IN THE SUPREME COURT OF FLORIDA

JOEL DALE WRIGHT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 64,391



ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA

# SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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## AUTHORITIES CITED

XI THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR NOR DEPRIVE APPELLANT OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BY CONDUCTING AN INQUIRY CONCERNING THE BIAS OF A JUROR OUTSIDE THE PRESENCE OF, AND WITHOUT THE KNOWLEDGE OF THE APPELLANT.

The right of a prisoner to be present at his trial derives from the common-law, although it is frequently guaranteed by constitution or statute, and the right to be present has been called a right scarcely less important to the accused than the right of trial itself. Hopt v Utah, 110 U.S. 574, 4 S.Ct. 202 28 L.Ed. 262 (1884). However, it has been held that so far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. Snyder v Massachussettes, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

The Constitution of Florida gives the accused the unqualified right to confront adverse witnesses at his trial, but it does not expressly require a defendant to be present during the entire time of a trial. Fla. Const. Art. I, § 16 (1968); Henry v State, 94 Fla. 783, 114 So.523 (1927).

The Rules of Criminal Procedure, provide that in all prosecutions for crime, the defendant must be present: (1) at first appearance; (2) when a plea is made, unless a written plea of not guilty is made in writing under the provisions of Florida

Rule of Criminal Procedure 3.170(a); (3) at any pre-trial conference, unless waived by the defendant in writing; (4) at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury; (5) at all proceedings before the court when the jury is present; (6) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury; (7) at any view by the jury (8) at the rendition of the verdict; and (9) at the pronouncement of judgment and the imposition of sentence. Fla. R. of Crim. P. 3.180(a). It is clear from the record in the instant case, that a fair and just hearing was not thwarted by the absence of the defendant, so as to support a finding of lack of due process under the Fourteenth Amendment. On the day in question, a Mr. Schwing came in the chambers and stated that he had overheard two ladies in the audience, one of whom said, that one of the ladies on the jury expressed an opinion that the defendant was guilty before trial commenced and would take no more than five minutes to render a vote in favor of guilt after the beginning of the jury deliberations (R 2833). Schwing did not state that the juror had stated that herself, but that the ladies purported to know or feel that she had (R 2834). A Marlene Tyler, who was a spectator testified that she had indicated that she knew the juror--Miss Hayes, to another spectator, Beulah Cannon (R 2846;2848). Cannon had never heard Tyler or any other woman express an opinion as to what Miss Hayes might do (R 2853). The court subsequently called Marlene Tyler on the telephone, on a speak-a-phone (R 2854).

Tyler advised the court that she was a spectator at trial and did know juror Hayes, but had no conversation with Hayes during the trial and Hayes never expressed any opinion one way or the other to her at any time during the trial and she had no conversation such as reported by Mr. Schwing (R 2855). She felt that someone may have mentioned during one of the recesses that they hoped it took more than five minutes to make up their minds (R 2855). The inquiry in question, was by nature a preliminary discourse to determine whether a hearing should be held in regard to possible bias of a juror. The inquiry in question did not even rise to the level of a hearing; it is something that the court could have undertaken itself as a preliminary investigation into juror bias. No factual determinations or evidentiary matters were undertaken at said preliminary inquiry. Due process of law was certainly not thwarted by the defendant not being present at such inquiry.

Under the Constitution of Florida, the defendant had only an unqualified right to confront adverse witnesses and did not have, in the first place, an express right to be present during the entire time of the trial.

Florida Rule of Criminal Procedure 3.180 does not recognize such a preliminary inquiry as one of the essential stages of a criminal trial where a defendant's presence is mandated. No violation of the Florida Rules of Criminal Procedure occurred by the defendant's absence during this preliminary matter. Moreover, the defendant was present at all proceedings before the court where the jury was present, and in this instance, no evidence was

addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury, so that the State procedural rules in this regard were fully complied with.

The record further reflects that the defendant recognizes that there probably was a conversation about why the parties were leaving the courtroom, but "everything was going so fast." (R 3090). Moreover, defense counsel never refused to let the defendant be present at any inquiry (R 3090). Nor did the State object to the defendant being brought into chambers (R 3104). The defendant himself never objected to not being present at the inquiry to either defense counsel or the court. (R 3115). The defendant was essentially passive as to who was handling the case and what steps were to be taken (R 3116). At the end of the inquiry, the defense counsel indicated to the judge that he felt he had gone as far as he could go and that no evidence had been produced that made it appear as if a juror had made statements to her friends to the effect that she was prejudiced (R 3109). Defense counsel acknowledges that there was no proof that his client had been prejudiced or harmed by juror misconduct (R 3111). Defense counsel discussed the facts of the inquiry with the defendant afterward, and it was acceptable to the defendant, the way the issue had been handled by his attorney (R 3108;3093). In essence, even assuming that the defendant was not initially aware of what was transpiring in regard to such inquiry, he was later informed by defense counsel and either ratified the action of his trial counsel or acquiesced in the same.

Cf. State v Melendez, 244 So.2d 137 (Fla. 1971). Under the circumstances of a similar case, Shriner v State, 452 So.2d 929 (Fla. 1984), this Court found no error. In Shriner, the defendant argued that he was not a participant in bench conferences held during trial, although he conceded that he was present at trial. The defendant raised no objection to the bench conferences, and expressed no desire to participate in the conferences, nor did he proffer what he believed transpired in those conferences. In Shriner, the defendant failed to show that any matter was determined in which he should have been consulted. Likewise, in the instant case, the record fails to show that such matter would require client consultation or would in any way affect the fairness of the trial. The preliminary inquiry established only that there was no factual basis to warrant a hearing on the issue of juror bias. Were the defendant present, he certainly could not have demanded the removal of an unbiased juror, and likewise, had the inquiry established bias, the court itself would have had an independent duty to remove such a juror regardless of a defendant's wish that such bias juror remain on the venire. And, as in Shriner, the defendant expressed no objection to not having participated in the inquiry. Moreover, the defendant had no constitutional right to be present at the preliminary inquiry that involved purely legal matters. Cf. United States v Killian, 639 Fed. 2d 206 (5th Cir. 1981). There was nothing the defendant could have added to the proceedings by way of testimony or advice to his attorney as to the statements of the spectators as the defendant was not a party to the overhearing of such unfounded rumors

in the first instance. Moreover, the alleged statement that was the subject of the rumor, was something that was formulated prior to trial so that any possible juror prejudice was extensively inquired into on voir dire examination, and at that point any error in this regard would have been cured.

## CONCLUSION

Based on the foregoing arguments and authorities presented, Appellee respectfully prays this Honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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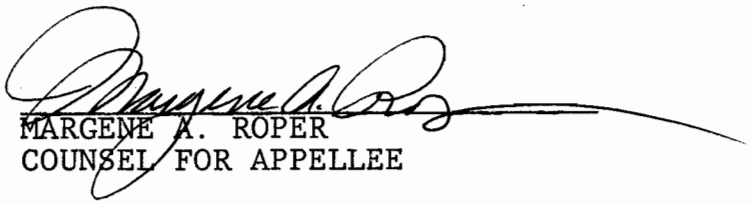
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Supplemental Answer Brief of Appellee has been furnished, by delivery, to Larry B. Henderson, Assistant Public Defender, Counsel for Appellant, at 1012 South Ridgewood Ave., Daytona Beach, Florida, 32014 this 9th day of November, 1984.



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