IN THE SUPREME COURT OF FLORIDA

RICHARD W. RHODES, :

Appellant, :

vs. : Case No. 79,627

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Page references to the record on appeal in case number 79,627 (the instant case) are designated by the prefix "R." Page references to the record on appeal in case number 67,842 (prior appeal of Appellant's conviction and sentence of death) are designated with the prefix "PR."

Appellant will rely upon his initial brief in reply to the arguments presented in the State's answer brief as to Issues I, IV, and VIII.

STATEMENT OF THE FACTS

On page 1 of its brief, Appellee states that defense witness Dr. Donald Taylor had no documentary corroboration for Appellant's telling him that he was sexually abused by both parents. However, Dr. Taylor also testified that the "best corroboration" he had for this was that when Appellant "was placed in the foster home at the age of eight he was engaging in sex play with other foster children in the foster home. And any time an eight year old does that, it is almost one hundred percent certain that the knowledge came from being sexually abused himself." (R 1029)

ARGUMENT

ISSUE II

THE COURT BELOW ERRED IN PERMITTING THE STATE TO PRESENT EXTENSIVE HEARSAY EVIDENCE AT APPELLANT'S RESENTENCING PROCEEDING, SOME OF WHICH APPELLANT HAD NO OPPORTUNITY TO CONFRONT OR REBUT.

Appellee correctly states in footnote 3 on page 12 of its brief that the testimony that Appellant threatened to kill anyone who "snitched" on him was given by Michael Allen, rather than Harvey Duranseau. Appellant so stated in the Statement of the Facts in his initial brief (pages 18-19), but incorrectly stated at page 59 of his initial brief that this testimony was given by Duranseau.

Appellee asserts at page 12 of its brief that Appellant cannot complain on appeal regarding specific testimony of the three "jailhouse snitches" whose former testimony was read at Appellant's resentencing, because Appellant did not lodge an objection with the trial court as to specific testimony given by these individuals. However, the point of Appellant's mention in his initial brief of some of the specific testimony presented by the State was to show the harmfulness of this evidence, a matter which is entirely proper for Appellant to broach on appeal.[1]

Appellee comments on page 12 of its brief that Appellant's point is "meritless as this Court merely noted in a footnote that

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[1] Appellant would also reiterate that at his original trial, much of Michael Allen's testimony came in over various defense objections and motions to strike. (PR 2064-2076, 2082, 2083, 2087-2088) (See Initial Brief of Appellant, p. 19)

the claim was without merit. Rhodes v. State, 547 So. 2d 1201, 1203, n. 2 (Fla. 1989)." This statement is most curious in light of the fact that the issue Appellant presents in this appeal was neither raised nor ruled upon by this Court in Appellant's prior appeal, nor could it have been.

Appellee's argument at pages 12-13 of its brief that any error in admitting Michael Allen's testimony regarding Appellant's alleged threat to kill a snitch would be harmless because the prosecutor did not urge this testimony in his closing argument to the jury is clearly without merit. The jury was entitled to consider any evidence they heard, regardless of whether the assistant state attorney repeated that testimony in his argument in favor of a death sentence.

At pages 15-16 of its brief, Appellee says that witnesses Allen and Duranseau were "absent from the state" for purposes of Florida Rule of Criminal Procedure 3.640(b), and that no serious assertion can be maintained that they were imprisoned elsewhere through the "consent or connivance" of the State. Appellee conveniently ignores that portion of the rule which requires the party introducing the former testimony to "show due diligence in attempting to procure the attendance of witnesses...." In Appellant's case, the State made no attempt whatsoever to secure the presence of the absent witnesses. In effect, therefore, these witnesses were out of the state through the "consent" of the prosecution, because no effort was made to bring them to Florida to testify in person at Appellant's resentencing proceeding. In

Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968), the Supreme Court of the United States held that the mere absence of a witness from the jurisdiction is not sufficient justification for using his former testimony against an accused in a criminal case. In Barber, as here, the State made no effort to obtain the presence of the out-of-state witness, who was incarcerated in a federal penitentiary; the sole reason he was not present to testify in person was that the State did not attempt to have him brought before the court. The Supreme Court noted that "[t]he right of confrontation may not be dispensed with so lightly." 20 L. Ed. 2d at 260. Appellee does not even argue that the former testimony of Edward Cottrell, who was located in Florida, was somehow admissible under the criminal rule.

Breeden v. State, 622 A. 2d 160 (Md. App. 1993) is particularly applicable to this case. The defendant there was being retried on the issue of his criminal responsibility for a homicide he committed. The State made several efforts to secure the presence of a psychologist who had testified at Breeden's first trial, writing him three letters in Puerto Rico, and speaking with him by telephone. Finally, at the direction of the trial court, the State attempted to invoke the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings a few days before the retrial was scheduled to take place, but by that time, it was too late. The trial court permitted the State to use the psychologist's former testimony at Breeden's retrial, but the appellate court reversed, and held that

> before an out-of-state witness whose location is known is declared "unavailable" and his prior testimony is admitted, the State's (or, for that matter, the defense's) good-faith effort in procuring the presence of that witness at trial must include a reasonable, timely attempt to utilize the provisions of the Uniform Act. In our view, the law's preference for live testimony and the spirit of cooperation between states that characterize the Uniform Act make the requirement that the State use the Uniform Act as part of its good-faith effort a fair and reasonable one.

622 A. 2d at 171. The Breeden court noted that its holding was "consistent with the trend of decisions of other states that have addressed similar situations." 622 A. 2d at 171. (Please see discussion of cases from other jurisdictions in Breeden.) The court further noted that if information regarding the location of a witness comes to a party

> too late to institute the Uniform Act proceedings and obtain a judicial determination before the time set for trial, that party has the additional burden of moving for a continuance of trial and attempting to secure the attendance of the witness through the Act.

622 A. 2d at 173. As Appellant noted in his initial brief, the State made no effort to invoke the provisions of the Uniform Act to secure the presence of the out-of-state witnesses. The State did not even make the effort that the prosecution made in Breeden which was found to be inadequate.

> The basic litmus of Sixth Amendment unavailability is established: "[A] witness is not 'unavailable' for purposes of...the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." [Citation omitted. Emphasis supplied by the Court.]

Ohio v. Roberts, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597, 613 (1980). Furthermore, "if there is a possibility, albeit

remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." Id., 65 L. Ed. 2d at 613. [Emphasis in original.] There was no good-faith effort to bring any of the three "jailhouse snitches" to Pinellas County to testify in person, and their former testimony should have been excluded.

Appellee argues on page 18 of its brief that the sentencing recommendation of a jury will somehow be arbitrary if the jury is not apprised of all the facts and circumstances surrounding the homicide. However, the jury's consideration of aggravating circumstances is limited to those factors set forth in section 921.141(5) of the Florida Statutes. Allowing the State carte blanche to introduce guilt phase-type evidence as to circumstances surrounding the homicide that do not directly relate to the exclusive aggravating circumstances when a new sentencing proceeding takes place would hardly tend to promote rationality and eliminate arbitrariness in the sentencing process; quite the opposite.

ISSUE III

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INJECT IRRELEVANT AND PREJUDICIAL MATTERS INTO THE PROCEEDINGS BELOW, INCLUDING EVIDENCE OF APPELLANT'S STATEMENTS FOLLOWING HIS ARREST FOR ROBBERY IN OREGON WHICH WERE OBTAINED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellee's reliance upon Preston v. State, 607 So. 2d 404 (Fla. 1992) and Hall v. State, 614 So. 2d 473 (Fla. 1993) (Brief of the Appellee, page 19) is misplaced. These cases held that upon resentencing, a trial court is not bound by the findings made by the original sentencing court; the cases did not address a situation such as that of the instant case in which this Court has rejected two aggravating circumstances for evidentiary insufficiency. Furthermore, the trial court and the prosecutor below seemed to have operated on the assumption that "HAC" and "CCP" could not be considered due to this Court's opinion in Appellant's previous appeal, and the State should not now be permitted to change its position and argue that these aggravators properly could have been argued to the jury and/or found by the sentencing court.

Appellee argues at page 19 of its brief that the cause of death--strangulation--somehow was relevant to the aggravating circumstance of a homicide committed during a sexual battery, and somehow tended to rebut the mitigating evidence proffered relating to whether Appellant was under the influence of extreme mental or emotional disturbance or extreme duress at the time of the homicide, but does not explain how this evidence was relevant to these issues. Furthermore, at the time the prosecutor below

broached the subject of the cause of death, no mitigating evidence had been presented, and so there was nothing to rebut.

ISSUE V

THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON, AND FINDING IN AGGRAVATION, THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN COMMITTING A SEXUAL BATTERY OR ATTEMPTED SEXUAL BATTERY.

In arguing that the evidence was sufficient to support a finding that the capital felony was committed during a sexual battery or attempted sexual battery, Appellee relies upon the former testimony of "jailhouse snitches" Michael Guy Allen and Edward Cottrell that was read at Appellant's new sentencing proceeding. (Brief of the Appellee, pp. 30-31) Appellee thus in effect concedes the harmfulness in admitting this evidence. (Please see Issue II in the briefs.)

Appellee attempts to have its cake and eat it too by suggesting that it was all right for the trial court to rely upon this Court's finding that the aggravating circumstance in question was supported by sufficient evidence, while arguing under Issue III that the fact that this Court found "HAC" and "CCP" not to be supported by sufficient evidence would not preclude the trial court or the new jury from considering these factors on resentencing.

ISSUE VI

THE COURT BELOW ERRED IN FAILING TO AFFORD APPELLANT AN OPPORTUNITY TO BE HEARD IN PERSON PRIOR TO IMPOSING SENTENCE, AND IN PREDICATING APPELLANT'S SENTENCE UPON INAPPROPRIATE CONSIDERATIONS, WITHOUT SUFFICIENT AND LEGALLY CORRECT ANALYSIS.

At page 34 of its brief, Appellee attempts to raise a procedural bar to Appellant's issue by stating that Appellant failed to complain at the hearing on March 20, 1992. However, State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984) indicates that the "purpose for the contemporaneous objection rule is not present in the sentencing process..." No objection by Appellant was required. Furthermore, by the time Appellant arrived at the March 20, 1992 sentencing hearing, his sentence was already a fait accompli, as the trial judge had prepared his written "Findings in Support of Sentence of Death" ahead of time, and merely read his order into the record. Any protest at that point obviously would have been futile.

Appellee asserts at pages 34-35 of its brief that the trial court's failure to consider Appellant's mental problems in the context of non-statutory mitigating circumstances may have been due to the failure of defense counsel specifically to urge "non-extreme" mental or emotional disturbance in his sentencing memorandum. However, while Appellant's counsel did not explicitly urge "non-extreme" mental problems as non-statutory mitigation, he implicitly did so in his references in the sentencing memorandum to Appellant's placement in the psychiatric wing of the state hospital

in California during his teenage years, and his mention of the fact that when Appellant was discharged from the hospital, "he was found to be disabled and qualified for State financial assistance which would indicate his mental and emotional health had not improved." (R 458-459) Moreover, the trial court's failure to consider Appellant's disturbed background in the context of non-statutory mitigation shows that the court failed to use the proper legal standard in assessing the mitigating evidence presented, and demonstrates a fundamental misunderstanding of the court's responsibilities in the sentencing process.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING RICHARD RHODES TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Cruse v. State, 588 So. 2d 983 (Fla. 1991), cited by Appellee on page 41 of its brief, has no applicability to this issue. Unlike the instant case, the trial court there found four aggravating circumstances, which this Court upheld. Although Cruse apparently made some sort of proportionality argument, the basis for it is not revealed in the opinion; this Court rejected the argument in a footnote. 588 So. 2d at 993.

In a footnote on page 43 of its brief, Appellee refers to the fact that "despite a similar background [to that of Appellant] appellant's brother James did not turn to murder." The record reflects, however, that James also had serious problems with the

law. He robbed a liquor store in Nevada and had about a dozen assault and battery-related felony convictions. (R 976-979) He had a bad temper which led to violence, including the beating of his wife. (R 978-980, 1000) James attributed his problems to his abused and abandoned upbringing. (R 980-981) Fortunately for James, he was able to benefit from some sort of an "anger management" program before (apparently) he actually killed anyone. (R 978, 1000)[2] Appellant was not as lucky; he never received the type of support that James had that could have turned his life around.

On page 43 of its brief, Appellee says that Appellant is 30 years old; apparently, Appellee is referring to Appellant's age at the time of offense. Appellant is now 40 years old; he was born in 1953. (R 425, 426, 427, 428, 440, 823, 985)

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[2] James testified as follows (R 978): "If you came up on me on the streets and say hey, James, you do something, you were dead where you were." Appellant's brother thus indicated that he was at least capable of killing someone, and perhaps that he had actually done so. James testified that he had never been convicted of killing anyone. (R 995)

CONCLUSION

Appellant, Richard W. Rhodes, respectfully renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of September, 1993.

Respectfully submitted,

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