IN THE SUPREME COURT OF FLORIDA

RONALD WOODS,

Appellant,

v.

CASE NO. 64,509

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR UNION COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING WOODS' MOTION FOR MISTRIAL BECAUSE THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state's argument on this issue has several errors meriting rebuttal:

I. Retroactivity of State v. Neil, 457 So.2d 481 (Fla. 1984)

The state first says (on page 31 of its brief) that Neil has announced a new constitutional rule. Neil has not done so. The "rule" of Neil and Swain v. Alabama, 380 U.S. 202, 13 L.Ed. 729, 85 S.Ct. 824 (1965) is that blacks cannot be excluded from serving on petit juries solely on account of their race. Only in the implementing test do Neil and Swain differ.

In refusing to apply this test retroactively, this Court intended to preclude persons whose cases were no longer pending or "in the

pipeline" from raising the issue. In such instances, finality of judgments outweighs competing interests. Nevertheless, for those cases for which finality has not attached, fairness dictates that the Neil issue be considered when raised at the trial court level. Thus, what the state has not seen fit to tell this Court is that it argued the same issue it is now arguing to this Court when Woods asked this Court to relinquish its jurisdiction to reconstruct the record so the Neil issue could be argued. Had the state been correct as to the retroactivity of Neil to pipeline cases, this Court could have denied the motion. Instead, it granted it.

Moreover, the state has not seen fit to discuss or distinguish Jones v. State, Case No. 81-2176 (Fla. 3d DCA February 26, 1985) (10 FLW 528) in which the Third District Court of Appeal applied Neil retroactively. Accord Cotton v. State, Case No. 83-1531 (Fla. 3d DCA May 8, 1985). Instead, the state has by analogy relied upon this Court's holding that Edwards v. Arizona, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1880 (1981) is not retroactive. State v. LeCroy, 461 So.2d 88 (Fla. 1984). The court in Lecroy indeed held that Edwards was inapplicable to cases on direct appeal. Id. at 92. What the state has not seen fit to tell this Court, however, is that the United States Supreme Court has rejected this Court's position in Shea v. Louisiana, __U.S.__, opinion filed February 20, 1985, 53 U.S.L.W. 4173.

Shea emphasized the distinction between collateral attacks and direct appeal and the different emphasis or importance of finality in collateral attacks and direct appeals. Moreover, underlying both courts' analysis is a recognition that retroactive application of a change in the law must further some legitimate judicial purpose. In LeCroy the court said that retroactive application of Edwards would not further the purpose of the

exclusionary rule, to deter police misconduct. Disagreeing with this analysis, the United States Supreme Court in Shea said:

> There is nothing about a Fourth Amendment rule that suggests that in this context it should be given greater retroactive effect than a Fifth Amendment rule. Indeed, a Fifth Amendment violation may be more likely to affect the truthfinding process than a Fourth Amendment violation. And Justice Harlan's reasoning-that principled decisionmaking and fairness to similarly situated petitioners requires application of a new rule to all cases pending on direct review-is applicable with equal force to the situation presently before us.

The state has also ignored United States v. Johnson, 457 U.S. 537, 73 L.Ed. 202, 102 S.Ct. 2579 (1982) which applied Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) to pipeline cases. Similarly, the state has ignored Hoberman v. State, 400 So.2d 758 (Fla. 1981) which applied Sarmiento v. State, 397 So.2d 643 (Fla. 1981) retroactively. And most significantly, the state has ignored Andrews v. State, 459 So.2d 1018 (Fla. 1984) and Jones v. State, 464 So.2d 547 (Fla. 1985) which clearly indicate Neil controls pipeline cases.

The state is acting like Chicken Little when it says retroactive application of Neil will result in wholesale per se reversals of all pipeline cases in which an objection was made concerning the prosecutor's use of peremptory challenges. In the first place, assuming this is true, Woods doubts that few cases will be reversed. Except for this case, appellate counsel recalls no other case of the hundreds of cases he has been involved in where this issue has been raised. Moreover, compared with the application of Tascano v. State, 393 So.2d 540 (Fla. 1980) to pipeline cases, the values retroactive application of Neil seeks to preserve would indicate that such reversals are well worth the cost.

Per se reversals, however, are not required as this case well illustrates.

Where trial counsel has made an appropriate objection, the appellate court need only relinquish its jurisdiction to reconstruct the record, as this Court did. Once the appellate court has the reconstructed record, it can then determine if the prosecutor has misused its peremptory challenges. Thus, the hearing in this case was not fortuitous as the state might claim, but it was the deliberate action of this Court to perfect the record on appeal.

II The Neil Issue

As to the Neil issue itself, the state says precious little. Instead, it focuses upon what defense counsel did or did not do. For example, the state says Woods excused black prospective jurors. True, but so what? See People v. Thompson, 435 NYS 2d 739 (1981). The state is not alleging Bean or Woods excused them solely because of their race. In any event, counsel explained why they excused the blacks they challenged peremptorily. That is more than the state did regarding two of the blacks it challenged.

Likewise, the fact that Woods had peremptories left is not controlling. Why should that fact cure the prosecutor's racism? Even if Woods could have gotten one or more blacks to sit as jurors, that fact should not thereby legitimate the prosecutor's peremptory challenge of blacks solely because they were black. In Commonwealth v. Soares, 387 N.E.2d 499 (Sup. Jud.Ct. of Mass. 1979) the state peremptorily excused 12 of 13 blacks called as jurors. Significantly, the 13th black actually served not only as a juror but as the jury's foreman. In Neil, an alternate juror was black. In both cases the fact that a black actually served either as a juror or an alternate juror did not prevent either court from reaching the defendant's claim of the state's misuse of its peremptory challenges.

Similarly, here the fact that Woods did not exhaust his peremptory

challenges should not divert this Court from facing the Neil issue. If this Court accepts the state's argument then by implication the prosecutor's racism can be excused as long as the defendant did not do his most to minimize the state's error. That is nonsense. If the state is wrong, why punish Woods for not minimizing the state's mistake? Reason dictates that if the state has erred, the state should be held responsible for minimizing the effects of its errors, not the defendant.

The state says on page 35 of its brief that Mr. Bernstein (trial counsel) could not say on what basis Mr. Tobin had made his peremptory challenges. That is no more than saying Mr. Bernstein could not read Mr. Tobin's mind. But Mr. Bernstein could see what Mr. Tobin was doing, and that was clear to him:

> The pattern seemed clear in that out of at least 50 percent of the State's challenges were removing all of the blacks who were seated.
>
> * * *
>
> At the time of the objection I had noticed this pattern of blacks being removed there had been no remarkable statements by the blacks who had been removed in the jury voir dire examination by either side. There were no real extremes.

(SR-50-51).

The state's primary argument is that "the prosecutor's unrefuted testimony under oath should end the matter." (appellee's brief at p.35). This argument is unpersuasive as a matter of common sense. How many people, in this day, are going to admit they are racist? Perhaps 50 years ago someone might have said that, but no public official today will openly admit he is a bigot. Moreover, the prosecutor in People v. Thompson, 435 NYS 2d 739 (1981) said that he did not systematically exclude blacks from sitting on Thompson's jury. That statement did not preclude

the appellate court from examining Thompson's claim of the state's deliberate misuse of peremptories and then ordering a new trial. Similarly here, the state's bald assertion should not prevent this Court from examining Woods' claims.

The state is also incorrect in claiming Mr. Tobin's statements were unrefuted. Bernstein's observations quoted above and in Woods' initial brief refutes Tobin's claims. Similarly, Tobin's inability to explain why he peremptorily excused two black women raises the presumption that they were excused solely because they were black (see initial brief at p.16).

The state also says the trial court would have found no discrimination if it had been required to make a ruling (SR-54). That was a gratuitous statement made by the trial court, as it was not required to rule, and it had not heard argument of counsel on the issue.

Finally, the state says whatever error occurred was harmless (appellee's brief at p. 35). This argument was rejected in Commonwealth v. Soares, 387 N.E. 2d 499 (Sup.Ct. Mass. 1979). The right to a fair trial and a jury of a defendant's peers is so basic to our system of justice that violating it can never be harmless error.

ISSUE II

THE COURT ERRED IN DENYING SEVERAL OF WOODS' MOTIONS TO CONTINUE HIS CASE IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

The state on page 40 of its brief cites United States v. Cronic, __U.S.__, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984) to support its argument that Vipperman, Woods' trial counsel, had adequate time to prepare his case. Although Cronic involved a Sixth Amendment analysis and was a non-capital case, it provides a useful comparison to this case.

In Cronic, the federal government investigated Cronic's "checkkiting"

scheme over 4 1/2 years. Eventually, the government charged him with fraud, and the trial court appointed a young attorney with a real estate practice to represent Cronic. The court, however, allowed him only 25 days to prepare for trial. In upholding the trial court's action, the United States Supreme Court noted that although trial counsel had only 25 days to prepare for trial he had asked for only 30 days. In addition, the government's burden in gathering and assembling admissible evidence sufficient to establish Cronic's guilt was significantly more substantial than that of Cronic's burden to establish a reasonable doubt:

> The Government's task of finding and assembling admissible evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge. Of course, in some cases the rebuttal may be equally burdensome and time consuming, but there is no necessary correlation between the two. In this case, the time devoted by the Government to the assembly, organization, and summarization of the thousands of written records evidencing the two streams of checks flowing between the banks in Florida and Oklahoma unquestionably simplified the work of defense counsel in identifying and understanding the basic character of the defendants' scheme. When a series of repetitious transactions fit into a single mold, the number of written exhibits that are needed to define the pattern may be unrelated to the time that is needed to understand it.

Id. at 671.

In addition, the only real issue at trial was Cronic's intent, and 25 days was ample time to determine whether the facts justified an inference of criminal intent.[1]

In this case, counsel for Woods stood in a similar position as the government in Cronic. That is, in analyzing his penalty phase case, Vipperman

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[1] The Supreme Court's rationalization has a flavor of Monday morning quarterbacking. What Cronic actually stands for is a rejection of a per se inference of ineffective assistance of counsel. The court did not answer the question of whether Cronic's counsel was actually ineffective, it said only that such ineffectiveness must be demonstrated by pointing to specific areas made by trial counsel. Id. at 673.

undoubtedly realized that the court could find at least one statutory aggravating factor. In light of the fact that death is presumably the correct sentence when one aggravating circumstance is present (and no mitigation exists), State v. Dixon, 283 So.2d 1 (Fla. 1973), Vipperman had the burden to prove that death was the inappropriate sentence in this case. Similar to the government in Cronic, Vipperman had to gather and assemble the relevant evidence to support its case for his case. Instead of 4 1/2 years to do this as the government had in Cronic or the four months Bean's counsel had, Vipperman had only two months.

That such time was insufficient is evident by the fact that:

> (1) Vipperman was never able to investigate whether the Dixie Playboys, an inmate clandestine organization, existed and duped Woods into committing these crimes (SR-60,62).
>
> (2) Vipperman was unable to verify allegations of guards beating inmates (SR-60). This would have tied in with Vipperman's Dixie Playboys theory as an indication of rising prison tensions which were used to egg Woods into committing these crimes.
>
> (3) Vipperman was unable to depose 25 witnesses (SR-62).
>
> (4) Vipperman, at least three days before trial, had not developed Woods' competency to stand trial, and he had been unable to develop the psychiatric testimony regarding any potential mental mitigation (R-481).

The effect of the court's denial of a 20 day continuance (T-806) is evident when compared with Woods' co-defendant, Bean. Bean's counsel had two months longer than Vipperman to prepare his case, and Bean received a life sentence while Woods got death.[2] That is the ultimate prejudice,

[2] The state incorrectly implies that Vipperman had from May 5, 1983, to September 26, 1983, to prepare for trial (appellee's brief at p. 40). May 5th was the date the offense was committed, but Vipperman was not appointed until July 21, 1983 (R-58). Moreover, comparing this case with Valle v. State, 394 So.2d 1004 (Fla. 1981) indicates that Valle was tried within 24 days of arraignment, 30 days of appointment of counsel, and 36 days from the date of the crime.

especially in light of the fact that from the court's sentencing order, no significant difference exists between Bean and Woods.

Finally, the state says the court noted that Vipperman did a thorough job (R-656,657). How, is the court to know that, especially in light of the fact that Vipperman said he was not ready for trial, and he had many witnesses undeposed and theories undeveloped (T-812, SR-58-62). The fact that Vipperman deposed several witnesses does not mean he was prepared for trial. Likewise, even though Vipperman filed several motions, most of those were either requests for additional time, money, or help (e.g. R-106-109,154-155,331-336,337-338) or were form type motions filed in most capital murder cases (see e.g. R-273-275,286-287,288-298,276-277). Significantly, except for the motions to continue, Vipperman did not extensively argue these motions, and the court either summarily granted or denied them (see e.g. T-780-796,801-805).

The ultimate irony of this is that appellate counsel for Woods and the state and this Court will have spent far more time on this issue than the court gave Vipperman to prepare for the entire trial.

ISSUE III

THE COURT ERRED IN NOT EXCLUDING THE LARGE NUMBERS OF UNIFORMED DEPARTMENT OF CORRECTIONS' EMPLOYEES FROM THE SPECTATORS' PORTIONS OF THE COURTROOM IN VIOLATION OF WOODS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY AND RIGHT TO A FAIR TRIAL.

The state has presented three arguments on this issue. None withstand casual examination.

The state claims that Bean did not preserve this issue because it was not raised until the end of trial (appellee's brief at p.42). In the first place, the objection was not made at the conclusion of the trial; it was made before closing argument (T-2136). Second, there is no evidence

that trial counsel noticed the large number of guards in the spectators' section before he raised the objection or that half of the gallery was filled with uniformed Department of Corrections' employees before then. From what the record reveals, Bernstein promptly raised the issue as soon as he became aware of it. Certainly, if he had not, the court and prosecutor would have mentioned his tardiness. That they did not, is indicative that Bernstein raised the issue in a timely manner and in no way "sandbagged" the trial court. If such was the case, Woods can think of no reason why Bernstein waited until closing to raise the issue. The issue, in short, was raised by trial counsel in a timely manner, and the trial court knew the basis for the objection. Appellate counsel has not tried to make an issue out of something that the trial court was unaware of and did not rule on. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The issue argued on appeal is precisely the same issue raised and ruled on below.

As to the issue itself, the state says on page 43 of its brief that:

> Appellant has been unable to cite to the Court a single case in which the presence of uniformed correctional officers resulted in a per se unfair trial.

In the first place, Woods never claimed that the presence of uniformed correctional officers amounted to a per se unfair trial. In the second place, the state has not cited to this Court a single case in which the presence of uniformed guards was non-prejudicial. Because of this absence, Woods can only conclude that no such case exists which implies that no other court but this one has permitted such an intolerable situation to exist. If any other court had permitted this, certainly the issue would have been raised on appeal.

If Woods found no cases involving correctional officers, he did find several cases involving similar circumstances as presented here. State v. Gens, 93 S.E. 139 (S.C. 1917); United States v. Rios-Ruiz, 579 F.2d 67 (CA 1 1978); State v. Franklin, Case No. 16,142 (W.Va.S.Ct. of Appeal, opinion filed March 1, 1985), 36 Cr.L.Rptr. 2471.

Franklin, supra, in fact, is very similar to this case. In that case, Franklin was charged with and convicted of driving under the influence of alcohol, resulting in death. During the trial, 10 to 30 spectators prominently wore a bright yellow button with the letters MADD (mothers against drunk driving), remained in the courtroom, and sat directly in front of the jury. Despite defense counsel's requests to control the presence of these spectators, the court refused to take any action against the MADD presence. The trial court's inaction, however, was reversible error:

> In this case the spectators were clearly distinguishable from other visitors in the courtroom and, led by the sheriff, they constituted a formidable, albeit passive, influence on the jury. Indeed, the court's cardinal failure in this case was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty. This Court quite simply cannot state that the mere presence of the spectators wearing MADD buttons and the pressure and activities of the uniformed sheriff leading them did not do irreparable damage to the defendant's right to a fair trial by an impartial jury. Indeed, it constitutes reversible error.

The state, on the other hand, cited no cases even remotely similar to this case, and its reference to Zygadlo v. Wainwright, 720 F.2d 1221 (CA 11 1983) is largely irrelevant. That case involved Zygadlo's being shackled during trial, not improper influence by spectators. The only

relevance Woods can perceive to this case is that being in shackles does not per se deny a defendant a fair trial. But Woods never argued that the error here was per se reversible. Instead, he has admitted that the trial court has some discretion in the conduct of a trial to include the control of the audience (initial brief at pp. 30,34).

Likewise, the state's repeated references to a change of venue are irrelevant. Venue issues focus upon the ability to seat an unbiased jury when community feelings and state of mind of the inhabitants militates against either the state or defendant receiving a fair trial. Manning v. State, 378 So.2d 274 (Fla. 1980). The problem here has nothing to do with selecting an unbiased jury. Instead, it focuses upon the unfair pressure put upon a jury by a significant portion of an obviously biased community. Even though Woods may have selected an impartial jury, that fact does not mean that they remained impartial when half of the courtroom was filled with spectators obviously wanting to find Bean and Woods guilty.

Unlike prospective jurors, courtroom spectators could not be questioned about their biases and prejudices and eliminated if they cannot be fair. Thus, Morgan v. State, 415 So.2d 6 (Fla. 1982) and Lusk v. State, 446 So.2d 1038 (Fla. 1984) are irrelevant to this case as those cases say that prison guards are not per se excludable from serving as jurors.

Finally, the state says this is harmless error in light of the overwhelming evidence of Bean's guilt. In State v. Franklin, supra, in less egregious circumstances than here, the court reversed without considering the harmless error doctrine:

> This Court quite simply cannot state that the mere presence of the spectatirs wearing MADD buttons and the pressure and activities of the uniformed sheriff leading them did not do irreparable damage to the defendant's right to a fair trial by an impartial jury. Indeed, it constitutes reversible error.

Similarly, here this Court cannot say that Woods received a fair trial in light of the extensive community bias evident at the trial. The harmless error doctrine cannot cure this defect.

ISSUE IV

THE COURT ERRED IN SENTENCING WOODS TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In sentencing Woods to death, the trial court found only two aggravating factors applicable to Woods:

> 1. Woods was under sentence of imprisonment at the time of the murder.
>
> 2. Bean and Woods committed the murder to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(R-655).

The court explicitly rejected the other aggravating factors (R-655), and the state's argument utilizing the facts of Dennard's death are irrelevant as they were not discussed in the sentencing order.[3] The sentencing order does not in any way distinguish Bean from Woods, and in fact, it could apply equally to Bean as well as to Woods.

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[3] The state provided no reference to support its claim that Woods "drove his knife through Dennard's skull all the way to his shoulder and spine" (appellee's brief at p.45). Woods only stabbed Dennard between the shoulder blades (T-1337). Similarly, the state provided no reference for its claim that Woods held the door to the office closed, preventing anyone from helping Dennard. The most that anyone said was that Woods kicked the door shut (T-1936-1938). Also, Bean was convicted for the attempted first degree murder of Anderson (R-592-597).

The state on page 46 of its brief says:

> ...it should be noted that the constitution does not require equal treatment as sentencing--rather, the focus is upon whether the person who received the death sentence deserved it, and not whether someone who did not receive a death sentence deserved it. Antone v. Strickland, 706 F.2d 1534, 1538 (11th Cir. 1983) see also Thompson v. State, 410 So.2d 500 (Fla. 1982).

No court has said that and Antone and Thompson certainly do not. In Antone, the Eleventh Circuit recognized what Woods himself acknowledged in his initial brief: people with different degrees of participation can be punished differently (see appellant's initial brief at p.37). In Antone, this Court said Antone was "the mastermind of this operation" thus justifying different sentences. Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980). In Thompson, the court similarly said Thompson was the dominant force. In this case, this Court certainly cannot say Woods was the dominant force, and as was argued in Woods' initial brief, Bean and Woods are indistinguishable for sentencing purposes.

Finally, the state says this Court has rejected Woods' argument on this issue in Bassett v. State, 449 So.2d 803 (Fla. 1984) (appellee's brief at p.46). Again, Bassett does not support the state's claim. In Bassett, Bassett elected to be tried while his co-defendant pled nolo contendere upon the condition that he would receive two concurrent life sentences. In this case, Bean and Woods both elected to be tried by jury and, in fact, they were tried before the same jury. In contrast to Bassett, Woods is being punished more severely than Bean though they both chose to be tried by a jury (see Justice Overton's dissent in part in Bassett). Neither Bassett or Jacobs v. State, 396 So.2d 1113 (Fla. 1981) answer the question raised by Woods.

ISSUE V

THE COURT ERRED IN NOT FINDING ANY MITIGATION THAT REFLECTED WOODS' CHARACTER.

The state claims Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983) controls this case (appellee's brief at p.47). If so, let us see what that case holds. In Pope, Pope claimed that the trial court failed to consider certain unrebutted evidence that Pope suffered from his Vietnam experience. In rejecting this claim, this Court said:

> The law is clear that the trial court must consider all evidence offered in mitigation. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The transcript of court proceedings and the trial court's discussion of the evidence in the sentencing order show the serious consideration the court gave to the issue. So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. (cites omitted)

In contrast to Pope, there is no evidence the court in this case gave the mitigating evidence the serious consideration the court in Pope gave to the evidence. At the sentencing hearing, the court merely adjudged Woods guilty of the offenses the jury had found him guilty of committing and sentenced him on each offense (T-2589-2592). In fact, the court spent more time saying how competent his attorney was than in sentencing Woods to death (T-2590-2592). Likewise, in its sentencing order, the court spent more time on Woods' attorney's competence than considering the statutory mitigating factors (R-656-657). Nowhere does the court say, or in any way demonstrate, as the court in Pope did, that it considered and weighed all the testimony and evidence. Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982).

Moreover, there is no evidence the court ever considered the evidence in terms of some non-statutory mitigation. To the contrary, what

the court said was that:

> Pursuant to Florida Statute 921.141(5) and (6) the court has considered the existence and weight to be accorded statutory aggravating and mitigating circumstances.

(R-654) (emphasis supplied).

Not only is there no evidence that the court considered all the evidence in mitigation, there is no evidence the court considered any of the evidence in terms of any non-statutory mitigation.

Pope, therefore, states good law, but it is law that the trial court in this case did not follow.

The state then says that if what the trial court did was error, it was harmless error, in light of the fact that it could have found other aggravating factors. The fact is, however, that the trial court did not, and it is pure conjecture for the state or this Court to say that other factors could apply. This is especially true since it is the trial court's duty to find aggravating factors, and the court expressly found that the factors the state says it could have found did not apply in this case (R-654).

On page 49 of its brief, the state says that Woods' psychologist agreed that there was no evidence that Woods was following anyone. What the psychologist said was that he had no such actual evidence, not that none existed (T-2362,2372). He did, however, also says that due to Woods' impaired judgment he could be easily led (T-2354).

Finally, the state says on page 49 that Woods' own psychologist said there was no evidence that Woods could not appreciate the criminality of his conduct. That simply is not true (T-2352-2359).

II CONCLUSION

Based upon the arguments presented above, Ronald Woods respectfully asks this Honorable Court to reverse the trial court's judgment and sentence and remand for a new trial. In the alternative, he asks that this Court reverse the trial court's sentence and either impose a life sentence or remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand to Mr. Lawrence A. Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, Mr. Ronald Woods, #064857, P. O. Box 747, Starke, Florida, 32091, this 3 day of June, 1985.

DAVID A. DAVIS