IN THE SUPREME COURT OF FLORIDA

ROBERT ANTHONY PRESTON, JR.,

Appellant,

v. CASE NO. 78,025

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FL. BAR. #618550
210 N. Palmetto Avenue
Suite 447
Daytona Beach, Florida 32114
(904) 238-4990

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Preston's statement of the case and statement of facts, as far as they go and to the extent that all testimony as to his mental processes and actions is recognized only as the opinions of the witnesses. For purposes of its answer brief appellee adds the following facts:

Preston knew of a place where he could get same money (R 916). He left his house, and went ta the convenience store where Barline Walker was working and robbed it; he took cash, food stamps and cigarettes (R 876). After locking the door to the store, Preston and Ms. Walker got into her car and drove approximately two miles and parked (R 855). They got out of the car and walked approximately 500-600 feet into a vacant field (R 855). All of Ms. Walker's clothes, except her tennis shoes, were removed (R 869). Preston slashed her throat from ear to ear, slicing through both jugular veins and carotid arteries, virtually severing Ms. Walker's head from her body (R 842-43). Ms. Walker had one small defensive wound on her finger (R 844). Preston stabbed Ms. Walker in the stomach, and carved up her breast, vagina and forehead (R 842-43). Preston returned home with cash, woke up his brother and his brother's girlfriend, and said "I did it" (R 909).

The state introduced two photographs at the resentencing; Exhibit 1 is a distant view of the body and Exhibit 2 is a close-up view of the body (R 1978). Both photographs were utilized by the medical examiner as he described the body as it appeared in the field when he arrived at the crime scene, and as he described

the fatal wounds (R 841-43). The defense used the photographs during the testimony of three of its experts in an attempt to demonstrate that the wounds were consistent with a PCP induced rage (R 939, 1373, 1034).

The murder occurred in January 1978; Dr. Levin saw Preston January 21, 1991 (R 921); Dr. Vaughan saw Preston in April 1981 (R 960); Dr. Krop saw Preston in April, 1985 and January, 1991 (R 1372); and Dr. Mussenden saw Preston in April 1981 and January 1991 (R 1021). Dr. Levin testified that Preston was "having difficulty" conforming his behavior to the law, and he could not answer whether Preston had the ability to appreciate the criminality of the killing (R 936, 942). Dr. Mussenden testified that it was "possible" that Preston's ability to appreciate the criminality of his conduct would be significantly impaired (R 1033), and it "seemed like" Preston was under the influence of PCP (R 1032). Dr. Levin has seen thousands of people on PCP, and none of them committed murder (R 952). Houghtaling had never seen anyone get violent when they were on PCP (R 903). Dr. Levin acknowledged that Preston's early goal directed behavior demonstrated some understanding of the criminality of his behavior (R 942). Dr. Krop is not an expert in PCP treatment (R 1381).

Although Preston asked his brother to assist him in injecting PCP, his brother refused (R 908). Houghtaling, who had known Preston for four or five years, had only seen him doing drugs on one prior ocassion, about a year before the murder (R 915). Preston's mother never associated Preston's behavior with

drugs, as he regularly bathed, changed his clothes, and "ate like a horse", and she would leave him in charge of his younger brothers (R 988, 993, 996).

SUMMARY OF ARGUMENT

POINT 1: A prior sentence, vacated on appeal, is a nullity, and a resentencing proceeds *de novo* on all issues bearing on the appropriate sentence. Preston has never been "acquitted" of the death penalty by any advisory jury, sentencing court or reviewing court, so the "clean slate" rule was applicable to his resentencing, and the trial court was free to correct any previous legal errors. A defendant should not be permitted to utilize fairness as a sword in post convictions and as a shield on resentencing, and Preston should not be heard to complain about piecemeal litigation and fundamental fairness where he waited eight years to attack a formerly valid aggravating factor,

POINT 2: The facts of this murder and precedent demonstrate that there is a legal basis for each of the aggravating factors found by the trial court, and each is supported by competent, substantial evidence. Error, if any, is harmless.

POINT 3: The two photographs that were admitted during Preston's resentencing proceeding were relevant and their probative value outweighed any possible prejudice, so no abuse of discretion has been demonstrated. Error, if any, is harmless.O

POINT 4: Preston's claim that he was precluded from presenting evidence in support of two mitigating factors is not cognizable as it was never presented to the trial court below. Even if the claim is cognizable, relief is not warranted.

POINT 5: The testimony on Preston's mental state was based upon speculation by witnesses who did not see Preston at the time of the offense, and the trial court did not abuse its discretion in

rejecting mitigating factors on the basis of that testimony that are refuted by the facts of the crime. The jury unanimously recommended the death penalty, which indicates it was not persuaded by Preston's mitigating evidence either, and this recommendation is entitled to great weight.

POINT 6: Compared with other cases where the jury has recommended death and the trial court has imposed a death sentence, Preston's case warrants the death penalty.

POINT 7: This court has consistently rejected the claim that the aggravating factor heinous, atrocious or cruel is unconstitutionally vague.

POINT 8: The trial court did not abuse its discretion in admitting very limited testimony as to the wounds Preston inflicted on Ms. Walker after she was rendered unconscious, but if error occurred it is harmless. The trial court did not err in not giving two of Preston's requested jury instructions that were confusing, not entirely correct statements, and were encompassed in the instructions the jury was given. The jury received adequate guidance.

POINT 1

THE DEATH SENTENCE AND JURY RECOMMENDATION ARE BASED ON PROPER AGGRAVATING FACTORS.

Preston first contends that the trial judge exceeded the mandate of this court in *Preston v. State*, **564** So.2d **120 (Fla.** 1990), and violated the principles of law of the **case** and *res judicata* in finding that the instant murder was committed for pecuniary gain and was committed to avoid arrest. **A** prior sentence, vacated on appeal, is a nullity, and a resentencing should proceed ***de*** *novo* on all issues bearing on the proper sentence which the jury recommends be imposed. *Teffeteller v. State*, **495** So.2d **744, 745** (Fla. **1986). A** resentencing is a completely new proceeding, separate and distinct from the first sentencing. King *v.* ***Dugger*****, 555** So.2d **355** (Fla. 1990). In ***King***, this court held that a mitigating circumstance in one proceeding is not an "ultimate fact" that collateral estoppel or the law of the case would preclude being rejected on resentencing. Likewise, appellee submits that any findings on aggravating factors are not ultimate facts which would carry over into the completely new proceeding. Preston apparently did not feel restrained by these doctrines in the trial court when he presented additional mitigating evidence. Appellee would also point out that if such doctrines applied to resentencings, than this court need not address Preston's Point V, as the trial court's previous rejection of these mitigating circumstances would likewise be **law** of the **case.**

Preston's contention that the trial court exceeded this court's mandate is likewise without merit. This court simply remanded for resentencing, *Preston,* 561 So.2d at **123,** which as stated, is an entirely new proceeding, and which the trial court conducted. This court has previously held that the trial judge may properly apply the law and is not bound in remand proceedings by a prior legal error. *Spaziano v. State,* **433** So.2d *508* (Fla. 1983). Further, a literal interpretation of Preston's argument would mean that a new jury should have been empaneled and simply read the prior record, excluding any reference to Preston's subsequently vacated conviction. Clearly this was not the intent of this court, the **trial** court, or counsel below, as Preston was permitted to present anything additional in mitigation that he so desired.[1]

Preston next contends that double jeopardy principles preclude the finding of an aggravating factor on resentencing that was not faund at the original sentencing. As stated, the prior sentencing is a nullity. *Teffeteller, supra; King, supra.* Aggravating circumstances are not separate penalties or offenses, and the failure to find any particular aggravating factor does not "acquit" **a** defendant of the death **penalty.** *Poland v. Arizona,* **476 U.S. 147 (1986).** *Poland* involved a resentencing where the trial court found one aggravating factor that had previously been stricken by the appellate court (heinous, atrocious or cruel), one aggravating factor that it had previously found inapplicable

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[1] With **the** exception of the evidence excluded on the grounds that it was not proper mitigating evidence. See, Point **4,** *infra.*

(pecuniary gain), and one additional aggravating factor (as to one defendant) that it had not previously found (prior conviction involving violence). The Court refused to view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance, and stated:

> This concern with protecting the finality of acquittals is not implicated when, as in these case, a defendant is sentenced to death, *i.e.*, "convicted". There is no cause to shield such a defendant from further litigation; further litigation is the only hope he has. The defendant may argue on appeal that the evidence at his sentencing hearing was as a matter of law insufficient to support the aggravating circumstances on which his death penalty was based, but the Double Jeopardy Clause does not require the reviewing court, if it sustains that claim, to ignore evidence in the record supporting another aggravating circumstance which the sentencer has erroneously rejected.

Id. at 156-57. The court went an to hold that where a reviewing court does not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty acquittal by that court, so the Double Jeopardy Clause does not foreclose a second sentencing hearing at which the "clean slate" rule applies.

Likewise, Preston has never been "acquitted" of the death penalty by any advisory jury, trial court, or reviewing court, so the "clean slate" rule is applicable to his resentencing. The trial court was free to consider factors it previously erroneously rejected, and Preston is free to argue that the evidence is insufficient to support all of the aggravating

factors. The *Poland* Court also attached no importance to the fact that the state had not cross-appealed the trial court's rejection of the pecuniary gain aggravating factor, noting that the state court had not accorded significance to it, so it could not say as a matter of state law that the court was precluded from considering the evidence regarding this factor. Likewise, in *Spaziano, supra,* this court attached no significance to the fact that the state had not cross-appealed, and pursuant to Florida law the trial court is not bound by prior legal error. *See also, Hitchcock v. State, 578* So.2d *685* (Fla. 1990) (no double jeopardy violation in applying aggravating factor of under sentence of imprisonment on resentencing even though it was not found at first sentencing). Appellee would also point out that this court has found it is not error to apply the aggravating factor cold, calculated and premeditated on resentencing when it was not available at the original sentencing. *Zeigler v. State, 580* So.2d 127 (Fla. 1991). See *also, Douglas v. State, 575* So.2d 165 (Fla. 1991).

Finally, Preston argues that fundamental fairness and the need to avoid piecemeal litigation in capital cases require that only those aggravating factors that were found in 1981 can apply. Preston contends that there is no *bona fide* reason for the state not to pursue, at the time a defendant is initially sentenced, all of the statutory aggravating factors that can arguably apply to a defendant's case. Preston certainly should not be heard to complain about piecemeal litigation and fairness. At the time Preston was sentenced in 1981, his prior violent felony

conviction had been final for six months. *See, Preston v. State,* 397 So.2d 712 (Fla. 1981). One motion for post conviction relief (which Preston was permitted to amend), one petition for writ of habeas corpus, one petition for writ of error coram nobis, and eight years later, Preston successfully moved to vacate that conviction. This court has refused to apply a procedural bar in situations where a defendant sits on a claim like that for years, *see, Duest v. Dugger,* **555** So.2d 849, 851 (Fla. 1990), no doubt because it would not be "fair". A defendant should not be permitted to utilize "fairness" in this aspect as a sword in post conviction proceedings and as a shield on resentencing. In a situation such as this, where the state relies on a valid prior conviction in sentencing, and through no fault of the state and through unforeseeable circumstances that factor is stricken eight years later, and a resentencing is ordered, a defendant should not be heard to complain that fundamental fairness requires that the state rely only on the original aggravating factors, one of which is gone.

Even if this court finds that any of Preston's arguments have merit, appellee submits that it would only apply to the avoid arrest factor, as the trial court previously **found** that the murder was committed for pecuniary gain, but simply weighed it under the committed during a robbery/kidnapping aggravating factor (Supp. R. 3). Further, even if error occurred in this respect it is harmless at worst, as the trial court specifically stated that two aggravating circumstances alone (during a kidnapping and heinous, atrocious and cruel) are sufficient to

outweigh the mitigating circumstances (R 1925). Death is the appropriate penalty. *See, Jones v. State,* 580 So.2d 143 (Fla. 1991) (trial court specifically stated stricken aggravating circumstance was not determinative and death would have been imposed in its absence); *Young v. State,* 579 So.2d 721 (Fla. 1991) (trial court stated that mitigating evidence was outweighed by any one aggravating factor).

POINT 2

THE TRIAL COURT CORRECTLY FOUND THAT THE MURDER OF EARLINE WALKER WAS COMMITTED TO AVOID ARREST; FOR PECUNIARY GAIN; DURING THE COURSE OF A KIDNAPPING; AND WAS HEINOUS, ATROCIOUS AND CRUEL.

Preston acknowledges that the murder was committed during the course of a robbery and/or kidnapping, but contends that the remaining aggravating circumstances are not supported by competent, substantial evidence, When there is a legal basis to support an aggravating factor, a reviewing court will not substitute its judgment for that of the trial court. *Occhicone v. State,* 570 So.2d 902 (Fla. 1990). The resolution of factual conflicts is solely the responsibility and duty of the trial judge and an appellate court has no authority to reweigh that evidence. *Gunsby v. State,* 574 So.2d 1085 (Fla. 1991). In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a "common-sense inference from the circumstances". *Swafford v. State, 533* So.2d *270,* 277 (Fla. 1988); *Gilliam v. State,* 582 So.2d *610,* 612 (Fla. 1991). When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, this finding should not be overturned unless there is a lack of competent substantial evidence to support it. *Bryan v. State, 533* So.2d 744 (Fla. 1988). The facts of this murder and precedent demonstrate that there is a legal basis for each of the aggravating factors found by the trial court, and each is supported by competent, substantial evidence. Appellee will first review those facts, then specifically address each of Preston's challenges.

Preston knew of a place where he could get some money (R 916). He left his house, and went to the convenience store where Earline Walker was working and robbed it; he took cash, food stamps and cigarettes (R 876). After locking the door to the store, Preston and Ms. Walker got into her car and drove approximately two miles and parked (R 855). They got out of the car and walked approximately 500-600 feet into a vacant field (R 855). All of Ms. Walker's clothes, except her tennis shoes, were removed (R 869). Preston slashed her throat from ear to ear, slicing through both jugular veins and carotid arteries, virtually severing Ms. Walker's head from her body (R 842-43). Ms. Walker had one small defensive wound on her finger (R 844). Preston stabbed Ms. Walker in the stomach, and carved up her breast, vagina and forehead (R 842-43). Preston returned home with cash, woke up his brother and his brother's girlfriend, and said "I did it" (R 909).

Avoid arrest

A motive to eliminate a witness to an antecedent crime can provide the basis for this aggravating factor, and it is not necessary that an arrest be imminent at the time of the murder. *Swafford, supra.* Even though there was no direct statement that Preston murdered Ms. Walker to eliminate her as a witness, the common sense inference that can be drawn from these facts indicates that was his motive. *Id.; Occhicone, supra.* The facts in *Swafford* are virtually identical to those in the instant case, and this court found this aggravating factor was applicable. *Id.* at 276. Preston knew a place to get money, and that place was a

store close to his home. Preston had robbed the store, and did not simply leave or kill Ms. Walker at the store, either of which would have strongly increased chances of his detection, but forced her to drive several miles from the store where she was forced to strip then murdered. The wound inflicted by Preston, a virtual severing of Ms. Walker's head, was one sure to cause death. The circumstances of this murder are similar to those in many cases where the arrest avoidance factor has been approved. ***Id.; Cave*** *v.* ***State,*** 476 So.2d 180 (Fla. 1985); *Engle v.* ***State,*** 510 So.2d 881 **(Fla. 1987);** ***Routly v. State,*** 440 So.2d 1257 (Fla. 1983); ***Burr v. State,*** 466 So.2d 1051 (Fla. 1985).

Even if for some reason this court determines that the trial court erred in finding this factor, any error is harmless. The trial court specifically stated that two aggravating circumstances alone (during a kidnapping and heinous, atrocious and cruel) are sufficient to outweigh the mitigating circumstances (R 1925). Death is the appropriate penalty. ***See, Jones,*** *supra;* ***Young, supra.***

Pecuniary gain/Course of a kidnapping

Preston contends that two aggravating factors, for pecuniary gain and during the course of a kidnapping, merge and should be considered as a single aggravating circumstance. This court has previously approved the separate findings of pecuniary gain and during the course of a robbery and kidnapping. *Bryan v. State,* **533** So.2d 744 (Fla. 1988); ***Bates v. State,*** 465 So.2d 490 (Fla. **1985);** ***Routly v. State,*** 440 So.2d 1257 (Fla. 1983); ***Stevens v. State,*** **419 So.2d 1058** (Fla. **1982).** The evidence in the instant case

shows that the kidnapping had a broader purpose than simply providing the opportunity for a robbery, and in fact occurred after Preston had obtained the money. *See, Brown v.* ***State,*** **473** So.2d 1260 (Fla. 1985). Preston was motivated by a desire for pecuniary gain, as the trial court acknowledged (R 1916), and **the** murder was committed while he was engaged in the commission of a kidnapping. There is no reason why the facts of this case cannot support multiple aggravating factors which are separate and distinct **and** not merely restatements of each other. ***See,*** *Echols v.* ***State,*** 484 So.2d 568 (Fla. 1985). Even if error occurred, it is harmless where the trial court found that two aggravating factors outweigh the mitigating evidence, *so* the merging of these two factors would not affect the outcome. ***Jones, supra;*** *Young,* ***supra.***

Heinous, atrocious and cruel

In support of this aggravating factor, the trial court found:

> The murder of Earline Walker was accomplished after Preston had robbed and kidnapped the victim. He used a knife to cut her throat, slashing it with such violence that the jugular vein, trachea, and main arteries of the neck were severed and she was nearly decapitated. Furthermore, the circumstances leading to the ultimate murder of Earline Walker were such that she felt terror and fear prior to her murder. She was forced to drive to a remote location, forced to walk at knifepaint into a dark field, and forced to disrobe, before her throat was brutally slashed. The circumstances surrounding her abduction, and the deliberate slashing of her throat from one side to the other with sufficient force to Sever the jugular veins, trachea, and main arteries establishes

> that this murder was especially heinous, atrocious or cruel.

(R 1916-17). This court has already found that the facts of this murder support this aggravating factor. *Preston v. State,* 444 So.2d 939 (Fla. 1984). While that finding is not binding since this is a resentencing, appellee submits it is very persuasive, particularly since this court has consistently applied this aggravating factor to murders where it is clear that the victims suffered fear and emotional strain and had time to contemplate their impending deaths. *See, Douglas v. State,* 575 So.2d 165 (Fla. 1991); *Hitchcock v. State,* 578 So.2d 685 (Fla. 1990); *Rivera v. State,* 561 So.2d 536 (Fla. 1990); *Mendyk v. State,* 545 So.2d 846 (Fla. 1989); *Swafford v. State,* 533 So.2d 270 (Fla. 1988); *Hildwin v. State,* 531 So.2d 124 (Fla. 1988).

The instant case is distinguishable from *Robinson v. State,* 574 So.2d 108 (Fla. 1991). In that case, the court found that there was evidence that the victim had been reassured that she would be released. There is no such evidence in the instant case, and the only "common-sense inference" that can be drawn from these facts is that Ms. Walker suffered severe emotional trauma over the thought of her impending death, as after she was robbed she was forced at knife point to drive several miles, walk across a field, and strip down to her tennis shoes. Ms. walker's murder was accampanied by additional acts setting it apart from the norm of capital felonies, and the trial court properly found that it was heinous, atrocious and cruel.

POINT 3

THERE WAS NO ABUSE OF DISCRETION IN THE ADMISSION OF TWO PHOTOGRAPHS OF THE VICTIM.

Preston contends that the trial court erred in admitting, over objection, two photographs of the victim, because they were graphic and gruesome and not relevant to any issue. While there was initially an objection when the state moved the photographs into evidence, the defense subsequently used the photographs during the testimony of three of its experts in an attempt to demonstrate that the wounds were consistent with a PCP induced rage (R 939, 1373, 1034). Appellee submits that the defense's subsequent use of the photographs for its own benefit constitutes waiver of its previous objection. In any event, even if the claim is preserved relief is not warranted.

The trial court has discretion, absent abuse, to admit photographic evidence so long as the evidence is relevant, and the gruesome nature of the Photographs does not render the decision to admit them into evidence an abuse of discretion. *Thompson v. State*, 565 So.2d 1311, 1314 (Fla. 1990). Exhibit 1 is a distant view of the body and shows the surrounding area, how far the victim's clothes were from the body, and how the body was clothed (R 1976). Exhibit 2 is a close-up view of the body, showing the two fatal stab wounds (R 1978). Both photographs were utilized by the medical examiner as he described the body as it appeared in the field when he arrived at the crime scene, and as he described the fatal wounds (R 841-43). There were only two photographs, they are not duplicative, and are relevant to show

the location of the body, the manner in which it was (un)clothed, the nature of the surrounding area, other objects in relationship to the body, as well as the nature of the wounds. These factors are all relevant to the finding of heinous, atrocious, and cruel, as they show the field the victim was forced to walk across at knife point, that she was forced to strip down to only her tennis shoes, then brutally slaughtered as her thraat was cut from side to side, almost severing her head from her body, so no abuse of discretion has been demonstrated.

Appellee also submits that the wounds inflicted after Ms. Walker was rendered unconscious were relevant to refute Preston's claim that this murder was committed in a PCP induced frenzy. The photos reflect that these wounds are very deliberate, i.e., specific cuts to Ms. Walker's sex organs and face. Since the photographs were relevant and their probative value outweighed any possible prejudice, no abuse of discretion has been demonstrated.

This is not a case where the condition of the body was the result of the length of time it had been dead and the work of extraneous factors. *See, Czubak v. State, 570* So.2d 925 (Fla. 1990). Preston should not be heard to complain that most of the injuries depicted in the photographs that *he inflicted* were inflicted post mortem, so the photographs were irrelevant. *See, Henderson v. State,* 463 So.2d 196, 200 (Fla. 1985) ("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments"). Given the nature of the subject, the photographs were not unnecessarily "graphic and

gruesome", and are not so shocking as to outweigh their probative value. ***See, Thompson,*** *supra; Nixon v.* ***State,*** **572** So.2d **1336** (Fla. **1990);** ***Henry v. State, 586*** So.2d 1033 (Fla. 1991); ***Halibur-ton v. State,*** **561** So.2d 248 (Fla. 1990).

Even if the admission of the photographs was error, it was harmless at worst since the outcome could not have been affected. ***State v. DiGuilio,*** 491 So.2d 1129 (Fla. 1986). The jury was specifically instructed that any event which occurred after the victim was unconscious could not be considered as evidence of the **especially** wicked, evil, atrocious or cruel nature of the **crime,** (R 1098), and these injuries were never argued as a basis for the finding of this factor. Indeed, as demonstrated in Point 2, ***supra,*** this murder was truly heinous, atrocious and **cruel,** and that factor would have to be given great weight strictly on the basis of the facts, **and** it is impossible to imagine that it would have been given any less weight if the pictures had not been admitted.

POINT 4

THE TRIAL COURT DID NOT ERR IN GRANTING THE STATE'S "MOTION IN LIMINE TO EXCLUDE EVIDENCE OR ARGUMENT INTENDED TO CREATE DOUBT AS TO DEFENDANT'S GUILT",

Preston contends that the trial court erred in refusing to allow him to present evidence that his brother Scott murdered Earline Walker as it was relevant to two statutory mitigating factors. This argument was never presented to the trial court so it is not cognizable on appeal. *Bertolotti v. Dugger*, 514 So.2d **1095** (Fla. 1987). The record demonstrates that the state moved to preclude lingering doubt evidence, and the trial court was correct in precluding such evidence. ***See, Hitchcock v. State, 578*** So.2d 685, **690** (Fla. 1990), and cases cited therein. The defense never sought to introduce this evidence on any other grounds, and when proffering the affidavits counsel specifically stated:

> Your honor, at this time, this might be a good time also, since the jury's out, we would tender to the Court in the form of a proffer the affidavits of Steve Hagman and John Yanzell, (sic) which , basically constitutes testimony that the actual...that Scott **Preston,** the Defendant's brother, had admitted killing the decedent, Earline Walker in this case, and in ***light of the Court's earlier ruling on lingering doubt, we could not present that testimony.*** *But in order to* ***preserve that issue,*** we are going to introduce those affidavits in lieu of live testimony, although those witnesses are available and could testify to the contents of the affidavit.

(R 1041-42) (emphasis supplied). Thus the only issue that was preserved was the court's ruling on lingering doubt, and as stated, it was correct, as Preston recognizes (IB 35).

Even if the claim is cognizable, relief is not warranted since the proffered affidavits are not relevant to show that Preston was an accomplice whose participation was relatively minor, or that he acted under extreme duress or under the substantial domination of another, One affidavit states that Scott and "another person" committed the crimes, and the other specifically states that Robert Preston had passed out at home and was not there (R 1986, 1992-93). Thus, the only thing these affidavits are even arguably relevant to is lingering doubt and the testimony was properly excluded. The state would also point out that the statements in the affidavits are at odds with the testimony of defense witness Donna Houghtaling, who stated that she was with Scott that evening (R 907-09).

POINT 5

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING PRESTON'S PROFFERED MENTAL MITIGATION.

Preston contends that he presented a large quantum of competent uncontroverted evidence in support of the two statutory mental mitigating factors, and the trial court was bound to accept it, and having failed to do so, resentencing is required. Deciding whether a mitigating circumstance has been established is within the trial court's discretion, and reversal is not warranted simply because an appellant draws a different conclusion. *Sireci v.* ***State,*** 587 So.2d 450 (Fla. 1991); *Stano v.* ***State,*** 460 So.2d **890 (Fla. 1984).** It **is** the trial court's duty to resolve conflicts in the evidence and that determination should be final if it is supported by competent, substantial evidence. *Id.* Appellee would first point out that the jury unanimously recommended the death penalty, which strongly indicates that it rejected Preston's expert testimony, as it was instructed it **could do (R 1103).** The record supports the trial court's rejection of this evidence as well, and Preston has failed to demonstrate an abuse of discretion.

First, the testimony of the experts is based on the assumption that Preston was a serious drug abuser and ingested PCP the night of the murder. This basic assumption could be rejected, thus rendering meaningless all of the expert testimony based upon it. The only testimony to support this is Preston's self-serving statement, and while he distinctly remembers everything he did that day **up** until the time he allegedly took

the PCP, he remembers nothing after that.[2] Donna Houghtaling testified that Preston asked his brother to help him tie off his arm so he could shoat up because apparently he could not do it himself, but his brother did not assist him (R 908). Significantly, Houghtaling, who had known Preston for four or five years and who apparently was quite a drug abuser at that time, had only seen him use drugs on one prior occasion, about a year before the murder (R 899, 915). Preston's mother never associated Preston's behavior with drugs, as he regularly bathed, changed his clothes, and "ate like a horse", and she would leave him in charge of his younger brothers when she started making a social life for herself after Preston turned eighteen (R 988, 993, 996). There was no evidence that Preston has any brain damage, which is frequently associated with long term drug abuse, and in fact that record demonstrates that he is quite intelligent and his IQ is in the top 75-78% (R 1383).

Further, testimony that Preston was under the influence of extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired could be rejected on the basis of testimony and evidence presented. There is no direct evidence of Preston's thought processes that evening, due to his convenient memory lass, so all that is left is the speculation of the expert witnesses, none of whom saw Preston at

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[2] Preston's claim that he does not remember anything is suspect as well, which casts doubt on all of his statements. It is interesting to note that when the prosecutor asked Dr. Levin "But isn't it true that he did not remember the murder?", Dr. Levin replied "That's correct. Well, that's what he reported" (R 948).

the time of the offense.[3] There was no testimony from anyone who had ever seen Preston under the influence of PCP.[4] There was no testimony as to when, how much, or what quality of PCP Preston may have ingested. The experts testified that PCP has a wide range of effects, from sedation to aggravation, and that individuals react differently at different times (R 925-27, 1027-31). The testimony as to how Preston *might* have reacted *if* he had taken the drug was far from competent and substantial. Dr. Levin testified that Preston was "having difficulty" conforming his behavior to the law, and he could not answer whether Preston had the ability to appreciate the criminality of the killing (R 936, 942). Dr. Mussenden testified that it was "possible" that Preston's ability to appreciate the criminality of his conduct would be significantly impaired (R 1033), and it "seemed like" Preston was under the influence of PCP (R 1032). There was no testimony that PCP causes its users to commit murder, and in fact Dr. Levin has seen thousands of people on PCP, and none of them had committed murder (R 952). Houghtaling had never seen anyone get violent when they were on PCP (R 903). Dr. Krop is not an expert in PCP treatment (R 1381).

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[3] The murder occurred in January, 1978 (R 1680). Dr. Levin saw Preston January 21, 1991 (R 921); Dr. Vaughan saw Preston in April 1981 (R 960); Dr. Krop saw Prestan in April, 1985 and January 1991 (R 1372); and Dr. Mussenden saw Preston in April, 1981 and January, 1991 (R 1021).

[4] While Houghtaling testified that she would say Preston was under the influence of PCP when he returned home after the murder (R 912), she did not see him take any PCP and had never seen him under the influence of it before.

Dr. Levin acknowledged that Preston's early goal directed behavior demonstrated some understanding of the criminality of his behavior (R 942). Appellee submits that the facts of this crime demonstrate that it was all deliberate and goal directed, and clearly sufficient to rebut the mental mitigating factors as the trial court found. Preston's goal that night was to get some money (R 916). Preston armed himself with a knife, and went to the store where Ms. Walker worked, and obtained cash, cigarettes, and food stamps (R 867). After locking the door behind them, Preston forced Ms. Walker into her car, and they proceeded to an isolated location several miles from the store (R 857, 855). Preston then forced Ms. Walker to walk 500-600 feet from the car into a field, and had her undress (R 855, 869). With one vicious knife stroke from behind, Preston slashed Ms. Walker's throat from ear to ear, almost severing her head from her body (R 842, 844). Appellee submits that this is not evidence of a frenzied stabbing, but rather the purposeful infliction of a life ending injury. Likewise, the wounds inflicted after Ms. Walker would have become unconscious were purposefully inflicted rather than a random, frenzied stabbing; Preston deliberately cut Ms. Walker's sexual organs and further defaced her body by carving an X in the forehead (R 843). Ms. Walker had one small defensive wound on her finger (R 844), which indicates Preston was in control of the situation as well as in control of the victim. Preston did some travelling that night, to very specific locations, and was not found wandering around aimlessly and disoriented; rather, Preston returned home with the proceeds from his crime spree and told his

brother and Houghtaling "I did it", which indicates that he had carried out a formulated plan.

The trial court was certainly free to reject this speculative testimony based on what Preston might have done if he had ingested PCP. While the circumstances of this crime may be consistent with someone on PCP, they are just as consistent with a deliberate thought process. On the basis of the testimony presented, there are at least three possible scenarios: Preston did not do any PCP, and was well aware of what he was doing; Preston did some PCP, and was well aware of what he was doing, as evidenced by his goal directed behavior[5]; Preston did PCP and is the only known person to have committed murder because of it. But certainly neither the trial court nor the jury is required to make this final quantum leap, which ignores all of the circumstances between the robbery and murder, on the basis of pure speculation. As stated, it is just as likely that Preston did not ingest PCP and went out and committed a calculated and brutal murder, or that Preston did ingest PCP, but was still able to formulate and carry out his plan, as the facts of this murder

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[5] As stated, Dr. Levin testified that Preston's early goal directed behavior demonstrated some understanding of the criminality of his behavior. There was no testimony as to when this goal directed behavior ceased, and it seems as if Preston's position is that it ceased when he stabbed Ms. Walker in a PCP frenzy, This overlooks the cause of the kidnapping. If Preston went into a PCP frenzy at the store, it would seem that he would have killed Ms. Walker then and there. Since he did not, it is apparent that he had a purpose in mind when he kidnapped Ms. Walker and took her several miles from the store, and that was to murder her,

demonstrate, and as the trial court and no doubt the jury found in light of its unanimous death recommendation.

These actions indicate Preston was capable of planning and deliberate thought (R 1918). Preston's actions all indicate "a logical (albeit criminal) prcgression of thought, unaffected by psychological or emotional disturbance". *Cook v. State*, **581 So.2d 141, 144 (Fla. 1991).** The resolution of factual conflicts is solely the responsibility and duty of the trial judge, and this court has no authority to reweigh that evidence. *Gunsby v. State*, **574 So.2d 1085** (Fla. **1991).** The trial court considered the testimony as well as the circumstances of the offense, and rejected Preston's claims on the basis of those circumstances, which was not an abuse of discretion. *Bruno v.* ***State,*** 574 So.2d **76** (Fla. **1991);** *Ponticelli v. State,* 16 F.L.W. 669 (Fla. October 10, 1991). The testimony regarding Preston's mental state was based upon speculation and was not without equivocation, and it was such that the trial judge was within his authority to deny application of the mitigating factors. ***See,*** *Sanchez-Velasco v.* ***State,*** *570* **So.2d** 908 (Fla. **1991).**

Preston claims that if this court approves that trial court's findings with regard to the mental mitigating factors, it is questionable whether the factors could ever be proven **as** mitigating circumstances (IB 42). *To* the contrary, approval of the trial court's findings is consistent with all established precedent which dictates that the trial court and jury are free to reject testimony and this court may not reweigh those findings. Further, approval of the trial court's findings would

not call into question whether these factors could ever be proven, as a defendant will always be able to present evidence in support of these factors from which the trial court may determine their existence. Rather, disapproval of the trial court's findings would open the door for a required finding of these factors any time there was unsubstantiated testimony by the defendant that he was on drugs and could not remember anything. This is not nor should it ever be the state of the law. Finally, this court simply cannot ignore the unanimous death recommendation, which indicates that not only the trial court but also the jury was not sufficiently impressed by this evidence. *See, Grossman v. State,* 525 So.2d 833, 841 (Fla. 1988). This recommendation is entitled to great weight. *Id.* at 839 n. 1.

POINT 6

THE DEATH SENTENCE IS PROPORTIONATE.

Proportionality review is not a comparison between the number of aggravating and mitigating circumstances, but is a thoughtful, deliberate process of considering the totality of circumstances in a case and comparing it with others. *Porter v. State,* 564 So.2d 1060 (Fla. 1990). Preston asserts that there are at best two aggravating factors, and uncontroverted mitigating circumstances. As demonstrated in the previous points, there are four valid aggravating factors,[6] and as the trial court found (and the jury as well as is reflected in its unanimous death recommendation), nothing compelling in mitigation.

Compared with other cases where the jury has recommended death and the trial court has imposed a death sentence, Preston's case warrants the death penalty. *Rivera v. State,* 561 So.2d 536 (Fla. 1990) (kidnap and murder of young girl-three aggravating factors weighed against one mitigating factor); *Randolph v. State,* 562 So.2d 331 (Fla. 1990) (murder of convenience store clerk-four aggravating factors weighed against two nonstatutory mitigating circumstances); *Gunsby v. State,* 574 So.2d 1085 (Fla. 1991) (murder of convenience store clerk-three aggravating factors weighed against one nonstatutary mitigating factor); *Lewis v. State, 572*

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[6] Even if this court were to find that one or two of the aggravating factors was improperly found or doubled, the trial court found that death is still appropriate, and it is a proportionate sentence as well. *See,* e.g., Hayes v. State, 581 So.2d 121 (Fla. 1991) (two aggravating factors, with pecuniary gain and robbery merged, against minor mitigating factor of age, low intelligence, learning disabled, product of deprived environment); Brown v. State, 565 So.2d 304 (Fla. 1990) (three valid aggravating factors are not overcome by the mitigation).

So.2d 908 (Fla. **1990)** (kidnapping, robbery and murder-three aggravating factors weighed against no mitigation); ***Gilliam*** *v. State,* ***582*** So.2d 610 (Fla. **1991)** (three aggravating factors against two nonstatutory mitigating factors); *Sochor* ***v. State,*** 580 So.2d 595 (Fla. **1991)** (three aggravating factors against no mitigation); *Engle* ***v.*** *State,* 510 So.2d 881 (Fla. **1987);** ***Mendyk*** *v. State,* 545 So.2d 846 (Fla. 1989); ***Swafford*** *v. State,* **533** So.2d **210** (Fla. **1988)** (these last three **cases** all involved the abduction and murder of convenience store clerks).

Further, the cases Preston relies on are distinguishable. *Blakely v. State,* **561** So.2d *560* **(Fla.** 1990), *Wilson* ***v. State,*** **493** So.2d **1019** (Fla. **1986),** and ***Farinas*** *v.* ***State,*** **569** So.2d 425 (Fla. **1990)** all involved heated domestic confrontations. *Livingston v. State, 565* So.2d 1288 (Fla. **1988)** and ***Fitzpatrick*** *v.* ***State,*** 527 So.2d 809 (Fla. 1988), both involved extensive mitigating factors which are not present in the instant case. ***See,*** *e.g., Gunsby, supra.* ***Rembsrt*** *v. State,* 445 So.2d **337** (Fla. 1984) involved only one aggravating factor which was during the course of a felony. The death penalty is proportionally warranted in the instant case.

POINT 7

THE AGGRAVATING FACTOR HEINOUS, ATROCIOUS OR CRUEL IS NOT UNCONSTITUTIONALLY VAGUE.

Preston contends that the aggravating factor heinous, atrocious or cruel is vague and that the limiting construction used by this court both facially and applied is too vague and indefinite to comport with the Eighth and Fourteenth Amendments as set forth in *Maynard v. Cartwright*, **486 U.S. 356** (1988), *Godfrey v.* ***Georgia*****, 446 U.S. 420 (1980),** and *Shell v.* Mississippi, **111 S.Ct. 313 (1990).** Preston's claim is without merit. *Smalley v.* ***State*****,** 546 So.2d 720 (Fla. 1989). ***See*** *also, Robinson v. State,* 574 So.2d **108** (Fla. **1991**); *Tratter v. State,* 576 **So.2d 691** (Fla. **1990**); *Occhicone v. State, 570* **So.2d** 902 (Fla. 1990); ***Freeman v. State*****, 563** So.2d **73** (Fla. 1990); *Randolph v.* ***State*****,** *562* **So.2d** 331 **(Fla.** 1990); *Brown v. State, 565* So.2d **304** (Fla. 1990); *Smith v.* ***Dugger*****,** *565* **So.2d 1293 (Fla. 1990).** In *Smalley,* this court found that its narrowing construction of this aggravating factor had been upheld in ***Proffitt*** *v. Florida,* 428 **U.S. 242** (1976), and the fact that ***Proffitt*** is still good law today is apparent from the *Maynard* decision, where the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *Smalley* at 722. The ***Shell*** decision does not change this fact, as it was decided on the basis of *Maynard.*

Further, the United States Supreme Court recently upheld the Arizona Supreme Court's construction of this aggravating factor, noting that it was similar to Florida's construction which was approved in *Proffitt. Walton v. Arizona,* 110 S.Ct. 3047, 3057-58 (1990). This clearly indicates that *Proffitt* continues to

be good law today, and that this court's construction of the heinous, atrocious or cruel aggravating factor comports with constitutional standards. The trial court expressly set forth in the record the justification for finding such factor, and it is clear that he was aware of the construction given to it by this court. *See, Sanchez-Velasco v. State,* 570 So.2d 908 (Fla. 1990). Additionally, the trial court, pursuant to Preston's request, gave a long instruction on heinous, atrocious and cruel which included additional language based on *State v. Dixon,* 283 So.2d 1 (Fla. 1973), and addressed any problem the standard instruction could present in light of *Maynard v. Cartwright,* 486 U.S. 356 (Fla. 1988) (R 1098-99, 1741).

POINT 8

PRESTON WAS NOT DENIED DUE PROCESS; THE EVIDENCE AT ISSUE WAS RELEVANT AND THERE WAS NO ERROR IN NOT GIVING THE REQUESTED JURY INSTRUCTIONS.

Preston contends that he was denied due process because of the admission of certain evidence during the penalty phase and the refusal to give requested jury instructions. The allegedly irrelevant evidence involves wounds inflicted after the victim was rendered unconscious. The jury instructions relate to doubling of aggravating factors and the procedure for weighing aggravating and mitigating circumstances. Error has not been demonstrated.

As to the admission of evidence in a resentencing proceeding, this court has held

> that it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum.

Teffeteller v. State, **495** So.2d 744, 745 (Fla. 1986); *Valle v. State,* **581** So.2d 40, 45 (Fla. 1991). Evidence of the injuries inflicted after the victim was rendered unconscious are part of the criminal episode, and also demonstrate the deliberate nature of this crime and refute Preston's claim that he was in a PCP induced frenzy. The state should certainly be permitted to present the entire factual context in which this murder occurred,

for as a recent case demonstrates, failure to do so could result in dire consequences. *See, Tillman v. State,* 16 F.L.W. 674 (Fla. October 17, 1991). The defendant should not be permitted to pick and choose which of his actions are presented to the jury, thus forcing the state to run this risk.

Further, the evidence presented by the state on this issue was brief and concise (R 843), and where the defense questioned three of its experts about the post mortem wounds (R 939, 1373, 1034), Preston should not be heard to complain. This is not a case where the jury was improperly instructed on an aggravating factor and could have improperly found it on the basis of impermissible considerations. *See,* Jones *v. State,* 569 So.2d 1234 (Fla. 1990). In fact, the jury in the instant case was specifically instructed that it could not consider injuries inflicted after the victim was unconscious in support of the heinous, atrocious or cruel aggravator (R 1098-99). The trial court did not abuse its discretion in allowing this evidence, and even if for some reason it did, any error would have to be harmless. The jury received the special instruction, there is nothing to indicate it did not follow this instruction, and the heinous, atrocious or cruel aggravator is clearly applicable to this murder and entitled to great weight without consideration of the additional stab wounds.

As to the jury instructions, the record demonstrates that the trial court gave most of the defense's specially requested instructions, and it certainly was not error to not give the two at issue. The first requested instruction, that if two

aggravating factors are proven beyond a reasonable doubt but refer to the same aspect of the offense they should be considered as one aggravating circumstance, is confusing and not an entirely correct statement of the law, particularly based on the facts of the instant case. *Mendyk v. State,* 545 So.2d 846, 849 (Fla. 1989). Further, where evidence of an aggravating factor has been presented to a jury, an instruction on that factor is required. *Bowden v. State,* 16 F.L.W. 614 (Fla. September 12, 1991); *Stewart v. State,* 558 So.2d 416 (Fla. 1990). In the instant case, there was evidence that the murder was committed during the commission of a kidnapping (Preston's kidnapping conviction), and evidence that the murder was committed for pecuniary gain (the robbery). These are two different aspects of the offense, and must be given separate consideration. Further, without any explanation as to what "the same aspect of the offense" is, a jury, which is unfamiliar with precedent and limited to following the law it is instructed upon, would be confused by the proposed instruction so the trial court was correct in refusing to give it.

Preston's second proposed instruction as a whole would also likely confuse the jury rather than assist it. The jury was instructed that it was its "duty to determine whether mitigating circumstances exist and that the aggravating circumstances outweigh the mitigating circumstances", and further instructed to "weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations" (R 1099, 1104). The prosecutor argued that it was a weighing process (R 1056, 1057), as did defense counsel (R

1093-94). There was no need to instruct the jury that it was to make "a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present" where this was already encompassed in the instructions as given. See, *Mendyk, supra* at 850. The jury received adequate guidance and Preston has failed to demonstrate error.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm in all respects the order of the trial court sentencing Robert A. Preston to death for the murder of Earline Walker,

Respectfully submitted,

ROBERT A. BUTTERWORTH,
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by delivery to Michael S. Becker, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL 32114, this 18th day of December, 1991.

Kellie A. Nielan
Of Counsel