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IN THE SUPREME COURT OF FLORIDA

MOSES McCRAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____________________________/

CASE NO. SC16-1235
LT CASE NOS. 4D14-0907
502013CF008088AXXXMB

PETITIONER'S MERITS BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner was found guilty after a jury trial of one count of aggravated assault with a firearm on a law enforcement officer, three counts of aggravated assault with a deadly weapon on a law enforcement officer, and one count of possession of a firearm by a convicted felon. The facts as set forth in the opinion of the District Court follows:

> During voir dire, the following discussions occurred with Juror 3.9:
>
> JUROR 3.9: My name.... I live in Lake Worth. My occupation, I'm working for school district. I'm a driver. I'm married. My wife is (indiscernible). I do have three children. They are high school. I have never been served jury before.
>
> COURT: Is that a no?
>
> JUROR 3.9: No. I have never been in crime victim of any crime. I don't have any friends in law enforcement. And I will follow the law explained. And yes, I will give fair trial to both sides. And no reason I cannot serve.
>
> ....
>
> STATE: [Juror 3.9], how are you?
>
> JUROR 3.9: Fine.
>
> STATE: Good. We have several folks here that have nice accents and I can kind of tell from some individuals having served on prior jury service or their answers that there was no issue with language. But I wanted to check with you to see you have a nice accent but I want to make sure are you understanding everything that we're saying?
>
> JUROR 3.9: Yes.

> STATE: Excellent. No language problem if you were to serve on the jury?
>
> JUROR 3.9: No.

The defense did not ask Juror 3.9 any direct questions.

During the parties' initial round of cause challenges, the defendant did not challenge Juror 3.9 for cause.

During the parties' peremptory strikes, the defendant used his last peremptory strike on Juror 2.5. That strike put Juror 3.9 "in the box" as the sixth juror. The state, which had two peremptory strikes remaining, accepted the panel, including Juror 3.9.

The defendant then stated he wanted to challenge Juror 3.9 for cause because he had "a serious question about [Juror 3.9's] ability to speak English."

In response, the trial court stated that Juror 3.9 gave "direct and positive," "appropriate[ ]" answers; "[h]e did not hesitate in response to any questions;" and he appeared insulted or angered when the state questioned his English. The court therefore denied the defendant's cause challenge to Juror 3.9.

The defendant then asked for two additional preemptory strikes, after which the following discussion occurred:

> COURT: And the reason is because I denied your cause challenge [to juror 3.9]?

> DEFENSE: Yes, sir.
>
> COURT: That would be denied.
> ....
>
> DEFENSE: [Judge], can we back-strike or unstrike [Juror 2.5] then?
>
> COURT: Unstrike?
>
> DEFENSE: Or back-strike.
>
> COURT: This is a first for me.
>
> STATE: I have never heard of an unstrike.
>
> COURT: It's not a back-strike because [Juror 2.5 has] already been stricken.
> ....
>
> DEFENSE: ... You're right, Judge. We've already stricken [Juror 2.5].
>
> COURT: *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....
>
> (emphasis added).

McCray v. State, 2016 WL 3533852, at 1–2 (Fla. 4th DCA 2016).

Pursuant to its decision in *Davis v. State*, 922 So. 2d 454 (Fla. 4th DCA 2006), the Fourth District court held that the trial court did not err in refusing Petitioner's request to "unstrike" Juror 3.9. *Id.* at 3. The court explained that when the state accepted the panel after Petitioner used his last peremptory strike on Juror 2.5, the state's strategy to accept Juror 3.9 was revealed, and granting the

"unstrike" would thus prejudice the state. *Id.*

The court certified conflict with *McIntosh v. State*, 743 So. 2d 155 (Fla. 3d DCA 1999). *McCray*, 2016 WL 3533852, at 3-4. In *McIntosh,* at the conclusion of jury selection for a twelve person jury, the venire panel was exhausted with only eleven jurors selected. *McIntosh*, 743 So. 2d at 156. The prosecutor proposed to withdraw a previously exercised peremptory strike against juror Blanco. *Id.* Defense counsel objected on the ground that peremptory strikes by the defense had been exercised strategically under the assumption that Blanco had been struck. *Id.* Defense counsel requested an additional peremptory strike, but wished to use that strike on a juror other than Blanco. *Id.* The trial court denied that request. *Id.*

The Third District Court of Appeals affirmed, finding that the trial court did not abuse its discretion by seating Blanco over defense objection. *Id.* The court explained that the claim of harm was entirely speculative because the defense did not want to strike Blanco if given an additional peremptory strike, and thus Blanco was acceptable to the defense as a juror. *Id.*

In this case, the district court commented that *McIntosh* may be distinguishable based on the facts in each case, specifically that in *McIntosh* the state had "merely" been trying to "backfill" an incomplete jury panel, whereas here the defense had exhausted his peremptory strikes, the state had accepted the panel, and the defense then moved to "unstrike" juror 2.5 so he could strike juror 3.9.

McCray, at 4. The court acknowledged that a conflict may exist because of the different results in each case, namely allowing an "unstrike" requested by the state in *McIntosh*, and denying an "unstrike" in this case and *Davis*. *Id.*

The court concluded that it 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.*

The court certified conflict "to the extent the results of this case and *Davis* may be perceived to conflict with *McIntosh*. . ." *Id.*

A timely notice of discretionary review was filed by petitioner. This Court in a written order accepted jurisdiction over the instant cause.

SUMMARY OF ARGUMENT

McIntosh was decided correctly. Parties are allowed to withdraw a peremptory strike and use it on another juror until the jury has been sworn. The free use of peremptory strikes is a cornerstone of the jury selection process, as long as they are not exercised in such a way as to discriminate against a protected class of persons. The trial court may use its discretion in crafting a remedy to any demonstrated prejudice. This case should be reversed and remanded for a new trial.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DECIDED *McINTOSH,* BECAUSE "UNSTRIKING" INVOLVES THE FREE USE OF PEREMPTORY STRIKES WITHOUT RECOURSE TO THE DISCRETION OF THE TRIAL COURT.

This case is about the use of peremptory strikes during jury selection, specifically whether either party may withdraw a previously used strike and use it on a different juror. The Third District Court of Appeal has ruled that a judge does not err in allowing such an "unstrike," while the Fourth District Court Appeal has ruled that "unstriking" is not allowed. The standard of review is whether the trial judge committed an abuse of discretion in denying Petitioner's request to "unstrike" juror 2.5. *McIntosh*, 743 So. at 156.

I. The use of peremptory strikes is a one of the most important rights secured to the accused.

"A trial judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn." *Gilliam v. State,* 514 So. 2d 1098, 1099 (Fla. 1987) (quoting *Jackson v. State,* 464 So. 2d 1181, 1183 (Fla. 1985)). The peremptory challenge is "part of our common law heritage" and has "very old credentials." *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 147 (1994). This Court has long recognized that peremptory strikes are "one of the most important of the rights secured to the accused." *Smith v. State,* 59 So. 3d 1107, 1111 (Fla. 2011) (quoting *Busby v. State,* 894 So. 2d 88, 98 (Fla. 2004)). Under Florida law, the use of peremptory challenges is limited only by the rule that the challenges may not be used to exclude members of a 'distinctive group.' *San Martin v. State,* 705 So. 2d 1337, 1343 (Fla. 1997). The broad application of the right to use peremptory strikes is reflected in the flexibility of rules of procedure dealing with jury selection, which allow strikes to be exercised even after the jury has been sworn. Fla. R. Crim. P. 3.310; *Valle v. State*, 581 So. 2d 40 (Fla. 1991) (recognizing that the trial court has broad discretion in determining whether "good cause" has been established).

II. *McIntosh* was decided correctly because the issue is whether a defendant's right to use peremptory strikes may be limited to exclude "unstriking", not whether the trial court must grant additional strikes for "backstriking."

In *McIntosh*, the appellate court found no abuse of discretion by the trial

court in allowing the prosecution to "unstrike" a juror. *McIntosh*, at 156. The Third DCA's opinion is essentially an evaluation of harm and available remedy. The court considered whether the defense had predicated its use of any peremptory strikes on the basis that the "unstruck" juror would not serve, finding that the defense had not done so. *Id.* The court stated that if the defense had done so it would be understandable to request an additional peremptory strike to use on the "unstruck" juror. *Id.* Because the "unstruck" juror was acceptable to the defense, and the defense wished to strike a different juror instead, the court found that any claim of harm by the defense was speculative and thus the defense's objection to the "unstrike" was properly overruled. *Id.*

This is the proper analysis to apply in an "unstrike" case. Upholding a policy of free use of peremptory strikes to include "unstriking" is consistent with the importance of the right, and the history of limiting that right only when it is exercised in order to discriminate against particular groups. Evaluating what harm, if any, was done to the opposing party allows an appropriate remedy to be crafted.

The Fourth DCA's opinion in this case is based that court's decision in *Davis*. *Davis*, and, by extension, this case were not decided correctly because they applied holdings in backstriking cases in an "unstriking" context. This was error at the time *Davis* was decided and it is error now.

In *Davis,* the defense used all ten peremptory strikes, while the state used six

strikes. *Davis*, 922 So. 2d at 455. After the panel and alternate were accepted by both sides, defense counsel asked to "unstrike" a juror and use that strike on another juror. The state objected and the court denied counsel's "unstrike" request. *Id.* Defense counsel did not request an additional peremptory strike. *Id.* The appellate court found that it was not reversible error to deny the defense's "unstrike" request. *Id.* The court cited *Hunter v. State*, 660 So. 2d 244 (Fla. 1995), in concluding that when a party who has exhausted all peremptory strikes challenges a juror it is not reversible error to deny that challenge.

In *Hunter*, this Court addressed an issue of backstriking when a party has used all of their peremptory challenges. *Hunter* did not address or consider whether a party may "unstrike" after having used all available peremptory strikes. Specifically, after the jury was formed Hunter requested a backstrike. *Hunter*, 660 So. 2d 244 at 248. The judge responded that backstriking would not be allowed. *Id.* This Court found that the judge's comments were inconsistent with the ruling in *Gilliam*, which held that a defendant has a right to challenge a prospective juror before the jury is sworn and that a trial court has no authority to infringe upon that right. *Id*. This Court did not find prejudicial error however, because Hunter had used all of his peremptory challenges when he asked to backstrike. *Id.* There is no indication in the *Hunter* opinion that Hunter asked to "unstrike."

This Court's holding in *Hunter* is clearly correct: when a party has used all

their peremptory strikes a trial court may properly deny a backstrike. The requesting party cannot backstrike even if the court granted the request because they have no strikes left.[1] This Court's holding in *Hunter* does not apply to cases involving "unstriking" like *Davis* and this case. This is so because the two types of cases are factually different in a legally relevant way. *Hunter* applies to cases where a party has exhausted their peremptory challenges and asks to strike another juror. *Davis* and this case address cases where a party requests to withdraw their strike to use it on another juror to whom they have objected, without recourse to the trial court's discretion. *Hunter* cases require that the trial court exercise its discretion to grant an additional strike in order to carry out the backstrike request. It is well established that granting an additional peremptory is within the trial judge's discretion, and no abuse occurs through denial of that request. Fla. R. Crim. P. 3.350(e) ("The trial judge may exercise discretion to allow additional peremptory challenges when appropriate."); *Parker v. State*, 456 So. 2d 436, 442 (Fla. 1984) (citing *Johnson v. State*, 222 So. 2d 191 (Fla. 1969)). "Unstrike" cases do not involve the granting of an additional peremptory challenge, merely the unfettered use of a party's peremptory strikes in a nondiscriminatory way. Thus, the holdings in *Hunter* do not apply to *Davis* and this case.

[1] This Court did not treat *Hunter* as a request for an additional peremptory strike clothed in a request for a backstrike.

As argued above, *McIntosh* was correctly analyzed and properly allowed a party to exercise their peremptory strikes before the jury was sworn, and in a nondiscriminatory way. The *Davis* analysis applied in this case unnecessarily limits the right of parties to use their peremptory challenges. Here, that restriction led to Petitioner proceeding to trial with a juror he had challenged for cause and requested an additional peremptory challenge in order to strike. Petitioner stated that he would use his "unstrike" on this juror, and was denied that opportunity.

III. "Unstriking" is allowed in another state.

The issue of "unstriking" has been addressed and approved in Texas. Considering the paucity of cases available addressing "unstriking" in Florida, an examination of that case may be helpful to this Court.

In *Arnold v. State*, 2006 WL 40744 (Tex. Ct. App., Dallas 2006), both sides had exhausted their peremptory strikes, and the jury had been selected. *Arnold*, 2006 WL 40744 at 4. The prosecutor "realized a mistake had been made" and alerted the trial court that he thought one of the seated jurors had been struck for cause. *Id.* The court allowed the prosecution to strike that juror, and stated that another juror would have to be "unstruck". *Id.* Over defense objection a peremptory strike was withdrawn from one juror and used on the seated juror. *Arnold*, 2006 WL 40744 at 5. The trial court offered an additional peremptory strike to defense counsel, who declined because he "thought it would waive the

error." *Id.*

The appellate court determined that the trial judge had not abused his discretion in allowing the "unstrike." *Id.* The court stated that the fundamental right to jury trial encompassed a right to have the jury selected in accordance with applicable procedural rules, and examined Texas Code of Criminal Procedure article 35.03 that directs how and when peremptory challenges can be used. *Id.* Based on article 35.03, the court determined that "the power to grant an excusal from jury service pursuant to article 35.03 inheres to the trial judge from the first assemblage of the array until the juror is, at last, seated." *Id.* The court relied on two cases from the Texas Court of Criminal Appeals in stating that the refusal to grant an "unstrike" by either party is an abuse of discretion. *Id.* The court also required that Appellant make a showing that he was harmed by the prosecution's use of an "unstrike". *Id.* The court concluded that *Arnold* could not do so, because he did not claim or show he was forced to take an objectionable juror, he was offered an additional peremptory challenge and declined, and Appellant had failed to show the jury that heard his case was fair and impartial.

The rule applied in *Arnold*, which the appellate court determined allowed the "unstrike" are not as broad as the rule in Florida. Texas's article 35.03 is reflected in Florida's rule 3.310. Rule 3.310 is even more liberal than article 35.03, because it allows the trial court to strike a juror *after* the jury has been sworn. Thus, the

scope of discretion of a Florida judge in jury selection is even wider than that of a Texas judge, allowing "unstriking" as a legitimate use of peremptory strikes.

As to the harm analysis, and unlike the defendant in *Arnold*, Appellant did claim at trial that juror 3.9 was objectionable to him, first attempting to have 3.9 dismissed for cause, then requesting an additional peremptory strike to use on 3.9, and finally requesting an "unstrike" to be used on juror 3.9. However, Appellant is not in the same factual position as the defendant in *Arnold.* The state in this case occupies the same position as the defendant in *Arnold*. The state here cannot show that prejudice or harm would have resulted from granting the "unstrike", because the state could have remedied any perceived harm by using one of its remaining peremptory strikes on juror 2.5, and requesting an additional peremptory strike if necessary on the basis that the "unstrike" used up a strike that would have been applied elsewhere. The state could even have requested that the jury selection be "rewound" to juror 2.5 and begun again, or that the entire jury pool be excused and a new pool be summoned. Whether to grant these requests would be left to the trial court's discretion and analyzed for abuse of discretion on appeal, as is done with all other jury selection issues, except *Batson*[2] claims.

While out of court authority may be neither controlling nor persuasive, it does illustrate that "unstriking" can be a normal part of jury selection without

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[2] Batson v Kentucky, 476 U.S. 79 (1986)

creating confusion or disarray. The broad discretion of the trial court in crafting a remedy to any prejudice or harm, combined with the free exercise of one of the most fundamental rights of a defendant, allow jury selection to proceed in an orderly fashion when "unstrikes" are incorporated.

CONCLUSION

This Court should quash the decision of the Fourth District Court of Appeals and remand the case to the district court for reconsideration in light of this Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Brief has been furnished to Celia Terenzio, Assistant Attorney General, 1515 N Flagler Dr, Suite 900, West Palm Beach, FL 33401 by e-service to CrimAppWPB@myfloridalegal.com; and electronically filed with this Court on this 19th day of October, 2016.

/s Virginia Murphy
Virginia Murphy

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s Virginia Murphy
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