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IN THE SUPREME COURT OF FLORIDA

JOHN WEST,

Petitioner,

v. Case No. 78,570

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

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_____/

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

Petitioner, John West, defendant and appellant below, will be referred to herein as "petitioner." Respondent, the State of Florida, prosecuting authority below, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent accepts, with the exception of highly argumentative footnote 1 at page 3, petitioner's statement of the case and facts with the following clarifications:

In responding to appellant's amended motion for new trial, the state filed a response stating, in part, as follows:

> 3. The first panel released by the Court consisted of thirty-five (35) persons selected at random from a pool of potential jurors summoned for jury service in accord with the law.
>
> 4. The second panel, from which the jury [which] heard this case was selected, consisted of thirty-five (35) persons selected at random from the same pool of potential jurors as the first panel.
>
> 5. The defense attorney did not object to the court releasing the first panel.
>
> 6. In selecting the jury which heard this case, neither the State nor the Defense used all its [peremptory] challenges.
>
> 7. The defense did not object to the [peremptory] challenges used by the state.
>
> 8. The defense did not object the manner in which the jury was chosen.
>
> 9. The defense attorney, in the presence of the defendant, told the trial judge he was satisfied with the jury in this case. . . .

(R 146)

SUMMARY OF ARGUMENT

I. In that the substantive statutes under which petitioner was convicted expressly authorized enhanced sentencing pursuant to section 775.084, petitioner was properly sentenced as an habitual felony offender.

II. Petitioner failed in the trial court to assert that he was deprived of his Sixth Amendment right to a fairly and randomly selected jury and to effective assistance of counsel, and that his right to voir dire examination was impaired. The district court properly found that these arguments were not preserved for review. The sole objection presented to the trial court was that the dismissal of the venire was a violation of petitioner's due process rights. The district court properly found that petitioner received a fair trial.

ARGUMENT

ISSUE I

CERTIFIED QUESTION

> IS A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

Petitioner contends that the First District erred in affirming his sentence under the habitual felony offender statute based on his convictions for armed robbery and armed burglary, each a so-called "first degree felony punishable by life." Petitioner claims that because the felony classification for the crimes for which he was convicted is not specifically listed under the enhancement provision of Section 775.084(4), Fla. Stat. (1989), he cannot be sentenced as a habitual felony offender.[1] For the reasons that follow, this argument must fail.

First, petitioner is incorrect in his assertion that there is a felony classification of "first degree felony punishable by life." Section 775.081(1), Fla. Stat. (1989) provides that

> [f]elonies are classified, for the purpose of sentence and for any other purpose specifically provided by statute, into the following categories:

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[1] This issue is also pending before this court in Harris v. State, Case No. 78,787; Mixon v. State, Case No. 78,608 and Burdick v. State, Case No. 78,466.

(a) Capital felony;
(b) Life felony;
(c) Felony of the first degree;
(d) Felony of the second degree; and
(e) Felony of the third degree.

These are the only felony classifications which the legislature has established. Conspicuously absent from this list is a classification dubbed "first degree punishable by life;" rather, all first degree felonies, no matter what their maximum possible penalties, are included within one classification. See e.g., Lee v. State, 399 So.2d 1027 (Fla. 1st DCA 1981), rev. denied, 407 So.2d 1106 (Fla. 1981). Thus, because the enhancement or "bump-up" provision of Section 775.084(4) provides an enhanced maximum sentence for all first degree felonies, and because petitioner was convicted of a first degree felony with a maximum penalty of life, petitioner is indeed subject to sentencing under Section 775.084 and he was properly sentenced as a habitual felony offender.

The First District, when faced with this argument in Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991) (en banc), rev. pending, Case No. 78,466 (Fla.), stated:

> In essence, appellant here asks us to judicially amend Section 775.081, Florida Statutes to add another classification of felonious crime, that of "first degree felony punishable by life." We decline appellant's invitation and, in doing so, observe that a first degree felony, no matter what the punishment imposed by the

> substantive law that condemns the particular criminal conduct involved, is still a first degree felony and subject to enhancement by Section 775.084(4)(a)(1), Florida Statutes.

Id. at D1964. The First District was eminently correct in refusing to create a new felony classification of "first degree punishable by life," and this Court should adopt the Burdick court's reasoning and reject petitioner's argument.[2]

Even assuming that there is a separate classification of "first degree felony punishable by life," petitioner's argument must nevertheless fail. Petitioner contends that he should not have been sentenced as a habitual felony offender because the legislature's omission of first degree felonies punishable by life in Section 775.084(4) "evinces its clear intent to exclude this category, especially since such crimes are already punishable by life in Section

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[2] Petitioner mistakenly asserts that the First District, in Jones v. State, 546 So.2d 1134 (Fla. 1st DCA 1989), held that "a first degree felony punishable by life was properly scored as a life felony on a sentencing guidelines scoresheet." Petitioner's brief at 4, n.1. In Jones, the First District held that "[i]t is clear that there is no distinct felony classification of 'first degree punishable by life,' but only a first degree felony which may be punished [by imprisonment for a term of years or, where specifically provided in the pertinent criminal statute, by life]." Id. at 1135. Accordingly, the Jones court determined that the trial court there did not err in reclassifying the defendant's conviction for a first degree felony, punishable by life, to a life felony pursuant to Section 775.087(1)(a), Fla. Stat. (1987), even though the statute did not specifically provide for reclassification of a "first degree felony punishable by life." Id. Thus, it was the reclassification of the crime to a life felony, and not, as petitioner claims, the fact that the defendant was convicted of a "first degree felony punishable by life," which permitted the trial court to score the offense as a life felony.

775.082(3)(b), Florida Statutes." Petitioner's brief at 6. Petitioner, however, has overlooked the fact that although his crime may be punished by a maximum sentence of life imprisonment, that crime is subject to the sentencing guidelines, as are all life felonies. Thus, although petitioner's crime is already punishable by life imprisonment, this does not mean that he will receive a life sentence. Indeed, unless a defendant has a serious prior record or unless he or she receives a departure sentence, it is highly unlikely that a defendant convicted of a life felony or a first degree felony "punishable by life" will receive life imprisonment under the sentencing guidelines. Accordingly, petitioner's assertion that he cannot be sentenced under Section 775.084 merely because the crime of which he was convicted carries a possible maximum penalty of life imprisonment is unavailing.

This Court should interpret Sections 775.084(4)(a) and (b) as provisions which enhance the maximum penalties for all first degree felonies, as well as second and third degree felonies, rather than as provisions containing an exhaustive list of the crimes which are punishable under the habitual offender statute. Only by interpreting the statute in this manner can this Court avoid the absurd result that habitual felons convicted of the most serious crimes (i.e., life felonies and, as petitioner argues, first degree felonies punishable by life) retain the diminished penalties of the sentencing guidelines and the benefit of extensive

gain-time, while those convicted of lesser crimes do not. Moreover, this interpretation of Section 775.084(4) explains why the legislature omitted life felonies from the subsection: Because life felonies already carry a maximum possible penalty of life imprisonment, the maximum penalties for those crimes cannot be "enhanced," and there was no need for the legislature to list them in subsection (4).

Reflective of the legislature's intent in this case to punish all felonies, including "first degree felonies punishable by life," under the habitual felony offender statute is Section 812.13(2)(a), Fla. Stat. (1989), the substantive statutes under which petitioner was convicted. Section 812.13(2)(a) provides that armed robbery

> is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added). Section 810.02 similarly references 775.084 as a sentencing alternative. Thus, the substantive statutes indicate that the legislature expressly intended for armed robbery and armed burglary to be punishable pursuant to the habitual felony offender statute, despite the fact that Section 775.084(4) does not itself specifically provide for enhancement of the maximum penalty for so-called "first degree felonies punishable by life."

The First District squarely addressed the issue presented in the instant case in Watson v. State, 504 So.2d

1267 (Fla. 1st DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). There, the defendant presented the argument that because Section 775.084, Fla. Stat. (1983) only provided for enhancement of first, second and third degree felonies, it was inapplicable to a defendant convicted of a life felony. The First District rejected Watson's contention, holding that

> the statute under which Watson was sentenced, Section 794.011(3), provides that the crime of sexual battery with great force is a life felony punishable as provided in Sections 775.082, 775.083 or 775.084, Florida Statutes. Section 775.084 is the habitual offender statute. Hence, this argument is without merit. While the legislature did not directly set out how a life felony is to be enhanced in Section 775.084, presumably it was their intent that it be enhanced in the same manner as a first degree felony, the highest offense covered.

Id., 504 So.2d at 1269-1270 (emphasis added). See also Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) (defendant convicted of kidnapping, a first degree felony punishable by life imprisonment, was properly sentenced as a habitual felony offender where kidnapping statute provided for punishment under Section 775.084).

Should this Court determine that a "first degree felony punishable by life" is indeed a distinct felony classification which differs from the first degree felony classification, the Court should nevertheless answer the certified question in the affirmative by adopting the First

District's reasoning in Watson. As was the case in Watson, petitioner in the case at bar was convicted under substantive statutes which provide for punishment under Section 775.084, the habitual felony offender statute. Thus, even though Section 775.084 does not list first degree felonies "punishable by life" in the enhancement provisions of subsection (4), the legislature clearly intended to make habitual felons convicted of that crime subject to the gain-time restrictions and, more importantly, the exemption for the sentencing guidelines provided by Section 775.084(4)(e), Fla. Stat. (1989). Again, a holding by this Court to the contrary would lead to the absurd result, clearly never intended by the legislature, that habitual felons convicted of the most serious crimes receive greater protections than those convicted of lesser crimes. This Court must avoid such a result. Dorsey v. State, 402 So.2d 1178, 1183 (Fla. 1981) ("In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results." (Citation omitted)); State v. Webb, 398 So.2d 820, 824 (Fla. 1981).

Petitioner attempts preemptively to refute this argument, claiming that a defendant convicted of a first degree felony punishable by life or a life felony is not subject to sentencing under the habitual offender statute, regardless of the fact that the substantive statute under which the defendant is convicted specifically provides for punishment under Section 775.084. Petitioner, relying on

Judge Ervin's dissent in Burdick, supra, contends that the legislature's intent not to punish serious offenders under the habitual offender statute is reflected by the fact that the legislature failed to delete references to Section 775.084 when listing the punishments for certain misdemeanors, even after the habitual misdemeanant portion of Section 775.084 was deleted in 1988. In his dissent Judge Ervin, as quoted by petitioner, stated that

> [c]onsidering the legislature's wholesale indiscriminate reference to the habitual offender statute throughout the Florida Statutes, many of which are inapplicable, I do not consider that the state can take any comfort in the reference made in [the substantive statute] to section 775.084.

Burdick, 16 F.L.W. D1965.

It is true that there are several substantive misdemeanor provisions which still refer to Section 775.084, even though the legislature has abolished the habitual misdemeanant provision. Critically, however, at the time the legislature listed Section 775.084 among the possible penalties for those misdemeanors, there was a habitual misdemeanant provision. Thus, the legislature intended for habitual misdemeanants convicted under the pertinent misdemeanor provisions to remain subject to sentencing under Section 775.084 so long as it was applicable to them. Likewise, at the time the legislature provided for punishment under Section 775.084 in certain substantive criminal provisions for life felonies and first degree

felonies punishable by life, there was a habitual felony offender statute, which remains in effect today. Thus, because the legislature clearly intended for defendants convicted of felonies (life or otherwise) in which Section 775.084 is listed as a possible punishment to be subject to sentencing under the habitual felony offender statute so long as there is one, and because such a provision remains in effect, petitioner's claim that the State cannot rely on the legislature's reference to Section 775.084 in pertinent substantive criminal provisions is without merit.

To summarize, the First District in Burdick v. State, supra, correctly interpreted Section 775.081 in determining that there is no felony classification of "first degree felony punishable by life." Hence, because Section 775.084 provides for enhancement of all first degree felonies, petitioner's claim that the habitual felony offender statute is inapplicable to him must fail. Moreover, the substantive provisions under which petitioner was convicted specifically list Section 775.084, the habitual offender statute, as a possible punishment. This reflects the legislature's intent that each of the so-called "first degree felony punishable by life" for which petitioner was convicted is indeed subject to punishment under the habitual felony offender statute. Finally, an interpretation of Section 775.084 which excludes defendants convicted of life felonies and first degree felonies punishable by life from sentencing under the habitual felony offender statute would lead to the

absurd result that habitual felons convicted of the most serious offenses would retain the protection of the sentencing guidelines and gain-time provisions, while those convicted of lesser crimes would not. Accordingly, this Court should answer the certified question in the affirmative.

ISSUE II

THE DISMISSAL OF THE FIRST VENIRE DID NOT VIOLATE PETITIONER'S RIGHTS TO DUE PROCESS, TO A FAIRLY AND RANDOMLY SELECTED JURY, TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS, AND TO THE ASSISTANCE OF COUNSEL. (Restated)

Petitioner argues that he is entitled to a new trial because the dismissal of the first venire in his case deprived him of due process, vitiated his right to a fairly and randomly selected jury, impaired his right to voir dire examination, effectively permitted the state to exercise unlimited peremptory challenges, and denied him his right to be presented at all critical stages of the criminal proceedings and to effective assistance of counsel. Respondent notes that this court need not address this issue since it is not encompassed within the certified question. See Gould v. State, 577 So.2d 1302, 1303 n 2. (Fla. 1991).

In his amended motion for new trial, Petitioner alleged that the dismissal of the first venire denied him his due process right to a fair trial under Article I, Section 9 of the Florida Constitution, and permitted the state to exercise unlimited peremptory challenges. (R 139-140). During the hearing on the motion, defense counsel argued that his client was entitled to jurors from the first venire, that dismissal of the venire permitted the state to exercise unlimited peremptory challenges, that the improper dismissal violated Petitioner's due process rights. (R 735, 741).

In that Petitioner did not argue at any time in he trial court that the dismissal of the prospective jurors deprived him of his Sixth Amendment right to a jury drawn from a representative crosssection of the community, impaired his right to voir dire examination, or deprived him of effective assistance of counsel, these arguments were not preserved for review. See Hill v. State, 549 So.2d 179 (Fla. 1989); Glendening v. State, 536 So.2d 212 (Fla. 1988); Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The district court properly found these arguments were not preserved.

Even if Petitioner's fair crosssection argument were cognizable in the instant proceeding, it is clear that his allegations utterly fail to even approach a prima facie case of any violation of his Sixth Amendment right to a jury composed of a fair crosssection of the community.

The underlying premise of Petitioner's fair crosssection argument is his perceived entitlement to a jury selected from the first venire. Courts have made clear that the impartial jury requirement of the Sixth and Fourteenth amendments of the United States Constitution does not entitle defendants to be tried by any particular jurors or by a jury of a particular composition. See Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The court in Fay v. New York, 332 U.S. 283, 67 S.Ct. 1613, 91 L.Ed 2043 (1947) stated:

> But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense. [cites omitted] Trial must be held before a tribunal not biased by interest in the event. [cites omitted] Undoubtedly a system of exclusion could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process. A verdict on the evidence, however, is all an accused can claim; he is not entitled to a setup that will give a change of escape after he is properly proven guilty. Society also has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury.

Id. 332 U.S. at 288, 91 L.Ed. 2060. See also United States v. Hawkins, 566 F.2d 1006, 1014 (5th Cir. 1978) (There is no constitutional right to a randomly selected jury.); United States v. Nelson, 718 F.2d 315 (9th Cir. 1983) (Use of volunteer jurors does not diminish the likelihood of a fair crosssection of the community.)

In Taylor v. Louisiana, the court held that an essential component of the Sixth Amendment right to a jury trial is a trial jury drawn from a representative crosssection of the community. This right contemplates that the jury will be drawn from a representative crosssection of the community without the systematic exclusion of large, distinct and identifiable segments. In Duren v. Missouri, 459 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d

579 (1979) the court held that a defendant must demonstrate the following three elements to establish a prima facie violation of the Sixth Amendment's fair crosssection requirement:

> (1) that the group alleged to be excluded is a "distinctive" group in the community;
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;
> (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. at 364, 99 S.Ct. at 668, 58 L.Ed.2d at 587. Under the Sixth Amendment, every jury need not actually contain representatives of all the economic, social, religious, racial, political, and geographical groups within the community. Thiel v. Southern Pacific Company, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946). As this court in Carwise v. State, 454 So.2d 707 (Fla. 1st DCA 1984) further explained:

> The constitutional requirement that a jury be comprised of a fair crosssection of the community is met when the selection process for summoning jurors for impaneling occurs randomly. State v. Silva, 259 So.2d 153, 163 (Fla. 1972). This randomness in selection or summoning is thought to assure a 'fair possibility for obtaining a representative crosssection of the community.' Jordan v. State, 293 So.2d 131, 134 (Fla. 2d DCA 1974) (citation omitted). This principle was recognized in Bass v. State, [368 So.2d 447 (Fla. 1st DCA 1979)], where the

> court noted that Sergeant Morris' summoning of jurors from an all-Caucasian church 'precluded the possibility that black members of the community would be among the special venire from which [defendant Bass'] jury was to be drawn." Bass v. State, supra at 449.

In this case, Petitioner's fair crosssection argument, in its entirety, is that the "randomness of the jury selection was destroyed when the state prevailed upon the trial court to dismiss the first jury pool." Petitioner's Brief at 17. Petitioner utterly fails to allege any systematic exclusion of any distinct group in the community or that any group was not fairly and reasonably represented in the succeeding venire, as required under Duren v. Missouri. Petitioner fails to set forth any factual basis to show that members of the second venire were somehow distinct from, or less randomly chosen than, the members of the first venire. The misguided and unsupportable notion of the prosecutor that one group of randomly selected prospective jurors was more desirable than another group of randomly selected prospective jurors clearly is not enough to establish Petitioner's Sixth Amendment claim. Petitioner does not assail the juror summoning process, or the master list from which prospective jurors in the community were drawn. Petitioner does not allege that any juror selected from the second venire was unqualified to do so. His claim rests solely on the exchange had no bearing upon the randomness of the jury selection process:

> When the first panel was excused there isn't any question it was excused because of the false statement by the prosecutor. But when they were excused they went back in the pool, like you would release a bucketful of minnows back into the pond. When they called for the panel the second time, my analogy would be you pick up the bucket and scoop from the same pond a second time. You might get all the same ones you dumped out. You might win the lottery next week, too. The odds are good you won't do any of those. The odds are equally against your scooping again and would get some of the same ones, some different one. But be that as it may, it's the pond that is in question. If the pond is full of people who have been found to be qualified to be jurors, then any panel pulled out of that group is a legal panel. And the defendant is not deprived of any due process by using Panel A or Panel B.

(T 742-743). Under Taylor v. Louisana and Duren v. Missouri, petitioner has completely failed to allege any violation of his Sixth Amendment right to a jury drawn from a representative crosssection of the community.

Petitioner's argument that his right to voir dire examination of the prospective jurors was "greatly impaired" because the state effectively was permitted to conduct a voir dire examination of the venire in his absence and to determine the acceptability of the prospective jurors was not presented below, and thus is not preserved for review.

Even if this argument had been made in the trial court, and rule upon, the argument is without merit. The

state clearly conducted no examination of the members of the dismissed venire. Rather, the prosecutor stated in her disclosure that she merely saw the prospective jurors assembled outside the courtroom. She observed the venire and drew a negative conclusion, upon which she improperly acted. Defense counsel had the same opportunity to observe. The state did not have any access to the venire which defense counsel did not have.

Similarly, Petitioner's argument that the dismissal of the venire was tantamount to the exercise of unlimited peremptory challenges by the state mischaracterizes the facts. Peremptory strikes are challenges to individual prospective jurors following a voir dire examination. The state did not by its communication to the trial court challenge any particular prospective juror, and, more significantly, the trial court did not by its dismissal of the venire in order to attend to a perceived emergency, grant any particular challenge. In that the trial court dismissed the venire for a reason which it believed to be legitimate, case law cited by Petitioner holding that a trial court's grant of peremptory challenges in excess of those permitted by law is reversible error per se, Sanders v. State, 328 So.2d 268, 269 (Fla. 1st DCA 1976); Moore v. State, 335 So.2d 877, 878 (Fla. 4th DCA 1976) is irrelevant to this case. The prosecutor's improper communication to the trial court, and the trial court's dismissal of the venire in response to that communication, were more akin to

the state having obtained a continuance under false pretenses than to the exercise of a peremptory challenge to an entire venire which was never examined. Assuming an improper continuance was obtained by the state, petitioner fails to establish any prejudice attributable to that action. Petitioner failed in the trial court, on direct appeal and in the instant proceedings to allege any harm to him by the exchange of the venires. As the state noted in the trial court, defense counsel expressed his satisfaction with the jurors empaneled in petitioner's case, and did not object to the state's peremptory challenges. Petitioner advances no argument that the racial, social or economic composition of the dismissed venire was distinguishable from the venire from which the jurors in his case were chosen. He does not allege that the jurors who tried him were less qualified than the prospective jurors who were dismissed. If the dismissal is characterized as an improperly obtained continuance, it is clear beyond a reasonable doubt that the error did not affect the jury verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Gray v. State, 536 So.2d 363 (Fla. 4th DCA 1989) (applying harmless error analysis to trial court's improper action is permitting the final juror and alternate to be chosen from volunteers on the venire.).

Petitioner's arguments that the trial court's dismissal of the venire deprived him of his right to be present at a critical stage of the criminal proceedings and

to his right to effective assistance of counsel were not made in the trial court. Deprivation of the defendant's right to be present at critical stages of a trial is fundamental error which does not require preservation for review. See Salcedo v. State, 497 So.2d 1294 (Fla. 1st DCA 1986). However, courts have also applied a harmless error analysis when this constitutional violation is alleged. Francis v. State, 413 So.2d 1175 (Fla. 1982); Lane v. State, 459 So.2d 1145 (Fla. 3d DCA 1984). Courts have held that deprivation of a defendant's right to effective assistance of counsel must be preserved for review, See Crutchfield v. Wainwright, 803 F.2d 103 (11th Cir. 1986) and that a harmless error analysis is applicable. Recinos v. State, 420 So.2d 95 (Fla. 3d DCA 1982).

Respondent agrees that a criminal defendant has the right to be present during all crucial stages of his trial, including the challenging of jurors. Salcedo, Francis v. State, 413 So.2d 1175 (Fla. 1982). Petitioner in this case argues that the trial court's dismissal of the venire upon the state's misrepresentation to it deprived him of his right to be present during the challenge of jurors. This argument is without merit because no prospective jurors were challenged at the time the trial court dismiss the venire. The trial court excused the venire for what it believed to be a legitimate emergency requiring its attention. The state did not examine these prospective jurors and did not peremptorily challenge them. The trial

court did not grant any challenges to the prospective jurors. Thus, the excusal of the venire, under these circumstances, was not a critical stage of the proceedings. Petitioner was present during the jury selection in his case, and the record makes clear that defense counsel consulted with him during those proceedings, and that petitioner and his counsel found the jury satisfactory. If the dismissal of the venire is interpreted as an improper continuance, the granting of the continuance was not a critical stage of the trial proceedings in the absence of any infringement on petitioner's speedy trial rights. If the dismissal of the venire constituted a deprivation of petitioner's constitutional right to be present at a critical stage in the criminal proceedings, the error was harmless beyond a reasonable doubt. Frances; Lane. Petitioner does not assert any prejudice to him as a result of the dismissal of the venire and his trial by jurors selected from the second venire. No allegation is made that the evidence against Petitioner was marginal. Nothing in the record supports a conclusions that the dismissal of the venire affected the verdict.

Petitioner did not raise the deprivation of effective assistance of counsel argument in his motion for new trial, and this argument therefore is not preserved for review. Even if the argument were subject to review, it is without merit. Petitioner premises his assertion of deprivation of counsel on the above argument that he and his counsel were

deprived of the right to be present at a critical stage of the trial proceedings. Respondent reiterates that jury challenges and selection in petitioner's case did not occur when the trial court dismissed the venire. The record indicates that defense counsel was present when the court dismissed the venire and recessed, although counsel did not know the underlying reason for the dismissal and recess.

If petitioner was deprived of his constitutional right to counsel at the time the venire was dismissed, the error was harmless beyond a reasonable doubt. Petitioner does not allege any prejudice attribute to the dismissal of the first venire or to the selection of the jurors in his case from the second venire. There is no evidence in the record that the jurors who sat in petitioner's case were unqualified, and no evidence that the selection of the jurors from the second venire as opposed to the second venire affected the jury verdict. Recinos.

In his amended motion for new trial, petitioner asserted that he did not receive a fair trial because of the dismissal of the venire. To justify a new trial, a defendant must establish that the alleged error seriously affected the fairness of his trial. Atkins v. State, 210 So.2d 9 (Fla. 1st DCA 1968), cert. discharged, 218 So.2d 748, cert. denied, 396 U.S. 859, 90 S.Ct. 128, 24 L.Ed.2d 111 (1968). An abuse of discretion standard applies upon review of a trial court order granting or denying a motion

for new trial. State v. Tresvant, 359 So.2d 524, 527 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1375 (Fla. 1979). Petitioner completely failed to establish that the dismissal of the venire affected the fairness of his trial, and no abuse of discretion is shown in the trial court's denial of his motion for new trial.

This court therefore should approve the district court decision finding that dismissal of the first venire had no impact upon the fairness of petitioner's trial.

CONCLUSION

Based on the foregoing argument and citations of authority, respondent requests this court to answer the certified question in the affirmative, and to otherwise approve the district court decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301 this 7th day of November, 1991.

Laura Rush
Assistant Attorney General