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APPELLANT'S NAME:	RONALD RAY HOWARD	DATE OF OPINION: June 19, 1996
OFFENSE:	Capital Murder (Death)	COUNTY: Jackson
COURT OF APPEALS:	N/A	RESULT: N/A
CRIMINAL APPEALS NO:	71,739	JUDGE: Mansfield, J.
DISPOSITION:	T/C Affirmed	

Challenges for Cause / Bias or Prejudice Against Theory Upon Which the State Is Entitled to Rely: Appellant claimed that the trial court erred in striking for cause veniremember Durling, who stated she would not answer the special issue on future dangerousness affirmatively unless the State proved that he had previously committed another murder, and to veniremember Ochoa, who conceded that violent illegal acts directed toward property were "criminal acts of violence that would constitute a continuing threat to society . . ," but would not affirmatively find future danger unless the State proved such acts of violence to be directed toward people. Appellant argued that, rather than bias against a part of the law on which the State was entitled to rely, the two veniremembers "merely required more than the "legally sufficient minimum" to find future dangerousness, as set out in Garrett v. State, 851 S.W.2d 853 (Tex.Cr.App. 1993).

Holding: Potential jurors must be able to set aside their personal preferences and biases to consider death eligible all those defined as death eligible by § 19.03 of the Texas Penal Code and Article 37.071, and may not displace the broad legal categories of death eligibility with their personal agendas. Since both veniremembers unequivocally stated an unwillingness to set aside their views regarding death eligibility -- such definition adding to the Article 37.071 statutory definition of those eligible for the death sentence in Texas -- each possessed a bias against that law.

Note: Judge Maloney filed a dissenting opinion, joined by Judge Clinton and Baird, and agrees with Appellant regarding the applicability of Garrett.

Challenges for Cause / Opportunity to Examine: The trial court granted the State's causal challenges against eight veniremembers without affording appellant the opportunity to examine them.

Holding: Where it is clear, after inquiry by the trial court, that venirepersons are conclusively biased against a phase of the law upon which the State is entitled to rely at guilt/innocence or at punishment, and where such views prevent or substantially impair the performance of their duties as jurors, it is not error to deny a defendant an opportunity to question those venirepersons before granting the State's challenge for cause. Thus, with respect to the eight veniremembers at issue here, although the trial court did grant the State's challenges for cause without affording appellant the opportunity to question the veniremembers, such conduct was not error, however, because each veniremember was questioned at length and clearly demonstrated that he or she would never answer the special issues in a manner which resulted in the imposition of the death penalty.

Fundamental Fairness / Uniformed Officers in Courtroom: During the penalty phase of this trial for the capital murder of a DPS trooper, transferred from Jackson County to Travis County, the trial court permitted twenty uniformed state troopers and police officers to attend, as spectators, final jury argument for the penalty phase of the trial. Appellant did not claim the peace officers actively conducted themselves in a manner which prejudiced his opportunity to receive a fair trial, but objected only to their presence and any message such a presence might entail.

Holding: This Court cannot hold that the mute and distant presence of twenty peace officers -- comprising roughly one-fifth of the spectator gallery -- is prejudicial, *per se*, without some other indication of prejudice. ("If the record at bar indicated some overt conduct or expression, or perhaps a higher ratio of police officers, or even perhaps some indication that the law-enforcement contingency gravitated toward the jury, then there might be some basis for appellant's argument. Yet none of these considerations are present").

Note: It is not clear whether these officers were passive observers or were actually present in an attempt to prejudice which trial counsel failed to adequately document.

Punishment Phase / Automatic Life Sentence / Hung Jury: The jury began deliberating the punishment phase on July 8 at 5:30 p.m. At 6:15 p.m., the same day, the jury indicated via a note that it would "need more time, possibly considerable, to make a decision in this case . . .," then recessed at 6:35 p.m., resuming at 8:30 a.m. the next morning. At 10:40 a.m., the jury requested a transcript of Appellant's punishment testimony. At 5:15 p.m., the jury requested information regarding whether certain letters and diary entries were admitted into evidence. At 6:30 p.m. (prior to the overnight recess), the jury sent a note which indicated that it had been deadlocked most of the day. The jury foreperson wrote that they were deadlocked "at 10 yes and 2 no votes on Special Issue Number 1." Appellant moved for a mistrial, arguing deadlock and seeking the entry of a life-sentence. The trial court overruled the motion. The next morning (July 10), the jury again deliberated from 8:30 a.m. Until 9:30 a.m., when testimony regarding correspondence Appellant wrote while in jail was read to the jury. The day was then uneventful until 5:45 p.m., when the jury foreperson sent a note indicating: "This jury has been hopelessly deadlocked with 10 no votes against 2 yes votes since 11 o'clock this morning on Issue 2." Appellant again moved for a mistrial and the entry of an obligatory life sentence. This motion was also denied. The jury returned for deliberation on July 11, at 8:30 a.m. At 4:00 p.m., the jury requested an explanation of the term "blameworthiness," then recessed at 6:15 p.m. On July 12, the jury began to deliberate at 8:30 a.m. The jury did not exhibit deadlock and made no contact with the trial court. It recessed at 5:30 p.m. The next day, July 13, the jury began deliberation at 8:55 a.m. At 11:10 a.m. the jury sent the following note: "Issue Number 2. After several days careful deliberation, this jury is still hopelessly deadlocked with 10 no votes and 2 yes votes. I strongly feel that any further deliberation will not change this final vote." Appellant again moved for mistrial and the trial court overruled. At 11:20 a.m., "to further encourage dialectic," the trial court provided a supplemental instruction via an "Allen" charge. The jury continued deliberation until it recessed at 6:00 p.m. The jury returned a verdict at 9:50 a.m. the next day, July 14. Appellant claimed that the trial court abused its discretion in overruling the motions for mistrial.

Holding: The trial court did not abuse its discretion in overruling the third motion for mistrial.

Note: The Court states that, although the trial court did not abuse its discretion, it is "mindful, however, that with the third note, received July 13, at 11:10 a.m., the trial court approached the limit of its discretion. Additional lengthy deliberation might have become oppressive and coercive. Yet the jury returned its verdict within roughly seven hours of this final deadlock note. While this time-interval began to approach the trial court's permissible range of discretion, given the context of the deliberations to that point, we do not find an abuse of discretion in this case."

COMMENT: (**David A. Schulman**) All this case shows is that "anything goes" in this State's rush to execution, and that 10 "death qualified" jurors can, with the assistance of a determined trial judge, bully two jurors into abandoning the positions they had fought long to protect in order to escape "deliberations" which probably seemed unending.