

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Spartanburg County

Edward W. Miller, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

FREDRICK ANTONIO EVINS,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

1.

Appellant has shown at length in his initial brief how the extraordinary amount of publicity, including the media coverage linking appellant to the unrelated Huff murder, affected the venire. The judge abused his discretion by denying a change of venue under the highly unusual facts of this case.

The state notes that the trial judge stated on-the-record, after hearing appellant's presentation on the very recent and extensive media coverage of both the Ward and Huff murders, as well as the other coverage, that the constant media coverage in this case amounted to "irresponsible journalism." Respondent's Brief at 4. R. 119, l. 5- 124, l. 19. The state then makes the generalized conclusion that the judge did a thorough *voir dire* and therefore he did not abuse his discretion by failing to avail himself of the readily available method of ensuring appellant a fair trial under these unusual circumstances - - a change of venue.

Further, S.C. Code § 17-21-85 now provides that a circuit judge, in a criminal case, can order jury selection to go forward in some other county and the jury, once selected, can be transported back into the county where the crime was committed – Spartanburg. There was, obviously, also the other remedy of just moving the trial to another county.

First, it is clear that under the First Amendment to the United States Constitution, that efforts by the trial court to control the media to protect a criminal defendant often will be labeled misguided, incorrect procedurally, and reversible when they are, as usual, challenged by the media on appeal. See e.g., Ex Parte Hearst- Argyle Television, Inc., et al. v. Williams, 369 S.C. 69, 631 S.E.2d 86 (2006). The fact the trial judge thought the media

in this case was irresponsible should have made the granting of the motion for a change of venue in this case all the more palpable since that duty to provide a fair trial by changing venue was within the trial judge's control. The newspaper articles (if better quality ones can be obtained) are reprinted in the Record at pp. 2735 - 2765 and the originals are on file with this Court.

Regardless of irresponsible journalism or just extensive journalism, including that linking appellant to the unrelated Huff murder, appellant in his initial brief showed the pervasive newspaper and television coverage that existed in this case, and how it was recalled by members of the venire. For example, in an article subtitled "Capital Case: Juror selection starts today, in the Monday, November 9, 2004 edition of the Spartanburg Herald-Journal, it states that "Evins also has been charged with killing Damaris Huff, whose body was found in a wooded area in Duncan Park in September, 2002. Gowdy has decided to try Evins on the Goodwin case first." See, also Court's exhibit 29.

Further, seven of the final twelve petit jurors had been exposed to pretrial publicity. One juror (Betty Kirby, No. 204) and one alternate, (Linda Means, No. 246) also recalled coverage of this case in connection to the Demaris Huff/Duncan Park case.

The other exposed petit jurors were Mark Roller, # 316; Donald Bower # 19; Neddie Richards, # 306; Pamela Ridings # 309; Michael Henline # 149; Betty Kirby # 204; Susan Kanipe # 194; and Linda Means, # 246 (alternate). R. 1322, l. 2 - 1323, l. 5; R. 1331, l. 1 - 1338, l. 25. See Appellant's brief at 9-14.

In the final analysis it was the trial judge's duty to ensure the jury was fair and unbiased and free of passion, prejudice, and excitement. Chambers v. Florida, 309 U.S. 227 - 236, 237, 60 S.Ct. 472, 476 - 477 (1940); Ristaino v. Ross, 424 U.S. 589, 96 S.Ct.

1017 (1976). This was a highly unusual case and special case given the extensive media coverage recalled by members of the venire and seven of twelve petit jurors seated, and given the Huff murder appellant was linked to in this case.

It was also very unusual given that this case and the Huff murder apparently sparked debate wherein appellant became a poster boy over whether the sex offender registry was effective, about “lenient treatment” by the criminal justice system of sex offenders, and appellant’s alleged link to unsolved cases. That was all the more true since Mrs. Huff came from an upscale neighborhood. Headline: “Neighbor saw beauty in all things” . . .”Clemson lured the honors student back to her South” . . . “Mommy believes that education never ended.” See Articles on file with this Court, including Teresa Killian article. R. 2739.

Further, “the Evins case prompted Spartanburg County Sheriff Bill Coffey to order his deputies to find the more than 200 people on the (sex offender) list to make sure their address were correct.” Sunday edition of the Herald-Journal on file with this Court. (Court’s exhibit 26); Suellen E. Dean article. R. 2750.

“The crimes against women of which Fredrick Evins has been accused throughout his adult life, both proven and unproven, are consistent in one regard, their brutality.” This article by Tom Langhorne article also notes cases dismissed, and “the time Evins has served has been relatively short the gravity of his proven offenses.” R. 30; and on file with this Court.

This was therefore one of those most unusual cases where juror bias could be expected as a matter of human nature and common sense even where prospective jurors and actual jurors exposed to the extensive media coverage stated they could be fair, or

would make every effort to be fair, and would make every effort to disavow themselves of what they have already read in the newspaper or seen on television. See Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417 (1963).<sup>1</sup>

The judge abused his discretion by not ordering a change of venue in this case. That is true regardless of whether the Rideau standard controls this case. Given the trial judge's abuse of discretion in refusing to grant the motion for a change of venue, appellant should be granted a new trial.

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<sup>1</sup> The state's attempt in its brief to twist appellant's position into relying solely on the Rideau standard is a totally unfair reading of appellant's position that this case must also be analyzed under that standard.

The sentencing phase photographs – particularly those showing that the decedent had defecated upon herself -- went beyond any legitimate purpose during the sentencing phase and invited a verdict based on passion and prejudice or arbitrary factors.

The state cites State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) as justifying the admission of the objectionable photographs in this case. Respondent's Brief at 33. Respectfully, the photographs showing that the decedent had defecated upon herself differ qualitatively from photographs showing stab wounds, gunshot wounds or blood in other death penalty cases. As in Haselden, where the photograph of the child's anus was used to insinuate Haselden was responsible for the child's enlarged anus had the tendency to inflame the jury, the objectionable defecation photographs in this case were sure to sicken and inflame the jury, and thereby invite a verdict on an improper basis.<sup>2</sup>

Appellant fully recognizes this Court has allowed wide latitude in the admission of sentencing phase photographs. However, and respectfully, the defecation photographs here were inflammatory, and, although appellant understands this is a delicate matter, they depicted something seemingly beyond the defendant's ability to control or foresee, and they invited a death verdict based upon an improper basis.

For that reason, they are qualitatively different than "normal" penalty phase photographs or even graphic bloody photographs, and this Court respectfully should hold at a minimum that the defecation photographs, and state's #74, the staged photograph,

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<sup>2</sup> Appellant in this reply brief has focused almost solely on the defecation photographs. Appellant obviously reiterates his objections to the other photographs argued in his initial brief, including that at least one, State's #74, appears to be staged beyond dispute since

should not have been admitted because they invited a death verdict upon an improper basis.

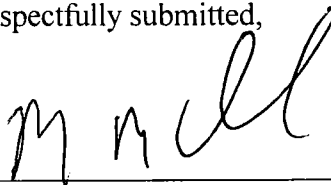
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the victim is laying face up. The defecation photographs depict the victim laying face down in the dirt.

CONCLUSION

By reason of the arguments in appellant's brief, and in this reply brief, appellant's conviction should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial. In the alternative, a new sentencing phase trial should be granted.

Respectfully submitted,



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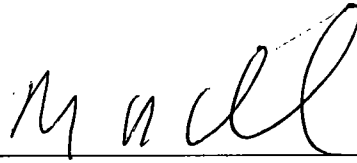
ATTORNEYS FOR APPELLANT.

December 12, 2006

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 12, 2006

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

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Attorney for Appellant

STATE OF SOUTH CAROLINA

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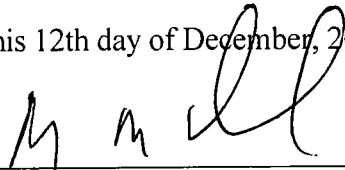
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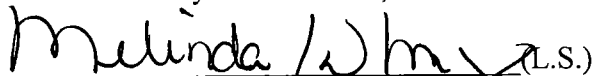
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Derrick K. McFarland, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201 this 12th day of December, 2006.

  
Robert M. Dudek  
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ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 12th day of December, 2006.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: November 16, 2008