IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2013-CF-008026-AXXX-MA
DIVISION: CR-C

vs.

JAMES PATRICK TADROS,

Defendant.

WJXT-TV4, POST-NEWSWEEK
STATIONS FLORIDA, INC.

Respondent.
_____/

RESPONDENT POST-NEWSWEEK STATIONS FLORIDA, INC.'S
***SECOND* NOTICE OF SUPPLEMENTAL AUTHORITY AND ARGUMENT**

Respondent Post-Newsweek Stations Florida, Inc. (WJXT-TV4), by counsel, hereby files this Second Notice of Supplemental Authority and Argument providing the Court with copies of additional case and argument relevant to Defendant's Emergency Motion for Protective Order.[1]

WJXT-TV4 submits that the Court's temporary order prohibiting dissemination of the statements attributed to Defendant James Tadros constitutes an unconstitutional prior restraint of the news media which the Sixth Amendment does not require and the First Amendment cannot tolerate.

In additional to all of the authorities and arguments that WJXT-TV4 previously submitted for the Court's consideration, in opposition to Defendant's Motion, WJXT-TV4 submits the following:

[1] As well as providing new authority and argument, this Second Notice provides a complete set of exhibits to the Amended Affidavit of Edward L. Birk, some of which were missing from the version e-filed on August 29, 2013 but which were included in copies hand delivered to the Court and to all parties prior to the August 29, 2013 hearing on Defendant's Motion for Order to Show Cause.

1. Amended Affidavit of Edward L. Birk, clarifying the route that un-redacted information regarding Mr. Tadros' guardianship traveled from the Clerk's office to The Florida Times-Union.

2. *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608 (Fla. 5th DCA 2007) (reversing injunction against TV station from broadcasting appellee's private information obtained after storage unit auctioned documents for failure to pay storage fees), *r'hg denied*, 2007 Fla. App. LEXIS 20084 (Fla. 5th DCA Nov. 19, 2007). Prior restraint of the press is presumed unconstitutional and is the "most serious and the least tolerable infringement on First Amendment rights." *Guetzloe*, 968 So. 2d at 610. "Indeed, in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, . . ." *Guetzloe*, 968 So. 2d at 611 (quoting *Matter of Providence Journal Co.*, 820 F. 2d 1342, 1348 (1st Cir. 1986).

3. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *The Florida Star*, the appellant weekly newspaper published the identity of a rape victim, contrary to a Florida statute prohibiting publication of such information and contrary to the newspaper's own policy. The newspaper obtained the information from the sheriff, who mistakenly released the information in a report made available to members of the media. The statute made it a crime to publish such information and to "cause or allow to be printed, published or broadcast . . . ." 491 U.S. 526 n.1.

The rape victim filed suit and obtained civil damages against the weekly newspaper based on per se negligence arising from violation of the statute. The newspaper appealed. The United States Supreme Court found the statute unconstitutional. The Court examined a triology of its cases examining "the conflict between truthful reporting and state-protected privacy interests." *Id.* at 530. The Court determined that a principle best articulated in one of the three cases—*Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (invalidating indictments against two

newspapers for publishing name of juvenile without written approval from the court, in violation of West Virginia statute)—would answer whether the weekly newspaper could be punished with civil damages for publishing truthful information. The two-part *Daily Mail* principle that the Court applied in Florida Statue is:

> [I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.

491 U.S. at 533.

With these *Daily Mail* principles in mind, the Court in *The Florida Star* considered "whether the newspaper lawfully obtain[ed] truthful information about a matter of public significance." 491 U.S. at 536.

As to legally obtaining the information, the Court concluded that it was the duty of the government, not the news media, to protect such information from publication. When the sensitive information is in custody of the government, the government has great power to "forestall or mitigate the injury caused by its release. . . . [and] may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its official where they government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." 491 U.S. at 534 (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (recommending "careful internal procedures" to avoid release of judicial disciplinary proceedings)).

The rape victim argued that the newspaper did not obtain the information legally because state statute barred its publication. The Court handily rejected that argument and noted that crime is always a matter of public importance:

> But the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government. Nor does the fact that the [sheriff] apparently failed to fulfill its obligation under § 794.03 not to "cause or allow to be . . . published" the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful. Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step. It is, clear, furthermore, that . . . the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.

491 U.S. at 536-37.[2]

The Court then considered the second question—whether punishing publication would further a state interest of the highest order. 491 U.S. at 537. The Court found several reasons that punishing the press for publication of legally obtained information would be "too precipitous" and "extreme." *Id.*

First, punishing the press for disseminating information which the government has made available is "unlikely to advance" meaningful public interests and "it is highly anomalous to sanction persons other than the source of its release." 491 U.S. at 535. Timidity and self-censorship may result from allowing the media to be punished for publishing truthful information. 491 U.S. at 535-36. The government provided the information only because of the

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[2] In footnote 8, the U.S. Supreme Court presaged the *Bartnicki v. Vopper* case, which WJXT-TV4 has previously submitted to this Court, when it noted: "The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) [The Pentagon Papers case], and reserved in *Landmark Communications*, 435 U.S. at 837. We have no occasion to address it here."

"erroneous, if inadvertent" inclusion by the sheriff of the victim's identity. Where it is the government that fails to police itself, imposing damages against the press for subsequent publication "can hardly be said to be a narrowly tailored means of safeguarding anonymity." 491 U.S. at 538. "Once the government has placed such information in the public domain, 'reliance must rest upon the judgment of those who decide what to publish or broadcast,' and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence." 491 U.S. at 538.

Second, the Court repeated its refusal to categorically prohibit media access to pr publication of information when important first amendment concerns are at stake. And, third, the statute was under-inclusive because it applied only to an undefined "instrument of mass communication" but not to casual publishers such as back-yard gossips. 491 U.S. at 540.

Applying *The Florida Star* case to the matter at hand leads to the conclusion that prior restraint of WJXT-TV4 from broadcasting the un-redacted Arrest and Booking Report is not warranted or supportable because 1) WJXT-TV4 obtained the information legally, and 2) there are far-less restrictive means of furthering the state's interest in protecting Mr. Tadros' right to a fair trial.

As WJXT-TV4 previously argued, neither the Defendant nor the State has brought forth authority for the proposition that WJXT-TV4's acquisition of the un-redacted Arrest and Booking Report was unlawful. It appears that WJXT-TV4's ability to obtain the un-redacted Arrest and Booking Report likely resulted from an understandable oversight of the Clerk in not redacting exempt information from the Arrest and Booking Report before making it available on-line. To find otherwise, would be contrary to the Clerk's obligations under Florida Rule of

Judicial Procedure 2.420, which incorporates chapter 119, *Florida Statutes*, and places the burden squarely on the custodian to ensure exempt and confidential information is not released. Moreover, it appears a similar mistake was made with regard to Mr. Tadros' 2002 guardianship file, as reported by the Florida Times-Union on August 29, 2013. *See* Amended Affidavit of Edward L. Birk, ¶ 6. Defendant and the State argued at hearing that the public could not have obtained the same un-redacted document. The facts suggest otherwise. The Clerk erred by not redacting the on-line version of the document. A member of the public just as easily could have received an un-redacted document at the walk-up window in the Courthouse if exempt material was overlooked and left un-redacted. Exhibit 1 admitted during the hearing on August 28 purports to be terms and conditions for attorney on-line access. Nothing in Exhibit 1 states that attorneys will have access to information that chapter 119 and/or Rule 2.420 deem to be exempt or confidential. The Arrest and Booking Report was supposed to redacted, regardless of who outside the Clerk's office accessed the document. Its status of a public record began when the Clerk received it, not when the Clerk redacted or did not redact. §119.011(12).

In *The Florida Star*, the Court balanced First Amendment interests against privacy interests. Here, the Court must balance Mr. Tadros' Sixth Amendment right to a fair trial with the First Amendment. Clearly, a defendant's right to a fair trial is an "interest of the highest order" as described in *Florida Star.* Prior restraint, however, sweeps too broadly to preserve the fair-trial that Mr. Tadros deserves. Instead, the Court has at its disposal a number of less-restrictive alternatives to ensuring that a fair-trial is had—continuance, larger venire, specific questions of potential jurors, pre-voir dire juror questionnaires, juror admonitions, additional peremptory challenges, evaluation of press coverage at the time of trial rather than today, evaluation whether the press coverage was factual or inflammatory, evaluation of the size of the

community and the scope of dissemination of the damaging information. *See Miami Herald Publ'g Co. v. Lewis*, 426 So. 2d 1, 8 (Fla. 1982).

4. Numerous courts have found fair-trial rights have been protected even in light of notorious pretrial publicity. *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (finding no denial of fair trial because of months of "virulent" pre-trial publicity alone, but reversing conviction because of "carnival" atmosphere at trial); *Murphy v. Florida*, 421 U.S. 794 (1975) (finding no denial of fair trial for notorious jewel thief—"[s]ome of the jurors had a vague recollection of the robbery with which [he] was charged and each had some knowledge of [his] past crimes, but none betrayed any belief in the relevance of [his] past to the present case."); *Hooks v. State*, 82 So. 3d 905 (Fla. 4th DCA 2011) (denying motion to change venue post-internet prosecution even though video of defendants beating homeless man was released by police and extensively disseminated by news media), *review den'd by, Hooks v. State,* 83 So. 3d 707 (Fla. 2012).[3]

5. More to the point, Florida courts have held that pretrial publicity regarding a confession is not automatic grounds to grant a change venue or find a defendant was denied a fair trial. *See State v. Kozma*, 1994 WL 397438, Case No. 92-CF-15914-10E (Fla. 17th Jud. Cir. Broward County Feb. 4, 1994) (defining narrowly the "substance of confession" exempted from public disclosure). In *Kozma*, the court noted that even "where pretrial publicity includes publication of inadmissible evidence or confessions, a defendant can still receive a fair trial." Id. at *2. *Holsworth v. State* 522 So. 2d 348, 351 (Fla. 1988). In *Holsworth*, the Supreme Court of Florida listed repeated instances where the court had rejected an earlier holding that pretrial publicity involving a confession required a change in venue. 522 So. 2d at 351. The court reviewed newer cases, such as *Straight v. State*, 397 So. 2d 903, 906 (Fla.), *cert. denied*, 454

[3] A co-defendant's motion for change of venue was also denied, which denial was affirmed. *Daugherty v. State,* 96 So. 3d 1076 (Fla. 4th DCA 2012).

U.S. 1022 (1981). In *Straight*, there was "considerable media attention and . . . knowledge of the murder was widespread. Four-fifths of the prospective jurors, and eight of the twelve jurors who served on the jury, had some prior knowledge of the case." 522 So. 2d at 351.

> The crucial consideration, however, is not knowledge, but whether such knowledge rendered the jurors prejudiced. Despite the widespread publicity in that case, we held that [*Oliver v. State*, 250 So. 2d 888 (Fla. 1971)] did not require reversal because the trial judge here presided over a long and painstaking voir dire procedure. The record shows that prospective jurors exhibiting even a hint of prejudice were excused. The court granted the appellant extra peremptory challenges and defense counsel did not use them all. Thus, our cases since *Oliver* implicitly have held that ***publicity about a confession, standing alone, is not per se grounds for the granting of a change of venue.*** Although publicity about a confession may be inflammatory, the defendant still must demonstrate that the publicity was prejudicial either by evidence that the particular jury was affected or by evidence that the general state of mind of the inhabitants of the community was so infected that a fair trial could not be obtained. The critical factor where there is pretrial publicity of any kind is the 'extent of the prejudice or lack of impartiality among potential jurors that may accompany the knowledge of the incident.'

522 So. 2d at 351 (emphasis added).

Some of the words at issue in this case cannot be described as the substance of a confession. The burden is on Defendant to show if other words in the Arrest and Booking Report meet the definition of the substance of a confession; a decision to be made after in camera inspection. Moreover, even if the statements do contain confessions, no trial is scheduled for this case. If indeed the words constitute a confession, Mr. Tadros may recant. He may be found incompetent to have made a knowing and voluntary confession. In sum, it is merely speculation at this early stage to say that publication of the un-redacted contents of the Arrest and Booking Report would deny Mr. Tadros a fair trial. Speculation about harm and its imminence is inadequate to support a prior restraint.

WHEREFORE, Respondent WJXT-TV4 request the Court take into account the foregoing decisional law as well as the arguments and authorities presented during the **August 28, 2013** hearing and deny Defendant's motion, and lift the Court's prohibition on publication of the un-redacted portions of he Arrest and Booking Report.

Respectfully submitted this 3d **day of September 2013**.

/s Edward L. Birk
Edward L. Birk
Florida Bar No. 0068462
MARKS GRAY, P.A.
Post Office Box 447
Jacksonville, FL 32201
Telephone: (904) 398-0900
Facsimile: (904) 399-8440
Attorneys for Intervenor Post-Newsweek Stations, Florida, Inc. d/b/a WJXT-TV4

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished this 3d **day of September 2013**, via **E-MAIL only to**:

The Honorable Adrian G. Soud, Circuit Judge;

Timothy J. Conner, Esquire, counsel for The Florida Times-Union;

Angela Corey, State Attorney; and

Fred C. Gazaleh, Assistant Public Defender.

/s Edward L. Birk
Attorney

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IN THE CIRCUIT COURT, FOURTH
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STATE OF FLORIDA

CASE NO.: 16-2013-CF-008026-AXXX-MA
DIVISION: CR-

vs.

JAMES PATRICK TADROS

WJXT-TV4, POST-NEWSWEEK
STATIONS FLORIDA, INC.

Respondent.
_____/

AMENDED AFFIDAVIT OF EDWARD L. BIRK[1]

STATE OF FLORIDA
COUNTY OF DUVAL

Before me appeared the undersigned affiant, Edward L. Birk, who after being duly sworn stated as follows:

1. I am over the age of 18 and have personal knowledge of the matters herein.

2. On August 28, 2013, after the hearing in this matter, I searched the Duval County Clerk of Court's CORE website in a comprehensive manner for any and all information regarding levels of access for attorneys, the general public, "distinguished entities" and others.

3. I was unable to locate any document on the website that reflected the content of Exhibit 1 admitted at hearing on August 28, 2013, which was described as "terms and conditions" for attorney access to on-line images.

[1] Birk amends this affidavit to clarify in paragraph 6 that the newspaper did not receive the un-redacted guardianship records directly from the clerk, but apparently, as indicated by reasonable inference drawn from the newspaper article, which quotes the un-redacted information, the newspaper obtained access to the un-redacted records from First Coast News, who did receive the un-redacted documents from the Clerk.

4. Attached hereto are screen shots from the Clerk's CORE website regarding applications for access by members of the public, Florida attorneys, and others with "business reasons" to access CORE and its contents. They are true and correct images of the represented pages from the CORE website.

5. My diligent search of the CORE website found no terms and conditions regarding access, let alone terms and conditions remotely similar to those contained in hearing Exhibit 1 regarding attorney access.

6. Attached is a true and correct copy of the Florida-Times Union article headlined "Man charged with attack has autism, records indicate." The article states that the newspaper's news partner First Coast News obtained un-redacted copies of guardianship records from the Clerk of Court regarding Defendant's 2002 guardianship proceeding. The newspaper quotes from those un-redacted guardianship records, apparently after having seen the un-redacted papers obtained by First Coast News. I searched the Clerk's redacted version of the cited documents, and they are redacted, which is consistent with the newspaper's report of its own search efforts. Details of Defendant's life-long dependency and psychiatric treatment were thus released into the public record by the Clerk's office, according to the newspaper's description of events.

FURTHER AFFIANT SAYETH NAUGHT.

Edward L. Birk

State of Florida)
) ss.
County of Duval)

SWORN TO and SUBSCRIBED before me by Edward L. Birk who is personally known or produced identification (type of identification produced _____), this 3rd day of September 2013.

NOTARY PUBLIC

LINDA L. BEVERLY
MY COMMISSION # DD 977051
EXPIRES: April 11, 2014
Bonded Thru Pichard Insurance Agency

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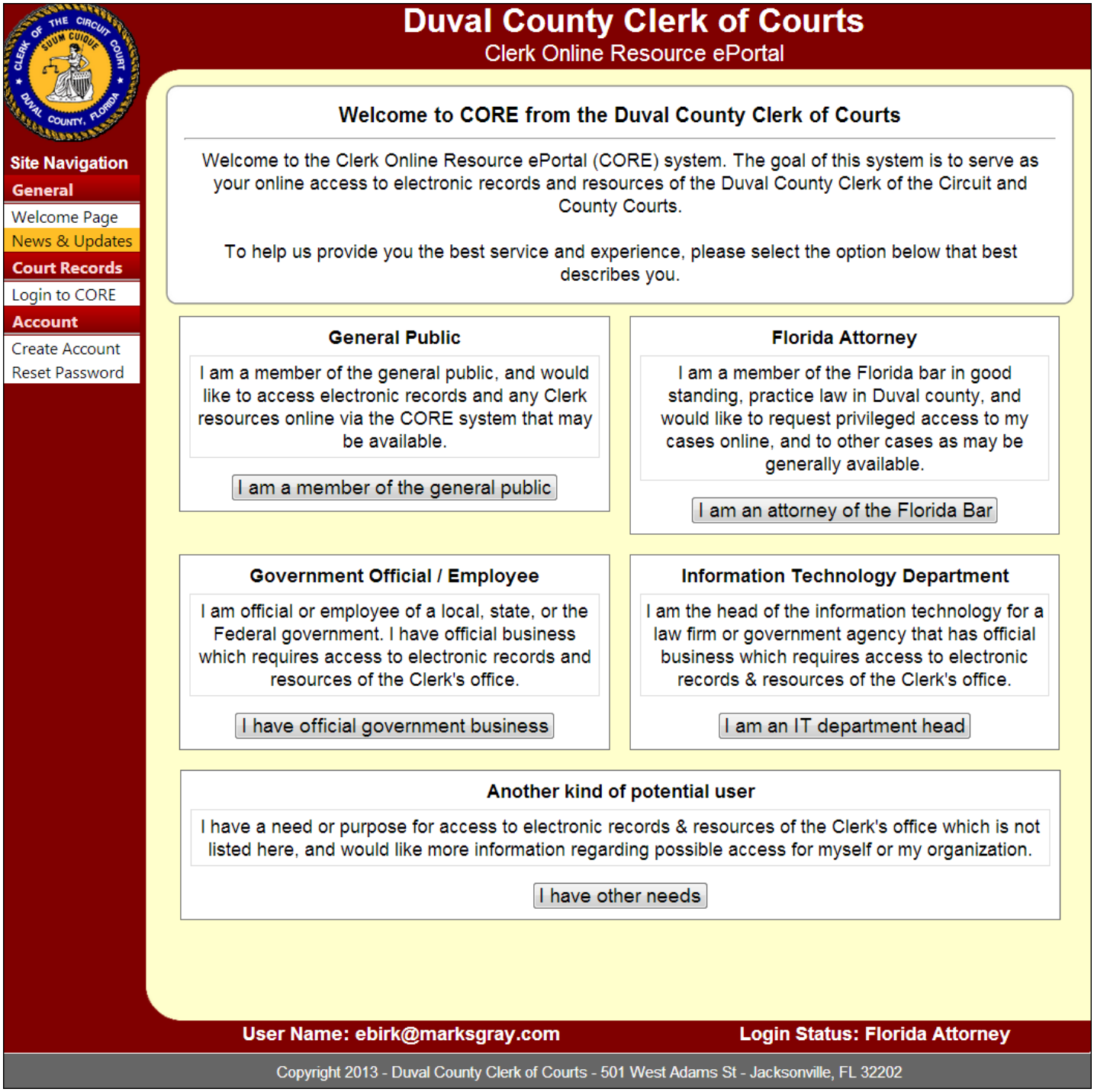
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I am a member of the general public
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I am a member of the Florida bar in good standing, practice law in Duval county, and would like to request privileged access to my cases online, and to other cases as may be generally available.
I am an attorney of the Florida Bar
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I am official or employee of a local, state, or the Federal government. I have official business which requires access to electronic records and resources of the Clerk's office.
I have official government business
Information Technology Department
I am the head of the information technology for a law firm or government agency that has official business which requires access to electronic records & resources of the Clerk's office.
I am an IT department head
Another kind of potential user
I have a need or purpose for access to electronic records & resources of the Clerk's office which is not listed here, and would like more information regarding possible access for myself or my organization.
I have other needs
User Name: ebirk@marksgray.com
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type)

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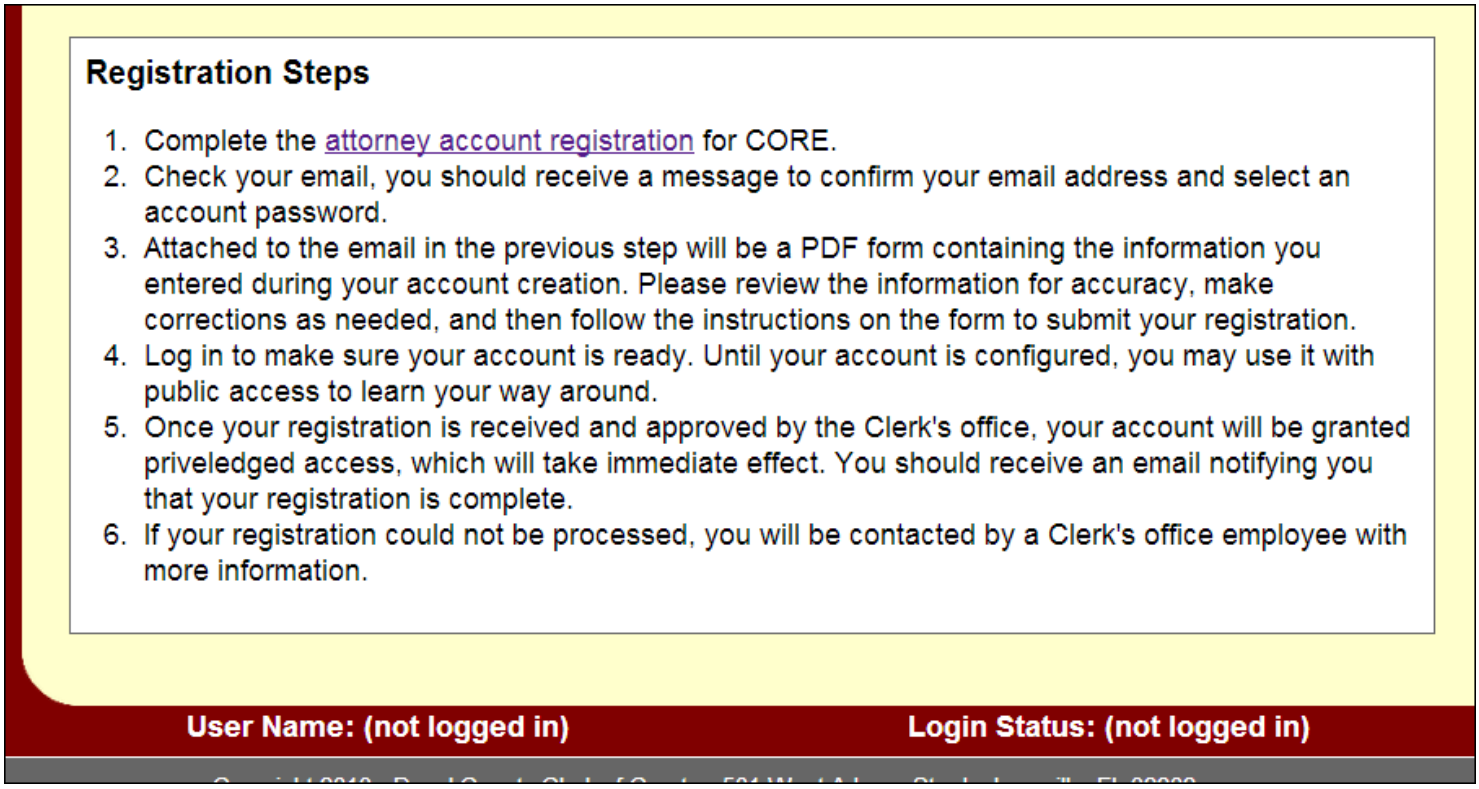

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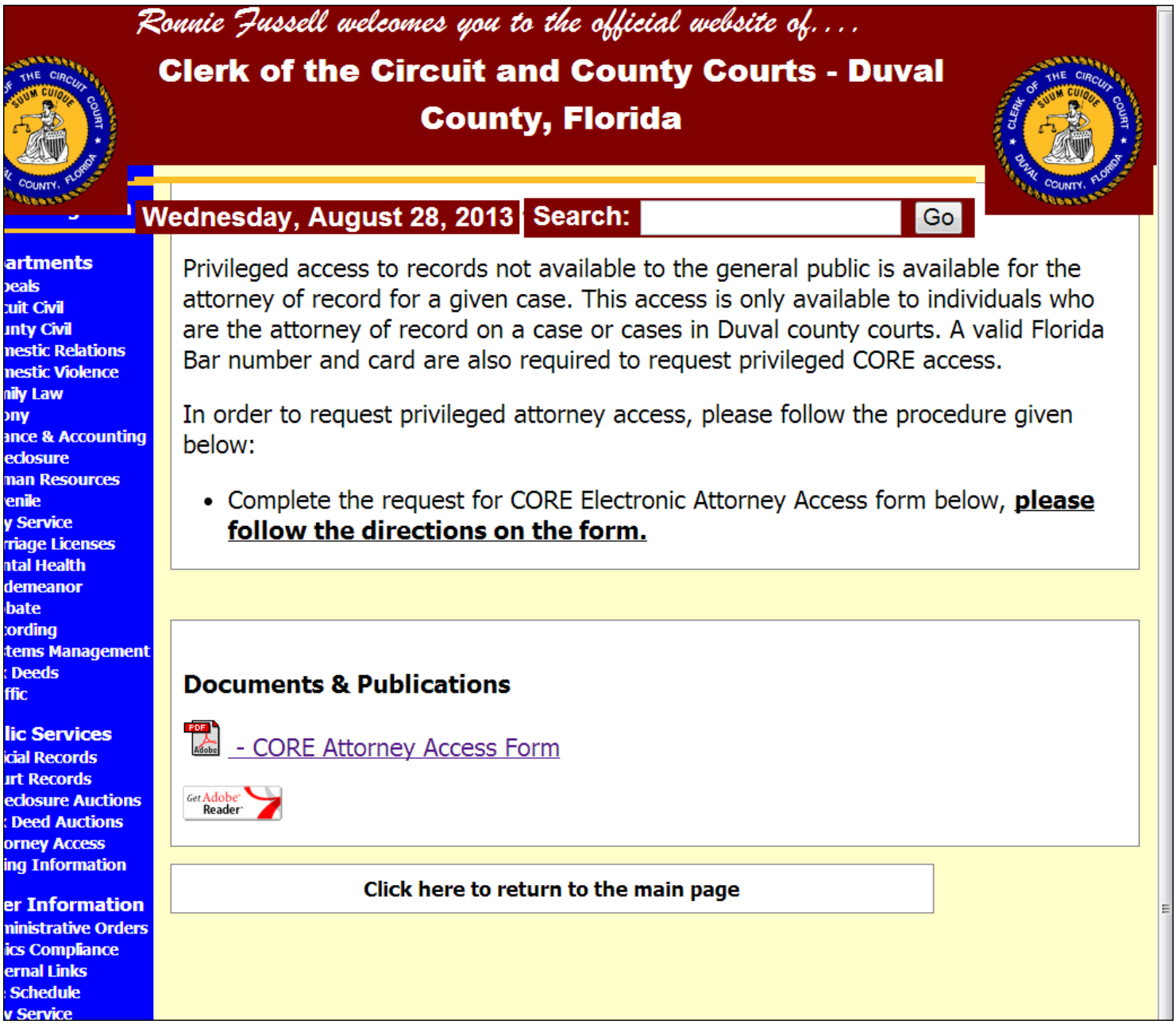
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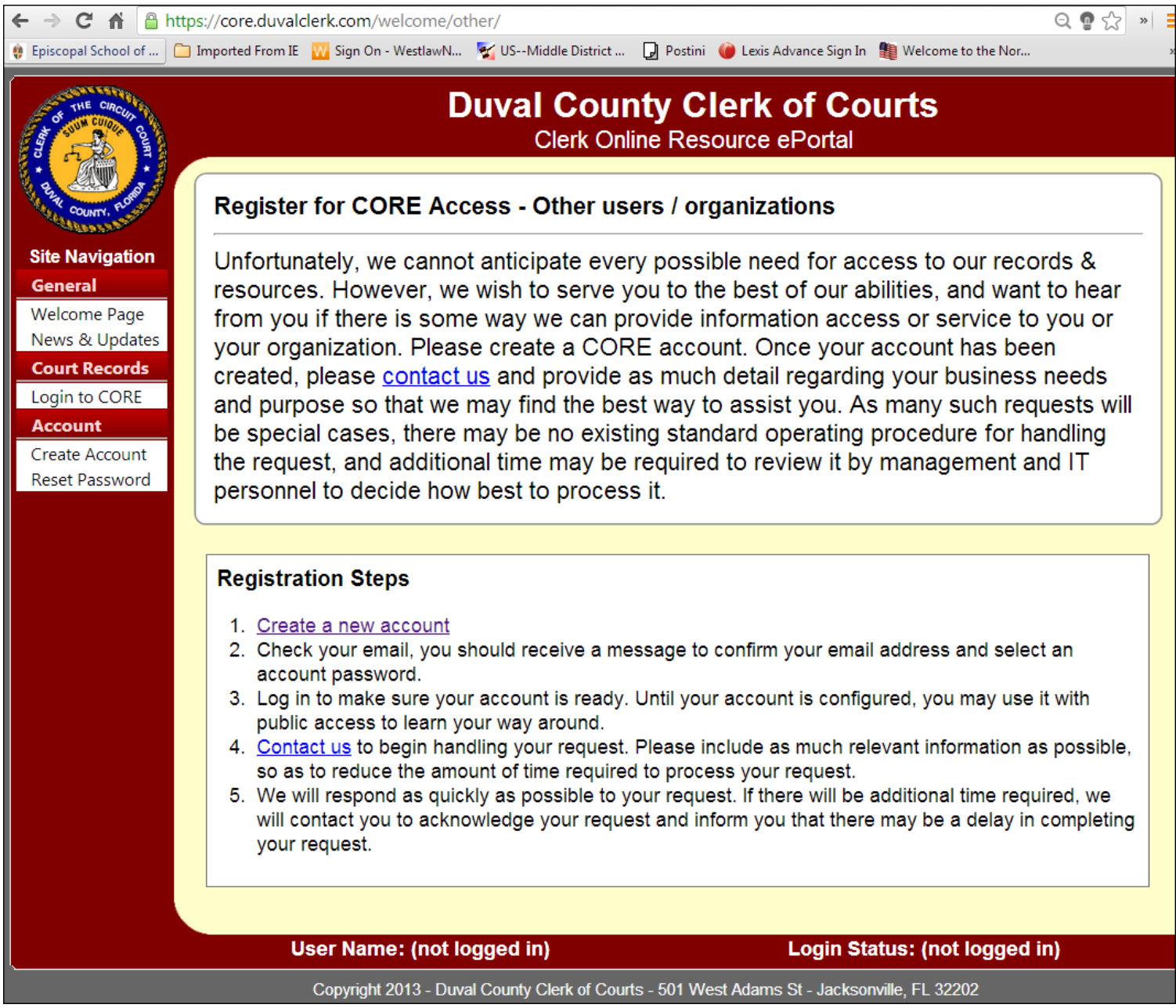
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1. Create a new account
2. Check your email, you should receive a message to confirm your email address and select an account password.
3. Log in to make sure your account is ready. Until your account is configured, you may use it with public access to learn your way around.
4. Contact us to begin handling your request. Please include as much relevant information as possible, so as to reduce the amount of time required to process your request.
5. We will respond as quickly as possible to your request. If there will be additional time required, we will contact you to acknowledge your request and inform you that there may be a delay in completing your request.
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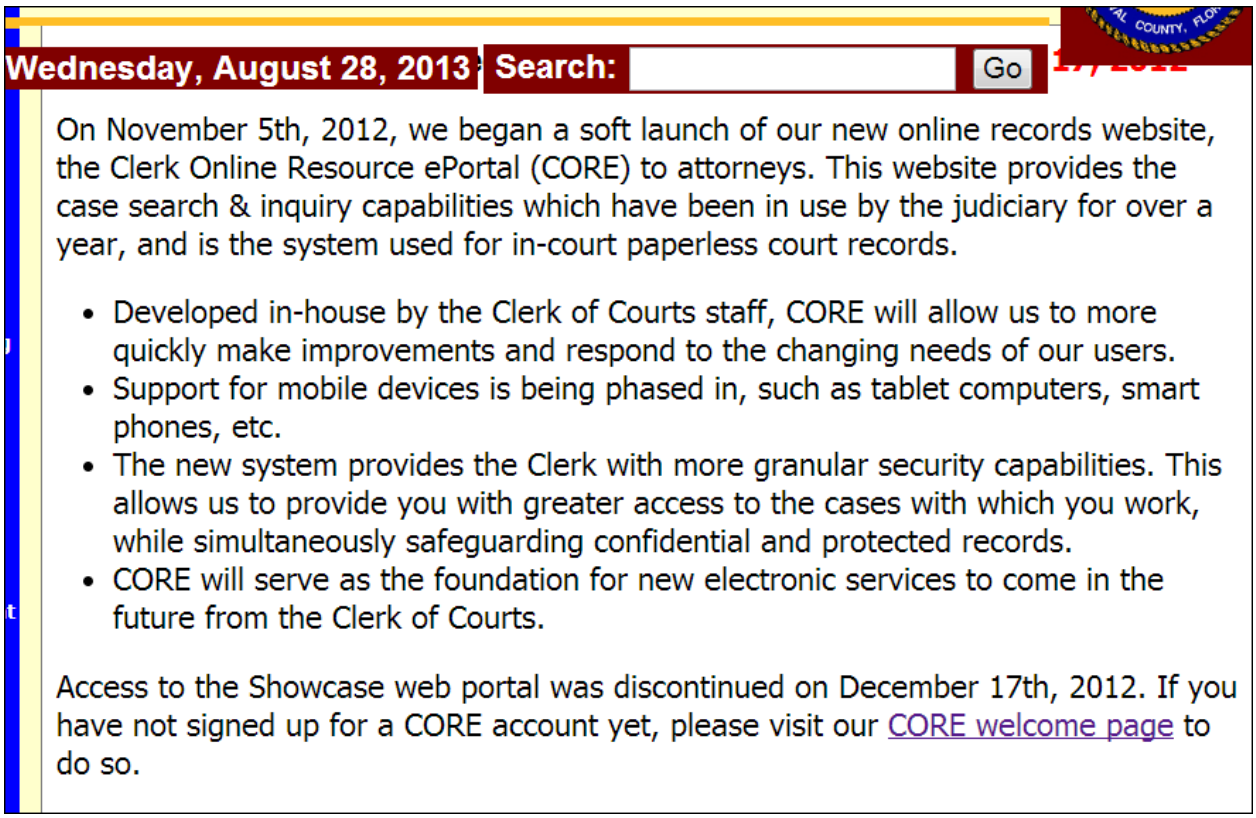

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- Developed in-house by the Clerk of Courts staff, CORE will allow us to more quickly make improvements and respond to the changing needs of our users.
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- CORE will serve as the foundation for new electronic services to come in the future from the Clerk of Courts.

Access to the Showcase web portal was discontinued on December 17th, 2012. If you have not signed up for a CORE account yet, please visit our CORE welcome page to do so.

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metro

Man charged with attack has autism, records indicate

Court records: He was diagnosed by Miami doctor when he was 10

James Tadros is charged with attempted murder in attack on 9-year-old girl.

By Derek Gilliam
derek.gilliam@jacksonville.com

The man police say coerced a 9-year-old girl into a Best Buy bathroom and then attacked her was diagnosed with "Asperger syndrome autism" when he was 10 years old by a Miami doctor, according to Duval County Clerk of Court records, obtained Tuesday by Times-Union news partner First Coast News.

James Patrick Tadros, 29, is charged with attempted murder in connection with the incident that occurred at the Southside store on Friday about 5:30 p.m. The victim was listed in stable condition after the attack.

Asperger syndrome is characterized by difficulties in social interaction, according to the U.S. Centers for Disease Control's website, but was removed in May as a diagnosis in the "Diagnostic and Statistical Manual of Mental Disorders." Instead, it was folded into a broader definition that is autism disorder.

First Coast News obtained a unredacted copy of a 2002 guardianship application by Tadros' mother from Clerk of Courts officials. The Times-Union obtained the records Wednesday, but entire paragraphs had

TADROS continues on B-4

TADROS

Continued from B-1

been removed.

When Tadros was 18, his mother sought guardianship of him because his "mental state does not allow him much independence," he had "no knowledge of financial affairs," and could not make "meaningful health decisions" regarding his own medical care, the documents show.

"Tadros is more competent in some areas than others but has difficulty understanding and is excited in large crowds," the documents read.

According to the file, Tadros took medications and was seen by a doctor about two to three times a month. He also met with a psychiatrist. He also had been diagnosed with obsessive compulsive disorder.

The file said Tadros' mother was qualified to be his guardian according to state statutes, and the courts allowed the mother to waive a requirement to receive training or appear annually to reassess Tadros' mental state.

His "condition has been consistent since birth, and will not improve substantially at any time in the future," the documents said.

Tadros was unable to verbalize his intentions, and was unable to write, the file said.

"Prognosis is that he will remain in this condition for the remainder of his lifetime and will also require the care of his mother for the remainder of his lifetime," the documents read.

Derek Gilliam: (904) 359-4619

968 So.2d 608
District Court of Appeal of Florida,
Fifth District.

POST–NEWSWEEK STATIONS ORLANDO, INC., d/b/a WKMG, Appellant,
v.
Douglas M. GUETZLOE, Appellee.

Nos. 5D07–430, 5D07–526. | Oct. 4, 2007. | Rehearing Denied Nov. 19, 2007.

Synopsis

Background: Public figure, whose personal records were sold at auction by the owner of storage facility due to public figure's alleged failure to pay rent and which were purchased by unknown third party who, in turn, gave them to television station broadcaster, brought action seeking to prevent the public airing of his personal information by filing complaint seeking declaratory and injunctive relief and replevin and seeking temporary injunction. The Circuit Court, Orange County, Rom W. Powell, Senior Judge, temporarily enjoined television station broadcaster from publicly airing the information, and broadcaster appealed.

Holding: The District Court of Appeal, Torpy, J., held that temporary injunction enjoining broadcaster from publicly airing information in public figure's personal records operated as a prior restraint on First Amendment rights of broadcaster and was therefore presumed unconstitutional, and figure's privacy rights did not justify such a restraint.

Reversed.

West Headnotes (1)

[1] Constitutional Law
Program content
Injunction
Threats, harassment, and rights of privacy

Temporary injunction enjoining television station broadcaster from publicly airing information in public figure's personal records, which were sold at auction by owner of storage facility due to public figure's alleged failure to pay rent and which ended up in hands of broadcaster, operated as a prior restraint on First Amendment rights of broadcaster and was therefore presumed unconstitutional, and figure's privacy rights did not justify such a restraint; public figure failed to establish that an actionable invasion of privacy was likely to occur because there was no proof that the publication of his records would be highly offensive to a reasonable person. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

Attorneys and Law Firms

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Sanford L. Bohrer, Judith M. Mercier, Charles D. Tobin and David C. Borucke of Holland & Knight LLP, Orlando, for Amici Curiae The Florida Association of Broadcasters, Orlando Sentinel, South Florida Sun–Sentinel, WBZL–TV, Tribune Company, Inc., WESH–TV, Hearst–Argyle Television, Inc., WOFL FOX 35, WOGX FOX 51, WRBW 65, WTVT FOX 13, WPTV–TV, WFTS–TV, The Naples Daily News, Treasure Coast Newspapers, The E.W. Scripps Co., The Daytona Beach News–Journal, News–Journal Corp., The

Lakeland Ledger, The Sarasota Herald–Tribune, The Ocala Star–Banner, The Gainesville Sun, The New York Times Co., Florida Today, The News–Press, Pensacola News Journal, Tallahassee Democrat, WTSP–TV, WTLV–TV, WJXX–TV, Gannett Co., Inc., The Associated Press, The Washington Post, Cable News Network, Inc., The Florida Press Assoc., and The First Amendment Foundation in Support of Defendant/Appellant WKMG.

Frederic B. O'Neal, Windermere, for Appellee.

Opinion

TORPY, J.

Appellant, a television station broadcaster, challenges a temporary injunction that prohibits it from broadcasting the contents of documents obtained from a storage unit leased by Appellee. Appellant's challenge is based on its argument that the injunction constitutes an unconstitutional prior restraint on free speech. After de novo review, we determine that Appellee failed to meet his heavy burden to justify imposition of the injunction. Therefore, we reverse the injunction order.

Appellant came into possession of eighty boxes of Appellee's records after they were sold at auction by the owner of a storage facility due to Appellee's alleged failure to pay rent. An unknown third party purchased the records. Appellant acquired the documents from the third party. Thereafter, Appellant contacted Appellee to inform him that it intended to publish portions of the contents of the records in its telecast. Appellee sought to prevent the public airing of his personal information by filing a two-count complaint seeking declaratory and injunctive relief and replevin. He also filed a verified motion for temporary injunction without notice. In the motion, Appellee alleged that the records remained his private property, despite Appellant's claim of ownership, because the storage facility's determination that he had failed to pay was erroneous. The motion further alleged that some of the boxes of records included medical records of Appellee and his family, and communications between Appellee and his attorneys. The lower court granted the motion, ex parte, and temporarily enjoined Appellant from publicly airing the information.

After receiving notice of its issuance, Appellant filed a motion to dissolve the temporary injunction, contending that it was overbroad and an unconstitutional prior ***610** restraint on its right to broadcast news based on lawfully obtained information. Appellant also contended that the injunction had been improperly entered without notice and failed to meet all the requirements of Florida Rule of Civil Procedure 1.610.

A hearing was held on Appellant's dissolution motion; no evidence was introduced by either party. The parties did stipulate, however, that Appellee is a "public figure" as that phrase is used in First Amendment jurisprudence. Beyond that, the factual underpinning for the court's order was based entirely on Appellee's verified motion. At the close of the hearing, the court took the matter under advisement. The following day, the court notified counsel of its intention to enter a detailed order in the case modifying the injunction, in part, but otherwise denying the motion to dissolve it. Before the written order was entered, Appellant filed a notice of appeal, in which it challenged the original temporary injunction and the oral ruling denying the motion to dissolve the temporary injunction. (Case number 07–430). The court then entered a written order denying Appellant's motion to dissolve the temporary injunction but modifying the injunction. As modified, the injunction prohibits only the publication of the contents of medical records of Appellee and his family and communications between Appellee and his attorneys. Appellant filed a second notice of appeal challenging the written order. (Case number 07–526). We consolidated the two appeals.

Although Appellant raises several arguments, we need only address one—whether the injunction imposes an unconstitutional prior restraint on the press in violation of the First Amendment. We disagree with the parties' and amici curiae's assertion that our standard of review is whether the lower court abused its discretion. The evidence upon which the lower court based its ruling was in the form of a verified motion and a stipulated fact. The trial judge's ruling was expressly based entirely on the application of the law to these undisputed facts; thus, our review is de novo. *Smith v. Coalition to Reduce Class Size*, 827 So.2d 959 (Fla.2002).[1]

Appellee properly concedes that the injunction at issue here operated as a prior restraint on the First Amendment rights of Appellant and is therefore presumed unconstitutional. *See Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (describing temporary and permanent injunctions that forbid speech activities as "classic examples of prior restraints"). This presumption exists because "[p]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). Although the prohibition against prior restraints is by no means absolute, the censorship of publication has been

considered acceptable only in "exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). As our high court has emphasized:

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break ***611** the law than to throttle them and all others beforehand.

Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). To overcome this presumption of unconstitutionality, the proponent of the injunction bears a "heavy burden." *Neb. Press Ass'n*, 427 U.S. at 559, 96 S.Ct. 2791.

Although the Supreme Court has never articulated a clear test that we can apply to determine when this "heavy burden" has been met, the Court has demonstrated the weight of this burden by consistently holding that the prohibition against such restraints attaches even when substantial competing interests are at stake. *See, e.g.*, *Butterworth v. Smith*, 494 U.S. 624, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990) (invalidating criminal statute to extent it prohibited witness from disclosing content of witness's grand jury testimony); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (invalidating state's criminal statute prohibiting publication of information regarding judicial review commission proceedings); *Neb. Press Ass'n*, 427 U.S. 539, 96 S.Ct. 2791 (invalidating, as improper prior restraint, pretrial gag order prohibiting publication of defendant's confession in highly publicized murder trial, despite state's competing interest in protecting defendant's right to fair trial); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (prohibiting injunction, as improper prior restraint, against publication of stolen, classified government documents). Indeed, in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here. *See Matter of Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir.1986).[2]

Here, Appellee asserts that his privacy interest in his private papers, and in particular his medical information and attorney-client communications, is sufficient to sustain his burden. Although Appellee does not direct our attention to any Supreme Court case that has ever upheld a prior restraint to protect a competing privacy interest, the possibility that privacy rights might justify such a restraint has not been completely foreclosed by the Court. For example, in a leading case, although stating that a prior restraint may be justified only in "exceptional cases," such as maintaining the secrecy of troop movements in wartime, the Court emphasized that its holding did not address the "authority to prevent publications to protect private rights according to principles ... of equity." *Near*, 283 U.S. at 716, 51 S.Ct. 625. *See also The Florida Star v. B.J.F.*, 491 U.S. 524, 541, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (declining to conclude that "there is no zone of personal privacy within which the State may protect the individual from intrusion by the press ...").

Notwithstanding any suggestion by the Court that privacy rights might trump the First Amendment in a given circumstance, time after time, when the high court has been called upon to consider whether the free exercise of speech under the First Amendment may be curtailed to protect privacy rights, it has not been hesitant in ***612** resolving the ostensible conflict in favor of the exercise of free speech. The Court has done so by prohibiting both prior restraints and the constitutionally less-intrusive, post-publication imposition of criminal and civil liability. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) (holding, based on First Amendment protections, although government interest in protecting private conversation is strong, publication of contents of illegally obtained tape recording on matter of public interest cannot give rise to damage claim); *The Florida Star*, 491 U.S. 524, 109 S.Ct. 2603 (holding that state statute prohibiting media from publishing name of rape victim was unconstitutional because not narrowly tailored to address state interest of "highest order"); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) (holding state statute, which prohibited publication of names of juvenile offenders and under which two newspapers were indicted, unconstitutional); *Okla. Publ'g Co. v. Okla. County Dist. Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) (holding as unconstitutional pretrial order enjoining media from publishing name or photograph of eleven-year-old boy in connection with juvenile proceeding); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (holding as unconstitutional civil damage award against television station for publishing name of rape-murder victim); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) (holding injunction against private pamphleteering not valid even assuming it constitutes an

invasion of privacy).

Although these precedents are somewhat instructive because they suggest that privacy will rarely trump the First Amendment, all of these cases are distinguishable from the situation that we are confronted with here. In this case, Appellee seeks to enjoin the publication of documents that, based on the nature of the documents, are of no obvious public concern. We particularly observe that in most instances, an individual's medical records would not be of public interest. We do not think that Appellee's status as a public figure means that every aspect of his private life is of public concern. *See Nixon v. Admin'r of Gen. Servs.*, 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (suggesting that even public officials are "not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity"). But even if Appellee's documents are of public concern due to his status, it is difficult to envision how the medical records of his family could be a concern to the public.

The abstract issue framed by the parties in this case, therefore, involves the extent to which privacy interests in information, which is of no apparent public concern, may be asserted as a basis for limiting the First Amendment's prohibition against censored expression by a publisher who comes into possession of the information without resort to improper means. Appellant urges that the answer is never; it contends that the sole remedy for an alleged invasion of privacy under these circumstances is an action for damages. Otherwise, Appellant argues that the determination of whether a fact is of public concern is taken away from editors and placed with the courts, amounting to prohibited censorship. Appellee's position is not as rigid. He contends that a prior restraint based on privacy grounds may be justified when privacy rights outweigh the First Amendment's protections. He urges that the balancing of these interests, as was done by the lower court here, is the appropriate approach. We find it unnecessary to sanction either position to ***613** resolve this case because, even under Appellee's approach, we determine that the injunction is not justified as Appellee has failed to establish that the contents of the records at issue are sufficiently sensitive to give rise to an actionable invasion of privacy should the documents be published. Therefore, even if we were to balance the respective rights of the parties, Appellant would prevail.

To reach this conclusion, we need only examine *Wolfson v. Lewis*, 924 F.Supp. 1413 (E.D.Pa.1996), the case upon which Appellee places his heaviest reliance. There, the court entered an injunction to prohibit broadcast journalists from engaging in certain conduct in connection with an *Inside Edition* exposé on the high salaries being paid to the executives of U.S. Healthcare. The court predicated the injunction on a finding that the plaintiff had established a likelihood that he would succeed on his claims for unlawful interception of oral communications and invasion of privacy under Pennsylvania and Florida state law. On the invasion of privacy claim, the court found that the plaintiff had proven the "highly offensive to a reasonable person" element of the tort. These statutory and tort law violations, said the court, were sufficient to overcome the defendants' First Amendment arguments. Even assuming that *Wolfson* is a correct analysis of the interplay between the First Amendment and privacy interests protected by state law, we cannot conclude that Appellee has shown that he is likely to prevail because he has not proven that Appellant's anticipated conduct would constitute a tort or actionable violation of state law.[3]

To sustain his burden here, it cannot be gainsaid that Appellee must establish that his privacy interest is at least one that is recognized and protected by state law. *See The Florida Star*, 491 U.S. at 530–33, 109 S.Ct. 2603 (recognizing tension is between First Amendment and statutory and common law doctrines protecting privacy; First Amendment yields only to state interest of the "highest order"). *Accord People v. Bryant*, 94 P.3d 624, 636 (Colo.2004).[4] Unlike the situation in *Wolfson*, here, Appellee has failed to establish that an actionable invasion of privacy is likely to occur because there is no proof that the publication of his records would be "highly offensive to a reasonable person." *Cape Publ'ns, Inc. v. Hitchner*, 549 So.2d 1374, 1377–78 (Fla.1989) (stating that to prove tort of invasion of privacy by publication of private facts, publication must be "highly offensive to reasonable person"). Although we can certainly conceive of hypothetical situations when publication of sensitive medical records or attorney-client communications might meet this element, we cannot conclude that the publication of any such records will necessarily meet this threshold merely because of their nature. Speculation cannot suffice to rebut the heavy presumption against a prior restraint. *Se. Promotions*, 420 U.S. at 561, 95 S.Ct. 1239; *New York Times Co.*, 403 U.S. at 725–26, 91 S.Ct. 2140 (Brennan, J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated ***614** upon surmise or conjecture that untoward consequences may result.").[5]

Taking our cue from the Supreme Court, we emphasize that our holding today is limited. The heavy burden rested with Appellee throughout these proceedings. *City of Ormond Beach v. City of Daytona Beach*, 794 So.2d 660,

662 (Fla. 5th DCA 2001). We hold simply that the burden was not met here.[6]

REVERSED.

Parallel Citations

32 Fla. L. Weekly D2397, 35 Media L. Rep. 2357, 42 Communications Reg. (P&F) 1211

ORFINGER and EVANDER, JJ., concur.

Footnotes

1 For this reason, we reject Appellee's threshold argument that Appellant's failure to provide a transcript of the hearing precludes any challenge to the injunction. *Hoelzle v. Shapiro,* 736 So.2d 1207 (Fla. 1st DCA 1999).

2 We have not overlooked Appellee's argument that this is not a pure speech case, but instead a conduct case. This argument seems to contradict Appellee's concession that the prior restraint analysis is appropriate here. *See Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 764, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (finding that injunction prohibiting conduct not subject to prior restraint analysis). Nevertheless, we reject Appellee's attempt to characterize this case as anything other than a pure speech case. The injunction prohibits the publication of information already in the possession of Appellant. As such, it operates to restrain pure speech, not conduct, as Appellee urges.

3 Appellant dismisses *Wolfson* as a conduct case. We agree that the injunction pertained solely to conduct. Therefore, the *Wolfson* court's prior restraint analysis was unnecessary to its conclusion. By citation to *Wolfson,* we do not suggest that we would endorse its analysis and conclusion in a pure speech case such as this.

4 Although not central to our holding, we reject Appellee's claim that his privacy interest is grounded in either the state or federal constitutions, which pertain only to governmental intrusions into private affairs.

5 Although the trial judge cited the statutory attorney-client privilege and the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (1996) ("HIPAA") in his order, Appellee does not specifically argue these issues on appeal and they would not justify the injunction in any event. The attorney-client privilege is an evidentiary privilege, which does not prohibit the publication at issue here. We are not dealing with a situation wherein Appellee claims that the disclosure might jeopardize his right to a fair trial in a criminal proceeding. *See, e.g., United States v. Noriega,* 752 F.Supp. 1045 (S.D.Fla.1990) (noting injunction against publication of protected communications might be appropriate to protect accused right to fair trial in criminal prosecution); *State–Record Co., Inc. v. State,* 332 S.C. 346, 504 S.E.2d 592 (1998) (upholding prior restraint to protect fundamental right to fair trial). As to the HIPAA laws, they do not protect against the disclosure of medical records in the circumstances presented here.

We have not overlooked the issue of ownership of the documents. Based on the state of the record, we assume for the sake of argument, that the storage company did not have legal authority to auction the documents. We further assume that Appellee has made a colorable claim to ownership of the records. Appellee has not shown that Appellant engaged in unlawful conduct to obtain possession of the records, however, and an ownership interest in the records, standing alone, would not justify an injunction against publication. *New York Times Co.,* 403 U.S. 713, 91 S.Ct. 2140.

6 We are not unmindful of the practical dilemma faced by Appellee and his counsel. Because Appellant had the records in its possession, the burden of proof was made more difficult, especially given the urgency of the proceedings. We note that Appellee made no attempt to seek in camera inspection of the documents or offer secondary evidence of the contents of the records. Nevertheless, the burden to justify this extraordinary relief was on Appellee and did not shift to Appellant merely because it possessed the documents.

109 S.Ct. 2603
Supreme Court of the United States

THE FLORIDA STAR, Appellant
v.
B.J.F.

No. 87-329. | Argued March 21, 1989. | Decided June 21, 1989.

Rape victim brought suit against newspaper for publishing her name which it had obtained from a publicly released police report. The Circuit Court, Duval County, John S. Cox, J., awarded compensatory and punitive damages, and newspaper appealed. The District Court of Appeal of Florida, First District, 499 So.2d 883, affirmed, and newspaper appealed. The Supreme Court, Justice Marshall, held that imposing damages on newspaper violated First Amendment.

Reversed.

Justice Scalia filed opinion concurring in part and concurring in the judgment.

Justice White filed dissenting opinion in which Chief Justice Rehnquist and Justice O'Connor joined.

West Headnotes (2)

[1] **Constitutional Law**
Press in General
Torts
Defenses in General

Imposing damages on newspaper for publishing name of rape victim which had been obtained from publicly released police report, in violation of Florida statute and newspaper's own internal policy did not comport with First Amendment; information was obtained lawfully, identification of victim was accurate and imposing liability did not serve need to further a state interest of the highest order. West's F.S.A. §§ 119.07(3)(h), 794.03; U.S.C.A. Const.Amend. 1.

169 Cases that cite this headnote

[2] **Constitutional Law**
Press in General

Where newspaper publishes truthful information which it has lawfully obtained, damages may be imposed on newspaper only when narrowly tailored to state interest of the highest order. West's F.S.A. § 794.03; U.S.C.A. Const.Amend. 1.

112 Cases that cite this headnote

****2604 *Syllabus*[*]**

***524** Appellant, The Florida Star, is a newspaper which publishes a "Police Reports" section containing brief articles describing local criminal incidents under police investigation. After appellee B.J.F. reported to the Sheriff's Department (Department) that she had been robbed and sexually assaulted, the Department prepared a report, which identified B.J.F. by her full name, and placed it in the Department's press room. The Department does not restrict access to the room or to the reports available there. A Star reporter-trainee sent to the press room copied the police report verbatim, including B.J.F.'s full name. Consequently, her name was included in a "Police Reports" story in the paper, in violation of the Star's internal policy. Florida Stat. § 794.03 makes it unlawful to "print, publish, or broadcast ... in any instrument of mass communication" the name of the victim of a sexual offense. B.J.F. filed suit in a Florida court alleging, *inter alia*, that the Star had negligently violated § 794.03. The trial court denied the Star's motion to dismiss, which claimed, among other things, that imposing civil sanctions on the newspaper pursuant to § 794.03 violated the First Amendment. However, it granted B.J.F.'s motion for a directed verdict on the issue of negligence, finding the Star *per se* negligent based on its violation of § 794.03. The jury then awarded B.J.F. both compensatory and punitive damages. The verdict was upheld on appeal.

Held: Imposing damages on the Star for publishing B.J.F.'s name violates the First Amendment. Pp. 2606-2613.

(a) The sensitivity and significance of the interests presented in clashes between First Amendment and

privacy rights counsels the Court to rely on limited principles that sweep no more broadly than the appropriate context of the instant case, rather than to accept invitations to hold broadly that truthful publication may never be punished consistent with the First Amendment or that publication of a rape victim's name never enjoys constitutional protection. One such principle is that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103, 99 S.Ct. 2667, 2670-71, 61 L.Ed.2d 399. ***525** Applied to the instant case, the *Daily Mail* principle commands reversal. Pp. 2606-2611.

(b) The Star "lawfully obtain[ed] truthful information." The actual news article was accurate, and the Star lawfully obtained B.J.F.'s name from the government. The fact that state officials are not required to disclose such reports or that the Sheriff's Department apparently failed to fulfill its § 794.03 obligation not to cause or allow B.J.F.'s name to be published does not make it unlawful for the Star to have received the information, and Florida has taken no steps to proscribe such receipt. The government has ample means to safeguard the information that are less drastic than punishing truthful publication. Furthermore, it is clear that the news article generally, as opposed to the specific identity contained in it, involved "a matter of public significance": the commission, and investigation, of a violent crime that had been reported to authorities. Pp. 2610-2611.

****2605** (c) Imposing liability on the Star does not serve "a need to further a state interest of the highest order." Although the interests in protecting the privacy and safety of sexual assault victims and in encouraging them to report offenses without fear of exposure are highly significant, imposing liability on the Star in this case is too precipitous a means of advancing those interests. Since the Star obtained the information because the Sheriff's Department failed to abide by § 794.03's policy, the imposition of damages can hardly be said to be a narrowly tailored means of safeguarding anonymity. Self-censorship is especially likely to result from imposition of liability when a newspaper gains access to the information from a government news release. Moreover, the negligence *per se* standard adopted by the courts below does not permit case-by-case findings that the disclosure was one a reasonable person would find offensive and does not have a scienter requirement of any kind. In addition, § 794.03's facial underinclusiveness-which prohibits publication only by an "instrument of mass communication" and does not prohibit the spread of victims' names by other means-raises serious doubts about whether Florida is serving the interests specified by B.J.F. A State must demonstrate its commitment to the extraordinary measure of punishing truthful publication in the name of privacy by applying its prohibition evenhandedly to both the smalltime disseminator and the media giant. Pp. 2611-2613.

499 So.2d 883 (Fla.App.1986), reversed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, STEVENS, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 2613. ***526** WHITE, J., filed a dissenting opinion, in which REHNQUIST, C.J., and O'CONNOR, J., joined, *post*, p. 2614.

Attorneys and Law Firms

George K. Rahdert argued the cause and filed briefs for appellant.

Joel D. Eaton argued the cause and filed a brief for appellee.*

* Briefs of *amici curiae* urging reversal were filed for the American Newspaper Publishers Association et al. by *Richard J. Ovelmen, W. Terry Maguire, Gary B. Pruitt, Paul J. Levine, Laura Besvinisk,* and *Gregg D. Thomas;* and for the Reporters Committee for Freedom of the Press et al. by *Jane E. Kirtley, Robert J. Brinkmann,* and *J. Laurent Scharff.*

Ronald A. Zumbrun and *Anthony T. Caso* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging affirmance.

Opinion

Justice MARSHALL delivered the opinion of the Court.

Florida Stat. § 794.03 (1987) makes it unlawful to "print, publish, or broadcast ... in any instrument of mass communication" the name of the victim of a sexual offense.[1] Pursuant to this statute, appellant The Florida Star was found civilly liable for publishing the name of a rape victim which it had obtained from a publicly released police report. The issue presented here is whether this result comports with the First Amendment. We hold that it does not.

I

The Florida Star is a weekly newspaper which serves the community of Jacksonville, Florida, and which has an average circulation of approximately 18,000 copies. A regular feature of the newspaper is its "Police Reports" section. ***527** That section, typically two to three pages in length, contains brief articles describing local criminal incidents under police investigation.

On October 20, 1983, appellee B.J.F.[2] reported to the Duval County, Florida, Sheriff's Department (Department) that she had been robbed and sexually assaulted by an unknown assailant. The Department prepared ****2606** a report on the incident which identified B.J.F. by her full name. The Department then placed the report in its pressroom. The Department does not restrict access either to the pressroom or to the reports made available therein.

A Florida Star reporter-trainee sent to the pressroom copied the police report verbatim, including B.J.F.'s full name, on a blank duplicate of the Department's forms. A Florida Star reporter then prepared a one-paragraph article about the crime, derived entirely from the trainee's copy of the police report. The article included B.J.F.'s full name. It appeared in the "Robberies" subsection of the "Police Reports" section on October 29, 1983, one of 54 police blotter stories in that day's edition. The article read:

> "[B.J.F.] reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, enroute to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch and gold necklace. Patrol efforts have been suspended concerning this incident because of a lack of evidence."

***528** In printing B.J.F.'s full name, The Florida Star violated its internal policy of not publishing the names of sexual offense victims.

On September 26, 1984, B.J.F. filed suit in the Circuit Court of Duval County against the Department and The Florida Star, alleging that these parties negligently violated § 794.03. See n. 1, *supra*. Before trial, the Department settled with B.J.F. for $2,500. The Florida Star moved to dismiss, claiming, *inter alia*, that imposing civil sanctions on the newspaper pursuant to § 794.03 violated the First Amendment. The trial judge rejected the motion. App. 4.

At the ensuing daylong trial, B.J.F. testified that she had suffered emotional distress from the publication of her name. She stated that she had heard about the article from fellow workers and acquaintances; that her mother had received several threatening phone calls from a man who stated that he would rape B.J.F. again; and that these events had forced B.J.F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling. In defense, The Florida Star put forth evidence indicating that the newspaper had learned B.J.F.'s name from the incident report released by the Department, and that the newspaper's violation of its internal rule against publishing the names of sexual offense victims was inadvertent.

At the close of B.J.F.'s case, and again at the close of its defense, The Florida Star moved for a directed verdict. On both occasions, the trial judge denied these motions. He ruled from the bench that § 794.03 was constitutional because it reflected a proper balance between the First Amendment and privacy rights, as it applied only to a narrow set of "rather sensitive ... criminal offenses." App. 18-19 (rejecting first motion); see *id.*, at 32-33 (rejecting second motion). At the close of the newspaper's defense, the judge granted B.J.F.'s motion for a directed verdict on the issue of negligence, finding the newspaper *per se* negligent based upon its ***529** violation of § 794.03. *Id.*, at 33. This ruling left the jury to consider only the questions of causation and damages. The judge instructed the jury that it could award B.J.F. punitive damages if it found that the newspaper had "acted with reckless indifference to the rights of others." *Id.*, at 35. The jury awarded B.J.F. $75,000 in compensatory damages and $25,000 in punitive damages. Against the actual damages award, the judge set off B.J.F.'s settlement with the Department.

****2607** The First District Court of Appeal affirmed in a three-paragraph *per curiam* opinion. 499 So.2d 883 (1986). In the paragraph devoted to The Florida Star's First Amendment claim, the court stated that the directed verdict for B.J.F. had been properly entered because, under § 794.03, a rape victim's name is "of a private nature and not to be published as a matter of law." *Id.*, at 884, citing *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So.2d 328, 330 (Fla.App.1983) (footnote omitted).[3] The Supreme Court of Florida denied discretionary review.

The Florida Star appealed to this Court.[4] We noted probable jurisdiction, 488 U.S. 887, 109 S.Ct. 216, 102 L.Ed.2d 208 (1988), and now reverse.

***530 II**

The tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other, is a subject we have addressed several times in recent years. Our decisions in cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy, have not, however, exhaustively considered this conflict. On the contrary, although our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context.[5]

The parties to this case frame their contentions in light of a trilogy of cases which have presented, in different contexts, the conflict between truthful reporting and state-protected privacy interests. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), we found unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim which the station had obtained from courthouse records. In *Oklahoma Publishing* ***531** *Co. v. Oklahoma County* ****2608** *District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977), we found unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an 11-year-old boy in connection with a juvenile proceeding involving that child which reporters had attended. Finally, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979), we found unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender. The papers had learned about a shooting by monitoring a police band radio frequency and had obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor.

Appellant takes the position that this case is indistinguishable from *Cox Broadcasting*. Brief for Appellant 8. Alternatively, it urges that our decisions in the above trilogy, and in other cases in which we have held that the right of the press to publish truth overcame asserted interests other than personal privacy,[6] can be distilled to yield a broader First Amendment principle that the press may never be punished, civilly or criminally, for publishing the truth. *Id.*, at 19. Appellee counters that the privacy trilogy is inapposite, because in each case the private information already appeared on a "public record," Brief for Appellee 12, 24, 25, and because the privacy interests at stake were far less profound than in the present case. See, *e.g.*, *id.*, at 34. In the alternative, appellee urges that *Cox Broadcasting* be overruled and replaced with a categorical rule that publication of the ***532** name of a rape victim never enjoys constitutional protection. Tr. of Oral Arg. 44.

[1] We conclude that imposing damages on appellant for publishing B.J.F.'s name violates the First Amendment, although not for either of the reasons appellant urges. Despite the strong resemblance this case bears to *Cox Broadcasting*, that case cannot fairly be read as controlling here. The name of the rape victim in that case was obtained from courthouse records that were open to public inspection, a fact which Justice WHITE's opinion for the Court repeatedly noted. 420 U.S., at 492, 95 S.Ct., at 1044-45 (noting "special protected nature of accurate reports of *judicial* proceedings") (emphasis added); see also *id.*, at 493, 496, 95 S.Ct., at 1045, 1046-47. Significantly, one of the reasons we gave in *Cox Broadcasting* for invalidating the challenged damages award was the important role the press plays in subjecting trials to public scrutiny and thereby helping guarantee their fairness. *Id.*, at 492-493, 95 S.Ct., at 1044-1045.[7] That role is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.

Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the ****2609** First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. See, *e.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) (hypothesizing "publication of the sailing dates of transports or the number and location of troops"); see also ***533** *Garrison v. Louisiana*, 379 U.S. 64, 72, n. 8, 74, 85 S.Ct. 209, 215, n. 8, 216, 13 L.Ed.2d 125 (1964) (endorsing absolute defense of truth "where discussion of public affairs is concerned," but leaving unsettled the constitutional implications of truthfulness "in the discrete area of purely private libels"); *Landmark Communications, Inc. v.*

Virginia, 435 U.S. 829, 838, 98 S.Ct. 1535, 1541, 56 L.Ed.2d 1 (1978); *Time, Inc. v. Hill*, 385 U.S. 374, 383, n. 7, 87 S.Ct. 534, 539-40, n. 7, 17 L.Ed.2d 456 (1967). Indeed, in *Cox Broadcasting*, we pointedly refused to answer even the less sweeping question "whether truthful publications may ever be subjected to civil or criminal liability" for invading "an area of privacy" defined by the State. 420 U.S., at 491, 95 S.Ct., at 1044. Respecting the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society," we instead focused on the less sweeping issue "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records-more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." *Ibid.* We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

In our view, this case is appropriately analyzed with reference to such a limited First Amendment principle. It is the one, in fact, which we articulated in *Daily Mail* in our synthesis of prior cases involving attempts to punish truthful publication: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S., at 103, 99 S.Ct., at 2671. According the press the ample protection provided by that principle is supported by at least three separate considerations, in addition to, of course, the overarching " 'public interest, secured by the Constitution, in the dissemination of truth.' " *Cox Broadcasting*, ***534** *supra*, 420 U.S., at 491, 95 S.Ct., at 1044, quoting *Garrison, supra*, 379 U.S., at 73, 85 S.Ct., at 215 (footnote omitted). The cases on which the *Daily Mail* synthesis relied demonstrate these considerations.

First, because the *Daily Mail* formulation only protects the publication of information which a newspaper has "lawfully obtain[ed]," 443 U.S., at 103, 99 S.Ct., at 2671, the government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity. To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired. To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts. See, *e.g.*, *Landmark Communications, supra*, 435 U.S., at 845, 98 S.Ct., at 1545 ("[M]uch of the risk [from disclosure of sensitive information regarding ****2610** judicial disciplinary proceedings] can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings"); *Oklahoma Publishing*, 430 U.S., at 311, 97 S.Ct., at 1046-47 (noting trial judge's failure to avail himself of the opportunity, provided by a state statute, to close juvenile hearing to the public, including members of the press, who later broadcast juvenile defendant's name); *Cox Broadcasting, supra*, 420 U.S., at 496, 95 S.Ct., at 1047 ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which ***535** avoid public documentation or other exposure of private information").[8]

A second consideration undergirding the *Daily Mail* principle is the fact that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act. It is not, of course, always the case that information lawfully acquired by the press is known, or accessible, to others. But where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release. We noted this anomaly in *Cox Broadcasting:* "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." 420 U.S., at 495, 95 S.Ct., at 1046. The *Daily Mail* formulation reflects the fact that it is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities, like the press. As *Daily Mail* observed in its summary of *Oklahoma Publishing*, "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." 443 U.S., at 103, 99 S.Ct., at 2671.

A third and final consideration is the "timidity and self-censorship" which may result from allowing the media to be punished for publishing certain truthful information. *Cox Broadcasting, supra*, 420 U.S., at 496, 95 S.Ct., at 1046-47. *Cox Broadcasting* noted this concern

with overdeterrence in the context of information made public through official court records, but the fear of excessive ***536** media self-suppression is applicable as well to other information released, without qualification, by the government. A contrary rule, depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object was to reproduce, with no substantial change, the government's rendition of the event in question.

Applied to the instant case, the *Daily Mail* principle clearly commands reversal. The first inquiry is whether the newspaper "lawfully obtain[ed] truthful information about a matter of public significance." 443 U.S., at 103, 99 S.Ct., at 2671. It is undisputed that the news article describing the assault on B.J.F. was accurate. In addition, appellant lawfully obtained B.J.F.'s name. Appellee's argument to the contrary is based on the fact that under Florida law, police reports which reveal the identity of the victim of a sexual offense are not among the matters of "public record" which the public, by law, is entitled to inspect. Brief for Appellee 17-18, citing Fla.Stat. § 119.07(3)(h) (1983). But the fact that state officials are not required to disclose ****2611** such reports does not make it unlawful for a newspaper to receive them when furnished by the government. Nor does the fact that the Department apparently failed to fulfill its obligation under § 794.03 not to "cause or allow to be ... published" the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful. Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step. It is, clear, furthermore, that the news article concerned "a matter of public significance," 443 U.S., at 103, 99 S.Ct., at 2671, in the sense in which the *Daily Mail* synthesis of prior cases used that term. That is, the article generally, as opposed to the specific identity contained within it, involved a ***537** matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities. See *Cox Broadcasting*, *supra* (article identifying victim of rape-murder); *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) (article identifying juvenile alleged to have committed murder); *Daily Mail*, *supra* (same); cf. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (article identifying judges whose conduct was being investigated).

The second inquiry is whether imposing liability on appellant pursuant to § 794.03 serves "a need to further a state interest of the highest order." *Daily Mail*, 443 U.S., at 103, 99 S.Ct., at 2671. Appellee argues that a rule punishing publication furthers three closely related interests: the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure. Brief for Appellee 29-30.

At a time in which we are daily reminded of the tragic reality of rape, it is undeniable that these are highly significant interests, a fact underscored by the Florida Legislature's explicit attempt to protect these interests by enacting a criminal statute prohibiting much dissemination of victim identities. We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the *Daily Mail* standard. For three independent reasons, however, imposing liability for publication under the circumstances of this case is too precipitous a means of advancing these interests to convince us that there is a "need" within the meaning of the *Daily Mail* formulation for Florida to take this extreme step. Cf. *Landmark Communications*, *supra* (invalidating penalty on publication despite State's expressed interest in nondissemination, ***538** reflected in statute prohibiting unauthorized divulging of names of judges under investigation).

First is the manner in which appellant obtained the identifying information in question. As we have noted, where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. That assumption is richly borne out in this case. B.J.F.'s identity would never have come to light were it not for the erroneous, if inadvertent, inclusion by the Department of her full name in an incident report made available in a pressroom open to the public. Florida's policy against disclosure of rape victims' identities, reflected in § 794.03, was undercut by the Department's failure to abide by this policy. Where, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding

anonymity. See *supra*, at 2609. Once the government has placed ****2612** such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," *Cox Broadcasting*, 420 U.S., at 496, 95 S.Ct., at 1047, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.

That appellant gained access to the information in question through a government news release makes it especially likely that, if liability were to be imposed, self-censorship would result. Reliance on a news release is a paradigmatically "routine newspaper reporting techniqu[e]." *Daily Mail*, *supra*, at 103, 99 S.Ct., at 2671. The government's issuance of such a release, without qualification, can only convey to recipients that the ***539** government considered dissemination lawful, and indeed expected the recipients to disseminate the information further. Had appellant merely reproduced the news release prepared and released by the Department, imposing civil damages would surely violate the First Amendment. The fact that appellant converted the police report into a news story by adding the linguistic connecting tissue necessary to transform the report's facts into full sentences cannot change this result.

A second problem with Florida's imposition of liability for publication is the broad sweep of the negligence *per se* standard applied under the civil cause of action implied from § 794.03. Unlike claims based on the common law tort of invasion of privacy, see Restatement (Second) of Torts § 652D (1977), civil actions based on § 794.03 require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive. On the contrary, under the *per se* theory of negligence adopted by the courts below, liability follows automatically from publication. This is so regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern-because, perhaps, questions have arisen whether the victim fabricated an assault by a particular person. Nor is there a scienter requirement of any kind under § 794.03, engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures, where liability is evaluated under a standard, usually applied by a jury, of ordinary negligence. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). We have previously noted the impermissibility of categorical prohibitions upon media access where important First Amendment interests are at stake. See *Globe* ***540** *Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 608, 102 S.Ct. 2613, 2620-21, 73 L.Ed.2d 248 (1982) (invalidating state statute providing for the categorical exclusion of the public from trials of sexual offenses involving juvenile victims). More individualized adjudication is no less indispensable where the State, seeking to safeguard the anonymity of crime victims, sets its face against publication of their names.

Third, and finally, the facial underinclusiveness of § 794.03 raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance. Section 794.03 prohibits the publication of identifying information only if this information appears in an "instrument of mass communication," a term the statute does not define. Section 794.03 does not prohibit the spread by other means of the identities of victims of sexual offenses. An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may ****2613** have consequences as devastating as the exposure of her name to large numbers of strangers. See Tr. of Oral Arg. 49-50 (appellee acknowledges that § 794.03 would not apply to "the backyard gossip who tells 50 people that don't have to know").

When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant. Where important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury. A ban on disclosures effected by "instrument [s] of mass communication" simply cannot be defended on the ground that partial prohibitions may effect partial relief. See *Daily Mail*, 443 U.S., at 104-105, 99 S.Ct., at 2671-2672 (statute is insufficiently tailored to interest in protecting anonymity where it restricted only newspapers, not ***541** the electronic media or other forms of publication, from identifying juvenile defendants); *id.*, at 110, 99 S.Ct., at 2674-75 (REHNQUIST, J., concurring in judgment) (same); cf. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S.Ct. 1722, 1727-1728, 95 L.Ed.2d 209 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 103 S.Ct. 1365, 1371-72, 75 L.Ed.2d 295 (1983). Without

more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose.[9]

III

[2] Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under § 794.03 to appellant under the facts of this case. The decision below is therefore

Reversed.

Justice SCALIA, concurring in part and concurring in the judgment.

I think it sufficient to decide this case to rely upon the third ground set forth in the Court's opinion, *ante*, at 15-16: that a law cannot be regarded as protecting an interest ***542** "of the highest order," *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103, 99 S.Ct. 2667, 2670-71, 61 L.Ed.2d 399 (1979), and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited. In the present case, I would anticipate that the rape victim's discomfort at the dissemination of news of her misfortune among friends and acquaintances would be at least as great as her discomfort at its publication by the media to people to whom she is only a name. Yet the law in question does not prohibit the former in either oral or written form. Nor is it at all clear, as I think it must be to validate this statute, that Florida's general privacy law would prohibit such gossip. Nor, finally, is it credible that the interest meant to be served by the statute is the protection of the victim against a rapist still at large-an interest that arguably would extend only to mass publication. There would be little reason to limit a statute with that objective to rape alone; or to extend it to all rapes, whether or not the felon has been apprehended and confined. In any case, the instructions here did not ****2614** require the jury to find that the rapist was at large. This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest "of the highest order." For that reason, I agree that the judgment of the court below must be reversed.

Justice WHITE, with whom THE CHIEF JUSTICE and Justice O'CONNOR join, dissenting.

"Short of homicide, [rape] is the 'ultimate violation of self.' " *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 2869, 53 L.Ed.2d 982 (1977) (opinion of WHITE, J.). For B.J.F., however, the violation she suffered at a rapist's knifepoint marked only the beginning of her ordeal. A week later, while her assailant was still at large, an account of this assault-identifying by name B.J.F. as the victim-was published by The Florida Star. As a result, B.J.F. received harassing phone calls, required mental health counseling, was forced to move from ***543** her home, and was even threatened with being raped again. Yet today, the Court holds that a jury award of $75,000 to compensate B.J.F. for the harm she suffered due to the Star's negligence is at odds with the First Amendment. I do not accept this result.

The Court reaches its conclusion based on an analysis of three of our precedents and a concern with three particular aspects of the judgment against appellant. I consider each of these points in turn, and then consider some of the larger issues implicated by today's decision.

I

The Court finds its result compelled, or at least supported in varying degrees, by three of our prior cases: *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977); and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). I disagree. None of these cases requires the harsh outcome reached today.

Cox Broadcasting reversed a damages award entered against a television station, which had obtained a rape victim's name from public records maintained in connection with the judicial proceedings brought against her assailants. While there are similarities, critical aspects of that case make it wholly distinguishable from this one.

First, in *Cox Broadcasting*, the victim's name had been disclosed in the hearing where her assailants pleaded guilty; and, as we recognized, judicial records have always been considered public information in this country. See *Cox Broadcasting, supra,* 420 U.S., at 492-493, 95 S.Ct., at 1044-1045. In fact, even the earliest notion of privacy rights exempted the information contained in judicial records from its protections. See Warren & Brandeis, The Right to Privacy, 4 Harv.L.Rev. 193, 216-217 (1890). Second, unlike the incident report at issue here, which was meant by state law to be withheld from public release, the judicial proceedings ***544** at issue in *Cox Broadcasting* were open as a matter of state law. Thus, in *Cox Broadcasting*, the state-law scheme made public disclosure of the victim's name almost inevitable; here, Florida law forbids such disclosure. See Fla.Stat. § 794.03 (1987).

These facts-that the disclosure came in judicial proceedings, which were open to the public-were critical to our analysis in *Cox Broadcasting*. The distinction between that case and this one is made obvious by the penultimate paragraph of *Cox Broadcasting:*

> "We are reluctant to embark on a course that would make *public records generally available to the media* but would forbid their publication if offensive.... [T]he First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information *released to the public in official court records. If there are privacy interests to be protected in judicial* ****2615** *proceedings, the States must respond by means which avoid public documentation or other exposure of private information....* Once true information is disclosed in *public court documents open to public inspection*, the press cannot be sanctioned for publishing it." *Cox Broadcasting, supra,* at 496, 95 S.Ct., at 1047 (emphasis added).

Cox Broadcasting stands for the proposition that the State cannot make the press its first line of defense in withholding private information from the public-it cannot ask the press to secrete private facts that the State makes no effort to safeguard in the first place. In this case, however, the State has undertaken "means which avoid [but obviously, not altogether prevent] public documentation or other exposure of private information." No doubt this is why the Court frankly admits that "*Cox Broadcasting* ... cannot fairly be read as controlling here." *Ante,* at 2608.

Finding *Cox Broadcasting* inadequate to support its result, the Court relies on *Smith v. Daily Mail Publishing Co.* as its ***545** principal authority.[1] But the flat rule from *Daily Mail* on which the Court places so much reliance-"[I]f a newspaper lawfully obtains truthful information ... then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"-was introduced in *Daily Mail* with the cautious qualifier that such a rule was "suggest[ed]" by our prior cases, "[n]one of [which] ... directly control[led]" in *Daily Mail.* See *Daily Mail,* 443 U.S., at 103, 99 S.Ct., at 2671. The rule the Court takes as a given was thus offered only as a hypothesis in *Daily Mail:* it should not be so uncritically accepted as constitutional dogma.

More importantly, at issue in *Daily Mail* was the disclosure of the name of the perpetrator of an infamous murder of a 15-year-old student. *Id.,* at 99, 99 S.Ct., at 2668-69. Surely the rights of those accused of crimes and those who are their victims must differ with respect to privacy concerns. That is, whatever rights alleged criminals have to maintain their anonymity pending an adjudication of guilt-and after *Daily Mail,* those rights would seem to be minimal-the rights of crime victims to stay shielded from public view must be infinitely more substantial. *Daily Mail* was careful to state that the "holding in this case is narrow.... *there is no issue here of privacy.*" *Id.,* at 105, 99 S.Ct., at 2672 (emphasis added). But in this case, there is an issue of privacy-indeed, that is the principal issue-and therefore, this case falls outside of *Daily Mail's* "rule" ***546** which, as I suggest above, was perhaps not even meant as a rule in the first place).

Consequently, I cannot agree that *Cox Broadcasting,* or *Oklahoma Publishing,* or *Daily Mail* requires-or even substantially supports-the result reached by the Court today.

II

We are left, then, to wonder whether the three "independent reasons" the Court cites for reversing the judgment for B.J.F. support its result. See *ante,* at 2611-2613.

The first of these reasons relied on by the Court is the fact "appellant gained access to [B.J.F.'s name] through a government news release." *Ante,* at 2612. "The government's issuance of such a release, without qualification, can only convey to recipients that the government considered dissemination lawful," the Court suggests. *Ibid.* So described, this case begins to look like the situation in *Oklahoma Publishing,* ****2616** where a judge invited reporters into his courtroom, but then tried to prohibit them from reporting on the proceedings they

observed. But this case is profoundly different. Here, the "release" of information provided by the government was not, as the Court says, "without qualification." As the Star's own reporter conceded at trial, the crime incident report that inadvertently included B.J.F.'s name was posted in a room that contained signs making it clear that the names of rape victims were not matters of public record, and were not to be published. See 2 Record 113, 115, 117. The Star's reporter indicated that she understood that she "[was not] allowed to take down that information" (*i.e.*, B.J.F.'s name) and that she "[was] not supposed to take the information from the police department." *Id.*, at 117. Thus, by her own admission the posting of the incident report did not convey to the Star's reporter the idea that "the government considered dissemination lawful"; the Court's suggestion to the contrary is inapt.

***547** Instead, Florida has done precisely what we suggested, in *Cox Broadcasting*, that States wishing to protect the privacy rights of rape victims might do: "respond [to the challenge] by means which *avoid* public documentation or other exposure of private information." 420 U.S., at 496, 95 S.Ct., at 1047 (emphasis added). By amending its public records statute to exempt rape victims names from disclosure, Fla.Stat. § 119.07(3)(h) (1983), and forbidding its officials to release such information, Fla.Stat. § 794.03 (1983), the State has taken virtually every step imaginable to prevent what happened here. This case presents a far cry, then, from *Cox Broadcasting* or *Oklahoma Publishing*, where the State asked the news media not to publish information it had made generally available to the public: here, the State is not asking the media to do the State's job in the first instance. Unfortunately, as this case illustrates, mistakes happen: even when States take measures to "avoid" disclosure, sometimes rape victims' names are found out. As I see it, it is not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victims' name, address, and/or phone number.[2]

***548** Second, the Court complains that appellant was judged here under too strict a liability standard. The Court contends that a newspaper might be found liable under the Florida courts' negligence *per se* theory without regard to a newspaper's scienter or degree of fault. *Ante*, at 2612. The short answer to this complaint is that whatever merit the Court's argument might have, it is wholly inapposite here, where the jury found that appellant acted with "reckless indifference towards the rights of others," 2 Record 170, a standard far higher than the *Gertz* standard the Court urges as a constitutional minimum today. *Ante*, at 2612. B.J.F. proved the Star's negligence at trial-and, actually, far more than simple negligence; the Court's concerns about damages resting on a strict liability or mere causation basis are irrelevant to the validity of the judgment for appellee.

****2617** But even taking the Court's concerns in the abstract, they miss the mark. Permitting liability under a negligence *per se* theory does not mean that defendants will be held liable without a showing of negligence, but rather, that the standard of care has been set by the legislature, instead of the courts. The Court says that negligence *per se* permits a plaintiff to hold a defendant liable without a showing that the disclosure was "of a fact about a person's private life ... that a reasonable person would find highly offensive." *Ibid.* But the point here is that the legislature-reflecting popular sentiment-has determined that disclosure of the fact that a person was raped is categorically a revelation that reasonable people find offensive. And as for the Court's suggestion that the Florida courts' theory permits liability without regard for whether the victim's identity is already ***549** known, or whether she herself has made it known-these are facts that would surely enter into the calculation of damages in such a case. In any event, none of these mitigating factors was present here; whatever the force of these arguments generally, they do not justify the Court's ruling against B.J.F. in this case.

Third, the Court faults the Florida criminal statute for being underinclusive: § 794.03 covers disclosure of rape victims' names in " 'instrument[s] of mass communication,' " but not other means of distribution, the Court observes. *Ante*, at 2612-2613. But our cases which have struck down laws that limit or burden the press due to their underinclusiveness have involved situations where a legislature has singled out one segment of the news media or press for adverse treatment, see, *e.g.*, *Daily Mail* (restricting newspapers and not radio or television), or singled out the press for adverse treatment when compared to other similarly situated enterprises, see, *e.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 578, 103 S.Ct. 1365, 1368, 75 L.Ed.2d 295 (1983). Here, the Florida law evenhandedly covers all "instrument[s] of mass communication" no matter their form, media, content, nature, or purpose. It excludes neighborhood gossips, cf. *ante*, at 2612-2613, because presumably the Florida Legislature has determined that neighborhood gossips do not pose the danger and intrusion to rape victims that "instrument[s] of mass communication" do. Simply put: Florida wanted to prevent the widespread distribution of rape victims' names, and therefore enacted a statute tailored almost as precisely as possible to achieving that end.

Moreover, the Court's "underinclusiveness" analysis itself is "underinclusive." After all, the lawsuit against the Star which is at issue here is not an action for violating the statute which the Court deems underinclusive, but is, more accurately, for the negligent publication of appellee's name. See App. to Juris. Statement A10. The scheme which the Court should review, then, is not only § 794.03 (which, as ***550** noted above, merely provided the standard of care in this litigation), but rather, the whole of Florida privacy tort law. As to the latter, Florida does recognize a tort of publication of private facts.[3] Thus, it is quite possible that the neighborhood gossip whom the Court so fears being left scot free to spread news of a rape victim's identity would be subjected to the same (or similar) liability regime under which appellant was taxed. The Court's myopic focus on § 794.03 ignores the probability that Florida law is more comprehensive than the Court gives it credit for being.

Consequently, neither the State's "dissemination" of B.J.F.'s name, nor the standard of liability imposed here, nor the underinclusiveness of Florida tort law requires setting aside the verdict for B.J.F. And as noted above, such a result is not compelled by our cases. I turn, therefore, to the more general principles at issue here ****2618** to see if they recommend the Court's result.

III

At issue in this case is whether there is any information about people, which-though true-may not be published in the press. By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation, see Tr. of Oral Arg. 10-11, to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. W. Prosser, J. Wade, & V. Schwartz, Torts 951-952 (8th ed. 1988). Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons ***551** (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television.[4]

Of course, the right to privacy is not absolute. Even the article widely relied upon in cases vindicating privacy rights, Warren & Brandeis, The Right to Privacy, 4 Harv.L.Rev. 193 (1890), recognized that this right inevitably conflicts with the public's right to know about matters of general concern-and that sometimes, the latter must trump the former. *Id.*, at 214-215. Resolving this conflict is a difficult matter, and I fault the Court not for attempting to strike an appropriate balance between the two, but rather, fault it for according too little weight to B.J.F.'s side of equation, and too much on the other.

***552** I would strike the balance rather differently. Writing for the Ninth Circuit, Judge Merrill put this view eloquently:

> "Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellowmen? In our view it does not. In our view, fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable. The public's right to know is, then, subject to reasonable limitations so far as concerns the private facts of its individual members." *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (1975), cert. denied, 425 U.S. 998, 96 S.Ct. 2215, 48 L.Ed.2d 823 (1976).

Ironically, this Court, too, had occasion to consider this same balance just a few weeks ago, in *United States Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). There, we were faced with a press request, under the Freedom of Information Act, for a "rap sheet" on a person accused of bribing a Congressman-presumably, a person ****2619** whose privacy rights would be far less than B.J.F.'s. Yet this Court rejected the media's request for disclosure of the "rap sheet," saying:

> "The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the government is up to,' the privacy interest ... is ... at its apex while the ... public interest in disclosure is at its nadir." *Id.*, at 780, 109 S.Ct., at 1485.

The Court went on to conclude that disclosure of rap sheets "categorical[ly]" constitutes an "unwarranted" invasion of privacy. *Ibid.* The same surely must be true-indeed, much more so-for the disclosure of a rape victim's name.

I do not suggest that the Court's decision today is a radical departure from a previously charted course. The Court's ***553** ruling has been foreshadowed. In *Time, Inc.*

v. Hill, 385 U.S. 374, 383-384, n. 7, 87 S.Ct. 534, 539-540, n. 7, 17 L.Ed.2d 456 (1967), we observed that-after a brief period early in this century where Brandeis' view was ascendant-the trend in "modern" jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish. More recently, in *Cox Broadcasting*, 420 U.S. at 491, 95 S.Ct., at 1044, we acknowledged the possibility that the First Amendment may prevent a State from ever subjecting the publication of truthful but private information to civil liability. Today, we hit the bottom of the slippery slope.

I would find a place to draw the line higher on the hillside: a spot high enough to protect B.J.F.'s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy. There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime-and no public interest in immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy have failed. Consequently, I respectfully dissent.[5]

Parallel Citations

109 S.Ct. 2603, 105 L.Ed.2d 443, 57 USLW 4816, 16 Media L. Rep. 1801

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The statute provides in its entirety:
"Unlawful to publish or broadcast information identifying sexual offense victim.-No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084." Fla.Stat. § 794.03 (1987).

2 In filing this lawsuit, appellee used her full name in the caption of the case. On appeal, the Florida District Court of Appeal *sua sponte* revised the caption, stating that it would refer to the appellee by her initials, "in order to preserve [her] privacy interests." 499 So.2d 883, 883, n. (1986). Respecting those interests, we, too, refer to appellee by her initials, both in the caption and in our discussion.

3 In *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So.2d, at 329, the Second District Court of Appeal upheld the dismissal on First Amendment grounds of a rape victim's damages claim against a Florida television station which had broadcast portions of her testimony at her assailant's trial. The court reasoned that, as in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the information in question "was readily available to the public, through the vehicle of a public trial." 436 So.2d, at 330. The court stated, however, that § 794.03 could constitutionally be applied to punish publication of a sexual offense victim's name or other identifying information where it had not yet become "part of an open public record" by virtue of being revealed in "open, public judicial proceedings." *Ibid.*, citing Fla.Op.Atty.Gen. 075-203 (1975).

4 Before noting probable jurisdiction, we certified to the Florida Supreme Court the question whether it had possessed jurisdiction when it declined to hear the newspaper's case. 484 U.S. 984, 108 S.Ct. 499, 98 L.Ed.2d 498 (1987). The State Supreme Court answered in the affirmative. 530 So.2d 286, 287 (Fla.1988).

5 The somewhat uncharted state of the law in this area thus contrasts markedly with the well-mapped area of defamatory falsehoods, where a long line of decisions has produced relatively detailed legal standards governing the multifarious situations in which individuals aggrieved by the dissemination of damaging untruths seek redress. See, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); *Henry v. Collins*, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965); *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966); *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971); *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

6 See, *e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (interest in confidentiality of judicial disciplinary proceedings); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (interest in maintaining professionalism of attorneys); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (interest in accused's right to fair trial); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (interest in maintaining professionalism of licensed pharmacists); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (interest in national security); *Garrison*, *supra* (interest in public figure's reputation).

7 We also recognized that privacy interests fade once information already appears on the public record, 420 U.S., at 494-495, 95 S.Ct., at 1045-1046, and that making public records generally available to the media while allowing their publication to be punished if offensive would invite "self-censorship and very likely lead to the suppression of many items that ... should be made available to the public." *Id.*, at 496, 95 S.Ct., at 1046-47.

8 The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), and reserved in *Landmark Communications*, 435 U.S., at 837, 98 S.Ct., at 1540-41. We have no occasion to address it here.

9 Having concluded that imposing liability on appellant pursuant to § 794.03 violates the First Amendment, we have no occasion to address appellant's subsidiary arguments that the imposition of punitive damages for publication independently violated the First Amendment, or that § 794.03 functions as an impermissible prior restraint. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-102, 99 S.Ct. 2667, 2669-2670, 61 L.Ed.2d 399 (1979).

1 The second case in the "trilogy" which the Court cites is *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977). See *Ante*, at 2607. But not much reliance is placed on that case, and I do not discuss it with the degree of attention devoted to *Cox Broadcasting* or *Daily Mail*.

As for the support *Oklahoma Publishing* allegedly provides for the Court's result here, the reasons that distinguish *Cox Broadcasting* and *Daily Mail* from this case are even more apt in the case of *Oklahoma Publishing*. Probably that is why the Court places so little weight on this middle leg of the three.

2 The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter.

This was evidenced at trial, when the Florida Star's lawyer explained why the paper was not to blame for any anguish caused B.J.F. by a phone call she received, the day after the Star's story was published, from a man threatening to rape B.J.F. again. Noting that the phone call was received at B.J.F.'s home by her mother (who was babysitting B.J.F.'s children while B.J.F. was in the hospital), who relayed the threat to B.J.F., the Star's counsel suggested:

"[I]n reference to the [threatening] phone call, it is sort of blunted by the fact that [B.J.F.] didn't receive the phone call. Her mother did. And if there is any pain and suffering in connection with the phone call, it has to lay in her mother's hands. I mean, my God, she called [B.J.F.] up at the hospital to tell her [of the threat]-you know, I think that is tragic, but I don't think that is something you can blame the Florida Star for." 2 Record 154-155.

While I would not want to live in a society where freedom of the press was unduly limited, I also find regrettable an interpretation of the First Amendment that fosters such a degree of irresponsibility on the part of the news media.

3 See, *e.g.*, *Cape Publications, Inc. v. Hitchner*, 514 So.2d 1136, 1137-1138 (Fla.App.1987); *Loft v. Fuller*, 408 So.2d 619, 622 (Fla.App.1981).

4 The consequences of the Court's ruling-that a State cannot prevent the publication of private facts about its citizens which the State inadvertently discloses-is particularly troubling when one considers the extensive powers of the State to collect information. One recent example illustrates this point.

In *Boettger v. Loverro*, 521 Pa. 366, 555 A.2d 1234 (1989), police officers had lawfully "tapped" the telephone of a man suspected of bookmaking. Under Pennsylvania law transcripts of the conversations intercepted this way may not be disclosed. 18 Pa.Con.Stat. § 5703 (1988). Another statute imposes civil liability on any person who "discloses" the content of tapped conversations. § 5725. Nonetheless, in a preliminary court hearing, a prosecutor inadvertently attached a transcript of the phone conversations to a document filed with the court. A reporter obtained a copy of the transcript due to this error, and his paper published a version of the remarks disclosed by the telephone tap. On appeal, the Supreme Court of Pennsylvania upheld a civil liability award of $1,000 against the paper for its unlawful disclosure of the contents of the phone conversations, concluding that individuals' rights to privacy outweighed the interest in public disclosure of such private telephone communications. *Boettger*, *supra*, at 376-377, 555 A.2d, at 1239-1240.

The Court's decision today suggests that this ruling by the Pennsylvania court was erroneous. In light of the substantial privacy interest in such communications, though, cf. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), I would

strike the balance as the Pennsylvania Supreme Court did.

5 The Court does not address the distinct constitutional questions raised by the award of punitive damages in this case. *Ante,* at 2613, n. 9. Consequently, I do not do so either. That award is more troublesome than the compensatory award discussed above. Cf. Note, Punitive Damages and Libel Law, 98 Harv.L.Rev. 847 (1985).

426 So.2d 1
Supreme Court of Florida.

The MIAMI HERALD PUBLISHING CO., etc., et al., Petitioners,
v.
Royce R. LEWIS, et al., Respondents.

No. 59392. | Sept. 2, 1982. | Rehearing Denied March 2, 1983.

Media appealed from ruling entered in the Circuit Court, Indian River County, Royce R. Lewis, J., which closed pretrial hearing on the motion to suppress confessions of alleged murder and sealed records pertaining to that suppression hearing until selection and swearing in of jury at forthcoming trial. The District Court of Appeal, 383 So.2d 236, Letts, J., affirmed in part, reversed in part and remanded with directions and certified the matter as one of great public importance. The Supreme Court, Adkins, J., held that there is no First Amendment protection of public's and press's rights to attend pretrial suppression hearing as distinguished from right to attend criminal trial, and summarized guidelines for trial judge to use in applying the three-pronged standard.

Quashed and remanded with instructions.

West Headnotes (12)

[1] **Courts**
In general; nature and source of judicial authority
Courts
Power to regulate procedure

Courts have inherent power to preserve order and decorum in courtroom, to protect rights of parties and witnesses, and generally to further administration of justice.

2 Cases that cite this headnote

[2] **Constitutional Law**
Freedom of Speech, Expression, and Press

News media, even though not party to litigation, has standing to question validity of order restricting publicity because its ability to gather news is directly impaired or curtailed.

[3] **Criminal Law**
Right of defendant to fair trial in general

Trial court has inherent power to control conduct of proceedings before it, and it is trial court's responsibility to protect defendant in criminal prosecution from inherently prejudicial influences which threaten fairness of his trial and abrogation of his constitutional rights.

[4] **Constitutional Law**
Preliminary or pretrial proceedings

There is no First Amendment protection of public's and press's rights to attend pretrial suppression hearing as distinguished from right to attend criminal trial. U.S.C.A. Const.Amend. 1.

10 Cases that cite this headnote

[5] **Criminal Law**
Conduct of Preliminary Examination

Trial courts in criminal proceedings may exclude public and press from pretrial hearing where closure is necessary to prevent serious and imminent threat to administration of justice; no alternatives are available, other than change of venue, which would protect defendant's right to fair trial; and closure would be effective in protecting rights of accused, without being broader than necessary to accomplish this purpose. West's F.S.A. Const. Art. 1, § 16.

43 Cases that cite this headnote

[6] **Criminal Law**
Conduct of Preliminary Examination

Those seeking closure of pretrial hearing have burden of producing evidence and proving by greater weight of evidence that closure is necessary, presumption being that pretrial hearing should be open one.

2 Cases that cite this headnote

[7] **Criminal Law**
Necessity, sufficiency, and effect of motion or request

When motion for closure is filed and when it is heard by trial court, notice must be given to at least one representative of local news media.

6 Cases that cite this headnote

[8] **Criminal Law**
Conduct of Preliminary Examination

In determining whether to close pretrial hearing, factors to be considered in determining whether closure is necessary to prevent serious and imminent harm to administration of justice include extent of prior hostile publicity, probability that issues involved at pretrial hearing will further aggravate adverse publicity, and whether traditional judicial techniques to insulate jury from consequences of such publicity will ameliorate the problem.

11 Cases that cite this headnote

[9] **Criminal Law**
Conduct of Preliminary Examination

In determining whether pretrial hearing should be closed, evidentiary hearing should be held and findings of fact should be recorded by judge in his order granting or refusing closure.

6 Cases that cite this headnote

[10] **Criminal Law**
Conduct of Preliminary Examination

Less restrictive alternative measures to closure of pretrial hearing include: continuance, severance, change of venue, voir dire, peremptory challenge, sequestration, and admonition of jury.

4 Cases that cite this headnote

[11] **Constitutional Law**
Preliminary or pretrial proceedings

News media have no First Amendment right to attend pretrial hearing as long as, when closure is ordered, transcript of hearing is made available to news media at specified future time, when danger of prejudice will be dissipated. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[12] **Criminal Law**
Conduct of Preliminary Examination

At hearing to determine whether to close pretrial hearing, court, where possible, should exclude contents of confession or of wiretap, or nature of evidence seized, when issues involved relate to manner in which prosecution obtained this material.

Attorneys and Law Firms

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Barry Scott Richard of Roberts, Miller, Baggett, LaFace, Richard & Wiser, Tallahassee, for The Florida Press Ass'n and The Florida Soc. of Newspaper Editors, amicus curiae.

Opinion

ADKINS, Justice.

The matter before us has been certified as of great public importance by the Fourth District Court of Appeal in the case of *Miami Herald Publishing Co. v. Lewis*, 383 So.2d 236 (Fla. 4th DCA 1980). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

The questions certified are:

> (1) HOW CAN THE TRIAL COURTS MEANINGFULLY INCLUDE THE MEDIA AT EVIDENTIARY HEARINGS CONVENED TO DECIDE WHETHER THE MEDIA SHOULD BE PRECLUDED FROM ACCESS TO THAT VERY SAME EVIDENCE?
>
> (2) SHOULD THIS COURT ABANDON THE THREE-PRONGED STANDARD WHICH WE ADOPTED IN *MIAMI HERALD v. STATE* IN VIEW OF THE HOLDING IN *GANNETT* ?

The district court held that in light of pretrial publicity, the trial judge in the murder trial of Brooks John Bellay properly ordered closure of a hearing on a motion to suppress Bellay's confessions, but that the judge improperly sealed records pertaining to the suppression hearing.

The facts upon which the trial judge based his order closing the hearing and sealing the record are as follows. Fourteen-year-old Brooks John Bellay became the focal point of an investigation into the murder of four-year-old Angel Halstead. Angel's disappearance, the search for and discovery of her body, and the investigation into her murder were all extensively covered by local news media. Bellay was interviewed and quoted widely by the print and broadcast media, perhaps because of his active role in the search and his seemingly intimate knowledge of the crime. Bellay was questioned by police shortly after Angel's body was found. He gave them four inculpatory statements. The details of the search, the killing, and Bellay's confession were widely reported by the press, as were certain of Bellay's pretrial hearings. Dozens of articles and several videotapes of television broadcasts were presented by Bellay's attorney to the trial judge. The tapes and articles made numerous and repeated references to Bellay and included interviews with him and quotations from him. The public had been made aware, by the news media, that Bellay had confessed to the crime. The public was virtually inundated with information detailing the crime.

***3** Petitioner's position in the matter is that this Court should formally adopt the so-called "three-pronged test" for closure of judicial proceedings, and that press participation in closure motions poses no threat to the fair administration of justice. *See Miami Herald Publishing Co. v. State*, 363 So.2d 603 (Fla. 4th DCA 1978). The three-pronged test would impose the following requirements on an order to close a pretrial hearing.

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No less restrictive alternative measures than closure are available; and
>
> 3. Closure will in fact achieve the court's purpose.

Respondent, on the other hand, argues that we should abandon the three-pronged standard in view of the holding of the United States Supreme Court in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). Respondent further argues that there are certain situations that warrant exclusion of the press from pretrial suppression hearings. Respondent finally argues, as an alternative to the three-pronged test, that the following requirements be imposed on closure of a pretrial hearing.

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

We adopt the three-pronged test proposed by respondent.

The precise question raised in this case is whether a trial court in a criminal proceeding has the authority to exclude the public and press from a pretrial suppression hearing in order to assure the defendant a "speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." U.S. Const. amend. VI.

In considering this question, we must delicately balance the competing yet fundamental rights of an accused to a fair trial by an impartial jury, and of the free press guaranteed by the first amendment. The inherent conflict between these two rights is a difficult one to resolve, and in so doing, we seek a solution that gives maximum importance to both interests.

An additional factor that must be considered is the inherent power and interest of the court in guaranteeing to the litigants the fundamental right to a fair trial. The question then, is three dimensional, dealing with the power and authority of the court, the rights of the defendant, and the rights and interests of the public and the press.

Generally speaking, an accused who seeks to exclude the news media from a judicial proceeding does so based on the sixth amendment right to a "speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const.amend. VI. Although this has been recognized to be a fundamental right of one accused of a crime, *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); *United States v. Columbia Broadcasting System Inc.*, 497 F.2d 102 (5th Cir.1974); it is also clear that freedom of the press is a basic right and must be weighed in the balance when fair trial rights are being considered.

[1] Courts have the inherent power "to preserve order and decorum in the court room, to protect the rights of the parties and witnesses and generally to further the administration of justice." *State ex rel. Gore Newspapers Co. v. Tyson*, 313 So.2d 777, 782 (Fla. 4th DCA 1975) (overruled *English v. McCrary*, 348 So.2d 293 (Fla.1977), citing *People v. Hinton*, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 286 N.E.2d 265 (1972), *cert. denied*, 410 U.S. 911, 93 S.Ct. 970, 35 L.Ed.2d 273 (1973). "This power exists apart from any statute or specific constitutional provision and springs from the creation ***4** of the very court itself; it is essential to the existence and meaningful functioning of the judicial tribunal." *Id.* at 781.

[2] [3] We held in *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904 (Fla.1977), that the public should generally have unrestricted access to all judicial proceedings, *id.* at 908, and we recognize that the news media, even though not a party to litigation, has standing to question the validity of an order restricting publicity because its ability to gather news is directly impaired or curtailed. *Id.* "Nevertheless, a trial court has the inherent power to control the conduct of the proceedings before it, and it is the trial court's responsibility to protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten [the] fairness of his trial and the abrogation of his constitutional rights." *Id.* at 909, citing *United States v. Dickinson*, 465 F.2d 496 (5th Cir.1972) (footnotes omitted).

Two recent United States Supreme Court decisions pertinent to the issues are *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). In *Gannett*, defense attorneys for two men charged with murder moved to close a pretrial suppression hearing to the press and public. The defendants' lawyers argued that adverse publicity had jeopardized their clients' fair trial rights. The motion was not opposed by the prosecutor and was not objected to by the representative of the petitioner newspaper. The trial judge ultimately granted defendants' motion, concluding that the interests of the press and public were outweighed by defendants' right to a fair trial. The trial judge found that an open suppression hearing would pose a "reasonable probability of prejudice to these defendants...." 443 U.S. at 376, 99 S.Ct. at 2903. The Supreme Court of the State of New York vacated the trial court's orders holding that the exclusionary orders transgressed the public's vital interest in open judicial proceedings and constituted an unlawful prior restraint in violation of the first and fourteenth amendments. *Gannett Co. v. DePasquale*, 55 App.Div.2d 107, 389 N.Y.S.2d 719 (1976).

On appeal, the New York Court of Appeals upheld the exclusion based on the danger to the defendants' fair trial rights, which rights overcame the presumption of openness surrounding criminal trials. *Gannett Co., Inc. v. DePasquale*, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977). The United States Supreme Court in *Gannett* considered two aspects of the access issue. As to the sixth amendment, the Court held that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." 443 U.S. at 390, 99 S.Ct. at 2911.

The Court, while declining to rule on the first amendment claims, concluded that the actions of the trial judge were

consistent with any right of access that may have been available under the first and fourteenth amendments.

> Several factors lead to the conclusion that the actions of the trial judge here were consistent with any right of access the petitioner may have had under the First and Fourteenth Amendments. First, none of the spectators present in the courtroom, including the reporter employed by the petitioner, objected when the defendants made the closure motion. Despite this failure to make a contemporaneous objection, counsel for the petitioner was given an opportunity to be heard at a proceeding where he was allowed to voice the petitioner's objections to closure of the pretrial hearing. At this proceeding, which took place after the filing of briefs, the trial court balanced the "constitutional rights of the press and the public" against the "defendants' right to a fair trial." The trial judge concluded after making this appraisal that the press and the public could be excluded from the suppression hearing and could be denied immediate access to a transcript, because an open proceeding would pose a "reasonable probability of prejudice to these defendants." Thus, the trial court found ***5** that the representatives of the press did have a right of access of constitutional dimension, but held, under the circumstances of this case, that this right was outweighed by the defendants' right to a fair trial. In short, the closure decision was based "on an assessment of the competing societal interests involved .... rather than on any determination that First Amendment freedoms were not implicated." *Saxbe* [*v. Washington Post. Co.*] *supra,* [417 U.S. 843] at 860, 94 S.Ct. 2811, [at 2819] 41 L.Ed.2d 514 (Powell, J., dissenting).
>
> Furthermore, any denial of access in this case was not absolute but only temporary. Once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available. The press and the public then had a full opportunity to scrutinize the suppression hearing. Unlike the case of an absolute ban on access, therefore, the press here had the opportunity to inform the public of the details of the pretrial hearing accurately and completely. Under these circumstances, any First and Fourteenth Amendment right of the petitioner to attend a criminal trial was not violated.

443 U.S. at 392–93, 99 S.Ct. at 2911–12 (footnote omitted).

In the conclusion of the Court's opinion it is made clear that the constitution affords no affirmative right of access to the pretrial hearing at issue in *Gannett.*

Richmond Newspapers involved the closure of an entire trial. This was the defendant's fourth trial on the same murder charges. Defense counsel's motion to close the trial to the public was not objected to and was granted by the trial judge. The trial judge apparently relied on a Virginia statute which granted discretion to courts in criminal cases to exclude persons from the trial whose presence would impair the conduct of a fair trial. The Virginia Supreme Court found no reversible error. The United States Supreme Court reversed, holding that the court order violated the right of access of the public and the press to criminal trials granted by the first and fourteenth amendments. *Gannett* was distinguished in *Richmond Newspapers,* as follows:

> In *Gannett* ..., the Court was not required to decide whether a right of access to *trials,* as distinguished from hearings on *pre* trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre* trial suppression hearing. One concurring opinion specifically emphasized that "a hearing on a motion before trial to suppress evidence is not a *trial* ..." 443 U.S., at 394 [99 S.Ct. at 2912], ... (Burger, C.J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials, *id.*, at 392, and n. 24 [99 S.Ct. at 2911, and n. 24] nor did the dissenting opinion reach this issue. *Id.* at 447 [99 S.Ct. at 2940] (opinion of Blackmun, J.).

448 U.S. at 564, 100 S.Ct. at 2821 (emphasis in the original.)

The specific holding in *Richmond Newspapers* is that the right to attend criminal trials is implicit in the guarantees of the first amendment. This holding is somewhat qualified, however, by footnote 18, which provides, *inter alia:*

> We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public .... but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic ... so may a trial judge, in the interest of the fair administration of

> justice, impose reasonable limitations on access to a trial.

448 U.S. at 581 n. 18, 100 S.Ct. at 2830 n. 18.

The *Richmond Newspapers* decision is distinguishable from *Gannett*, and from the facts of the instant case, so it does not set ***6** forth mandatory precedent with respect to the question before us.

[4] There is no first amendment protection of the public's and press' rights to attend pretrial suppression hearings as distinguished from the right to attend a criminal trial. Indeed, in his concurring opinion in *Richmond Newspapers*, Justice Stewart suggested that there has not yet been a definitive statement by the Court concerning the application of the first and fourteenth amendments to pretrial suppression hearings. 448 U.S. at 598–99, 100 S.Ct. at 2839. The Court in *Gannett* spoke to this issue generally, and in dicta, however, it was explicitly stated that a decision would not be made based on the first and fourteenth amendments. This, we feel, leaves us considerable leeway in determining how we will resolve this problem in the state of Florida.

This Court has been supportive of open government, as witnessed by our decisions in *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla.1969), and *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla.1971). We have been supportive of open government with respect to the judicial branch as well. In *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla.1979), we permitted the electronic media to have access to courtrooms. "The prime motivating consideration prompting our conclusion is this state's commitment to open government." 370 So.2d at 780 (footnote omitted). And in *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904, 908–09 (Fla.1977), we held:

> A trial is a public event, and there is no special perquisite of the judiciary which enables it to suppress, edit or censor events which transpire in proceedings before it, and those who see and hear what transpired may report it with impunity, subject to constitutional restraints mentioned herein.

(Footnote omitted).

So a concern for open government is not new to us, nor is the application of a policy of open government to the judicial branch. *See also King v. State*, 390 So.2d 315 (Fla.1980), *aff'd in part and rev'd in part, State v. Hegstrom*, 401 So.2d 1343 (Fla.), *cert. denied*, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981); *Harnum v. State*, 384 So.2d 1320 (Fla. 2d DCA 1980); *Green v. State*, 377 So.2d 193 (Fla. 3d DCA 1979); *Smith v. State*, 376 So.2d 455 (Fla. 1st DCA 1979), *cert. denied*, 402 So.2d 613 (Fla.1981), (all following the Florida Supreme Court's decision in *Post-Newsweek*).

[5] In our opinion, *Gannett* does not require that we abandon the three-pronged test. However, it should be modified in the following particulars, as suggested by respondent.

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;

2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and

3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Every defendant has the right "to have a ... trial ... in the county where the crime was committed." Art. I, § 16, Fla.Const. (1968). There is no first amendment protection of the press' rights to attend pretrial hearings. *Gannett.* We should not elevate this non-constitutional privilege of the press above the constitutional right of the defendant to be tried in the county where the crime was committed. A change of venue should not be considered as an alternative to closure.

Public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system. *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). Such access gives the assurance that the proceedings were conducted fairly to all concerned. *Richmond Newspapers.* Aside from any beneficial consequences which flow from having open courts, the people have a right ***7** to know what occurs in the courts. The Supreme Court of the United States has noted repeatedly that a trial is a public event. What transpires in the courtroom is public property. *Craig v. Harney*, 331 U.S. 367, 373–74, 67 S.Ct. 1249, 1253–54, 91 L.Ed. 1546 (1947). Public access also serves as a check on corrupt practices by exposing the judicial process to public scrutiny, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559–560, 96 S.Ct. 2791, 2802–2803, 49 L.Ed.2d 683 (1976), and protects the rights of the accused to a fair

trial. *Richmond Newspapers,* 448 U.S. at 564, 100 S.Ct. at 2821 et seq. Finally, because participating lawyers, witnesses and judges know their conduct will be subject to public scrutiny, it is fair to conclude that they will be more conscientious in the performance of their roles.

The above three-pronged test provides the best balance between the need for open government and public access, through the media, to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury. The courts of other states have recently faced the issue of press access to pretrial suppression hearings or trials, and their decisions support endorsement of three-part tests similar to the one here. *Lexington Herald Leader Co. v. Tackett,* 601 S.W.2d 905 (Ky.1980); *Detroit Free Press, Inc. v. Recorder's Court Judge,* 409 Mich. 364, 294 N.W.2d 827 (1980); *Commonwealth v. Hayes,* 489 Pa. 419, 414 A.2d 318, *cert. denied*, 449 U.S. 992, 101 S.Ct. 528, 66 L.Ed.2d 289 (1980); *Herald Ass'n v. Ellison,* 138 Vt. 529, 419 A.2d 323, (1980); *Federated Publications, Inc. v. Kurtz,* 94 Wash.2d 51, 615 P.2d 440 (1980); *State ex rel. Herald Mail Co. v. Hamilton,* 267 S.E.2d 544 (W.Va.1980); *Williams v. Stafford,* 589 P.2d 322 (Wyo.1979).

The other question certified to us by the District Court reads:

> How can the trial courts meaningfully include the media at evidentiary hearings convened to decide whether the media should be precluded from access to that very same evidence?

In *State ex rel. Pensacola News-Journal, Inc. v. Fleet,* 388 So.2d 1106, 1107 (Fla. 1st DCA 1980), the court correctly noted "that only the circumstances surrounding the giving of the statement [to be suppressed] are at issue [in a suppression hearing], not necessarily the contents of the alleged confession." Thus, in a typical case, a carefully controlled suppression hearing can itself be conducted in open court without creating any prejudice whatever. The issues concern not so much the contents of a confession or of a wiretap, or the nature of the evidence seized, but the circumstances under which the prosecution obtained this material.

[6] The news media has been the public surrogate on the issue of courtroom closure. Therefore, the news media must be given an opportunity to be heard on the question of closure prior to the court's decision. Implicit in the right of the members of the news media to be present and to be heard is the right to be notified that a motion for closure is under consideration. This procedure will avoid unnecessary appeals that will otherwise eventually occur.

[7] [8] [9] At the hearing, those who seek closure should first provide an adequate basis to support a finding that closure is necessary to prevent a serious and imminent threat to the administration of justice. The primary purpose of closure is to protect the defendant's right to a fair trial, one free of widespread hostile publicity, so as to insure him an unbiased jury. The factors to be considered include the extent of prior hostile publicity, the probability that the issues involved at the pretrial hearing will further aggravate the adverse publicity, and whether traditional judicial techniques to insulate the jury from the consequences of such publicity will ameliorate the problem. Absent a showing of widespread adverse publicity, the trial court should not grant a motion to close the hearing. The trial judge must determine if there is a serious and imminent threat that publication will preclude the fair administration of justice. In determining this question, an evidentiary hearing should be held and ***8** findings of fact should be recorded by the judge in his order granting or refusing closure.

[10] Second, those seeking closure should be required to show that no less restrictive alternative measures than closure are available for this purpose. Where a less restrictive alternative is available for assuring the fair trial guarantee and the use of the alternative does not unduly burden the expeditious disposition of the cause, the alternative procedure should be opted for in preference to closure. The following alternatives should be considered: continuance, severance, change of venire, voir dire, peremptory challenges, sequestration, and admonition of the jury. One or more of these alternatives may adequately protect the accused's interest and relieve the court of any need to close the proceeding in advance.

Third, those seeking closure should demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm. Where prejudicial information already has been made public, there would be little justification for closing a pretrial hearing in order to prevent only the disclosure of details which had already been publicized. Of course, the probability that the issues involved at the pretrial hearing will further aggravate the adverse publicity is a factor to be considered in determining whether or not closure is necessary to prevent a serious and imminent threat to the administration of justice.

The trial court should begin its consideration with the assumption that a pretrial hearing be conducted in open

court unless those seeking closure carry their burden to demonstrate a strict and inescapable necessity for closure. The issues considered at such hearings are of great moment beyond their importance to the outcome of the prosecution. A motion to suppress involves allegations of misconduct by police and prosecution that raise constitutional issues. Such allegations, although they may prove to be unfounded, are of importance to the public as well as to the defendants. The searches and interrogations that such hearings evaluate do not take place in public. The suppression hearing is the only opportunity that the public has to learn about police and prosecutorial conduct. It is important that a decision of the trial judge on a motion to suppress be made on the basis of evidence and argument offered in open court, so that all who care to see or read about the case may evaluate for themselves the propriety of the exclusion.

The trial court, upon ruling that a closure motion is warranted, must make findings of fact and must extend its order no further than the circumstances warrant. It is impossible to adopt prophylactic rules to guide the trial judge in applying the three-pronged test. It is within the inherent power of the court to protect the rights of the parties and witnesses and generally to further the administration of justice. The judge's goal is to balance the countervailing interest, restricting each as little as possible while still serving the ends of justice.

[11] [12] As a summary of guidelines for the trial judge to use in applying the "three-pronged standard," we hold: (1) Notice must be given to at least one representative of the local news media when a motion for closure is filed and when it is heard by the court. *See State ex rel. Miami Herald Publishing Co. v. McIntosh,* 340 So.2d 904, 912 (Fla.1977) (Sundberg, J., concurring). (2) Those seeking closure have the burden of producing evidence and proving by a greater weight of the evidence that closure is necessary, the presumption being that a pretrial hearing should be an open one. (3) The news media have no first amendment right to attend the pretrial hearing as long as when closure is ordered, the transcript of the hearing is made available to the news media at a specified future time, when the danger of prejudice will be dissipated (for example, after the trial jury is sequestered). (4) Where possible, the court should exclude the contents of a confession or of a wiretap, or the nature of the evidence seized, when the issues involved relate to the manner in which the prosecution obtained this material. (5) The trial ***9** judge shall make findings of fact and conclusions of law so that the reviewing court will have the benefit of his reasoning in granting or denying closure.

The decision of the District Court of Appeal is quashed and the cause is remanded with instructions to affirm the order of the trial court.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, SUNDBERG and McDONALD, JJ., concur.

Parallel Citations

8 Media L. Rep. 2281

86 S.Ct. 1507
Supreme Court of the United States

Samuel H. SHEPPARD, Petitioner,
v.
E. L. MAXWELL, Warden.

No. 490. | Argued Feb. 28, 1966. | Decided June 6, 1966.

Habeas corpus proceeding by state prisoner seeking release from custody. The United States District Court for the Southern District of Ohio, 231 F.Supp. 37, held conviction void, and an appeal was taken. The Court of Appeals, Sixth Circuit, 346 F.2d 707, reversed, and certiorari was granted. The United States Supreme Court, Mr. Justice Clark, held that failure of state trial judge in murder prosecution to protect defendant from inherenty prejudicial publicity which saturated community and to control disruptive influences in courtroom deprived defendant of fair trial consistent with due process.

Reversed and remanded with instructions.

Mr. Justice Black dissented.

West Headnotes (15)

[1] **Constitutional Law**
Press in General

Unqualified prohibitions laid down by framers of Constitution were intended to give liberty of press broadest scope that could be countenanced in orderly society.

[2] **Constitutional Law**
Publicity Regarding Proceedings
Constitutional Law
Publicity Regarding Proceedings

Freedom of discussion should be given widest range compatible with essential requirement of fair and orderly administration of justice, but it must not be allowed to divert trial from very purpose of court system to adjudicate controversies, both criminal and civil, in calmness and solemnity of courtroom according to legal procedure.

214 Cases that cite this headnote

[3] **Criminal Law**
Deliberations in General

Jury's verdict must be based on evidence received in open court and not from outside sources.

70 Cases that cite this headnote

[4] **Habeas Corpus**
Particular Issues and Problems

Burden of showing essential unfairness in criminal trial as demonstrable reality need not be undertaken when television has exposed community repeatedly and in depth to spectacle of accused personally confessing in detail to crimes with which he is later to be charged.

39 Cases that cite this headnote

[5] **Criminal Law**
Management of Courtroom in General
Criminal Law
Publicity, Media Coverage, and Occurrences Extraneous to Trial

Extensive newspaper, radio and television coverage of criminal trial, together with physical arrangements in courtroom itself for news media, deprived defendant of judicial serenity and calm to which he was entitled.

44 Cases that cite this headnote

[6] **Criminal Law**
Publicity, Media Coverage, and Occurrences Extraneous to Trial

Court has power to control publicity concerning criminal trial.

12 Cases that cite this headnote

[7] **Courts**
Courthouses and Courtrooms

Courtroom and courthouse premises are subject to control of court.

13 Cases that cite this headnote

[8] **Criminal Law**
Publicity, Media Coverage, and Occurrences Extraneous to Trial

Presence of press at judicial proceedings must be limited when it is apparent that accused might otherwise be prejudiced or disadvantaged.

15 Cases that cite this headnote

[9] **Constitutional Law**
Fair and Impartial Jury

Due process requires that accused receive trial by impartial jury freefrom outside influences. U.S.C.A.Const. Amend. 14.

160 Cases that cite this headnote

[10] **Criminal Law**
Publicity, Media Coverage, and Occurrences Extraneous to Trial
Criminal Law
Conduct of Trial in General

Given pervasiveness of modern communications and difficulty of effacing prejudicial publicity from minds of jurors, trial courts must take strong measures to ensure that balance is never weighed against accused, and appellate tribunals have duty to make independent evaluation of circumstances.

357 Cases that cite this headnote

[11] **Criminal Law**
Local Prejudice
Criminal Law
Local Prejudice

Where there is reasonable likelihood that prejudicial news prior to trial will prevent fair trial, judge should continue case until threat abates or transfer it to another county not so permeated with publicity.

558 Cases that cite this headnote

[12] **Criminal Law**
Errors and Irregularities in Conduct of Trial

If publicity during proceedings threatens fairness of trial, new trial should be ordered.

7 Cases that cite this headnote

[13] **Criminal Law**
Publicity, Media Coverage, and Occurrences Extraneous to Trial

Courts must take steps by rules and regulations that will protect their processes from prejudicial outside interferences, and neither prosecutors, defense counsel, accused, witnesses, court staff nor enforcement officers coming under jurisdiction of court should be permitted to frustrate its function.

80 Cases that cite this headnote

[14] **Attorney and Client**
Grounds for Discipline
Criminal Law
Miscellaneous Particular Issues
Criminal Law
Duties and Obligations of Defense Attorneys

Collaboration between counsel and press as to information affecting fairness of criminal trial is not only subject to regulation but is highly censurable and worthy of disciplinary measures.

8 Cases that cite this headnote

[15] **Constitutional Law**
Publicity
Criminal Law
Requisites of Fair Trial
Criminal Law
Publicity, Media Coverage, and Occurrences Extraneous to Trial
Habeas Corpus
Conduct and Deliberations of Jury

Failure of state trial judge in murder prosecution to protect defendant from inherently prejudicial publicity which saturated community and to control disruptive influences in courtroom deprived defendant of fair trial consistent with due process and necessitated reversal of denial of defendant's habeas corpus petition. U.S.C.A.Const. Amend. 14.

466 Cases that cite this headnote

Attorneys and Law Firms

****1508 *334** F. Lee Bailey, Boston, Mass., for petitioner.

***335** Bernard A. Berkman, Cleveland, Ohio, for American Civil Liberties Union, and others, as amici curiae.

William B. Saxbe, Columbus, Ohio, and John T. Corrigan, Cleveland, Ohio, for respondent.

Opinion

Mr. Justice CLARK delivered the opinion of the Court.

This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution.[1] The United States District Court held that he was not afforded a fair trial and granted the writ subject to the State's right to put Sheppard to trial again, 231 F.Supp. 37 (D.C.S.D.Ohio 1964). The Court of Appeals for the Sixth Circuit reversed by a divided vote, 346 F.2d 707 (1965). We granted certiorari, 382 U.S. 916, 86 S.Ct. 289, 15 L.Ed.2d 231 (1965). We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment.

I.

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lakeshore ***336** home ****1509** in Bay Village, Ohio, a suburb of Cleveland. On the day of the tragedy, July 4, 1954, Sheppard pieced together for several local officials the following story: He and his wife had entertained neighborhood friends, the Aherns, on the previous evening at their home. After dinner they watched television in the living room. Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered was hearing his wife cry out in the early morning hours. He hurried upstairs and in the dim light from the hall saw a 'form' standing next to his wife's bed. As he struggled with the 'form' he was struck on the back of the neck and rendered unconscious. On regaining his senses he found himself on the floor next to his wife's bed. He rose, looked at her, took her pulse and 'felt that she was gone.' He then went to his son's room and found him unmolested. Hearing a noise he hurried downstairs. He saw a 'form' running out the door and pursued it to the lake shore. He grappled with it on the beach and again lost consciousness. Upon his recovery he was lying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and 'determined or thought that she was gone.'[2] He then went downstairs and called a neighbor, Mayor Houk of Bay Village. The Mayor and his wife came over at once, found Sheppard slumped in an easy chair downstairs and asked, 'What happened?' Sheppard replied: 'I don't know but somebody ought to try to do something for Marilyn.' Mrs. Houk immediately went up

to the bedroom. The Mayor told Sheppard, 'Get hold of yourself. Can you tell me what happened?' ***337** Sheppard then related the above-outlined events. After Mrs. Houk discovered the body, the Mayor called the local police, Dr. Richard Sheppard, petitioner's brother, and the Aherns. The local police were the first to arrive. They in turn notified the Coroner and Cleveland police. Richard Sheppard then arrived, determined that Marilyn was dead, examined his brother's injuries, and removed him to the nearby clinic operated by the Sheppard family.[3] When the Coroner, the Cleveland police and other officials arrived, the house and surrounding area were thoroughly searched, the rooms of the house were photographed, and many persons, including the Houks and the Aherns, were interrogated. The Sheppard home and premises were taken into 'protective custody' and remained so until after the trial.[4]

From the outset officials focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported-and it is undenied-to have told his men, 'Well, it is evident the doctor did this, so let's go get the confession out of him.' He proceeded to interrogate and examine Sheppard while the latter was under sedation in his hospital room. On the same occasion, the Coroner was given the clothes Sheppard wore at the time of the tragedy together with the personal items in them. Later that afternoon Chief Eaton and two Cleveland police officers interrogated Sheppard at some length, confronting him with evidence and demanding explanations. Asked by Officer Shotke to take a lie detector test, Sheppard said he would if it were reliable. Shotke replied that it was 'infallible' and 'you might as well tell us ***338** all about it now.' At the end of the ****1510** interrogation Shotke told Sheppard: 'I think you killed your wife.' Still later in the same afternoon a physician sent by the Coroner was permitted to make a detailed examination of Sheppard. Until the Coroner's inquest on July 22, at which time he was subpoenaed, Sheppard made himself available for frequent and extended questioning without the presence of an attorney.

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon-later the chief prosecutor of Sheppard-sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. Under the headline 'Testify Now In Death, Bay Doctor Is Ordered,' one story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. The officers questioned him for several hours. On July 9, Sheppard, at the request of the Coroner, re-enacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner. The home was locked so that Sheppard was obliged to wait outside until the Coroner arrived. Sheppard's performance was reported in detail by the news media along with photographs. The newspapers also played up Sheppard's refusal to take a lie detector test and 'the protective ring' thrown up by his family. Front-page newspaper headlines announced on the same day that 'Doctor Balks At Lie Test; Retells Story.' A column opposite that story contained an 'exclusive' interview with Sheppard headlined: "Loved My Wife, She Loved Me," Sheppard Tells ***339** News Reporter.' The next day, another headline story disclosed that Sheppard had 'again late yesterday refused to take a lie detector test' and quoted an Assistant County Attorney as saying that 'at the end of a nin-hour questioning of Dr. Sheppard, I felt he was now ruling (a test) out completely.' But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with 'truth serum.'[5]

On the 20th, the 'editorial artillery' opened fire with a front-page charge that somebody is 'getting away with murder.' The editorial attributed the ineptness of the investigation to 'friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected * * *.' The following day, July 21, another page-one editorial was headed: 'Why No Inquest? Do It Now, Dr. Gerber.' The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. ***340** When Sheppard's chief counsel attempted to place ****1511** some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes.[6] At the end of the hearing the Coroner announced that he 'could' order Sheppard held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence.[7] During the inquest on July 26, a headline in large type stated: 'Kerr (Captain of the Cleveland Police) Urges Sheppard's Arrest.' In the story, Detective McArthur 'disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section,' a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extramarital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that ***341** Sheppard had any illicit relationships besides the one with Susan Hayes.

On July 28, an editorial entitled 'Why Don't Police Quiz Top Suspect' demanded that Sheppard be taken to police headquarters. It described him in the following language:

> 'Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases * * *.'

A front-page editorial on July 30 asked: 'Why Isn't Sam Sheppard in Jail?' It was later titled 'Quit Stalling-Bring Him In.' After calling Sheppard 'the most unusual murder suspect ever seen around these parts' the article said that '(e)xcept for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling * * *.' It asserted that he was 'surrounded by an iron curtain of protection (and) concealment.'

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned-having been denied a temporary delay to secure the presence of counsel-and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: 'DR. SAM: 'I Wish There Was Something I Could Get Off My Chest-but There Isn't.'' Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: "I Will Do Everything In My Power to Help Solve This Terrible ***342** Murder.'-Dr. Sam Sheppard.' Headlines announced, inter alia, that: 'Doctor ****1512** Evidence is Ready for Jury,' 'Corrigan Tactics Stall Quizzing.' 'Sheppard 'Gay Set' Is Revealed By Houk,' 'Blood Is Found In Garage,' 'New Murder Evidence Is Found, Police Claim,' 'Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him.' On August 18, an article appeared under the headline 'Dr. Sam Writes His Own Story.' And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: 'I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?' We do not detail the coverage further. There are five volumes filled with similar clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954. The record includes no excerpts from newscasts on radio and television but since space was reserved in the courtroom for these media we assume that their coverage was equally large.

II.

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors. The selection of the jury began on October 18, 1954.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside ***343** the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of

the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its vardict.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were ***344** photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and ****1513** extensively photographed for the newspapers and television. A rule of court prohibited picture-taking in the courtroom during the actual sessions of the court, but no restraints were put on photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch.

All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard. Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.

The daily record of the proceedings was made available to the newspapers and the testimony of each witness was printed verbatim in the local editions, along with objections of counsel, and rulings by the judge. Pictures of Sheppard, the judge, counsel, pertinent witnesses, and the jury often accompanied the daily newspaper ***345** and television accounts. At times the newspapers published photographs of exhibits introduced at the trial, and the rooms of Sheppard's house were featured along with relevant testimony.

The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at voir dire to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the jurors' homes, but we must assume that most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the Sheppard home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered-while the jurors were at lunch and sequestered by two bailiffs-the jury was separated into two groups to pose for photographs which appeared in the newspapers.

III.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an ***346** effort to use the resulting statistics to show the necessity for change of venue. The article said the survey 'smacks of mass jury tampering,' called on defense counsel to drop it, and stated that the bar association

should do something about it. It characterized the poll as 'non-judicial, non-legal, and nonsense.' The article ****1514** was called to the attention of the court but no action was taken.

2. On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that 'WHK doesn't have much coverage,' and that '(a)fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can.'

3. While the jury was being selected, a two-inch headline asked: 'But Who Will Speak for Marilyn?' The frontpage story spoke of the 'perfect face' of the accused. 'Study that face as long as you want. Never will you get from it a hint of what might be the answer * * *.' The two brothers of the accused were described as 'Prosperous, poised. His two sisters-in law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan.' The author then noted Marilyn Sheppard was 'still off stage,' and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author-through quotes from Detective Chief James McArthur-assured readers that the prosecution's exhibits would speak for ***347** Marilyn. 'Her story,' McArthur stated, 'will come into this courtroom through our witnesses.' The article ends:
'Then you realize how what and who is missing from the perfect setting will be supplied.

'How in the Big Case justice will be done.

'Justice to Sam Sheppard.

'And to Marilyn Sheppard.'

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss' confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continuance based on the same ground, saying:

> 'Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody. * * * We are not going to harass the jury every morning. * * * It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury * * *.'

***348** 6. On November 24, a story appeared under an eight-column headline: 'Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin To Testify.' It related that Marilyn had recently told friends that Sheppard was a 'Dr. Jekyll and Mr. Hyde' character. No such testimony was ever produced at the trial. The story went on to announce: 'The prosecution ****1515** has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper-countering the defense claim that the defendant is a gently physician with an even disposition.' Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: 'Would that have any effect upon your judgment?' Both replied, 'No.' This was accepted by the judge as sufficient; he merely asked the jury to 'pay no attention whatever to that type of scavenging. * * * Let's confine ourselves to this courtroom, if you please.' In answer to the motion for mistrial, the judge said:
'Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous

even if there were no trial here. The trial has nothing to do with it in the Court's mind, as far as its outrage is concerned, but-

***349** 'Mr. CORRIGAN: I don't know what effect it had on the mind of any of these jurors, and I can't find out unless inquiry is made.

'The COURT: How would you ever, in any jury, avoid that kind of a thing?'

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: " 'Bare-faced Liar,' Kerr Says of Sam." Captain Kerr never appeared as a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. Although the telephones had been removed from the jurors' rooms, the jurors were permitted to use the phones in the bailiffs' rooms. The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors' end of the conversation. The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

IV.

[1] The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' ***350** In re Oliver, 333 U.S. 257, 268, 68 S.Ct. 499, 92 L.Ed. 682 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news ****1516** media for '(w)hat transpires in the court room is public property.' Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press * * * the broadest scope that could be countenanced in an orderly society.' Bridges v. State of California, 314 U.S. 252, 265, 62 S.Ct. 190, 195, 86 L.Ed. 192 (1941). And where there was 'no threat or menace to the integrity of the trial,' Craig v. Harney, supra, 331 U.S. at 377, 67 S.Ct. at 1255, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

[2] [3] But the Court has also pointed out that '(l)egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' Bridges v. State of California, supra, 314 U.S. at 271, 62 S.Ct. at 197. And the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.' Chambers v. State of Florida, 309 U.S. 227, 236-237, 60 S.Ct. 472, 477, 84 L.Ed. 716 (1940). '.freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' Pennekamp v. State of Florida, 328 U.S. 331, 347, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system * * * to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the ***351** courtroom according to legal procedures.' Cox v. State of Louisiana, 379 U.S. 559, 583, 85 S.Ct. 466, 471, 13 L.Ed.2d 487 (1965) (Black, J., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 79 S.Ct. at 1173. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.' At 312, 79 S.Ct. at 1173. Likewise, in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

'With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion * * *.' At 728, 81 S.Ct., at 1645.

[4] The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in Patterson v. State of Colorado ex rel. Attorney General, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907):

> 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'

Moreover, 'the burden of showing essential unfairness * * * as a demonstrable reality,' ***352** Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942), need not be undertaken when television has exposed the community 'repeatedly and in depth to the spectacle of (the accused) personally confessing in detail to the crimes with which he was later to be charged.' ****1517** Rideau v. State of Louisiana, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963). In Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that,
'even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association * * *.' At 473, 85 S.Ct., at 550.

Only last Term in Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:
'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.' At 542-543, 85 S.Ct. at 1632.

And we cited with approval the language of Mr. Justice Black for the Court in In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), that 'our system of law has always endeavored to prevent even the probability of unfairness.'

V.

It is clear that the totality of circumstances in this case also warrants such an approach. Unlike Estes, Sheppard was not granted a change of venue to a locale away from ***353** where the publicity originated; nor was his jury sequestered. The Estes jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge's 'admonitions' at the beginning of the trial are representative:

> 'I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned. You will feel very much better as the trial proceeds * * *. I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content * * *.'

At intervals during the trial, the judge simply repeated his 'suggestions' and 'requests' that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. See Estes v. State of Texas, supra, 381 U.S., at 545-546, 85 S.Ct., at 1634. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.
The press coverage of the Estes trial was not nearly as

massive and pervasive as the attention given by the ***354** Cleveland newspapers and broadcasting stations to Sheppard's prosecution.[8] Sheppard ****1518** stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.[9]

[5] While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which ***355** the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that 'judicial serenity and calm to which (he) was entitled.' Estes v. State of Texas, supra, 381 U.S., at 536, 85 S.Ct., at 1629. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

***356 VI.**

There can be no question about the nature of the publicity which surrounded ****1519** Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for the Ohio Supreme Court:

'Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. * * * In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life.' 165 Ohio St., at 294, 135 N.E.2d, at 342.

Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.[10]

Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had ***357** hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a 'Jekyll-Hyde'; that he was 'a bare-faced liar' because of his testimony as to police treatment; and finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being 'doctored' to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about

the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury. See Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (1963).

VII.

[6] The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he ***358** reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce ****1520** the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.[11]

[7] [8] The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in Estes, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.[12] Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

***359** Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. See Estes v. State of Texas, supra, 381 U.S., at 547, 85 S.Ct., at 1635.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion.[13] That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. The judge made this statement in the presence of the jury:

'Now, the Court wants to say a word. That he was told-he has not ****1521** read anything about it at all-but he was informed that Dr. Steve Sheppard, who ***360** has been granted the privilege of remaining in the court room during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the State.

'Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case.

'The Court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the * * * privilege of being in the courtroom, if he wants to avail himself of that method during the progress of the trial.'

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that 'misrepresented entirely the testimony' in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner.[14] The story that Sheppard had been called ***361** a 'Jekyll-Hyde' personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was 'a 'bombshell witness' on tap' who would testify as to Sheppard's 'fiery temper' could only have emanated from

the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record.[15]

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. See Stroble v. State of California, 343 U.S. 181, 201, 72 S.Ct. 599, 609, 96 L.Ed. 872 (1952) (Frankfurter, J., dissenting). Effective control of these sources-concededly within the court's power-might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take ****1522** any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See State v. Van Duyne, 43 N.J., 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. ***362** Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.[16] In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of trial. See p. 1513, supra. In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom-not pieced together from extrajudicial statements.

[9] [10] [11] [12] [13] [14] From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing ***363** that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

[15] Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, ****1523** we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

Mr. Justice BLACK dissents.

Parallel Citations

6 Ohio Misc. 231, 86 S.Ct. 1507, 16 L.Ed.2d 600, 35 O.O.2d 431, 1 Media L. Rep. 1220

Footnotes

1 Sheppard was convicted in 1954 in the Court of Common Pleas of Cuyahoga County, Ohio. His conviction was affirmed by the Court of Appeals for Cuyahoga County, State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (1955), and the Ohio Supreme Court, 165 Ohio St. 293, 135 N.E.2d 340 (1956). We denied certiorari on the original application for review. 352 U.S. 910, 77 S.Ct. 118, 1 L.Ed.2d 119 (1956).

2 The several witnesses to whom Sheppard narrated his experiences differ in their description of various details. Sheppard claimed the vagueness of his perception was caused by his sudden awakening, the dimness of the light, and his loss of consciousness.

3 Sheppard was suffering from severe pain in his neck, a swollen eye, and shock.

4 But newspaper photographers and reporters were permitted access to Sheppard's home from time to time and took pictures throughout the premises.

5 At the same time, the newspapers reported that other possible suspects had been 'cleared' by lie detector tests. One of these persons was quoted as saying that he could not understand why an innocent man would refuse to take such a test.

6 The newspapers had heavily emphasized Sheppard's illicit affair with Susan Hayes, and the fact that he had initially lied about it.

7 A number of articles calculated to evoke sympathy for Sheppard were printed, such as the letters Sheppard wrote to his son while in jail. These stories often appeared together with news coverage which was unfavorable to him.

8 Many more reporters and photographers attended the Sheppard trial. And it attracted several nationally famous commentators as well.

9 At the commencement of trial, defense counsel made motions for continuance and change of venue. The judge postponed ruling on these motions until he determined whether an impartial jury could be impaneled. Voir dire examination showed that with one exception all members selected for jury service had read something about the case in the newspapers. Since, however, all of the jurors stated that they would not be influenced by what they had read or seen, the judge overruled both of the motions. Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in Delaney v. United States, 199 F.2d 107, 115 (C.A.1st. Cir. 1952), recognized such a duty under similar circumstances, holding that 'if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.'

10 Typical comments on the trial by the press itself include:
'The question of Dr. Sheppard's guilt or innocence still is before the courts. Those who have examined the trial record carefully are divided as to the propriety of the verdict. But almost everyone who watched the performance of the Cleveland press agrees that a fair hearing for the defendant, in that area, would be a modern miracle.' Harrison, 'The press vs. the Courts,' The Saturday Review (Oct. 15, 1955).
'At this distance, some 100 miles from Cleveland, it looks to us as though the Sheppard murder case was sensationalized to the point at which the press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of fair trials.' Editorial, The Toledo Blade (Dec. 22, 1954).

11 In an unsworn statement, which the parties agreed would have the status of a deposition, made 10 years after Sheppard's conviction and six years after Judge Blythin's death, Dorothy Kilgallen asserted that Judge Blythin had told her: 'It's an open and shut case * * * he is guilty as hell.' It is thus urged that Sheppard be released on the ground that the judge's bias infected the entire trial. But we need not reach this argument, since the judge's failure to insulate the proceedings from prejudicial publicity and disruptive influences deprived Sheppard of the chance to receive a fair hearing.

12 The judge's awareness of his power in this respect is manifest from his assignment of seats to the press.

13 The problem here was further complicated by the independent action of the newspapers in reporting 'evidence' and gossip which they uncovered. The press not only inferred that Sheppard was guilty because he 'stalled' the investigation, hid behind his family, and hired a prominent criminal lawyer, but denounced as 'mass jury tampering' his efforts to gather evidence of community prejudice caused by such publications. Sheppard's counterattacks added some fuel but, in these circumstances, cannot preclude him from asserting his right to a fair trial. Putting to one side news stories attributed to police officials, prospective witnesses, the Sheppards, and the lawyers, it is possible that the other publicity 'would itself have had a prejudicial effect.' Cf. Report of the President's Commission on the Assassination of President Kennedy, at 239.

14 When two police officers testified at trial that Sheppard refused to take a lie detector test, the judge declined to give a requested instruction that the results of such a test would be inadmissible in any event. He simply told the jury that no person has an obligation 'to take any lie detector test.'

15 Such 'premature disclosure and weighing of the evidence' may seriously jeopardize a defendant's right to an impartial jury. '(N)either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against (Sheppard).' Cf. Report of the President's Commission, supra, at 239, 240.

16 The Department of Justice, the City of New York, and other governmental agencies have issued such regulations. E.g., 28 CFR s 50.2 (1966). For general information on this topic see periodic publications (e.g., Nos. 71, 124, and 158) by the Freedom of Information Center, School of Journalism, University of Missouri.

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95 S.Ct. 2031
Supreme Court of the United States

Jack Roland MURPHY, Petitioner,
v.
State of FLORIDA.

No. 74-5116. | Argued April 15, 1975. | Decided June 16, 1975.

Florida prisoner filed petition for habeas corpus relief. The United States District Court for the Southern District of Florida, 363 F.Supp. 1224, denied relief, and petitioner appealed. The Court of Appeals, 495 F.2d 553, affirmed. Petition for writ of certiorari was granted. The Supreme Court, Mr. Justice Marshall, held that juror exposure to information about a state defendant's prior conviction or to news accounts of the crime with which he is charged do not alone presumptively deprive a defendant of due process, that jurors' indicia of impartiality may be disregarded in the case where the general atmosphere in the community or courtroom is sufficiently inflammatory and that petitioner was not denied a fair trial where although some jurors vaguely recalled the offense at issue and each had some knowledge of petitioner's past crimes, none betrayed and belief in the relevance of petitioner's past to the crime at issue and there was no indication from circumstances surrounding trial or number of the panel excused for prejudgment of petitioner of an inflamed community sentiment so as to counter indicia of impartiality disclosed by the voir dire transcript.

Affirmed.

Mr. Chief Justice Burger concurred in the judgment and filed opinion.

Mr. Justice Brennan dissented and filed opinion.

West Headnotes (14)

[1] **Courts**
Decisions of United States Courts as Authority in State Courts

The Marshall decision, which resulted in reversal of conviction because of juror exposure to a newspaper article concerning prior convictions where the trial court had refused to permit the prosecutor to introduce such evidence, was based on the Supreme Court's supervisory power to formulate and apply proper standards for enforcement of the criminal laws in the federal courts; Marshall was not a constitutional ruling applicable through the Fourteenth Amendment, to the states. U.S.C.A.Const. Amend. 14.

48 Cases that cite this headnote

[2] **Criminal Law**
Requisites of Fair Trial

A defendant is entitled to solemnity and sobriety in the criminal process; such elements are essential attributes of a system that subscribes to any notion of fairness and rejects the verdict of a mob.

35 Cases that cite this headnote

[3] **Constitutional Law**
Fair and Impartial Jury

Juror exposure to information about a state defendant's prior conviction or to news accounts of the crime with which he is charged do not alone presumptively deprive defendant of due process; such exposure must be viewed with the totality of the circumstances to determine whether the trial was fundamentally unfair. U.S.C.A.Const. Amend. 14.

300 Cases that cite this headnote

[4] **Jury**
Bias and Prejudice

Constitutional standard of fairness requires that a state defendant have a panel of impartial, indifferent jurors. U.S.C.A.Const. Amend. 14.

100 Cases that cite this headnote

[5] **Jury**
Knowledge of Matters in General

Although a defendant is entitled to a panel of impartial, indifferent jurors, qualified jurors need not be totally ignorant of the facts and issues involved. U.S.C.A.Const. Amend. 14.

210 Cases that cite this headnote

[6] **Jury**
Belief of Juror That Opinion Will Not Affect Verdict in General

A juror's assurances that he is equal to his task and can lay aside any preconceived impression or opinion and render a verdict on the evidence cannot be dispositive of the accused's rights; it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise a presumption of partiality. U.S.C.A.Const. Amend. 14.

218 Cases that cite this headnote

[7] **Jury**
Belief of Juror That Opinion Will Not Affect Verdict in General

In determining whether a defendant was deprived of a fair and impartial jury, the court will not readily discount the assurances of a juror as to his impartiality insofar as his exposure to a defendant's past crimes comes from defendant or his counsel. U.S.C.A.Const. Amend. 14.

24 Cases that cite this headnote

[8] **Jury**
Mode of Examination

Court disapproved counsel's habitual reference to his client, at voir dire, by name to which he had been generally referred to in the media, rather than by his real name.

17 Cases that cite this headnote

[9] **Jury**
Knowledge of Matters in General

In determining whether a defendant has been accorded his right to a fair and impartial jury, a distinction is to be made between mere familiarity with the defendant or his past and an actual predisposition against him, just as a distinction is made between largely factual publicity from that which is invidious or inflammatory; to ignore such real differences and the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent. U.S.C.A.Const. Amend. 14.

482 Cases that cite this headnote

[10] **Jury**
Trial and Determination

Although in response to leading and hypothetical question, presupposing a two or three-week presentation of evidence against state defendant and his failure to put on any defense, one juror conceded that his prior impression of defendant would dispose him to convict, the court, in determining whether defendant had been accorded his right to fair and impartial jury, would not accord great significance to such statement in light of the leading nature of counsel's questions and juror's testimony indicating that he had no deep impression of defendant at all. U.S.C.A.Const. Amend. 14.

24 Cases that cite this headnote

[11] **Jury**
Trial and Determination

Indicia of a juror's impartiality may be disregarded, in determining whether a defendant has been accorded his right to a fair and impartial jury, in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory. U.S.C.A.Const. Amend. 14.

136 Cases that cite this headnote

[12] **Jury**
Trial and Determination

Length to which trial court must go in order to select jurors who appear to be impartial is a factor relevant in evaluating juror's assurances of impartiality; in a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it. U.S.C.A.Const. Amend. 14.

96 Cases that cite this headnote

[13] **Jury**
Trial and Determination

Fact that 20 of 78 prospective jurors were excused because they indicated an opinion as to state defendant's guilt did not conclusively suggest a community with a sentiment so poisoned against defendant as to impeach the indifference of jurors who displayed no animus of their own. U.S.C.A.Const. Amend. 14.

51 Cases that cite this headnote

[14] **Constitutional Law**
Fair and Impartial Jury

Although jurors had learned, mainly from factual news accounts some seven months prior to jury selection, about a prior felony conviction of state defendant or certain facts about robbery with which he was charged, defendant was not denied due process, in that there was no such hostility by the jurors who served as to suggest a partiality that could not be set aside, where although some jurors had vague recollection of the robbery and each had some knowledge of defendant's past crimes none betrayed any belief in the relevance of defendant's past to the robbery case and there was no indication from the circumstances surrounding trial or from the number of panel excused as having prejudged defendant of an inflamed community sentiment so as to counter indicia of impartiality disclosed by voir dire transcript. U.S.C.A.Const. Amend. 14.

300 Cases that cite this headnote

****2033 *794** Syllabus*

Petitioner, who was convicted in state court of robbery contends in this habeas corpus proceeding that he was denied a fair trial because jurors had learned from news accounts of prior felony convictions or certain facts about the robbery charge. In the course of jury selection 78 members of the panel were questioned, 70 being excused (30 for personal reasons, 20 peremptorily, and 20 by the court as having prejudged petitioner), and eight being selected (including two alternates). The District Court and the Court of Appeals denied relief. Held:

1. Juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged to not alone presumptively deprive the defendant of due process. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751; Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663; Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543; Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, distinguished. Pp. 2035-2036.

2. The voir dire in this case indicates no such juror hostility to petitioner as to suggest a partiality that could not be laid aside. Though some jurors vaguely recalled the robbery and each had some knowledge of petitioner's past crimes, none betrayed any belief in the relevance to the roberry case of petitioner's past, and there was no

indication from the circumstances surrounding petitioner's trial or from the number of the panel excused for prejudgment of petitioner, of inflamed community sentiment to counter the indicia of impartiality disclosed by the voir dire transcript. Thus, in the totality of the circumstances, petitioner failed to show inherent prejudice in the trial setting or actual prejudice from the jury-selection process. Pp. 2036-2038.

5 Cir., 495 F.2d 553, affirmed.

Attorneys and Law Firms

***795** Harvey S. Swickle, Miami Beach, Fla., for petitioner.

William L. Rogers, Miami, Fla., for respondent, pro hac vice, by special leave of Court.

Opinion

****2034** Mr. Justice MARSHALL delivered the opinion of the Court.

The question presented by this case is whether the petitioner was denied a fair trial because members of the jury had learned from news accounts about a prior felony conviction or certain facts about the crime with which he was charged. Under the circumstances of this case, we find that petitioner has not been denied due process, and we therefore affirm the judgment below.

I

Petitioner was convicted in the Dade County, Fla., Criminal Court in 1970 of breaking and entering a home, while armed, with intent to commit robbery and of assault with intent to commit robbery. The charges stemmed from the January 1968 robbery of a Miami Beach home and petitioner's apprehension, with three others, while fleeing from the scene.

The robbery and petitioner's arrest received extensive press coverage because petitioner had been much in the news before. He had first made himself notorious for his part in the 1964 theft of the Star of India sapphire from a museum in New York. His flamboyant lifestyle made him a continuing subject of press interest; he was generally referred to-at least in the media-as 'Murph the Surf.'

Before the date set for petitioner's trial on the instant charges, he was indicted on two counts of murder in ***796** Broward County, Fla. Thereafter the Dade County court declared petitioner mentally incompetent to stand trial; he was committed to a hospital and the prosecutor nolle prossed the robbery indictment. In August 1968 he was indicted by a federal grand jury for conspiring to transport stolen securities in interstate commerce. After petitioner was adjudged competent for trial, he was convicted on one count of murder in Broward County (March 1969) and pleaded guilty to one count of the federal indictment involving stolen securities (December 1969). The indictment for robbery was refiled in August 1969 and came to trial one year later.

The events of 1968 and 1969 drew extensive press coverage. Each new case against petitioner was considered newsworthy, not only in Dade County but elsewhere as well.[1] The record in this case contains scores of articles reporting on petitioner's trials and tribulations during this period; many purportedly relate statements that petitioner or his attorney made to reporters.

Jury selection in the present case began in August 1970. Seventy-eight jurors were questioned. Of these, 30 were excused for miscellaneous personal reasons; 20 were excused peremptorily by the defense or prosecution; 20 were excused by the court as having prejudged petitioner; and the remaining eight served as the jury and two alternates. Petitioner's motions to dismiss the chosen jurors, on the ground that they were aware that he had previously been convicted of either the 1964 Star of India theft or the Broward County murder, were denied, as was his renewed motion for a change of venue based on allegedly prejudicial pretrial publicity.

***797** At trial, petitioner did not testify or put in any evidence; assertedly in protest of the selected jury, he did not cross-examine any of the State's witnesses. He was convicted on both counts, and after an unsuccessful appeal he sought habeas corpus relief in the District Court for the Southern District of Florida.

The District Court denied petitioner relief, D.C.Fla., 363 F.Supp. 1224 (1973), and the Court of Appeals for the Fifth ****2035** Circuit affirmed. 495 F.2d 553 (1974). We granted certiorari, 419 U.S. 1088, 95 S.Ct. 677, 42 L.Ed.2d 680 (1974), in order to resolve the apparent conflict between the decision below and that of the Third Circuit in United States ex rel. Doggett v. Yeager, 472 F.2d 229 (1973), over the applicability of Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), to state criminal proceedings.

II

[1] The defendant in Marshall was convicted of dispensing certain drugs without a prescription. In the course of the trial seven of the jurors were exposed to various news accounts relating that Marshall had previously been convicted of forgery, that he and his wife had been arrested for other narcotics offenses, and that he had for some time practiced medicine without a license. After interviewing the jurors, however, the trial judge denied a motion for a mistrial, relying on the jurors' assurances that they could maintain impartiality in spite of the news articles.

Noting that the jurors had been exposed to information with a high potential for prejudice, this Court reversed the conviction. It did so, however, expressly '(i)n the exercise of (its) supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts,' and not as a matter of constitutional compulsion. Id., at 313, 79 S.Ct., at 1173.

***798** In the face of so clear a statement, it cannot be maintained that Marshall was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States. Petitioner argues, nonetheless that more recent decisions of this Court have applied to state cases the principle underlying the Marshall decision:[2] that persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced. We cannot agree that Marshall has any application beyond the federal courts.

Petitioner relies principally upon Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In each of these cases, this Court overturned a state-court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage.

In Irvin v. Dowd the rural community in which the trial was held had been subjected to a barrage of inflammatory publicity immediately prior to trial, including information on the defendant's prior convictions, his confession to 24 burglaries and six murders including the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death sentence. As a result, eight of the 12 jurors had formed an opinion that the defendant was guilty before the trial began; some went 'so far as to say that it would take evidence to overcome their belief' in his guilt. 366 U.S., at 728, 81 S.Ct., at 1645. In these circumstances, the Court readily found actual prejudice against the petitioner to a degree that rendered a fair trial impossible.

Prejudice was presumed in the circumstances under which the trials in Rideau, Estes, and Sheppard were ***799** held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In Rideau the defendant had 'confessed' under police interrogation to the murder of which he stood convicted. A 20-minute film of his confession was broadcast three times by a television station in the community where the crime and the trial took place. In reversing, the Court did not examine the voir dire for evidence of actual prejudice ****2036** because it considered the trial under review 'but a hollow formality'-the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras.

[2] [3] The trial in Estes had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, Sheppard arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.

III

[4] [5] [6] The constitutional standard of fairness requires that a defendant have 'a panel of impartial, 'indifferent' jurors.' Irvin v. Dowd, 366 U.S. at 722, 81 S.Ct. at 1642. Qualified ***800** jurors need not, however, be totally ignorant of the facts and issues involved.

'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay

aside his impression or opinion and render a verdict based on the evidence presented in court.' Id., at 723, 81 S.Ct. at 1642.

At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Ibid.

[7] [8] [9] [10] [11] [12] [13] [14] The voir dire in this case indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. Some of the jurors had a vague recollection of the robbery with which petitioner was charged and each had some knowledge of petitioner's past crimes,[3] but none betrayed any belief in the relevance of petitioner's past to the present case.[4] Indeed, four of the six jurors volunteered their ***801** views of its irrelevance, and one suggested that people who have been in trouble before are too often singled out for suspicion of each new crime-a predisposition that could only operate in petitioner's favor.

****2037** In the entire voir dire transcript furnished to us, there is only one colloquy on which petitioner can base even a colorable claim of partiality by a juror. In response to a leading and hypothetical question, presupposing a two-or three-week presentation of evidence against petitioner and his failure to put on any defense, one juror conceded that his prior impression of petitioner would dispose him to convict.[5] We cannot attach great significance ***802** to this statement, however, in light of the leading nature of counsel's questions and the juror's other testimony indicating that he had no deep impression of petitioner at all.

The juror testified that he did not keep up with current events and, in fact, had never heard of petitioner until he arrived in the room for prospective jurors where some veniremen were discussing him. He did not know that petitioner was 'a convicted jewel thief' even then; it was petitioner's counsel who informed him of this fact. And he volunteered that petitioner's murder conviction, of which he had just heard, would not be relevant to his guilt or innocence in the present case, since '(w)e are not trying him for murder.'

Even these indicia of impartiality might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory, but the circumstances surrounding petitioner's trial are not at all of that variety. Petitioner attempts to portray them as inflammatory by reference to the publicity to which the community was exposed. The District Court found, however, that the news articles concerning petitioner had appeared almost entirely during the period between December 1967 and January 1969, the latter date being seven months before the jury in this case was selected. 363 F.Supp., at 1228. They were, moreover, largely factual in nature. Compare Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962), with Sheppard v. Maxwell, supra.

The length to which the trial court must go in order ***803** to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality. In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it. In Irvin v. Dowd, for example, the Court noted that 90% of those examined on the point were inclined to believe in the accused's guilt, and the court had excused for this cause 268 of the 430 veniremen. In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's ****2038** guilt.[6] This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

In sum, we are unable to conclude, in the circumstances presented in this case, that petitioner did not receive a fair trial. Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice. The judgment of the Court of Appeals must therefore be affirmed.

Judgment affirmed.

Mr. Chief Justice BURGER, concurring in the judgment.

I agree with Mr. Justice BRENNAN that the trial judge was woefully remiss in failing to insulate prospective jurors from the bizarre media coverage of this case ***804** and in not taking steps to prevent pretrial discussion of the case among them. Although I would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case. I agree with the Court that the circumstances of petitioner's trial did not rise to the level of a violation of the Due Process Clause of the Fourteenth Amendment.

Mr. Justice BRENNAN, dissenting.

I dissent. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), requires reversal of this conviction. As in that case, petitioner here was denied a fair trial. The risk that taint of widespread publicity regarding his criminal background, known to all members of the jury, infected the jury's deliberations is apparent, the trial court made no attempt to prevent discussion of the case or petitioner's previous criminal exploits among the prospective jurors, and one juror freely admitted that he was predisposed to convict petitioner.

During voir dire, petitioner's counsel had the following colloquy with that juror:
'Q. Now, when you go into that jury room and you decide upon Murphy's guilt or innocence, you are going to take into account that fact that he is a convicted murderer; aren't you?

'A. Not if we are listening to the case, I wouldn't.

'Q. But you know about it?

'A. How can you not know about it?

'Q. Fine, thank you.

'When you go into the jury room, the fact that he is a convicted murderer, that is going to influence your verdict; is it not?

'A. We are not trying him for murder.

'Q. The fact that he is a convicted murderer and jewel thief, that would influence your verdict?

***805** 'A. I didn't know he was a convicted jewel thief.

'Q. Oh, I see.

'I am sorry I put words in your mouth.

'Now, sir, after two or three weeks of being locked up in a downtown hotel, as the Court determines, and after hearing the State's case, and after hearing no case on behalf of Murphy, and hearing no testimony from Murphy saying, 'I am innocent, Mr. (Juror)'-when you go into the jury room, sir, all these facts are going to influence your verdict?

'A. I imagine it would be.

'Q. And in fact, you are saying if Murphy didn't testify, and if he doesn't offer evidence, 'My experience of him is such that right now I would find him guilty.'

'A. I believe so.'

I cannot agree with the Court that the obvious bias of this juror may be overlooked ****2039** simply because the juror's response was occasioned by a 'leading and hypothetical question,' ante, at 2037. Indeed, the hypothetical became reality when petitioner chose not to take the stand and offered no evidence. Thus petitioner was tried by a juror predisposed, because of his knowledge of petitioner's previous crimes, to find him guilty of this one.

Others who ultimately served as jurors revealed similar prejudice toward petitioner on voir dire. One juror conceded that it would be difficult, during deliberations, to put out of his mind that petitioner was a convicted criminal. He also admitted that he did not 'hold a convicted felon in the same regard as another person who has never been convicted of a felony,' and admitted further that he had termed petitioner a 'menace.'

A third juror testified that she knew from several ***806** sources that petitioner was a convicted murderer,[1] and was aware that the community regarded petitioner as a criminal who 'should be put away.' She disclaimed having a fixed opinion about the result she would reach, but acknowledged that the fact that petitioner was a convicted criminal would probably influence her verdict:
'Q. Now, if you go into that jury room and deliberate with your fellow jurors, in your deliberations, will you consider the fact that Murphy is a convicted murderer and jewel thief?
'A. Well, he has been convicted of murder. So, I guess that is what I would-

'Q. You would consider that in your verdict, right?

'A. Right.

'Q. And that would influence your verdict; would it not?

'A. If that is what you say, I guess it would.

'Q. I am not concerned about what I say, because if I said it, they wouldn't print it. It would influence your verdict?

'A. It probably would.

'Q. When you go into that jury room, you cannot forget the fact that it is Murph the Surf; that he is a convicted murderer, and a jewel thief-you can't put that out of your

mind, no matter what they tell you; can you, ma'am?

***807** 'A. Probably not.

'Q. And it would influence your verdict; right?

'A. Probably.'

Still another juror testified that the comments of venire members in discussing the case had made him 'sick to (his) stomach.' He testified that one venireman had said that petitioner was 'thoroughly rotten,' and that another had said: 'Hang him, he's guilty.'[2]

Moreover, the Court ignores the crucial significance of the fact that at no ****2040** time before or during this daily buildup of prejudice against Murphy did the trial judge instruct the prospective jurors not to discuss the case among themselves. Indeed the trial judge took no steps to insulate the jurors from media coverage of the case or from the many news articles that discussed petitioner's last criminal exploits.

It is of no moment that several jurors ultimately testified that they would try to exclude from their deliberations their knowledge of petitioner's past misdeeds and of his community reputation. Irvin held in like circumstances ***808** that little weight could be attached to such selfserving protestations:
No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see. " 366 U.S., at 728, 81 S.Ct. at 1645.

On the record of this voir dire, therefore, the conclusion is to me inescapable that the attitude of the entire venire toward Murphy reflected the 'then current community pattern of thought as indicated by the popular news media,' id., at 725, 81 S.Ct. at 1644, and was infected with the taint of the view that he was a 'criminal' guilty of notorious offenses, including that for which he was on trial. It is a plain case, from a review of the entire voir dire, where 'the extent and nature of the publicity has caused such a buildup of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial.' United States ex rel. Bloeth v. Denno, 2 Cir., 313 F.2d 364, 372 (CA2 1963). In my view, the denial of a change of venue was therefore prejudicial error, and I would reverse the conviction.

Parallel Citations

95 S.Ct. 2031, 44 L.Ed.2d 589, 1 Media L. Rep. 1232

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 See, e.g., New York Times, May 9, 1968, p. 51 (surrender on murder indictment); July 3, 1968, p. 70 (held incompetent to stand trial); Aug. 15, 1968, p. 44 (indicted in securities case); Feb, 18, 1969, p. 31 (murder trial scheduled); Mar. 2, 1969, p. 63 (convicted of murder).

2 This was the theory adopted by the Third Circuit in United States ex rel. Deggett v. Yeager, 472 F.2d 229 (1973).

3 One juror who did not know that petitioner had been previously convicted for the theft of the Star of India sapphire, one who did not know of the murder conviction, and one who had never heard about the securities case were informed about them by petitioner's counsel, who then asked whether that knowledge would not prejudice them against petitioner. We will not readily discount the assurances of a juror insofar as his exposure to a defendant's past crimes comes from the defendant or counsel. We note also, and disapprove counsel's habitual references to his client, at voir dire, as 'Murph the Surf' rather than by his name.

4 We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. E.g., Beck v. Washington, 369 U.S. 541, 556, 82 S.Ct. 955, 963, 8 L.Ed.2d 98 (1962). To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.

5 The entire exchange appears at App. 139:
'Q. Now, when you go into that jury room and you decide upon Murphy's guilt on innocence, you are going to take into account that fact that he is a convicted murderer; aren't you?
'A. Not if we are listening to the case, I wouldn't.
'Q. But you know about it?
'A. How can you not know about it?
'Q. Fine, thank you.
'When you go into the jury room, the fact that he is a convicted murderer, that is going to influence your verdict; is it not?
'A. We are not trying him for murder.
'Q. The fact that he is a convicted murderer and jewel thief, that would influence your verdict?
'A. I didn't know he was a convicted jewel thief.
'Q. Oh, I see.
'I am sorry I put words in your mouth.
'Now, sir, after two or three weeks of being locked up in a downtown hotel, as the Court determines, and after hearing the State's case, and after hearing no case on behalf of Murphy, and hearing no testimony from Murphy saying, 'I am innocent, Mr. (juror's name),'-when you go into the jury room, sir, all these facts are going to influence your verdict?
'A. I imagine it would be.
'Q. And in fact, you are saying if Murphy didn't testify, and if he doesn't offer evidence, 'My experience of him is such that right now I would find him guilty.'
'A. I believe so.'

6 If persons who are excused for other reasons also exhibited a disqualifying opinion as to guilt, petitioner has not so claimed.

1 The juror stated that she acquired a portion of her knowledge of petitioner's criminal background from an article in that week's Miami Herald entitled, 'Defense Exhausts Jury Challenges in Murphy Trial,' which included the sentence: 'Jury selection will continue today in the trial of beach boy hoodlum serving a life sentence for murder in connection with the Whisky Creek slaying of two secretaries in 1968.'

2 A juror chosen as an alternate testified that she did not know whether she 'would give the same fair and impartial treatment to a convicted killer as (she) would to another person.' She added that she did not know whether she could be fair and impartial in her deliberations in the case:
'Q. The question is, would you compromise your verdict; could you go there-and say the State proved his guilt and the defense proved that he was insane, but, 'I'm not going to let that guy walk the streets, so I'm going to find him guilty, period?'
'Would you do that?
'A. I don't know at this point.
'Q. Right.
'So in fact, ma'am, at this point you cannot tell us whether you can give a fair and impartial deliberation about Murphy, number one, because of the lack of evidence; and number two, because of what you know about Murphy; isn't that a fact?
'A. Yes.'

82 So.3d 905
District Court of Appeal of Florida,
Fourth District.

Brian HOOKS, Appellant,
v.
STATE of Florida, Appellee.

No. 4D08–4729. | June 29, 2011.

Synopsis
Background: Defendant was convicted by jury in the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Cynthia G. Imperato, J., of second degree murder and attempted second degree murder, and he appealed.

[Holding:] The District Court of Appeal, May, J., held that pretrial publicity did not warrant change of venue.

Affirmed.

West Headnotes (6)

[1] **Criminal Law**
Discretion of court
Criminal Law
Change of venue

Motion for change of venue is a matter addressed to the sound discretion of the trial court, and the trial court's decision will generally be upheld if there is no showing of a palpable abuse of discretion.

[2] **Criminal Law**
Local Prejudice

Test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

[3] **Criminal Law**
Particular offenses

Pretrial publicity, while extensive, did not so infect the community that it was impossible to select jury who would try the case solely on the evidence, and thus, change of venue was not warranted; Broward County was the second largest county in the State, and this rendered the publicity less likely to infect the entire community than it might in smaller community, media coverage alternated between condemning defendants' actions, and, at other times, reminding community of defendants' right to fair trial, majority of media coverage focused on surveillance video of first attack, which was admitted at trial and published to jury, and in the initial venire, at least 88 jurors admitted to having little or no knowledge about case.

[4] **Criminal Law**
Local Prejudice

Pretrial publicity is normal and expected in certain kinds of cases, and that fact, standing alone, will not require a change of venue.

[5] **Criminal Law**
Local Prejudice

On motion for change of venue, trial court must evaluate extent and nature of any pretrial

publicity and difficulty encountered in actually selecting jury.

1 Cases that cite this headnote

[6] **Criminal Law**
Local Prejudice

In evaluating nature and extent of any pretrial publicity on prospective jurors, trial courts consider many factors, including: (1) the length of time between the crime and the trial and when the publicity occurred; (2) whether the publicity was factual or inflammatory; (3) whether the publicity was one-sided; (4) the size of the community; and (5) whether the defendant exhausted his peremptory challenges.

Attorneys and Law Firms

***906** Jeremy J. Kroll of Bogenschutz, Dutko & Kroll, P.A., Fort Lauderdale, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

Opinion

MAY, J.

A sad tale of the murder of a homeless person sets the stage for the issues in this appeal. The defendant appeals his conviction on one count of second degree murder and two counts of attempted second degree murder, which resulted in concurrent sentences of thirty years' imprisonment. Several issues were raised, but none warrant a reversal. We write to discuss the trial court's denial of the defendant's motion ***907** to change venue due to pre-trial publicity. We affirm.

Four young men congregated for an evening of alcohol, marijuana, and Xanax, which culminated in tragedy. They decided to take a trip to the beach, and a couple of them decided they wanted to "beat up a bum." On this first trip, the defendant and co-defendant attacked their first victim, who was sitting on a bench at the downtown campus of FAU.

A surveillance video captured the attack as the first victim was beaten by two males with baseball bats at 1:06 a.m. The victim suffered a skull fracture, a facial fracture, a laceration and swelling to his forehead, some tenderness in his cervical spine, and a deformity of his left forearm wrist area.

The four then went to a park and attacked their second victim. During this attack, the defendant and co-defendant beat the victim with bats and shot him with a paintball gun. This victim did not survive the attack. Afterwards, they returned to the house of one of the attackers, at which point one of the young men departed and returned home for the evening. The remaining three ventured out again in the defendant's truck.

This time, the three young men came across another homeless man near a church, who was sleeping on the ground under a blanket. All three young men attacked the third victim, and ran off when he stood up and started yelling. This victim sustained head injuries and a shattered arm.

The grand jury indicted the defendant with one count of first degree murder and two counts of attempted first degree murder. The defendant entered a not guilty plea. Subsequently, the defendant moved for a change of venue, which was accompanied by three affidavits and eighty-six media reports exhibiting the intense media coverage received by this case. In response to this media coverage, the trial court entered orders precluding extrajudicial comment. The amended order noted: "The instant case has already garnered a great amount of national and local coverage, and this Court believes that some extrajudicial comments may very well have already been prejudicial to the respective [parties'] rights."

The trial court ordered the pre-screening of four hundred jurors, sealed the names and addresses of the jurors, and prohibited the filming or photographing of their faces. However, the trial court did allow the media to record their audible responses.

During the first round of jury selection, defense counsel advised the court that all the major newscasts had shown the surveillance video of the first incident the night before. Certain jurors confirmed being exposed to the news coverage, while others possessed copies of the local newspaper containing an article about the case. Of those jurors who had read the article, some had just read the article and others had discussed it as well.

The trial court acknowledged the publicity generated by the case, and commented:

> [T]he blogs are the most disconcerting thing for the Court. People have very, very strong opinions once they have seen this video. I mean, it's really disturbing, actually. And we saw it yesterday with people coming in that you know, I seen that video and I can't put that out of my head and we tried our best to—we are trying to find a fair and impartial jury for these defendants here.

And yet, some internet comments and online articles were either sympathetic to the defendants or unsympathetic to the homeless. Still, other comments focused on the defendants' right to a fair trial.

After pre-screening jurors, the defendant filed a renewed motion for change of venue with supplementary exhibits. The ***908** defendant requested to individually voir dire the jurors concerning the pre-trial publicity, and filed a motion for jury sequestration. The court denied the request to sequester the jurors.

The trial court took the motion for change of venue under advisement, noting the 529 jurors examined and the routine showing of the surveillance video. The defendant renewed all of his pre-trial objections and motions, all of which were again denied.

After opening statements, the trial court instructed the jury not to watch the news, read the paper, or talk to anyone about the case. Media coverage continued throughout the trial. During the trial, the third victim gave an interview outside the courthouse, which caused defense counsel to renew the motion for sequestration and move for a mistrial. The trial court questioned each juror individually, but denied the motions.

The trial continued and the defendant once again renewed his motion for sequestration. Counsel cited numerous articles: a biography of one of the victims; an interview with the parents of the deceased victim; and a video featuring a good friend of the deceased victim that appeared on a website with footage of the funeral and the videotape of the incident. The defendant again renewed his motion for change of venue. The trial court denied the motions, noting the jurors' obvious awareness of the community's interest since jury selection started due to the "amount of press that's been in the courtroom."

After closing arguments, the defendant renewed all motions, which the trial court denied. The jury returned a verdict finding the defendant guilty of second degree murder with a weapon as to Count 1, and guilty of attempted second degree murder with a weapon as to Counts 2 and 3. The trial court sentenced the defendant to concurrent terms of thirty years. From his conviction and sentence, the defendant appeals.

[1] "A motion for change of venue is a matter addressed to the sound discretion of the trial court, and the trial court's decision will generally be upheld if there is no showing of a palpable abuse of discretion." *Straight v. State*, 397 So.2d 903, 906 (Fla.1981). We have the responsibility to independently evaluate the circumstances. *Rolling v. State*, 695 So.2d 278, 285 (Fla.1997). The defendant has the burden to demonstrate prejudice. *Manning v. State*, 378 So.2d 274, 276 (Fla.1979).

The defendant argues the denial of his motion for change of venue deprived him of his constitutional right to a fair trial because the general state of mind of the jury venire was infected by the media attention given to the case. The State responds that notwithstanding the media attention, this jury tried the defendant solely upon the evidence. The jury members either had no knowledge of the case or were able to set aside that knowledge and be fair and impartial.

[2] [3] "The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom." *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla.1977) (quoting *Kelley v. State*, 212 So.2d 27, 28 (Fla. 2d DCA 1968)).

[4] [5] We start with the basic premise that "pretrial publicity is normal and expected in certain kinds of cases ... and that fact standing alone will not require a change of venue." *Rolling*, 695 So.2d at 285. Trial courts must consider a two-pronged analysis: "(1) the extent and nature of any pretrial publicity; and (2) the ***909** difficulty encountered in actually selecting a jury." *Id.*

[6] In evaluating the first prong, trial courts consider many factors, including: (1) the length of time between the crime and the trial and when the publicity occurred; (2) whether the publicity was factual or inflammatory; (3) whether the publicity was one-sided; (4) the size of the

community; and (5) whether the defendant exhausted his peremptory challenges. *Id.*

Here, the publicity began immediately after the crime when law enforcement released the surveillance video of the first attack to the media to help apprehend the perpetrators. The video was aired numerous times and the attacks received significant publicity up to and throughout the trial. More than two years elapsed between the crimes and the first round of voir dire. Nevertheless, in the initial venire, at least eighty-eight jurors admitted to having little or no knowledge about the case and at least eighty-two additional jurors in the second round also knew nothing about the case, including five of the jurors selected.[1]

Second, the majority of coverage focused on the surveillance video of the first attack, which was admitted at trial and published to the jury. Third, the video was factual, even though it was graphic and disturbing. The media coverage alternated between condemning the actions, and, at other times, reminding the community of the defendants' right to a fair trial.

Fourth, Broward County is the second largest county in the State. This renders the publicity less likely to infect the entire community than it might in a smaller community. *Manning,* 378 So.2d at 276. Fifth, the defendant exhausted all of his peremptory challenges. When all five factors are considered, the pretrial publicity, while extensive, did not so infect the community that it was impossible to select a jury who would try the case solely on the evidence.

"The second prong of the analysis requires the trial court to examine the extent of difficulty in actually selecting an impartial jury at voir dire." *Rolling,* 695 So.2d at 285. We pause a moment to compliment the trial court, who took significant time, exhibited considerable patience, and thoughtfully imposed precautions to ensure the defendant received a fair trial. Hundreds of persons underwent *voir dire* until the trial court was satisfied that the jurors were impartial and qualified to serve on the jury. While arduous, jury selection was accomplished.

We live in a day and age where news is instantaneous and pervasive. Within minutes, we are alerted to happenings from around the world. Video surveillance is commonplace and exposure of such video in the media is not uncommon. Access to media is available twenty-four hours a day, seven days a week. And the list of commentators expressing their opinions on every aspect of our lives is endless. Virtually no high profile case is immune to vast exposure on the electronic waves of today's communication devices. We must rely on our justice system and those that toil within it to ensure the protection of our constitutional guarantees. We are confident that this defendant's rights were protected and that he received a fair trial notwithstanding the pretrial publicity in this case. We find no abuse of discretion and affirm.

Affirmed.

DAMOORGIAN and LEVINE, JJ., concur.

Parallel Citations

36 Fla. L. Weekly D1382

Footnotes

1 These numbers were provided by the State and appear to be accurate.

Unpublished Disposition
83 So.3d 707 (Table)
Only the Westlaw citation is currently available.

Supreme Court of Florida.

Brian HOOKS, Petitioner(s)
v.
STATE of FLORIDA, Respondent(s).

No. SC11–1477. | Feb. 2, 2012.

Opinion

***1** This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R.App. P. 9.330(d)(2).

CANADY, C.J., and PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur.

Parallel Citations

2012 WL 360185 (Fla.)

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1994 WL 397438
Florida Circuit Court, Seventeenth Judicial Circuit, Broward County.

STATE of Florida, Plaintiff,
v.
Derek KOZMA, Defendant.

No. 92-15914 CF10E. | Feb. 4, 1994.

Opinion

ORDER GRANTING MEDIA'S MOTION FOR ACCESS AND DENYING *DEFENDANT'S MOTION TO PROHIBIT PUBLIC DISCLOSURE*

EADE, Judge.

***1** THIS CAUSE came before the Court for hearing on January 21 and 26, 1994, on the motions filed by The Miami Herald Publishing Company, a division of Knight-Ridder, Inc., and Post-Newsweek Stations of Florida, Inc. (collectively, the "Media") for limited intervention and for access to a Statement by Defendant Kozma, which was the subject of a suppression hearing in this case, and on the Defendant's Motion to prohibit public disclosure of that Statement. The Court having reviewed the videotape of the Statement *in camera*, having reviewed the parties' motions and the memoranda of law submitted by the Media, having conducted several hearings, having heard argument of counsel and being otherwise duly advised, makes the following findings of fact and conclusions of law:

1. Defendant Kozma is one of several co-defendants in this case. Defendant Kozma's videotaped statement was the subject of a motion to suppress. After a public hearing during which the Statement was discussed but not published in open court, this Court held the Statement would be inadmissible at the trial in this case, presently scheduled to commence in approximately 45 days.

2. The Media has requested the State Attorney's Office to provide them with copies of the videotape and transcript of the Statement under the Public Records Act, Chapter 119, Florida Statutes, and has also requested access to the Statement as a judicial record because it was considered by the Court as part of Defendant Kozma's Motion to Suppress. Defendants have requested the Court to prohibit public disclosure of the Statement. The State has taken no position on these issues, but has refused to disclose the Statement until the Court determines whether such disclosure is proper. These motions present several issues for the Court.

3. First, Defendant Kozma argues that the Statement reveals "the substance of a confession" within the meaning of Section 119.07(3)(m), Florida Statutes, and therefore cannot be disclosed. Section 119.07(3)(m) provides that records revealing "the substance of a confession" are exempt from the disclosure requirements of the Public Records Act until final disposition of the criminal case.

4. The Court has reviewed the Statement *in camera* as it is required to do under Section 119.07(2)(b), which also provides that only those portions of the Defendant's Statement which constitute a "confession" are to be withheld and the remainder is to be released to the public. In reviewing the Defendant's Statement, the Court is guided by the Opinion of the Attorney General 84-33 (1984), which analyzed the cases defining "confession" and concluded that only those portions in which the Defendant "acknowledges guilt of the offense charged" constitute a "confession" under this exemption. Unless a defendant admits every material element of the crime charged, his statement is not a "confession". The Court agrees with this Opinion of the Attorney General. If the Legislature had intended to exempt all statements or admissions by a defendant it would have so provided. There is no basis for assuming the Legislature intended to expand the definition of confession to include admissions against interest. This Court cannot rewrite the statutory exemption. This statutory interpretation is particularly required here because exemptions under the Public Records Act are to be construed narrowly. *Bludworth v. Palm Beach Newspapers,* 476 So.2d 775, 779 n. 1 (Fla. 4th DCA 1985). There is no legislative history indicating the Legislature intended to define "confession" any more broadly than it had been defined in the existing case law. *See, Brown v. State,* 111 So.2d 296, 298 (Fla.2d DCA 1959); *Louette v. State,* 12 So.2d 168 (Fla.1943); *Palmer v. State,* 145 So. 69, 72 (Fla.1933); *Parrish v. State,* 105 So. 130, 133 (Fla.1925); *Bates v. State,* 84 So. 373, 376 (Fla.1919). This Court expressly rejects the contrary view of the Circuit Court in *State v. Duvernois,* 16 F.L.W. C130 (Fla. 19th Cir.Ct.1991).

***2** 5. Based on the Court's *in camera* review of Defendant Kozma's Statement, the Court finds that although the Defendant has made some potentially damaging admissions in the Statement, he has not

admitted to every element of the offenses charged and he has not acknowledged guilt of those charges. Accordingly, the Court finds no portion of the Statement constitutes a "confession" within the meaning of Section 119.07(3)(m).

6. Even if the Statement were a "confession", Section 119.07(3)(m) could not alone prevent public disclosure of the Statement once it was used in connection with a judicial proceeding as it was in this case. At that point it became a judicial record to which the public is entitled to access under the First Amendment to the United States Constitution and under Florida common law. *Barron v. Florida Freedom Newspapers,* 531 So.2d 113, 118 (Fla.1988); *Bundy v. State,* 455 So.2d 330, 338 (Fla.1984); *State v. P.D.A.,* 618 So.2d 282, 284 (Fla. 2nd DCA 1993). Access can only be denied if the party seeking closure can prove at an evidentiary hearing each of the following three elements recognized in *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1, 6 (Fla.1982): (1) the requested limitation on access is necessary to prevent a serious and imminent threat to the administration of justice; (2) no other alternatives are available which would preserve fair trial rights, including voir dire of potential jurors, continuances, change of venire, peremptory challenges and admonition of the jury; *and* (3) the requested limitation on access would be effective in protecting those fair trial rights, and no broader than necessary to do so. *Bundy v. State,* 455 So.2d 330, 338 (Fla.1984); *Florida Freedom Newspapers, Inc. v. McCrary,* 520 So.2d 32, 35 (Fla.1988).

7. The burden is on the Defendant to present sufficient evidence to satisfy each element of this strict three-part *Lewis* test. Defendant Kozma has failed to do so. He relies on the extensive publicity in the print and television media about this case, and introduced into evidence numerous newspaper articles about the case. However, even massive pretrial publicity about a case is not enough to show a serious and imminent threat to the administration of justice or to the denial of fair trial rights. *Provenzano v. State,* 497 So.2d 1177, 1182 (Fla.1986); *Bundy v. State,* 471 So.2d 9, 19 (Fla.1985). The fact that the Statement has been determined to be inadmissible does not alter that conclusion. Even where pretrial publicity includes publication of inadmissible evidence or confessions, a defendant can still receive a fair trial. *Holsworth v. State,* 522 So.2d 348, 351 (Fla.1988); *Mu'Min v. Virginia,* 500 U.S. 415, 114 L.Ed.2d 493 (1991). The few instances in which extensive pretrial publicity has been found to pose a serious and imminent threat to fair trial rights have been in much smaller communities than Broward County, such as Jackson County (population 41,375 according to the 1990 census) which was inundated with prejudicial pretrial publicity in *Florida Freedom Newspapers, Inc. v. McCrary,* 520 So.2d 32 (Fla.1988). The large size and urban nature of the jury pool in Broward County essentially precludes the type of showing required by the strict three-part *Lewis* test. This Court agrees with the observation of another circuit judge in a different high profile case: "A significant number of the public does not retain what is disseminated by the media or, simply, does not read newspapers or watch television. As a result, the feared impact on the fair trial rights of criminal defendants often does not occur-even in matters that have received extensive media coverage." *Florida v. Bennett,* 19 Med.L.Rptr. 1383, 1384 (13th Cir.Ct.1991). In addition, Defendant has failed to satisfy the second prong of the three-part test. This Court can and will protect Defendant Kozma's fair trial rights through alternative measures less restrictive than the requested closure sought by the Defendant. Accordingly, even though this Court finds that the Statement does contain potentially damaging admissions by Defendant Kozma, the Court also finds he has not satisfied the first or the second prong of the three-part test.

***3** 8. Defendant Kozma's counsel requested this Court to delay release of the Statement for 45 days until a jury is impanelled. The Court denies this request as unjustified and contrary to law. "News delayed is news denied." *State ex rel. McIntosh v. Miami Herald,* 340 So.2d 904, 910 (Fla.1976).

IT IS THEREFORE ORDERED:

1. The Media's Motion for Limited Intervention is GRANTED.

2. The Media's Motion for Access to the Statement of Defendant Kozma is GRANTED, and the Defendants' Motion to prohibit public disclosure of the Statement is DENIED.

3. This Order is stayed for 48 hours, until January 28, 1994 at 11:00 a.m., to permit Defendant Kozma to seek appellate relief. Immediately upon expiration of such stay the Office of the State Attorney shall release to the Media copies of the Statement as requested by the Media unless the State Attorney's Office has been expressly notified that the appellate court has stayed this Order.

ORDERED.

Parallel Citations

22 Media L. Rep. 1539

22 Media L. Rep. 1539

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522 So.2d 348
Supreme Court of Florida.

Eric Brian HOLSWORTH, Appellant,
v.
STATE of Florida, Appellee.

No. 67973. | Feb. 18, 1988. | Rehearing Denied April 18, 1988.

Defendant was convicted in the Circuit Court for Broward County, Robert W. Tyson, Jr., J., of first-degree murder, and sentenced to death. Defendant appealed. The Supreme Court, Barkett, J., held that: (1) defendant failed to establish that pretrial publicity was prejudicial so as to warrant change of venue; (2) expert was properly precluded from testifying as to defendant's possible voluntary intoxication; (3) pretrial identification procedures were not impermissibly suggestive; (4) collateral crime evidence was properly admitted; (5) trial court did not err in failing to fully re-instruct jury when jury asked specific question during deliberations; but (6) trial court erred in disregarding jury's recommendation of life sentence.

Judgment of guilt affirmed; sentence vacated and remanded with directions.

Ehrlich and Shaw, JJ., concurred in part, dissented in part, and filed opinions.

West Headnotes (11)

[1] **Criminal Law**
Local Prejudice

Publicity about confession, standing alone, is not per se grounds for granting change of venue, and defendant must still demonstrate that publicity was prejudicial either by evidence that particular jury was affected or by evidence that general state of mind of community's residents was so infected that fair trial could not be obtained. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[2] **Criminal Law**
Weight and effect of opposing affidavits or other evidence

Defendant failed to establish that he was prejudiced as result of newspaper article reporting his confession such that motion for change of venue should have been granted; although one prospective juror was seen reading newspaper prior to jury selection, and although associate publisher of newspaper in question subsequently was seated on defendant's jury, there was no evidence that any potential juror, including associate editor, read article in question, and defendant failed to exercise peremptory challenge to excuse associate editor. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[3] **Criminal Law**
Expert witnesses

Expert testimony on affirmative defense of voluntary intoxication was properly excluded in murder prosecution due to fact that State did not receive formal notice of intent to rely on such defense until expert's testimony was proffered, and that defense conceded that it misled State by indicating that it would not call expert during guilt phase of trial.

2 Cases that cite this headnote

[4] **Criminal Law**
Intoxication

Murder defendant's out-of-court statement to expert, that he had been drinking alcohol, smoking marijuana, and taking PCP on night of crime, was insufficient to establish proof of ingestion such that expert's testimony as to effect of intoxicants was admissible.

1 Cases that cite this headnote

underlying felony and definition of "reasonable doubt."

2 Cases that cite this headnote

[5] **Criminal Law**
Manner of exhibition; suggestiveness
Criminal Law
Number, character, and appearance of lineup participants

Pretrial identification procedures were not suggestive, notwithstanding defendant's contention that he was given fifth position in both photographic array and live lineup, and that he was only person who appeared in both identification procedures; participants in lineup were allowed to position themselves as they liked and to exchange clothing, and victim had ample time to observe defendant during crime.

1 Cases that cite this headnote

[6] **Criminal Law**
Other particular offenses
Criminal Law
Geographic proximity

Collateral crime evidence showing that murder defendant had, three years earlier, entered trailer of another woman in same trailer park in which victim was killed was properly admitted to show identity, particularly in view of fact that incidents were committed within 2,000 feet of each other and within same distance of defendant's residence at time of each crime, and that circumstances of each assault were similar.

[7] **Criminal Law**
Requisites and sufficiency

When jury expressed apparent confusion during deliberations, as to whether first-degree murder would be supported by finding consistent with felony-murder theory, trial court properly limited its response to instruction relevant to both premeditated and felony-murder, rather than re-instructing jury on elements of

[8] **Sentencing and Punishment**
Overriding jury recommendation

In view of fact that evidence of valid mitigating circumstances was sufficient to justify jury's recommendation of life in murder prosecution, trial court erred in disregarding jury's recommendation and sentencing defendant to death; jury could have concluded from evidence that defendant's conduct was affected by his use of drugs and alcohol and his physical abuse as child, and jury could have considered that defendant's employment history and positive character traits showed potential for rehabilitation and productivity within prison system.

15 Cases that cite this headnote

[9] **Sentencing and Punishment**
Sufficiency

For purpose of mitigation supporting life sentence in capital murder case, evidence was sufficient for jury to reasonably have concluded that defendant may have been high on PCP and alcohol at time he committed murder.

4 Cases that cite this headnote

[10] **Sentencing and Punishment**
Childhood or familial background

For purpose of sentencing in capital murder case, childhood trauma constitutes recognized mitigating factor.

[11] **Sentencing and Punishment**
Offender's character in general
Sentencing and Punishment
Other matters related to offender

Defendant's employment history and positive character traits, showing potential for rehabilitation and productivity in prison system, constitutes proper mitigating factor for sentencing purposes in capital murder case.

2 Cases that cite this headnote

Attorneys and Law Firms

***349** H. Dohn Williams, Jr., Sp. Public Defender of H. Dohn Williams, Jr., P.A., Fort Lauderdale, for appellant.

Robert A. Butterworth, Atty. Gen., and Noel A. Pelella and Penny H. Brill, Asst. Attys. Gen., West Palm Beach, for appellee.

Opinion

BARKETT, Justice.

Eric Brian Holsworth appeals his conviction of first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm as to guilt but reduce his sentence to life in accordance with the jury's recommendation.

On June 9, 1984, Alice Dzikowski and her mother Gloria Salerno were attacked in their mobile home. Alice was on the couch in the living room when Gloria went to bed in a back bedroom. Shortly after midnight, Gloria was awakened by her daughter's screams from the living room. When she ran to her daughter's aid, Mrs. Salerno was grabbed from behind by appellant, who placed his hand over her mouth, brandished a knife, and said, "I'll get you bitch—I'll get you mama." Mrs. Salerno struggled, breaking the knife with her hand. Appellant grabbed another knife from the kitchen and continued to slash at Mrs. Salerno. After wounding her, appellant ran away from the trailer. Gloria Salerno received stab wounds to her arms, hands, lung, chest, and face as well as a severed tendon in her thumb. Alice Dzikowski received multiple stab wounds, including a five-inch wound to the heart that killed her. Appellant was arrested several months later in California during a routine traffic stop and returned to Florida for trial.

At trial, Mrs. Salerno positively identified appellant as the assailant. Penny Lindsey, who lived nearby, testified that she saw ***350** appellant covered in blood near her trailer approximately one hour after the murder. Further testimony at the trial revealed that appellant had quit his job the day after the murder and left town, saying that he was "going up north," that he was "in trouble" and had done "a stupid thing." Fingerprints identified as appellant's were found on a back bedroom window at the victims' trailer, the apparent point of entry and exit, and on one of the two knives used in the attack. Finding appellant guilty of attempted first-degree murder, armed burglary, and first-degree murder, the jury recommended life imprisonment on the murder charge. Overriding the jury's recommendation, the trial court sentenced appellant to death.

Appellant challenges his conviction on six grounds. First, appellant argues that the trial court erred in denying his motion for change of venue. The motion was prompted by a newspaper article which appeared in the Miami Herald, containing appellant's picture and reporting his confession, including parts of it that were suppressed. One of the prospective jurors was seen reading the newspaper (not the article) prior to jury selection. To further support his argument, appellant notes that an associate publisher of the Miami Herald subsequently was seated on the jury. Appellant contends that under these facts, automatic reversal is required under *Oliver v. State*, 250 So.2d 888 (Fla.1971). We disagree and take this opportunity to clarify *Oliver*.[1]

Generally, the test to determine whether a change of venue is required is

> "whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom."

McCaskill v. State, 344 So.2d 1276, 1278 (Fla.1977) (quoting *Kelley v. State*, 212 So.2d 27, 28 (Fla. 2d DCA 1968)). In order to meet this test, the defendant must establish that the general atmosphere of the community was deeply hostile to him, which can be demonstrated either by inflammatory publicity or great difficulty in selecting a jury. *Copeland v. State*, 457 So.2d 1012, 1017

(Fla.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985). Given this general rule, appellant contends that a special rule relating to confessions was established in *Oliver*, to wit, that the requisite showing of hostility must be presumed whenever "a 'confession' is featured in news media coverage of a prosecution" and that "the voir dire process cannot cure the effect of a 'confession' which has been given news media coverage." 250 So.2d at 890.

In *Oliver*, the sole daily newspaper in the area published a transcript of Oliver's confession in which he implicated himself and others, expressly stated that he had a motive for the crime, and gave a description of it. Moreover, *Oliver* dealt with a crime by a black man against a white woman during a period of racial unrest. On those facts, this Court found error without proof that members of the jury had seen the confession or been prejudiced by it.

This Court's holding in *Oliver*, however, has long since been "restricted and refined." *See Straight v. State*, 397 So.2d 903, 906 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); *Hoy v. State*, 353 So.2d 826, 830–31 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978). In *Hoy*, this Court declined to apply *Oliver*, noting that a retraction of the confession had also been published, the area in question was not dependent on a sole daily newspaper, and there was no evidence that any of the jurors read the article in question. In *Straight*, we again rejected the argument that the rule in *Oliver* required a change of ***351** venue solely because of publicity surrounding a confession. We noted that

> the case received considerable media attention and ... knowledge of the murder was widespread. Four-fifths of the prospective jurors, and eight of the twelve jurors who served on the jury, had some prior knowledge of the case. *The crucial consideration, however, is not knowledge, but whether such knowledge rendered the jurors prejudiced.*

397 So.2d at 905–06 (emphasis added). Despite the widespread publicity in that case, we held that *Oliver* did not require reversal because

> [t]he trial judge here presided over a long and painstaking voir dire procedure. The record shows that prospective jurors exhibiting even a hint of prejudice were excused. The court granted the appellant extra peremptory challenges and defense counsel did not use them all.

Straight, 397 So.2d at 906.

[1] Thus, our cases since *Oliver* implicitly have held that publicity about a confession, standing alone, is not *per se* grounds for the granting of a change of venue. Although publicity about a confession may be inflammatory, the defendant still must demonstrate that the publicity was prejudicial either by evidence that the particular jury was affected or by evidence that the "general state of mind of the inhabitants of the community was so infected" that a fair trial could not be obtained. The critical factor where there is pretrial publicity of any kind is "the extent of the prejudice or lack of impartiality among potential jurors that may accompany the knowledge of the incident." *Provenzano v. State*, 497 So.2d 1177, 1182 (Fla.1986), *cert. denied*, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987).

Turning to the facts of this case, we note initially that the trial court's ruling on a motion for change of venue will be upheld absent a manifest abuse of discretion. *Davis v. State*, 461 So.2d 67 (Fla.1984); *Johnson v. State*, 351 So.2d 10 (Fla.1977).

[2] The record shows that the trial court denied the motion for change of venue because the jury selection process had not yet begun and there was no evidence that any of the potential jurors had even read the article in question. The only basis for defendant's motion was the *presence* of the newspaper in the jury assembly room, that is, the room occupied by the entire jury pool for the Broward County courts. In ruling on the motion, the trial court stated that any potential juror exposed to the Miami Herald article or any other press coverage of the case would be excused for cause. In fact, two prospective jurors who had been exposed to press coverage of the case were so excused.

As to appellant's arguments concerning the juror who was an associate editor of the Miami Herald, we fail to see a connection between this juror and the motion for change of venue since the motion was denied *prior* to seating her. Appellant could have exercised a peremptory challenge to excuse her but chose not to do so. Appellant cannot now complain in light of his acquiescence in her selection. Moreover, we cannot agree with appellant that because this juror was an associate editor of the Miami Herald, we must presume that she read the article concerning appellant's trial. This contention is factually refuted by

this juror's unequivocal statements on voir dire that she avoided reading newspapers during the venire process and did not know or read anything about the case. We note, too, that the members of the jury, who at defense counsel's request were questioned a number of times throughout the trial about their exposure to media coverage of the case, repeatedly responded that they had not read or heard anything about it outside the courtroom.

Appellant has shown no evidence that even one of the jurors sitting on the case was exposed to *any* press coverage pertaining to the defendant nor any evidence of difficulty in selecting an impartial jury. In sum, the record fails to support any claim of prejudice. We find no abuse of discretion.

Appellant next argues that the trial court erred in refusing to allow the testimony of defense expert Dr. Antonio Varsida during the guilt phase of the trial on the issue of the affirmative defense of voluntary intoxication. ***352** Dr. Varsida would have testified that appellant's ingestion of alcohol and PCP on the night of the crime impaired his "psychological functioning," and, as a result, he lacked the specific intent to commit murder. We find the proffered testimony properly excluded for two reasons.

[3] First, although Dr. Varsida interviewed appellant on July 10, 1985, the state did not receive formal notice of intent to rely on the defense of voluntary intoxication until Dr. Varsida's testimony was proffered on July 31, 1985. Moreover, the defense conceded that it misled the state by indicating that Dr. Varsida would not be called during the guilt phase of the trial. The state was thereby precluded from obtaining witnesses to rebut Dr. Varsida's testimony.

[4] Second, expert testimony and opinion as to the effect of intoxicants on a defendant's mind are inadmissible absent some proof of ingestion other than the defendant's hearsay statements to the expert. *Cirack v. State*, 201 So.2d 706, 708–10 (Fla.1967); *Johnson v. State*, 478 So.2d 885, 886–87 (Fla. 3d DCA 1985). *See also Jones v. State*, 289 So.2d 725, 728–29 (Fla.1979). Here, the primary basis for Dr. Varsida's proffered opinion was appellant's out-of-court statement to Dr. Varsida that he had been drinking alcohol, smoking marijuana, and taking PCP the night of the crime. The only other evidence in the record was Gloria Salerno's statement that she thought she smelled beer on appellant's breath. Under these circumstances, the trial court did not err in precluding Dr. Varsida's testimony.

Appellant's third point is that his right to due process of law was violated because Gloria Salerno's in-court identification was tainted by unreliable out-of-court proceedings. We disagree. The test for evaluating such claims is whether the police employed a procedure so impermissively suggestive as to give rise to a substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968); *Grant v. State*, 390 So.2d 341 (Fla.1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981).

[5] We do not find in this case any indication of suggestive police methods which might have "tainted" Mrs. Salerno's identification of appellant. Mrs. Salerno was shown a photo display in which she identified three possible suspects, one of whom was appellant. Appellant's photograph was number five. Mrs. Salerno then viewed a live lineup in which appellant, again at position five, was the only one of the persons viewed who had also appeared in the previous photo display. For the live lineup, the suspects were given eyeglasses, allowed to position themselves as they liked, and allowed to exchange clothing. We do not find that either of these procedures was conducted in an unreasonably suggestive manner. Furthermore, Mrs. Salerno testified that she had ample opportunity to observe appellant during the crime. Under these circumstances, we agree with the trial court that the procedures used in this case did not give rise to a substantial likelihood of misidentification.

We also find no merit in appellant's fourth contention that the trial court erred in failing to suppress two statements made by Holsworth to the California and Florida police authorities during his arrest and transportation to Florida. We have reviewed the record and determined that the statements in issue were voluntarily made and not elicited by any police interrogation.

[6] Appellant's fifth contention of error as to his conviction concerns the admission of collateral crime evidence under the *Williams* rule. *See Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2)(a), Fla.Stat. (1985). We find no error. Testimony was admitted that three years earlier, appellant had entered the trailer of another woman in the same trailer park. Both the collateral crime and the instant offense were committed within two thousand feet of each other and within the same distance of Holsworth's residence at ***353** the time of each crime; both occurred in the early morning hours; both involved women asleep in house trailers and surreptitious entry; in both the assailant covered the mouths of his victims, battered and threatened them in response to their screams, and then quickly fled

the same way he had entered. Such similarities in the plan or scheme of two crimes can be used to show the identity of the perpetrator. *See Mason v. State*, 438 So.2d 374, 377 (Fla.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). Such evidence is not inadmissible merely because it points to another crime. *Williams.*

We likewise find no merit in appellant's final challenge to his conviction. Appellant argues that the trial court improperly responded to the following question posed by the jury during its deliberations:

> Is it possible to find the Defendant guilty of felonious First Degree Murder without "premeditated design?" The law reads felony First degree does not require a finding of premeditated design, yet, the charge refers to the indictment which uses both "feloniously" and "premeditated design."

The trial court asked the jury if it was referring to the jury instruction relating to felony murder. The foreman answered in the affirmative. The trial court then referred the jury to all of the instructions relevant to both premeditated and felony murder. The court further informed the jury that either theory, if found to be supported by the evidence, would justify a verdict of guilty of first-degree murder. Appellant contends that the jury should have been reinstructed on the elements of the underlying felony, burglary with the intent to commit a battery, and the definition of "reasonable doubt."

[7] We find no error. Apparently confused by the language of the indictment, the jury asked whether first-degree murder could be supported by a finding consistent with the felony murder theory. The jury's request for clarification was a narrow one and the reinstruction was complete on the subject involved. The decision of the trial court to limit the reinstruction to the specific question posed by the jury was proper. *Henry v. State*, 359 So.2d 864, 866–68 (Fla.1978); *Engle v. State*, 438 So.2d 803, 809–11 (Fla.1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984).

[8] We turn now to appellant's claims with regard to his sentence. Appellant contends that the trial court erred in sentencing him to death after the jury recommended that a life sentence be imposed. He argues that sufficient evidence of valid mitigating circumstances was presented upon which the jury reasonably could have based its recommendation of life, and the trial judge in overriding the jury's recommendation merely substituted his view of the evidence and the weight to be given it for that of the jury. We agree.

At the penalty phase, the defense presented testimony from numerous friends and family concerning appellant's family background and character. These witnesses testified that Holsworth was quiet, nonviolent, and well-liked; that he had held a number of jobs; that he had a history of drug and alcohol problems; that he came from a broken home; and that he and his mother were physically abused by his alcoholic stepfather. An expert witness, Dr. Antonio Varsida, testified that Holsworth was "a borderline personality with paranoid and schizoid features." He further testified that the use of alcohol and drugs, particularly the substance PCP, on the night of the murder would cause an extreme emotional reaction diminishing appellant's capacity to appreciate the nature and consequences of his acts.

At the sentencing proceeding before the judge only, the defense presented additional evidence regarding Holsworth's good employment history and his capacity for rehabilitation as demonstrated by his good prison conduct before and after the offense and his completion of several educational courses while in prison.

In support of the death sentence, the judge found as aggravating circumstances that appellant previously had been convicted of a felony involving the use or threat of ***354** violence, the murder was committed while the defendant was engaged in armed burglary, and the murder was especially heinous, atrocious, and cruel.[2] The trial judge found nothing in mitigation, expressly rejecting the testimony and opinion of the expert witness and giving little weight to the testimony of the other witnesses concerning appellant's drug and alcohol problem. The trial judge also found no mitigating value in the evidence offered concerning appellant's rehabilitation, employment history, or family history.

The jury, however, may have given more credence to this testimony. *See Robinson v. State*, 487 So.2d 1040, 1043 (Fla.1986) (trial judge may not have believed evidence of impaired capacity but others might have). Under Florida's capital sentencing statute, it is the jury's function, in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation. *See Valle v. State*, 502 So.2d 1225 (Fla.1987); *Floyd v. State*, 497 So.2d 1211 (Fla.1986). A jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908,

910 (Fla.1975). When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation. *See Gilvin v. State,* 418 So.2d 996, 999 (Fla.1982); *Mills v. State,* 476 So.2d 172, 180 (Fla.1985) (McDonald, J., concurring in part, dissenting in part), *cert. denied,* 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986). On the record before us, we find that adequate grounds exist for reasonable persons to recommend life imprisonment.

[9] First, we believe there was sufficient evidence for the jury to have concluded that appellant's conduct was affected by his use of drugs and alcohol. One of the defense theories in the guilt phase was that appellant's voluntary intoxication prevented him from forming the requisite specific intent for first-degree murder. Witnesses testified to appellant's drug and alcohol problem and the jury was instructed on this defense. Although the jury clearly found the appellant capable of forming at least the specific intent required to commit the underlying felony (armed burglary with intent to commit a battery), it may also have found that as a result of drugs and alcohol, his capacity to appreciate the criminality of his conduct or conform his conduct to the law was impaired. We find the evidence concerning drugs and alcohol, in conjunction with the testimony of numerous witnesses that Holsworth was generally a quiet, nonviolent person, was sufficient for the jury to reasonably have concluded that he may have been high on PCP and alcohol at the time of the murder. *See Norris v. State,* 429 So.2d 688 (Fla.1983) (override improper where there was evidence that appellant had a drug problem and claimed to be intoxicated at the time of the murder).

[10] The physical abuse appellant suffered as a child may also have been a factor in the jury's decision to recommend life imprisonment rather than death. The jury could have concluded that appellant's psychological disturbance was influenced in part by his difficult childhood. Childhood trauma has been recognized as a mitigating factor. *Herring v. State,* 446 So.2d 1049, 1057 (Fla.), *cert. denied,* 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); *Scott v. State,* 411 So.2d 866 (Fla.1982).

[11] The jury also may have considered in mitigation appellant's employment history and positive character traits as showing potential for rehabilitation and productivity within the prison system. *See Fead v. State,* 512 So.2d 176 (Fla.1987); *McCampbell v. State,* 421 So.2d 1072 (Fla.1982).

After careful consideration of the entire record in this case, we conclude that the override was improper. The death penalty, ***355** unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." *State v. Dixon,* 283 So.2d 1, 7 (Fla.1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Despite the depravity of the crime, we find the mitigating evidence sufficient to support a life recommendation. The facts are not so clear and convincing that no reasonable person could differ that death is the only appropriate penalty. *See Tedder.*

Accordingly, we affirm the judgment of guilt, but vacate the sentence of death and remand for the imposition of a life sentence.

It is so ordered.

McDONALD, C.J., and OVERTON, GRIMES and KOGAN, JJ., concur.

EHRLICH and SHAW, JJ., concur in part and dissent in part with an opinion.

EHRLICH, Justice, concurring in part and dissenting in part.

I concur in the judgment of guilt but dissent from that portion of the judgment vacating the death sentence. In my opinion the sentencer, the trial judge, properly weighed the aggravating and mitigating factors and concluded that death was the appropriate penalty. This Court, in its opinion, has made the jury the sentencer by speculating what the jury may have considered in arriving at its life recommendation, and, in effect, has made the jury the sentencer, contrary to the clear and unequivocal language of the statute. If the legislature had opted to make the recommendation of the jury binding on the trial judge it would have so provided.

SHAW, Justice, concurring in part and dissenting in part.
I dissent from that portion of the opinion applying *Tedder v. State,* 322 So.2d 908 (Fla.1975), and vacating the death sentence. I would recede from *Tedder. See Combs v. State,* No. 68, 477 (Fla. Feb. 18, 1988) (Shaw, J., specially concurring); *Grossman v. State,* No. 68, 096 (Fla. Feb. 18, 1988) (Shaw, J., specially concurring); and *Burch v. State,* 522 So.2d 810 (Fla.1988) (Shaw, J., concurring in part, dissenting in part). The sentencing order is supported by competent substantial evidence and should not be disturbed. *State v. Bolender,* 503 So.2d

1247, 1249 (Fla.), *cert. denied*, 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 161 (1987); *Stano v. State*, 460 So.2d 890, 894 (Fla.1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

Parallel Citations

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Footnotes

1 As a threshold matter, we note that appellant offers no record evidence of compliance with Florida Rule of Criminal Procedure 3.240(b)(1), which requires that motions for change of venue be in writing and accompanied by at least three affidavits setting forth facts upon which the motion is based. However, assuming arguendo that appellant's oral motion was procedurally sufficient, we review this claim on its merits.

2 We reject appellant's contention that the trial court improperly applied the heinous, atrocious, or cruel aggravating circumstance. *See Medina v. State*, 466 So.2d 1046, 1050 (Fla.1985); *Duest v. State*, 462 So.2d 446, 449 (Fla.1985); *Peavy v. State*, 442 So.2d 200, 202 (Fla.1983).

397 So.2d 903
Supreme Court of Florida.

Ronald J. STRAIGHT, Appellant,
v.
STATE of Florida, Appellee.

No. 52460. | March 19, 1981. | Rehearing Denied June 2, 1981.

Defendant was convicted in the Circuit Court, Duval County, Virginia Q. Beverly, J., of murder and sentenced to death, and he appealed. The Supreme Court held that: (1) trial court did not abuse its discretion in denying defendant's motion for change of venue; (2) trial court did not err in admitting photographs depicting victim's body which was recovered from river after 20 days, and which showed wounds inflicted on deceased and were quite gruesome because of decomposition; (3) evidence of defendant's flight from police and use of his gun was relevant to issue of his guilty knowledge and thereby to the issue of guilt; (4) assistant state attorney's question suggesting unrelated criminal activity, which was calculated to elicit irrelevant testimony and suggested to the jury existence of such prejudicial evidence was improper; however, improper comment by itself was insufficient to require that the court grant motion for mistrial; and (5) sentence of death imposed upon defendant was proper.

Affirmed.

Sundberg, C. J., concurred in result.

West Headnotes (12)

[1] **Criminal Law**
Evidence and witnesses
Criminal Law
Necessity of requests

Where defense attorney at trial did not object to instruction on credibility or ask for a different or additional one, issue whether judge had a duty to instruct the jury that evidence of prior convictions could only be used in evaluating the defendant's credibility and for no other purpose was waived on appeal.

2 Cases that cite this headnote

[2] **Criminal Law**
Discretion of court

Trial court did not abuse its discretion in denying defendant's motion for change of venue, which was filed due to widespread publicity of murder and news media coverage of his codefendant's confession, in that it was not clear that confession of codefendant implicated both himself and defendant, prospective jurors exhibiting even a hint of prejudice were excused, and court granted the defendant extra peremptory challenges, yet defense counsel did not use them all.

10 Cases that cite this headnote

[3] **Criminal Law**
Photographs and Other Pictures

Basic test of admissibility of photographs is not necessity, but relevance; photographs can be relevant to material issue either independently or by corroborating other evidence.

10 Cases that cite this headnote

[4] **Criminal Law**
Purpose of admission

Trial court in murder prosecution did not err in admitting into evidence photographs depicting victim's body which was recovered from river after 20 days, and which showed wounds inflicted on the deceased and were quite gruesome because of decomposition, in that photographs were few in number and included only a very few gruesome ones which were relevant to corroborate testimony as to how death was inflicted.

14 Cases that cite this headnote

[5] **Criminal Law**
Character or Reputation of Accused

It is improper for a jury to base a verdict of guilt on the conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged.

22 Cases that cite this headnote

[6] **Criminal Law**
Showing bad character or criminal propensity in general
Criminal Law
Relevancy
Criminal Law
Materiality
Criminal Law
Rulings as to evidence

Evidence of criminal activity not charged is inadmissible if its sole purpose is to show bad character or propensity to crime, but evidence of criminal activity not charged is admissible if relevant to an issue of material fact; if irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.

49 Cases that cite this headnote

[7] **Criminal Law**
Flight or refusal to flee
Criminal Law
Resisting or avoiding arrest
Criminal Law
Concealment of identity

When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilty which may be inferred from such circumstance.

14 Cases that cite this headnote

[8] **Criminal Law**
Homicide, mayhem, and assault with intent to kill

Testimony establishing that defendant, who was convicted of murder, fired his gun in direction of police officers in California prior to his arrest was proper, in that evidence of defendant's flight from police and use of his gun was relevant to issue of his guilty knowledge and thereby to the issue of guilt.

10 Cases that cite this headnote

[9] **Criminal Law**
Prejudicial effect and probative value

Even when evidence of separate criminal activity has relevance, it is possible for such evidence, as it is presented, to have an improper prejudicial impact that outweighs its probative value.

4 Cases that cite this headnote

[10] **Criminal Law**
Impeachment
Criminal Law
Introducing evidence of other misconduct by accused

Assistant state attorney's question to defendant suggesting unrelated criminal activity, which was calculated to elicit irrelevant testimony and suggested to the jury the existence of such prejudicial evidence, was highly improper; however, improper comment by itself was insufficient to require the court to grant motion

for mistrial, in that improper comment did not tend to discredit any particular feature of defendant's account of his activities during time crime was being committed or undermine any particular theory of the defense, and, in light of the overwhelming evidence against defendant, it was inconceivable that the prosecutor's improper question might have affected the verdict.

5 Cases that cite this headnote

[11] **Sentencing and Punishment**
Offense committed while in custody or legal restraint
Sentencing and Punishment
Killing while committing other offense or in course of criminal conduct
Sentencing and Punishment
Vileness, heinousness, or atrocity

Sentence of death imposed upon defendant, who was convicted of murder, was proper, in that evidence that defendant was on parole from prison at time of offense supported finding of aggravating circumstance that crime was committed when defendant was under sentence of imprisonment, court properly found one statutory aggravating circumstance based on commission of murder in the course of the felony of robbery, and evidence supported factual findings that defendant directly participated in murder inflicted by multiple stab wounds and bludgeoning establishing statutory aggravating factor that felony was especially heinous, atrocious, and cruel. West's F.S.A. § 921.141(5)(a, d, f, h).

1 Cases that cite this headnote

[12] **Sentencing and Punishment**
Effect of applying invalid factor
Sentencing and Punishment
Dual use of evidence or aggravating factor

Where double recitation of aggravating circumstances in determining propriety of death sentence based on a single aspect of the crime indicates that inflated consideration was accorded to the factor, it is error; however, error of double recitation is harmless where it is clear that the sentencing judge merely recited both statutory factors without giving improper double consideration to the single aspect in question, or where the absence of mitigating circumstances makes clear that any added weight accorded the factor did not tip the balance in favor of a sentence of death rather than life.

1 Cases that cite this headnote

Attorneys and Law Firms

***904** H. Randolph Fallin, Jacksonville, for appellant.

Jim Smith, Atty. Gen., and Carolyn M. Snurkowski, Asst. Atty. Gen., Tallahassee, for appellee.

Opinion

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County. Appellant Ronald J. Straight was convicted of murder in the first degree and sentenced to death. We have jurisdiction of his appeal. Art. V, s 3(b)(1), Fla.Const. We have given careful consideration to each of the appellant's stated grounds of appeal, as the discussion to follow will show. We have reviewed the entire record of the proceedings below in order to determine whether the jury's verdict of guilt was supported by competent, substantial evidence. ***905** We have also reviewed the sentencing proceeding to determine whether the sentence of death is appropriate to this case under the law. s 921.141(4), Fla.Stat. (1975). We affirm the conviction and the sentence.

The evidence at trial showed that at the time of the crime the appellant and Timothy Charles Palmes were living in an apartment also occupied by Jane Albert and her seven-year-old daughter, Stephanie. Mrs. Albert was employed by James Stone at his furniture store. On the day of the crime, in accordance with a plan conceived by Jane Albert, Palmes, and the appellant, James Stone was lured to the apartment. When Stone left the store to go to the apartment, Albert telephoned Palmes and Straight to tell them that Stone was on his way.

When Stone arrived at the apartment, the seven-year-old

Stephanie, on instructions from Palmes and Straight, admitted him and directed him to one of the bedrooms. There Palmes and Straight bound him with wire and placed him in a large box they had constructed in the apartment. They tormented him with hammer blows and stabbings for approximately half an hour before he died from the knife wounds. Then they sealed the box, removed it to a truck, and dumped it in the St. Johns River.

The next day appellant, Palmes, Albert, and Stephanie left Florida taking Stone's car, his credit cards, money from his wallet, and several days' cash receipts from the furniture store. They were arrested in California. Straight fled as police officers approached him and attempted to avoid arrest by firing at the officers.

Mrs. Albert was given immunity and testified at trial as a witness for the state.

Palmes and Straight were jointly indicted for murder in the first degree. Their trials were severed; Palmes was tried first and convicted. Among the items of evidence introduced against him was his confession. There was news media coverage of the fact that he made a confession and also of his later retraction and his repudiation of the confession at trial.

[1] Appellant presents five points on appeal of his conviction. Among them is the argument that the court failed to adequately instruct the jury on the limited use they could make of appellant's prior convictions, which were brought out on his cross-examination, and that this failure was reversible error. He argues that after eliciting the fact of the six convictions on cross-examination of appellant, the prosecutor subsequently commented on them. Thus, he argues, the judge had a duty to instruct the jury that the evidence of prior convictions could only be used in evaluating the defendant's credibility and for no other purpose. We decline to discuss the merits of this argument because the defense attorney at trial did not object to the instruction on credibility or ask for a different or additional one. "An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made." State v. Barber, 301 So.2d 7, 9 (Fla.1974). In order to secure appellate review of jury instructions, the defendant must make known to the court what charges he wants the court to give or not give and his grounds therefor. See Williams v. State, 285 So.2d 13 (Fla.1973); Fla.R.Crim.P. 3.390(d).

Appellant's remaining arguments are: (1) that the court should have granted a change of venue; (2) that the court should have excluded from the evidence certain photographs said to be gruesome and inflammatory; (3) that the court erred in admitting into evidence the depositions of two California police officers which established that appellant resisted arrest there with deadly force; and (4) that the court should have granted a mistrial when on cross-examination of the appellant the state's counsel asked a question, other than permitted impeachment, about unrelated criminal activity.

Appellant contends that the denial of his motion for change of venue deprived him of a fair trial because of widespread publicity. The record shows that the case received considerable media attention and that knowledge of the murder was widespread. ***906** Four-fifths of the prospective jurors, and eight of the twelve jurors who served on the jury, had some prior knowledge of the case. The crucial consideration, however, is not knowledge, but whether such knowledge rendered the jurors prejudiced.

A motion for change of venue is a matter addressed to the sound discretion of the trial court, and the trial court's decision will generally be upheld if there is no showing of a palpable abuse of discretion. Johnson v. State, 351 So.2d 10 (Fla.1977); McNealy v. State, 17 Fla. 198 (1879).

The motion for a change of venue based on widespread prejudicial publicity called for a determination by the trial court of

> whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Manning v. State, 378 So.2d 274, 276 (Fla.1979); Jackson v. State, 359 So.2d 1190 (Fla.1978), cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979); Kelley v. State, 212 So.2d 27 (Fla. 2d DCA 1968).

[2] Appellant argues that the news media coverage of his codefendant's confession brings this case within the rule of Oliver v. State, 250 So.2d 888, 890 (Fla.1971), in which this Court said that in general, "when a 'confession' is featured in news media coverage of a prosecution, ... a change of venue motion should be granted whenever requested...." It is not clear in the

instant case, however, that the confession of Palmes implicated both himself and his co-defendant, as was the case in Oliver. Oliver dealt with a crime committed during a period of racial unrest. The victim was white and the defendants were black. The community in question was a relatively small one. Compare Dobbert v. State, 328 So.2d 433 (Fla.1976) aff'd, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) with Manning v. State, 378 So.2d 274 (Fla.1979). The circumstances here are different.

Furthermore, the general rule stated in Oliver has been restricted and refined. In Hoy v. State, 353 So.2d 826 (Fla.1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978), the appellant argued that the rule of Oliver required a change of venue because of publicity surrounding his confession. The Court distinguished Oliver, and pointed out that Hoy's retraction of his confession was covered with equal prominence in the newspaper and that none of the jurors had actually read the articles in question. We hold that Oliver does not require reversal in the present case.

The trial judge here presided over a long and painstaking voir dire procedure. The record shows that prospective jurors exhibiting even a hint of prejudice were excused. The court granted the appellant extra peremptory challenges and defense counsel did not use them all. The court did not abuse its discretion in denying the motion for change of venue.

[3] Appellant next argues that the court erred in admitting a number of photographs over the objection that they were not relevant to any material issues in the case. In support of this contention at trial, the appellant stated his willingness to stipulate to several factual matters which he argued were the only facts the photographs were relevant to prove. Among the photographs objected to were several depicting the victim's body which was recovered from the river after twenty days. The pictures showed the wounds inflicted on the deceased and were quite gruesome because of decomposition. The basic test of admissibility of photographs, however, is not necessity, but relevance. Bauldree v. State, 284 So.2d 196 (Fla.1973). Photographs can be relevant to a material issue either independently or by corroborating other evidence. State v. Wright, 265 So.2d 361 (Fla.1972).

> Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative," or "whether photographed away from the scene," are routine issues basic to a determination ***907** of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

Id. at 362.

[4] In Young v. State, 234 So.2d 341 (Fla.1970), the Court had for consideration the contention that gruesome photographs denied the appellant a fair trial. Forty-five photographs in all were admitted, including twenty-five showing the partially decomposed body of the victim. The victim had drowned. The Court said:

> The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs, particularly in large numbers must have some relevancy, either independently or as corroborative of other evidence.
>
> Several of the photographs were unquestionably relevant to the issues before the jury, as one color photograph depicting a tatoo on the victim's arm for purposes of establishing his identification. One issue before the jury was whether the deceased had committed suicide or whether he was murdered, the specific question being whether the victim could possibly have arranged strands of wire around himself in the manner in which it was found upon his recovery from the lake. Several of the photographs taken in the office of the County Medical Examiner at the time of the autopsy were relevant to this issue, as they revealed the manner in which several strands of wire had been wrapped around the victim's neck and body.
>
> We do not intend to invade the discretion of the state in the selection of evidence which it chose to present to the jury, or the discretion exercised by the trial court in admitting such evidence, but we must insure that both state and trial court act within reasonable limits. The very number of photographs of the victim in evidence here, especially those taken away from the scene of the crime, cannot but have had an inflammatory influence on the normal fact-finding process of the jury. The number of inflammatory photographs and resulting effect thereof was totally unnecessary to a full and complete presentation of the state's case. The same information could have been presented to the jury by use of the less offensive photographs whenever possible, and by careful selection and use of a limited number of the more gruesome ones relevant to the issues before the jury. In concluding that reversible error was committed by introduction of an unnecessarily large number of inflammatory photographs, we are merely applying to the facts of this case a principle reiterated in Leach v. State (132 So.2d 329, 331-32 (Fla.1961), cert. denied, 368 U.S. 1005, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962)).

> "(W)here there is an element of relevancy to support admissibility then the trial judge in the first instant and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence."

Young v. State, 234 So.2d at 347-48 (footnotes omitted). Thus Young v. State and the cited case of Leach v. State recognize that even relevant photographs sometimes must be excluded if they are unduly prejudicial, but the pictures in the present case were not repetitive as in Young and were of greater relevance. We hold that all the photographs admitted were relevant either independently or as corroborative of other evidence, specifically, the testimony of witnesses. They were few in number and included only a very few gruesome ones which were relevant to corroborate testimony as to how death was inflicted. The photographs were properly admitted.

Appellant's third contention is that it was error to admit the testimony establishing that appellant fired his gun in the direction of police officers in California. He argues that evidence of collateral criminal activity is inadmissible because of its potential prejudicial impact.

***908** [5] [6] It is improper for a jury to base a verdict of guilt on the conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged. See, e. g., Winstead v. State, 91 So.2d 809 (Fla.1956); Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). Therefore, evidence of criminal activity not charged is inadmissible if its sole purpose is to show bad character or propensity to crime. But evidence of criminal activity not charged is admissible if relevant to an issue of material fact. Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). If irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.

[7] When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance. State v. Young, 217 So.2d 567 (Fla.1968), cert. denied, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969); Daniels v. State, 108 So.2d 755 (Fla.1959); Blackwell v. State, 79 Fla. 709, 86 So. 224 (1920).

[8] We hold that the evidence of appellant's flight from police and use of his gun was relevant to the issue of his guilty knowledge and thereby to the issue of guilt. Appellant was willing to use at least the threat of deadly force to try to avoid arrest. This is probative of his mental state at the time. The depositions were properly admitted.

Appellant's final contention concerns a question asked him by the state's counsel on cross-examination. Appellant's motion for mistrial made when the question was asked was denied. His objection to the question was sustained and his request that the jury be instructed to disregard the question was granted. So, the question was never answered. The challenge now is not to the admission of any evidence but to the very impropriety of the question. Appellant contends that that impropriety required the declaration of a mistrial.

During the direct examination of Jane Albert, she told of how she had purchased a gun for appellant in accordance with a request from him. On cross-examination, defense counsel asked Albert if there had been talk of appellant doing a drug deal in Texas. She replied that she knew nothing of a Texas deal but had heard of a plan to procure some drugs from a Dr. Day. Neither the state nor the defense questioned her further regarding Dr. Day or the nature of the transaction that was talked about.

Appellant took the witness stand in his own defense. On cross-examination the state's counsel asked him about his activities on the day of the murder. He testified that during the afternoon or evening of that day he went to visit a woman in order to obtain some drugs. The prosecutor asked whether he knew the source of the drugs.

> Q. What doctor did she go to to get her prescriptions?
>
> A. I have no idea.
>
> Q. Would it have been Dr. Day?
>
> A. I don't have no idea.
>
> Q. You never heard that name mentioned?
>
> A. No, sir.
>
> Q. Isn't it true that it was Dr. Day that you were going to use the pistol on that Jane bought you?

Transcript of testimony at 832-33. Defense counsel immediately asked to approach the bench and moved for a mistrial on the ground that the prosecutor's question constituted a suggestion of unrelated criminal activity prejudicing the jury against the defendant. The court

denied the motion for mistrial but sustained the objection. The question was not answered and the jury was instructed to disregard the question.

Appellant argues that the denial of his motion for a mistrial was reversible error. He grounds this argument on the rule that ***909** evidence of unrelated criminal activity of an accused is inadmissible. Evidence of separate crime, however, is generally admissible if somehow relevant to an issue of material fact. There are a number of recognized ways that separate criminal activity can be relevant. Williams v. State, 117 So.2d 473 (Fla.1960).

On the other hand, it is generally harmful error "to admit evidence of other or collateral crimes independent of and unconnected with the crime for which the defendant is on trial." Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925). As stated above, the reason for this rule, establishing the harmfulness of the error in admitting a certain class of irrelevant evidence, is:

> Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.

Id. at 685, 106 So. at 488. The opinion in Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), told of how this recognition of the possible prejudicial impact led to the rule being stated as a rule of exclusion with certain exceptions rather than as a rule of admissibility. See, e. g., Winstead v. State, 91 So.2d 809 (Fla.1956); Talley v. State, 160 Fla. 593, 36 So.2d 201 (1948); Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1972).

[9] Even when the evidence of separate criminal activity has relevance, it is possible for such evidence, as it is presented, to have an improper prejudicial impact that outweighs its probative value. See, e. g., Williams v. State, 117 So.2d 473 (Fla.1960); Denson v. State, 264 So.2d 442 (Fla. 1st DCA 1972).

Appellant cites several cases where convictions were reversed because of the admission of evidence of unrelated crime, Ragusa v. State, 338 So.2d 1103 (Fla. 4th DCA 1976); Colbert v. State, 320 So.2d 853 (Fla. 1st DCA 1975), cert. denied, 330 So.2d 726 (Fla.1976); Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973). In each of these cases, the defendant's objection was overruled and the state was permitted to confront the defendant with or admit evidence of accusations or arrests. Thus they do not resolve the issue in the present case which is whether the mere propounding of a question by the prosecutor, seeking to elicit testimony that would be irrelevant but which suggests the existence of unrelated criminal activity, is reversible error when the objection to the question is sustained, the witness does not answer, and the jury is instructed to disregard the question.

[10] That the assistant state attorney's question, calculated to elicit irrelevant testimony and suggesting to the jury the existence of such prejudicial evidence, was highly improper, is without question. We do not believe, however, that the improper comment, by itself, was sufficient to require that the court grant the motion for a mistrial. Feldman v. State, 194 So.2d 48 (Fla. 4th DCA 1967). The appellant denied any involvement or knowledge of the crime charged. The improper comment did not tend to discredit any particular feature of appellant's account of his activities during the time the crime was being committed or undermine any particular theory of the defense. Its impropriety lay in its general attack on the defendant's character. In light of the overwhelming evidence against appellant, we find it inconceivable that the prosecutor's improper question might have affected the verdict. The motion for mistrial was properly denied.

After the separate proceeding on sentence was held, the jury returned a recommended sentence of death. The court deferred sentencing until after the receipt of a presentence investigation. A copy of the presentence investigation report was furnished to appellant prior to sentencing.

As aggravating circumstances, the court found that appellant committed the murder while under a sentence of imprisonment, s 921.141(5)(a), Fla.Stat. (1975), that the murder was committed in the course of a robbery, id. s 921.141(5)(d), that the murder was committed for pecuniary gain, id. s 921.141(5)(f), and that the murder was ***910** especially heinous, atrocious, and cruel. Id. s 921.141(5)(h). The court found that there were no mitigating circumstances.

[11] The trial judge's finding that appellant was under sentence of imprisonment was based on the fact that he was on parole from prison. We hold that this fact, established by evidence, supports the finding of this aggravating circumstance.

[12] The trial judge's findings that the murder was committed in the course of a robbery and that it was

committed for pecuniary gain are both based on the same aspect of the crime. Where such double recitation of aggravating circumstances based on a single aspect of the crime indicates that inflated consideration was accorded to the factor, it is error. Provence v. State, 337 So.2d 783 (Fla.1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Where it is clear that the sentencing judge merely recited both statutory factors without giving improper double consideration to the single aspect in question, or where the absence of mitigating circumstances makes clear that any added weight accorded the factor did not tip the balance in favor of a sentence of death rather than life, the error of double recitation is harmless. See Hargrave v. State, 366 So.2d 1 (Fla.1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Elledge v. State, 346 So.2d 998 (Fla.1977). We approve the finding of one statutory aggravating circumstance based on the commission of murder in the course of the felony of robbery.

The trial judge's finding that the capital felony was especially heinous, atrocious, and cruel was based on evidence that appellant directly participated in the murder inflicted by multiple stab wounds and bludgeoning. The evidence supports the factual findings and the facts establish this statutory factor. See, e. g., Washington v. State, 362 So.2d 658 (Fla.1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979); Funchess v. State, 341 So.2d 762 (Fla.1975), cert. denied, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977).

Upon our review of the sentencing proceedings and the court's findings based on the whole record, we conclude that there was no prejudicial error in the sentencing phase and that the court properly found several aggravating circumstances and no mitigating circumstances. The sentence of death is proper.

The judgment of conviction of murder in the first degree is affirmed. The sentence of death, having been found to be appropriate to this case, is approved.

It is so ordered.

ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

SUNDBERG, C. J., concurs in result only.

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102 S.Ct. 556
Supreme Court of the United States

Ronald J. STRAIGHT, Petitioner
v.
FLORIDA

No. 81-5338 | November 2, 1981 | Rehearing Denied Jan. 11, 1982. | See 454 U.S. 1165, 102 S.Ct. 1043.

Facts and opinion, 397 So.2d 903.

Opinion

Petition for writ of certiorari to the Supreme Court of Florida.

Denied.

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2971, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.

Parallel Citations

102 S.Ct. 556 (Mem), 70 L.Ed.2d 418