burglary occurred three years ago. (T. 81). For family members that had been accused of committing crimes, he stated that his fiancée's son had been arrested and convicted. (T. 80-1). This occurred in Pennsylvania, and while in

court, he "wondered why some people had a longer sentence than he did. That was it. I didn't really think that it was unfair." (T. 81-2).

Juror Buchholz, stated that he served on criminal jury in Missouri, but that while in deliberations the defendant accepted a negotiated plea.[5] (T. 94-5). He stated that he had no family members accused of committing any crimes, and that his home had been robbed when he lived in Boca.[6] (T. 94-5). The alternate juror, Shirley Smith, was also similarly situated to Juror Buchholz and Juror Colas. Juror Smith stated that she served on a civil jury that reached a verdict and that she was the victim of a crime, her purse had been stolen from her residence. (T. 105-6). She also stated that her son was a victim, he had been wrongfully accused of drug trafficking. (T. 106). Further, she stated that she had a daughter who was employed as a corrections officer. (T. 106). Defendant did not object to Juror Smith being seated as an alternate juror, even though she had a similar background to Juror Buchholz. (T. 222).

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[5] Juror Buchholz stated that his jury service was in Missouri, thus while no party inquired into how long ago this service occurred, since he had resided in Dade County for seventeen years, it is plausible that his jury service was over seventeen years ago.

[6] Juror Buchholz had previously stated that he had resided in unincorporated Dade County for seventeen years, thus it plausible that the home robbery that occurred in Boca was seventeen years ago. Further, as no questions were further inquired about being the victim of a crime, it is not clear whether it was in fact a home burglary, or whether it was a robbery.

Petitioner argues that Juror Buchholz and Juror Colas were, in fact, not similarly situated, however, Petitioner failed to raise this argument in the trial court. After the state informed the trial court that the two jurors were similarly situated, Petitioner did not raise the argument that Juror Colas had experience with the criminal justice system as a result of his fiancée's son being arrested and convicted, and therefore, was different from Juror Buchholz. (T. 211-12). Thus, the trial court was not provided with the opportunity to determine whether the two jurors were in fact not similarly situated since Petitioner failed to challenge the state's assertion. Since this argument was not raised at the trial court, it cannot now be an argument used to establish the genuineness of Petitioner's race-neutral reasons for attempting to exercise a peremptory strike on Juror Buchholz. *See Austin v. State*, 679 So. 2d 1197, 1199 (Fla. 3d DCA 1996), *rev. denied* 689 So. 2d 1068 (Fla. 1997) ("the defendant failed to properly preserve the additional pretextual arguments by not raising the issues during the *Neil* inquiry."); *Johnson v. State*, 717 So. 2d 1057 (Fla. 1st DCA 1998) (holding that a claim that the jurors were similarly situated was not preserved for appeal because the claim was not raised in the trial court); *Lidiano v. State*, 967 So. 2d 972 (Fla. 3d DCA 2007) (same).

Therefore, the Third District Court of Appeal correctly determined that the trial court did not abuse its discretion in conducting a *Melbourne* inquiry and

correctly determined that Petitioner failed to provide a genuine race-neutral reason for the peremptory challenge. This decision follows this Court's decisions in *Franqui v. State,* 699 So. 2d 1332 (Fla. 1997), and *State v. Alen,* 616 So. 2d 452 (Fla. 1993), and the general principle that "any doubt concerning whether the objecting party has met its initial burden must be resolved in that party's favor." *State v. Holiday,* 682 So. 2d 1092, 1093 (Fla. 1996). To reach Petitioner's result through public policy arguments would be in contradiction to the decisions established by this Court and the fact that trial courts are encouraged to err on the side of granting a *Melbourne* inquiry. To hold otherwise would be to place more emphasis on form over substance, which was condemned by the First District Court of Appeal in *Murray v. Haley,* 833 So. 2d 877 (Fla. 1st DCA 2003).

D. This Court should revisit whether harmless error applies to wrongfully denied or granted peremptory challenges in light of the United States Supreme Court Case of *Illinois v. Rivera,* 129 S.Ct. 1446 (2009).

In *Busby v. State,* 894 So. 2d 88 (Fla. 2004), this Court held that it is reversible error when a legally objectionable juror sits on a jury. *Id.* at 104. This Court noted that "it is interesting to note that only a bare majority of state courts require a showing that a biased juror actually sat on the jury panel. Nineteen other states in addition to Florida require reversal when a defendant is wrongly denied

the use of a peremptory challenge." *Id.* However, since this decision, the United States Supreme Court decided *Illinois v. Rivera,* 129 S.Ct. 1446 (2009), which holds that the Constitution permits a state to choose between harmless error review and automatic reversal when a trial court erroneously denies a defendant's peremptory challenge. *Id.* at 1452-54. This is a result of the fact that there is no federal constitutional right to peremptory challenges. *Id.* at 1453. *See* Case Comment, *Peremptory Challenges – Harmless Error Doctrine,* 123 Harv. L. Rev. 212 (2009), for a discussion on *Rivera v. Illinois* and its impact on the evolution of peremptory challenges.

Thus, in light of *Illinois v. Rivera,* this Court should revisit whether the harmless error doctrine is applicable to the denial of peremptory challenges. The U.S. Supreme Court recognized that "peremptory challenges are within the States' province to grant or withhold, [and] the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution." *Id.* at 1454. Thus, since the Court found that the denial of a peremptory challenge does not deprive a defendant of the fundamental elements of fairness at trial, under state law the trial court's denial of Petitioner's peremptory challenge cannot be so fundamental to require reversal without first conducting a harmless error analysis.

CONCLUSION

WHEREFORE, the State of Florida respectfully requests an Order of this Court affirming the decision of the district court.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS was mailed this 30th day of December 2009, to Beth Weitzner, Assistant Public Defender, Office of the Public Defender, 1329 NW 14th Street, Miami, Florida 33125.

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CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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