IN THE SUPREME COURT OF FLORIDA

ALLEN LEE DAVIS,

Appellant,

v. CASE NO. 63,374

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

		PAGE
TABLE OF CONTENTS		i
TABLE OF CITATIONS		ii
I	PRELIMINARY STATEMENT	1
III	ARGUMENT	
	ISSUE I	
	THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT APPELLANT'S MOTION FOR CHANGE OF VENUE	1
	ISSUE II	
	THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE.	6
	ISSUE III	
	THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR LANE.	9
IV	CONCLUSION	12
CERTIFICATE OF SERVICE		13

TABLE OF CITATIONS

CASES	PAGE(S)
Carr v. Watts, 597 F.2d 830 (2d Cir. 1979)	11
Chandler v. State, __So.2d__ (Fal. 1983)(case no. 60,790, opinion filed July 28, 1983)(1983 FLW 291)	11
Chapman v. California, 386 U.S. 18 (1967)	5
Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983)	4
Connecticut v. Johnson, __U.S.__ 103 S.C. 969 (1983)	5
Davis v. Georgia, 429 U.S. 122 (1976)	11
Francis v. State, 413 So.2d 1175 (Fla. 1982)	11
Goins v. McKeen, 605 F.2d 949 (6th Cir. 1979)	2
Holloway v. Arkansas, 435 U.S. 475 (1978)	5
Irvin v. Dowd, 366 U.S. 717 (1961)	4,6
Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981)	4
McCorquodale v. Balkcom, 705 F.2d 1553, n. 17 (11th Cir. 1983)	8
Maine v. Superior Court of Mendocino County, 438 P.2d 372 (Cal. 1968)	12
Olson v. North Dakota District Court, 271 NW2d 574 (ND 1978)	12
Paramore v. State, 229 So.2d 855 (Fla. 1969)	10
Payne v. Arkansas, 356 U.S. 560 (1958)	5
People v. Cole, 298 NE2d 705 (Ill. 1973)	4,5,8
People v. Taylor, 447 NE2d 519 (Ill.App. 1973)	2
Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983)	6
Rideau v. Louisiana, 373 U.S. 723 (1963)	5

TABLE OF CITATIONS
(cont.)

CASES	PAGE(S)
Sheppard v. Maxwell, 384 U.S. 333 (1966)	3
Singer v. State, 109 So.2d 7 (Fla. 1959)	4,9
State v. Goodson, 412 So.2d 1077 (La. 1982)	4,8
State v. Morrison, 447 SW2d 445 (Mo. 1977)	9
State v. Stiltner, 491 P.2d 1043 (Wash. 1971)	2
Swain v. Alabama, 380 U.S. 202 (1965)	8,11
Tumey v. Ohio, 273 U.S. 510 (1927)	5
United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982)	11
United States v. Davis, 583 F.2s 190 (5th Cir. 1978)	4,6,8,11
United States v. Goodson, 412 So.2d 1077 (La. 1982)	6
United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981)	4,6,8
United States v. McIver, 688 F.2d 726 (11th Cir. 1982)	4
United States v. Mobley, 656 F.2d 988 (5th Cir. 1981)	11
United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977)	8
United States v. Turner, 558 F.2d 535 (9th Cir. 1977)	11
Witherspoon v. Illinois, 391 U.S. 510 (1968)	10
Witt v. Wainwright, __F.2d__ (11th Cir. 1983) (case no. 81-5740, opinion filed September 16, 1983)	11
Worthen v. State, 399 A.2d 272 n. 3 (Md.App.1979)	11

IN THE SUPREME COURT OF FLORIDA

ALLEN LEE DAVIS, :

Appellant, :

v. : CASE NO. 63,374

STATE OF FLORIDA, :

Appellee. :

_____:

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "AB". Other references will be as denoted in appellant's initial brief. This reply brief is directed to Issues I, II, and III; appellant will rely on the arguments advanced in his initial brief as to Issues IV and V.

III ARGUMENT

ISSUE I

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT APPELLANT'S MOTION FOR CHANGE OF VENUE.

There appears to be some confusion in both appellant's initial brief (p.20-21) and the state's answer brief (p.11-12) as to the number of prospective jurors, and actual trial jurors, who acknowledged having some prior knowledge of the case. Appellant inadvertently missed Mrs. Arceneaux, who stated that

she had some knowledge of the case from the news media (T.661) and who served on the jury (T.774). With the inclusion of Mrs. Arceneaux, there were at least ten prospective jurors[1] who knew something about the case from their exposure to the pre-trial publicity, and four of these - Richardson, Jackson, Griswold, and Arceneaux - actually served on the jury.

Far more significant than the number of jurors who acknowledged having acquired some extra-judicial knowledge of the case is the fact that (as a consequence of the trial court's denial of appellant's motion for individual and sequestered voir dire) the voir dire examination of the prospective jurors was incapable of revealing specifically what each juror had learned about the case. In light of the fact that the Jacksonville media - including the city's three network television stations and two major newspapers - had disclosed that appellant had taken a polygraph examination and failed it[2], there is a reasonable likelihood,

---

[1] Richardson (T.599-600,651), Lane (T.644-46), Stanley Johnson (T.599,646-47), Jackson (T.601-02,650-51), Cassidy (T.564,625,636-37), Griswold (T.609), James Johnson (T.677,688-89), Robb (T.770), Price (T.763, see T.741), and Arceneaux (T.661).

[2] State v. Stiltner, 491 P.2d 1043 (Wash.1971), which is referred to extensively in appellant's initial brief, discusses the inherently prejudicial effect of the media's pre-trial disclosure of polygraph results, and emphasizes the incapability of the voir dire process to cure the prejudice. See also People v. Taylor, 447 NE2d 519,522 (Ill.App.1973), in which the news media reported that the defendant had taken a lie detector test (one article said he failed it and another article said that the test was inconclusive), while co-defendant was released after passing a lie detector test. The appellate court reversed Taylor's murder and robbery convictions, holding that the trial court's refusal to grant a change of venue deprived him of an impartial trial. The court noted the highly prejudicial nature of the publicity regarding the polygraph tests, and said:

> The "little black box" or lie testing equipment, while apparently not infallible, has been used in criminal investigations for many years and has been adopted by some employers for use in screening applicants for employment. In the minds of laymen it has achieved the status of being the "last word" in determining the truthfulness or untruthfullness of an examinee.

Cf. Goins v. McKeen, 605 F.2d 949 (6th Cir.1979)(media disclosure of information which was both inadmissible and highly probative of guilt).

not dispelled by the voir dire examination, that one or more of these jurors knew that appellant failed the polygraph. This information is inadmissible and grossly prejudicial, both because of the unreliability of polygraph testing and because of the readiness of many laymen to regard it as conclusive. See appellant's initial brief, p. 28, 61-62. Yet the media's disclosure of appellant's failure of the polygraph test was only one aspect of the prejudicial publicity in this case. In his initial brief, appellant identified nine distinct varieties of publicity which have been recognized as inherently prejudicial to an accused in a criminal case, and which occurred to a substantial degree in the instant case. See appellant's initial brief, p. 5-6, 7-18, 18-19, 22-26. Appellant also pointed out that the Jacksonville Sheriff's Department played an active role in disseminating the prejudicial publicity. See initial brief, p. 29-33. The state's response to appellant's argument - both in terms of the content of the publicity and the case law - is to ignore it. The state, in essence, takes the simplistic position that since the four individuals who acknowledged having previous knowledge of the case gained through publicity each said they could put aside their prior knowledge and render a verdict based on the evidence presented at trial, appellant's right to an impartial jury was adequately protected without a change of venue (see AB 11-12). However, it is well recognized that where a juror has been exposed to prejudicial publicity, his assurances that he can be impartial are not necessarily dispositive. See Sheppard v. Maxwell, 384 U.S. 333, 351 (1966);

Irvin v. Dowd, 366 U.S. 717, 728 (1961); Singer v. State, 109 So.2d 7, 24 (Fla. 1959); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981). See also Coleman v. Zant, 708 F.2d 541, 546-47 (11th Cir. 1983) (the primary facts regarding defendant's claim of presumed prejudice concern the nature and scope of the pre-trial publicity and its effect on the community where the trial was held; voir dire is not conclusive evidence of absence of prejudice). Where the nature of the publicity as a whole raises a significant possibility of prejudice, and a juror acknowledges some exposure to that publicity, it is the responsibility of the trial court, not the juror himself, to make the ultimate determination of whether his impartiality has been impaired. United States v. Hawkins, 658 F.2d 279, 283, 285 (5th Cir. 1981); United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978), see State v. Goodson, 412 So.2d 1077, 1083 (La. 1982). Because the voir dire examination in the instant case was incapable of revealing what each juror had heard or read, the trial court was not in a position to fulfill his constitutional responsibility in this regard.

The Sixth Amendment guarantees the right to be tried by an impartial jury; the failure to protect this right "violates even the minimal standards of due process". Irvin v. Dowd, 366 U.S. 717 (1961); United States v. McIver, 688 F.2d 726, 729-30 (11th Cir. 1982); People v. Cole, 298 NE2d 705, 711 (Ill. 1973). The trial court's failure to grant a change of venue, or even to permit questioning of the prospective jurors outside one another's presence to determine whether any irrep-

arably prejudicial information (such as the polygraph results or appellant's criminal record) had come to their attention through their exposure to the television and newspaper publicity, deprived appellant of this basic and fundamental right. As a result, reversal of his convictions and death sentences is constitutionally required. People v. Cole, supra; see Tumey v. Ohio, 273 U.S. 510 (1927); Payne v. Arkansas, 356 U.S. 560 (1958); Rideau v. Louisiana, 373 U.S. 723 (1963); Chapman v. California, 386 U.S. 18 (1967); Holloway v. Arkansas, 435 U.S. 475 (1978); Connecticut v. Johnson, __U.S.__, 103 S.Ct. 969 (1983)(recognizing that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error).

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE.

Much of the argument contained in Issue I of this reply brief applies equally to Issue II, particularly the principle that it is the responsibility of the trial court[3] to determine the impartiality (or lack thereof) of a prospective juror who has been exposed to pre-trial publicity; the juror's unilateral (and possibly self-serving, or sincere but unrealistic, see Irvin v. Dowd, supra) assurances that he can put aside whatever extra-judicial knowledge he has cannot be dispositive, particularly when the method of voir dire adopted by the trial court precludes the court and the attorneys from determining what particular information the juror has acquired. See United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); United States v. Davis, 583 F.2d 190 (5th Cir. 1978); State v. Goodson, 412 So.2d 1077 (La. 1982). In State v. Goodson, supra (at 1081), for example, the Louisiana Supreme Court stated "A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind." In the instant case, courtesy of the Jacksonville Sheriff's Department and the news media, a great deal of information of this nature was broadcast throughout the community, including

3 See also Peri v. State, 426 So.2d 1021, 1024-25 (Fla. 3d DCA 1983)(while counsel for defense and state are participants in voir dire process, the ultimate responsibility in securing an impartial jury is upon the trial court).

the inadmissible fact that appellant failed a lie detector test, the inadmissible fact that he had a number of prior convictions of violent crimes, the inadmissible fact that he was on parole at the time of the murders, and the fact that he admitted to police that he was in the Weiler home at the time the medical examiner said the murders occurred; as well as substantial amounts of inflammatory material (see appellant's initial brief, p. 19 and p. 5-18). At least ten prospective jurors, and at least four of the actual trial jurors,[4] had heard or read something about the case. Under these circumstances, there is a distinct possibility that one or more of the jurors had extra-judicial knowledge of inadmissible and highly incriminating material which, notwithstanding their assurances of impartiality made in good faith, would render it impossible for them to be fair and impartial jurors in the case.[5] The method of voir dire employed

---

[4] With the inclusion of Mrs. Arceneaux (see Issue I, supra), appellant must correct the assertion in his initial brief that nine prospective jurors, and three of those selected to try the case, had prior knowledge of the case.

[5] The state mischaracterizes appellant's argument as "speculat[ing] that three of the jurors may have hidden their prejudices" (AB 16). To the contrary, appellant attributes no misconduct to the jurors. Appellant's argument is simply that, as a result of their acknowledged exposure to pre-trial publicity, and because the publicity contained so much material which was incriminating, inadmissible, and/or inflammatory, these jurors may well have had extra-judicial knowledge which was inherently prejudicial, notwithstanding the juror's sincere belief that he could put it aside. A new trial is required as a result of the trial court's failure to protect appellant's right to an impartial jury, either by granting a change of venue (Issue I), or by adopting a method of voir dire which would enable the juror to disclose what in particular he had heard or read about the case, and enable the court to make an independent determination of the juror's impartiality (Issue II).

by the trial court, after his denial of appellant's motion for individual and sequestered voir dire, failed to "give reasonable assurance that prejudice would be discovered if present" (see United States v. Hawkins, supra; United States v. Davis, supra; McCorquodale v. Balkcom, 705 F.2d 1553, 1559-60, n. 17 (11th Cir. 1983)), and it severely impaired the defense's ability to intelligently exercise its right to challenge for cause[6] (State v. Goodson, supra; United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977)) and its peremptory challenges (United States v. Rucker, supra; see Swain v. Alabama, 380 U.S. 202, 219 (1965)). Reversal of appellant's convictions and death sentences is constitutionally required.[7] United States v. Hawkins, supra; United States v. Davis, supra; see People v. Cole, supra and the cases cited on p. 5 of this reply brief.

---

[6] "A voir dire that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice." United States v. Rucker, supra, at 1049.

[7] The state's suggestion that this issue is raised for the first time on appeal is barely worthy of comment. Appellant filed a written motion for individual and sequestered voir dire on June 9, 1982, in which he fully asserted the ground now argued on appeal (exposure of the jury panel to prejudicial publicity, and the inability to reveal a juror's knowledge without tainting the entire venire) as well as another ground relating to "death-qualification" (R. 142-46). Defense attorney Tassone, upon replacing the Public Defender's office as appellant's counsel, adopted a number of motions previously filed on behalf of appellant, including the motions for change of venue and individual and sequestered voir dire (R. 269). Immediately prior to jury selection, defense counsel called the court's attention to the pending motion for individual and sequestered voir dire, and the court denied the motion. (T.532).

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR LANE.

Appellant argued in his initial brief that the trial court's clearly erroneous denial of his challenge for cause to Mrs. Lane requires reversal, without consideration of whether he exhausted his peremptory challenges. [Appellant had one peremptory challenge remaining when the jury was accepted]. In support of his position, appellant called the Court's attention to the Supreme Court of Missouri's decision in State v. Morrison, 557 SW2d 445 (Mo. 1977) (holding that in determining on appeal the propriety of a trial court's ruling on a challenge for cause, it is improper to mix with it a consideration of the question as to whether or not the complaining party had exhausted his peremptory challenges). Appellant quoted extensively from the Morrison opinion, and argued that the legal principles and reasoning contained therein are equally applicable under the Florida and federal constitutions. The state, in its answer brief, says "Appellant now maintains that pursuant to Missouri case law this Court should not consider whether or not he had exhausted his peremptory challenges" (AB.21).

Instead of offering any reason why the reasoning of the Missouri Supreme Court in Morrison should not be persuasive, the state prefers to rely on a case involving the converse situation [Singer v. State, 109 So.2d 7 (Fla. 1959), in which the defendant did exhaust his peremptory challenges, and the

Court considered this fact in determining that the denial of a challenge for cause was reversible error], and on certain language in another case, Paramore v. State, 229 So.2d 855, 858 (Fla. 1969), which is (a) not on point, (b) self-acknowledged dicta, and (c) no longer even arguably good law. The state cites Paramore for the proposition that "in sustaining the trial judge's excusal of jurors for cause [because they expressed their convictions against imposition of the death penalty] the Court considered the fact that 'the State had more than enough remaining peremptory challenges available to have removed those prospective jurors had the trial judge declined to do so.'" Paramore, therefore, involved a Witherspoon[8] issue. The excerpt quoted by the state is clearly dicta; because the Court held on the merits that the excusal of the jurors was proper, and further held that the defendant was in no position to complain because he had not objected at trial to the excusal of the jurors, or expressed any desire to keep them. With regard to the matter of the state's having enough peremptory challenges to have removed the jurors had the court declined to excuse them, this Court said "Although this fact may be considered in sustaining the action of the trial judge, we should hesitate in conjecturing that the prosecutor would have used his peremptory challenges to excuse all such jurors". Paramore v. State, supra, at 858. The main weakness, however, in the state's reliance on the Paramore dictum is

[8] Witherspoon v. Illinois, 391 U.S. 510 (1968)(prospective jurors may not be excused for cause simply for voicing general objections to the death penalty).

that it is no longer even arguably valid in light of this Court's recent decision in Chandler v. State, __So.2d__ (Fla. 1983)(case no. 60,790, opinion filed July 28, 1983)(1983 FLW 291)(improper exclusion of an otherwise qualified juror in violation of Witherspoon is harmful and reversible error regardless of whether the state utilized all of its peremptory challenges). Accord, Davis v. Georgia, 429 U.S. 122 (1976); Witt v. Wainwright, __F.2d__ (11th Cir. 1983)(case no. 81-5740, opinion filed September 16, 1983). To the extent that the issues are analogous, Davis, Chandler, and Witt support appellant's position that the Missouri Supreme Court's analysis in Morrison is correct - the trial court's denial of a challenge for cause, if clearly erroneous, should be grounds for reversal without requiring the defendant to expend his peremptory challenges. See Swain v. Alabama, supra; United States v. Mobley, 656 F.2d 988, 989-90 (5th Cir. 1981); United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir. 1982); Carr v. Watts, 597 F.2d 830 (2nd Cir. 1979); United States v. Turner, 558 F.2d 535 (9th Cir. 1977); Worthen v. State, 399 A.2d 272, 278 n. 3 (Md.App. 1979)(any error which impairs the exercise of peremptory challenges requires reversal, and no showing of prejudice is required). See also Francis v. State, 413 So.2d 1175, 1178-79 (Fla. 1982)(exercise of peremptory challenges is essential to fairness of trial by jury; it is "an arbitrary and capricious right which must be exercised freely to accomplish its purpose"); Maine v. Superior Court of Mendocino County, 438 P.2d 372 (Cal.

1968); Olson v. North Dakota District Court, 271 NW2d 574, 578-79 (ND 1978)(recognizing that a defense attorney may reasonably be reluctant to exhaust his peremptory challenges).

IV CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse his convictions and death sentences and remand this case for a new trial, to be held in a location outside of the Jacksonville media market [Issues I, II, III, and IV].

Based on the argument, reasoning, and citation of authority contained in his initial brief, appellant respectfully requests that this Court reverse his death sentences and remand this case for a new penalty proceeding (Issue V).

Respectfully submitted,

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Kathryn Sands, Assistant Attorney General, Suite 513, Duval County Courthouse, Jacksonville, Florida 32202 and a copy mailed to appellant, Mr. Allen Lee Davis, #040174, Post Office Box 747, Starke, Florida 32091 on this 24th day of October, 1983.

Steven L. Bolotin

STEVEN L. BOLOTIN