

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

CASENO.: 16-2012-CF-011572

DIVISION: CR-D

STATE OF FLORIDA

VS.

MICHAEL DAVID DUNN
_____ /

DEFENDANT'S MOTION TO PROHIBIT SPECTATORS
FROM WEARING ITEMS THAT DEPICT SUPPORT

COMES NOW, MICHAEL DUNN, by and through his undersigned counsel, and files this motion to prohibit the wearing buttons, clothing, accessories, or the like that depicts support of the prosecution or Jordan Davis, or any other alleged victim, in the courtroom during the trial and as grounds, therefore states the following:

1. If spectators wear anything showing pictures or support of the state prosecution or Jordan Davis, or any other alleged victim, the spectators' "message" would be inherently prejudicial to Mr. Dunn and would clearly jeopardize his guarantee of a fair and impartial jury trial under the Sixth Amendment.
2. The Court should prohibit this conduct at all costs, even excluding specific items and/or persons that arise at time of trial and unknown to the parties as of today.
3. Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.: *Taylor v. Kentucky*, 436 U.S. 478 (1978).

4. Fla. R. Crim. P. 3.600(b)(8) states that a court shall grant a new trial if, "[f]or any other cause not due to the defendant's own fault, the defendant did not receive a fair and impartial trial."

5. Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused.

Holbrook v. Flynn U.S. 560, 570 (1986). At the very beginning of proceedings, the jury can only speculate on how they will feel after being exposed daily to a practice over the course of a long trial. *Id.* Whenever a courtroom arrangement is challenged as inherently prejudicial, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play." *Id.*

6. The Eleventh Circuit in *Woods v. Dugger*, applied *Flynn* when it reversed a defendant's death sentence for murdering a prison guard. 923 F.2d 1454, 1456 (1991).

Woods alleged that he was denied a fair trial due to the hostile atmosphere in the community in which the trial took place and to the number of prison guards who attended the trial in full uniform. *Id.* The court concluded that the defendant had been denied a fair trial because of the inherently prejudicial hostile courtroom atmosphere created by the number of prison guards, combined with pretrial publicity. The court noted that the Sixth Amendment ensures that an accused receives "a fair trial in which the jury reaches its verdict based only on the evidence subjected to the crucible of the adversarial process." *Id.* at 1460.

The prison officers, the court noted, were present because "they hoped to show solidarity with the killed correctional officer." The court further noted that "In part, it appears that

they wanted to communicate a message to the jury." *Id.* The message of the officers is clear in light of the extensive pretrial publicity, and the officers wanted a conviction. *Id.* The court concluded that the jury could not help but receive the message.

7. Applying the unacceptable risk of impermissible factors test to the particular circumstances of *Shootes v. State*, 20 So. 3d 434, 439 (1st DCA 2009), Florida's First District Court of Appeals concluded that the trial court's denial of the motion for new trial was an abuse of discretion and must be reversed. The appearance of the considerable number of Jacksonville Sheriff's Office Narcotics Unit officers in various modes of official Sheriff's Office attire presented an unacceptable risk of impermissible factors coming into play. *Id.*
8. *Pozo v. State*, in where a hearing on a motion to interview jurors, defense counsel pointed out that several members of the Palm Beach County Sheriff's Office sat in the court during the trial wearing t-shirts which showed that they were with the sheriff's department. *Pozo v. State*, 963 So. 2d 831, 834 (4th DCA 2007) (*emphasis added*). That occurred despite a prior agreed order entered by the trial court that observers would be precluded from wearing buttons or t-shirts reflecting a bias for or against the state or the victim. *Id.* Given the juror's allegations that the jurors discussed the possibility that the Palm Beach Sheriff's Office would harass jurors if they did not vote to convict, defense counsel argued that this external influence on the jury verdict needed to be investigated. *Id.* The 4th District Court of Appeals concluded that the trial court erred in denying the motion to interview the jurors. *Id.*

9. The Florida Supreme Court applied *Woods*, and stated that under certain circumstances, prejudicial exhibition of emotion may deprive a defendant of a fair trial. *Buckner v. State*, 714 So. 2d 384, 389 (Fla. 1998). The court stated that it is inappropriate for a judge to inquire into the emotions, mental processes, or mistaken beliefs of jurors.

Id. (quoting *State v. Hamilton*, 574 So.2d at 124 (Fla. 1991)). However, a judge may objectively look at the extrinsic factual matters disclosed to the jury, and then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant. *Id.* (quoting *Hamilton*, 574 So.2d at 129). In *Buckner*, a few of the jurors saw photographs for only a brief moment and even then, saw them only from a distance.

Buckner at 389. The photographs consisted of the victim with other individuals, and none of the jurors who saw the photographs could identify who was depicted in the photographs. *Id.* On those facts, the Florida Supreme Court concluded that there was no reasonable possibility that the jury's brief exposure to the photographs may have changed the outcome of the proceeding. *Id.*

10. If spectators wear buttons, shirts, or any other accessories or clothing depicting photographs or support, the members of the jury will know who is pictured in the photographs and will be prejudiced. Multiple photographs of Jordan Davis, and other alleged victims, as well as Michael Dunn have been released to the public and displayed frequently on television, print media, and social media. There is a reasonable probability that emotions will be inflamed if spectators wear anything showing pictures or other items of support.

WHEREFORE, Defendant respectfully requests and prays this Honorable Court to enter an Order prohibiting spectators from wearing clothing, buttons or other indicia of support that transmit any messages to members of the jury, regardless of the spectator's intent.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, Duval County, 220 East Bay St., Jacksonville, Florida 32202 by Efile, Email, Hand Delivery or Facsimile this 2nd September, 2014.

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