

IN THE SUPREME COURT OF FLORIDA

MOSES MCCRAY,

Petitioner,

v.

Case No. SC16-1235

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE#
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
THE FOURTH DISTRICT'S OPINION IN THE INSTANT CASE IS NOT ACTUALLY IN CONFLICT WITH A DECISION FROM THE THIRD DISTRICT. (Restated)	3
CONCLUSION	6
CERTIFICATE OF SERVICE	6
CERTIFICATE OF COMPLIANCE	7

TABLE OF CITATIONS

AUTHORITIES CITED	PAGE#
Cases	
<u>Ansin v. Thurston</u> , 101 So. 2d 808, 810 (Fla. 1958).....	6
<u>Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.</u> , 498 So.2d 888, 889 (Fla. 1986)	4
<u>Jenkins v. State</u> , 385 So.2d 1356, 1359 (Fla. 1980).....	5
<u>McCray v. State</u> , 4D14-907, 2016 WL 3533852 (Fla. 4 th DCA June 29, 2016)	passim
<u>McIntosh v. State</u> , 743 So. 2d 155 (Fla. 3d DCA 1999)..	2, 3, 6, 7
<u>Reaves v. State</u> , 485 So.2d 829, 830 (Fla. 1986).....	4, 5
<u>Stallworth v. Moore</u> , 827 So.2d 974 (Fla. 2002).....	5
<u>State v. Frierson</u> , 926 So. 2d 1139, 1142 (Fla. 2006).....	5
<u>State v. Jean</u> , 116 So. 2d 384 (Fla. 2013).....	5
Other Authorities	
Article V, §3(b)(4), Florida Constitution.....	4
Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi).....	4

PRELIMINARY STATEMENT

Respondent, the State of Florida, the appellee in the District Court of Appeal for the Fourth District (hereinafter "the Fourth District") and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, McCray, the appellant in the district court and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The petitioner's Initial Brief on Jurisdiction will be designated by the symbol "IB". That symbol is followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal which is attached to the instant brief. The decision of the lower tribunal also can be found at McCray v. State, 4D14-907, 2016 WL 3533852 (Fla. 4th DCA June 29, 2016).

In pertinent part, the Fourth District held that the trial court did not abuse his discretion in not permitting the defendant to "unstrike" a juror upon whom the defendant had used his last peremptory challenge in order to use this last peremptory challenge on another juror. Id. "Allowing the defendant to reveal the State's strategy to accept Juror 3.9, and then allowing the defendant to

"unstrike" Juror 2.5 in order to strike Juror 3.9, would have prejudiced the state." Id., at *3.

The Fourth District stated that the court was "aware of no authority holding that a party, who has exhausted their peremptory strikes, has the right to retract a peremptory strike in order to use a peremptory strike on another juror after the other party has revealed their jury selection strategy but before the jury is sworn. To recognize such a holding would disrupt what should be an otherwise orderly jury selection process." Id., at *4.

The Fourth District certified conflict with McIntosh v. State, 743 So. 2d 155 (Fla. 3d DCA 1999), however. Id. In so certifying, the appellate court could only say that there "may" be a "possible" conflict with McIntosh. The Fourth District noted that the circumstances of both cases were different. First, in this case,

the defendant already had exhausted his peremptory strikes, and the state already had accepted the panel, when the defendant moved to "unstrike" a juror upon whom he used his last peremptory strike, so that he could use his last peremptory strike on another juror instead. However, in McIntosh, the state merely sought to "backfill" an otherwise incomplete jury by moving to "unstrike" juror Blanco, whom the state had stricken but who was acceptable to the defense, without seeking to use that peremptory strike on another juror.

Id., at *4.

Second, in the instant case, the court held that the trial court "did not abuse their discretion in *denying* a motion to 'unstrike' a juror. However, McIntosh held, under different

circumstances, that a court did not abuse its discretion in granting a motion to 'unstrike' a juror." Id., at *4.

Ultimately, the appellate court rejected Petitioner's contention that the trial court had abused discretion in denying a "unstrike" and affirmed Petitioner's convictions and sentences. Id. This proceeding followed.

SUMMARY OF ARGUMENT

Although the Fourth District certified conflict with an opinion from the Third District, McIntosh v. State, 743 So. 2d 155 (Fla. 3d DCA 1999), the appellate court itself admitted that McIntosh was distinguishable. The State submits that there is no actual conflict. Therefore, this Court must dismiss this case for lack of jurisdiction.

ARGUMENT

THE FOURTH DISTRICT'S OPINION IN THE INSTANT CASE IS NOT ACTUALLY IN CONFLICT WITH A DECISION FROM THE THIRD DISTRICT. (RESTATED)

Petitioner contends that this Court has jurisdiction pursuant to Article V, §3(b)(4), of the Florida Constitution, which parallels Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). The Constitution provides: "The supreme court ... [m]ay review any decision of a district court of appeal ... that is certified by it to be in direct conflict with a decision of another district court of appeal."

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision."

Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So.2d 974 (Fla. 2002). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So.2d at 1359. Finally, this Court has the discretion to determine that it should not exercise jurisdiction despite a certification of conflict by a district court. State v. Frierson, 926 So. 2d 1139, 1142 (Fla. 2006). Also c.f., State v. Jean, 116 So. 2d 384 (Fla. 2013) (Court declined to accept jurisdiction despite certification of conflict).

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system

for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Here, this Court should decline to accept jurisdiction. This is because, as the Fourth District admitted, the Third District's opinion is distinguishable. Therefore, the decision below is not actually in conflict with McIntosh v. State, 743 So. 2d 155 (Fla. 3d DCA 1999).

In this case, the Fourth District stated that the court was "**aware of no authority** holding that a party, who has exhausted their peremptory strikes, has the right to retract a peremptory strike in order to use a peremptory strike on another juror after the other party has revealed their jury selection strategy but before the jury is sworn." Id., at *4 (emphasis added). Clearly, as the Fourth District recognized, the instant case is not in conflict with any other case from any other district.

It is true that the Fourth District certified conflict with McIntosh v. State, 743 So. 2d 155 (Fla. 3d DCA 1999). Id. But, in so certifying, the appellate court could only say that there "**may**" be a "**possible**" conflict with McIntosh. Id., at *3. Yet, as the Fourth District noted, the circumstances of both cases were different.

First, in this case,

the defendant already had exhausted his peremptory strikes, and the state already had accepted the panel, when the defendant moved to "unstrike" a juror upon whom he used his last peremptory strike, so that he could use his last peremptory strike on another juror instead. However, in McIntosh, the state merely sought to "backfill" an otherwise incomplete jury by moving to "unstrike" juror Blanco, whom the state had stricken but who was acceptable to the defense, without seeking to use that peremptory strike on another juror.

Id., at *4.

Second, as the Fourth District acknowledged, in the instant case, the Fourth District had held that the trial court "did not abuse their discretion in *denying* a motion to 'unstrike' a juror. However, McIntosh held, under different circumstances, that a court did not abuse its discretion in *granting* a motion to 'unstrike' a juror." Id., at *4.

As can be seen by this Court, and as was recognized by the Fourth District, the facts in the opinion at bar are clearly distinguishable from the facts of McIntosh. Therefore, there is no actual conflict. Because there is no conflict, this Court must dismiss this case for lack of jurisdiction.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL via the E-Portal on August 11, 2016: Virginia Murphy,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier
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Respectfully submitted and certified,
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