IN THE SUPREME COURT OF FLORIDA

MOSES McCRAY,

Petitioner,

vs. CASE NO. SC2016-1235

DCA NO. 4D14-0907

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S REPLY BRIEF

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REPLY TO STATEMENT OF THE CASE AND FACTS

In the statement of case and facts, Respondent claims that Celestine "clearly" did not have language issue. Answer Brief, 8. This is an assumption. There were errors in Celestine's responses, and his answers on further questioning by the state were monosyllabic, and thus did not provide additional information about his fluency. Initial Brief, 1-2. Respondent's emphasis on Celestine's fluency is misplaced, because the issue here is not whether Celestine was or was not sufficiently fluent. The issue here is that Petitioner's concerns about Celestine's fluency led him to requesting an "unstrike," and that request was denied. Use of peremptory strikes does not require a showing on the record supporting the strike, so long as a juror is not being challenged solely based on impermissible discrimination. *Busby v.* State, 894 So. 2d 88, 99 (Fla. 2004) ("Peremptory challenges, on the other hand, can be used to excuse a juror for any reason, so long as that reason does not serve as a pretext for discrimination. . . While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.")(citations omitted); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

REPLY TO ARGUMENTS

ARGUMENT I

A policy of allowing "unstrikes" is consonant with this Court's prior decisions and sound practical application.

This Court has approved of the uncurtailed use of nondiscriminatory peremptory strikes. *Jackson v.* State, 464 So. 2d 1181, 1183 (Fla. 1985); *Tedder v. Video Elecs., Inc.,* 491 So. 2d 533, 535 (Fla. 1986); *Gilliam v.* State, 514 So. 2d 1098, 1099 (Fla. 1987); *Ter Keurst v. Miami Elevator Co.,* 486 So. 2d 547, 549 (Fla. 1986); *Kibler v. State*, 546 So. 2d 710, 712, 714(Fla. 1989); *Hunter v. State*, 660 So. 2d 244, 248 (Fla. 1995); *San Martin v. State*, 705 So. 2d 1337, 1343 (Fla. 1997). This has been true even where, as in backstriking, the use of a peremptory strike could potentially reveal an opposing party's jury selection strategy and preferences.

Respondent states that if "unstriking" is allowed "voir dire might never come to an end" and expresses nebulous fears of "gamesmanship." Answer Brief, 10. These are not sufficient grounds to deny criminal defendants from exercising their peremptory challenge in a nondiscriminatory way. **"**[A]cting in good faith in exercising one's challenges is expected." *Ter Keurst*, 486 So. 2d at 549. Florida attorneys are required to use legal procedures only for legitimate purposes, not for

harassment or intimidation, and to balance challenging the rectitude of an official action with their duty to uphold legal process. Rules of Professional Conduct of the Florida Bar, Chapter 4.

Respondent is correct that consideration of the practical application of such a policy change must be addressed. The certified question and this Court's decision in *Tedder* supra provides a framework for the reasonable application of "unstriking." The certified question in *Tedder* was as follows:

> IN THE ABSENCE OF SUBSTANTIAL REASONS ARISING FROM EXCEPTIONAL CIRCUMSTANCES SHOWN TO EXIST IN THE PARTICULAR CASE, IS IT AN ABUSE OF DISCRETION FOR A TRIAL COURT TO EMPLOY A JURY SELECTION PROCEDURE IN WHICH SOME BUT NOT ALL PROSPECTIVE JURORS ARE SWORN FOR THE PURPOSE OF PROHIBITING THE EXERCISE OF PEREMPTORY CHALLENGES TO BACKSTRIKE SUCH JURORS?

Video Elecs. v. Tedder, 470 So. 2d 4, 9 (Fla. 1st DCA 1985). The lower court answered in the affirmative, and this Court approved that decision. *Tedder,* 491 So. 2d at 535 (Fla. 1986). Thus, the general rule is that backstriking is allowed and procedures imposed by the trial court that infringe on either party's ability to backstrike are an abuse of discretion. However, when substantial reasons arise from exceptional circumstances are shown to exist in the particular case at issue, the trial court may use its discretion in limiting backstrikes.

The same rule and exception can be applied to "unstrikes." As a general rule, "unstrikes" may be an allowable exercise of peremptory strikes. If a trial court finds that there is substantial gamesmanship occurring in the use of unstrikes in a particular case, an exception to the general assumption of good faith and demonstration of right conduct by the parties, a judge's discretion could include crafting a solution to the problem.

A blanket prohibition on "unstrikes" may lead to unintended results. A simple mistake in jury selection, as in *Arnold v. State*, 2006 WL 40744 (Tex. App. Jan. 9, 2006), could result in a juror serving who all parties recognize was intended to be struck. Imagine a juror pool with three male jurors with the last name of Smith, one sitting in position 1.2, one at 2.1, and one at 2.2. By mistake, as in *Arnold*, one of the parties strikes the Smith at 2.1, when they intended to strike the Smith at 1.2. A total ban on "unstriking" would require that this party use another peremptory strike on 1.2, if they have one left, and both parties would be deprived of the Smith at 2.1 as a juror. This cannot be a rational solution to fears that attorneys will abuse a procedural aspect of jury selection.

> "[A] party may challenge any juror at any time before jurors are sworn. A trial judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily of for cause, prior to the time the jury is sworn." What a judge cannot do directly, he should not be able to do indirectly under the auspices of "sound discretion."

Tedder v. Video Elecs., 491 So. 2d 533, 535 (Fla. 1986) (quoting *Jackson,* 464 So. 2d at 1183). As has been show in the long line of backstriking cases, it is possible to balance the unfettered use of peremptory strikes with judicial efficiency, while respecting the trial court's wide discretion in jury selection procedure. The state's concerns about creating chaos injury selection, while worthy of consideration, are ill founded when examined in the light of this Court's holding in *Tedder*. The alternative, to deny a criminal defendant's nondiscriminatory use of peremptory strikes, would "cause justice to suffer in a different fashion." *Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 645 (1991)(Scalia, J., dissenting).

ARGUMENT II

Denying Petitioner's "unstrike" was not harmless error.

The denial of the right to challenge any prospective juror by cause or peremptory challenge, before the jury is sworn, has been held to be per se reversible error. *Gilliam*, 514 So. 2d at 1099. A denial of the right to exercise a peremptory challenge is not harmless error. *See Tedder*, 491 So. 2d 533 (Fla. 1986); *St. Paul Fire and Marine Ins. Co. v. Welsh*, 501 So. 2d 54, 56 (Fla. 4th DCA 1987). Here, Petitioner was forced to proceed to trial with an objectionable juror, whom he had sought to dismiss by use of his peremptory strike. Petitioner's

right to use his peremptory strike was denied, and thus the error cannot be harmless.

CONCLUSION

For the reasons outlined in Petitioner's initial brief, and those above, 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 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 6th day of January, 2017.

/s Virginia Murphy
Virginia Murphy

CERTIFICATE OF FONT

I certify that this brief was prepared with 14 point Times New Roman type, in compliance with a Florida Rule of Appellate Procedure 9.210(a)(2).

/s Virginia Murphy
Virginia Murphy