IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-386

ANTHONY E. SMITH,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY 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

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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.

A. The State's Failure to Demonstrate *Melbourne*'s First Step-Requirement or *Franqui*'s Narrow, General Objection Exception

In its brief, the State admits that it did not satisfy *Melbourne*'s first-step requirement of identifying the cognizable group to which juror Buchholz belonged. The State nonetheless declares "the record is clear that the trial court understood the reason for the [State's] challenge," citing the trial court's finding that **"anybody qualifies under our present great, deeply thought out appellate decisions. "** Respondent's Brief on the Merits at18. Relying on this finding, the State asserts that the record satisfies the narrow, general-objection exception of *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997).

Like the Third District below, the State misapplies *Franqui*'s exception. In *Franqui*, it was clear that the general objection "was being made on racial grounds" because it concerned "the challenge of a venireperson in Dade County, who was born and

raised in Havana, Cuba, and whose name was Aurelio Diaz." 699 So. 2d at 1335.

The State's own brief illustrates the gulf between this case and *Franqui*. The State waffles over what cognizable group is being targeted and, in so doing, makes an argument never advanced in the trial court that "Juror Buchholz, whether German-American **or White**, is a member of a cognizable class." Respondent's Brief on the Merits at 18. (emphasis added).

As noted in the initial brief, nothing in the record reflects that Mr. Buchholz is German-American, or that defense counsel harbored an anti-German bias, or that the charges were related to Germany. The trial court's speculative, off-hand comment that the juror's surname "sounds to me like a German name," failed to satisfy *Melbourne*'s first step or *Franqui*'s exception.

Furthermore, neither the State nor the trial judge ever maintained that defense counsel was attempting to strike Buchholz – **or any other prospective juror** – because he was white. Nor did the Third District determine that defense counsel intended to strike Buchholz because he was white.

Nevertheless, the State now strives to confect a defense reverse-racial animus by referencing a complaint defense counsel made at the end of jury selection, long after the Buchholz strike had been denied: that, with the exception of one alternate, the State had peremptorily stricken all black jurors, resulting in an all white or white Hispanic jury. (T.

229). Perverting the serious equal protection interests underlying *Batson/Melbourne*, the State now seizes on defense counsel's understandable concern in order to belatedly raise an unsubstantiated accusation of reverse discrimination.[1]

The State also argues that because defense counsel provided reasons for the strike of Buchholz, the State's failure to demonstrate his membership in a protected group became moot. Respondent's Brief on the Merits at 20. The State refers to dicta in the plurality decision in *Hernandez v. New York*, 500 U.S. 352, 359 (1991), that once a proponent of a strike offers his reasons, and the trial court rules on the ultimate question of discrimination, the question of whether the opponent of the strike presented a prima facie case of discrimination becomes moot. The State misapprehends this principle, confusing the first step of *Melbourne* with the prima facie case required under *Batson*.[2]

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[1] In this regard, the State now asserts, at page 28, footote 4 of its brief, that defense counsel used two of its five peremptory challenges (excluding Buchholz) against prospective jurors Polinski and Lorie whom the State speculates were white based upon their last names. The defense used these strikes for cogent reasons. Before striking prospective juror Sharon Kay Polinski, defense counsel had moved to challenge her for cause (T. 206-07): her brother was a Metro-Dade police captain, she discussed his cases with him, and one of the charges against Petitioner was assault on a law enforcement officer, a charge which she admitted "is certainly a red flag for me. … From a personal standpoint. I would feel I certainly wouldn't want my brother to be in that situation." (T. 88-90). The second prospective juror, Marlene Rubio Lorie, had a cousin who was a Miami-Dade police lieutenant and, like Buchholz, was a crime victim. (T. 95).

[2] In *State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993), this Court eliminated the requirement that the opponent of the strike make a prima facie showing of racial discrimination. *See Melbourne*, 679 So. 2d 759, 764 n. 5 (Fla. 1996).

The prima facie case deemed moot in *Hernandez* did not concern the jurors' membership in a protected group. Everyone in *Hernandez* understood the objections to the stricken prospective jurors were because they were Latinos. *Hernandez*, 500 U.S. at 355-56. What was subject to mootness in *Hernandez* was whether the opponent of the strike had made a prima case of discrimination against Latinos. Once the proponent of the strike volunteered his reasons without waiting for the court's determination as to the prima facie case, that determination became moot. How could membership in a cognizable group ever be moot, for without it there could be no determination of unconstitutional intent to exclude?[3]

Buried in footnote 2, page 22 of its brief, the State asks, as an alternative to reversal, to remand the case to the Third District in order for that court to assess whether petitioner waived the issue because the record recites that defense counsel stated "[t]his is a recognized minority group within the law I believe." (T. 211). The Third District already considered and rejected the State's claim. On rehearing, the Third District withdrew its initial opinion in regard to waiver (authored by one district judge, with the remaining two judges agreeing in result only), and substituted the decision under review

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[3] Additionally, the failure to make *Batson*'s prima facie showing is moot where, as in *Hernandez*, the trial court ultimately allows the peremptory strike. Where, however, the strike is denied, as here, the mootness principle is inapplicable. *See People v. Rivera*, 852 N.E.2d 771, 786-87 (Ill. 2006); *United States v. Stewart*, 65 F.3d 918, 925 (11th Cir. 1995).

in which it omitted any reference to waiver. *Smith v. State*, 1 So. 3d 352 (Fla. 3d DCA 2009). This is because, while defense counsel may have agreed that German-American was a cognizable group, he never agreed that Buchholz was a member of this group. Indeed, the voir dire record is replete with defense counsel's repeated objections to the ruling denying his attempt to challenge Buchholz. (T. 212, 216, 221, 223).

B. A Trial Judge's Sua Sponte Challenge To A Peremptory Strike Is Subject to *Melbourne*'s First-Step Requirement.

The State argues that the trial court was authorized to sua sponte initiate the *Melbourne* procedure. *See* Respondent's Brief on the Merits at 23-29. Petitioner does not dispute this sua sponte authority and specifically recognized it in his initial brief at pages 23-24. However, a trial court, no different than counsel, must genuinely, not arbitrarily, invoke the *Melbourne* procedure, and must follow its first-step requirement of demonstrating the venireperson's membership in a cognizable group.

This is evident from the nine decisions cited by the State which recognize a trial court's sua sponte authority to initiate a *Batson* inquiry. Six of these decisions prohibit a trial judge from raising the procedure sua sponte unless a prima face case of discrimination is established, and a seventh case allows a sua sponte inquiry "only in narrow circumstances." *See People v. Bell*, 702 N.W.2d 128, 134 (2005) ("[T]he trial court may make an inquiry sua sponte after observing a prima facie case of purposeful

discrimination through the use of peremptory challenges.");[4] *Hitchman v. Nagy*, 889 A.2d 1066, 1074 (N.J. Super. Ct. App. Div. 2006) ("[D]efendants argue that while a trial court may, sua sponte, initiate a *Batson/Gilmore* inquiry, it may do so only *after* identifying a prima facie showing of discrimination. We agree. Trial courts 'must be cautious not to discourage the [attorneys] from using peremptory challenges in all proper instances to further, though not to undermine, the right to trial by an impartial jury.'" (emphasis in original) (citation omitted)); *State v. Evans*, 998 P.2d 373, 383 (Wash. Ct. App. 2000) ("[W]e hold that a court may, in the sound exercise of its discretion, raise sua sponte a *Batson* issue. But it may do so only when a prima facie case of purposeful discrimination exists.");[5] *Williams v. State*, 669 N.E.2d 1372, 1382 (Ind. 1996) ("Intervention *sua sponte* is only authorized when a *prima facie* case is abundantly clear with respect to a particular juror."); *Lemley v. State*, 599 So. 2d 64, 70-71 (Ala. Crim. App. 1992) ("By requiring the defense to come forward with reasons for its strikes of

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[4] In its brief at pages 24-26, the State cites to *People v. Bell*, 675 N.W. 2d 894 (Mich. Ct. App. 2003), for the proposition that in Michigan a judge may sua sponte invoke *Batson* inquiries without any prima facie showing. However, the Supreme Court of Michigan, overruling that decision on other grounds, approvingly interpreted the lower appellate court's decision as conditioning the exercise of the sua sponte authority upon a prima facie showing of discriminatory intent. *See* 702 N.W. 2d at 134.

[5] In its brief at page 26, the State misstates that Washington allows a court to unqualifiedly initiate the *Batson* procedure sua sponte. As shown by *State v. Evans*, *supra*, that state, like Michigan, prevents the exercise of this authority absent a prima facie case of discrimination.

black veniremembers, the circuit court implicitly found a prima facie case of racial discrimination. That finding was warranted…"); *Brogden v. State*, 649 A.2d 1196, 1199 (Md. Ct. Spec. App. 1994) (Court affirms use of sua sponte authority where trial court found a prima facie case of racial discrimination, noting that "[n]either this Court nor the Court of Appeals has heretofore been asked to decide whether a trial court may determine sua sponte that the manner in which peremptory challenges were exercised created a prima facie case of racial discrimination."); *Doe v. Burnham*, 6 F.3d 476, 481 (7th Cir. 1993) ("Judges should [sua sponte] invade a party's discretion to strike potential jurors only in narrow circumstances.").

Unlike this case, in all nine of the cases cited by the State, the records specifically identified the prospective juror's membership in a discrete cognizable group. Most importantly, in each of those cases where the invocation of a trial court's sua sponte authority was approved, the facts rationally justified active judicial apprehension at the possibility of invidious discrimination in jury selection. *See Richardson v. State*, 575 So. 2d 294, 295 (Fla. 4th DCA 1991) (peremptory strike against "the only black juror on the panel."); *United States v. Huff*, 2009 WL 2997016 (A.F.Ct.Crim.App. 2009) ("[She] was the only African-American and only remaining female prospective court member on the appellant's court-martial panel."); *Lemley v. State*, 599 So. 2d 64, 66-67, 70 (Ala. Crim. App. 1992) ("[I]n a case with racial overtones" involving a white adult defendant

shooting a black youth, defense counsel used seven of his ten peremptory challenges to remove blacks and the State used all of its peremptory challenges to remove whites.); *Brogden v. State*, 649 A. 2d 1196, 1198, n. 2 ((Md. Ct. Spec. App. 1994) (Trial court found a prima facie case of racial discrimination where the array consisted of 26 African-American and 14 white potential jurors, at least one of the 14 white potential jurors had been struck for cause, defense counsel "used eight of his ten peremptory challenges to strike white potential jurors … only nine white potential jurors that were in the array had been called up during the jury selection process, and only one of those potential jurors had been seated."); *People v. Bell*, 702 N.W. 2d 128, 135 (Mich. 2005) ("defense counsel, for the better part of the day, had only excused Caucasian male jurors" and had "exercised seven of nine peremptory challenges against Caucasians" which "created a pattern.")

Nothing rationally justified the trial court's sua sponte *Melbourne* inquiry in this case. There was no conceivable concern about unconstitutional bias against German-Americans. Nor was Mr. Buchholz demonstrated to be a German-American. And, as set forth at pages 10-11 *infra*, the State has not overcome the legally valid, factually supported, ethnic-neutral reasons defense counsel had for the strike.

Instead, the record reflects the sheerest caprice in the court's exercise of its sua sponte authority. Mr. Buchholz, whom the trial court recognized from the NASDAQ Open (T. 94), was the only venireperson for whom the trial court sua sponte initiated a

Melbourne inquiry. In contrast to the reception of peremptory challenges made to every other venireperson, when defense counsel announced he was striking Buchholz, the trial court immediately protested, "Wait a minute. What about Buchholz? You are peremptorily challenging him?" (T. 211). Buchholz was the only prospective juror in regard to whom the court prompted the State to request reasons for the strike: "Are you requiring an explanation?" (T. 211). And he was the only juror whose cognizability the trial court speculated upon: In responding to defense counsel's question as to Buchholz' cognizable group membership, the trial court mused, "[s]ounds to me like a German name" before throwing up its hands, "anybody qualifies under our present, great, deeply thought out appellate decisions." (T. 211). In short, the record reflects a solicitude by the court for preventing a peremptory strike against Mr. Buchholz that was not based upon an actual concern for unconstitutional discrimination. The court lacked the authority to force-seat this juror and infringe on petitioner's right to peremptorily challenge him, in the absence of any evidence of discriminatory intent, and there was none.

C. The Trial Court Abused its Discretion in Denying the Peremptory Strike Where Counsel's Reasons for the Strike were Factually Supported and Race Neutral, And The State Has Failed to Establish Disparate Treatment.

The State does not dispute that defense counsel's two reasons for striking Buchholz - that he was the victim of a robbery (the same offense for which petitioner was charged) and that he served as a juror in a criminal jury trial - were record supported and race

neutral.

Instead, the State contends that defense counsel did not strike two other jurors, Mr. Colas and alternate juror Ms. Smith, whom the State alleges were similarly situated. The state disregards the record.

Indeed, the State ignores the very position it advanced below to justify its peremptory strike against juror Colas. Mr. Colas testified on voir dire that he had observed in court his fiancee's stepson receiving a stiffer sentence than other defendants. (T. 81, 146, 210). This experience could have rendered Colas biased against law enforcement, as the State itself explained to the trial court:

> Judge, I know that when Mr. Colas was questioned about his fiancee's son's treatment by law enforcement or by the system in general, he indicated that he thought that he had received a harsher punishment than the other cases that were in court that day. No, he did not feel that, you know, he was really certain in terms of whether – whether he was treated fairly or not.

(T. 210). In sharp contrast with Colas, there was no testimony that Buchholz had relatives or friends who had been arrested or charged with crime. Accordingly, the State's own argument explains why Buchholz was not similarly situated to Colas, and why defense counsel would have wanted Colas, not Buchholz, on the jury.[6]

[6] In its brief at page 32, the State seeks to avoid this difference between the two jurors on the basis that defense counsel did not discuss it below. The trial court regarded the State's invocation of Colas as an attempt to relitigate that strike. In any case, it is

There is also no disparate treatment in regard to the alternate juror Mrs. Shirley Smith. Unlike Buchholz, Smith had a family arrest history – her "son was a victim, he had been wrongfully accused of drug trafficking." Brief of Respondent at 31. This feature would inure to the benefit of the defense and was certainly a valid reason for defense counsel not to strike her.

It may also be noted that defense peremptorily struck prospective juror Nieves Torrens who, like Buchholz, had no family members accused of crime, had served on a criminal jury, and was the victim of a home burglary. (T. 93).

4. The Wrongful Denial of Petitioner's Right to Exercise a Peremptory Challenge Constitutes Per Se Reversible Error.

Upon the basis of *Rivera v. Illinois*, _ U.S. _, 129 S.Ct. 1446 (2009), the State asks this Court to reconsider its holding in *Busby v. State,* 894 So. 2d 88 (Fla. 2004) that the wrongful denial of a peremptory challenge is not subject to harmless error. The State has not only failed to raise this issue below, but *Rivera* provides no support for its position. *Rivera* held that as a matter of federal constitutional law, the erroneous denial of a peremptory challenge is not *per se* error, but that "States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*." 129 S.Ct. at 1456. This Court in *Busby* decided just that. It held that because of

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clear that the court's disallowance of the Buchholz strike was not based on any finding that he and Colas were similarly situated. (T. 211-12).

the very important role peremptory challenges play in ensuring a fair trial, the wrongful deprivation of that right could not be held harmless as a matter of state constitutional and statutory law. "As the arbiters of the meaning and extent of the safeguards provided under Florida's Constitution, we reiterate that the ability to exercise peremptory challenges as provided under Florida law is an essential component to achieving Florida's constitutional guaranty of trial by an impartial jury." *Busby*, 894 So. 2d at 102.

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 8th day of February, 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