OCTOBER TERM 2019
No: 20-____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN PACCHIANA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether this Court should grant a Writ of Certiorari to review the decision of the Florida Supreme Court finding that counsel failed to preserve an objection to the exclusion of a black Jehovah's Witness solely for religious reasons in derogation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

1. Paul Backman, Arthur Hearing, Preliminary Judge
2. Martin Bidwill, Disqualified Judge
3. Christin Bilotti, Co-Defendant/Co-Appellant
4. Michael Bilotti, Co-Defendant/Co-Appellant
5. J. David Bogenschutz, Esq., Trial Counsel for Christin Bilotti
6. Herbert Cohen, Esq., Witness/Counsel for Co-Defendant/Witness Richard Corbin
7. Richard Corbin, Co-Defendant/Witness
8. Melanie Dale Surber, Former Assistant Attorney General now Palm Beach County Judge
9. John Cotrone, Esq., Counsel for Pacchiana for several years
10. Ilona Holmes, Disqualified Judge
11. Jeffrey R. Levenson, Trial Judge
12. Ashley Moody, Attorney General
13. Matthew Ocksrider, Esq., Office of the Attorney General
14. John Pacchiana, Appellant/Petitioner
15. Wayne Palazzola, Co-Defendant/Witness
16. Greg Rossman, Esq., Former Assistant State Attorney
17. Keith Seltzer, Esq., Trial Counsel for Wayne Palazzola
18. Sasha Shulman, Esq., Assistant State Attorney
19. H. Dohn Williams, Esq., Trial Counsel for John Pacchiana

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Pacchiana respectfully Petitions for a Writ of Certiorari to review the decision of the Supreme Court of Florida that quashed a decision of the Fourth District Court of Appeals of Florida ordering a new trial for Petitioner, as well as his two Co-Defendants/Co-Appellants [by separate opinions] on the same grounds.

OPINION BELOW

The decision of the Fourth District Court of Appeals of Florida in this matter which reversed the Petitioner's conviction and ordered a new trial due to improper use of a "juror strike" is reported as *Pacchiana v. State,* 240 So.3d 803 (Fla. 4th DCA 2018). The decision of the Florida Supreme Court quashing that decision and ordering the upholding of the conviction and sentence imposed in the trial court is reported as *State of Florida v. Pacchiana*, __ So.3d __ (January 9, 2020). It is the decision of the Florida Supreme Court for which review is being sought, due to the constitutional issues raised by the District Court of Appeals vis a vis this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), as well as referencing *Davis v. Minnesota*, 511 U.S. 1115 (1994) and *Torcaso v. Watkins*, 367 U.S. 488 (1961) and several other cases of this Court, both decisions are included in the Appendix as Appendix A and Appendix B, and the Supreme Court's finding all such claims were waived.

JURISDICTIONAL STATEMENT

The opinion of the Florida Supreme Court was rendered on January 9, 2020 and is included as Appendix A. A timely Petition for Rehearing was denied by the Court on February 21, 2020. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), see *Hohn v. United States*, 524 U.S. 236 (1998). This Petition is within 90 days of the Florida Supreme Court's Order Denying Rehearing.

CONSTITUTIONAL PROVISIONS INVOKED

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

STATEMENT OF THE CASE

The Petitioner, John Pacchiana, together with his employer Michael Bilotti and Mr. Bilotti's daughter Christin were indicted in the Circuit Court of Broward County, Florida for the crime of First Degree Murder and Conspiracy to Commit First Degree Murder in the death of Richard Rojas, a boyfriend or former boyfriend of Ms. Bilotti. While this was a first degree murder allegation the State of Florida waived the death penalty, hence the case was decided by the Fourth District Court of Appeals as non death cases are not within the jurisdiction of the Florida Supreme Court on direct appeal.

While many issues were raised by the Petitioner and the Co-Defendants, the issue addressed by the Fourth District Court of Appeals concerned the issue of the exclusion, by peremptory challenge, exercised by the prosecution of a black juror that happened to be a Jehovah's Witness, who, having previously sat on a jury, stated she could be a fair juror, particularly since no penalty was involved that would involve her input, that is the death penalty.

The issue before the Fourth District Court of Appeals was decided in *Pacchiana v. State*, 240 So.3d 803 (Fla. 4th DCA 2018) and the question was whether the Court improperly allowed the State to strike that juror.

The State of Florida, in response to the Brief of Appellant on that matter raised the State's main argument which was the issue of preservation, that is that under the "state" requirements the objections to the strike were not properly presented to preserve the issue for review. While writing separate opinions the three judges of the Appellate panel unanimously found, in the end, that the issue of exclusion by strike was properly preserved for appellate review, and proceeded to the merits of the case with two of the three judges voting to reverse the matter for a new trial.

Thus, turning to the actual issue, again, three opinions on the appellate level issued, the main opinion reversing the conviction was authored by Judge Levine and concurred for various reasons by Judge Gerber, while the dissent on the merits of disallowing the peremptory challenge was penned by Judge May.

After denial of Rehearing in the Appellate Court, the State of Florida sought a Petition for Writ of Certiorari before the Supreme Court of Florida, and over opposition, the Petition was granted and oral argument had. While the matter was argued to the then seven sitting Justices of the Florida Supreme Court, prior to decision two were elevated by President Trump to the United States Court of Appeals for the Eleventh Circuit, so five justices decided the case.

On January 9, 2020 the Florida Supreme Court [one Judge dissenting] quashed the decision of the Fourth District Court of Appeals and stated, in its opening paragraph:

> This case is before the Court for review of the decision of the Fourth District Court of Appeal in *Pacchiana v. State*, 240 So.3d 803 (Fla. 4th DCA 2018), which held that a peremptory strike was constitutionally impermissible because it was based on the prospective juror's religion. The Fourth District's decision was based in part on its conclusion that the peremptory strike involved an unconstitutional religious test. See art. VI, cl. 3, U.S. Const. ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.") see also art. I, §2, Fla. Const. ("Basic rights. – . . . No person shall be deprived of any right because of race, religion, national origin, or physical disability."); art I, §3, Fla. Const. ("Religious freedom.– There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof."). Because in reaching this conclusion the district court expressly construed provisions of the United States and Florida Constitutions, we have jurisdictions. See art. V. §3(b)(3), Fla. Const. [Footnote omitted]
>
> But we do not decide the issue of the constitutionality of a religion-based strike. Instead, we conclude that the issue was not properly preserved in the trial court and that the district court erred in reversing on the basis of an unpreserved argument. We therefore quash the decision of the district court in *Pacchiana* and remand for further proceedings in accordance with this opinion.

As noted, timely Petition for Rehearing was denied, but quite obviously the Court passed upon issues of constitutionality within the jurisdiction of this Court for as the Florida Supreme Court held "[B]ecause in reaching this conclusion the district court expressly construed provisions of the United States and Florida Constitutions, we have jurisdiction".

The Co-Appellants in the Florida Appeals Court, Michael and Christin Bilotti, had separate appeals despite a joint trial, and both of their convictions were also reversed based on the Pacchiana decision, the reversals were stayed by the Florida Supreme Court pending its decision in the Pacchiana case. That Court has entered an order to show cause why the cases should not be reversed in accord with Pacchiana

and remanded for imposition of judgment and sentence. The undersigned petitioned for a stay pending this Court's resolution of the instant Petition, but has not received a ruling. Most Florida Supreme Court business is on hold due to the COVID-19 virus.

The Florida Supreme Court quashed a decision that admittedly touched upon issues of the United States Constitution, and as well construed certain decisions of this Court, *Batson v. Kentucky*, *supra* and *J.E.B. v. Alabama ex rel. T.B., supra* and others, including the dissenting opinion on the denial of certiorari by this Court on the issue of exclusion of Jehovah's Witnesses as jurors in *Davis v. Minnesota*, *supra*, as well as, as noted, Article VI Clause 3 of the United States Constitution that in so many words forbids a religious belief or disbelief as any kind of test.

But rather than discuss the meritorious issues raised by Petitioner as found by the Appellate Court, the Florida Supreme Court dismissed the issue quite out of hand with an argument of "lack of preservation of the issue". The dissent of Justice Labarga details the preservation of the issue, as did the unanimous finding of preservation, for different reasons in the three separate appellate opinions of the judges of the Fourth District Court of Appeals. Indeed, whether the issue was preserved before the jury was sworn, and whether the trial judge was apprised of the objection and the basis is illustrated in Justice Labarga's dissent which includes the exchange with the trial court and Petitioner's counsel and co-counsel:

> LABARGA, J., dissenting.
>
> Because the defense's religion-based objection to the peremptory strike of the juror was preserved, I dissent. The general purpose of requiring a contemporaneous objection is to place the trial court on notice of a possible error and give the court the opportunity to correct it. *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005). Strict, formalistic terminology is not necessary to accomplish this goal, and we have held that "magic words" are not required to preserve an objection. *See, e.g., Aills v. Boemi,* 29 So. 3d 1105, 1109 (Fla. 2010) ("While no magic words are required to make a proper objection . . . the concern articulated in the objection must be sufficiently specific to inform the court of the perceived error."); *Murray v. State,* 3 So. 3d 1108, 1117 (Fla. 2009) (same); *Williams v. State,* 414 So. 2d 509, 512 (Fla. 1982) ("[M]agic words are not needed to make a proper objection"). This is a commonsense rule because attorneys are not robots and should not be expected to follow a rote script while in the courtroom. To require exact language is contrary to the

purpose of preservation and operates to the detriment of a client, regardless of whether that client is a private party, the State, or an accused.

Applying these principles to the present case, the objection to the peremptory strike of the juror based upon her religion was preserved. When defense counsel asked for a race-neutral reason for striking the juror, the State's response was:

> STATE: She's a Jehovah[`s] Witness. I've never had one say, and I highlighted it, they've always said they can't sit in judgment. She never brought it up.
>
> COUNSEL FOR PACCHIANA: She did.
>
> STATE: No, but she put at the bottom that she's a Jehovah[`s] Witness, that gives me pause.

Thus, the State's initial explanation for striking this juror was based exclusively upon her religion. Immediately thereafter, counsel for Pacchiana's codefendant stated, "That's a religious based strike." Although co-counsel could have been more precise in his wording, it is evident this was an objection to striking the juror based upon her religion.

In ruling on the objection, the court specifically referenced the juror's religion:

> Listen, she's a Jehovah[`s] Witness, I think there was some discussion about her and the issue of the sentencing part of it, she did waiver [sic] along the way there.
>
> Look, if it were me making a decision, me perceiving it differently, but out of deference to the person who is the moving party, as long as there's some reason, or suggestion based upon her responses and overall nature of her—and plus I think alternatively, additionally I want to point out I know it's a

> blind record but there's a number of other African Americans on the jury, I think that based on the totality of the circumstances I think it rises to the legal [sic] of a non based reason. I understand your point though, it is well taken.

[R. 2332] Further, in ruling on a motion that was filed after the juror was struck and before the jury was sworn, the court again returned to the juror's status as a Jehovah's Witness:

> Jehovah[`s] Witnesses are peculiar, and many of them in my experience have said they cannot judge, that God judges, and based on that I find that to be a genuine non-race-based reason. . . . So, the fact that she says, the juror says, that she's a Jehovah[`s] Witness, notwithstanding the fact that she says she can still be fair and impartial, he says, "You know what, I don't feel comfortable with the fact that she has that religion."
>
> . . . .
>
> A Jehovah[`s] Witness, that as a religion, it would almost be malpractice for a prosecutor to let someone on the jury like that.

Finally, the following dialogue occurred between the court and defense counsel:

> COURT: . . . I think you concede . . . this is a first impression type issue.
>
> COUNSEL FOR PACCHIANA: Right.
>
> COURT: You want to extend *Batson* [*v. Kentucky,* 476 U.S. 79 (1986)], which the Supreme Court has not done.
>
> COUNSEL FOR PACCHIANA: Absolutely.

Interestingly the majority opinion of the Florida Supreme Court begins as follows:

> During jury selection, the State used a peremptory challenge to strike the prospective juror. The following then transpired:
>
> > [DEFENSE COUNSEL]: Can we get a race neutral reason? [Emphasis supplied by the Court]
> >
> > [THE STATE]: She's a Jehovah Witness. I've never had one say, and I highlighted it, they've always said they can't sit in judgment. She never brought it up.
> >
> > [DEFENSE COUNSEL]: She did.
> >
> > [THE STATE]: No, but she put at the bottom [of Juror Questionnaire] that she's a Jehovah Witness, that gives me pause.
> >
> > [DEFENSE COUNSEL FOR CODEFENDANT[1]]: That's a religious based strike. [Emphasis supplied by the Court]

After a bit of further comment the trial judge brought the juror back to the courtroom and was questioned by the trial judge and counsel about her religion beliefs as a Jehovah's Witness. Certainly the trial judge and the State were well aware of the full extent of the objection to the challenge.

The State continued to object and then defense counsel stated, "We object to her being challenged for cause, then he's going to have to come up with a race neutral reason" [Emphasis by the Florida Court]. The State replied "This is a peremptory" and the Court stated "Over the Defense objection I find that the record sufficiently supports a race neutral reason because of the concern about her responses to the questions. So over your objection it'll be granted".

Five days later, while jury selection was still ongoing, Pacchiana filed a Motion for Mistrial and to select a new jury. The Supreme Court of Florida stated:

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[1]It was agreed before trial an objection by one counsel was for all unless specifically opted out.

> At the hearing on the motion, the State argued that the motion was untimely, pointing out that Pacchiana was now attempting to make a separate religion-based objection to the use of the strike in addition to his previous race-based objection. The trial court noted that Pacchiana was seeking to extend *Batson v. Kentucky,* 476 U.S. 79 (1986)—in which the United States Supreme Court held that the Equal Protection Clause prohibits race-based peremptory challenges—to religion. The trial court declined the invitation to extend *Batson* to religion, maintained its earlier ruling that the strike was permissible, and stated that all of Pacchiana's objections were "duly noted and preserved at this time." [Emphasis by Petitioner]

Hence the trial court acknowledged its full knowledge of the intent and extent of the objections, and itself deemed them preserved. Since the entirety of the objection to the black juror was due to religious reasons, the race neutral aspects of the expanded *Batson, supra* decision were presented and rejected by the trial court. And interestingly, another Florida Appellate case, *Johnson v. State*, 235 So.3d 1054 (Fla. 1st DCA 2018), addressed certain objections during jury selection. As quoted from Petitioner Pacchiana's Brief on Jurisdiction filed in the Florida Supreme Court:

> . . . after defense counsel used peremptory challenge on prospective juror 14, the prosecutor asked for a 'race neutral reason' because 'the defense has used a strike on all four males that have been available for the panel', and due to reasons raised by the defense counsel's response, or lack thereof, the Court disallowed the challenge and that juror sat and that seating of the juror was the subject of appeal.
>
> The *Johnson* Court, in its opinion, relevant to the issues at bench found:
>
> > Here, although the prosecutor asked for a race-neutral reason for defense counsel's use of a peremptory challenge on prospective juror 14, it is clear from the context of the request that he was actually seeking a gender-neutral reason because he pointed out what defense counsel had used peremptory challenges on all of the prospective male jurors on the panel. This objection was sufficient to satisfy step 1 or *Melbourne* . . .

REASONS FOR GRANTING THE WRIT

> This Court should grant a Writ of Certiorari to review the decision of the Florida Supreme Court finding that counsel failed to preserve an objection to the exclusion of a black Jehovah's Witness solely for religious reasons in derogation of *Batson v. Kentucky*, 476 U.S. 79 (1986)

The Petitioner, of course, is aware that this Court was presented with a very similar issue in *Davis v. Minnesota*, *supra*, and the Petition for Writ of Certiorari was denied, with Justice Ginsberg concurring in that decision. Justice Ginsberg wrote:

> I write only to note that the dissent's portrayal of the opinion of the Minnesota Supreme Court is incomplete. That court made two key observations: (1) "[R]eligious affiliation (or lack thereof) is not as self-evident as race or gender," 504 N.W.2d 767, 771 (Minn. 1993); (2) "Ordinarily . . . inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper," *id*., at 772 (adding that "proper questioning . . . should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment").

The dissent of Justice Thomas, joined by Justice Scalia, really provides an illustration of the challenges that were raised by the Petitioner Pacchiana below, and the decision of the Appellate Court in large measure accepted that rationale in light of *J.E.B. v. Alabama et rel. T.B., supra*.

Justice Thomas' opening paragraph confirms, it is respectfully submitted, the preservation issue for this Court:

> During jury selection for petitioner's trial on a charge of aggravated robbery, the prosecutor used a peremptory strike to remove a black man from the venire. Petitioner, who is black, objected on *Batson* grounds and requested a race-neutral explanation for the strike. See *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986). The prosecutor responded that she had struck the venireman because he was a Jehovah's Witness and explained that "[i]n my experience Jahovah Witness [sic] are reluctant to exercise authority over their fellow

> human beings in this Court House." 504 N.W.2d 767, 768 (Minn. 1993). The trial court accepted that reason for the strike and proceeded to trial. Petitioner subsequently was convicted.

While certainly not a forecast of things to come, Justice Thomas and Justice Scalia felt the matter worthy of review.

As an aside, the issue of religion recently has come to the forefront, at least in a death penalty case the undersigned tried last year in Fort Lauderdale [*State of Florida v. Pablo Ibar*], where the State was particularly allowed to inquire into whether any jurors were Catholic due to the Pope's recent denouncement of the death penalty and his apparent calling on the faithful to oppose the same.

This Court's opinion in *Powers v. Ohio*, 499 U.S. 400 (1991) is quite illustrative of the importance the Court attaches to jury selection and the context of race within that process and the paragraphs from *Strauder v. West Virginia*, 100 U.S. 303 (1880) as quoted in *Powers* at 408:

> The very fact that [in this case Jehovah's Witnesses] are singled out and expressly denied ... all right to participate in the administration of the law . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority . . .

This is, it is submitted, is doubly true with a black Jehovah's Witness.

However as to preservation and while not a case of similar import, the decision of the Court in *Pucket v. United States*, 556 U.S. 129 (2009) addresses the issue of preservation of issues in a federal proceedings, but which is quite appropriate to consider at bench.

Justice Scalia wrote:

> If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue.

After discussing forfeiture of a right for failure to make a timely assertion, Justice Scalia continued:

> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and

> resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "`sandbagging'" the court — remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. Cf. *Wainwright v. Sykes,* 433 U.S. 72, 89, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); see also *United States v. Vonn,* 535 U.S. 55, 72, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002).
>
> In federal criminal cases, Rule 51(b) tells parties how to preserve claims of error: "by informing the court — when the court ruling or order is made or sought — of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Failure to abide by this contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error. See *United States v. Young,* 470 U.S. 1, 15, and n. 12, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Rule 52(b), however, recognizes a limited exception to that preclusion. The Rule provides, in full: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

Petitioner submits there was no "plain error" to find a waiver exception.

The opinions of both the Appellate Court and Supreme Court of Florida demonstrate unequivocally that the trial judge was well aware of the issues; the entirety of the conversations concerned the black juror's religion. That, it is submitted, is a *Batson, supra* violation and for that the Writ should issue to the Florida Supreme Court for this Court to determine the proper application of what are the rights afforded under the Fifth and Sixth Amendments to the Constitution through the operation of the Fourteenth Amendment.

The Petitioner would submit a strictly contemporaneous objection is not required and a party's *Batson* objections is timely if it is made before the jury is sworn and the trial commences. This holding is rooted in *Batson, supra*, *Ford v. Georgia*, 498 U.S. 411 (1991) and cases decided by other Federal Circuits. In *Batson*, the challenge to the prosecutor's use of peremptory strikes against African American jurors was deemed timely because, before the jury was sworn, the Defendant moved

to discharge the jury as unconstitutionally selected. *Batson*, 476 U.S. at 83, 100. Certainly the State rule as construed by some of the judges that considered it in the instant case is not a valid bar under the facts of the case. Cf: *Wainwright v. Sykes*, 433 U.S. 72 (1977).

In light of various jury selection practices followed in State and Federal Courts, the Supreme Court declined to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges" and made "no attempt to instruct these Courts how best to implement" the *Batson* holding. *Id*. at 99. The Court expressed "no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire". *Id*.

The Federal Circuits have not settled on a single rule for assessing the timeliness of *Batson* objections. Some Courts take the view that a *Batson* objection is timely if it is made as soon as possible or by the close of voir dire. See, e.g., *United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992); *Gov't of Virgin Islands v. Forte*, 806 F.2d 73, 75-76 (3rd Cir. 1986). Other Courts find a *Batson* challenge timely if it is raised before the jury venire is dismissed and before the trial commences. See, e.g., *Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997); *United States v. Parham*, 16 F.3d 844, 847 (8th Cir. 1994); *United States v. Maseratti*, 1 F.3d 330, 335 (5th Cir. 1993); *United States v. Romero-Reyna*, 867 F.2d 834, 837 (5th Cir. 1989). Still other Courts take the position that a *Batson* challenge is timely if it is "made as soon as possible and preferably before the jury is sworn". See, e.g., *United States v. Contreras-Contreras*, 83 F.3d 1103, 1104 (9th Cir. 1996). Each of these rules recognizes the practical necessity of selecting the time frame for a *Batson* objection that provides sufficient time for counsel to ascertain the propriety of an objection (as to one strike or a pattern of strikes) while jurors are still present, thereby alleviating premature *Batson* objections, hasty determinations of *Batson* waivers, and post-trial *Batson* inquires. On the other hand, each rule acknowledges the importance of assuring that both the *Batson* inquiry and the trial will proceed efficiently.

The Petitioner's objections were timely made, contemporaneously, as to *Batson, supra* and the trial court was well aware the issue was the black juror's religion which was raised again before the jury was sworn. Certainly, since no jury had been sworn the excused prospective juror could have been brought back save that the trial judge suggested it would be malpractice to keep a Jehovah's Witness on a jury.

The Writ should issue.

CONCLUSION

For the foregoing reasons, a writ of certiorari ought issue to the Florida Supreme Court to review the decision at issue and enter whatever other orders are appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has furnished to Matthew Ocksrider, Esq., Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401-3432, this 30th day of April, 2020.

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