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Supreme Court of Florida

FILED
SID J. WHITE
MAY 9 1984
CLERK, SUPREME COURT
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STATE OF FLORIDA, *
Petitioner, *

-vs- * CASE NUMBER - 64,368

*

JULES M. BOIVIN, *
Respondent. *

ANSWER BRIEF

Respectfully Submitted,
Jules M. Boivin
Jules M. Boivin
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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF CASE AND FACTS IN DISAGREEMENT	2
ARGUMENT I	5-10
ARGUMENT II	11-15
ARGUMENT III	16-19
ARGUMENT IV	20-24
CONCLUSION	25
CERTIFICATE OF SERVICE	26

TABLE OF CITATIONS

CASES	PAGE
BELL V. STATE, 437 So.2d 1057 (Fla. 1983)	19
BOIVIN V. STATE, 436 So.2d 1074 (Fla. 3d DCA 1983)	9,17,18
BURNS V. FREUND, 49 So.2d 592 (Fla. 1950)	13
BORGES V. STATE, 415 So.2d 1265 (Fla. 1982)	17,18
COXWELL V. STATE, 62 So.2d 892 (Fla. 1953)	13
DAVIS V. ALASKA, 415 U.S. 308,94 S.Ct.1105, 39 L.Ed.2d 347 (1974)	13
GREEN V. WAINWRIGHT, 634 F.2d 272 (5th Cir 1981)	14
HAWKINS V. STATE, 436 So.2d 44 (Fla. 1983)	19
JOHNSON V. REYNOLDS, 97 Fla. 591, 121 So. 793 (1929)	13
LEAVINE V. STATE, 109 Fla. 447, 147 So. 897 (1983)	13
PADGETT V. STATE, 64 Fla. 389, 59 So.946 (1912)	13
PEARCE V. STATE, 93 Fla. 504, 112 So.83 (1927)	13
PORTER V. STATE, 386 So.2d 1209 (Fla.3rd D.C.A. 1980)	13
STRIPLING V. STATE, 349 So.2d 187 (Fla. 3rd D.C.A. 1977)	13

TABLE OF CITATIONS (CONT.)

TRUMAN V. WAINWRIGHT, 514 F.2d 150 (5th Cir.1975) 13

UNITED STATES V. PARTIN, 493 F.2d 750,762 (5th Cir. 1974) Cert. denied, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed. 2d 189 (1977) 14

STATUTES

§90.608(1)(d), Fla. Statutes 13

§775.021(4), Fla. Statutes 17,18

RULES OF COURT

Fla. R. Crim. P. 3.150(a) 17

Fla. R. App. P. 9.040(a) 21

Fla. R. App. P. 9.210(c) 2

COMMITTEE NOTES: 1977 Revision Fla. R. App. P. 9.040(a) 22

SUPREME COURT CASE NUMBER 64,444

Boivin v. State 4,22,24

INTRODUCTION

The Respondent, Jules M. Boivin, was the defendant in the trial Court and the Petitioner, the State of Florida, was the prosecution. The parties will be referred to as they stand before this Court.

The symbol "R" will refer to the record on appeal, the symbol "T" will refer to the separately bound transcript of proceedings and "App." will refer to the appendix to this brief.

STATEMENT OF THE CASE AND FACTS IN DISAGREEMENT [1]

1. (Petitioner's brief on the merits, pg. 2, line 8, insert following ..."R.47") On September 21, 1981, the State filed a motion in limine requesting the following facts and circumstances not be mentioned in the presence of the jury because they were irrelevant and immaterial to this action:

a. Whether the complaining witness has in the past, received treatment for mental illness related to the Viet Nam War.

b. Whether, as a result of (a) above, the complaining witness has been prescribed, or has been under medication (With out showing a relevency to this action).

c. Whether Mr. Jacob Koch, a State witness to this action, and the father of the complaining witness was also arrested with a gun during the course of the occurrence on December 27, 1980.

d. Whether the complaining witness has ever suffered from any mental illness as result of, and related to, his service of his country in the Viet Nam War. (R. 28-29)(T. 48-49)

The motion was granted (R.27).

1. Pursuant to Fla. R. App. P. 9.210 (c) and only to the extent of disagreement. Entries are in corresponding order to those set forth in the initial brief of the State* With additional pertinent facts being sequenced chronologically.

2. (. . .Pg.-2, disagrees with paragraphs 2,3 and 4) insert following paragraph 1 . . ."(T.1-208)"

Testimony of Jules M. Boivin at trial indicated that on the day in question he was awakened by a woman's screaming. (T. 147)[1]. The screaming continued and he got up and went to the kitchen window to try to look out. He saw a woman's arms. (T.156) The next sound he heard was a voice saying, "don't go to that door". BOIVIN testified that at that point he heard a hard banging at the trailer door. It stopped, he hesitated, then went to the door and cautiously opened it.

Steven Koch was at the top of the stairs(T.156). Koch told BOIVIN, "I'm going to bury you." BOIVIN slammed the door. Steven Koch's face looked "wild" to him. Not taking time to try to secure the lock, BOIVIN grabbed his rifle, chambered a round and fired one time downward through the lower portion of the door. (T.110-111) the projectile was fragmented by the door, parts striking Steven Koch's arm causing severe damage, others scattering themselves around the general area. Some were discovered embedded in the front left tire of BOIVIN'S truck. (T.18).

When officer Conti arrived on the scene, identified himself as being from the Sheriff's Department and asked BOIVIN to come out of the trialer; BOIVIN willingly turned himself over and an arrest was effectuated without incident. (T.11-12)

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1. Jacob Koch testified that when he and his son went to BOIVIN'S trailer, Steven's girl friend, was also outside.

3. (. . .Page 4, paragraph 1, line 3 insert following . . ."September 6, 1983,") . . . The following set of circumstances was established by the entire panel:

> . . . BOIVIN had been discharged from military service with a 100% disability and had a history of mental problems. He stated that he had to shoot because "they were going to bury (him)." His shot injured the son. (App. 2)

4. (. . . Page 4, insert between paragraphs 7 and 8).

On September 23, 1983, in response to BOIVIN'S Motion for Rehearing (Striken as untimely) the decision was altered to read:

> . . . The victim had been discharged from Military Service with a 100% disability and had a history of mental problems. BOIVIN stated that he had to shoot because 'they were going to bury (him)'. His shot injured the son. (App. 4)

5. (. . . Page 4, paragraph 8, line 2, insert following . . ."this Court." On October 25, 1983 BOIVIN filed a Notice Invoking the Discretionary Jurisdiction of this Court concerning the single remaining conviction in Florida Supreme Court case number 64,444, that cause being active and Briefs in Jurisdiction of both parties having been filed. (App.5,6)

I

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED BY PROFFERING AN OPINION IN ERROR IN FACT, UPON REVIEW OF AN INNACURATE RECORD AND DETERMINED BY INCORRECT CIRCUMSTANCES; THEREBY TAINTING ANY SUBSEQUENT CONCLUSIONS THAT MIGHT HAVE BEEN DRAWN AND RENDERING MOOT ANY ARGUMENTS BASED UPON THE MERITS OF THOSE CONCLUSIONS.

On September 6, 1983, the 3rd District Court of Appeal proffered an opinion in this cause: (App.1-3)

> ... BOIVIN shot at a man and his son who came to BOIVIN'S trailer to apologize for bumping into the trailer. BOIVIN had been discharged from military service with a 100% disability and had a history of mental problems. He stated that he had to shoot because "they were going to bury (him)." His shot injured the son.

The D.C.A. went on to affirm one of the convictions and sentences while vacating the two lesser included offenses. These actions were prefaced by a sound and concise description of how they came about their conclusions:

> ... Upon review of the record we have determined that under the circumstances of this case,
> . . .

At this point we must study carefully the composition of the first excerpt. BOIVIN is referred to by using the pronoun "he" twice. Steven Koch is referred to twice as the "son". BOIVIN is referred to by name on three different occassions to prevent any misunderstanding over whom the Justices were referring to. Steven Koch is referred to in no way other than "the son". The pattern of logic runs continuous. A man suffering from disabling mental problems,

in an unprovoked and bizarre reaction, fires his hunting rifle at two neighbors who were trying to apologize for damaging his trailer. To support that thesis BOIVIN'S irrational babble, "They were going to bury (him)" is included.

Out of 200 pages of transcribed testimony; 50 different documents in the Record of Appeal; countless statements, depositions, affidavits and exhibits; thousands of words in oral argument and page upon page of briefs from BOIVIN and the State, these are the words the D.C.A. chose as those most relevant those most representative of the record and circumstances of this case.

The problem developed upon the D.C.A. discovering, by way of BOIVIN'S Motion for Rehearing En Banc, that Jules M. Boivin has never been in the military service in any capacity, nor is he disabled, nor has he any history of mental problems. He has, in fact, lived half a century as a normal law abiding citizen. Not so Steven Koch. Steven Koch was in the Viet Nam War and was effected terribly by that experience. (T.48-49) He has been in and out of V.A. hospitals for alcoholism, mental problems and bizarre behavior. He was discharged with 100% disability.

The history of Boivin's Motion for Rehearing En Banc is well established in this Court. It was striken as untimely. (App. 4).

> ...2. The Marion Correctional Institution legal mail log will reflect that BOIVIN was served with notification from the D.C.A.

in the form of a copy of the
(September 6, 1983 3rd D.C.A.).
decision on September 19, 1983.
(App. 7).

More important than the errs themselves is what caused them. Any man of reason would acknowledge that we have more than a simple typographical error here. The Justices were actually mistaken about the circumstances. Yet they had reviewed the record. They had studied the circumstances. A careful study of that record sheds light on at least some of the difficulty.

On page 48, line 14 of the trial transcript, in voir dire testimony questioning Steven Koch's competency to testify, (T. 48-49) Steven is referred to in a prominent quote from a Veteran's Administration psychiatrist report as "The defendant". Confusing, yes. And interesting, because in those few lines the report documents Steven Koch's history of mental problems and Steven Koch's being discharged from the military service with 100% disability.

Another part of the record is the "Brief of Appellant"[1] as prepared by Bruce A. Rosenthal, Assistant Public Defender. The Court's attention is directed to page 2, paragraph 2 (Statement of the case and facts) Mr. Rosenthal in recounting the facts is disussing the State's Motion in limine (R.28)(App.8).

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[1]BOIVIN has never seen the State's Brief, nor was any of what might have been said during oral argument shared with him. Hopefully the Court will be furnished those as part of the record.

> ...b. Whether, as a result of (a) above, the defendant has been prescribed or has been under medication. . .

And what was the qualifying excerpt from "(a) above"?

> ... received treatment for mental illness related to the Viet Nam War...

We see from the original motion in limine (R.28) that it is merely an err. That it should have read, . . ." the complaining witness." Steven Koch. The son.

Again, in the same document, page 18:

> ...b. Whether, as a result of (a) above, the defendant has been prescribed or has been under medication. . . .

Three times in three diffrent portions of the record the Justices were confronted with erroneous or confusing information. Each time the identity of "defendant" was mistakenly assigned to Steven Koch. Each time it graphically documented the defendant's history of mental problems. Each time it verified the defendant's disability related to his military history. And Jules M. Boivin was the defendant.

The September 6, 1983 decision in BOIVIN vs. STATE, 436 So.2d 1074 (Fla. 3d. D.C.A. 1983) was not as it reads in the

Appendix attached to petitioner's Brief on the merits. That language developed from BOIVIN'S striken Motion for Rehearing En Banc pointing out grievous err.

Human beings are subject to err. Even Judges. Even the State of Florida. The travesty develops when err is defended, even covered up, for the sake of some institution. Is the face of a court, any court, so important that a man's freedom would be the consequence?

The District Court of Appeal erred in toto by proffering an opinion in err in fact, upon review of an inaccurate record and determined by incorrect circumstances; thereby tainting any subsequent conclusions that might have been drawn and rendering moot any arguments based upon the merits of those conclusions.

II

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED BY ALTERING AN OPINION, IN AN EFFORT TO RECONCILE THAT OPINION WITH FACT, THUS INCORPORATING IRRELEVANT AND IMMATERIAL INFORMATION NOT ALLOWED AT TRIAL TO APPEAR AS A KEYSTONE UPON WHICH ITS CONCLUSIONS WERE DRAWN, THEREBY TAINTING THE OPINION IN TOTO AND RENDERING MOOT ANY ARGUMENT BASED UPON THE MERITS OF THOSE CONCLUSIONS.

On September 23, 1983, in response to BOIVIN'S Motion for Rehearing (stricken as untimely), the September 6, 1983 opinion was altered in an effort to reconcile it with fact. (App. 4). Once altered the language read"

> . . . The victim had been discharged from Military Service with a 100% disability and had a history of mental problems. BOIVIN stated that he had to shoot because 'they were going to bury him.' His shot injured the son.

Ground II of BOIVIN'S Brief on Appeal in this cause was:

> THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE PREVENTING DEFENSE COUNSEL FROM CROSS-EXAMINING THE VICTIM ABOUT HIS PAST MENTAL ILLNESS, WHERE SUCH EVIDENCE WAS RELEVANT TO THE VICTIM'S CAPACITY TO REMEMBER, OBSERVE AND RECOUNT THE EVENTS IN QUESTION. (App. 10)

The Motion in limine requested that four facts be withheld from the jury because they are "irrelevant and immaterial" to this action: Whether Steven Koch has received treatment for mental illness related to the Viet Nam War, Whether he was under medication because of that, Whether Jacob Koch was also arrested with a gun during the course of the occurrence and whether Steven Koch has ever suffered from any mental illness because of Viet Nam.

Respondent contends that all of these facts are extremely relevant to the determination of Steven Koch's capacity to remember, observe and recount the event's in question; the credibility of Steven and Jacob Koch's testimony about two friendly neighbors going next door to apologize for bumping into a boat trailor and corroboration of BOIVIN'S account of the episode. Notwithstanding, the right of full cross-examination of relevant issues is absolute, and the denial of that right is harmful and fatal error. COXWELL vs. STATE, 62 So.2d 892 (Fla. 1953). It is the principal means by which a witness' perceptions and memory are tested, and its vital importance is even clearer when the cross-examination is of key prosecution witness . DAVIS vs. ALASKA, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974); STRIPLING vs. STATE, 349 So.2d 187 (Fla. 3rd D.C.A. 1977); TRUMAN vs. WAINWRIGHT, 514 F.2d 150 (5th Cir. 1975). Because the credibility of the prosecution witness is of paramont concern to a jury, such credibility is subject to attack upon cross-examination by showing a defect of capacity, ability or opportunity of the witness to observe, remember or recount the matters about which he has testified § 90.608(1)(d), Fla. Stat.(1979); BURNS vs. FREUND, 49 So.2d 592 (Fla. 1950); LEAVINE vs. STATE, 109 Fla. 447,147 So. 897 (1933); JOHNSON vs. REYNOLDS, 97 Fla. 591, 121 So. 793 (1929); PEARCE vs. STATE, 93 Fla. 504, 112 So. 83 (1927); PADGETT vs. STATE, 64 Fla. 389, 59 So. 946 (1912); PORTER vs. STATE, 386 So.2d 1209 (Fla. 3d D.C.A. 1980).

In a case similiar to the instant case, GREEN vs. WAINWRIGHT, 634 F.2d 272 (5th Cir. 1981) the State files a motion in limine to prohibit the defense from cross-examining the witness on his past mental illness at trial. In holding that the trial court's grant of the State's motion was in error, the Fifth Circuit recognized that:

> . . .the jury should within reason, be informed of all matters affecting witness' credibilty to aid in their determination of the truth. . . It is just as reasonable that a jury be informed of a witness' mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. GREEN vs. WAINWRIGHT, quoting UNITED STATES vs. PARTIN, 493 F.2d 750,762 (5th Cir. 1974). cert. denied, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed. 2d 189 (1977).

Why Jacob Koch carried a gun with him when he and his son went to their neighbor's home to apologize for an accident that caused no damage to the neighbor's property would also seem a reasonable and relevant topic for cross-examination.

The trial court granted the State's motion in limine restricting cross-examination or any mention at all of these facts declaring them irrelevant and immaterial to this action. (R27)

Steven Koch's history of mental illness related to his military service and Steven Koch's 100% disability related to his military service, both of these facts irrelevant and immaterial to this action, now appear as a keystone upon which the lower tribunal declares to have made a determination of this cause:

> . . .Upon review of the record we have determined that under the. . . circumstances of this case . . . (App. 2)

If any of the facts in the motion in limine were indeed relevant as contended by the respondent and suggested by the altered 3rd D.C.A. opinion, and the trial court in error by granting the motion in limine, then the 3rd D.C.A. should rightly have vacated not only the convictions and sentences for the two lesser included offenses, rather it should have reversed the judgment of the trial court in toto and granted BOIVIN a new trial.

Conversely, if the trial court is correct, and the facts of Steven Koch's mental illness and treatment for mental illness are irrelevant and immaterial, the the District Court of Appeal erred by altering their opinion in an effort to reconcile it to the facts, thus incorporating irrelevant and immaterial information not allowed at trial to appear as a keystone upon which its conclusions were drawn, thereby tainting the opinion in toto and rendering moot any argument based upon the merits of those conclusions.

III.

ARGUMENT

THE REASONING AND APPLICATION OF THE DISTRICT COURT OF APPEAL IN VACATING RESPONDENT'S CONVICTIONS AND SENTENCES FOR THE LESSER INCLUDED OFFENSES OF AGGRAVATED BATTERY AND POSSESSION OF A FIREARM IN THE COMMISSION OF A FELONY PURSUANT TO AFFIRMING A CONVICTION AND SENTENCE IN THE SAME CAUSE OF ATTEMPTED FIRST DEGREE MURDER WERE SOUND

Not withstanding argument I and II herein, Petitioner's claim of an incorrect analysis of the three offenses in question is invalid. Uncertain as to whether the State is challenging §775.021(4), Florida Statutes, Fla. R. Crim. P. Rule 3.150(a) or the lower tribunal's discretion in the application of reason; Respondent would remind the Court that the State sought Jurisdiction on the grounds of decisional conflict.

Relying heavily on BORGES vs. STATE, 415 So.2d 1265 (Fla. 1982), the State argues that this Court affirmed seperate convictions and seperate sentences imposed pursuant to convictions for burglary while armed with a dangerous weapon, possession of tools with intent to use them in a burglary or tresspass, possession of a firearm by a person convicted of a felony and carrying a concealed weapon. Respondent agrees. The Court's reasoning and application were equally as sound then as those used by the District Court of Appeal in BOIVIN vs. STATE, supra when precluding the imposition of multiple convictions and sentences which were lesser included offenses. (App. 2)

Examining BORGE, SUPRA more closely, the Court correctly rejected the Petitioner's argument that under the facts of his case, he was subjected to improper multiple convictions and sentences. Even considering the facts of his case, the argument was frivolous. He was an ex-felon in possession of a firearm. That act was seperate and distinct of any other predicted only upon having a firearm in his possession because

of his ex-felon status. Had he never entered a home or crossed another person's property, the simple possession of burglary tools coupled with any proven intent to commit trespass or burglary is sufficient to convict regardless of circumstances. Being armed with a deadly weapon while committing a burglary qualified him for the remaining charge and was not predicated by either of the other two charges.

In BOIVIN, SUPRA, only the gun need be examined to refute the State's argument. BOIVIN was not an ex-felon. He was a law abiding citizen with a legal and constitutional right to possess his hunting rifle. No felony of any description was committed by BOIVIN until he fired that single shot down through his trailer door. No other offense occurred either before or after that one instant in time - the fraction of a second from the pressure of his finger to the projectile slamming through the door. A door BOIVIN didn't open again (once pulling it shut and reaching for his rifle) until he heard officer Conti and no longer felt threatened (T.148) A door the Court would later not allow into evidence. (T.116)

As all three offenses charged were predicated upon the one solitary act, not only does no conflict exist between BORGES, SUPRA, and BOIVIN, SUPRA; no resemblence exists either and the Court should likewise reject Petitioner's argument. This is supported by the Court's reasoning in BORGES, SUPRA,:

> The explicit exclusion of lesser included offenses in section 775.021(4) makes clear that the

> legislature does not intend seperate convictions for two or more Statutorily defined offenses when in fact only one crime has been committed.

The fact that all three charges appeared on a single information was decision of the prosecutor. In BELL vs. STATE, 437 So.2d 1057 (Fla. 1983):

> The fact that a single indictment or information charges both the greater and the lesser included offenses should not change the result regarding the propriety of multiple convictions. To hold otherwise would allow prosecutors to obtain multiple convictions based on a charging decision, an unjust result which we decline to legitimize.

Because BELL had been convicted and sentenced for the offense of trafficking in narcotics, seperate convictions and sentences for the lesser included offenses of sales and possession were disallowed. All three counts of the information charge BOIVIN with the single act of shooting Steven Koch with a rifle. (R.4-7)

The State's Brief on Jurisdiction also cited conflict between HAWKINS vs. STATE, 436 So.2d 44 (Fla. 1983). As Respondent failed to find any reference to that asserted conflict in the subsequent Brief of Petitioner on the merits, he will assume the State has surrendered that claim.

IV

ARGUMENT

GRIEVOUS AND HARMFUL ERR, HASTY REVIEW AND EXAMINATION OF THE RECORD AND CIRCUMSTANCES AND THE NUMBER OF SERIOUS QUESTIONS THAT REMAIN UNANSWERED IN THIS CAUSE DEMAND A COMPLETE DETERMINATION FROM THIS COURT

Thrice confronted with the same error in three different parts of the record and, of all the record, that particular language being chosen from all other as a keystone upon which the justices claim to have drawn their conclusions; any subsequent argument on the merits of those conclusions is so damaged that nothing less than a totally new and unbiased review of that record and those circumstances will be necessary for a determination of this cause.

This problem cannot be solved by the District Court of Appeal even though created by them. In allowing 13 days of BOIVIN'S 15 day time for filing his motion for rehearing en banc to expire before informing him that a decision had been rendered, thus making timely filing impossible, and then attempting to treat the err as some form of "Typo", the lower tribunal has demonstrated sufficient disregard for Respondent's rights to constitute bias. It was within their purview to disregard the procedural error as it did not adversely effect the substantial rights of the parties. The merits of the motion were unquestionable. They needed only be able to accept the normalancy of being human - to be able to say, "We made a mistake," - and entertain the motion that could have been no more than 12 hours untimely.

The trial court can be of no help, because it was from their judgment BOIVIN sought appeal. This leaves the matter squarely in the hands of the Florida Supreme Court. Pursuant to the general provision, Fla. R. App. P. 9.040, in

all proceedings the court shall have such jurisdiction as may be necessary for a complete determination of a cause. It was derived from the last sentence of former Rule 2.1(a)(5)(a), which concerned direct appeal to the Supreme Court and is intended to guarantee that once the jurisdiction of any Court is properly invoked, the Court may determine the entire case to the extent permitted by substantive law. 1977 Revision-Committee Notes.

The above not withstanding, the serious questions heretofore left unresolved cry out for complete determination by this Court:

> a. Why counsel for Boivin was restricted from cross-examination of either of the State's material witnesses concerning a pending civil suit brought against Boivin from which they stood to gain substantially if their testimony so influenced the jury as to bring about a verdict of guilty.
>
> b. Why the only material witness who observed Jacob and Steven Koch's actions on the day in question, Steven Koch's girlfriend, refused to corroborate their story in Court.

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1. BOIVIN vs. STATE, Florida Supreme Court Case No: 64,444. jurisdiction invoked by Boivin and the cause reinstated with both parties having submitted Briefs on Jurisdiction.

c. Why Jacob and Steven Koch carried a gun with them to go to BOIVIN'S home in the middle of the day to perform the neighborly service of apologizing for bumping into his boat trailer, destroying the front of Steven Koch's car and not even scratching any of Boivin's property. (R.28)

d. Why BOIVIN'S counsel was denied cross-examining Jacob Koch about his being arrested with that gun during the occurrence in question.

e. Why no evidence favorable to BOIVIN'S cause was allowed into evidence; not the door (T.111-116) which was so important until counsel for Boivin brought it into the court-room; not Jacob Koch's gun or his arrest; not the civil suit; not Barbara Young, second on the State's list of material witnesses, (R.11) and the only person not directly involved in the confrontation between the Kochs and Jules Boivin; not Steven Koch's drugs; not Steven Koch's drunkeness; not Steven Koch's mental problems. (R.28)

No. Only a complete review of the record and circumstances of this case by this Court and an exercise of jurisdiction as may be necessary for a complete determination can serve the ends of justice in this cause.

CONCLUSION

The District Court of Appeal proffered an opinion in error in fact, based upon conclusions drawn from review of an inaccurate record and determined by an incorrect examination of the circumstances. In an effort to reconcile their decision to the facts, the D.C.A. altered the language of the opinion to include facts previously declared irrelevant and immaterial to this action (and which were not allowed at trial) as a keystone upon which their conclusions were founded; thereby, in both instances so tainting the decision and any conclusions therein that any subsequent argument based upon the merits of those conclusions is moot. These facts notwithstanding, the reasoning and application of the Justices in rendering that portion of the opinion presently challenged by the State were sound, within the discretion of that tribunal and not expressly and directly in conflict with the authorities cited in Petitioner's Brief on Merits.

Based upon the foregoing arguments and authorities and pursuant to the cited general provision, Respondent respectfully submits that this Court should exercise its jurisdiction in such a way as may be necessary for a complete determination of this cause; or, in the alternative, to affirm that portion of the District Court's opinion that vacates the conviction and sentences for two lesser included offenses and grant jurisdiction to Jules M. Boivin in Florida Supreme Court case no: 64,444 to determine the fate of the single remaining conviction in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A true and correct copy of the foregoing ANSWER BRIEF was furnished by mail to the office of the Attorney General, 401 N.W. 2d Avenue, Suite 820, Miami, Florida, 33128, on this 8th day of May, 1984.

Jules M. Boivin
Jules M. Boivin
pro se