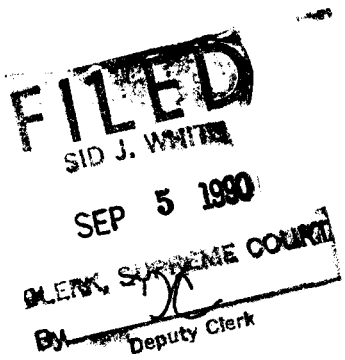
IN THE SUPREME COURT OF FLORIDA



RAYMOND WARFIELD WIKE,

Appellant,

v. CASE NO. 74,722

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT, IN
AND FOR SANTA ROSA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The Appellant, Raymond Wike, relies on the initial brief to reply to the State's answer brief, except for the following additions concerning Issues I and IV:

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF THE WARRANTLESS ARREST OF WIKE IN HIS PARENTS' HOME.

The State contends that Wike voluntarily chose to leave the confines of his home. (Answer Brief at 21-22, 25)

> The sum of 11 police officers positioned around the residence at 654 North Airport Road and the dispatcher's request that appellant step outside does not equal coercion. Appellant did not have to leave his home, and could have remained inside,

> had he so desired, until the officers had obtained an arrest warrant.

(Answer Brief at 22) This contention is without merit. Eleven police officers surrounded the house. (R 1635-1636, 1643) The dispatcher told Wike to go outside with his hands on top of his head. (R 1614, 1676-1677) Wike feared that he would be shot if he did not comply. (R 1677) Moreover, the suggestion that Wike was free to remain inside until the officers secured a warrant ignores the testimony of the lead investigator on the case. He had made the decision to go into the house without a warrant if Wike had not come outside. (R 1617-1619) Wike was coerced into leaving his home. He did not consent to the officers entry or voluntarily comply with a request to leave the house. He was effectively arrested inside his home in violation of Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

In an attempt to distinguish this case from Brown v. State, 392 So.2d 281 (Fla. 1st DCA 1980) and United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984), the State claims the "police officers here did not enter appellant's property before arresting him." (Answer Brief at 25) Initially, this assertion is factually incorrect. Eleven police officers surrounded Wike's house. (R 1635-1636, 1643) They were positioned around the house and in the yard to prevent an escape. (R 1635-1636, 1643) While the officers did not drive a patrol car into the yard as occurred in Brown, officers did come onto the property in a show of force. Furthermore, even if the officers had not actually positioned themselves within the curtilage of the

house, the number of officers, coupled with a direct order to Wike to leave the house with his hands on top of his head, constitutes coercion. This was no casual request to come outside and talk. The fact that he was taken into custody as soon as he came onto the carport further demonstrates the officers' intention to arrest at the time Wike was ordered outside. This case is indistinguishable from Brown and Morgan.

This case is also not a "fresh pursuit" case as the State suggests. (Answer Brief at 25-26) Although the investigation lead to Wike fairly quickly, there was no pursuit from the scene of the crime as this exception envisions. Welch v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). The circumstances here are not unlike the ones in Welch which the Supreme Court deemed insufficient to satisfy the "hot pursuit" exception to Payton. In Welch, an automobile which was being erratically driven ran off the road and stopped in an open field just before 9:00 p.m. Ignoring witnesses' suggestions that he wait for the police, the driver walked away. Witnesses reported to the police that the driver left and seemed intoxicated or sick. The police discovered that the car was registered to Welch and that he lived nearby. The police arrived at Welch's home about 9:00. They entered without a warrant and arrested Welch in his bedroom for driving while intoxicated. Rejecting the state's reliance on the hot-pursuit exception, the Court wrote,

> On the facts of this case, however, the claim of hot pursuit is unconvincing because there was no immediate or

> continuous pursuit of the petitioner from the scene of a crime.

466 U.S. at 753. Just as in Welch, there was no "immediate or continuous pursuit" from the crime scene here. Just as in Welch, there was a rather quick investigation leading to the arrest, but there was no hot pursuit.

The State also relies on the safety of others and the possible destruction of evidence factors to show exigent circumstances. (Answer Brief at 27-28) As argued in the initial brief, the officers had no facts to support these proposed reasons for a warrantless entry and arrest. (Initial Brief at 29-30) Only pure speculation on the part of the officers existed. Bottoson v. State, 443 So.2d 962 (Fla. 1983) and Lara v. State, 464 So.2d 1173 (Fla. 1985) offer no support for the State's position. In Bottoson, exigent circumstances were present because a known victim was missing and the officers did not know if the victim was then alive or dead. The only known victims in this case had been found at the time of the warrantless arrest. In Lara, the police were responding to a homicide scene and consequently, they were allowed to make an immediate warrantless entry to check victims, preserve evidence and to apprehend the perpetrator if present. Wike's home was not the homicide scene and Lara is inapplicable.

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ORDERING THAT WIKE BE SHACKLED DURING THE PENALTY PHASE OF THE TRIAL.

The State claims that no prejudice accrued to Wike as a of result the court's decision to shackle him for the penalty phase of the trial. This claim overlooks the impact of shackling a defendant during trial. Shackling a defendant is inherently prejudicial, thus requiring the State to demonstrate the need for such an extreme measure. As the Court in Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), said,

> ...even to contemplate such a technique [shackling and gagging an obstreperous defendant], much less to see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of the judicial proceedings that the judge is seeking to uphold.

397 U.S. at 344. It was the State's burden, not Wike's, to show that the need for shackling outweighed the inherent prejudice involve. Here, the prosecutor himself, who was also the object of the alleged threats, suggested to the court that Wike not be shackled. (R 1324-1325) He conceded that there was no need for shackles.

Efforts that trial judge made to minimize the impact of the shackling on the jury were inadequate. First, the draping

of counsel tables, when they had been uncovered throughout the first part of the trial, merely drew attention to the fact that something was being hidden from view. Second, Wike had to keep his hands from view to hide the handcuffs. Third, Wike had to testify from counsel table rather than the witness stand. Finally, when Wike inadvertently adjusted his glasses and exposed the handcuffs, the jury knew he was shackled. To suggest these measures hid the fact of the shackles from the jury gives the jurors little credit as observers.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Raymond Wike asks this Court to reverse his convictions for a new trial, or alternatively, to reduce his death sentence to life.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Ms. Gypsy Bailey, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Raymond W. Wike, #116838, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 5th day of September, 1990.

W. C. McLAIN