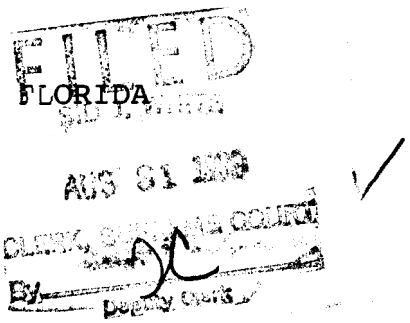
IN THE SUPREME COURT OF FLORIDA



MICHAEL G. PATRICK REILLY,

Appellant,

v. CASE NO. 73,571

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

WILLIAM C. MCLAIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #201170
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
ARGUMENT	1
ISSUE I	
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT TO THE PROPOSITION THAT THE TRIAL COURT ERRED IN RESTRICTING REILLY'S SIXTH AMENDMENT RIGHT TO CONFRONT A MATERIAL STATE'S WITNESS BY PROHIBITING THE DISCLOSURE OF THE WITNESS'S MENTAL EVALUATION PERFORMED WHEN HE WAS FOUND INCOMPETENT TO STAND TRIAL, SINCE THE EVALUATION WOULD HAVE IMPEACHED THE WITNESS'S TRIAL TESTIMONY CONCERNING HIS MENTAL ABILITIES.	1
ISSUE II	
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING A DEFENSE CHALLENGE FOR CAUSE TO TWO PROSPECTIVE JURORS: ONE HAVING KNOWLEDGE FROM MEDIA ACCOUNTS OF REILLY'S CONFESSION WHICH WAS SUPPRESSED AS INVOLUNTARY AND THE SECOND HAVING BELIEFS IN FAVOR OF THE DEATH PENALTY WHICH WOULD INTERFERE WITH HIS ABILITY TO FAIRLY CONSIDER A LIFE SENTENCE.	3
ISSUE III	
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING REILLY'S MOTION FOR CHANGE OF VENUE.	5
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

CASES	PAGE
Dinkins v. State, 244 So.2d 148 (Fla. 4th DCA 1971)	2
Fields v. State, 379 So.2d 408 (Fla. 3d DCA 1980)	3
Hawkins v. State, 326 So.2d 229 (Fla. 2d DCA), cert.den., 336 So.2d 108 (Fla. 1976)	2,3
Hill v. State, 477 So.2d 553 (Fla. 1985)	4
Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981)	4
Moore v. State, 525 So.2d 870 (Fla. 1988)	4
Ross v. Oklahoma, 487 U.S. __, 108 S.Ct. __, 101 L.Ed.2d 80 (1988)	4
State v. Coe, 521 So.2d 373 (Fla. 2d DCA 1988)	2

STATUTES	
Section 90.608(1)(d), Florida Statutes	2

IN THE SUPREME COURT OF FLORIDA

MICHAEL G. PATRICK REILLY,

Appellant,

v. CASE NO. 73,571

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Michael Reilly relies on his initial brief to reply to the State's answer brief except for the the following additions concerning Issues I, II and 111:

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT TO THE PROPOSITION THAT THE TRIAL COURT ERRED IN RESTRICTING REILLY'S SIXTH AMENDMENT RIGHT TO CONFRONT A MATERIAL STATE'S WITNESS BY PROHIBITING THE DISCLOSURE OF THE WITNESS'S MENTAL EVALUATION PERFORMED WHEN HE WAS FOUND INCOMPETENT TO STAND TRIAL, SINCE THE EVALUATION WOULD HAVE IMPEACHED THE WITNESS'S TRIAL TESTIMONY CONCERNING HIS MENTAL ABILITIES.

On page 10 of the State's brief, the assertion is made that "...the issue of whether any such [psychotherapist-patient] privilege existed (in the first place) has not been raised on appeal and has been waived.'' Counsel for the State must have overlooked pages 22 and 23 of

the initial brief where Reilly specifically claims that Randy White had no such privilege to assert.

On pages 11 through 14, the State argues that Reilly did not have the right to cross-examine White concerning his mental abilities. However, Section 90.608(1)(d) Florida Statutes specifically allows impeachment of a witness on such matters:

> (1) Any party, except the party calling the witness, may attack the credibility of a witness by:
>
> * * * *
>
> (d) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matter about which he testified.

Moreover, Hawkins v. State, 326 So.2d 229 (Fla. 2d DCA), cert. den., 336 So.2d 108 (Fla. 1976), which the State cites in its brief, supports, rather than refutes, this point. In Hawkins, the court held that the defense does have the right to use existing mental evaluations of witnesses for impeachment. Ibid. at 230-231. This situation is distinguishable from the ones found in Dinkins v. State, 244 So.2d 148 (Fla. 4th DCA 1971) and State v. Coe, 521 So.2d 373 (Fla. 2d DCA 1988), where the defense requested mental evaluations of the witnesses be performed solely for impeachment. The instant case, therefore, is analogous to Hawkins and distinguishable from Dinkins and Coe. Reilly merely wanted access to existing psychological evaluations. The State's reliance on Dinkins and Coe is misplaced.

Finally, on page 12 of the State's brief, the claim is made that Reilly's request for the psychological information is untimely. First, the timeliness of the request was never an issue in the trial court and was not the basis of the trial judge's ruling. (R **671-673)** This fact, alone, distinguishes this case from Fields v. State, **379** So.2d **408** (Fla. **3d** DCA 1980), upon which the State relies. Second, the psychological report requested was sealed in an existing court file. There would have been little delay in the proceedings necessary to secure the information. In fact, in Hawkins, the trial court was reversed for not granting a brief continuance of the defendant's trial, which was in progress, for the purpose of securing a psychological evaluation of the prosecuting witness. 326 So.2d at 230. The State's assertion is without merit.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING A DEFENSE CHALLENGE FOR CAUSE TO TWO PROSPECTIVE JURORS: ONE HAVING KNOWLEDGE FROM MEDIA ACCOUNTS OF REILLY'S CONFESSION WHICH WAS SUPPRESSED AS INVOLUNTARY AND THE SECOND HAVING BELIEFS IN FAVOR OF THE DEATH PENALTY WHICH WOULD INTERFERE WITH HIS ABILITY TO FAIRLY CONSIDER A LIFE SENTENCE.

The State makes some invalid factual assertions. First, on page 16 of the answer brief, counsel for the State claims that Reilly has taken the prospective jurors' comments out of context. Reilly has extensively quoted all of the jurors' responses which form the basis for the cause challenges. (initial brief at pages 29, 30, 31, 33, 34, 35, 36, 37)

Interestingly, the State made no effort to correct the alleged "out of context" responses. Second, the State implies that Reilly is claiming the trial judge acted in bad faith in denying the cause challenges in attempt to "stack" the jury against him. (answer brief at page 18) This is a red herring.

On pages 18 and 19 of its brief, the State claims that Reilly's argument must fail because trial counsel did not state the reasons why he would have exercised peremptory challenges, if he had more, on three sitting jurors. In order to demonstrate prejudice from a erroneous denial of a cause challenge, the defense need only exhaust all peremptory challenges and request more. See, Moore v. State, 525 So.2d 870 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981). There is no requirement that reasons be given regarding the use of any additional challenges. The State's reference to Ross v. Oklahoma, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 80 (1988), is not applicable. The defense does not have to establish that the jurors he was forced to accept because of exhaustion of peremptory challenges were impartial and themselves subject to a cause challenge. Such a burdensome requirement would render the erroneous denial of a cause challenge virtually unreviewable. This Court has never mandated such a test. Defense counsel stated those jurors were objectionable, and he would have used a peremptory challenge on each of them if he had had more challenges available.

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING REILLY'S MOTION FOR CHANGE OF VENUE.

The State, on page 20 of its brief, incorrectly claims "...not one of the jurors in this case read or recalled those [news] reports." As Reilly noted on page 12 of his initial brief, all **12** jurors had read or heard about the crime. In footnote number one, found on that same page, Reilly has provided this Court with the record references for the voir dire of each of the 12 jurors on this subject.

CONCLUSION

For the reason presented in the initial brief and this reply brief, Michael Reilly asks this Court to reverse his judgments and sentences.

Respectfully Submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. MCLAIN
Assistant Public Defender
Florida Bar #201170
Leon County Courthouse
Fourth Floor, North
Tallahassee, Florida **32301**
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida on this 31 day of October, 1989.

W. C. MCLAIN