IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-386

ANTHONY E. SMITH,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW–
DIRECT CONFLICT
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1928

Beth C. Weitzner
Assistant Public Defender
Florida Bar Number 203221
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITY

INTRODUCTION

This case is before this Court on discretionary review of an express and direct conflict between the Third District Court of Appeal's decision below with *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997) and *State v. Alen*, 616 So. 2d 452 (Fla. 1993).

In the proceedings below, the Petitioner, Anthony E. Smith, was the Appellant/Defendant and the Respondent, State of Florida, was the Appellee/Plaintiff. In this brief, the parties will be referred to as they stood in the lower courts, by proper name, or as Petitioner and Respondent. The symbol "T." will denote the transcripts of the proceedings below. The symbol "R." will denote the record on appeal.

STATEMENT OF THE CASE AND FACTS

Facts

Petitioner Anthony Smith, a black man, was charged with robbery, burglary, and resisting/assaulting police officers in a predominantly black neighborhood known as Brownsville. (R. 6-18; T. 306, 311, 334). At trial, the defense was misidentification. (T. 247-252; 443-454). On appeal, the issue was the denial of a defense peremptory strike against Earl Buchholz, Jr. – a tennis celebrity – based on the trial court's finding that the strike was motivated by animus against persons with German sounding names. There was no evidence that Mr. Buchholz is German-American, none of the witnesses or attorneys had German-sounding surnames, and the trial had nothing to do with Germany. (T. 68).

During voir dire, Mr. Buchholz identified himself as the chairman of the NASDAQ Open, a prestigious international tennis tournament held annually in Key Biscayne, Florida. The trial judge had heard of Mr. Buchholz, and greeted him by his nickname "Butch." (T. 94). Mr. Buchholz provided the following information in response to standard questioning: he had previously served on a criminal jury, in a case that was resolved during deliberations by a plea; his family had been the victim of a robbery at their home in Boca Raton; and he had never been accused of a crime. (T.

94-95). No information was elicited from Mr. Buchholz about his national origin or his ethnicity:

> MR. BUCHHOLZ: My name is Earl Buchholz, Jr.
>
> I was born 9/16/1940. I reside in Unincorporated Dade. I have lived here about 17 years. My occupation is I'm chairman of the NASDAQ 100 Open, which is a tennis tournament at Key Biscayne.
>
> THE COURT: Isn't your name Butch?
>
> MR. BUCCHOLZ [sic]: Yes, hello. How are you doing?
>
> My wife is a domestic engineer. I have three grown children. I have served on a jury before when I was living in St. Louis. It was a criminal charge and they settled the case, plea bargained.
>
> I do not have any law enforcement people in my family. We have been robbed when we lived in Boca. Our house was robbed.
>
> I have never been accused of a crime. And I have not been a witness.

(T. 94-95).

During the parties' exercise of challenges, defense counsel stated that he was peremptorily striking Mr. Buchholz. (T. 211). The trial judge expressed consternation: "Wait a minute. What about Buchholz? You are peremptorily challenging him?" (T.

211). When defense counsel said "[y]es," the trial judge directed the prosecutor to seek an explanation for the strike. (T. 211). Defense counsel was perplexed: "Is he a member of a distinct minority group which would render him ----" The trial judge broke in that Buchholz sounded to him "like a German name," adding archly that "[A]nybody qualifies under our present great, deeply thought out appellate decisions." (T. 211):

> MR. CASASNOVAS [defense counsel]: We are going to ask for a peremptory on Mr. Buchholz, No. 12.
>
> MS. MATO [prosecutor]: Judge, I would - - -
>
> THE COURT: Wait a minute. What about Buchholz? You are peremptorily challenging him?
>
> MR. CASASNOVAS: Yes, sir.
>
> THE COURT: Are you requiring an explanation?
>
> MS. MATO: Yes, Judge.
>
> MR. CASASNOVAS: Is he a member of a distinct minority group which would render him ----
>
> THE COURT: Buchholz?
>
> MR. CASASNOVAS: Yes.
>
> THE COURT: Sounds to me like a German name.

> MR. CASASNOVAS: This is a recognized minority group within the law, I believe. Mr. Buchholz ----
>
> THE COURT: I suppose there is -- anybody qualifies under our present great, deeply thought out appellate decisions.

(T. 211).

Defense counsel provided two record-supported reasons for his strike of Mr. Buchholz: he was the victim of a robbery at his house, and he had previously served on a criminal jury. (T. 211-12). The trial judge summarily rejected both reasons as being "not [ ] genuine." (T. 211). Defense counsel protested that the judge's rulings were over his objection. (T. 212).

> MR. CASASNOVAS: He is a victim of a house robbery which makes him a victim of a crime. And he can harbor bias or any difficulty in this case ----
>
> THE COURT: The Court will rule that is not a genuine objection and it is overruled.
>
> MR. CASASNOVAS: We have several others.
>
> THE COURT: Go ahead.
>
> MR. CASASNOVAS: He served on a jury.
>
> THE COURT: He served on a jury in Ohio.
>
> MS. WRIGHT [co-defense counsel]: St. Louis.

MR. CASASNOVAS: In a criminal case.

MS. MATO: Those were the same reasons I requested that juror No. 3 be excused.

THE COURT: We are done with Juror No. 3.

MS. MATO: The reasons they said were not the same reasons they are saying for Juror No. 12 [Buchholz].[1]

THE COURT: I don't think that the objections to Buchholz are genuine. I'm going to overrule it.

MR. CASASNOVAS: That is over our respectful objection.

THE COURT: That's correct.

(T. 211-12).

[1] Juror "No. 3" was Orlando Miguel Colas, whom the State had attempted to strike peremptorily. (R. 32; T. 209-10). The prosecutor had argued the same two reasons (crime victim, prior jury service) in attempting to strike Juror Colas. The prosecutor is here suggesting that because the trial judge disallowed the Colas strike, he must disallow the Buchholz strike. However, as defense counsel pointed out at the time, a juror's experience as a crime victim would normally inure to the benefit of the State. (T. 209).

Furthermore, the reason defense counsel wanted Colas, and his dissimilarity from any other juror, was that he was had been present in court observing his fiancée's son receive a harsher sentence than those meted out to other defendants the same day. (T. 81-82, 146, 210).

During the remainder of voir dire, the defense repeatedly renewed its objection to being denied the right to exercise a peremptory challenge against Buchholz (T. 216, 221), and just before the jury was sworn, defense counsel accepted the panel "subject to" his prior objections "[s]pecifically with regard to Mr. Buchholz, we disagree with Your Honor, respectfully." (T. 223).

Mr. Buchholz served on Mr. Smith's jury. (R. 32; T. 223-24). At the conclusion of trial, Mr. Smith was adjudicated guilty of the charged offenses and was sentenced to life imprisonment. (R. 92, 95-97).

The Issue Raised Below and the Third District's Decision

The defense appealed the trial court's denial of the strike of Juror Buchholz to the Third District Court of Appeal on the grounds that: Contrary to *Melbourne*'s[2] first-step requirement, the State had failed to identify Buchholz as a member of any cognizable racial, gender or ethnic group; nor could the trial judge's musing that Buchholz sounded German substitute for a basis in the record for identifying Buchholz as a member of a protected class. Furthermore, the reasons defense counsel provided to explain his strike of Buchholz – his status as a robbery victim and his prior service on a criminal jury – were record-supported and race-neutral. Finally, in the absence of

any conceivable reason for concluding that the defense was motivated by animus against German-Americans or Germany, the trial court abused its discretion in denying the strike. *See* Initial Brief of Appellant, at 8-20.

In its answer brief, the State argued for the very first time that the real reason for the defense strike of Buchholz was not because he might be German-American, but because he was white. *See* Brief of Appellee, at 8. The State claimed that the trial judge understood that it was Mr. Buchholz' race, not his ethnicity or national origin, that triggered the *Melbourne* proceeding. The State added that the trial judge was right to deny the Buchholz strike because it had denied the State's strike of a different juror upon finding that the same reasons – being a robbery victim and serving on a criminal jury – were pretextual when urged by the State. *See* Brief of Appellee, at 6-11.

In the Third District Court of Appeal's initial decision, Judge Leslie Rothenberg – the two other judges concurring "in result only" – found that defense counsel had waived objection to the forced-seating of Mr. Buchholz. According to Judge Rothenberg, the transcript reflected that everyone understood that the State's objection to the Buchholz strike was based upon his "ethnicity," that everyone believed that Buchholz "appeared to be of German descent," that everyone agreed that being of

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[2] *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996).

"German descent" was a "recognizable" group, and that the defense did not object to giving reasons for striking Buchholz. Therefore, the opinion concluded, the issue was waived and not subject to appellate review. *See* slip opinion *Smith v. State*, No. 3D05-90 (Fla. 3d DCA Jan. 31, 2007) at www.3dca.flcourts.org/Opinions/3d05-0090.pdf.

A timely motion for rehearing and rehearing *en banc* specifically disputed the opinion's assertion that "the parties all agreed or accepted that being German placed Buchholz in a recognizable group or class." *See* Motion for Rehearing and Rehearing *En Banc* at 3-4. To the contrary, the defense maintained, nothing in the record supported the suggestion that anyone claimed or agreed that Mr. Buchholz belonged to a German ethnic group or had any German ancestry.

Almost two years to the day following its initial opinion,[3] the Third District denied rehearing, but withdrew its former opinion and entered the decision under review, again authored by Judge Rothenberg. *Smith v. State*, 1 So. 3d 352 (Fla. 3d DCA 2009). The panel now redacted all references to a "waiver" by defense counsel, instead affirming on the basis of this Court's opinion in *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997) and a few related cases.

[3] The Third District's initial opinion was issued on January 31, 2007, and the substituted opinion was issued on January 28, 2009.

Jurisdictional Basis for this Court's Review

Franqui recognized a narrow exception to *Melbourne*'s first-step requirement that the opponent of a peremptory strike demonstrate on the record the juror's membership in a cognizable group as the basis for its claim of invidious discrimination. This narrow exception applies only where the record reflects that the juror is a member of a protected group, and that the trial judge has determined that the juror's membership in that group was the basis for invoking a *Melbourne* inquiry. In *State v. Alen*, 616 So. 2d 452(Fla. 1993), this Court recognized that surname alone is insufficient to demonstrate ethnicity.

In *Franqui*, 699 So. 2d at 1335, the narrow exception applied because this Court held that the record established, and the trial court understood, that the State's invocation of *State v. Neil*, 457 So. 2d 481 (Fla. 1984) was based on the prospective juror's ethnicity as a Hispanic: his name was Aurelio Diaz, he was born and raised in Havana, Cuba, and the trial was held in Miami.

It is the Third District's disregard of *Alen*, and misapplication of *Franqui*'s narrow exception to this case – a record barren of the juror's ancestry, national origin or ethnicity, a record barren of any basis for defense animus against German-Americans or Germany – that is the reason for discretionary review by this Court.

SUMMARY OF ARGUMENT

This case involves a black defendant accused of crimes in a predominantly black neighborhood. Earl Buchholz, Jr. ("Butch" Buchholz), a sports celebrity known to the trial judge, was a prospective juror. There was no evidence in voir dire that Buchholz was born in Germany or was German-American. There was no evidence at trial relating to Germany or German-Americans. On the sole basis that Buchholz sounded "German" to him, the trial judge – remarking that "anybody qualifies under our present great, deeply thought out appellate decisions" – determined that the juror was a member of a protected class, then summarily rejected as pretextual the defense's record-supported, race-neutral, well-established reasons for the strike.

This Court has accepted jurisdiction due to a conflict with *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997) and *State v. Alen*, 616 So. 2d 452 (Fla. 1993). *Alen* held that surname alone does not determine a juror's ethnicity. *Franqui* carved a narrow exception to *Melbourne*'s first-step requirement that the party opposing a strike establish the juror's membership in a protected class for those rare instances in which, notwithstanding a general objection, the record is abundantly clear that the juror's membership in the protected class is precisely the reason for opposing the strike.

Franqui has no application to a case like this in which, other than the trial

judge's untutored hunch that the surname sounds German, there is no indication that the juror is, or identifies as German, and in which there is no conceivable reason why the strike's proponent would seek to exclude Germans from the venire. Indeed, to apply *Franqui* to a case like this would blunt *Melbourne*'s purpose to eradicate racial animus from jury selection, and would thwart the legitimate use of peremptory challenges in producing an impartial jury.

ARGUMENT

THE TRIAL COURT CLEARLY ERRED IN DENYING MR. SMITH'S RIGHT TO EXERCISE A PEREMPTORY CHALLENGE WHERE (1) THE STATE FAILED TO DEMONSTRATE THAT THE JUROR WAS A MEMBER OF A PROTECTED GROUP, (2) THE TRIAL COURT WITHOUT ANY RECORD BASIS SPECULATED THAT THE JUROR'S LAST NAME SOUNDED GERMAN, (3) DEFENSE COUNSEL GAVE NEUTRAL REASONS SUPPORTED BY THE RECORD, AND (4) NOTHING SUGGESTED THAT THE CHALLENGE WAS MOTIVATED BY PERNICIOUS DISCRIMINATION AGAINST GERMAN-AMERICANS.

Introduction

Over the years since *State v. Neil*, 457 So. 2d 481 (Fla. 1984), this Court has remained deeply committed to eliminating racial discrimination in the courtroom by creating procedures intended to eradicate the invidious exercise of peremptory challenges in jury selection. It has extended the constitutional protections of *Batson*[4] and *Neil* to include gender and ethnicity, as well as race. And, by eliminating the first-step burden that *Batson* places on the opponent of a peremptory strike to establish a *prima facie* case of discrimination, this Court has streamlined the procedure for eliciting the proponent's reasons for seeking to exercise the peremptory strike. Under

[4] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Melbourne v. State, 679 So. 2d 759 (Fla. 1996), a party need only object and demonstrate the prospective juror's membership in a constitutionally-protected group to trigger *Melbourne*'s next two steps: (2) the proponent's giving of race-neutral reasons for the strike, and (3) the trial court's evaluation of the genuineness of the reasons. *Melbourne*, 679 So. 2d at 764.

While *Melbourne*'s streamlined procedure is intended to reduce the existence of pernicious discrimination in court, there is potential for abuse, requiring the "good faith obligations" of the parties "to refrain from making frivolous . . . objections." *State v. Whitby*, 975 So. 2d 1124, 1127 (Fla. 2008) (Pariente, J. concurring) (footnote omitted). Frivolous claims of racial discrimination, which invoke *Melbourne* not in order to reduce pernicious discrimination, but solely to thwart the legitimate use of peremptory challenges, mock this Court's important mission to end unconstitutional discrimination.

In this case, Mr. Smith was denied the right to peremptorily strike a juror in the absence of any evidence of discriminatory purpose. The State failed to follow the procedure required under *Melbourne*, and the trial court acted capriciously in denying Mr. Smith the right to peremptorily challenge a juror.

The juror was Earl "Butch" Buchholz, Jr., a sports celebrity. As he announced

in voir dire, he is chairman of the NASDAQ 100 Open, an international tennis tournament held annually at Key Biscayne. (T. 94). The State never attempted to identify Mr. Buchholz as a member of a protected group against which defense counsel was purposefully discriminating. (T. 211-12). It was the trial judge who speculated that Buchholz was a German name, and prodded the State to seek an explanation for the strike. (T. 211). While defense counsel acknowledged that German-Americans might be a cognizable class, he did not acknowledge, nor was there any basis to believe that Mr. Buchholz belonged to that class. (T. 55-225). Undeterred, the trial judge stated that "anybody qualifies under our present great, deeply thought out appellate decisions." (T. 211).

This case involved a black defendant charged with robbery in a predominantly black Miami neighborhood known as Brownsville. There were no German witnesses, no issues related to Germany, and no evidence that Mr. Buchholz' national origin is German, or that he speaks German, or affiliates himself in any way with a German-American ethnicity. Defense counsel's record-supported reasons for striking Mr. Buchholz – he was a victim of a robbery, and had served on a criminal jury – were well-established, race-neutral grounds for exercising a peremptory strike. Nothing in the record suggested that these reasons were a pretext for anti-German animus. Given

these *bona fide*, cogent, race-neutral, record-supported reasons, and the absence of any conceivable basis for counsel to discriminate against a juror with a German-sounding surname, the State did not meet its heavy burden to prove that the peremptory strike was motivated by impermissible prejudice. *Melbourne v. State*, 679 So. 2d at 764. The trial court's ruling is therefore clearly erroneous.[5]

1. State's Failure to Establish *Melbourne*'s First Step

Peremptory challenges are presumed to be exercised in a racially nondiscriminatory manner. *Hoskins v. State*, 965 So. 2d 1, 7 (Fla. 2007). To overcome the presumption, a party objecting to the other's use of a peremptory challenge on racial grounds must comply with the first step of *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996). To satisfy this first step, the opponent must: "a) make a timely objection on that basis," and "b) show that the venireperson is a member of a distinct racial group." *Melbourne*, 679 So. 2d at 764 (footnotes omitted). The fundamental

[5] In reviewing whether the opponent of the strike has met *Melbourne*'s first step of objecting and demonstrating on the record the prospective juror's membership in a protected group, the appellate court looks to the record to see if the opponent has raised this required predicate. *Melbourne*, *supra*. Throughout the process, the burden of persuasion to prove purposeful discrimination never leaves the opponent of the strike. *Melbourne*, 679 So. 2d at 764. The trial court's evaluation of the genuineness of the reasons, under *Melbourne*'s third step, is subject to the clearly erroneous standard of review. *Id.* at 764-65.

requirement that the opponent identify the juror's membership in a protected group has existed since *State v. Neil, supra.* It is the essential predicate for evaluating whether a peremptory challenge is being used to exclude a juror solely because he or she belongs to a constitutionally-protected group.

Franqui v. State, 699 So. 2d 1332 (1997) established a narrow "general objection" exception to *Melbourne*'s first-step requirement that the strike's opponent establish that the venire person belongs to a protected class. The narrow exception applies only where it is **perfectly obvious** that the juror's membership in a protected class is the basis for opposing his strike.[6]

In *Franqui*, the State made only a general objection to the defense's attempt to

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[6] The Third District, in addition to relying on *Franqui*, cited to the following cases in which, unlike this case, the records clearly demonstrated that the prospective jurors' cognizable group membership was the subject of the *Neil* objection: *Alsopp v. State*, 855 So. 2d 695, 697 & n. 2 (Fla. 3d DCA 2003) (general objection sufficient because "[t]he record in this case adequately establishes that Campos is Hispanic" and "the transcripts confirm that the parties and the trial court understood that Campos was Hispanic."); *Foxx v. State*, 680 So. 2d 1064, 1065 (Fla. 3d DCA 1996) ("Although the State here did not expressly state that the venireperson was a member of a distinct racial group, it is clear from the record that such was the case and that the trial court was aware of this fact."); *Joseph v. State*, 636 So. 2d 777, 781 (Fla. 3d DCA 1994) (defense counsel expressly objects to strike of Jewish prospective juror in case where defendant is Jewish, and a careful review of voir dire transcript shows "[t]here is no question that the trial judge understood the basis of the defendant's objection.").

peremptorily strike a juror. Notwithstanding the general objection, this Court specifically upheld the disallowance of the peremptory challenge: the record established that the strike was made to **"a venireperson in Dade County, who was born and raised in Havana, Cuba, and whose name was Aurelio Diaz."** *Franqui*, 699 So. 2d at 1335 (emphasis supplied). Based upon his Cuban national origin, his years in Cuba, his Hispanic given name and surname, and his residency in Miami-Dade County, the parties and the trial judge all "clearly understood that the objection" was based upon Mr. Diaz' Hispanic ethnicity. *Franqui*, 699 So. 2d at 1335.

Franqui could not be further from this case: other than the trial court's hunch that Buchholz' surname sounded German, nothing in the record established that the name was German, much less that Mr. Buchholz was born in Germany, or that he had German ancestry, or spoke German, or ethnically identified as a German-American. Furthermore, while Miami-Dade County has long been a locus for discrimination against Hispanics, it is not known for animus against German-Americans. *Cf. State v. Alen*, 616 So. 2d 452, 455 (Fla. 1993) (observing the "harsh" reality that for Hispanics "discrimination [is] directed at them precisely because they are Hispanic."); *Olibrices v. State*, 929 So. 2d 1176, 1180 (Fla. 4th DCA 2006) ("[I]n the wake of September 11, 2001, and the ensuiing War on Terror against enemies who are thought fanatically

Muslim and Arab or Persian in origin, the possibility of group-based, invidious discrimination against Pakistanis in this country is not fanciful but real."). Applying *Franqui*'s narrow exception to the facts of this case runs counter to and makes a mockery of *Melbourne*'s purpose to eradicate pernicious discrimination from the courtroom. And, as Justice Harding pressed in his dissent in *Franqui*, 699 So. 2d at 1341, "If nothing more than a general objection can thwart the use of peremptory challenge, then we **do** eliminate peremptory challenges as they have been used historically . . . ." 699 So. 2d at 1341 (emphasis in original).[7]

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[7] *Franqui*'s narrow exception was decided by a narrow majority. The dissenting opinion of Justice Harding, to which Justices Kogan and Anstead concurred, opposed carving a general-objection exception to the mandatory first-step requirement under *Melbourne*. The dissent observed that the exception was inconsistent with this Court's decision in *Windom v. State*, 656 So. 2d 432, 437 (Fla. 1995) which had held there was no error for the trial court to refuse to conduct a *Melbourne* inquiry where "defense counsel did not make a timely objection demonstrating on the record that the prospective juror was a member of a cognizable class." *Franqui*, 699 So. 2d at 1340. The dissent emphasized the importance of strict compliance with *Melbourne*'s first step by the opponent of the strike in **all** cases.

> When a party objects to an opposing party's use of a peremptory challenge, the basis of the objection and **the challenged juror's race or ethnicity cannot be left to inference.** Rather, the party objecting to the challenge must demonstrate on the record that the juror is a member of a particular group at the time the objection is made.

Franqui, 699 So. 2d at 1341 (emphasis added).

The only indication that Mr. Buchholz may have been German or German-American was the trial court's hunch that his name was German-sounding. Baseless conjecture about a surname's origin is inadequate to identify a juror's ethnicity. In *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000), the State objected to defense counsel's strike of a Hispanic juror. Defense counsel attempted to defend his strike by pointing out that he had kept another "similarly situated" juror on the panel who also had an Hispanic surname: "Alfred Arzuaga."[8] This Court rejected this argument because, other than Arzuaga's surname, the juror was not identified as Hispanic. *Rodriguez*, 753 So. 2d at 40. This Court distinguished the record in *Franqui* which, unlike the records in *Rodriguez* and in this case, manifestly evidenced Aurelio Diaz' ethnicity as a Hispanic:

> This is different from the situation at issue in *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997), where we indicated that there was no need to state on the record the race of the challenged venireperson. In *Franqui*, we found that the trial court clearly knew the venireperson was Hispanic because he was born and raised in Havana, Cuba, and his name was Aurelio Diaz. Here, the allegation that the similarly situated venireperson was Hispanic is **based on the venireperson's name**. . . .

[8] *See* Rodriguez' Initial Brief of Appellant in SC90153, available at http://www.law.fsu.edu/library/flsupct/sc90153/90153ini.pdf.

Rodriguez, 753 So. 2d at 40 n. 5 (emphasis added).

In *State v. Alen*, 616 So. 2d 452, 455 (Fla. 1993), this Court also pronounced that reliance solely on surname to determine ethnicity is insufficient. It concluded that while a person's "native language and surname" may be used "in determining whether a potential juror can be classified as a Hispanic, those characteristics are not strictly dispositive. . . . Like the characteristics of language and surname, national origin is an important, but not a decisive, factor in determining a person's ethnicity." *Accord Davis v. State*, 691 So. 2d 1180, 1182 n. 1 (Fla. 3d DCA 1997) (court rejects disparate treatment argument used by defendant to oppose State's peremptory strike of black juror, because racial identities of similarly-situated jurors, including a juror named Rodriguez, were not demonstrated: "Although surnames can sometimes indicate a heritage that qualifies as a distinct racial or ethnic group, they are not determinative of the juror's race or ethnicity. . . Because all peremptory challenges carry a presumption of non-discriminatory use, it is the responsibility of the party objecting to the exercise of the peremptory strike to establish the race, ethnicity or gender of the juror in question."); *Morales v. State*, 768 So. 2d 475, 476 (Fla. 2d DCA 2000) (claim that jury venire did not fairly represent Hispanics rejected where only indicator of national origin was Hispanic surname). *Cf. Olibrices v. State*, 929 So. 2d 1176, 1177, 1179

(Fla. 4th DCA 2006) (reversible error for failure to conduct *Melbourne* inquiry into State's attempted peremptory strike against juror Mohammad Khan, where defense counsel identified juror as a Pakistani Muslim based upon record evidence that he was in fact a Pakistani, that juror's name "Mohammed" is a common Muslim name, and that Pakistan "is overwhelmingly Muslim.").

Other jurisdictions have likewise recognized the general unreliability of surname alone as proof of ethnicity.[9] In particular, the multi-generational assimilation

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[9] *See e.g. United States v. Campione*, 942 F.2d 429, 433 (7th Cir. 1991) ("the spelling of a person's surname is insufficient – standing alone – to show that he or she belongs to a particular ethnic group."); *United States v. Sgro*, 816 F.2d 30, 32 (1st Cir. 1987) (requiring "evidence showing what surnames are 'Italian-American' or demonstrating the relationship between surnames and ethnicity."); *United States v. Esparsen*, 930 F.2d 1461, 1466 (10th Cir. 1991) ("Defendants' claim that Ms. Armijo, Ms. Martinez, Ms. Lucero, Ms. Castillo, Mr. Rivera and Mr. Zamora are Hispanic appears to rest solely on their surnames. While such an inference seems plausible, it rests on the assumptions that these surnames are Hispanic, and that people with Hispanic surnames are Hispanic . . . we cannot sustain a *Batson* challenge on conjecture."); *United States v. Di Pasquale*, 864 F.2d 271, 277 (3rd Cir. 1988) (defendant "offered no evidence from which the district court could reasonably have found that persons with Italian surnames are reliably identified as members of a single ethnic descent. . ."); *United States v. Changco*, 1 F.3d 837, 841 n. 1 (9th Cir. 1993) ("While racial identity can often be determined simply by looking at the prospective juror, ethnicity is much harder to ascertain without knowing more about the juror's family background. Even if one could identify with precision which surnames connote Hispanic ethnicity, the question remains whether the name was obtained through marriage or adoption rather than birth. Moreover, some Hispanic-sounding names – such as Cardozo and Perez – are common among Sephardic Jews. Ordinarily,

of early European ethnic immigrant groups in the United States through intermarriage, name change and adoption, and the fact that surnames are generally paternal and so do not reflect the influence of discrete maternal ethnicities, caution against concluding a person's ethnicity from surname alone. *See* Mary C. Waters, *The Everyday Use of Surname to Determine Ethnic Ancestry*, QUALITATIVE SOCIOLOGY, 12(3), Fall 1989 at 316-19, 322.

With a trial that had no bearing on anything German, a juror who is not identified as German-related, and an opponent of a strike who is silent about the juror's protected group membership, the trial judge had no basis to deny the peremptory challenge. This is not to dispute that a trial judge may *sua sponte* initiate the

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therefore, surnames alone would not suffice for a *Batson* challenge."); *United States v. Gelb*, 881 F.2d 1155, 1161-62 (2d Cir. 1989) ("[s]tereotypical ethnic or religious characterizations of surnames are unreliable and only tenuous indicia of a jury's makeup."); *Commonwealth v. Rico*, 551 Pa. 526, 536, 711 A.2d 990, 994 (1998) ("The mere spelling of a person's surname is insufficient to show that he or she belongs to a particular ethnic group."). *Cf. Joseph v. State*, 636 So. 2d 777, 781 (Fla. 3d DCA 1994) (where accused was Jewish and defense objected to striking of Jewish surnamed prospective juror, trial court committed reversible error in refusing to entertain *Neil* challenge to strike based on its erroneous conclusion that *Neil* applied only to African-Americans and Hispanics, not Jews. The appellate court rejected the state's claim on appeal that "no showing was made that Ms. Friedman was, in fact, Jewish, " explaining that "the trial judge understood the basis of the defendant's objection" and that its reversal was based upon the trial court's erroneous legal ruling pretermitting any *Neil* challenge because Jews were not a protected class.).

Batson/Melbourne procedure where there is a good faith basis to suspect that underlying an attempted peremptory strike is forbidden discriminatory motive. However, where, as here, there is absolutely nothing to support such suspicion, the procedure cannot be used to defeat a peremptory challenge.

Because the State failed to identify Buchholz's membership in any particular ethnic group, there could be no legal basis to conclude that defense counsel acted purposely to eliminate a particular ethnic group from the jury. Tacitly acknowledging its failure to satisfy *Melbourne*'s requirement to identify the juror's protected status, the State suggested – not until appeal – that the real reason the defense sought to strike Mr. Buchholz was because he is white.[10] *See* Brief of Appellee at 8. This suggestion, never made by either the prosecutor or the trial judge, nor endorsed by the Third District, comes too late. As this Court observed, "the appellate court is not a forum for conducting an after-the fact *Neil* inquiry. Such endeavors . . . seldom reflect the true thought processes that occurred at the time of the challenge. . . . the proper forum is the trial court, not the appellate court." *Hall v. Daee*, 602 So. 2d 512, 515-16 (Fla. 1992).

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[10] The petit jury was later described as being all white, with the exception of an alternate. (T. 229).

Contrary to the Third District's decision, this case does not fall within the narrow *Franqui* general-objection exception to *Melbourne*'s mandatory first step. Absent compliance with this crucial first-step predicate, or compliance with *Franqui*'s narrow exception to it, the trial court's evaluation of the genuineness of the reasons for the strike under *Melbourne*'s third step became an irrelevant and impermissible exercise.

2. Counsel's Reasons were Factually Supported, Cogent and Race Neutral

Even assuming that Buchholz is a German surname, or the juror was born in Germany, had German ancestry, or identified ethnically as a German-American, or all four combined, the reasons provided were race neutral and record supported.

After the trial judge's arch assertion that "anybody qualifies under our present great, deeply thought out appellate decisions," defense counsel promptly volunteered his reasons for the strike. Counsel had nothing to hide; the fact that he promptly volunteered his reasons only evinced his candor and good conscience. *See Hernandez v. New York*, 500 U.S. 352, 353-54 (1991) ("[I]n crediting the prosecutor's explanation . . . the court could have relied on the facts that he defended his use of peremptory challenges without being asked to do so by the judge . . . .").

Counsel provided two reasons. Both were factually-supported, well-established,

facially race-neutral reasons for a defense peremptory strike.[11] The first was that Mr. Buchholz was a victim of a burglary of his home (he said, "We have been robbed . . . [our] house was robbed.") (R. 95, 211). Mr. Smith was on trial for burglary and robbery. (R. 8-9). A venireperson's status as a crime victim – especially the same crime with which petitioner was charged – is a cogent, race-neutral reason for why defense counsel would exercise a peremptory strike. *Williams v. State*, 619 So. 2d 487, 491 (Fla. 1st DCA1993); *Barnes v. State*, 620 So. 2d 243 (Fla. 3d DCA 1993); *Robinson v. State*, 832 So. 2d 944 (Fla. 3d DCA 2002). Furthermore, unlike other crime victims in the venire, Mr. Buchholz had no experience of ever being accused of a crime, an experience which might have mitigated the presumed anti-defense bias that arises from being a victim. (T. 94-5)

The second reason was that Mr. Buchholz had served as a juror on a criminal trial which ended in a plea bargain during deliberations. (T. 95, 151). The parties questioned the entire panel about prior jury service, the distinction between civil and criminal trials, and whether anyone had been a foreperson. (T. 73, 78-79, 80, 83, 84, 86, 88, 93-96, 100-114, 117 -18, 149, 150, 151,153, 158 188-89). Inexperienced first-

[11] The ethnic neutrality of reasons given for a strike is a question of law, subject to de novo review. *Frazier v. State*, 899 So. 2d 1169, 1172-73 (Fla. 4th DCA 2005).

time jurors might look for leadership to venirepersons such as Buchholz who had served on a criminal jury trial, particularly in view of Buchholz' leadership of the NASDAQ tournament. That is why prior jury trial experience is a valid, race-neutral basis to exercise a peremptory strike. *Jones v. State*, 787 So. 2d 154, 156 (Fla. 4th DCA 2001); *Betancourt v. State*, 650 So. 2d 1021, 1023 (Fla. 3d DCA 1995); *Speights v. State*, 668 So. 2d 316, 317 (Fla. 4th DCA 1996).

3. State's Failure to Establish Discriminatory Motive

The trial judge abused his discretion in denying the peremptory challenge. The moment defense counsel explained that he was striking Buchholz because he was a robbery victim, the trial judge ruled that this reason was "not a genuine objection." (T. 211). While no magic words are required in the denial of a peremptory challenge, it is difficult to imagine that the trial court gave consideration to the relevant factors to be evaluated under *Melbourne*'s third step, including "the [ethnic] makeup of the venire; prior strikes exercised against the same [ethnic] group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment." *Melbourne*, 679 So. 2d at 764 n. 8. The record fails to establish that defense counsel had a pattern of striking German-Americans, because it fails to establish if there were any German-American venirepersons. To the contrary, it should

be noted that defense counsel agreed to the seating of venireperson John Charles Lineberger, whose surname, just like Buchholz', might (or might not) also be Germanic. (R. 32; T. 223).

Further, there was no disparate treatment of other jurors. After the trial judge ruled that being a crime victim was not a genuine reason, defense counsel pointed to Buchholz' prior service on a criminal jury. At this point, the prosecutor ventured that defense counsel's prior objection to the State's strike of Juror Colas, who was also a crime victim and had served on a jury, showed that counsel's reasons for striking Buchholz were pretextual. (T. 212). Defense counsel had previously raised a *Melbourne* objection to the State's strike of Mr. Colas on the stated basis that he was Hispanic. (T. 209-10). While the State's reasons for striking Mr. Colas included that he was a crime victim, this is a fact that ordinarily inures to the State's benefit. *See Valentine v. State*, 616 So. 2d 971, 974 (Fla. 1993). The State's invocation of its Colas strike to thwart the defendant's Buchholz strike was the kind of facile, "what's-good-for-the-goose" riposte that too often substitutes for the sober reflection required to effectuate *Melbourne*'s intent. Furthermore, Colas was not similar to Buchholz. Unlike any other veniremember, Colas had witnessed the imposition on his fiancée's stepson of a stiffer sentence than was meted out to other defendants in court. (T. 81-

82, 146, 210). This experience could have rendered Colas skeptical of the fairness of law enforcement in a way that would inure to the benefit of the defense. *See Hoskins v. State*, 965 So. 2d 1, 11 (Fla. 2007) ("Ms. Sauro had previously indicated that her husband was a deputy for the Brevard County Sheriff's Office. Thus, the State likely found Ms. Sauro acceptable on that basis, regardless of any negative law enforcement contacts her brother may have had"); *Files v. State*, 613 So. 2d 1301, 1305 (Fla. 1992) (state strike against African-American person who was divorced, had five children and was unemployed not shown to be pretextual because, although some jurors whom the state failed to strike were unemployed and some were divorced, none but the juror in question was both unemployed and divorced with five children.). In short, the State failed to meet its heavy and continuing burden to prove that defense counsel engaged in purposeful discrimination against German-Americans by seeking to peremptorily strike Mr. Buchholz, and the judge's denial of the strike was an abuse of discretion.

4. The Balance Between the Right to Exercise and the Duty to Disallow Peremptory Challenges

This Court has recognized the essential role peremptory challenges play in achieving the constitutional guaranty of trial by an impartial jury:

> Today, every state provides peremptory challenges to both parties in criminal and civil cases. In Florida, one's entitlement to peremptory challenges is long-standing. In fact, the entitlement to peremptory challenges preceded Florida's statehood.
>
> ***
>
> As recognized by the United States Supreme Court, "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Indeed, as this Court has recognized, the very purpose of peremptory challenges is "the effectuation of the constitutional guaranty of trial by an impartial jury." Although peremptory challenges are not themselves constitutionally guaranteed at either the state or federal level, such challenges are nonetheless "one of the most important of the rights secured to the accused."

Busby v. State, 894 So. 2d 88, 98 (Fla. 2004) (internal citations omitted). As long as the strike is not used for constitutionally-prohibited discrimination, a party has the right to peremptorily excuse a juror for any reason real or imagined. *Id.* at 99.

Thus, while *Melbourne* reflects this Court's commitment to eliminate discrimination through the use of peremptory challenges, *Busby* reflects this Court's concern for the viability of the right to peremptory challenges. The trial court's task is to strike a balance between two rights that are occasionally in tension, particularly in the context of our complex multicultural society: the right to trial before a jury selected

without pernicious discrimination, and the right to trial by an impartial jury. The *Melbourne* procedure for streamlining access to the striking party's motivation is intended to facilitate the former; but as *Busby* makes clear, the *Melbourne* procedure must not be invoked for the purpose of thwarting the latter. When the procedure is disingenuously invoked, it undermines both *Melbourne*'s commitment to eradicate unconstitutional animus in the courtroom, and *Busby*'s recognition of the value of the peremptory challenge to an impartial jury. Careful compliance with *Melbourne*'s first step averts these concerns.

Here, there was no good faith assertion of discriminatory motive behind counsel's challenge to juror Buchholz. The first two prongs of *Melbourne*'s first step were ignored. And, contrary to the Third District's conclusion, the narrow *Franqui* exception had no application to a record barren as to Buchholz' ethnic identity. In the face of the State's silence as to the juror's ethnic background, the trial judge's interjection that Buchholz sounded German – as a predicate to an apparently foregone genuineness inquiry – corrupted the meaning of *Melbourne* and served solely to thwart the defendant's appropriate exercise of a peremptory challenge. Neither reason, commonsense, nor the record, overcame the presumption that the peremptory strike was motivated by forbidden discriminatory intent.

CONCLUSION

Petitioner Anthony E. Smith respectfully requests that this Court quash the decision of the Third District Court of Appeal below, and reverse his judgment of convictions and sentences and remand this case for a new trial.

Respectfully submitted,
CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1928

By: _____
Beth C. Weitzner
Assistant Public Defender
Florida Bar Number 203221
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered by U.S. mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida this ___ day of November, 2009.

By: _____
Beth C. Weitzner
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

By: _____
Beth C. Weitzner
Assistant Public Defender