

IN THE SUPREME COURT OF FLORIDA

MOSES McCRAY,)
)
 Petitioner,)
)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. SC2016-1235
 DCA Case No. 4D14-907

PETITIONER’S BRIEF ON JURISDICTION

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

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STATEMENT OF THE CASE AND FACTS

The facts relevant to a determination of whether discretionary review is warranted are set forth in the decision of the Fourth District affirming Petitioner's prison sentence as follows:

Petitioner was convicted of felony offenses. *McCray v. State*, 41 Fla. L. Weekly D1514b, 1 (Fla. 4th DCA June 29, 2016). *See* Appendix. On appeal he argued that the trial court erred in denying his motion to “unstrike” the juror upon whom he had used his last peremptory strike (“Juror 2.5”) so that he could use his last peremptory strike on another juror (“Juror 3.9”). *Id.*

Because Petitioner used his last peremptory strike on Juror 2.5, Juror 3.9 was “in the box”. *Id.*, 2. The state accepted the panel. *Id.*, 3. Petitioner moved to challenge Juror 3.9 for cause, citing concern about Juror 3.9's ability to speak English. *Id.* The trial court denied Petitioner's cause challenge, and Petitioner asked for two additional peremptory strikes. *Id.* The trial court enquired if Petitioner wanted additional strikes because the court had denied the cause challenge on Juror 3.9. *Id.* Petitioner indicated that he did. *Id.* The trial court denied Petitioner's request for additional peremptory strikes. *Id.*

Petitioner then asked to “unstrike” Juror 2.5. *Id.* The trial judge stated:

I don't know how I can unstrike a strike because then that messes up everybody else's decisions on what you struck or so. That's our jury...

Id., 4.

Juror 3.9 served on Petitioner's jury and Juror 2.5 remained struck from the jury.

The Fourth District affirmed Petitioner's conviction but certified conflict with the holdings in *McIntosh v. State*, 743 So. 2d 155 (Fla. 3d DCA 1999), on the issue of whether "unstriking" is permitted.

Petitioner filed a timely Notice to Invoke Discretionary Review on July 8, 2016.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction under Article V, section 3(b)(3) of the Florida Constitution to review a decision that is “certified to be in direct conflict with decision of another district of appeal.” *See also* Fla. R. App. P. 9.030(a)(2)(A)(vi).

The Fourth District in affirming Petitioner’s prison sentence certified conflict with a decision of another district court of appeal as follows:

On the other hand, it could be argued that our holdings in this case and *Davis* may conflict with *McIntosh*, simply because of the different results. That is, we have held, under the circumstances presented to us, that the courts did not abuse their discretion in *denying* a motion to “unstrike” a juror. Thus, to the extent the results of this case and *Davis* may be perceived to conflict with *McIntosh*, we certify conflict.

Affirmed; conflict certified.

McCray, 7 (emphasis in the original).

This Court has discretionary jurisdiction under Article V, section 3(b)(3) of the Florida Constitution to review a decision that is “certified to be in direct conflict with a decision of another district of appeal.” *See also* Fla. R. App. P. 9.030 (a)(2)(A)(v) and (vi). This Honorable Court should accept jurisdiction on this ground and review this cause on the merits.

ARGUMENT

THIS COURT HAS JURISDICTION BECAUSE THE FOURTH DISTRICT COURT OF APPEALS CERTIFIED CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT.

The Fourth District in affirming Petitioner/Petitioner Mr. Bowers' prison sentence certified conflict with *McIntosh v. State*, 743 So. 2d 155 (Fla. 3d DCA 1999). *McCray*, 7.

In *McIntosh*, at the conclusion of jury selection, only eleven jurors of a twelve juror panel had been selected and no additional jurors remained. *McIntosh*, 743 So. 2d at 156. The state, over the defendant's objection, offered to withdraw a strike against one juror. *Id.* The defendant then requested an additional peremptory strike, to be used against a juror who was not the subject of the state's "unstrike." *Id.* The trial court denied the defendant's request for an additional peremptory strike. *Id.*

McIntosh appealed, arguing that the trial court erred by allowing the state to "unstrike" a juror, with the result that that juror sat on the panel. *Id.* The Third District Court of Appeal affirmed, finding no abuse of discretion. *Id.* In so ruling, the appellate court stated that if McIntosh had used his peremptory strikes based on the "unstruck" juror not serving on the jury, "then it would be understandable if the defense had requested an additional peremptory challenge to strike" the "unstruck" juror. *Id.* The appellate court found that because McIntosh did not wish to use the

additional peremptory strike on the “unstruck” juror, any claim of harm was “entirely speculative.” *Id.*

McIntosh allowed an “unstrike” to stand when exercised by the state. In this case, an “unstrike” by Petitioner was denied by the trial court and upheld on appeal.

This Honorable Court should accept jurisdiction and review this case on the merits.

CONCLUSION

Based on this Court's discretionary jurisdiction over certified conflicts Petitioner requests this Honorable Court to exercise its discretionary jurisdiction, accept jurisdiction of this cause, and review this cause on the merits.

Respectfully submitted,

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CERTIFICATE OF E-SERVICE AND E-FILING

I CERTIFY that a copy of Petitioner's Brief on Jurisdiction has been furnished to Celia Terenzio, Assistant Attorney General, 1515 North Flagler Drive, 9th floor, West Palm Beach, Florida 33401 by e-service at CrimAppWPB@myfloridalegal.com; and electronically filed with this Court on this 18th day of July, 2016.

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CERTIFICATE OF FONT SIZE

I CERTIFY that this brief has been prepared with 14 point Times New Roman font as required by Fla. R. App. P. 9.210.

/s/ Virginia Murphy
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