

IN THE FLORIDA SUPREME COURT

RICHARD WALLACE RHODES,
Appellant,

vs.

Case No. 67,842

STATE OF FLORIDA,
Appellee.

FEB 19 2007
CLERK OF THE SUPREME COURT
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APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, RICHARD RHODES, will rely upon his initial brief to reply to the arguments presented in the State's answer brief, except for the following additions regarding Issues I., III., V., VI., IX., X., XI., XII.A., XII.B., XIII., XIV., and XV.

ARGUMENT

ISSUE I.

THE COURT BELOW ERRED IN DENYING RICHARD RHODES' MOTION TO SUPPRESS STATEMENTS HE MADE AFTER HIS ARREST, AS THE STATEMENTS WERE THE PRODUCT OF AN ILLEGAL ARREST.

Appellee says Trooper Drawdy asked Jessie Hoots and Connors "if they had Mr. Rhodes [sic] identification, they denied it." (Brief of Appellee, p.15 -- emphasis supplied) The record reflects that the trooper only asked this of Connors, not of both men. (R 2825)

Appellee claims the computer check Drawdy ran after arresting Rhodes for no valid driver's license gave the trooper probable cause to arrest Rhodes for driving without a license. (Brief of Appellee, p.16) However, Drawdy's testimony at the pre-trial suppression hearing was very unclear as to what, if anything, the check revealed. Drawdy testified (R 2817):

I recollect I did do an extensive -- make an extensive effort to both, locate his driving record out of the computer in Tallahassee, and I also called my patrol section to call Pinellas County Sheriff's Department, to see if they could run someone by, or make contact by telephone with the individual at the address whose name was shown on the registration, and -- all to no avail.

All this shows is that Drawdy was unable to locate Rhodes' driving record for unknown reasons; it does not establish that Rhodes had no driver's license.

At page 17 of its brief Appellee states: "It should be noted that in the instant case, Appellant was not formally arrested until after the officer had run the computer check." The record

believes this contention. It clearly shows that Trooper Drawdy arrested Richard Rhodes for operating a motor vehicle without a driver's license before he ran any computer check. (R 2812-2813) Furthermore, an arrest is an arrest. Appellee has not cited the Court to any statute or precedent which makes a legal distinction between an "arrest" and a "formal arrest." That is because there is none.

In United States v. Thompson, 712 F.2d 1356 (11th Cir. 1983) the court recognized that there are three types of police-citizen encounters: (1) Contact such as the mere approach and questioning of a willing person in a public place, which involved no coercion or detention and so is outside the domain of the Fourth Amendment. (2) Investigative stops of the type sanctioned in Terry v. Ohio, 392 U.S.1, 88 S.Ct.1868, 20 L.Ed.2d 889 (1968). (3) Full-scale arrests which must be supported by probable cause. The Thompson court made no mention of any fourth category of the type Appellee apparently would interpose between Terry stops and full-scale arrests.

ISSUE 111.

THE COURT BELOW ERRED IN PERMITTING
STATE WITNESS MICHAEL ALLEN TO TESTIFY
CONCERNING STATEMENTS ALLEGEDLY MADE
BY RICHARD RHODES WHICH WERE IRRELE-
VANT AND PREJUDICIAL.

Appellee claims it is irrelevant whether threats Richard Rhodes allegedly made were communicated to potential witnesses, because Michael Allen's testimony concerning said threats "is submitted on the issue of defendant's guilt." (Brief of Appellee, p.29) However, the cases upon which Appellee relies as authorizing admission of Allen's testimony, Jones v. State, 385 So.2d 1042 (Fla.1st DCA 1980)^{1/} and Goodman v. State, 418 So.2d 308 (Fla.1st DCA 1982) speak only to the admissibility of attempts by the defendant or a third person to induce a witness to testify falsely. Obviously, unless the alleged threats were communicated to the potential witnesses, they could hardly constitute attempts to influence the witnesses in any manner whatsoever.

Appellee accuses Rhodes of taking out of context a threat Rhodes supposedly made against Richard Nieradka, husband of Karen Nieradka. (Brief of Appellee, p.30) In light of this accusation, Rhodes will reproduce Michael Allen's testimony on direct examination relative to the Nieradka threat (R 2084):

^{1/} Jones was disapproved on other grounds in Justus v. State, 438 So.2d 358 (Fla.1983).

Q (By Mr. Zinober) Now, did there come a time when Mr. Rhodes became aware that the victim's husband was in jail?

A Yes. One morning, I guess it was mid-morning, some detective came to the cell and Rhodes' cell door was open and the detective went in to Rhodes' cell, was in there a couple minutes.

After he left a guy named Wayne Templeton yelled down to Rhodes and he said, "Rhodes, what was that all about?" Rhodes said that the detective had told him that the girl he killed, her old man was in jail.

Q Did he say anything about what would happen if he ran into him?

A Well, Rhodes thought that the Sheriff's Department was trying to set him up with this guy, this woman's husband or whoever he was. And he said that if he ever went out in the hallway wearing leg shackles and handcuffs he thought this guy would be out there waiting on him. He said if he ever went out there and he was waiting for him, he said he would get worse than his old lady got.

According to Appellee, the above testimony was relevant because it constituted an admission that Rhodes killed Karen Nieradka, and showed his knowledge of facts of the crime. (Brief of Appellee, p.30) The latter argument is clearly erroneous; Allen's testimony did not indicate that Rhodes knew any specific facts of the crime. Appellee infers an admission of guilt from Allen's testimony that "Rhodes said that the detectives had told him the girl he killed, her old man was in jail." However, this testimony is susceptible to the interpretation that the detective said to Rhodes, in effect, "The husband of the girl you killed is in jail," which would not constitute an admission on Rhodes' part.

Furthermore, Allen's testimony did not establish that the "girl" in question was Karen Nieradka.

Appellee dismisses Rhodes' argument that evidence of threats he allegedly made was analogous to highly prejudicial "collateral crimes" evidence. However, in Fasenmyer v. State, 383 So.2d 706 (Fla.1st DCA 1980) the court found testimony regarding the defendant's threats to kill his accomplice if he went to the police to be irrelevant, as it tended only to put the defendant's character in issue, in violation of the principles expressed in Williams v. State, 110 So.2d 654 (Fla.1959). Thus it is most appropriate to examine Allen's testimony in the context of the Williams Rule.

ISSUE V

THE COURT BELOW ERRED IN ADMITTING
TESTIMONY OF F.B.I. SPECIAL AGENT
MICHAEL MALONE THAT WAS OUTSIDE
THE AREA OF HIS EXPERTISE AS AN
EXPERT IN HAIR AND FIBER ANALYSIS.

Appellee cites a civil case, Depfer v. Walker, 123
Fla. 862, 169 So. 660 (Fla. 1936) for the following proposition:

A witness can become an expert where
he is shown to have sufficient knowledge,
whether that knowledge is gained by books,
experiments, experience, or other reliable
sources, so that his opinion would be of
value, his evidence may be admitted.

(Brief of Appellee, p. 38--emphasis supplied) This case is
inapposite, as the State did not show that the unknown medical
examiner who told the State's expert witness, Michael Malone,
that people tend to clutch their own hair in the moments before
death was a "reliable source."

Appellee cites Johnson v. State, 314 So. 2d 248
(Fla. 1st DCA 1975) for the principle that the trial court's
decision on whether or not to admit expert testimony will not
be disturbed on appeal absent a clear showing of abuse of discretion.
(Brief of Appellee, p. 39) However, in Johnson the court noted
that the discretion of the trial court is not without bounds
and in fact found that the lower court had abused his discretion
in admitting certain testimony of a medical expert.

In reciting the qualifications of State witness
Michael Malone, Appellee says Malone holds a "master in science
degree in biology." (Brief of Appellee, p. 39) However,
Malone only testified that he had a "master of science degree,"

without specifying his field of study. (R 1862)

According to Appellee, Malone testified that his knowledge that people have a tendency to grab their own hair in the moment before death was "based on his experience and the experience of every hair examiner he has ever talked to." (Brief of Appellee, p. 40) This is misleading. A correct reading of the record shows that Malone was referring only to the fact that "the vast majority of hairs found in a dead victim's hands are their own hairs" (R 1877) when he referred to his experience and that of other hair examiners; he was not referring to the reason this is true (i.e., because people in death throes tend to grab their own hair).

Appellee finds it "ironic" that Rhodes argues that Malone's testimony was irrelevant while also arguing that it played an important role in the outcome of the trial. (Brief of Appellee, p. 41) There is nothing "ironic" or inconsistent in Rhodes' argument; numerous convictions and/or sentences have been reversed by this Court and others because irrelevant, prejudicial evidence was admitted which affected the outcome of the trial. If the evidence did not have such a prejudicial effect, its admission would constitute harmless error.

ISSUE VI

THE TRIAL COURT ERRED IN ADMITTING
IRRELEVANT EVIDENCE OF COLLATERAL
CRIMES WHICH ONLY TENDED TO PROVE
RICHARD RHODES' PROPENSITY TO COMMIT
CRIME.

Appellee claims that Detective Porter's testimony that Richard Rhodes said he studied forensic lobotomy in prison "was relevant as it showed consciousness of guilt on the appellant's part" (Brief of Appellee, p. 42) and showed that Rhodes "knew if he could delay the discovery of the body [of Karen Nieradka] that the State's ability to prove the case would be severely hindered." (Brief of Appellee, p. 44) Rhodes fails to see how the statement in question tended to prove the matters urged by the State. Even if his study of "forensic lobotomy," whatever that is, might tend to prove something (which it did not), the fact that he studied it in prison had no relevance and was highly prejudicial. Rhodes would also note that although Nieradka's body was not discovered for a few weeks, the State was able to obtain a conviction against Richard Rhodes, apparently without being "severely hindered."

With regard to defense counsel's withdrawal of his request for a curative instruction, Appellee states:

Both counsel and the judge felt that this remark did not warrant a curative instruction because the emphasis had been placed on the fact that he had studied forensic lobotomy, not the fact that he had been in prison.

(Brief of Appellee, p. 45) This is inaccurate. The reason defense counsel decided not to have the court give a curative instruction

was because counsel did not believe the error could be cured by such an instruction (R1912, 1914, 1917), and Judge Hansel talked counsel out of requesting a curative instruction by saying she felt it would only emphasize the objectionable testimony, to the prejudice of the defendant. (R1916-1917) Counsel did not agree with the court that more emphasis was placed on the fact that Rhodes studied forensic lobotomy than that his studies occurred in prison, as Appellee contends.

Appellee is speculating when it assumes the jurors did not know the difference between prison and jail, or that they may have concluded that Rhodes was not an inmate when he studied forensic lobotomy in prison. (Brief of Appellee, p.46) The logical inference to be drawn from Det. Porter's testimony was that Rhodes was studying forensic lobotomy to pass the time while he was serving a prison sentence for some crime(s) he had committed.

Whether or not the point of the testimony was that Rhodes was in prison is irrelevant. Along with whatever else they heard, the jurors learned that Rhodes had a prison sentence in his past, to his prejudice.

ISSUE IX.

THE COURT BELOW ERRED IN DENYING
RICHARD RHODES' MOTIONS FOR MIS-
TRIAL DUE TO IMPROPER REMARKS
OF THE PROSECUTOR DURING HIS
FINAL ARGUMENTS TO THE JURY.

Appellee's assertion at page 56 of its brief that Rhodes admitted to Harvey Duranseau and John Bennett that he had committed murder is not correct. Duranseau did not so testify. (R 1832-1860) Furthermore, Duranseau specifically testified that Rhodes never told him that he (Rhodes) killed Karen Nieradka or did this particular murder. (R 1860) All John Bennett testified to was that Rhodes said he "bruised more than a grape, but they can't prove it." (R 2060)

X.

THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON FLIGHT, IN GIVING AN ERRONEOUS INSTRUCTION REGARDING PROOF OF THE TIME OF COMMISSION OF THE CRIME, AND IN REFUSING TO INSTRUCT ON SECOND DEGREE FELONY MURDER.

A. Flight Instruction

At page 60 of its brief Appellee states that Detective Kelly "testified that the defendant said he was lying when he said he was going to Jan's [his girlfriend's], rather than heading up north at the time he was arrested." This is an inaccurate reading of Kelly's testimony, which was as follows (R 2020):

We questioned as to why he had Karen's car and what his destination was when he was arrested? Richard stated that he was not going up north, but was merely going to his girlfriend Jan's house who lives in Hudson.

And trying to substantiate what Richard had just related, writer and Detective Porter questioned him further about his involvement in Karen's death. Richard again stated he had been lying to us, but maintained that he would now tell us the truth.

Although Rhodes indicated he had lied to the detectives, he did not specifically say he lied about going to Jan Pitkin's house, as Appellee claims.

Appellee says at page 60 of its brief that when Trooper Drawdy "originally spotted Rhodes' car, it was hidden behind a building...." Obviously, the car was not "hidden," as Drawdy was able to "spot" it from the highway. (R 2810-2811)

Appellee's assertion that Rhodes turned south because he knew the trooper was pursuing him (Brief of Appellee, p.60) is pure speculation, unsupported by anything in the record. There was no testimony that Rhodes in any way attempted to flee or elude Trooper Drawdy; it appears Rhodes pulled over promptly when Drawdy

flashed his blue light. (R 1780,2811,2822-2823)

As for the fact that Rhodes turned south after initially heading north, perhaps he turned around after realizing he was going in the wrong direction to get to Jan Pitkin's house.

Appellee incorrectly cites Bundy v. State, 471 So.2d 9 (Fla.1985) for the proposition that, "The law does not require that the flight be for the crime charged." (Brief of Appellee, p.60) In Bundy this Court specifically found it to be a "reasonable inference to make that Bundy fled from the officer as a result of consciousness of guilt on his part for the Leach crime [which was the crime involved in the appeal]." 471 So.2d at 21. There was not even dicta in the opinion to suggest that flight for some other crime would be adequate. On the contrary, the Court noted:

The probative value of flight evidence as circumstantial evidence of guilt has been analyzed by the Fifth Circuit Court of Appeals as depending upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. United States v. Myers, 550 F.2d 1036, 1049 (5th Cir.1977).

471 So 2d at 21-22 (emphasis supplied). The Court also noted that the probative value of flight evidence is weakened "if the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged..." and "where there were not clear indications that the defendant had in fact fled..." 471 So.2d at 21 (emphasis supplied). Rhodes was

stopped long before the authorities were aware a homicide had been committed, and there is nothing in the record to show that he was aware he was a suspect in any criminal investigation relating to Karen Nieradka's disappearance. Also, as Rhodes pointed out in his initial brief, there were not "clear indications" that he "had in fact fled."

B. Instruction Regarding Proof of
Time of Commission of Crime

A clarification is in order. On page 62 of its brief Appellee states that Rebecca Barton testified that Karen Nieradka eventually left Barton's house "in the company of Richard Rhodes." However, Nieradka was also "in the company of" two other men, Danny Pauley and George Kaftanden, when she left Barton's house. (R 1621, 1625, 1635, 1640, 1643-1644)

C. Second Degree Felony Murder

The fact that Rhodes may have recanted his story concerning transporting Crazy Angel and Karen Nieradka to the old hotel, referred to at page 65 of Appellee's brief, is irrelevant. The jury was free to believe or reject all or any part of the stories Rhodes allegedly told. See Fla. Std. Jury Instr. (Crim.) 2.04. If a recanted version could not be relied upon by the triers of fact, then only the final version of any confession or admission made by a criminal defendant could ever be presented to a jury.

XI.

THE COURT BELOW ERRED IN INSTRUCTING THE ALTERNATE JURORS, IN THE PRESENCE OF THE JURORS WHO ULTIMATELY FOUND RICHARD RHODES GUILTY OF MURDER, TO REMAIN IN THE COURTROOM IN CASE THEY WERE NEEDED FOR A PENALTY PHASE.

Appellee concedes that Judge Hansel committed error by instructing the alternate jurors in the presence of the regular jurors, but argues that the error was harmless because the evidence against Richard Rhodes was "clear and convincing." (Brief of Appellee, p.68) Rhodes disagrees with this view of the evidence.

The prosecution's case against Rhodes consisted of circumstantial evidence and a number of confused and contradictory statements Rhodes allegedly made to various people. Perhaps the only real confession Rhodes made to killing Karen Nieradka came during the discussions he supposedly had with "jail-house snitch" Edward Cottrell. However, Cottrell's testimony should not have been admitted, for the reasons expressed in Issue II. in the briefs. Furthermore, Cottrell had multiple felony convictions (R 2040-2041), and was expecting and counting on a deal that would result in lower sentences on charges of "felony possession of a firearm," sexual battery, and aggravated assault, to which he had already pled, but for which he had not yet been sentenced. (R 2028, 2041-2042, 2050, 2054, 2841, 2864-2865) Thus, Cottrell's testimony was highly suspect at best.

In sum, the evidence adduced below was neither "clear" nor "convincing," and was certainly not adequate to overcome the serious deprivation of due process of law Rhodes suffered as a result of the

prejudicial instructions Judge Hansel gave to the alternates before the regular jurors went out to deliberate.

XII.

THE PENALTY PHASE OF RICHARD RHODES' TRIAL WAS TAINTED BY EVIDENCE HE WAS UNABLE TO CONFRONT, IMPROPER CROSS-EXAMINATION OF A DEFENSE WITNESS, AND IMPROPER AND INFLAMMATORY ARGUMENT BY THE PROSECUTOR.

A. Inadmissible Evidence

In its discussion of this issue Appellee views Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), a case decided long before the advent of modern death penalty statutes and concepts of due process relative thereto, as controlling. The Supreme Court discussed Williams at some length in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977), in which the Court held it to be a violation of due process of law where the death penalty was imposed, at least in part, on the basis of information which Gardner had no opportunity to deny or explain. While the Court did not overrule Williams, that case retains little vitality after Gardner. Furthermore, Appellee's reliance upon Williams seems inconsistent with its concession "that the Sixth Amendment right of confrontation applies to the sentencing process." (Brief of Appellee, p. 72)

Appellee claims Richard Rhodes could have rebutted the taped statement of Jema Adduchio by "subpoenaing its declarant." (Brief of Appellee, p. 74) As Adduchio was in Nevada, the only way Rhodes possibly could have secured her attendance at trial was by invoking the "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," which is found in Chapter 942 of the Florida Statutes. However, under

this law a witness will not be compelled to travel to another state to testify where to do so would "cause undue hardship" to the witness. §942.02(2), Fla.Stat.(1985). On the morning of the penalty phase defense counsel attempted to ascertain whether Adduchio was available. He was informed that she "was not ambulatory in terms of making a trip from Nevada to Florida." (R 2605) Therefore, it seems very likely a court would have found it to be an undue hardship for this witness to be required to go to Florida to testify and would not have compelled her to do so. Furthermore, even if Rhodes could have called Adduchio to testify at his penalty phase, he could not have cross-examined or impeached her, as he would have been the party calling her as a witness. See §90.608(1), Fla. Stat.(1985).

The effect of Rhodes' guilty plea to Nevada charges was only to admit the acts charged. Gibbs v. Mayo, 81 So.2d 739 (Fla. 1955). His plea did not constitute an admission of "Mrs. Adduchio's account of the attack" in all its details, as Appellee claims at page 74 of its brief, especially such subjective matters as the panic Adduchio said she felt. (R 3009) Rhodes would also note that such portions of the tape as Adduchio's account of how she felt during the episode could not be rebutted by Rhodes taking the stand himself, and so Appellee's suggestion that Rhodes could have rebutted the tape by testifying (Brief of Appellee, p.74) is not entirely correct.

B. Improper Cross-Examination

Robinson v. State, 487 So.2d 1040 (Fla.1986) is more relevant to this issue than the non-capital case cited by Appellee, Cornelius v. State, 49 So.2d 332 (Fla.1950). In Robinson this Court noted that there is a very fine distinction between using questions about other crimes to attack the credibility of a character witness and using them in aggravation of sentence. In fact, in Robinson this Court found the distinction to be "meaningless because it improperly lets the state do by one method something which it cannot do by another." 487 So.2d at 1042.

ISSUE XIII.

THE COURT BELOW ERRED IN ANSWERING A QUESTION FROM THE JURY WITHOUT NOTIFYING COUNSEL FOR THE STATE OR COUNSEL FOR THE DEFENSE, AND WITHOUT CONDUCTING THE JURY INTO THE COURTROOM.

At page 82 of its brief Appellee refers to the fact that Rhodes failed to suggest in his initial brief what course of action defense counsel could have recommended if Judge Hansel had consulted him prior to responding to the jury's question about being polled. It should be obvious that at least two courses of action could have been recommended by counsel that would have avoided prejudice to Rhodes. Judge Hansel could have simply told the jury that she could not answer the question. Or, preferably, she could have informed the jurors that while there was a possibility they would be polled, no juror would be required to state his vote or that of any other juror, but only whether the advisory sentence was correctly stated when read by the clerk. See Fla.Std.Jury Instr.(Crim.), p.83. This latter course of action would have assuaged any fears the jurors might have had that they would be required to announce their votes for life or death in open court.

In view of the apparently overwhelming public support for the death penalty, Rhodes rejects the State's argument that the jurors likely would have feared having to announce that they recommended a death sentence more than they would have feared having to announce a life recommendation.

ISSUE XIV.

THE FINDINGS OF THE COURT BELOW IN
AGGRAVATION AND MITIGATION ARE INSUF-
FICIENT TO SUPPORT IMPOSITION OF THE
DEATH PENALTY UPON RICHARD RHODES.

Appellee's argument emphasizes the fact that Judge Hansel prepared a written order setting forth her findings in aggravation and mitigation the same day she orally sentenced Richard Rhodes to death, September 12, 1985. (Brief of Appellee, pp.84,87-88) Although her written findings do bear the date of September 12, 1985 (R 2986), it seems highly unusual, to say the least, that they would not be filed for more than a year after their preparation. Furthermore, the written findings were included in a supplement to the record on appeal that was mailed to the Court on September 29, 1986, even though neither counsel for the State nor counsel for Richard Rhodes had moved for leave to supplement the record with this item, and even though this Court's order of August 28, 1986, which directed the clerk of the circuit court to supplement the record on appeal with certain items, did not include Judge Hansel's written findings in aggravation and mitigation as one of the items the clerk was to include in the supplement. (R 2987)

Under these circumstances Rhodes suggests that a hearing may be in order to ascertain why, if Judge Hansel's order was prepared on September 12, 1985, it was not filed until over a year later, and how the order came to be included in a supplement to the record on appeal when neither party, nor this Court, requested that it be included.

XV.

THE TRIAL COURT ERRED IN SENTENCING RICHARD RHODES TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

- A. The Evidence Was Insufficient To Support The Court's Finding That The Murder Of Karen Nieradka Was Committed While Rhodes Was Engaged In The Commission Of A Robbery Or Sexual Battery.

At page 91 of its brief Appellee refers to the fact that a key ring found in Richard Rhodes' possession contained a key to Karen Nieradka's mother's house and a key to Nieradka's storage box in Clearwater. Barbara Tannis could not identify these keys with certainty. Although she was "quite certain" about the key to the storage box, she only "thought" the other key was to Nieradka's mother's house, but was "not real positive." (R 1982)

Appellee cites Cone v. State, 69 So.2d 175 (Fla.1954) for the proposition that when "'possession is fairly recent, exclusive and unexplained or unsatisfactorily explained, such circumstances raise the presumption that the one charged was the thief.'" (Brief of Appellee, p.92) Cone was not a robbery case but a larceny case. It is inapposite.

With regard to the alleged sexual battery upon Karen Neiradka, the evidence cited by the State at pages 92-93 of its brief might tend to support, at most, an attempted sexual battery, not the completed act. Also, the fact that Nieradka was wearing only a

brassiere when found is irrelevant in light of the fact that her body had apparently been through the demolition of a building and transported to the Wyoming Antelope Gun Club. It is reasonable to infer that her clothing came off during this process.

B. The Court Below Erred In Finding The
Murder Of Karen Nieradka To Have Been
Especially Heinous, Atrocious, Or Cruel.

At page 95 Appellee makes this statement: "Contrary to what appellant claims in his brief, Dr. Maples stated that it is highly unlikely that a fracture to the Hyoid bone could occur post-mortem. (R1767)" In his initial brief Rhodes stated that breakage of the hyoid bone could have occurred post-mortem (pages 73-74). This is not "contrary" to Dr. Maples' testimony; it is consistent therewith. Dr. Maples testified that it was highly unlikely the hyoid was fractured post-mortem, but he could not say beyond a conclusion of every reasonable doubt that it was broken before Nieradka died. (R 1757-1758) Therefore, the hyoid could have been broken post-mortem, exactly as Rhodes stated in his initial brief.

At page 97 of its brief Appellee attempts to rely upon testimony of Michael Malone, which as discussed in Issue V of the briefs, should not have been admitted into evidence, and should not be relied upon by this Court. Also, the fact that Karen Nieradka might have reflexively pulled her hair before she died would not necessarily contradict Rhodes' suggestion that Nieradka may have been unconscious during the strangulation (if indeed she was strangled), as Appellee claims.

C. The Court Below Erred In Finding That Rhodes Murdered Karen Nieradka In A Cold, Calculated And Premeditated Manner, Without Any Pretense Of Moral Or Legal Justification.

Appellee cites what it views as evidence of premeditation and asserts that it would support the cold, calculated, and premeditated aggravating circumstance. However, as the cases Rhodes cited in his initial brief show, more is needed to prove this factor than proof of simple premeditation.

At page 98 of its brief Appellee refers to the fact that Rhodes supposedly rolled Karen Nieradka's body in carpet to prevent discovery. However, Appellee fails to explain how this after-the-fact conduct proves that Rhodes possessed a heightened degree of premeditation at the time of the homicide.

The State also "adamantly contends that murder by strangulation does, per se, support a finding that death was effected in a cold, calculated and premeditated manner. [Footnote omitted.]" (Brief of Appellee, p.98) Appellee ignores the fact that this contention is directly contrary to this Court's holding in Hardwick v. State, 461 So.2d 79 (Fla.1984). In Hardwick the Court rejected the cold, calculated, and premeditated aggravating circumstance even though it took Hardwick's victim more than a minute to die after he began to choke or smother her. The Court noted that "the fact that it takes the victim a matter of minutes to die once the process begins" does not support this factor, which "emphasizes cold calculation before the murder itself." 461 So.2d at 81.

Finally, Appellee asserts that the conclusion of Dr. Walter Afield, a witness for the defense at penalty phase, that Rhodes was

sane somehow supports the finding of this aggravating circumstance. (Brief of Appellee, p.99) Appellee overlooks Dr. Afield's testimony that Rhodes was under the influence of extreme mental or emotional disturbance at the time of the Nieradka homicide, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R 2655,2657)

D. The Court Below Failed To Give Adequate Consideration To The Substantial Evidence Rhodes Presented In Mitigation, Particularly Dr. Afield's Testimony.

Appellee chides Rhodes for "deleting" the fact that Dr. Afield found Rhodes to know right from wrong at the time of the offense and at the time of his trial. (Brief of Appellee, p.101) Obviously, Rhodes "deleted" this information because it is irrelevant. What is relevant is that Dr. Afield found Richard Rhodes to qualify fully for the mitigating circumstances found in subsections 921.141 (6) (b) and (f) of the Florida Statutes.

CONCLUSION

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

Respectfully submitted,

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TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida, 33602, by mail on this 17th day of February, 1987.

Robert F. Moeller
ROBERT F. MOELLER