IN THE SUPREME COURT OF FLORIDA

ALLEN W. COX,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC00-175
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL FOLLOWING A DISCOVERY VIOLATION IN THE MIDDLE OF TRIAL THAT RESULTED IN A DENIAL OF A FAIR TRIAL.

The state contends that Appellant's objection to the state's discovery violation was untimely. In so doing, the state relies on this Court's opinion in Reese v. State, 694 So.2d 678 (Fla. 1997). Reese is clearly distinguishable. In Reese, the prosecutor, during opening statements, told the jury the substance of the defendant's oral statement. The Reese defense counsel objected for the first time

after four witnesses had testified.

In contrast, the first mention of Appellant's oral statement to Inspector Faulk ("I heard you guys found a knife"), occurred during the testimony of Inspector Faulk. Appellant concedes that defense counsel did not object immediately. The first mention of a possible discovery violation occurred during recross of Faulk regarding the omission from his case diary of Appellant's statement. (XIX 1926-31)

This is a very different situation from that presented in Reese. Appellant's objection came during the testimony of the witness who, for the first time, testified regarding an oral statement made by Appellant. The substance of the statement was not mentioned by the prosecutor during his opening statement. The first suggestion of Appellant having knowledge that authorities had found the knife came when the witness testified. Unlike Reese, the cat was not already out of the bag after opening statements. Therefore, Reese is inapposite.

Appellant's trial was a complex one. A murder at a maximum-security prison spawns a confusing trial with a myriad of witnesses, most of them convicted felons. Defense counsel undoubtedly first realized that the state committed a discovery violation when they more closely inspected Faulk's investigative diary and realized the omission. Inspector Faulk and his investigative diary, reports, etc.,

were a frequent problem in the discovery process both before and during trial. See, e.g., (X 176-87; XI 265-75; XIX 1871) Under the circumstances, defense counsel's objection regarding the state's discovery violation was timely.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE A WITNESS VIOLATED THE TRIAL COURT'S ORDER IN LIMINE WHEN HE TOLD THE JURY THAT APPELLANT WAS ALREADY SERVING TWO LIFE SENTENCES.

The state contends that the error was harmless in light of the evidence. The state appears to distinguish the two cases on which Appellant relies by pointing out that self-defense was an issue in both cases. In contrast, the assistant attorney general opines that Appellant's testimony that he, at least in part, acted in self-defense, is not worthy of belief. The validity of Appellant's defense should be left up to the jury, not the assistant attorney general. The jury should have been allowed to make that credibility determination without the unfair prejudice that occurred when the jury heard of Appellant's two life sentences.

Appellant testified that he acted, at least in part, in self-defense. Additionally, the jury heard evidence that could have led them to the conclusion that the victim in this case was armed. Vincent Maynard testified that he heard Tony Wilson warn the victim earlier that day that he had better get a knife and should watch his back. (XXI 2283-85) Maynard also testified that, at the beginning of the fight with Appellant, Baker (the victim) appeared to be reaching

for a weapon. (XXI 2298-2305) In light of this pertinent evidence that established self-defense, Appellant's reliance on Thomas v. State, 701 So.2d 891 (Fla. 1st DCA 1997) and Bozeman v. State, 698 So.2d 629 (Fla. 4th DCA 1997) is warranted.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT'S CONTRAVENTION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.202 RESULTED IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

The state seems to argue that Appellant failed to preserve this issue when defense counsel complied with certain instructions from the trial court and agreed to certain procedures prior to trial. It should not be overlooked that, well before trial, Appellant challenged the validity of Florida Rule of Criminal Procedure 3.202. (II 281-95) Appellant challenged the constitutionality (both facially and as applied) of the entire procedure. The trial court ultimately denied Appellant's challenges. (III 505-8; X 130-39) Subsequently, Appellant unsuccessfully objected when the trial court ordered Dr. McMann to turn over her notes to the state's expert prior to the commencement of the guilt/innocence phase of the trial. (XI 326-33, 362-86) The state had already deposed Dr. McMann. The trial court admitted that it might have erred by letting the deposition proceed prior to trial, but concluded that no harm had been done. In light of Appellant's initial challenge of the validity of the rule, this issue has been preserved and does not constitute invited error.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN REFUSING TO ACCEPT APPELLANT'S OFFER TO STIPULATE TO HIS PRIOR VIOLENT FELONY CONVICTIONS IN CONTRAVENTION OF OLD CHIEF V. UNITED STATES[1] RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL.

Appellant relies on the argument set forth in the Initial Brief.

[1] Old Chief v. United States, 519 U.S. 172 (1997).

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT FUNDAMENTAL ERROR OCCURRED WHEN THE PROSECUTOR REPEATEDLY MISSTATED THE LAW DURING VOIR DIRE AND ENGAGED IN IMPROPER ARGUMENT THEREBY TAINTING THE JURY'S DEATH RECOMMENDATION.

Appellant relies on the argument set forth in the Initial Brief.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY OVER TIMELY OBJECTION AND FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL WHERE THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING FACTOR.

Appellant relies on the argument set forth in the Initial Brief.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

Appellant relies on the argument set forth in the Initial Brief.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN FAILING TO CONSIDER AVAILABLE MITIGATING EVIDENCE AND IN GIVING LITTLE WEIGHT TO VALID MITIGATION BASED ON A MISTAKE OF LAW.

The state contends that the court appropriately gave diminished weight to Appellant's poor childhood based on, inter alia, the fact that Appellant's siblings, who grew up in the same environment, did not grow up to lead a life of crime. (Answer Brief, p.78) The state's assertion is incorrect. Although Appellant's sisters stayed out of legal trouble, David Cox, Appellant's brother, "stays in trouble" with the police. (XXV 3187-89)

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE DEATH SENTENCE IS DISPROPORTIONATE IN LIGHT OF THE FACTS SURROUNDING THE MURDER AND THE SUBSTANTIAL MITIGATION WEIGHED AGAINST THE VALID AGGRAVATION.

Appellant relies on the argument set forth in the Initial Brief.

POINT X

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES, DOES NOT REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS, PERMITS A NON-UNANIMOUS RECOMMENDATION OF DEATH, IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, AND FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

Appellant relies on the argument set forth in the Initial Brief.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to reverse and remand for a new trial as to Point I and II. As to Points III, IV, V, VI and VII vacate the death sentence and remand for a new penalty phase or, in the alternative, the imposition of a life sentence. As to Points VIII, IX and X, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Allen W. Cox, #188854, Florida State Prison, P.O. Box 747, Starke, FL 32091, this 10th day of October, 2001.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER