IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2006-KA-00603-COA

DAVID MARK HAVARD — APPELLANT

VS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
WILKINSON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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I. Appellant was denied his right to an impartial jury in violation of Article III, Section 26 and 31 of the Mississippi Constitution of 1890 and the Sixth and Fourteenth Amendments to the United States Constitution

A. Appellant was denied his right to effectively challenge the petit jury which tried his case

B. The Clerk radically departed from the statutory method of drawing and selecting jurors

The authorities cited by the state for the proposition that an irregularity in the manner in which a jury is drawn and selected does not constitute grounds for reversal are inapposite to the facts before this court. In the principal case cited by the state, **Pratt v. State,** 870 So. 2d 1241 (Miss. App. 2004) the defendant argued on appeal to this court that it was error to draw the venire which convicted him from only one of the two districts comprising the county of venue. **Pratt** at 1244. This court analyzed Pratt's claim that the failure to draw the venire from the entire county deprived him of his right to be tried by a fair cross-section of potential jurors under the standards set forth in **Duren v. Missouri,** 439 U. S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979) and found Pratt's argument to be without merit. **Pratt** at 1246.

Similarly, the other cases cited by the state in response to Havard's argument that his right to a fair and impartial jury was violated by the clerk's complete failure to comply with the applicable law, with one exception, all dealt with jury selection processes from counties having dual districts: **Davis v. State,** 660 So. 2d 1228 (Miss. 1995) (Defendant alleged trial court abused its discretion in not drawing venIRE members from **both** judicial districts); **Gates v. State**, 829 So. 2d 1283 (Miss. App. 2002) (Defendant alleged error in failing to provide jury from **only** the Second Judicial District of Chichasaw County); **Darden v. State,** 798 So. 2d 632 (Miss. App.

2001) (Defendant alleged error because venire was drawn from **both** Judicial Districts of Chickasaw County).

None of these cases have application to the argument before the court. First, Wilkinson County is a single district. Second, Havard's objection was to the failure of the clerk to randomly select the appropriate number of jurors from the jury box as required by § 13-5-26 Miss. Code R. 293, R. E. 35. Specifically, Havard objected, and moved for a mistrial, because nine of thirty-two veniremen impaneled for the February trial had previously sat on the October venire which had been dismissed due to a mistrial being declared by the trial court. R. 172

Prior to the dismissal of the October jury panel, the parties undertook an extensive voir dire. R. 106-172. Recalling that Wilkinson County is a small rural community, and Havard's case had been declared a mistrial twice, it was clear following the October term that people in the county would be quite familiar with Havard's case by the time it was to be retried in February, 2006. Despite this unavoidable tainting by the prior mistrial, the clerk, rather that following the statutorily mandated procedure of randomly selecting venirermen, (and arguably reducing the amount of preconceived opinions being brought into the courtroom by prospective jurors) compounded the problem of prejudicial jurors by ignoring his statutory duty and deliberately recalling nine of the individuals who had sat on the October venire. The cases cited by the state concerning jury selection in dual district counties is simply inapposite to the facts and argument presented by Havard.

Of the other two cases cited by the state in this portion of their brief, **King v. State**, 857 So. 2d 702 (Miss. 2003) and **Adams v. State**, 537 So. 2d 891 (Miss. 1989), the first dealt with a defendant complaining of the sealing of the venire list and a denial of individual voir dire, **King** at

724, and the other was concerned with a deputy clerk's unauthorized exclusion from the venire summons list those persons the deputy clerk knew to be over the age of sixty five or had previously served on a jury. **Adams** at 893. Of these two cases, only **Adams** has any relevance to Havard's situation. As stated, **Adams** involved a post-trial motion filed on the defendant's behalf for a new trial because the deputy clerk had unilaterally struck twenty-nines names from the jury summons list. **Adams** at 892. In reversing the defendant's conviction due to the deputy clerk's action of striking the twenty-nine people from the venire list the court stated that "It may well be that this Court in the past has sanctioned rather considerable deviation from our law's directives regarding jury composition, but we have never condoned a venire selection process completely contrary to them wherein the clerk did that which the law expressly prohibits." **Adams** at 895. Just as in **Adams,** the clerk in the present case acted in a manner expressly prohibited by law, necessitating a reversal of Havard's conviction and a new trial ordered. Such a holding would be in keeping with the intent of the legislature when it enacted the Jury selection statutes and prior decisional law of this state. **Rhodman v. State,** 153 Miss. 15, 120 So. 201 (Miss. 1929) (holding that the judge's handpicking of the names for the jury list was a total departure from the statutes and required reversal).

C.Juror William Jefferson should been struck for cause.

The state contends that the trial court's effort to rehabilitate juror Jefferson should be deemed sufficient to withstand Havard's challenge for cause. (Brief for state 4). Havard respectfully submits that this is simply not credible under the facts as presented by juror Jefferson. Jefferson stated he had been permanently injured due to an automobile accident involving a drunken driver eight or nine years prior to the present case. R. 291, R. E. 26. As stated in Havard's initial brief, the law presumes bias exists in certain jurors due to the circumstances surrounding the particular case. Without repeating the entire argument, the question to be considered in determining whether a juror would be "presumed to biased" in the case sub judice is whether the average juror, having been permanently injured by a d.u.i. driver, would be biased in the present matter. Havard submits that the only possible response is an unequivocal "yes".

Prior Mississippi law is consistent with such a finding. In **Mabry v. State,** 71 Miss. 716, 14 So. 267 (Miss. 1894) the defendants' conviction of murder was reversed because a juror could not meet the requirements of an "impartial juror". **Mabry** at 268. In **Jeffries v. State,** 74 Miss. 675, 21 So. 526 (Miss. 1897) the defendant's murder conviction was reversed when it was disclosed after the verdict had been rendered that one of the jurors had predetermined that the defendant was not justified in the subject killing. **Jeffries** at 526. The Court in **Jeffries,** after reversing the conviction, went on the state "that a verdict of a jury embracing one disqualified member cannot be allowed to stand..." **Jeffries** at 528. Accord, **Sheppric v. State,** 79 Miss. 740, 31 So. 416 (Miss. 1902); **Murphy v. State,** 92 Miss. 203, 45 So. 865 (Miss. 1908); **Langston v. State,** 129 Miss. 394, 92 So. 554 (Miss. 1922); **Stevenson v. State,** 325 So. 2d 113 (Miss. 1975).

Just as the Court stated in **Jeffries** that a verdict may not be allowed to stand if there is one disqualified juror, so too should this Court hold that Havard's conviction should not stand due to juror Jefferson's participation.

D. A member of the grand jury which indicted Havard also served on the Petit jury which convicted him, requiring reversal.

The state's only response to Havard's argument on this point is that the grand jury list containing Kelisha Renay Anderews name was not part of the official record. (State's Brief 5). Havard in no way concedes that it is necessary for this to be made a part of the official record in order for this court to take judicial notice of the document as originally presented (which was certified by the clerk), but out of an abundance of caution Havard has caused to be filed an amendment to the official record which now includes the grand jury list. This document was formally filed with the Clerk of this court on May 22, 2007 and is referenced herein as Supplemental Record Excerpt page 5.

Havard also takes exception to the state's position that the Circuit Court no longer had jurisdiction over his Motion for Post-Conviction Relief, inasmuch as that Court was the last Court to issue a ruling in the present case. As stated in § 99-39-7 Miss. Code "The motion . . . shall be filed . . . in the trial court, except in cases . . . appealed to the Supreme Court of Mississippi and there **affirmed** or the appeal **dismissed**." The present case has neither been affirmed nor dismissed on appeal, and until such occurs the trial retains jurisdiction to entertain Havard's motion.

Regardless of the status of the Post-Conviction Relief, it is clear from the state's failure to substantively respond to Havard's argument on this point that reversal is required and a new trial ordered based upon the authorities presented in the opening Brief. Havard respectfully submits that the presence of one of the grand juror's who indicted him on the petit jury which convicted him mandates a reversal of the instant cause. **Hood v. State,** 523 So. 2d 302 (Miss. 1988).

CONCLUSION

For all of the foregoing reasons and authority Havard respectfully submits that his conviction should be reversed and a new trial ordered and for such further relief as this honorable Court may deem appropriate.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I, David M. Read, Attorney for Appellant, ***David Mark Havard***, do hereby certify that I have this day mailed via U.S. mail postage prepaid a true and correct copy of the foregoing Reply Brief of Appellant to the following:

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