IN THE SUPREME COURT OF FLORIDA

CASE NO. SC:11-1617

RAFAEL MATARRANZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY BRIEFOF PETITIONER ON THE MERITS

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

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THE TRIAL COURT ERRED IN DENYING A CAUSE CHALLENGE TO MS. CEBALLOS ON THE BASIS OF HER EVENTUAL DISCLAIMER OF A PREVIOUSLY CONCEDED BIAS WHERE THE PROSECUTOR HAD CHASTISED THE JUROR FOR HER BIAS, AND THE EVENTUAL DISCLAIMER, AS OBSERVED BY THE TRIAL COURT, RESULTED FROM HER EMBARRASSMENT.

Petitioner in his initial brief argued that the trial judge committed manifest error since the totality of Juror Ceballos' responses during questioning by the parties and trial judge established a reasonable doubt as to the juror's ability to be a fair and impartial juror. Petitioner specifically argued that the mere fact that Juror Ceballos, after being embarrassed by her insistence that she would lean toward the state, eventually stated that she would have an open mind did not change the fact that there was a reasonable doubt as to whether she could be a fair and impartial juror in this case.

The state in its brief argues the following:

1. Petitioner did not preserve this issue for appellate review and Petitioner was not prejudiced by the wrongful denial of the challenge for cause;

2. The fact that a reasonable doubt may exist as to a juror's ability to be fair and impartial is insufficient to establish manifest error;

3. The totality of Juror Ceballos' responses did not create a reasonable doubt as to her ability to be a fair and impartial juror;

4. The trial judge was in a better position than this Court to determine if Juror Ceballos could be a fair and impartial juror.

None of these arguments have merit.

1. The issue was properly preserved and Petitioner was prejudiced by the wrongful denial of the challenge for cause.

In *Trottier v. State*, 576 So.2d 691(Fla. 1990), this Court made very clear what the requirements were to properly preserve a challenge for cause issue for appellate review. First, a party must move to challenge the juror for cause. If the challenge for cause is denied the party must then exhaust all of his peremptory challenges. After exhausting all of his peremptory challenges the party must then request additional peremptory challenges. Finally, the party must identify a juror who is going to serve on the jury that he would have stricken if he had an additional peremptory challenge. *See also Busby v. State*, 894 So.2d 88 (Fla. 2004).

Despite the fact that Petitioner moved to strike Juror Ceballos for cause, exhausted all of his peremptory challenges, requested additional peremptory challenges which was denied, identified jurors he would have used those peremptory challenges to strike from the jury and objected to the jury prior to the swearing of the jury being sworn, the state argues Petitioner has not preserved this issue. (T. 394, 547, 664). It is the state's position that when defense counsel requested additional peremptory challenges and listed some of the jurors who he had moved to strike for cause, he did not include Juror Ceballos and, therefore, Petitioner cannot object to the

trial court's denial of his request to strike Juror Ceballos for cause. The state makes this argument despite the fact that there is no requirement that when defense counsel requests additional peremptory challenges after exhausting all of his peremptory challenges, he must rename all the jurors that the trial judge refused to strike for cause since this requirement would be nothing more than a futile act.

In this case Petitioner argued in detail to the trial judge why he believed Juror Ceballos should be stricken for cause and after hearing argument, the trial court denied the request. (T. 394). At the conclusion of the voir dire defense counsel, after exhausting his peremptory challenges requested additional challenges and the trial judge summarily denied this request. (T. 547). The fact that defense counsel neglected to include Juror Ceballos in his list of jurors who should have been stricken for cause had no effect on the trial judge's ruling, which was to deny Petitioner any additional peremptory challenges. Therefore, defense counsel's failure to reiterate the names of all the jurors that the trial judge failed to strike for cause did not result in a waiver of this issue.

In *Bryant v. State,* 601 So.2d 529 (Fla. 1992), Bryant challenged eleven jurors for cause based on their views of the death penalty. After Bryant exhausted all of his peremptory challenges, he requested additional peremptory challenges which were denied. Two of the jurors who remained on the jury were jurors Bryant attempted to

strike for cause. When Bryant asked for the additional peremptory challenges he did not use as grounds the fact that the court had erred in denying his challengers for cause but instead, requested the additional peremptory challenges so that the jury would be more racially represented. On appeal, similar to this case, the state argued that the issue was not properly preserved. Despite the state's argument, this Court reversed Bryant's conviction and ordered a new sentencing hearing. Therefore, since defense counsel followed all of the requirements set out by this Court in *Trottier, supra,* this Court should reject the state's position that this issue has not been preserved for appellate review.

The state also asks this Court to recede from its decision in *Busby v. State*, 894 So.2d 88 (Fla. 2004), wherein this Court specifically held that after a defendant has exhausted all of his peremptory challenges, requested additional challenges which were denied and, identified a juror he would have excused if he had an additional peremptory challenge, he is not required to establish that the identified juror was a legally objectionable juror who should have been excused for cause. In reaching this conclusion this Court recognized how important peremptory challenges are to a fair trial in the State of Florida and that when a trial judge's decision to deny a challenge for cause results in a party being denied a peremptory challenge, the party has been prejudiced and deserves a new trial.

In the most recent case of *Hayes v. State*, 37 Fla. L. Weekly S 253 (Fla. 2012), this Court citing *Busby* once again recognized, "While there is no freestanding constitutional right to exercise peremptory challenges at either the state or federal level, this Court has long recognized that "such challenges are 'nonetheless one of the most important of the rights secured to the accused." *See also Smith v. State*, 59 So. 3d 1107, 1111 (Fla. 2011) (*quoting Busby*, 894 So. 2d at 98). Therefore, since this Court has continued, as recently as this year, to rely upon the rationale in *Busby*, this Court should reject the state's argument that this Court should overrule *Busby*.

2. This Court has continually recognized that the standard for excusing a juror for cause is whether a reasonable doubt exists as to whether the juror can be a fair and impartial juror.

The Third District Court of Appeal's opinion concluded that Petitioner failed to establish manifest error without any reference or adherence to the reasonable doubt standard of juror qualification as set forth in this Court's decisions in *Singer v. State*, 109 So.2d 7 (Fla. 1959) and *Hamilton v. State*, 547 So.2d 630 (Fla. 1989). Recognizing this problem with the Third District's opinion, the state on page fifteen of their brief argue that this Court's decisions in *Singer* and *Hamilton,*"did not in fact establish a "reasonable doubt standard" as being the sole standard of appellate review for rulings on cause challenges." The state makes this assertion despite the fact that this Court has continually held, "A juror must be excused for cause if any reasonable

doubt exists as to whether the juror possesses an impartial state of mind." *Banks v. State*, 46 So. 3d 989 (Fla. 2010); *Kopsho v. State*, 959 So. 2d 168, 170 (Fla. 2007); *Smith v. State*, 28 So. 3d 838 (Fla. 2009). This Court has also recognized that manifest error is tantamount to an abuse of discretion and numerous district courts have recognized that a trial court's failure to excuse a juror for cause is manifest error and an abuse of discretion when a juror's responses create a reasonable doubt as to whether the juror possesses the requisite state of mind necessary to render an impartial decision. *See Johnson v. State*, 969 So. 2d 938, 946 (Fla. 2007); *Peters v. State*, 874 So.2d 677 (Fla. 4th DCA 2004).

If the Third District Court of Appeal would have applied the proper reasonable doubt standard as required by this Court's cases, the court would have come to the inescapable conclusion that the trial judge committed manifest error in this case since the totality of Juror Ceballos' responses created a reasonable doubt as to her ability to be fair and impartial.

3. The totality of the juror's responses established a reasonable doubt as to Juror Ceballos' ability to be fair and impartial and, therefore, the trial judge committed manifest error in denying Petitioner's motion to strike the juror for cause.

The state properly argues that in determining whether a reasonable doubt exists as to a juror's ability to be fair and impartial, the court must look to the totality

of the juror's responses. The state erroneously argues that Petitioner's brief focused on just a few isolated comments made by the juror wherein, she indicated she may have a grudge against the Petitioner. A review of the record establishes that Petitioner did not ignore any of the responses made by Juror Ceballos. Petitioner's position clearly is that when the court looks at **all** of Juror Ceballos' responses, the inescapable conclusion is that a reasonable doubt that existed as to juror Ceballos' ability to be a fair and impartial juror.

The state in its brief relies upon three comments made by Juror Ceballos wherein, she indicated she could be a fair juror, to support their position that any reasonable doubt concerning Juror Ceballos' ability to be a fair juror was erased. A review of these comments will establish that the state failed to analyze these comments in the context in which they were given and when the court looks at these comments in context, it will become obvious that Juror Ceballos should have been stricken for cause.

First, the state argues, "that when specifically asked by the prosecutor whether she could put aside her feelings for the State or for the defendant and determine whether the State had proved the charges based on the evidence she heard, Ms Ceballos answered with an unqualified, "Yes." (T. 160)(page 8 of state's brief). What the state ignores was prior to giving this response Juror Ceballos, pursuant to

questions from both the trial judge and the state, had continually maintained that she would hold a grudge against defendant and lean toward the state. (*See* Petitioners initial brief pages 3-6 which recites all of the juror's responses to questions from both the judge and state concerning her fear that she could not be a fair juror in this case.) The state also inexplicably chose to ignore the conversation between the prosecutor and the witness immediately prior to the response relied upon by the state wherein, the prosecutor specifically instructed the juror that, "You can't lean" and "You can't say I think." It was only after this admonishment from the prosecutor that the juror finally appeased the prosecutor and agreed that she would base her verdict on the evidence presented. (T. 160).

The state next relies upon the equivocal response given by the juror to defense counsel that she did not think her past experiences would affect her decision in this case. (T. 162-4). Once again the state ignores the fact that this comment made by the juror was only given after the juror had been questioned and instructed by both the judge and prosecutor that the law required that she not lean toward the state. (T. 156-62).

Finally, the state mentions the fact that after the juror went home for the night, talked about her responses and became embarrassed by her insistence that she may not be fair, the juror finally stated that, "anything that happened to me in the past

has nothing to do with this case." (T. 352). Once again when the court looks at this statement along with all of the jurors other statements, it is clear that this statement, did not erase the reasonable doubt that existed as to Juror Ceballos' ability to be a fair juror in this case.[1]

The state, relying upon the opinion of the Third District Court of Appeal, concludes that since there were isolated statements in the record wherein Juror Ceballos stated she could be a fair juror, it is impossible for Petitioner to establish that the trial judge committed manifest error. In taking this position, the state completely ignores the entire line of cases cited in Petitioner's brief wherein, both this Court and other district courts of appeal have recognized, that a juror's last response that she would be free of bias does not automatically overcome the effect of what the juror had previously said as to his state of mind. *See Overton v. State*, 801 So.2d 877 (Fla. 2001); *Singer v. State*, 109 So.2d 7 (Fla.1959); *Hamilton v. State*, 547 So.2d 630 (Fla. 1989); *Williams v. State*, 638 So.2d 976 (Fla. 4th DCA 1994). As the state properly recognized, it is necessary for a reviewing court to look at all of the juror's responses and since Juror Ceballos' responses taken in their totality created a

[1]The state also relies upon the fact that Juror Ceballos indicated that she understood that (1) defendant did not have to testify; (2) the state had the burden of proof; (3) defendant had no burden of proof and (4) she would hold the state to their burden of proof. As argued in the initial brief the above mentioned responses were undisputed and had no relevance to the issue of the juror's admitted bias against Petitioner.

reasonable doubt as to her ability to be fair and impartial, the trial judge committed manifest error by not excusing the juror for cause and granting Petitioner an additional peremptory challenge.

4. The trial judge's conclusion after viewing the entire voir dire that Juror Ceballos eventually changed her mind and indicated she could have an open mind since she was embarrassed by her initial insistence that she would hold a grudge against defendant and lean toward the state establishes that the trial judge committed manifest error in this case.

There is no dispute that deference is accorded to a trial judge's ruling on a challenge for cause since the trial judge has the opportunity to view the juror. However, the state in its brief conveniently ignores the most important finding made by the trial judge concerning the juror's demeanor, which clearly establishes a reasonable doubt concerning Juror Ceballos' ability to be a fair juror. After listening to Juror Ceballos responses on both the first and second day of voir dire, the trial indicated that based upon the juror's responses on the first day of voir dire, the court was inclined to grant the challenge for cause. The trial judge went on to find that the juror, after going home and talking and thinking about her responses became embarrassed, which lead to her disclaimer that she would hold a grudge against the defendant and lean toward the state. (T. 394-5). As argued in the initial brief no juror should be forced to feel embarrassed by her honest responses that this was not the right case for her to serve.

Since the trial judge's factual finding that Juror Ceballos' final statement that she could be a fair juror was the result of her being embarrassed by her initial insistence that she would hold a grudge against Petitioner and lean toward the state, supports Petitioner's position that the totality of Juror Ceballos' responses created a reasonable doubt as to her ability to be a fair juror in this case, this Court should vacate the opinion of the Third District Court of Appeal and grant Petitioner a new trial.

CONCLUSION

Based upon the foregoing, this honorable Court is respectfully requested to quash the opinion of the Third District Court of Appeal and grant Mr. Matarranz a new trial.

Respectfully submitted,

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BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this ____ day of August, 2012.

_____

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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