IN THE SUPREME COURT OF FLORIDA

MOSES MCCRAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-1235

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

ANSWER BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

CELIA A. TERENZIO
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 656879

JEANINE GERMANOWICZ
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0019607

Office of the Attorney General
1515 N. Flagler Drive, Ste. 900
West Palm Beach, FL 33401
Primary E-Mail:
CrimAppWPB@myfloridalegal.com
(561)837-5016
(561)837-5108

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

AUTHORITIES CITED **PAGE#**

Cases

Other Authorities

PRELIMINARY STATEMENT

This brief will refer to Petitioner as such, Defendant, or by proper name, e.g., "McCray." Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State. Reference to Petitioner's brief on the merits will be by the symbol "IB," followed by the appropriate page number. In this case, there is a two volume record which contains documents filed in the lower court as well as photographic exhibits. This is referred to as "R." There is a ten volume supplemental record containing the trial transcripts. This is referred to as "1SR." And there is a two volume second supplemental record containing a missing portion of the trial transcripts. This is referred to as "2SR." Any reference to the records on appeal will be followed by the appropriate volume and page numbers. For example, page one of volume two of the second supplemental record would appear as (2SR2 1).

STATEMENT OF THE CASE AND FACTS

As authorized by Florida Rule of Appellate Procedure 9.210(c), the State submits a summary of the relevant facts.

During **voir dire**, Prospective Juror Celestin (Juror 3.9) stated his name was Delius Celestin, he lived in Lake Worth, he worked as a driver for the school district, he was married with three children in high school, he had never served on a jury before, he

had never been a victim of any crime, he did not have any friends in law enforcement, he would follow the law, and give a fair trial to both sides, and there was no reason he could not serve. (1SR2 72) Later, the prosecutor asked Celestin how he was and Celestin said he was fine. (1SR2 118) The prosecutor noted that Celestin had a nice accent and he wanted to make sure that Celestin understood everything they were saying, to which Celestin responded "yes." (1SR2 119) Celestin affirmed there would be no language problem if Celestin served. (1SR2 119)

Initially, both the defense and the state accepted the jury panel. (2SR2 23) Then, the defense decided to use their last two peremptories to strike several jurors: Juror Hungerman (Juror 2.6) and Juror Taylor (Juror 2.5). (2SR2 23-24) The defense struck Juror Taylor with their last peremptory challenge. (2SR2 24) The defense subsequently moved to strike Juror Celestin (Juror 3.9) for cause, asserting that they had a question about his ability to speak English. (2SR2 24-26) Both the judge and the prosecutor noted that Celestin said he understood the language. (2SR2 25-26) The prosecutor put on the record that Juror Celestin was an African American male. (2SR2 26) The judge denied a cause challenge, saying Celestin was very clear that he understood English. (2SR2 25-26) The defense then asked for two additional strikes. (2SR2 26) They wanted to peremptorily strike Celestin because of concerns about his ability to speak English. (2SR2 26) The judge denied the

additional peremptories. (2SR2 26-27) The defense then asked to "unstrike" Taylor. (2SR2 27) The judge stated that he did not know how he could "unstrike a strike because then that messes up everybody else's decisions on what you struck or so." (2SR2 28) The defense then accepted the panel subject to their objection. (2SR2 29)

The Fourth District affirmed the trial court's decision to deny the unstrike on appeal. McCray v. State, 199 So. 3d 1006 (Fla. 4th DCA 2016). This proceeding, seeking to invoke this Court's discretionary jurisdiction, followed.

SUMMARY OF ARGUMENT

The trial court did not err in denying Petitioner's request to "unstrike" Juror Taylor. If such were permitted, it could clearly and adversely impact an opposing party's own decisions regarding the makeup of the jury panel and result in unnecessary gamesmanship and a never ending jury selection process. This Court must uphold the appellate court's decision to affirm the trial court.

ARGUMENT

ISSUE I: THE TRIAL JUDGE DID NOT ABUSE DISCRETION AND ERR IN DENYING THE DEFENDANT'S ATTEMPT TO "UNSTRIKE" A JUROR. (RESTATED)

Petitioner asserts that the trial court erred in denying his request to "unstrike" Juror Taylor so he could use the peremptory challenge on Juror Celestin instead. But, contrary to Petitioner's assertions, there was no error.

A. Exercise of Discretionary Jurisdiction.

This Court accepted jurisdiction based on Petitioner's assertion, in the initial brief on jurisdiction, that there was a conflict between district courts. The State reiterates the contention, made in the State's answer brief on jurisdiction, that there is no conflict upon which to base jurisdiction. The State again submits that this Court should decline to accept jurisdiction.

B. Preservation.

This appears to have been preserved by a request for an "unstrike" (2SR2 27) and, once it was denied (2SR2 28), by accepting the panel subject to defense counsel's objection (2SR2 29).

C. Standard of Review.

In Dobek v. Ans, 475 So. 2d 1266, 1268 (Fla. 4th DCA 1985), the court stated that:

> **[t]he trial court has a broad discretion to determine the method to be used in jury selection** and it is not our intent to criticize the method to be used per se. However, any method used must preserve the rights of the litigants as established by the common law, and must permit either party to exercise any remaining peremptory challenges at any time before the jury is sworn.

(emphasis added).

And in Carames v. Golden, 445 So. 2d 1140 (Fla. 3d DCA 1984), citing Eastern Airlines v. Gellert, 438 So. 2d 923 (Fla. 3d DCA 1983), the court stated that "a trial court has broad discretion

to control the manner in which peremptory challenges are to be exercised." In Eastern Airlines v. Gellert, 438 So. 2d 923, 931 (Fla. 3d DCA 1983), disapproved on other grounds, Ter Keurst v. Miami Elevator Co., 486 So. 2d 547 (Fla. 1986), the court noted that a trial court, "while granted discretion over the manner in which challenges are exercised, must exercise that discretion so as not to violate the litigant's right to have a fair opportunity to make an intelligent judgment as to exercise of peremptory challenges." And in Ter Keurst v. Miami Elevator Co., 486 So. 2d 547, 549 (Fla. 1986), this Court stated:

> Counsel cannot be deprived of the use of all their peremptories nor can their right to use them be curtailed until the jury is sworn. Florida Rock Industries, Inc. v. United Building Systems, Inc., 408 So.2d 630 (Fla. 5th DCA), dismissed, 417 So.2d 331 (Fla.1982). Within those limitations, the procedure for jury selection has traditionally been a discretionary function of the trial judge.

D. The Merits.

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court found that peremptory strikes themselves are not constitutionally protected, although the right to an impartial jury is constitutionally protected. Jefferson v. State, 595 So. 2d 38, 41 (Fla. 1992) ("Peremptory challenges merely are a 'means of assuring the selection of a qualified and unbiased jury.'") (quoting Batson, 476 U.S. at 91). The purpose of peremptory challenges is to give each litigant the opportunity to exclude jurors who cannot be excused for cause, but who may be partial to

the opposing side. Hayes v. State, 94 So. 3d 452, 459 (Fla. 2012). Peremptory challenges are limited and can be exercised according to a party's discretion so long as that discretion is supported by a race-gender neutral reason. See id. at 460–61. A litigant is entitled to view six prospective jurors that are being considered for the final jury, or the "jury panel," as a whole in order to intelligently and effectively use his or her peremptory challenges. Van Sickle v. Zimmer, 807 So. 2d 182, 185 (Fla. 2d DCA 2002) (citing Tedder v. Video Electronics, Inc., 491 So. 2d 533, 535 (Fla. 1986) (explaining that the exercise of peremptory strikes includes the right to view the whole panel of six jurors before the jury is sworn)) (further citations omitted).

A defendant is entitled to have qualified jurors on his or her panel, however, there is no requirement that particular jurors serve. West v. State, 584 So. 2d 1044 (Fla. 1st DCA 1991), *aff'd*, 594 So. 2d 285, 286 (Fla. 1992); Newton v. State, 178 So. 2d 341, 345 (Fla. 2d DCA 1965). "Established case law rejects the proposition that a defendant is entitled to have a particular composition of jury." Rich v. State, 807 So. 2d 692, 693 (Fla. 3d DCA 2002); see also Taylor v. Louisiana, 419 U.S. 522, 538 (1975)) ("Defendants are not entitled to a jury of any particular composition, . . ."); 33 Fla. Jur. 2d Juries § 90 ("No one is entitled to a particular juror or jury of any particular

composition. The right is not one of selection; it is to reject jurors who are biased, prejudiced, or otherwise incompetent.").

This Court should affirm the appellate court's opinion declining to find that the trial court had abused his discretion herein. In this particular case, the judge heard the cause challenges for all the potential jurors first. (1SR3 205-208) Petitioner did not raise a cause challenge for Juror Celestin at that time. The judge then heard the peremptory challenges. (SR3 208) Petitioner did not peremptorily challenge Juror Taylor (Juror 2.5) but initially accepted her. (1SR3 206)

It was only at the end, after both the State and the defense had accepted the panel, that Petitioner suddenly decided he wanted to use the defense's last two peremptory challenges to backstrike two jurors; the backstrikes were permitted and Petitioner used his very last peremptory challenge on Juror Taylor. (2SR2 24) Petitioner either was well aware, or should have been well aware, that the next juror, if Taylor was stricken, was Juror Celestin. (2SR2 24-25) After peremptorily challenging Taylor, Petitioner then stated he wanted to challenge Celestin for cause. (2SR2 25)

The judge denied the cause challenge. In Cook v. State, 542 So. 2d 964, 969 (Fla. 1989), the Court found that the trial court did not err in refusing to excuse for cause two jurors who expressed some difficulty in understanding English. Similarly, the trial court herein did not err in refusing to excuse for cause Juror

Celestine since it was clear that he did not have any difficulties in understanding English.

Petitioner then requested not one but **two** additional peremptories (although Petitioner did not specify what he wanted to do with the second). (2SR2 26) Petitioner volunteered that he wanted to peremptorily challenge Celestin for the same reason that he wanted to challenge Celestin for cause. (2SR2 26) The judge again noted that the record clearly showed that Celestin did not suffer from a language barrier; as a result, the judge denied the additional peremptories. (2SR2 27) Notably, Petitioner did not claim that he thought Celestin was biased in any way, he simply claimed that he thought Celestin had a language problem, a claim refuted by the record and properly rejected by the trial judge.

Petitioner then requested the trial judge "unstrike" Juror Taylor. (2SR2 28) The judge indicated that he did not know how he could "unstrike a strike because then that messes up everybody else's decisions on what you struck." (2SR2 28) Petitioner was subsequently convicted and took an appeal.

Petitioner asserted on appeal that the trial court erred in not "unstriking" Juror Taylor so he could use his last peremptory challenge on Juror Celestine instead. But, the State submits that the trial court was within his **discretion** to decline to "unstrike" Juror Taylor. As the trial court pointed out, to "unstrike a

strike" would mess up everybody else's decisions on what you struck or so." (2SR2 28)

Juror Celestin clearly should have been challenged for cause earlier. If he had been challenged for cause at the very beginning of voir dire, as was proper, the judge would have denied it at the time, and then it would have been readily apparent that the defense would have to save a peremptory for Celestin if they truly wished to excuse him. Furthermore, the defense should have been aware, if they weren't already, that Celestin would be the very next juror if they backstruck two jurors, including Juror Taylor. The defense should have challenged Celestin for cause **before** backstriking either Juror Wasko or Juror Taylor, in order to avoid the problem that has now arisen. It can be seen that the defense has manufactured the issue on appeal herein through their belated challenge for cause.

Notably, the number of peremptory challenges is deliberately limited by law. See Fla. R. Crim. P. 3.350. Furthermore, "a trial court has broad discretion to control the manner in which peremptory challenges are to be exercised." Carames v. Golden, 445 So. 2d 1140 (Fla. 3d DCA 1984), citing Eastern Airlines v. Gellert, 438 So. 2d 923 (Fla. 3d DCA 1983). Here, the trial court was well within his discretion to decline to permit Petitioner to "unstrike" Juror Taylor.

As a general policy matter, this Court should not encourage the gamesmanship that could, and would, ensue in other cases if this Court were to find that the trial court abused discretion in this case. If parties were permitted to unstrike at will, then voir dire might never come to an end.

It is true that a party can challenge a juror peremptorily at any time before the jury is sworn. Rivers v. State, 458 So. 2d 762 (Fla. 1984). Therefore, backstriking is permissible at any time until the jury is sworn. Jackson v. State, 464 So. 2d 1181, 1183 (Fla. 1985). But what Petitioner wanted to do was "unstrike," not "backstrike," a juror. The difference between getting rid of a juror and adding back a juror is significant in terms of decisions on who to strike knowing who is yet to come. As the trial court rightly recognized, permitting "unstriking," in contrast to mere "backstriking," could cause havoc with the other party's jury panel strategy. (2SR2 28) That is, permitting an unstrike clearly could not help but affect the opposing party's decisions regarding what peremptories it would have exercised had it known the unstrike was coming or what peremptories it would have to exercise once the unstrike was permitted, especially if that party had not reserved enough challenges to deal with any objectionable jurors coming up.

In the instant case, the Fourth District affirmed the trial court's decision not to permit "unstriking." McCray v. State, 199 So. 3d 1006 (Fla. 4th DCA 2016). In so doing, the appellate court

relied on its own precedent of Davis v. State, 922 So. 2d 454 (Fla. 4th DCA 2006), as follows:

> The defendant's argument lacks merit, pursuant to our holding in Davis v. State, 922 So.2d 454 (Fla. 4th DCA 2006). In Davis, we described the facts as follows:
>
> > ... During jury selection, the state used six of its ten peremptory strikes. The defense used all ten of its peremptory strikes. Thereafter, the jury panel and an alternate were accepted by both sides. Defense counsel then told the [trial] court that [the defendant] wished to withdraw a peremptory [strike] made on one juror and use it to strike another. The state objected and the trial court denied the request. The jury was then sworn.
> >
> > The [trial] court's rationale in denying the "[unstrike]" request was that the prosecutor's strategy in utilizing peremptory [strikes] was based partially on the manner in which the defense exercised its peremptory [strikes]. The court, therefore, concluded that allowing the defendant to withdraw a [peremptory strike] so late in the process would prejudice the state.
>
> Id. at 455 (footnote omitted). We affirmed, reasoning as follows:
>
> > Although it is clearly reversible error to deny a challenge to a juror when the defendant has not exhausted all of his peremptory challenges prior to the jury's being sworn, that is not the case where, as here, a party has exhausted all of its peremptory challenges. Under the facts of this case, we cannot say that the trial court erred in denying [the defendant's] request to withdraw a peremptory [strike] and then backstrike a previously accepted juror.
>
> Id. (internal citation omitted).
>
> Similar to Davis, we cannot say here that the trial court erred in denying the defendant's motion to "unstrike" Juror 2.5, upon whom he used his last peremptory strike, so that he could use his last peremptory strike on Juror 3.9. **The reason is because, as in Davis, after the defendant used his last peremptory strike on Juror 2.5, the state accepted**

> **the panel, thereby revealing the state's strategy to accept Juror 3.9. 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.**
>
> The cases upon which the defendant relies are distinguishable because those cases hold that a party may exercise an unused peremptory strike at any time before the jury is sworn. See, e.g., [Arnold v. State, 755 So.2d 696, 698 (Fla. 4th DCA 1999)]. Here, the defendant already had exhausted his peremptory strikes, and the state already had accepted the panel, when the defendant moved to "unstrike" Juror 2.5, upon whom he used his last peremptory strike, so that he could use his last peremptory strike on Juror 3.9 instead. The trial court's denial of this motion did not prejudice the defendant when he already had exhausted his peremptory strikes. Cf. Hunter v. State, 660 So.2d 244 (Fla.1995) (although trial court erred when it indicated that it would prevent defense counsel from exercising peremptory backstrikes once the entire jury panel was formed, defendant was unable to demonstrate any prejudice because defense counsel had exhausted his allotted peremptory challenges when the opportunity to backstrike arose).

McCray, 199 So.3d at 1008-09 (emphasis added).

Based on the expressed rationale in Davis, the appellate court was correct to affirm in the instant case. Also see, Lestenkof v. State, 229 P.3d 182, 187 (Alaska Ct. App. 2010)(judge did not abuse discretion in rejecting defendant's request to rescind one of previously exercised peremptory challenges); People v. McNeil, 39 A.D.3d 206, 834 N.Y.S.2d 99, 101-02 (N.Y. App. Div. 2007)(slip opinion)(trial court erred in permitting, over defense objections, the prosecutor to withdraw two peremptory challenges, resulting in defendant having to use his last two peremptory challenges to

strike the reinstated jurors); United States v. Anderson, 562 F.2d 394, 397 (6th Cir. 1977)(court did not abuse discretion in limiting manner in which peremptories could be exercised nor err in declining defense's request to reinstate two jurors from original panel of twelve).

Notably, in Biddle v. State, 67 Md. 304, 10 A. 794 (Md. 1887), the defendant sought to withdraw his challenge of a certain juror but the state objected and the trial court declined to do so. The appellate court affirmed the trial court's decision stating:

> Such a practice as that sought to be introduced, if it were sanctioned, could not fail to be productive of mischief. It would lead inevitably to experiments in the formation of juries in criminal cases. A party accused might exhaust his right of peremptory challenge, and take his chance of getting jurors more favorable to him from among talesman to be returned; but if disappointed in that, and in order to exclude parties not liked, he would recall his previous challenges, and take jurors that had been before excluded. Such a result could well be accomplished; for if the right exists to recall or withdraw the challenge in respect to one juror, it must equally exist in respect to them all; and the accused would thus retain the right of selection as between those previously challenged by him and those subsequently offered to be sworn. No such practice as that would ever be tolerated. The right of peremptory challenge is a right not to select, but simply to reject, jurors, without cause assigned. Turpin v. State, 55 Md. 468 [(Md. 1881)]; U. S. v. Marchant, 12 Wheat. 480 [(1827)]; Hayes v. Missouri, 120 U. S. 71, 7 Sup. Ct. Rep. 350 [(1887)]. And where the accused has exercised the right of peremptory challenge in respect to any member of the panel, and the juror thus challenged has retired from the box, the court will not allow the challenge to be recalled or withdrawn. Rex v. Parry, 7 Car. & P. 836; 3 Whart. Crim. Law, § 3061.

Biddle, 67 Md. 304, 10 A. at 794.

Petitioner relies upon the Third District case of McIntosh v. State, 743 So. 2d 155, 156 (Fla. 3d DCA 1999). But it actually supports, rather than detracts from the State's position, or, at least, does not materially affect the State's position.

While McIntosh is not directly on point factually, it is still instructive.

> Defendant-appellant McIntosh contends that the trial court erred by allowing the State to withdraw a peremptory challenge it had exercised against juror Blanco, with the result that juror Blanco served on the jury. This came about because, at the conclusion of jury selection, the venire panel had been exhausted but only eleven jurors had been selected for the twelve-person jury. The court concluded that it would be necessary to resume proceedings the next day and begin voir dire with additional prospective jurors.
>
> The State asked for a few minutes to consider whether the State could live with any of the prospective jurors that the State had stricken. After a recess, the State indicated that it was willing to withdraw the previously exercised peremptory challenge against juror Blanco. **The defense objected to this procedure, saying that "had the State ... kept her on [the jury] initially, it might have changed some of my decisions after that point." Defense counsel went on to request an additional peremptory challenge, not to exercise against juror Blanco but instead to exercise against a different juror, juror Rodriguez.** Defense counsel indicated that she had accepted juror Rodriguez "given the contents of the panel at that time. The contents of the panel [have] changed." The court denied the request for an additional peremptory challenge.
>
> We find no abuse of discretion in the trial court's seating of juror Blanco over defense objection. **If defense counsel predicated the exercise of at least some of the peremptory challenges on the theory that juror Blanco, having been stricken by the State, would not serve on the jury, then it would be understandable if**

> **the defense had requested an additional peremptory challenge to strike juror Blanco. In that circumstance, we would have a different case.** Juror Blanco was, however, acceptable to the defense and the request instead was to strike a different juror. The claim of harm here was entirely speculative and the objection was properly overruled.

McIntosh, 743 So. 2d at 156 (emphasis added).

Notably, the Third District, by saying this in McIntosh, recognized that harm could indeed result to an opposing party from "unstriking" a juror. The Third District court affirmed the trial court's exercise of discretion in permitting the "unstrike" in Mcintosh because the opposing party in that case had not properly presented the issue for appeal. However, the court made it clear that, if the issue had been properly presented, they would likely have decided to the contrary, by saying: "If defense counsel predicated the exercise of at least some of the peremptory challenges on the theory that juror Blanco, having been stricken by the State, would not serve on the jury, then it would be understandable if the defense had requested an additional peremptory challenge to strike juror Blanco. **In that circumstance, we would have a different case.**" McIntosh, 743 So. 2d at 156 (emphasis added). The State submits that, despite any suggestion to the contrary by Petitioner or by the Fourth District below, the McIntosh case actually supports rather than conflicts with the

Davis case, in that it recognizes that unstriking can indeed adversely affect a party's strategy.

Moreover, the McIntosh case is factually distinguishable from the instant case, as the Fourth District recognized below in the instant case, saying:

> …the circumstances are different. That is, in this case and Davis, 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.**

McCray, 199 So. 3d at 1009–10 (emphasis added). Again, McIntosh does not dictate a different result in the instant case, despite any assertion by Petitioner to that effect.

Petitioner also cites to Arnold v. State, 2006 WL 40744 (Tex. App. Jan. 9, 2006), as support. First, that case is an **unpublished out of state** case which does not control over the instant case. Second, in the Arnold opinion, the Texas court stated that "[t]he Texas Court of Criminal Appeals has held that the trial court abuses its discretion by refusing to allow the defense to correct a mistake in peremptory strikes." Arnold, 2006 WL 40744, at *5 (citations omitted) The Texas court then noted that the State's "unstrike" was properly permitted because a mistake was made in

the first place; the State having intended to strike a certain juror all along and not having realized the juror had not, in fact, yet been stricken.

But, in the instant case, Petitioner did not even attempt to allege to the trial court that any such similar honest mistake was made like that in Arnold. Rather, as the record shows, after both parties had accepted the panel, Petitioner suddenly started attempting to backstrike and unstrike jurors. **Petitioner was clearly attempting to do so in order to pick and choose specific jurors from the jury pool to be on his panel; further, Petitioner's attempts to do so were in obvious disruption of any potential State strategy in using State challenges.**

Again, a defendant is not entitled to ensure that he has **specific** jurors on a panel; rather, the defendant is only entitled to use his challenges to ensure that he is tried by a jury panel that is fair and impartial. However, the **manner** of selecting a fair and impartial jury is properly left to the trial judge's discretion. Once the defendant has exhausted his peremptory challenges, the judge is entitled to exercise his discretion and declare the jury selection process at an end even though the defendant suddenly has second thoughts or decides to apply his challenges differently after seeing how the State applies theirs.

For all the above stated reasons, the State submits the trial court did not abuse discretion in declining to "unstrike" the

juror. The trial court did not improperly disturb Petitioner's right to an impartial jury thusly, especially given that Petitioner was attempting to challenge Celestin for language difficulties rather than because of any perceived partiality. Thus, the appellate court did not err in affirming the trial court's exercise of discretion herein. This Court should uphold the decisions of the courts below.

E. Harmless Error.

Any error in not permitting the "unstrike" was clearly harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1137 (Fla. 1986)(question is whether there is any reasonable possibility the error contributed to the conviction). Notably, Petitioner and the State had already initially accepted the panel, including Juror Taylor. (2SR2 23) Petitioner then suddenly decided to use up his last two peremptories to backstrike two jurors, Juror Hungerman and Juror Taylor, thus placing Juror Celestin on the panel. (2SR2 23-24) The State then accepted the panel. (2SR2 24) As the Fourth District noted below, McCray, 199 So. 3d at 1009, Petitioner had already exhausted his peremptory strikes and the state had already accepted the panel at the time that Petitioner moved to unstrike Juror Taylor. Cf. Hunter v. State, 660 So. 2d 244, 248–49 (Fla. 1995) (no prejudice resulted from trial court's refusal to allow backstriking because defense counsel had already

exhausted alloted peremptory challenges when opportunity to backstrike arose).

In addition, Petitioner only sought to "unstrike" Juror Taylor in order to strike Juror Celestin. But, Petitioner clearly was not trying to strike Juror Celestin because he was concerned that Celestin was biased; Petitioner's stated reason for striking Celestin was that he thought Celestin had a language barrier. And Petitioner's stated reason was refuted by the record and thus rejected by the trial judge. (1SR2 118; 2SR2 25-27)

Again, this Court has stated that the purpose of peremptory challenges is to give each litigant the opportunity to exclude jurors who cannot be excused for cause, but who may be partial to the opposing side. Hayes v. State, 94 So. 3d 452, 459 (Fla. 2012). But, here Petitioner expressed absolutely no concern that Celestin might be partial to the other side. Therefore, there is no suggestion that the jury that ultimately heard Petitioner's case was not fair and impartial as a whole. Again, a defendant is only entitled to a fair, qualified, and impartial jury; not to a specific venireperson or a specific composition of his jury. E.g., Piccott v. State, 116 So. 2d 626 (Fla. 1959), appeal dismissed, cert.denied, 364 U.S. 293, 81 S.Ct 106, 5 L.Ed.2d 83 (1960).

Indeed, the Supreme Court of the United States stressed in United States v. Martinez-Salazar, 528 U.S.304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), that peremptory challenges have served their

purpose when the jury finally selected is impartial. The Martinez-Salazar Court rejected any argument that a party is entitled to devote all peremptory challenges to a strategic use such as eliminating unbiased jurors who a party believes may favor the other side.

In sum, Petitioner was not prejudiced or harmed in any way by the denial of the "unstrike." Thus, this Court should uphold the decisions of the courts below.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court UPHOLD the opinion of the Fourth District which AFFIRMED the defendant's convictions and sentences.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on December 16, 2016: Virginia Murphy at vmurphy@pd15.state.fl.us, jcwalsh@pd15.state.fl.us, appeals@pd15.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Celia A. Terenzio
SENIOR ASSISTANT ATTORNEY GENERAL

Fla. Bar No. 656879

/s/ Jeanine Germanowicz
By: JEANINE GERMANOWICZ
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0019607
Attorney for Respondent, State of Fla.
Office of the Attorney General
1515 N. Flagler Drive, Ste. 900
West Palm Beach, FL 33401
Primary E-Mail:
CrimAppWPB@myfloridalegal.com
(561)837-5016
(561)837-5108

AG#: L16-1-08926