IN THE SUPREME COURT OF FLORIDA

ROBERT A. PRESTON,

Appellant,

v.

CASE NO. 75794

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Preston was charged in a seven count indictment with: Count I, premeditated murder; Count 11, felony murder committed in the course of a robbery; Count 111, felony murder committed in the course of a kidnapping; Count IV, felony murder committed in the course of a sexual battery; Count V, robbery; Count VI, kidnapping; and Count VII; sexual battery.

Prior to trial, Preston successfully challenged the admissibility of evidence obtained from his bedroom, and the state filed an interlocutory appeal. The District Court of Appeal of the State of Florida, Fifth District, reversed the trial court's order suppressing the evidence, and specifically held that Preston's mother had authority to give consent to the search. State v. Preston, 387 So.2d 495, (Fla. 5th DCA 1980).

Preston was tried before a jury during June 1-10, 1981, and convicted as charged on Counts I, 11, 111, V and VI. The trial court entered a judgment of acquittal as to Counts IV and VII. The fruits of the aforementioned search were admitted at trial following a second suppression hearing. A separate penalty phase was held, and the jury, by a vote of 7-5 recommended the death penalty on Count I, which the trial court imposed. Preston was sentenced to life imprisonment on Count VI, and fifteen years on Count V.

Preston appealed the judgment and sentence to the Supreme Court of Florida, raising five points on direct appeal. The

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[1] The points raised on direct appeal were: (1) the circuit and district courts erred in holding that his mother's consent to search his room was valid, (2) the trial court erred in failing to grant his motions for judgment of acquittal to Count I (premeditated murder) in that there was insufficient evidence of premeditation; (3) the trial court erred in failing to instruct the jury on the defense of insanity as requested, and in only instructing the jury on the elements of voluntary intoxication as a defense to negate specific intent; (4) the trial court improperly applied the aggravating and mitigating factors of section 921.141(5) and (6), Florida Statutes (1981), in arriving at its decision to impose the death penalty; and (5) the Florida capital sentencing statute is unconstitutional and constitutes cruel and unusual punishment.

Supreme Court of Florida unanimously affirmed the conviction and sentence. Preston v. State, 444 So.2d 939 (Fla. 1984).

On October 8, 1985, Governor Bob Graham signed Preston's first death warrant. Execution was set for November 4, 1985. On October 31, 1985, five days before his scheduled execution, Preston filed a motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. He also filed a motion to disqualify the state attorney's office and an application for a stay of execution.

In its opinion affirming the trial court's denial of Preston's 3.850 motion, Preston v. State, 528 So.2d 896 (Fla. 1988), the Supreme Court of Florida noted these facts: After the stay of execution was entered, the trial court permitted Preston to substantially amend his motion for post-conviction relief. The evidentiary hearing was postponed at the request of the Capital Collateral Representative (CCR) to permit further time for investigation. The hearing was finally held on October 21-23, 1986, nearly one year after the original motion had been filed.

At the beginning of the hearing, a new lawyer from CCR asked to be permitted to take over the case, though he was not admitted to the Florida Bar. The judge granted his request upon the understanding that he was prepared to go forward with the hearing. After the close of testimony, Preston's counsel asked to file a memorandum to supplement the hearing. The court granted the motion after receiving assurances that it was a legal memorandum directed to the issues addressed at the hearing.

Three weeks later, Preston's counsel moved for a continuance and asked for supplemental relief. He filed a supplemental memorandum, seeking to raise new substantive issues based on affidavits that had been signed after the evidentiary hearing. In addition, Preston filed another motion seeking to have a witness produced for testimony essential to the disposition of the motion. A "consolidated addendum" to the motion to vacate and a "request for further fact-finding proceedings" were also filed along with an "addendum to the proposed order previously

submitted.'' The record does not reflect any attempt to call these motions up for hearing.

On February 12, **1987**, the trial court denied the motion to vacate, addressing only the issues raised in the original amended motion that had been considered at the evidentiary hearing. Preston appealed the denial of post conviction relief to the Supreme Court of Florida, raising eleven points on appeal.[2] The trial court's order was affirmed in a per curiam decision. Preston v. State, **528** So.2d **896** (Fla. **1988).**

The Supreme Court of Florida noted that Preston had raised a myriad of issues in the appeal, some of which were predicated upon the motions filed after the evidentiary hearing and which sought to inject new issues into the case. The court determined that the trial court properly declined to rule on those issues,

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[2] The eleven points raised on appeal from the denial of post-conviction relief were as follows: **(1)** the state violated the dictates of *Brady v. Maryland,* **373 U.S. 83** (1963), **by** failing to notify Preston's counsel that the police had discovered keys bearing the name "Marcus A. Morales" in the victim's automobile; **(2)** the state committed another *Brady* violation by failing to disclose to the defense an unfavorable personnel evaluation of a hair analysis expert who testified at trial; **(3)** the conviction and sentence should be reversed on a theory of conflict of interest as several years before the murder Preston was represented on a misdemeanor charge by Don Marblestone, who subsequently became an assistant state attorney; **(4)** the trial judge did not properly consider all of the nonstatutory mitigating evidence; **(5)** the judge's instructions to the jurors misled them with respect to the significance to be attached to their sentencing verdict **(6)** *Estelle v. Smith,* **451 U.S. 454 (1981)** violation; **(7)** ineffective assistance of counsel at the guilt-innocence and penalty phases; (8) the sentencing court found an aggravating circumstance on the basis of a prior conviction resulting from proceedings during the course of which Preston received ineffective assistance of counsel; **(9)** the trial court erroneously aggravated the offense and rebutted mitigating evidence on the basis of unconstitutional misinformation; **(10)** the sentence of death violates the Eighth and Fourteenth Amendments because the trial court directed the jury to find an aggravating circumstance; **(11)** the erroneous jury instruction that a verdict of life imprisonment must be made by a majority of the jury misled the jury as to its role at sentencing and created a risk that death may have been imposed despite factors calling for a life and the sentence of death violates the Eighth and Fourteenth Amendments.

and did not address them in its opinion. It further stated that to the extent, if any, that the contents of those motions reflected newly discovered evidence tending to exonerate Preston, it could be presented through the filing of a motion for writ of error coram nobis. It also noted, however, that at least two of the affidavits relied upon by Preston were given by people who had already testified at the evidentiary hearing.

On August 25, **1988**, a second death warrant was signed by Governor Martinez. Execution was scheduled for September 27, **1988**. On or about September **19**, **1988**, Preston filed an application for leave to file a petition for writ of error coram nobis and/or for extraordinary relief and request for stay of execution in the Supreme Court of **Florida.**[3] The application and requested stay were denied by the Supreme Court of Florida on September 22, **1988**. Preston v. State, **531** So.2d 154 (Fla. **1988).**

On or about September 20, **1988**, Preston filed **a** petition for extraordinary relief, writ of habeas corpus, and a stay of execution in the Supreme Court of **Florida.**[4] The petition and

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[3] This petition was based on after-the-fact affidavits tendered to the trial court after the conclusion of the Florida Rule of Criminal Procedure **3.850** evidentiary hearing. The application purported to contain newly discovered evidence tending to exonerate Preston, derived from these affidavits. The affidavits of Steven F. Hagman, John A. Yazell, James Tait MacGeen and Glen Yazell contain the allegation that Robert Preston's brother, Scott Preston admitted that it was he, and not Robert who had killed Earlene Walker.

[4] The petition alleged that appellate counsel was ineffective for not raising the following grounds on direct appeal; **(1)** the state's suppression of keys bearing the name "Marcus Morales" found in the ashtray of the victim's car in violation of *Brady v. Maryland; (2)* the jury instruction that a verdict of life imprisonment must be made by a majority of the jury misled the jury; (**3**) the sentencing court erroneously used unconstitutional misinformation to aggravate the offense and rebut mitigating circumstances; (4) the trial court directed the jury to find an aggravating circumstance. Preston also raised the claim that **(5)** he was deprived of his right to an individualized and reliable capital sentencing determination as a result of the presentation of unconstitutional victim impact information in violation of ***Booth v.*** *Maryland;* (6) that the trial court unconstitutionally shifted the **burden** of proof at sentencing by instructing the jury

requested stay were denied by the Supreme Court of Florida on September 22, 1988. Preston v. Dugger, 531 So.2d 154 (Fla. 1988). On September 13, 1988, Preston filed an application for stay of execution pending the filing of a petition for writ of certiorari in the United States Supreme Court contending that his sentence of death violated Caldwell v. Mississippi, 472 U.S. 320 (1985). The Court granted the application in an order entered on September 23, 1988. The Court indicated that should certiorari be denied the stay would terminate automatically. Preston v. Florida, 109 S.Ct. 28 (1988). The petition for writ of certiorari was subsequently denied on March 6, 1989.

A third death warrant was signed by Governor Bob Martinez on March 30, 1989. On April 14, 1989, an evidentiary hearing was held in Preston's collateral case, where he had been convicted of throwing a deadly missile at an occupied vehicle. The trial court entered an order on April 17, 1989, granting Preston relief based on his claim that he received ineffective assistance of counsel in that case. Preston filed a habeas petition in the Florida Supreme Court on April 19, 1989, wherein he contended that based on the trial court's vacation of his prior conviction, his sentence of death in the instant case is unreliable. The petition was denied without prejudice to raise the same argument by 3.850 motion in the trial court. The state appealed the trial court's order granting Preston relief in the other case, and the order was affirmed by the Fifth District Court of Appeal on January 17, 1990.

On March 8, 1990 Governor Martinez signed a fourth death warrant running from April 3, 1990 to April 10, 1990. The Superintendent has selected 7:00 a.m. Wednesday, April 4, 1990 as the precise time of the execution. On March 19, 1990, Preston

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that the mitigating circumstances must outweigh the aggravating and (7) appellate counsel was ineffective for not arguing the same. Preston also asked the court (8) to revisit as fundamental error, the issue raised on direct appeal that the trial court erred in failing to instruct the jury on the defense of insanity as requested.

filed his second motion to vacate judgment and sentence, raising 9 claims. [5] The motion was summarily denied on March 30, 1990.

A detailed recitation of the facts of this case is set out in this court's opinion denying the petition for writ of error coram nobis. Preston, 531 So.2d at 155-57. The trial court found four aggravating circumstances: (1) that the defendant was previously convicted of another capital felony or of a felony involving the use of threat or violence to the person; (2) Preston committed the murder immediately after he had committed

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[5] Preston raised nine claims: 1) Robert Preston's jury and judge were provided with and relied upon misinformation of constitutional magnitude in sentencing him to death, in violation of Johnson v. Mississippi, 108 S.Ct. 1981 (1988), and the fifth, sixth, eighth, and fourteenth amendments; 2) Newly discovered evidence establishes that Mr. Preston's capital conviction and sentence of death are constitutionally unreliable and in violation of the fifth, sixth, eighth and fourteenth amendments; 3) Mr. Preston's rights under the fifth, sixth, eighth, and fourteenth amendments were violated by the state's deliberate suppression of material, exculpatory evidence, and appellate counsel was prejudicially ineffective for failing to raise this issue on direct appeal; 4) Mr. Preston was deprived of his rights to an individualized and reliable capital sentencing determination as a result of the presentation of constitutionally impermissible victim impact information, in violation of the eighth and fourteenth amendments;)5 Mr. Preston's sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, and the aggravator was improperly argued and imposed, in violation of Maynard v. Cartwright, Hitchcock v. Dugger, and the eighth and fourteenth amendments; 6) The cold, calculated, and premeditated aggravating circumstance was applied to Mr. Preston's case in violation of the eighth and fourteenth amendments; 7) Mr. Preston's rights to a reliable capital sentence was violated where his sentencing jury did not receive instructions guiding and channeling its sentencing discretion by explaining the limiting construction of the pecuniary gain aggravating circumstance, in violation of the eighth and fourteenth amendments; 8) The Florida Supreme Court's failure to remand for resentencing after striking an aggravating circumstance on direct appeal denied Mr. Preston the protections afforded under Florida's capital sentencing statute, in violation of due process, equal protection, and the eighth and fourteenth amendments; and 9) Mr. Preston's sentence of death violates the fifth, sixth, eighth, and fourteenth amendments because the penalty phase jury instructions shifted the burden to Mr. Preston to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Preston to death.

the crime of robbery and while he was engaged in the commission of the crime of kidnapping; (3) the murder for which the defendant was convicted was especially heinous, atrocious or cruel; (4) that the murder was cold, calculated and premeditated without any pretense of moral or legal justification. The trial court rejected all statutory mitigating circumstances, and found the aggravating circumstances to outweigh the mitigating circumstances. On direct appeal, the Supreme Court of Florida found that the cutting of the throat of the victim from one side to the other did not support the type of heightened premeditation required to support the cold and calculating aggravating factor and reversed the trial court as to the finding of this factor. Since there were no mitigating circumstances and three remaining aggravating factors, the death sentence was affirmed. Preston v. State, 444 So.2d 939, 947 (Fla. 1984).

Appellee anticipates that Preston will rely on the same facts set forth in his 3.850 motion, which appellee disputes. The areas of disagreement are as follows: Preston stated that the prior conviction in this case was used not only to establish the aggravating factor of a prior felony conviction, but also to rebut the statutory mitigating circumstance that he did not have a significant history of prior criminal activity. Motion, pp. 7, 13, 14, 22. The record amply demonstrates that even in the absence of the prior felony conviction, nobody would ever accuse Preston of being an angel in disguise, and defense counsel, even though he did not waive consideration of this mitigating circumstance, as much as conceded that it did not exist, even without the bottle throwing incident (R 2017).

As the trial court noted in its order, Preston testified that he had dealt in, sold, and used drugs for years. Preston

was also placed on probation for resisting an officer while he was a juvenile. Preston's brother testified that after the robbery/kidnapping/murder, Preston told him he had "...rolled a faggot down at the Parliament House" (R **1419**). Preston himself testified that his confusion as to the Parliament House incident may have resulted from visiting that establishment or other gay bars while he had previously assaulted and robbed homosexuals (R **1477-1478**).

Preston also stated that this was a case involving substantial mitigation, which provided more than a reasonable basis for a recommendation of life. Motion, p. **21**. The sentencer in this case found nothing in mitigation, and the Florida Supreme Court affirmed that finding on direct appeal. Preston, **444** So.2d at **947**. Preston's assertion that the mitigation in the record was more than a reasonable basis for a recommendation of life by the jury and his record references in support of it are likewise misleading.

Preston stated that Donna Maxwell testified that she had smoked a significant amount of marijuana with Preston on the night of the offense. Maxwell testified that approximately four joints were shared between four people, and she herself was not affected (R **771**). Preston also stated that Maxwell testified she heard Preston ask his brother to assist him injecting H.P. [sic], but omits the fact that the brother refused to do so. Preston also stated that Maxwell testified that she was aware of Preston's habitual use of that drug, and that she had seen him ingest it on numerous occasions. Maxwell testified that she had

seen Preston snort it once, and any further inquiries into the knowledge of Preston's prior drug use were foreclosed.

Preston stated that his brother Scott testified that on the night of the offense, Preston requested his assistance in injecting PCP, and that Preston looked and acted as if he was under the influence of PCP when he returned to the house early that morning. Preston omitted the fact that Scott never did help him inject PCP that night (R **1411**), in fact Scott never saw Preston use PCP (R **1399**), and in a prior statement to the police, Scott had stated that when Preston returned with the money the morning of the murder, he looked normal, and there was no mention in that statement that Preston appeared "high" (R **1437**). In his trial testimony, Scott noted that even in his allegedly "high state", Preston was able to concoct the story that he had "...rolled a faggot down at the Parliament House" (R **1419**). Scott also admitted that he had previously given false testimony in this case (R **1429-1430**).

In his motion, Preston also stated that Scott testified Preston had used heavy drugs since **1971** (for ten years prior to the time of trial), and that he had frequently seen drugs and drug paraphernalia in Robert's bedroom. When Scott was asked from what age Preston had been doing drugs, Scott replied "I have no idea" (R **1403**). Scott did deduce that since Preston was doing drugs when Scott was released form the Florida Sheriff's Boys Ranch where he had been for about three years, which was around **1973** or **1974**, that Preston started doing drugs some time between **1971** and **1974 (R 1403)**. Although Scott knew Preston had tried a

variety of drugs, he really did not know how frequent or extensive Preston's drug use was (R **1398-1403).** Consequently, the only "fact" that the state can agree with is that **1971** was ten years prior to trial.

The only testimony that Preston had done PCP on the night of the murder came from Preston himself, and although that fact was quite clear in his mind, fortuitously enough, that is about all he remembered. Consequently, what Preston refers to as the "mental health related mitigating evidence," which incidentally came from people none of whom qualified as experts in the field of PCP, was far from compelling and actually refuted Preston's claim that he was under the influence of PCP on the night of the murder.

Dr. Rufus Vaughn, a forensic psychiatrist, was recognized by the trial court as an expert in the field of psychiatry, but not as an expert in the field of PCP, although experienced enough in that field to testify (R **1571).** Vaughn examined Preston on two occasions **-** once on April **8, 1981,** and the second time on May **28, 1981 -** both occasions more than three years after the date of the murder (R **1572-1573).** His total length of time in psychiatric evaluation of Preston was approximately three hours. He had also talked with Preston's brother Scott by telephone (R **1573).**

Based on the interviews conducted with Preston, his testimony at trial, and the testimony of his brother Scott and other witness, Dr. Vaughn indicated that in his opinion between the hours of **1:00** a.m. and **4:30** a.m. on January **9, 1978,** he did

not believe Preston knew what he was doing, nor was he able to understand and comprehend the natural consequences of his act, or differentiate between right and wrong (R **1585).** The nature of the alleged mental infirmity was described by Vaughn as acute organic brain syndrome, a merely temporary disorder. His opinion was based on the assumption that Preston did indeed use drugs, including PCP, that he testified to that night, and that said drugs induced the acute organic brain syndrome upon which the diagnosis was based (R **1584-1585).** Based on his opinion that such a brain disfunction existed, Vaughn then testified that Preston's ability to form the intent to do any positive act "would be greatly compromised'' (R **1586).**

On cross-examination, Vaughn clearly stated that the acute organic brain syndrome allegedly affecting Preston at the time of the murder was drug induced and that without the presence of PCP, marijuana and alcohol, there would have been no disorder, since Preston did not suffer from any other mental infirmity, disease or defect (R **1586-1587).** There was no fixed and settled insanity, either permanent or intermittent observed in Preston by Vaughn. Vaughn also noted that the primary basis for his diagnosis was the ingestion of PCP "since it is the most powerful" and he noted that the only testimony establishing the use of the PCP at all was given by Preston himself (R **1589-1590).**

Vaughn admitted that in a prior report on Preston he had stated that the type of crime alleged to have been committed included very deliberate elements (robbery, abduction, homicide and retention of money) which <u>did not</u> fit a psychotic type of

crime, and that an acute brain syndrome caused by the use of drugs would typically allow actions which are second nature to the individual and not new behaviors (R **1592**). As the prosecutor outlined the crimes committed in this case, including the robbery, the abduction of Ms. Walker, and the factual actions supporting them, Vaughn stated that they indicated purposeful behavior which would probably not be consistent with someone suffering from the organic brain syndrome, drug induced, that he had diagnosed; nor would they be consistent with the acute psychotic episodes he had seen previously in PCP cases (R **1592-1594**). Vaughn also admitted that the nature of the wounds inflicted on Ms. Walker also indicated purposeful behavior which would be inconsistent with behavior of an individual allegedly subject to an acute brain syndrome (R **1596**). Finally, Vaughn admitted that the nature of the wounds inflicted on the victim and the behavior necessary to abduct her, remove her clothing and bring her to the scene of her death were all purposeful acts not consistent with acute brain syndrome (R **1598**). Dr. Vaughn also noted that were a person to commit a robbery and make up a story to cover the truth of what he did by saying he robbed someone else, such activity would not be consistent with acute organic brain syndrome.

Dr. Robert Kirkland, a psychiatrist who interviewed Preston on one occasion, May **28**, **1981**, also testified (R **1610**, **1613**). Dr. Kirkland stated that he had done no research on his own with regard to the drug PCP, but that he had been involved in the treatment of individuals using the drug (R **1613**). Dr. Kirkland

stated that in his opinion, Preston did not suffer from mental infirmity defect, or disease; that on January 8 and 9, 1978, he knew right from wrong (R 1618-1619), and on those same dates knew that cutting someone would indeed hurt them (R 1619). Kirkland indicated that he could not form an opinion as to the behavioral capabilities of an individual who had consumed the specific drugs in the quantities alleged by Preston on the evening before the murder because he could not be certain as to the purity of the PCP and effect of the dosage taken by the particular individual because of differences in tolerance (R 1621-1622). Kirkland also noted that the body probably develops a tolerance to PCP when used over a long period of time (R 1632). Kirkland also stated that a person who had reached a psychotic level from the use of PCP would exhibit a kind of behavior which would allow anyone who perceives him to realize that something was seriously wrong. The individual would appear out of control and have a wild or crazy look to the layman (R 1634).

The primary defense witness in mitigation of sentence was Dr. Gerald Mussenden, a clinical psychologist who examined Preston (R 1942-1955). Dr. Mussenden concluded that while no organic cause existed which would have affected Preston's judgment or reasoning at the time of the commission of the offenses, he would have suffered from diminished mental capacity and impaired judgment if he was provoked by the victim in his most vulnerable areas, i.e., if a derogatory remark were made in regard to his genitalia (R 1955, 1969-1970, 1973).

Preston also notes in the instant motion that there was testimony regarding his unstable home environment, his father's early abandonment of the family, the subsequent lack of a male role model during Preston's formative years, and his mother's frequent and extended absences from the home. Mrs. Preston testified that she has been employed by the Internal Revenue Service for thirteen years, and was home every evening (R **1368).** The only evidence of Mrs. Preston's frequent and prolonged absences from the home was that she spent the night away from home on the night of the murder (R **1391).**

Preston also stated that the state made his "deadly missile'' conviction the feature of its sentencing case, and in fact that was the only evidence it presented at the penalty phase. However, it was Preston who first trotted out all the details of the bottle-throwing offense, during the guilt phase, and over the state's objection (R **1468-1470).**

ARGUMENT

CLAIM I

THE TRIAL COURT PROPERLY DETERMINED THAT DEATH IS THE APPROPRIATE SENTENCE.

Preston alleges that his death sentence is unreliable because one of the aggravating factors, his prior conviction, has since been invalidated. Preston contends that here, as in Johnson v. Mississippi, **108** S.Ct. **1981 (1988),** materially inaccurate information was presented, argued to, and relied upon by the jury and judge when sentencing him to death. Preston further contends that resentencing before a new jury is

appropriate. Appellee contends that Preston is entitled to no relief.

First, it is important to note that in Johnson, a new sentencing was not ordered, but the case was remanded to the Mississippi Supreme Court for further proceedings. The concurring opinion specifically stated that it would be left to that court to determine whether a new sentencing hearing had to be held or whether that court itself should decide the appropriate sentence without reference to the inadmissible evidence, thus undertaking to reweigh the two untainted aggravating circumstances against the mitigating circumstances. Id. at **1989**. As such, there is nothing in Johnson to preclude a harmless error analysis.

The United States Supreme Court has now specifically addressed this issue, and held that it is constitutionally permissible for state appellate courts to reweigh the aggravating and mitigating evidence to uphold a jury-imposed death sentence that is based in part on an invalid or improperly defined aggravating circumstance, and also constitutionally permissible for the state appellate court to apply harmless-error analysis to the jury's consideration of the invalid aggravating circumstance. Clemons v. Mississippi, No. **88-6873** (March **28, 1990**). In **so** holding, the court stated that the Mississippi court, as it had in other cases, asserted its authority under state law to decide for itself whether the death sentence was to be affirmed even though one of two aggravating circumstances upon which the jury had relied should not have been or was improperly presented to

the jury, and that it had no basis for disputing that interpretation of state law. The Court also specifically addressed a line of cases involving Florida's appellate review of death sentences, wherein it had determined that this court had properly upheld death sentences where an aggravating factor had been improperly found. Clemons, slip opinion at 6-10, 12-13.

Thus, it is clear under Clemons and existing Florida precedent that a harmless error analysis is constitutionally permissible where an aggravating factor found by the sentencer is later found inapplicable. This court, like the Mississippi court, has long held that a death sentence may be affirmed when an aggravating circumstance is eliminated if the court is convinced such elimination would not have resulted in a life sentence. Shriner v. State, 386 So.2d 525 (Fla. 1980); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Kennedy v. State, 455 So.2d 351 (Fla. 1984); Duest v. State, 462 So.2d 446 (Fla. 1985); Duest v. Dugger, 15 F.L.W. S41 (Fla. January 18, 1990); See also pp. 27-28 infra. Consequently, the trial court correctly applied a harmless error analysis in the instant case. Indeed, there is no one in a better position to do so than the trial court judge who originally sentenced Preston, and his determination that the elimination of the prior violent felony conviction aggravating factor did not affect the outcome is thoroughly supported by the record.

Preston's death sentence was originally premised on the finding of four aggravating circumstances and nothing in

mitigation. Preston, 444 So.2d at 947. [6] Even with the aggravating circumstance relating to Preston's prior conviction stricken, two remain; the murder was especially heinous, atrocious or cruel, and Preston committed the murder immediately after he committed the crime of robbery and while he was engaged in the commission of the crime of kidnapping. First, the record amply demonstrates that the evidence of the prior conviction was not the determinative factor in the rejection of the mitigating factor of no substantial criminal history. As the trial court's order demonstrates, rejection of this factor was premised on Preston's self-admitted criminal history. Indeed, the bottle throwing incident is probably the least repugnant criminal incident in Preston's past!

Further, under Florida law, the weighing of aggravating factors is not merely a counting process. The record in the instant case demonstrates that the sentencer did not even want to consider Preston's prior conviction as an aggravating circumstance; thus it can be concluded that it was given minimal, if any, weight. During the sentencing proceeding, the following exchange took place:

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[6] This court found on direct appeal that the aggravating factor cold, calculated and premeditated was not supported by the record.

[7] Indeed, were it merely a counting process, an argument could be made that the one factor of after a robbery and during a kidnapping could be two factors, or could be the two factors of for pecuniary gain and during a kidnapping. Semantic games are unnecessary however, as it is clear that this one factor is entitled to great weight in imposing a death sentence.

The second aggravating circumstance, this aggravating circumstance is applicable. The Defendant has been previously, to this sentencing, been convicted of throwing a deadly missile, a bottle in an occupied vehicle in case 78-38-CFA. That conviction was affirmed in Preston vs. State, 390 So.2nd 712 by the Fifth District Court of Appeal on 1981.

As I previously indicated to you, the Supreme Court has interpreted that even subsequent crimes to be properly considered by the Court if there were convictions prior to the sentencing on the capital sentence.

The third aggravating circumstance --

THE COURT: Let me stop you before you go on to the third aggravation. You're going through the aggravations that are set forth in 921.1415?

MR. MOXLEY: Yes, sir.

THE COURT: Sub 5? I don't think there's any question that he was convicted of a capital felony involving the use of threats, use of threat of violence to the person because, as I understand that case, it was throwing a deadly missile. That was what he was convicted on. But, you know, there are different degrees of violence or threats.

You understand what I'm talking about?

MR. MOXLEY: Yes, sir.

THE COURT: I don't know. Does that have any bearing when you have only one?

MR. MOXLEY: Your Honor --

THE COURT: One felony here that involved a throwing incident? I don't know. I think there was a bottle thrown.

MR. MOXLEY: There was a bottle thrown.

THE COURT: A bottle or bottles?

MR. MOXLEY: A bottle.

THE COURT: At an occupied vehicle?

MR. MOXLEY: Yes, sir.

THE COURT: Do you think that that...it falls within the category, but do you think that that was of sufficient violence that this is what the Court's speaking of here, what the statute is speaking to?

MR. MOXLEY: I think the Court can consider, even though the he aggravating circumstance is prima facie, applicable, the facts and circumstances of the offense. In other words, I think both the Defendant's version and the State's version, you can consider. I believe it's applicable because it fits within previous violent felony convictions, but the weight that you assign it --

THE COURT: The weight?

MR. MOXLEY: -- I think would depend on the particular facts and circumstances of the case. In other words you may assign it not a great weight because of the bottle throwing.

THE COURT: The Court has discretion in considering it as an aggravating circumstance, but then to put whatever weight the Court feels upon that one circumstance?

MR. MOXLEY: Yes, sir.

THE COURT: All right, sir. Proceed.

(R 2075-2077)(emphasis supplied). As such, Preston's prior conviction was hardly a decisive factor in the choice between life or death.

It is also important to remember that Preston had trotted out all of the facts underlying this conviction during the guilt phase, unlike Johnson, where there was no evidence concerning the alleged assault. As defense counsel argued:

> ...but I think you remember the testimony, and the only testimony in the case having to do with that offense involved, and Robert felt that he was about...he was in a dispute with this fellow, and he felt that the guy was running the car at him, and he threw a beer bottle at the car, and no one was injured. The windshield wasn't even broken.
>
> Now that doesn't exactly square with the way it sounds, a deadly missile at an occupied vehicle.

(R 2011).

This is important for two reasons. First, unlike Johnson, a distinction can be drawn between Preston's prior conviction and the conduct that gave rise to that conviction. As the Johnson Court noted, the prosecutor there repeatedly urged the sentencer (the jury) to give the prior conviction weight in connection with its assigned task of balancing aggravating and mitigating circumstances "one against the other". Id. at 1987. The Court further stated that even without that express argument, there was a possibility that the sentencer's belief that Johnson had been convicted of a prior felony was decisive in the choice between life or death. Id. As stated, there is no possibility in the

instant case that the sentencer's belief that Preston had been convicted of a prior felony was decisive in the choice between life or death.

Further, the advisory jury in the instant case was not told to balance the aggravating and mitigating circumstances "one against the other," as was the sentencing jury in Johnson, nor, as Preston contends, was it told it must find an aggravating circumstance. Rather, it was instructed that it was to render an advisory sentence based on its determination as to whether sufficient aggravating circumstances existed to justify the imposition of the death penalty, and if so, whether mitigating circumstances existed to outweigh those aggravating circumstances (R 2026). The advisory jury was then instructed that one of the aggravating factors that it may consider was that Preston had previously been convicted of a felony involving the use of force to some person (R 2026).

The second reason it is important that Preston brought out all of the underlying facts of his prior conviction is that it does not render evidence of that prior conviction per se inadmissible, as was the case in Johnson, where the sentencer was not presented with any evidence describing the conduct. The advisory jury in the instant case was instructed that its advisory sentence should be based upon the evidence it heard during the guilt phase as well as the evidence that was presented during the penalty phase (R 2026). Thus, even if there was error in the instant case, it does not extend beyond the mere invalidation of an aggravating circumstance supported by evidence

that was otherwise admissible. Id. at 1989. See also, Richardson v. Johnson, 864 F.2d 1536, 1541-2 (11th Cir. 1989).

It is clear that the remaining aggravating factors carried much more weight than Preston's prior conviction, which carried little, if any weight. Considering the facts of this crime and the lack of mitigation, as well as the sentencer's own words regarding consideration of this as an aggravating factor, it is inconceivable that the bottle throwing incident affected the sentencer's decision as the order denying relief demonstrates. See Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1989). Even without such factor, a sentence of death is clearly appropriate.

CLAIM II

THE TRIAL COURT PROPERLY FOUND CLAIMS TWO, THREE, FOUR, FIVE, SIX, AND NINE PROCEDURALLY BARRED.

In Claim Two, Preston contended that evidence uncovered since the trial demonstrated the materiality of the withheld "Marcus Morales" evidence and the magnitude of the constitutional violation engendered by the State's suppression of such evidence and other related, even more compelling evidence of Preston's factual innocence. This court has already addressed the subject matter of this claim in Preston's application for writ of error coram nobis, Preston v. State, 531 So.2d 154, 157-58 (Fla. 1988), so he is procedurally barred from further litigation of this issue. See Spaziano v. Dugger, 15 F.L.W. S151 (Fla. March 15, 1990). The reassertion of this claim constitutes an abuse of process. Bundy v. State, 538 So.2d 445 (Fla. 1989). Richardson v. State, 546 So.2d 1037 (Fla. 1989) provides no basis for

bringing this claim, as it merely holds that newly discovered evidence claims should now be brought on 3.850 and will no longer be cognizable in an application for writ of error coram nobis unless the defendant is no longer in custody. It certainly does not provide a means for flaunting Florida's well established procedural rules by permitting a defendant to raise such claim where it has already been addressed on an application for a writ of error coram nobis.

In Claim Three, Preston contended that keys bearing the name Marcus Morales were found in the ashtray of the victim's car, and although the defense made appropriate Brady requests, the name Marcus Morales was not contained in the state's witness lists and no reference to keys bearing that name was made in any of the discovery materials provided by the state. Preston made no further allegations as to appellate counsel. These claims have already been addressed by this court, Preston v. State, 528 So.2d 896 (Fla. 1988); Preston v. State, 531 So.2d 154 (Fla. 1988), so they are procedurally barred and the reassertion of them at this juncture constitutes an abuse of process. Bundy, supra.

In Claim Four, Preston contended that throughout the proceedings which resulted in his conviction and sentence of death the prosecution focused the jury's attention on the personal characteristics of the victim, and the impact of her death on her family, friends, and the community. This court has already found this claim procedurally barred as there was no objection below. Preston v. State, 531 So.2d 154, 160 (Fla.

1988). Consequently, it is procedurally barred and reassertion of it constitutes an abuse of process. Bundy, supra.

In Claim Five, Preston contended that the limiting construction of the aggravating factor heinous, atrocious, or cruel set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973) has not been applied consistently and was not applied in his case and the jury in his case was never apprised of such a limiting construction. This is a claim which could and should have been raised on direct appeal and is thus procedurally barred in post-conviction proceedings. Adams v. State, 543 So.2d 1244 (Fla. 1989); Harich v. State, 542 So.2d 980 (Fla. 1989). Preston did in fact attack this factor on direct appeal and any argument on this issue could have been made at that time. See Jones v. Dugger, 533 So.2d 290 (Fla. 1988). Further, such claim is improperly raised in a successive motion for post-conviction relief and is procedurally barred as well by the two year time limitation set forth in Rule 3.850. Bundy, supra.

In any event, the claim is without merit, as Maynard does not affect Florida's sentencing procedure. Clark v. Dugger, 15 F.L.W. S50 (Fla. February 2, 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Smith v. State, 15 F.L.W. S81 (Fla. February 15, 1989). Further, the jury was informed of the limiting construction of this factor by both the prosecutor and defense counsel, (R 1994-95, 2012-13), and the trial court, which is presumed to know the construction of this factor, specifically found facts to support it, and the this court specifically found that those facts supported such finding. See Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989).

In Claim Six, Preston contended that neither his jury nor sentencing judge applied a proper standard to the aggravating factor of cold, calculated and premeditated. This is an issue which could and should have been raised on direct appeal and is thus procedurally barred in post-conviction proceedings. Correll v. State, **15** F.L.W. **S147** (Fla. March **16, 1990).** It is also improperly raised in a successive motion and beyond the two year time limitation set forth in Rule **3.850.** Bundy, supra. Even if the claim was cognizable, it is without merit, as the jury was never instructed as to this aggravating factor and the trial court's finding of it was found to be without record support on direct appeal, so it has no part in Preston's death sentence. See, Preston v. State, **444** So.2d **939, 947** (Fla. **1984).**

In Claim Nine, Preston contended that the burden was shifted to him on the question of whether he should live or die, i.e., to establish that mitigating circumstances outweighed aggravating circumstances. This claim has already been found procedurally barred by this court as it could and should have been raised on direct appeal, had it been preserved below. Preston v. State, **531** So.2d **154, 160** (Fla. **1988).** Reassertion of this claim constitutes an abuse of process. Bundy, supra.

CLAIM III

THE TRIAL COURT PROPERLY DETERMINED THAT THE CLAIM PERTAINING TO THE PECUNIARY GAIN AGGRAVATOR WAS WITHOUT RECORD SUPPORT.

Preston contended that the jury did not receive instructions narrowing the pecuniary gain aggravating

circumstance in accord with the limiting and narrowing construction adopted by the Florida Supreme Court. Preston alleged that the jury was instructed it could consider as an aggravating factor "[t]he crime for which the defendant is to be sentenced was committed for financial gain," and that the prosecutor argued that this aggravating circumstance applied because "[h]e was taking that TV set...for financial gain" (R 1354-55, 1346). This claim is not based on the record in this case, as the penalty phase proceedings can be found at pages 1926- 2041, the jury was never instructed on this aggravating factor, (R 2025-30), the trial court never found this aggravating circumstance, the prosecutor never made such an argument, and Preston never took a television in this case.

CLAIM IV

THE TRIAL COURT PROPERLY DETERMINED THAT PRESTON'S CONTENTION THAT THE FLORIDA SUPREME COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE ON DIRECT APPEAL DENIED MR. PRESTON THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS, WAS IMPROPERLY RAISED IN A 3.850 MOTION.

Preston contended, on the basis of Elledge v. State, 346 So.2d 998 (Fla. 1977), that since this court invalidated the cold, calculated and premeditated aggravating factor on direct appeal, the case should have been remanded for resentencing as the error in aggravation resulted in a skewed and improper weighing before the jury and the court, so there is no way to

know if the trial judge would have imposed death had he known of the invalidity of one of the five (sic) aggravating circumstances. Preston further alleged that his jury was permitted to consider an aggravating circumstance which was later held to be inappropriate, so the case should have been remanded for resentencing in front of a new jury. This claim is improperly raised in a **3.850** motion as it relates to an appellate matter, and should have been presented to this court in Preston's habeas petition. Even if **3.850** is the proper means for presenting such claim, it was improperly raised in the instant, successive petition, as it should have been raised in the first **3.850** motion, and is procedurally barred as well by the two year time limitation of Rule **3.850**. Bundy, supra. Even if the claim was cognizable, Preston is entitled to no relief.

This court recently stated that the Elledge error was in allowing the introduction of nonstatutory aggravating evidence that the defendant had admitted committing a murder for which a conviction had not yet been obtained. Hamblen v. Dugger, **546** So.2d **1039** (Fla. **1989).** See also, Mills v. Duqqer, **15** F.L.W. **S114** (Fla. March **1, 1990).** In the instant case, this court found that the aggravating factor of cold, calculated and premeditated was not supported by the record, but since there were three remaining aggravating factors and nothing in mitigation the death sentence was affirmed. Preston v. State, **444** So.2d **939** (Fla. **1984).**

As the Hamblen court stated, subsequent cases have made it clear that a death sentence may be affirmed when an aggravating

circumstance is eliminated if the court is convinced such elimination would not have resulted in a life sentence. Rogers v. State, 511 So.2d 526 (Fla. 1987); Rivera v. State, 545 So.2d 864 (Fla. 1989); Jackson v. State, 530 So.2d 269 (Fla. 1988; Hamblen v. State, 527 So.2d 800 (Fla. 1988). This is so even if mitigating circumstances have been found. Bassett v. State, 449 So.2d 803 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. 1980).

CONCLUSION

The argument herein conclusively demonstrates that Preston is entitled to no relief. In view of this the granting of a stay of execution would not serve the public interest. Sullivan v. State, 372 So.2d 938 (Fla. 1979). The order of the trial court denying Preston relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Billy H. Nolas, Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 2ND day of April, 1990.

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