IN THE SUPREME COURT OF FLORIDA

MARK DAVIS,
Appellant,

v.

Case No. 70,551

STATE OF FLORIDA,
Appellee.

# APPELLANT'S REPLY BRIEF

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## SUMMARY OF THE ARGUMENT

Appellant, MARK DAVIS', testimony that he was not present during jury selection was uncontradicted at the evidentiary hearing. Consequently, Judge John Griffin's findings that Appellant was present is wholly unsupported by the evidence.

## ISSUE

APPELLANT'S TESTIMONY ON HIS ABSENCE DURING JURY SELECTION WAS UNCONTRADICTED.

In its Answer Brief, the State makes much ado about the fact that Appellant did not bring up at trial that he was absent during jury selection and did not raise the issue until two years afterwards. Appellant explained that he did not know about the right to be present during jury selection until after the trial. (R-1720) It is unreasonable and unfounded for the State to expect a man with no legal training to know the law. In addition, the State's assertion that Appellant "never complained to anyone concerning this absence until two years after the trial" (Answer Brief page 2) is curious. Appellant timely raised the issue through proper appellate avenues. Moreover, Appellant's alleged failure to complain is not a waiver of his right to be present.

In its brief, the State emphasizes that the judge's findings are supported by competent evidence. A close look at the evidence reveals is it nothing but sheer conjecture. Judge Penick surmises that since Appellant did not waive his presence during jury selection he must have been there. (R-1770) Prosecutor Mary McKeown speculates that if Appellant had not been present she would have asked about his whereabouts. (R-1794) Appellant's counsel, John White testified that he did not remember if Appellant was in the courtroom. (R-1812) Finally, the State forgot to add that the court reporter, Debra Elliot, did not remember either. (R-1747)

The State's claim that Judge Penick, prosecutor McKeown, and counsel White's testimony constitute competent evidence is

inexplicable. None of those individuals could affirmatively say Appellant was present.

## CONCLUSION

The testimony of all the witnesses except for Appellant's boils down to: "I don't remember, but he must have been there." This simply will not do. The testimony is insufficient to clothe the judge's findings with a presumption of correctness.

Wherefore, Appellant, Mark Davis, respectfully requests this Honorable Court grant him a new trial.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to Peggy Quince, Assistant Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, FL 33607-2366, this 18th day of July, 1991.

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