IN THE SUPREME COURT OF FLORIDA

ROBERT C. COX,
Defendant/Appellant,

vs.

STATE OF FLORIDA,
Plaintiff/Appellee.

CASE NO. 73,150

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

POINT I

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE **1**, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

It is agreed that "the concern on appeal [is] whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment." Tibbs v. State, **397** So.2d **1120, 1123** (Fla. **1981).** In his Initial Brief Cox argued that the state failed to present a prima facie case against him, and that he therefore is entitled to discharge. To answer that claim, it should be a simple matter for the state to identify what competent, substantial evidence exists in the record that, in its opinion, establishes a prima facie case, and to cite specific authority to support that

contention. The state has chosen not to do so, and to instead rely on the general premise that it "is not required to disprove every possible hypothesis or [sic] innocence, or even the hypothesis offered by a defendant" A.B. 1/ at 7. Cox agrees that the state is not required to disprove "every possible hypothesis" of innocence, but that is not the issue. The issue is whether the state has, by competent, substantial evidence, presented a prima facie case that Robert Cox is guilty of the first-degree premeditated murder of Sharon Zellers. The failure of the state to do its job, i.e., set forth in its brief what evidence it contends is legally sufficient to meet its burden, does a gross disservice to this Court, and places Cox in the precise position about which the state complains, having to "prove the existence of a negative". A.B. at 7.

BOOT TRACK TESTIMONY

The state asserts that, "dusty shoe prints left on the interior of the victim's vehicle were consistent with the sandy, military-style boots worn by appellant on the evening of the victim's disappearance." A.B. at 14. Cox expressly challenges this representation of fact as being unsupported by the record. The state's representation is absolutely untrue. There has NEVER been a comparison made between the boots Cox was wearing the night Zellers disappeared (assuming that he was, in fact, wearing boots) and the marks found on the front seat of Zeller's vehicle. Without such a comparison, a claim of "consistency" is meritless.

1/ A.B. refers to the answer brief of appellee.

> Q. (Prosecutor): Looking at that print right now, could that, in your opinion, be from a military boot?
>
> A. (Pierpoint): Yes. The military had a boot which has a similar tread design. And when I say similar, there could be many little differences, but in general appearance, it appears to be the same. Also, there are some civilian shoes which have basically that same tread design, also.

(R628-29). The state just ignores that portion of the testimony stating that civilian shoes can make the same marks. This testimony is too equivocal to fairly support the claim that the marks found in Zeller's vehicle were "consistent" with the prints made by Cox's boots, assuming that he was wearing boots:

> Q. (Prosecutor): At the Orla Vista hospital. Did you come into contact with a person by the name of Robert Cox?
>
> A. (Deputy Harris): Yes, I did.
>
> Q. Where did you see Robert Cox?
>
> A. I saw him on a stretcher or a bed.
>
> Q. All right. Will you describe for the jury footwear that Robert Cox had when you saw him on the stretcher or the bed at Orla Vista hospital?
>
> A. It was a black army boot that laced up front.
>
> Q. All right. Will you describe the condition of the boot.
>
> A. It was sandy.
>
> Q. Can you describe how sandy the boot was?
>
> A. It was as if the shoe had been wet and someone had walked into a sandy area.

(R696-97).

CROSS-EXAMINAION

Q. (Defense Counsel): Let's talk about these boots, okay?

A. (Deputy Harris): Okay.

Q. You're at the hospital, right?

A. Right.

Q. And you see Mr. Cox?

A. Yes.

Q. And you note that he's wearing boots?

A. Yes.

Q. Is this because you had been in the Army?

A. Yes. It probably -- that's why it drew my attention.

Q. They're Army boots?

A. Yes.

Q. They were black?

A. Yes.

Q. And they, in your mind, looked like first-issue boots, correct?

A. I'm not positive of that. I would tend to think that, but I can't say that definitely that's what type of boot they were.

Q. Okay. Because it didn't stand out in your mind at that time?

A. The style didn't, but I did -- I did know they were Army boots.

Q. They were the type of boots that could be found in any Army surplus store, correct, in your experience?

A. Probably. I can't say for sure.

Q. Yes, Ma'am. Now, let's talk about the first time you discussed these boots with anyone, all right?

A. Okay.

Q. That was in April, wasn't it?

A. I believe that was the month, yes.

Q. April of 1988?

A. Yes,

Q. That's the first time you talked about the boots?

A. Yes.

Q. Or the sand?

A. Yes.

(Defense counsel): No further questions. Thank you Miss Harris.

REDIRECT

Q. (Prosecutor): Do you recall the soles of these boots by any chance?

A. No, I do not.

(R698-700). Even assuming that Cox wore military boots at the hospital, it is critical that there was NEVER a comparison made between those boots and the marks identified as civilian-shoe/ military-boot tracks by James Pierpoint. The state's repeated argument that Cox's boots made a print "consistent" with marks found in Zeller's vehicle is extremely misleading, and Cox respectfully submits that the argument must be rejected for lack of predicate on the authority of Ramirez v. State, 14 FLW 119 (Fla. March 16, 1989)(ballistics expert unable to identify particular knife as murder weapon) and Ramos v. State, 496 So.2d 121 (Fla. 1986)(testimony of dog handler insufficient predicate to support abilities of dog in dog scent discrimination lineup).

HAIR COMPARISON TESTIMONY

In 1979, an expert at the Orlando regional crime laboratory (R879) prepared microscopic slides of eight hairs found inside Zeller's vehicle (R886-90). In 1987, (R944), the state hired a private, out-of-state laboratory to examine those samples, and an expert from that corporation testified that three of the eight hairs were microscopically WITHIN THE RANGE OF CHEST HAIR of Robert Cox. (R940) The state asserts that the hair from Zeller's vehicle was "microscopically indistinguishable from the appellant's.'' A.B. at 13. This is not a fair representation of the testimony. The state's expert testified that three of eight hairs found within Zeller's vehicle were consistent with having come from Robert Cox.

> Q. (Prosecutor): Did you find any significant areas of variation between the range of hair of Robert Cox and the hairs in the Exhibit I just mentioned?
>
> A. (Expert): No.
>
> Q: Now, sir. Ask you about the other exhibit, State's Exhibit 46, and ask if you looked at the slides in here, which were from Exhibit 9-20 that's labeled from the petri dish, if you found any hairs in that exhibit that you found comparable to the hairs of Robert Cox?
>
> A. I should correct my previous testimony. I testified I found three hairs from the questioned sample. That included both exhibits here.
>
> Q: I see. Okay. How many hairs did you find in this exhibit, which is Q--, I am sorry. State's Exhibit 47, I believe it's Q-6?
>
> A: I found one hair in this sample identified as Q-6 that was similar to

> Mr, Cox's chest hair and then the other two hairs were found in this Exhibit, which is **66** -- no, excuse me, which was identified as **4-20**.

(R940). The term "microscopically indistinguishable" is not being used by the expert to say that Cox's hair and three hairs found in Zeller's vehicle are identical, as implied by the state (**A.B.** at 13), but that the hairs all had characteristics within the range of Cox's hair. That term was interjected into the case when the prosecutor asked whether the expert had ever seen microscopically indistinguishable hair. **(R940).** The expert had **(R941),** but said it is "relatively rare", whatever that means:

> **Q.** (Prosecutor): How likely is it that, if you can tell us, that the hairs in State's Exhibit **47** and State's Exhibit **46** came from someone other than Robert Cox? How likely is it?
>
> A. (Expert): I think it's relatively unlikely. It's a relatively rare occurrence that two peoples' hairs are indistinguishable microscopically. I can't tell you any -- what's the frequency of that in any numbers. I have no basis for that. My only basis is my experience of looking at samples from different people and usually being able to tell the difference.

(R942) (emphasis added).

The state's expert explained that hair even from the same place on the same person is never identical. **(R934)** The expert is using the term "microscopically indistinguishable'' to refer to two hairs having the same characteristics, within a range: "One hair is never identical in all of its features to another hair. The natural process of growth doesn't allow that. Everything, almost everything's unique in nature. It has many

characteristics that are consistent and within a relatively small range on a person's body, but no hairs are ever identical in all respects." (R934)

At most, drawing the inferences if favor of the state, the testimony establishes that three of eight hairs found in Zeller's vehicle could have come from Robert Cox. This evidence does nothing more than suggest that Robert Cox could have been Zeller's killer. This does not amount to substantial, competent evidence upon which to rest a conviction for first-degree murder. See Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988).

ALLEGED CONFLICT BETWEEN COX'S STATEMENT AND EVIDENCE

The argument of the state emphasized below is incorrect:

> Counsel on appeal has adequately set forth in his brief the state's case against the Appellant, along with the hypothesis of innocence offered by Appellant. See, Initial Brief of Appellant, pages 15-26. However, Appellant only acknowledges the existence of two areas of conflict between the statement given on January 19, 1979 and the facts adduced during the state's case-in-chief at trial. To the Appellant's detriment, the exercise of common sense reveals many more.

A.B. at 8. Cox acknowledges NO CONFLICT between his statement and the evidence presented at trial. The state continues; "as conceded by appellant, the state presented the testimony of two witnesses . . . to refute appellant's contention[.]" A.B. at 8. Nothing has been conceded! In plain English, so the state can understand; Yes. Witnesses were presented. NO. The testimony does NOT refute Cox's statement. The state is using artifice in an attempt to bolster its case. There is no "concession", unless

recognition that the state presented witnesses is a concession, and it irks the undersigned counsel to have such deleterious labels placed on merely repeating in the initial brief what a witness said on the stand. Repeating statements as a predicate to dealing with the legal consequences and the content of those statements are not concessions, yet the state would imply to this Court that Cox has conceded the existence on an inconsistency between the testimony of state witnesses and his own statement.

The state also plays fast and loose with emotional characterizations of the evidence. For example, without record cite, the state deems the incident between Cox and the group of people in the parking lot a "race riot". A.B. at 8. A sudden encounter where a single punch is quickly thrown cannot, without more, fairly be characterized as a "race riot". Common sense does not compel that people working inside a skating rink would be aware of such an incident occurring outside, so the state makes it into a "race riot." Even at that, common sense dictates that at times even a "race riot" could occur in a parking lot outside a skating rink and be unnoticed by those inside amid the music, laughing, yelling, and noisy patrons. Had Cox represented that he reported the incident to the management, or that someone else had, then there would be merit to the state's argument. In the absence of that representation, there is no contradiction of Cox's statement by the two inside "witnesses". In short, they are legally incompetent to testify that no fight occurred outside based on an assumption that someone would have told them had such a fight occurred.

Without record basis, the state argues that the bite mark sketched by the surgeon's assistant (state's exhibit 36) eight years after she viewed it was inconsistent with Appellant's explanation of how the injury occurred. A.B. at 10-11. The state assumes that Cox's tongue was protruding directly from the front of his mouth when he was struck in the chin by the fist of his assailant and/or the pavement he when fell. Even making that assumption, there is no testimony that the bitemark drawn by the assistant did not conform to the configuration of Cox's teeth. Anyone who has ever been punched in the mouth is aware that such blows often loosen teeth and distort the normal configuration of the teeth, whatever a "normal configuration" is. An example of this was seen on national television during the N.B.A. championship series when A. C. Green of the Los Angeles Lakers was hit in the mouth by a player from the Detroit Pistons this last fall. Green walked off straightening his front teeth which had been pushed in before a national television audience.

Again, this assumes that Cox's tongue was protruding straight between his teeth when he was hit and fell. What if, at the time Cox was struck, he became dazed and his tongue was severed by his rear teeth as he struck the pavement with his chin? He may have been attempting to dislodge a particle of food from a molar or wisdom tooth when punched. Perhaps he was feeling a cavity on a rear tooth, or a sore on his cheek-gums. There are hundreds of possibilities. Assuming that the state does not have to rebut those hundreds of possibilities, they still must present competent, substantial evidence that the injury is inconsistent

with Cox's bitemark before the jury may simply reject his statement. There is absolutely no testimony that Cox could not have inflicted the injury in the manner represented in State's Exhibit **36**, which quite obviously is not to scale. "A third of the front portion of tongue was gone" **(R722)**, whatever that means. The state did not even have Cox display his teeth to the jury so that they could compare Cox's bite to that drawn in State's **36**.

The state again mischaracterizes testimony by arguing, "Curiously, as noted by the appellant, not even a drop of blood was observed when Deputy Sarver inspected appellant's vehicle with the aid of a flashlight as appellant's father was retrieving the vehicle from the Skate World parking lot **(R975-976)**. See Initial Brief of Appellant, page **19**." A.B. at **12** (emphasis added). Deputy Sarver NEVER "inspected" Cox's vehicle. He looked into it at night with a flashlight and, though he could recall nothing else, he did not "see" any blood:

> Q. (Prosecutor): And would you tell the jurors the distance the car was from Skate World?
>
> A. (Deputy Sarver): It was about one hundred yards west.
>
> Q. West of Skate World, North of Handy City. Did you look inside that car when you took Mr. Cox to the car?
>
> A. Yes, I did.
>
> Q. Did you see any blood in that car?
>
> A. No, I did not.
>
> Q. Did you have anything that aided your vision?
>
> A. I had my flashlight. It was at night.

Q. Used your flashlight to look inside and you saw no blood whatsoever?

A. Correct.

Q. And Mr. Cox was with you at that time?

A. Yeah. He was there to pick up his son's car. * * *

CROSS-EXAMINATION

Q. (Defense Counsel): Mr. Sarver, will you tell the jury the make of the car?

A. (Deputy Sarver): I don't know what the make of the car was.

Q. Will you tell the jury the year of the car?

A. I don't know.

Q. Can you tell them the color of the car, Mr. Sarver?

A. No.

Q. Can you tell them whether the interior was cloth or was vinyl?

A. No.

Q. Can you tell these jurors the color of the interior?

A. No.

Q. Can you tell them whether the interior was clean or not?

A. No. * * *

(R975-77). There is a great distinction between a deputy saying "I inspected a vehicle and saw no blood'' and a deputy saying "I looked into a car at night with a flashlight and I don't remember seeing any blood, but, for that matter, I don't remember anything else about it either.''

The failure of the state to simply set forth in its Answer Brief what proof and legal authority shows a prima facie case suggests that there is none. A prima facie case requires more than simply showing that an individual could have committed a crime. "[E]ven though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hyposthesis of innocence." McArthur v. State, 351 So.2d 972, 978 (Fla. 1977); Jaramillo v. State, 417 So.2d 257 (Fla. 1982); Davis v. State, 90 So.2d 629 (Fla. 1956). The instant conviction rests on mere speculation and guesswork.

In cases where this Court has found circumstantial evidence legally sufficient to support a first-degree murder conviction, the determination was greatly influenced by the presence of direct evidence showing a motive for that particular defendant to have committed the murder. See Heiney v. State, 447 So.2d 210 (Fla.1984)(Williams rule testimony admisssible to show the defendant's motive to commit the murder); Rose v. State, 425 So.2d 521, 522 (Fla. 1989)("The evidence reveals that defendant had a motive for killing Lisa."). The motive suggested by the state for this killing (retaliation for Zellers biting tongue, A.B. at 13) comes from pyramiding tenuous inferences that are based solely on equivocal, circumstantial proof. See Benson v. State, 526 So.2d 948 (Fla. 2d DCA 1988)(circumstantial evidence legally sufficient where defendant, who was heir to $10 million estate of victim, at victim's insistence was to be audited for possible embezzlement of victim's funds).

As this Court has noted, the determination of the legal sufficiency of evidence in any particular case is controlled by the quality and quantity of the evidence the state has presented in that particular case. An analysis of past cases affords nothing more than a framework establishing that there must be substantial competent evidence in the record in order for the conviction to be sustained on direct appeal. Close review of the evidence presented by the state in this case demonstrates quite clearly that, even when the inferences are drawn in the state's favor, there is insufficient evidence as a matter of law to support the conviction. Robert Cox was not obligated to prove his innocence. Rather, the state is obligated to prove Cox's guilt. In that regard, the state failed to present substantial, competent evidence from which a reasonable person could conclude beyond a reasonable doubt that Robert Cox murdered Sharon Zellers from a premeditated design. Careful analysis reveals that the quantity and quality of evidence is legally insufficient, and that the trial court therefore erred in denying the timely and specific motion for judgment of acquittal. Accordingly, this Court must reverse the conviction and remand for the discharge of Robert Cox from Florida custody.

POINT II

THE UNJUSTIFIED EXCUSAL OF PROSPECTIVE JUROR SMITH OVER DEFENSE OBJECTION VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION,

The state argues that "The record indicates that the questionnaire was utilized for those individuals who, because of prior knowledge of the case or strong opinions concerning the death penalty, had been selected for individual voir dire. (R14-17)." A.B. at 18. The questionnaire prepared by defense counsel and previously approved for use by Judge Conrad was NOT used by Judge Cycmanick for any jurors. The questionnaire which has been appended to the state's brief in no way addressed the jurors' attitudes concerning the death penalty, but was instead a form to be completed by all prosepective jurors.

Omitting reference to Ms. Smith's lack of bias, the state contends, "Appellant's suggestion that the record evidence of prospective juror Smith's personal circumstances did not establish 'even a glimmer of ... hardship' ignores the realities of contemporary parenthood and represents at least as cavalier an approach to Smith's day care dilemma [sic] as that alleged to attend the trial court's ruling presently under review." A.B. at 21. What day care dilemna? For all we know, Ms. Smith only had a problem on that one day, and she may have wanted to be on this jury. What of her right to perform a traditionally American function? In the absence of a challenge from either party or a request by the juror to be excused from jury duty, a randomly

selected, duly qualified juror should be allowed to serve if she so desires. It must be noted that this was the very first day of jury selection, and Ms. Smith could reasonably have believed that arrangements to have the child cared for until 5:30 would be more than adequate. How was she to know that jury selection would run after 4:30, especially when the Court instructed her that she should return at that time? The refusal of the trial court to allow defense counsel an opportunity to question Ms. Smith in order to make a record is tantamount to denying defense counsel an opportunity to make a proffer, and it denies Due Process. Piccirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976).

The state urges that Ms. Smith may have been unqualified, urging that "[T]he only conditions precedent to Smith's mandatory excusal were establishment of her employment status as a part-time employee and a request for excusal based upon such circumstances." A.B. at 19. Appellant submits that, in the absence of those conditions precedent and in light of the fact that the trial court would not permit Cox to question Ms. Smith prior to her elimination from the jury venire, it must be presumed that Ms. Smith was statutorily qualified.

The state cites Jennings v. State, 512 So.2d 169 (Fla. 1987) as authority for a trial court's ability to excuse a juror on his own motion, and argues, "In Jennings, supra, the trial judge sua sponte excused a juror selected to hear the case after the jury had been sworn and the state's case-in-chief commenced." A.B. at 22-23. This assertion is incorrect. The trial judge in Jennings did NOT sua sponte excuse a juror. Rather, the juror

deliberated during the guilt-innocence phase, and only after a guilty verdict was reached did the judge grant a state motion to have the juror excused from the penalty phase. Jennings, 512 So.2d at 173. Jennings is inapposite. The court here abused its discretion in summarily excusing Ms. Smith in the absence of a request by the parties or the prospective juror that he do so.

POINT III

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 22 OF THE FLORIDA CONSTITUTION BY EXCUSING FOR CAUSE, OVER DEFENSE OBJECTION, A JUROR WHO WAS IN ALL RESPECTS QUALIFIED TO BE A JUROR AND/OR IN REFUSING TO STRIKE FOR CAUSE A JUROR WHO WAS STRONGLY IN FAVOR OF THE DEATH PENALTY.

The trial court excused Ms. McKissick for cause, stating, "I have the overall perception, not just isolated sentences, this lady would have a difficult time rendering a fair and impartial verdict with respect to the death penalty." (R 248-49). This is NOT the correct standard to be applied when ruling on a motion to strike for cause. It is clear that, though Ms. McKissick might indeed have a "difficult" time issuing a death recommendation, as well anyone should, she did not indicate that she would be unable to faithfully and impartially follow the law. See Wainwright v. Witt, 469 U.S. 412, 426. The ruling was erroneous.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE CHARGE AGINST COX DUE TO THE STATE'S VIOLATION OF THE INTERSTATE AGREEMENT OF DETAINERS.

The state contends that the argument presented on appeal is not the same as that presented to the trial court, stating, "On appeal, appellant concedes that [the initial] theory is without merit. See, Initial Brief of Appellant, page 53. ("It was only after Florida placed a detainer on Cox ... that Cox was able to demand disposition of the charge.")" A.B. at 29-30. Cox "conceded" nothing of the sort; the present argument is that same as that presented to the trial court. (R1390-94). It is a correct statement that, until Florida officially placed the detainer on him in California, he was powerless under the Interstate Agreement on Detainers (I.A.D.) to demand disposition.

The state asserts that notice under the I.A.D. is effective only when received by the receiving state. A.B. at 30. Appellant disagrees. See United States v. Smith, 696 F.Supp. 1381 (D.Or. 1988). The burden on Cox was to prove that a request by him had been made in compliance with formal I.A.D. procedures. See Johnson v. Stagner, 781 F.2d 758, 762 (9th Cir. 1986). This he did. The state failed to show justification for not bringing Cox to trial within 180 days from the date of that request. As argued to the trial court, the inaction of Florida in failing to formally file the detainer, combined with its neglect to provide sufficient information to enable Cox to expediently request disposition of the charges, also justify dismissal.

POINT V

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS DUE TO PREINDICTMENT DELAY.

Incredibly, the state argues that the destruction of the names and addresses of the sixty initial suspects in this case did not prejudice Cox because "most of these individuals were subject to hair comparison analysis and were subsequently eliminated as suspects because the hair samples obtained did not compare favorably with any of the hairs found in the victim's vehicle[.]" A.B. at 36. This is the same agency who waited until 1987 to hire a private laboratory to determine that three of the eight hairs found in Zellers' vehicle were consistent with Cox's hair. Maybe whoever killed Zellers did not leave any hair behind to have a comparison conducted. Just because the state chose to summarily reject these persons as suspects based on unfavorable hair comparison does not mean that Cox would have been satisfied with that conclusion.

Rather than repeat the state's argument verbatim here, Appellant submits that he was prejudiced by being forced to rely on the state's witnesses' stale recollection of what they saw or what other witnesses said more than eight years previously, in critical areas such as the nature of the injury to Cox's tongue, whether a fight occurred in the Skateworld parking lot, whether there was blood in Cox's car, and even whether Cox was wearing boots when he was observed by the unknown motel guest on the second floor (as opposed to being seen later at the hospital).

POINT VI

THE TRIAL COURT ERRED IN NUMEROUS EVIDENTIARY RULINGS DURING THE GUILT AND PENALTY PHASE OF TRIAL, RESULTING IN A VIOLATION OF COX'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, CONFRONTATION OF WITNESSES, AND A RELIABLE SENTENCE.

The state claims that no motion for mistrial was made when the prosecutor argued that the defendant should have called his father to establish that blood was present in Cox's car that was not seen by the deputy. A.B. at 47. The record establishes the following:

> (Prosecutor): This man had bitten his tongue; had, had cut through an artery in his tongue; was bleeding profusely. Got in his car, drove around and didn't leave one drop of blood in the car. Not one drop.
>
> Edwin Sarver told you he looked in that car and there was not one single drop. He used a flashlight and there was not one drop. He told you that Robert Cox's father was there with him; picked up that car.
>
> And I submit to you, Ladies and Gentlemen, that if there was blood in that car, and Edwin Sarver is wrong, that Robert Cox's father knows it.
>
> (Defense Counsel): Objection, Your Honor. May I approach?

(R1098-99). Defense counsel then argued that the argument was improper and an indirect comment on Cox's right to remain silent. (R1099). The prosecutor argued that the line of argument was appropriate under State v. Michaels, 454 So.2d 560 (Fla. 1984).

Defense counsel pointed out that here the state introduced the evidence concerning Robert Cox's statement and then sought to benefit from Cox not taking the stand or presenting evidence to support that statement, whereas in Michaels the defendant took the stand, thereby enabling the state to comment on the failure of the defendant to present corroborating evidence. (R1100).

The trial court ruled as follows:

> (Court): Well, I don't find the argument to be prejudicial. I don't think it's prejudicial, so I'm going to deny the motion for mistrial, but I really suggest that, you know, on a few things you're really walking a tight rope. And if you want to do that, I am not going to prognosticate and tell you not to. I am simply suggesting that, you know, we have lots of good things to talk about and be careful what you say.

(R1100). Clearly, either the motion for mistrial was made by defense counsel before the court reporter arrived at the bench to record the objection, or the court anticipated the motion being made, in which event making a motion for mistrial would have been a useless act.

The state argues that State v. Michaels, supra, is dispositive, and that any authority to support Appellant's position is "conspicuously absent" from the Initial Brief, A.B. at 47. In reply, Cox submits that Michaels, supra, is inapposite for the precise reasons enunciated by trial counsel, and that the issue is squarely controlled by Bayshore v. State, 437 So.2d 198, 199 (Fla. 3d DCA 1983), where the court held that the state not only failed to establish the competency and availibility of an alibi witness as a predicate to an argument that the defendant

could have presented testimony in his own behalf, "but - even more egregiously - itself created, in order to later destroy, the alibi defense."

> In Kindell v. State, [413 So.2d 1283 (Fla. 3d DCA 1982)], Judge Pearson stated that "[a]n inference adverse to the defendant is permitted when the defendant fails to call witnesses only when it is shown that the witnesses are peculiarly within the defendant's power to produce and the testimony of the witnesses would elucidate the transaction, that is, that the witnesses are both available and competent." Id at 1288. See also Lane v. State, 352 So.2d 1237 (Fla. 1st DCA 1977). The same adverse inference may be shown if the defendant raises alibi as a defense and then fails to call alibi witnesses. Pena v. State, 432 So.2d 715 (Fla. 3d DCA 1983); Jacobs v. State, 389 So.2d 1054 (Fla. 3d DCA 1980), rev. denied, 397 So.2d 778 (Fla. 1981); Daughtrey v. State, 325 So.2d 456 (Fla. 456 (Fla. 1st DCA), cert. denied, 336 So.2d 600 (Fla. 1976); Jenkins v. State, 317 So.2d 90 (Fla. 1st DCA 1975). In the instant case, however, as in Kindell, supra, the state not only "totally failed to establish the competency and availability of the ... [father as an] alibi witness as a predicate to its argument, but - even more egregiously - itself created, in order to later destroy, the alibi defense." Id at 1288.

Bayshore, 437 So.2d at 199. The same thing is happening here. The state, over objection, is able to imply that the defendant had a burden to present the testimony of his father to rebut the testimony of Deputy Sarver that he saw no blood in Cox's car, and that the failure of Cox to present such testimony may be held against Cox. This argument over timely objection is error, and it cannot fairly be characterized as "harmless".

POINT VII

THE TRIAL COURT VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION BY PERMITTING THE STATE TO IMPROPERLY USE TESTIMONY OF NON-VIOLENT CRIMINAL ACTIVITY BY COX AFTER DEFENSE COUNSEL TIMELY OBJECTED TO THE TESTIMONY AND HAD PREVIOUSLY WAIVED THE STATUTORY MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT PRIOR CRIMINAL HISTORY.

Citing Muehlman v. State, 503 So.2d 310 (Fla. 1987) and Parker v. State, 476 So.2d 134 (Fla. 1985), the state contends that "appellant's admission to the witness was directly relevant to the credibility of Bickett's opinion of the witness and that whether appellant had indeed confessed to having committed a crime during a period of time when he was characterized by the witness as having been a leader 'by example' was directly relevant to the issue [of] whether appellant was a good leader." A.B. at 52, 54. Both cases are inapposite, because in both cases the defense presented evidence concerning the criminal activity of the defendant which was later fully explored by the state. In Muehlman, a defense expert who testified at the penalty hearing stated that he had considered a "Juvenile Social History Report" in forming his opinion. Muehlman, 503 So.2d at 315. In Parker, such evidence was permitted where the defense extensively explored "appellant's past personal and social development history, including a prior criminal history." Parker, 476 So.2d at 139. In those cases, the door was opened by defense counsel during the direct examination of the defense witness concerning

the defendant's prior criminal activity. In the instant case, defense counsel scrupulously avoided the topic of Cox's prior criminal history. The trial court in fact ruled that no door had been opened by the very narrow direct examination of Bickett. (R1825). The suggestion that the subject was necessary to explore the basis of Bickett's opinion and to perhaps impeach the basis of his opinion by showing that Bickett did not know of Cox's juvenile activity is patently frivolous, because the prosecutor represented that Bickett had already told him that he was aware of the incident. (R1822)("He confessed that he did it to this man.")

The state would have this Court view the error as harmless by comparing the nature of such a trivial juvenile incident to the later, more serious convictions. A.B. at 55. Not only is this inequitable in light of the waiver that the state entered into, only to later violate with hands raised under protestations of "it's harmless, it's harmless", the argument fails to recognize that the jury recommendation process is a weighing procedure, which, in this case, was barely sufficient for a recommendation of death. (R2505, 7 to 5 recommendation for death). EVERY error in this case, especially those timely objected to, is reasonably viewed as prejudicial due to the paucity of evidence of guilt which, appellant maintains, is legally inadequate.

POINT VIII

THE DEATH PENALTY WAS IMPOSED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9, 16, AND 22 OF THE FLORIDA CONSTITUTION BECAUSE THE JURY DID NOT DETERMINE THE EXISTENCE OF STATUTORY AGGRAVATING CIRCUMSTANCES THAT DEFINE WHICH FIRST-DEGREE MURDERS ARE PUNISHABLE BY DEATH.

The state correctly points out that much of this argument has been rejected by this Court and now by the United State Supreme Court in Hildwin v. Florida. However, the argument in Hildwin was restricted solely to violations of the Sixth and Fourteenth Amendments, whereas the argument presented herein concerns violation of the Fifth and Eight Amendments and Articles 9, 16 and 22 of the Florida Constitution. The failure of the jury to make findings denies Due Process and results in arbitrary and capricious imposition of the death penalty due to the inability of the trial court or this Court to meaningfully review and consisently determine the basis of the jury recommendation. See Burch v. State, 522 So.2d 810, 815-16 (Fla. 1988)(Shaw, J., dissenting).

POINT IX

THE FLORIDA DEATH PENALTY VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION BECAUSE THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DO NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY: THE FACTORS ARE PRONE TO ARBITRARY AND CAPRICIOUS APPLICATION, ESPECIALLY WITH THE VACILLATING STANDARD OF APPELLATE REVIEW CAUSED BY THE PRESENCE OF A JURY RECOMMENDATION OF LIFE.

The state urges that many of the claims raised in Cox's Motion to Declare Florida Statute Section 921.141 Unconstitutional "were couched in terms of the prima facie unconstitutionality of the death penalty statute." A.B. at 64. It must be remembered, however, that the trial court denied Cox's motions to conduct an evidentiary hearing, *so* the motion was necessarily restricted to what was available at the time.

The state urges that this Court need not concern itself with Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), or any of the statutory aggravating factors challenged for vagueness by Cox but which were not found by the trial court, because, "As observed in Maynard v. Cartwright, 108 S.Ct. at 1858, 'vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. (citations omitted).'" A.B. a 67. The state should read the Maynard decision more closely before quoting one passage out of context. Maynard discussed three challenges for vagueness.

Challenges under the First Amendment, which the state perceives and acknowledges can be raised whether the offensive statute applies to the defendant. Challenges under the Due Process Clause of the Fifth Amendment (notice), which review on an as applied basis which the state asks this Court to adopt for the instant challenge. However, the instant challenge is brought under the third basis for challenging for vagueness, that being the Eighth Amendment, which Maynard expressly recognizes is available to a death sentenced inmate, because vague factors result in arbitrary and capricious imposition of the death penalty:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 [.]

Maynard, 100 L.Ed.2d at 390.

The state asserts, "Apparently, in appellant's view, everyone but the trial judge should have a role in Florida's capital sentencing structure." A.B. at 70. The trial judge has a role, and that is to apply the law to the facts. Appellant objects to the trial court finding the facts to which the law applies, and further objects to vague standards that afford trial and appellate courts too much maneuverability in the face of emotionally compelling facts. It must be noted that such a standard cuts both ways.

POINT X

IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS UNCONSTITUTIONAL, IN THAT IT WAS BASED ON JURY INSTRUCTIONS AND ARGUMENT WHICH WERE VAGUE, MISLEADING, AND GROSSLY INCORRECT IN SIGNIFICANT AREAS.

Appellant relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

POINT XI

THE TRIAL COURT ERRED DURING THE PENALTY PHASE BY PROVIDING THE STATE WITH CARTE BLANCHE AUTHORITY TO CROSS-EXAMINE THE DEFENDANT CONCERNING GUILT OR INNOCENCE, THEREBY INTIMIDATING THE DEFENDANT TO FOREGO ALLOCUTION.

Appellant relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

CONCLUSION

Based on the arguments and authorities set forth in this Brief and in the Initial Brief of Appellant, this Court is respectfully asked for the following relief:

Points I, IV, V - to reverse the conviction and discharge the defendant;

Points 11, 111, XI - to reverse the conviction and remand for a new trial;

Points VII, X, XI - to vacate the death sentence and remand for a new penalty phase;

Points VIII, IX - to vacate the death sentence and remand for imposition of a life sentence with no possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida, 32114, and to Mr. Robert Cox, #113377, P.O. Box 747, Starke, Florida, 32091 this 10th day of July, 1989.

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