Supreme Court of Florida

No. SC09-386

ANTHONY E. SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[March 17, 2011]
CORRECTED OPINION

PARIENTE, J.

The issue in this case is whether a trial court can deny a party the right to exercise a peremptory strike against a juror where the record does not establish that the juror was a member of a protected class. The decision of the Third District Court of Appeal in Smith v. State, 1 So. 3d 352 (Fla. 3d DCA 2009), is in express and direct conflict with our precedent in State v. Alen, 616 So. 2d 452 (Fla. 1993), which held that a juror's surname, without more, is insufficient to trigger an inquiry as to whether the strike was exercised in a discriminatory manner.[1] The

1. We have jurisdiction. See art. V, § 3(b)(3), Fla. Const.

Third District's opinion, which does not require that there be a threshold demonstration that the juror was a member of a protected class, has the potential to undermine the very purpose for the protections required to prevent invidious discrimination in jury selection. We quash the decision of the Third District because it is contrary to our precedent in Alen that a juror's surname, without more, is insufficient to trigger an inquiry as to whether the strike was exercised for a discriminatory reason.

FACTS

During voir dire, each of the jurors answered a list of standard questions regarding their backgrounds. A potential juror, Earl Buchholz, Jr., identified himself as the chairman of a prestigious international tennis tournament held annually in Key Biscayne, Florida.

> 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. BUCHHOLZ : 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.
>
> THE COURT: Thank you.

During the parties' exercise of challenges, defense counsel stated that he was peremptorily striking Mr. Buchholz, at which point the following exchange occurred:

> 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.[2] Mr. Buchholz—
>
> THE COURT: I suppose there is—anybody qualifies under our present great, deeply thought out appellate decisions.
>
> 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.

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2. Although there is a dispute as to whether defense counsel agreed that being a German could be a protected class under the law, the defense did not agree that Buchholz was a member of this class. Defense counsel subsequently attempted to correct the record, asserting that he stated being German is not a recognized minority group. However, this dispute is not relevant to our opinion because the Third District addressed the merits of the case and did not rely on counsel's alleged concession to uphold the trial court's decision. Before this Court, the State does not argue that the defense waived its objection.

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].
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.

(Emphasis added.)

On appeal, Smith raised only one issue: whether the trial court erred in denying defense counsel's peremptory challenge of Buchholz. In reaching its decision, the Third District rejected the defendant's claim that the State's objection to the peremptory challenge was insufficient. The Third District first recognized that when a party objects to the use of a peremptory challenge, the opponent "must make a timely objection, identify the racial or ethnic class or gender of the juror being challenged, and request that the trial court ask the striking party to articulate its reason(s) for the strike." Smith, 1 So. 3d at 353. Any doubt as to whether this initial burden was met must be resolved in the objecting party's favor. The Third District then held that if an objection is insufficient, a trial court is not required to make an inquiry as to the reason for the strike. Id. at 354. However, the "trial

court may exercise its discretion to do so if it clearly understands the nature of the objection." Id.

Relying on this Court's opinion in Franqui v. State, 699 So. 2d 1332, 1335 (Fla. 1997), the Third District interpreted Franqui as drawing a distinction between "those cases in which 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. In support, the Third District reasoned that

> in Franqui, while the State's objection was arguably insufficient to require the trial court to conduct a Neil[3] inquiry, the Florida Supreme Court affirmed Franqui's convictions after concluding that the trial court did not abuse its discretion in requesting the defense to provide a race-neutral reason for its peremptory challenge of the juror since it was clear that the trial court understood that the objection was made on racial grounds.

Id. (emphasis omitted). The Third District rejected the premise that an inquiry cannot be made by the trial court unless the objecting party meets the first prong of Melbourne,[4] which requires the objecting party to "make a timely objection, identify the racial or ethnic class or gender of the juror being challenged, and request that the trial court ask the striking party to articulate its reason(s) for the strike." Smith, 1 So. 3d at 353. The Third District then concluded that "the trial

3. State v. Neil, 457 So. 2d 481, 486 (Fla. 1984), receded from on other grounds by State v. Johans, 613 So. 2d 1319, 1321 (Fla. 1993).

4. Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996).

court did not abuse its discretion in requesting the defense to provide a race-neutral reason for its peremptory challenge of prospective juror Buchholz." Id. at 355. The Third District affirmed the trial court because the trial court found that the reasons proffered were not genuine and the record clearly supported the trial court's finding.

ANALYSIS

The conflict issue is whether a juror's surname, without more, is sufficient to trigger an inquiry into whether the peremptory strike was exercised in a discriminatory manner. As we explain below, the Third District's decision directly conflicts with this Court's decision in Alen, which held that a juror's surname alone is insufficient to demonstrate ethnicity. The Third District's opinion also mistakenly relied on and misapplied this Court's decision in Franqui. While Franqui recognized that no magic words were necessary to trigger an inquiry into whether a strike was exercised in a discriminatory manner, Franqui did not eliminate the necessity of establishing that the juror was a member of a cognizable class.

To answer this question, we discuss the law relative to peremptory challenges and then apply it in this case to determine if the trial court and the Third District properly determined that an inquiry into the basis for the peremptory

challenge was appropriate. For the reasons addressed in more depth below, we conclude that the inquiry was contrary to this Court's well-established precedent.

Our Precedent Regarding Peremptory Challenges

As recognized by this Court, "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) (citations omitted); see also Alen, 616 So. 2d at 453. These peremptory challenges, however, cannot be used in a discriminatory manner to exclude potential jurors based on race, ethnicity, or gender. Busby, 894 So. 2d at 99.

Article I, section 16, of the Florida Constitution guarantees a defendant the right to an impartial jury. This Court has held that the exercise of a peremptory challenge solely on the basis of race violates the right to trial by an impartial jury under article I, section 16, of the Florida Constitution. See Neil, 457 So. 2d at 486. The Court has explained the tension between the right to exercise peremptory challenges and the right to an impartial jury free of impermissible discrimination as follows:

> Traditionally, a peremptory challenge permits dismissal of a juror based on no more than "sudden impressions and unaccountable

> prejudices we are apt to conceive upon the bare looks and gestures of another." 4 W. Blackstone, Commentaries 353 (1807). This ancient tradition, however, is to some degree inconsistent with the requirements of the Florida and federal constitutions. We thus cannot permit the peremptory's use when it results in the exclusion of persons from jury service due to constitutionally impermissible prejudice. To the extent of the inconsistency, the constitutional principles must prevail, notwithstanding the traditionally unlimited scope of the peremptory.

State v. Slappy, 522 So. 2d 18, 20 (Fla. 1988), receded from on other grounds by Melbourne, 679 So. 2d at 765. In other words, the very purpose of placing any limits on the free exercise of peremptory challenges was to prevent the exclusion of individuals from jury service due to discrimination. As further explained in Alen:

> Although the peremptory challenge contributes significantly to the selection of a fair jury, it is also a tool that can be intentionally or unintentionally transformed into a disguise for discrimination against distinct groups of people. As we stated in Neil, "[i]t 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."

Alen, 616 So. 2d at 453 (quoting Neil, 457 So. 2d at 486).

Over the years, the procedure for determining whether impermissible prejudice occurred has evolved. The Court finally settled on the procedure set forth in Melbourne, 679 So. 2d at 764. This Court set forth clear guidelines that if a party objects to the opposing party's use of a peremptory challenge on such grounds, the objecting party must:

> a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation 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 (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

Id. (footnotes omitted) (emphasis added).

In Alen, after stressing that peremptory challenges cannot be used in a discriminatory manner to excuse a member of a cognizable class, this Court defined what constitutes a "cognizable class" that is entitled to protection under Neil. As this Court held:

> 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 distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.

Alen, 616 So. 2d at 454. Using these criteria, the Court held that Hispanics are a cognizable class in Florida. Id. at 455. Determining one's membership in a cognizable class is a matter of fact, and a trial judge is granted discretion in making such a determination. Id. at 456. The Court provided the following guidance:

> Although such salient characteristics as a person's native language and surname may represent ethnic commonality, we do not believe that these types of characteristics, standing alone, sufficiently describe Hispanics as a cognizable class. For example, a person who is born in Cuba, becomes a citizen of the United States at a young age, and is raised with English as her primary language, is no less Hispanic simply because she speaks English more frequently and fluently than she speaks Spanish. In the same vein, a person named Mary Smith who is born in the United States is no more Hispanic simply because she marries and adopts the surname of a man with a traditionally Hispanic name. Although a person's native language and surname may be used by a trial judge in determining whether a potential juror can be classified as a Hispanic, those characteristics are not strictly dispositive.

Id. at 455. In applying this to the facts in Alen, the Court held that the trial court erred in permitting the State's use of a peremptory challenge to remove a Hispanic juror (after the State previously removed another Hispanic juror). In reaching this conclusion, the Court noted that the State failed to explain why it sought to excuse this juror and thus "[b]y failing to show the absence of pretext or that its reasons for excusing [the juror] were supported by the record, the state failed to meet its burden of proof." Id. at 456.

In Franqui, 699 So. 2d at 1334, the defendant attempted to use a peremptory challenge to excuse prospective juror Aurelio Diaz from the jury. After the State summarily challenged the strike, the court inquired as to the reasons for the challenge. Defense counsel responded that he did not like the juror. The court disallowed the strike, finding that defense counsel did not offer a race-neutral reason. Id. On appeal, this Court expressly rejected the argument that the State's

objection was insufficient to permit the trial court to make an inquiry, noting that based on the record, it was obvious that the trial court clearly understood that the objection to the challenge was being made on racial or ethnic grounds, based on the fact that the juror was born and raised in Havana, Cuba, and the juror's name was Aurelio Diaz. Id. at 1335. The Court further noted that "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." Id. (footnote omitted). In reaching its holding, this Court noted that it had previously encouraged trial judges to err on the side of conducting a Neil inquiry. Id. (citing Slappy, 522 So. 2d at 18). However, the Court's encouragement to hold an inquiry assumed the threshold trigger that the juror was a member of a cognizable class (in that case, Hispanic) had been met.

Whether an Inquiry into the Basis for the Peremptory Challenge Was Appropriate

In this case, the trial court and then the Third District violated our precedent regarding peremptory challenges in two distinct ways. First, the trial court, without anything else in the record, allowed the inquiry because the name Buchholz sounded like a German name.[5] Throughout the voir dire, Mr. Buchholz

5. The specific objection to the peremptory challenge was based solely on the juror's ethnicity—not on his race. The dissent translates this into race and then reanalyzes the record based on the view that this issue was whether Mr. Buchholz was white. However, this was not the basis for the objection either in the trial

never discussed anything that related to his ethnic background. Requiring an inquiry, without establishing that the juror was a member of a cognizable class, was a clear violation of Alen. As this Court has held, determining whether a juror is a part of a cognizable class is a matter of fact, but a juror's surname, standing alone, is an insufficient basis for such a conclusion. Alen, 616 So. 2d at 455. We explained that "[a]lthough such salient characteristics as a person's native language and surname may represent ethnic commonality, we do not believe that these types of characteristics, standing alone, sufficiently describe Hispanics as a cognizable class. . . ." Id. Thus, "a person named Mary Smith who is born in the United States is no more Hispanic simply because she marries and adopts the surname of a man with a traditionally Hispanic name." Id.

Second, in upholding the denial of the strike for juror Buchholz, the Third District further erred by misapplying Franqui. According to the Third District, "as long as the trial court understands the nature of the objection, an inquiry may be made." Smith, 1 So. 3d at 354 (emphasis added). The Third District has misapplied our decision in Franqui, which does not stand for the proposition that a Melbourne inquiry is proper even if the record does not establish that the juror is a

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court or on appeal. The dissent asserts that the trial judge reviewed the objection because the judge understood that the challenge was based on the juror's race. The record does not support this, however. The trial judge was the person who first suggested that this juror was a member of a distinct minority group because his name sounded German.

member of a protected group. In Franqui, we simply allowed the parties leeway in making a sufficient objection based on the juror's race or ethnicity if the record established that a juror was a member of a protected minority. However, under the Third District's reasoning in the case at hand, a Melbourne challenge would be permissible even if the record never demonstrates that the juror was a member of a cognizable class. Such a holding is contrary to this Court's long-established precedent regarding the purpose of the law in restricting peremptory challenges. As we have previously stressed, "[t]he initial presumption is that peremptories will be exercised in a nondiscriminatory manner." Neil, 457 So. 2d at 486.

Here, the only support in the record for the conclusion that Buchholz was German is the trial court's statement that the juror's surname sounded "like a German name." Even assuming that being German is a protected class, in this case the record is devoid of any indication that Buchholz was actually German. As Smith explains, the record is "barren of the juror's ancestry, national origin or ethnicity." Many potential jurors have names that may suggest a national origin, even if they and their families have been in this country for generations.

This case is distinctly different from the situation in Franqui, where the record established that the venireperson at issue (Aurelio Diaz) was born and raised in Cuba and the trial court clearly understood the basis of the objection to the challenge. We further noted in Franqui that the trial court properly held a Neil

inquiry, particularly since "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." Id. at 1335 (footnote omitted). This Court's holding in Franqui did not dispose of the requirement that the venireperson be a member of a protected racial or ethnic group before an inquiry is permitted. We reaffirm Franqui and do not intend to recede from that decision.

The dissent contends that our decision will result in mini-trials as to whether a juror is indeed a member of a cognizable ethnic class. Contrary to the dissent's position, nothing within our opinion requires an evidentiary hearing to "prove" whether a potential juror is a member of a distinct ethnic group. In fact, as recognized in Alen, 616 So. 2d at 455, many times the identifying trait is physically visible, such as with race and gender.

The dissent further alleges that it is unworkable to permit a trial court to inquire from a prospective juror whether that juror is a member of a cognizable ethnic class. All that is required is for the trial court to briefly ask a juror as to his or her ethnicity in these rare circumstances where a party has objected to the use of a peremptory challenge on that basis and there is no support in the record as to whether the prospective juror is in fact a member of that cognizable class. Moreover, as to the dissent's concern with privacy, asking a simple question regarding a juror's ethnicity is certainly less invasive than other questions which

are typical in voir dire, including whether the juror or a member of his or her family has been convicted of a crime or has been the victim of a crime.

In this case, the State, as the opponent of the strike, never demonstrated that the venireperson was a member of a distinct racial or ethnic group, as required by Melbourne, 679 So. 2d at 764, and the record does not support any basis for such a conclusion. Thus, as the initial step of the Melbourne guidelines was not satisfied, the trial court erred in denying the use of the peremptory challenge.

Finally, permitting the trial court to inquire as to the basis for a strike without first determining whether the venireperson is a member of a distinct racial or ethnic group misses the very point of the Melbourne inquiry. As this Court stressed in Melbourne, 679 So. 2d at 764: "Throughout this [three-prong] process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination." A contrary holding runs the risk of completely eviscerating the right of a party to exercise a peremptory challenge. In Busby, this Court explained the extensive history of the right to peremptory challenges. Melbourne strikes a balance that preserves the right to peremptory challenges as long as the challenge is not exercised in a discriminatory manner to exclude a protected class. If any juror may be subject to being struck under Melbourne based on no reason other than his or her surname, we not only undermine the intent of

Melbourne and its progeny but significantly restrict the right to exercise peremptory challenges without a corresponding benefit.

We understand that trial judges are under an enormous burden to comply with the dictates of Melbourne and its progeny.[6] However, we must always keep in mind that the principles set forth in these cases are intended to eradicate invidious discrimination in juror selection.

CONCLUSION

For the reasons addressed above, we hold that the trial court erred in denying the use of the peremptory challenge and that the Third District's opinion is contrary to this Court's long-standing precedent.[7] Accordingly, we quash the decision of the Third District Court of Appeal in Smith.

It is so ordered.

QUINCE, LABARGA, and PERRY, JJ., concur.
LEWIS, J., concurs in result only.
POLSTON, J., dissents with an opinion, in which CANADY, C.J., concurs.

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6. In this case, during the jury selection process, the trial court stated that "under our present great, deeply thought out appellate decisions" anyone qualifies as a member of a protected class—a statement which may have been made out of frustration or cynicism.

7. We reject the State's invitation to reconsider our opinion in Busby v. State, 894 So. 2d 88 (Fla. 2004), in light of the recent case of Rivera v. Illinois, 129 S. Ct. 1446 (2009), because this issue is beyond the scope of the conflict below. Further, Rivera would not change this Court's reasoning in Busby.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., dissenting.

I agree with the majority that a juror's surname by itself does not indicate that the person is a member of a distinct racial group. See State v. Alen, 616 So. 2d 452 (Fla. 1993). But the majority seriously errs by expanding its ruling beyond the conflict issue and dramatically changing the landscape of jury selection.

The majority essentially requires evidentiary hearings to identify an individual juror's distinct racial or ethnic group. Not only is this practice unnecessary and intrusive, but it also is contrary to this Court's precedent. Specifically, by requiring this level of evidentiary proof of a juror's particular race or ethnicity, the majority is receding from Franqui v. State, 699 So. 2d 1332 (Fla. 1997). Franqui had encouraged trial courts to move through the Melbourne process once the parties and the trial court became aware of a race-based objection to a peremptory challenge.

The record in this case demonstrates why trial courts should be allowed the discretion to move through the Melbourne process and simply ask for a race-neutral reason without holding a mini-trial regarding the background, gender, and race of the particular venireperson challenged. When the defense attempted to strike Mr. Buchholz, the trial court was in the position to understand that the

defense had been attempting to strike the white members of the venire, such as Mr. Buchholz. In fact, the defense very clearly articulated its race-based goals for jury selection when stating on the record, "This is a black defendant and he needs to be judged by a jury of his reasonable peers, not white folks in Dade County." Appendix at 42.[8]

Accordingly, because the trial court properly adhered to this Court's precedent by erring on the side of requesting a race-neutral reason without conducting a needless evidentiary hearing and because the record in this case demonstrates the soundness of this precedent, I respectfully dissent.

I.

Prior to the majority's decision in this case, when the race or ethnicity of a prospective juror was obvious, the trial court could presume an objection to the peremptory strike of a juror was based on the juror's race or ethnicity, and no further evidentiary proof was required. See Franqui, 699 So. 2d at 1332. In Franqui, the State challenged the defendant's peremptory strike of prospective juror Aurelio Diaz without identifying the distinct ethnic group to which Mr. Diaz belonged. Id. at 1334. On appeal, the defense argued that the trial court erred by denying the defendant's peremptory strike because the objection was insufficient

8. A transcript of the selection process that included any Melbourne issues is attached as an appendix.

to satisfy the first step of Melbourne. Id. at 1334. This Court rejected the defendant's argument and found the State's objection was sufficient under Melbourne. Id. at 1335. This Court explained: "[T]he trial court clearly understood that the objection to the challenge of a venireperson in Dade County, who was born and raised in Havana, Cuba, and whose name was Aurelio Diaz, was being made on racial grounds." Id.

The dissenting opinion stated:

> I believe that the State's objection here was insufficient to require the defendant, the party exercising the peremptory challenge, to justify his peremptory strike. This record simply does not demonstrate that the challenged juror was a member of a protected group or that the challenge appeared to be used in a racially discriminatory manner. It is a stretch of the imagination and beyond logic how the majority, as the appellate court charged with reviewing the trial court's action, can conclude from this record that "the trial court clearly understood that the objection to the challenge of a venireperson in Dade County, who was born and raised in Havana, Cuba, and whose name was Aurelio Diaz, was being made on racial grounds." In fact, at oral argument, the State candidly conceded that we cannot know from this record whether the challenged juror was a member of a distinct racial group, or whether his color or national origin was even the basis of the State's objection to the strike.

Id. at 1340 (Harding, J., dissenting) (emphasis added) (citation omitted).

In rejecting the dissenting opinion in Franqui, the majority reasoned that the trial court understood the objection was on racial grounds and there was never any contention that the juror was not a member of a cognizable minority or that there should not be an inquiry. Id. at 1335. Further, this Court stressed that "we have

encouraged trial judges to err on the side of holding a Neil inquiry." Id. (citing State v. Slappy, 522 So. 2d 18 (Fla. 1988)).

Therefore, this Court in Franqui, 699 So. 2d at 1332, encouraged trial courts to move through the Melbourne process once an objection was made and the parties and trial court were aware of the type of objection made. We explained that when an objection to a peremptory challenge is obviously based upon a juror's race, the trial court may ask the challenging party for a race-neutral reason for the strike and then evaluate the reason to determine whether it is credible. Franqui, 699 So. 2d at 1335. That is exactly the process the trial court followed here in Smith. However, the majority now abandons the view that encouraged trial courts to err on the side of holding a Neil inquiry in favor of requiring proof, just like the dissent that was rejected in Franqui.

Specifically, in contrast to Franqui, the majority today holds that the objecting party must prove that the potential juror is a member of a distinct racial group. To do so will require an evidentiary hearing. But to hold an evidentiary hearing in every instance where a Melbourne issue arises is not what this Court has previously required—for good reason. It is unworkable. In order to prove membership in a distinct racial group, the objecting party would first have to identify and prove 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 distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.

Alen, 616 So. 2d at 454. Second, the objecting party would need to prove that the juror is part of that cognizable class. This process will cause numerous mini-trials during the jury selection process, which is inefficient and not what our precedent requires.

In this case, an evidentiary hearing to determine whether Mr. Buchholz is a member of a cognizable class serves no purpose. Mr. Buchholz is white,[9] and people who are white are considered a distinct racial group under Melbourne.[10] Additionally, the record indicates that during voir dire, when it was not clear whether a particular racial group was applicable, the attorneys objected and an

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9. The defense noted for the record that all the seated jurors with the exception of Ms. Smith were white or white Latinos. See appendix at 49. The majority states that the objection was based on ethnicity, not race. See majority op. at 11 n.5. However, under our case law, the dispositive legal analysis concerns whether the venireperson is a member of a cognizable class, a determination that considers ethnicity, race, or gender as well as other factors. See, e.g., Alen, 616 So. 2d at 454-55.

10. In Curtis v. State, 685 So. 2d 1234, 1237 (Fla. 1996), this Court was presented with the issue of "whether the [Melbourne] guidelines apply when a peremptory challenge is exercised against a white venireperson." In that case, the State objected on discrimination grounds after the defendant attempted to use a peremptory strike on a white venireperson. Curtis, 685 So. 2d at 1236. This Court held that "the [Melbourne] guidelines apply across the board to each 'venireperson [who] is a member of a distinct racial group.' " Id. at 1237 (quoting Melbourne, 679 So. 2d at 764).

inquiry was held.[11] No similar exchange occurred regarding Mr. Buchholz, so there was no need for the prosecution to establish membership of a distinct racial group as done with Ms. Alpizar. Therefore, in this case, the trial judge properly proceeded to steps two and three of the Melbourne inquiry.

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11. MR. CASASNOVAS: We move to strike Ms. Alpizar, No. 22.

MS. MATO: And, Your Honor, she is another Hispanic female which has been -- which defense has sought to strike from the panel. I'm asking for a race neutral, gender neutral reason.

MR. CASASNOVAS: How do you know she is Hispanic?

MS. MATO: Her name is Mara Isel Alpizar.

MR. CASASNOVAS: It could be Polish.

MS. MATO: Her last name is Hispanic.

THE COURT: Do you want to bring her in and ask her if she is Hispanic?

MR. CASASNOVAS: All right, yes.

THE COURT: Bring her in.

MS. BAIL: What is her name, Judge?

THE COURT: Alpizar.

MR. CASASNOVAS: You ran her for priors?

MS. MATO: Yes, I ran everybody.

THE BAILIFF: Ms. Alpizar.

(Thereupon, Ms. Alpizar entered the courtroom and the following proceedings were had:)

THE COURT: Ma'am, just a little questioning here. Is your national background Latin?

MS. ALICEA [sic]: Yes.

THE COURT: Are you from the United States or were you born someone else?

MS. ALPIZAR: Cuba.

THE COURT: You were born in Cuba?

MS. ALPIZAR: Yes.

THE COURT: Thank you very much.

Appendix at 43-44.

But even though the majority is willing to accept as a matter of law (without deciding the matter) that German is a cognizable class under Alen, the majority still requires a determination not only of whether German is a cognizable class, but also of whether Mr. Buchholz is a member of that class. See majority op. at 13. Why? Requiring this type of evidentiary hearing for every juror where this line of questioning occurs is inefficient, will unduly result in mini-trials, and will place prospective jurors in potentially very awkward positions. It is not necessary.

Even if a juror appears to be within a certain racial group, as Mr. Buchholz appeared white, the majority is requiring the objecting party to prove that juror's distinct racial or ethnic group. This level of proof may not be easy for everyone. Moreover, the names of racial and ethnic groups have different meanings to different people. See Kenneth E. Payson, Comment, Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People, 84 Cal. L. Rev. 1233, 1241 (1996) ("Racial categories and the rules of classification have varied from place to place and over time . . . . "); see also Naomi Mezey, Erasure and Recognition: The Census, Race, and the National Imagination, 97 Nw. U. L. Rev. 1701 (2003). In this case, the defense objected to "white Latinos" being seated on the jury. Are the parties therefore required to have an evidentiary hearing on whether "white Latinos" satisfy the criteria of Alen as a cognizable class, and whether the individual jurors actually belong to that class? See

generally Payson, supra, at 1241 (explaining "the social reality that Latinos in the United States are generally perceived as non-White, in contrast to [a federal directive's] presumptive fiction that Latinos are White"). Even if someone appears white, the majority opinion requires evidentiary proof of the matter and a determination of what type of white person they are. Does it require the same for gender? How are multiracial jurors to respond to questioning under oath about their race and national origin? What if someone is unsure of their exact racial composition? The level of proof the majority requires is absurd, unnecessary, and too invasive, especially in a case such as this where the parties did not even question it.

Further, how should the evidentiary hearing be conducted? The majority has not made clear what the trial court should have done in this case. The majority states that simply asking jurors will suffice,[12] but the majority does not indicate what specific question should be asked. It is unlikely that the legally accurate question, "Are you a member of a cognizable class?," will lead to useable responses. Moreover, in cases where a trial court has conducted an inquiry of an individual juror's race or ethnicity, the scope of the questioning has varied. In

12. See majority op. at 14 ("All that is required is for the trial court to briefly ask a juror as to his or her ethnicity in these rare circumstances where a party has objected to the use of a peremptory challenge on that basis and there is no support in the record as to whether the prospective juror is in fact a member of that cognizable class.").

some cases, the inquiry ends after the juror is asked to inform the court of his or her birthplace. See Dean v. State, 703 So. 2d 1180 (Fla. 3d DCA 1997) (recalling a prospective juror to inquire into his place of birth and heritage to determine whether he was Hispanic). Is that enough? Certainly, identifying a person's birthplace does not prove that a person is a member of a distinct racial group since not all people from the same country are the same race.

In other cases, the inquiry has ended after establishing a prospective juror's nationality. In Windom v. State, 656 So. 2d 432 (Fla. 1995), for example, the following dialogue ensued during voir dire:

> [DEFENSE COUNSEL]: I'd like to question that choice too, assuming she is black.
>
> [PROSECUTOR]: I don't believe she is.
>
> THE COURT: It says Hispanic.
>
> [PROSECUTOR]: I think she is actually Indian.

With this uncertainty, the court and counsel agreed to inquire of the person further:

> THE COURT: Hi. What is your nationality?
>
> [JUROR]: East Indian.
>
> THE COURT: Okay, That's all we need to know. Thank you. She is definitely not a recognized minority. She's East Indian.
>
> [DEFENSE COUNSEL]: Everybody in Trinidad is black.

> [PROSECUTOR]: Not everybody because she is, obviously, not.
>
> [DEFENSE COUNSEL]: She may be Indian.

Id. at 436-37. Upon review, this Court never discussed its specific approval or disapproval of the inquiry. This Court held only that the defendant's objection was insufficient because the defendant failed to "make a timely objection in which it was demonstrated on the record that this venire person was a member of a cognizable class." Id. at 437.

In another case, the Fourth District reviewed a case where the State exercised a peremptory challenge against a prospective juror named Mohammed Kahn. Olibrices v. State, 929 So. 2d 1176, 1176 (Fla. 4th DCA 2006). Defense counsel objected under Melbourne, and the following ensued:

> Court: Is he a minority that's recognized under Neil Slappy? I have never heard Muslim recognized under Neil Slappy.
>
> Defense: Your honor, if you give me a moment to look through my notes, that Neil Slappy can be used on anyone now.
>
> Court: No, not anyone. It has to be a recognized class of people that resides in the Community. So far, the cases I have seen are race. I have seen Spanish, Jewish; I haven't seen any Muslim.
>
> State: Your honor, I don't know if he was ever asked that question. I don't know what his religious affiliation is. How could I strike somebody on religious affiliation?
>
> Court: He is Pakistani. And I don't think there's a significant number of Pakistanis in the United States to come under Neil Slappy. There

was nothing shown as to his religion.

State: Is it Hindu? I don't know what the religion is in Pakistan.

Defense: There are many Muslims.

. . . .

Court: Okay. I think counsel is looking up whether or not Pakistani comes under Neil Slappy, and I haven't seen a case where Pakistani--. By that theory, then, everyone would come under Neil Slappy because everyone came from somewhere.

Defense: Your Honor, I said the fact that he was Muslim.

Court: There was no testimony whatsoever that he is Muslim, was there? It's just an assumption on your part. He said he was Pakistani. That's the ethnicity that I have.

Defense: And that assumption is based on, Your Honor, the name Mohammad is common.

Court: Well, unless you can show me a case where a Pakistani is excluded, or that's something under Neil Slappy, that Pakistanis are a recognized group that comprises a group under Neil Slappy. I have never seen a case on that. So I will deny it. Okay. He is struck. Mohammad Khan is struck by the state.

Id. at 1177 (footnote omitted).

In both Olibrices and Windom, questioning ensued to determine whether the objecting party had established the first step of Melbourne as the majority requires in this case. However, in both cases, the questioning served little purpose in the actual determination of whether the juror was a member of a cognizable class. This ineffective and invasive questioning demonstrates the complexity of class

determinations, the various related issues that may arise, and the additional evidence that parties will be required to submit for every juror subject to Melbourne under the majority's opinion.

In my view, this Court in Franqui had the right approach in encouraging the trial court to err on the side of simply asking for a race-neutral reason. There is no need to recede from that approach as the majority does here. However well-intended, the additional and enormous burden of requiring proof of a juror's race is unnecessary and unclear. We have set the law adrift even more.

II.

Furthermore, the record in this case demonstrates why trial courts should have the discretion to move to the second and third steps of Melbourne. After all, the trial court is in the best position to assess whether the parties are attempting to unconstitutionally exclude certain members of the panel from the jury. As this Court has explained, "the appropriate standard of appellate review for determining the threshold question of whether there is a likelihood of racial discrimination in the use of peremptory challenges is abuse of discretion." Nowell v. State, 998 So. 2d 597, 602 (Fla. 2008). "[T]he trial court is in the best position to assess the genuineness of the reason advanced . . . ." Id. In fact, "the trial court's decision [regarding genuineness] turns primarily on assessment of credibility and will be affirmed on appeal unless clearly erroneous." Melbourne, 679 So. 2d at 764-65;

see also Jones v. State, 923 So. 2d 486, 490 (Fla. 2006) ("When reviewing the trial court's decision on a Neil-Slappy claim, appellate courts are to keep in mind that 'the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.' " (quoting Melbourne, 679 So. 2d at 764-65)).

Findings by a trial court and the appellate review of those credibility findings according to a "clearly erroneous" standard of review were explained by the United States Supreme Court in Anderson v. City of Bessemer City, 470 U.S. 564 (1985). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson, 470 U.S. at 573 (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). There should be greater deference to trial court's findings when they are based on assessments of credibility because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." Id. at 575. "If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Id. at 573-74 (emphasis added).

Accordingly, under Anderson, rather than narrowly focusing on an individual juror, the whole voir dire record should be considered to determine whether the trial judge's ruling was clearly erroneous.

Had the majority witnessed voir dire as the trial court did, or even considered the entire voir dire record here, it would have been clear that both parties were posturing and that the trial judge wisely moved through the Melbourne process when the defense attempted to exercise a peremptory challenge of juror Buchholz. Significantly, during the jury selection process in the instant case, the defense argued that the State was trying to strike black jurors, and the State argued that the defense was trying to strike jurors who were not black.[13] For example, during voir dire, the prosecution objected to the defense striking a Hispanic female, noting that the defense had previously struck Hispanics from the jury panel. See appendix at 39. And during argument pertaining to a peremptory challenge raised by the State, the defense noted that it had "lost count of all the black females that [the State] has stricken" and, with rare clarity, stated, "[t]his is a black defendant and he needs to be judged by a jury of his reasonable peers, not

13. The defendant was a black man charged with the crimes of burglary with an assault or battery with a knife, robbery using a deadly weapon, aggravated assault, and seven counts of resisting with violence and aggravated assault on a law enforcement officer.

white folks in Dade County." Appendix at 41-42 (emphasis added).[14] Clearly, the defense did not want jurors who were white—that included Mr. Buchholz.

Here, while properly proceeding through a Melbourne inquiry, the trial court asked for a race-neutral explanation. The defense cited juror Buchholz's prior jury service—the same reason the prosecution had just provided for the immediately preceding juror. Although both sides gave apparent race-neutral reasons, the trial court rejected the reasons as not genuine. Because each side accused the other of trying to obtain a jury of a particular racial mix, the trial judge made credibility determinations as required by Melbourne and made rulings against both sides. The trial court was in the best position to make those findings, and the rulings are not clearly erroneous. The majority should not substitute its own credibility findings for those of the trial judge. Rather, the trial court's ruling that the race-neutral reasons given by the defense were not genuine was amply supported by the record and should be affirmed by this Court.

Although the defense's statement that he did not want "white folks" serving on the jury came after the ruling as to Mr. Buchholz, it demonstrates why trial

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14. The defense apparently includes "Latinos" among "white folks" because the attorney later noted that "[f]or the record, all jurors, with the exception of Ms. Smith, are white or white Latinos, white or white Latinos, just for the record because the record will speak for itself as to the challenges that were made by the State on the black jurors." Appendix at 49. Accordingly, it is apparent from the record that Mr. Buchholz, the challenged juror at issue, is white and was presumed by the trial judge to be of German descent because of his name.

courts should have the discretion to move through the Melbourne process. The trial judge was in the best position to evaluate voir dire, and the ruling was validated by later comments made by the defense. Making its own evaluation, the majority's ruling now improperly reverses the trial court's ruling and holds that the trial court should have allowed the defense to strike Mr. Buchholz, one of the "white folks."

III.

The majority errs by expanding its ruling beyond the conflict issue and by dramatically changing the process of jury selection by receding from Franqui and placing an unnecessary and illogical burden on trial courts and prospective jurors that will undoubtedly result in prolonged and inefficient voir dire proceedings. Furthermore, the voir dire record in this case clearly demonstrates why trial courts should be allowed to exercise discretion and ask for a race-neutral reason for a peremptory challenge without holding a mini-trial to establish what particular cognizable class a particular venireperson is a member of.

I would affirm. Therefore, I respectfully dissent.

APPENDIX

THE COURT: All right. Did you change your mind about anybody, prosecution?

MS. MATO: I would move, Judge, to strike Mr. -- Juror No. 3, Colas.

MR. CASASNOVAS: Judge, we are going to raise an objection as to a Ne[il] Slappy. I believe Mr. Colas is a member of a minority group known as Latinos.

THE COURT: Since when is that a minority group?

MR. CASASNOVAS: Not in Dade County, I know.

THE COURT: I think under the present law I have to require that you explain it.

MS. MATO: 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.

MR. CASASNOVAS: That would inure to the benefit of the defense. We are not objecting on those grounds.

MS. MATO: You chose to exercise a peremptory?

THE COURT: I don't think that is a genuine objection. I'm going to overrule you.

MR. CASASNOVAS: I'm sorry, Judge. What did you just say?

THE COURT: I overruled her.

MR. CASASNOVAS: All right.

THE COURT: So he is foreseated.

MS. MATO: He is what, I'm sorry?

THE COURT: Foreseated.

MS. MATO: You are not excusing him?

THE COURT: No.

MS. MATO: All right. Your Honor, if I may have a moment.

Judge, I know that when Mr. Colas was questioned about his fiancée'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 not really certain in terms of whether he -- whether he was treated fairly or not. So, that is another reason that I have, Judge, for requesting -- exercising a peremptory on him.

THE COURT: There is no need to argue. I'm denying it -- your objection, whatever you want to call it.

All right. So, we have six. Anything else, anybody?

MR. CASASNOVAS: We are going to ask for a peremptory on Mr. Buchholz, No. 12.

MS. MATO: 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.

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: 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.

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.

Defense, anybody else?

MR. CASASNOVAS: We move to strike Ms. Lorie, No. 13.

THE COURT: All right.

MR. CASASNOVAS: On peremptory grounds.

THE COURT: All right. Strike No. 4. All right.

Next one up would be then 17, Adderley, prosecution?

MS. MATO: I move for a cause challenge.

THE COURT: Speak.

MS. MATO: Yes. For one thing, she was very clear in that she could not find the defendant guilty based solely on testimonial evidence, despite the fact that that is not what the law requires.

So she, therefore, cannot follow the law. She also made several comments about police officers. For those reasons, Judge, I would move for a cause challenge on her.

THE COURT: The cause challenge is denied.

MS. MATO: All right. I would move for a peremptory strike then on her.

THE COURT: That is granted.

MR. CASASNOVAS: If we raise a Ne[il] Slappy, it would be academic at this point.

THE COURT: You do what you want. You are the lawyer.

MR. CASASNOVAS: We raise a Ne[il] Slappy. She is a black female, Judge.

THE COURT: And I just heard an explanation, I believe why.

MR. CASASNOVAS: That is why I am saying whether it's academic or not. I don't know whether Your Honor would consider it.

THE COURT: No, but she is off the jury anyway. You kicked her off. Right?

MS. MATO: I would ask that -- I would ask to exercise a peremptory on her.

THE COURT: We need another juror then, No. 6.

THE CLERK: Yes.

THE COURT: Next one up is, defense, Pena?

MS. WRIGHT: Your Honor, if we could just have some clarification.

MR. CASASNOVAS: We asked for a peremptory on Lorie.

THE COURT: That was No. 4.

MR. CASASNOVAS: That was No. 13.

MS. MATO: That was your fourth peremptory.

MR. CASASNOVAS: That was granted.

THE COURT: Yes.

MR. CASASNOVAS: I'm sorry, Judge. I'm falling asleep.

THE COURT: How many do we have, Jan?

THE CLERK: Five jurors, Judge.

THE COURT: So, No. 18, Pena, defense?

MR. CASASNOVAS: We accept.

MS. MATO: We accept, Judge.

THE COURT: All right. That is six again. Prosecution, do you change your mind about anybody?

MS. MATO: No, Judge.

THE COURT: Defense, do you change your mind about anybody?

MR. CASASNOVAS: Your Honor, we respectfully change our mind on Pena, No. 18, after consulting.

THE COURT: All right. Peremptory challenge on her, whatever.

MS. MATO: Your Honor, at this time - -

THE COURT: Wait. Wait. Is that a peremptory challenge?

MR. CASASNOVAS: Yes.

THE COURT: That is your fifth.

MS. MATO: Your Honor, I would raise a Ne[il] Slappy challenge. She is the second or actually the third Hispanic female that the defense has sought to kick off the panel. So I would ask for a race neutral, gender neutral reason.

THE COURT: All right. Sir.

MR. CASASNOVAS: She was the victim of a theft and she is also a supervisor in the Building Department.

THE COURT: I will tell you what. I'm going to -- this is Christmas. I'm going to grant your motion. She is off.

MS. MATO: That would be over the State's objection, Judge.

THE COURT: No. 19, prosecution?

MS. MATO: Accept.

MR. CASASNOVAS: We accept, Judge.

THE CLERK: Six.

THE COURT: That is six again. Defense, have you changed your mind about anybody?

MR. CASASNOVAS: No.

Well, we objected to Buchholz already. No, Judge. Not at this point.

THE COURT: Prosecution?

MS. MATO: Judge, I would exercise a peremptory on Juror No. 16.

MR. CASASNOVAS: Your Honor, we object respectfully.

THE COURT: You are requiring an explanation?

MR. CASASNOVAS: Requiring an explanation, she is a black female and this is the -- how many so far -- so far.

THE COURT: I require -- what is your explanation?

MS. MATO: Yes, Judge. My reason for striking her is that her husband who she has been married to for a while has been arrested before and has been -- has served time in prison for gun charges.

THE COURT: That's correct. All right.

MR. CASASNOVAS: My recollection, with all due respect, she was asked by Ms. Mato and she said he was treated fairly by the State.

MS. WRIGHT: Furthermore, she had never really discussed the charges that he had been convicted of with her husband and that by the time she had gotten together with him, that case had already been closed out.

THE COURT: That is true, but it is a ground under case law, as I recall from other research, so it is granted.

So, now we've got No. 20, defense. That is Zenck. She is gone.

MR. CASASNOVAS: She is cause.

MS. MATO: She is gone.

THE COURT: No. 21, prosecution?

MS. MATO: I accept.

MR. CASASNOVAS: We accept.

THE COURT: That is six again. Any further objections from anybody?

MS. MATO: Judge, I would move to strike Juror No. 9, Ms. Wallace.

MR. CASASNOVAS: Your Honor, we have a deep seated objection. This is the -- I lost count of all the black females that she has stricken.

THE COURT: I don't think she is black.

MR. CASASNOVAS: She is a black female, Judge. She is a black female. This is a black defendant and he needs to be judged by a jury of his reasonable peers, not white folks in Dade County. This is our objection, Your Honor.

We are now seeing a pattern with regard to the State seeking to strike all black jurors in this case.

MS. MATO: You are asking for a race neutral, gender neutral reason?

THE COURT: Yes.

MS. MATO: Judge, she indicated earlier she was familiar with the area where this crime occurred. She also indicated that she had been -- let's see, that her brother had been arrested for domestic violence. She had been a witness to his domestic violence case. Her father had been arrested also for drug possession and her brother had also been arrested for stealing driver license forms. She was also the victim of a crime. She had been sexually harassed earlier.

For the record, Judge, I have sought to strike Hispanic males and Hispanic jurors from this panel so those are my grounds for striking Juror No. 9, Judge.

THE COURT: Under the case law, as I understand it, your motion is granted.

MR. CASASNOVAS: Over our respectful objection.

THE COURT: That is fine. Next one up, then, is No. 22, I think. Yes, defense, Alpizar?

MR. CASASNOVAS: We accept.

MS. MATO: I accept, Judge.

THE COURT: All right. That is six again.

Any further objections from anybody?

MR. CASASNOVAS: We move to strike Ms. Alpizar, No. 22.

MS. MATO: And, Your Honor, she is another Hispanic female which has been -- which defense has sought to strike from the panel. I'm asking for a race neutral, gender neutral reason.

MR. CASASNOVAS: How do you know she is Hispanic?

MS. MATO: Her name is Mara Isel Alpizar.

MR. CASASNOVAS: It could be Polish.

MS. MATO: Her last name is Hispanic.

THE COURT: Do you want to bring her in and ask her if she is Hispanic?

MR. CASASNOVAS: All right, yes.

THE COURT: Bring her in.

MS. BAIL: What is her name, Judge?

THE COURT: Alpizar.

MR. CASASNOVAS: You ran her for priors?

MS. MATO: Yes, I ran everybody.

THE BAILIFF: Ms. Alpizar.

(Thereupon, Ms. Alpizar entered the courtroom and the following proceedings were had:)

THE COURT: Ma'am, just a little questioning here. Is your national background Latin?

MS. ALICEA [sic]: Yes.

THE COURT: Are you from the United States or were you born someone else?

MS. ALPIZAR: Cuba.

THE COURT: You were born in Cuba?

MS. ALPIZAR: Yes.

THE COURT: Thank you very much.

(Thereupon, Ms. Alpizar exited the courtroom and the following proceedings were had:)

THE COURT: All right. Your objection to Ms. Alpizar is overruled. I believe that is six.

Am I correct?

THE CLERK: Yes, Judge.

THE COURT: Numerically correct. Whether I am legally correct will be tested by the District Court of Appeal. Right, Jan, six?

THE CLERK: Yes, Judge.

THE COURT: All right. Jan, just so we are absolutely correct –

THE CLERK: Yes. Lawrence is Juror No. 2. Cue is Juror No. 3.

MR. CASASNOVAS: Buchholz.

Over our objection.

THE CLERK: Lineberger is five and we are on six now.

THE COURT: All right. Now, let's get an alternate. Next one up is.

MS. MATO: No. 23.

THE CLERK: Judge, you don't have six jurors as of yet.

MS. MATO: Yes, we do.

THE CLERK: I thought you read Alpizar. Was she stricken?

THE COURT: No.

THE CLERK: That is six.

THE COURT: The alternate, without objection, would be Castaneda.

MS. WRIGHT: Actually, Your Honor, I believe that would be cause on Castaneda.

MS. MATO: I would agree, Judge.

THE COURT: No. 24, Smith?

MR. CASASNOVAS: I have no objection.

MS. MATO: I have no objection to her, Judge.

THE COURT: Shirley Smith will be the alternate. Are we sufficient with one?

THE CLERK: Yes, Judge.

MS. MATO: Do you think we need a second one just in case?

Judge, can we get a second one, just in case. We might as well. We have people left.

THE COURT: Next one is 25, Ulloa?

MS. MATO: I accept her, Judge.

MR. CASASNOVAS: We have an objection to her language. I'm not sure. She was very clear when she spoke.

THE COURT: You object to Ulloa, whatever the name, No. 25?

MS. MATO: They think she has language difficulty or something.

THE COURT: All right. No. 26 would be next. Diaz, any problem with him or her?

MS. MATO: I have no objection, Judge. I accept her. Supper is waiting. I've got to get to it.

MR. CASASNOVAS: Objection, Judge. We will keep her.

THE COURT: She is the second alternate. All right.

Jan, just so we can absolutely be sure. Please recite the names of the people on the jury.

THE CLERK: No. 3, Colas, Orlando Colas. No. 6, Duke Lawrence. No. 12, Earl Buchholz. No. 19, Manuel Caban. No. 21, John Lineberger. No. 22, Mara Alpizar, and No. 24, Shirley Smith. Digna Diaz.

THE COURT: Would you bring them in, please?

MR. CASASNOVAS: Judge with respect to ---

THE COURT: Hold on a minute.

MR. CASASNOVAS: We just are, for the record, accepting subject to all prior motions and objections.

THE COURT: Very well.

MR. CASASNOVAS: Specifically with regard to Mr. Buchholz, we disagree with Your Honor, respectfully.

THE COURT: Fine. Bring them in, please.

(Thereupon, the prospective jurors entered the courtroom at 5:50 p.m.)

THE BAILIFF: Please be seated.

THE COURT: All right. Note for the record the presence of the defendant and the jury. Folks, we are going to now announce the names of the people who have been selected. If you hear your name called, it means that you have been selected on the jury.

If your name is not called, please get up, leave your badge on the desk and you may go home.

All right, Jan.

THE CLERK: Orlando Colas, Duke Lawrence, Earl Buchholz, Manuel Caban.

THE COURT: Manuel what?

THE CLERK: Caban, thank you. John Lineberger, Mara Alpizar.

THE COURT: Mara Alpizar, Shirley Smith and Digna Diaz.

THE COURT: Digna Diaz. All right. Those folks please remain seated. The rest of you, please get up, put your badge on the desk and you may go.

(Thereupon, the prospective jurors exited the courtroom and the following proceedings were had:)

THE COURT: Folks, would you move that way? Sir, white shirt, sir.

That's fine. Come on up other folks, please.

We have all eight here.

Please swear the jurors, please.

(Thereupon, the jurors and the alternates were duly sworn.)

. . .

[instructions given to the jury by the trial court]

(Thereupon, the jury exited the courtroom at 6:00 p.m. and the following proceedings were had:)

THE COURT: All right.

MR. CASANOVAS: Your Honor, one last just supplementing of the record, one sentence.

THE COURT: Go ahead.

MR. CASASNOVAS: For the record, all jurors, with the exception of Ms. Smith, are white or white Latinos, white or white Latinos, just for the record because the record will speak for itself as to the challenges that were made by the State on the black jurors.

THE COURT: Anything else?

MR. CASASNOVAS: For now, no.

THE COURT: See you tomorrow at ten o'clock.

MR. CASASNOVAS: Have a nice day.

THE COURT: You will be here earlier, though.

(Thereupon, the proceedings were adjourned until 10:00 a.m. the following day).

CANADY, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Third District - Case No. 3D05-90

(Dade County)

Carlos J. Martinez, Public Defender, and Beth C. Weitzner, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida,

for Petitioner

Pamela J. Bondi, Attorney General, Tallahassee, Florida, Richard L. Polin, Bureau Chief, Douglas J. Glaid and Ansley B. Peacock, Assistant Attorneys General, Miami, Florida,

for Respondent