IN THE SUPREME COURT OF FLORIDA

ROBERT A. PRESTON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 78,025

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

In Preston v. State, 564 So.2d 120 (Fla. 1990), this Court vacated Appellant's death sentence and remanded to cause for a new sentencing proceeding. (R 1682-1692) Appellant filed four separate motions to declare the death penalty unconstitutional. (R 1718-1719, 1720-1721, 1728-1731, 1732-1736) Appellant also filed a motion to strike certain adjectives from the statutory mitigating circumstances. (R 1722-1725) A hearing on these pre-trial motions was conducted on January 7, 1991, before the Honorable s. Joseph Davis, Jr., Circuit Judge. (R 1587-1635) Following argument, the court denied all of these pre-trial motions. (R 1596, 1605, 1609, 1611, 1769, 1770, 1771, 1774) Appellant also filed a motion to declare Section 921.141(5)(h), Florida Statutes (1989) [HAC] unconstitutional,

but the trial court denied this motion. (R 1779, 1780)

Prior to the commencement of the re-sentencing proceeding, the parties filed several motions in limine. The defense filed a motion seeking to prevent any testimony or argument by the state concerning injuries which may have been inflicted upon the victim after her death. (R 1775-1776) The defense also requested that the state be prevented from arguing the aggravating factors that the murder was committed to avoid arrest and that the murder was committed for pecuniary gain on the grounds that these factors had specifically been found not to exist in the prior proceeding. (R 1782-1785) The trial court denied both of these motions. (R 4-5) The state filed its motion in limine seeking to prevent the defense from producing any evidence which it characterized as reflecting on "lingering doubt". (R 1761-1762) This motion was granted. (R 1792) However, the court did permit the defense to proffer the affidavits of the two witnesses whom it sought to present. (R 1792, 1041-1042)

The initial re-sentencing proceeding was conducted from January 28, 1991 through February 1, 1991. (R 1136-1528) However, pursuant to a defense motion for a new penalty phase, the trial court granted a new re-sentencing proceeding. (R 1810-1813, 1832-1834, 1841-1844)

A new re-sentencing proceeding was conducted on April 15 - 19, 1991 with the Honorable S. Joseph Davis. Jr., Circuit Judge, presiding. (R 1-1134) Prior to the commencement, both

the defense and the state renewed all their previous pre-trial motions and the court reaffirmed its rulings on each. (R 4-5) Defense counsel objected to the admission into evidence of pictures of the victim on the grounds that such pictures were not relevant to any aggravating circumstances. (R 870-873) Defense counsel also proffered into evidence affidavits of two witnesses who were prepared to testify that Appellant's brother, Scott Preston, had admitted to committing the murder. (R 1041-1042, 1985-1988, 1989-1996) Defense counsel submitted written requested jury instructions which were denied on the grounds that the standard jury instructions covered them. (R 1108-1109, 1740-1745, 1789)

Following deliberations, the jury returned an advisory verdict unanimously recommending that Appellant be sentenced to death. (R 1130, 1907) Appellant filed a timely notice for a new penalty phase. (R 1911-1912) This motion was denied. (R 1939) On April 29, 1991, Judge Davis heard arguments by both parties concerning the appropriate sentence to be imposed. (R 1636-1672) On May 8, 1991, Appellant appeared before Judge Davis for sentencing. (R 1673-1679) Judge Davis found that four aggravating circumstances had been established by the evidence and further considered one statutory and four non-statutory mitigating circumstances. (R 1675-1676) However, Judge Davis ruled that the aggravating circumstances outweighed the mitigating circumstances and therefore sentence Appellant to death. (R 1677, 1914, 1925)

Appellant filed a timely notice of appeal on May 31, 1991. (R 1962-1963) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R 1927)

STATEMENT OF THE FACTS

At approximately 2:30 a.m. on January 9, 1978, Earline Walker was working as a clerk in a Li'l Champ convenient store in Seminole County. (R 856) Later that morning, police officers stopped at the store and found that Ms. Walker and her car were missing. (R 857) A BOLO was issued for both Ms. Walker and her car, a blue Ford Pinto. (R 858) Ms. Walker's car was later found on Pine Street approximately one tenth of a mile off state Road 436. (R 858-589) Several hours later, the naked body of Ms. Walker was found in a field nearby. (R 855, 859, 841) An autopsy was performed on January 10, 1978. (R 842) There were two main stab wounds found: The first was a complete severance of the trachea including both carotid arteries and both jugular veins. (R 842) The second wound was a penetrating stab wound in the upper abdomen that perforated the liver and produced tremendous hemorrhaging into the abdomen. (R 843) There were also multiple stab wounds to the forehead, the base of the nose, each breast, the right flank, the belly, and to the vagina which perforated the urinary bladder. (R 843) The first wound was the one to the neck which was cut from behind. (R 847, 844) Upon the severing of the carotid arteries, Ms. Walker suffered an immediate loss of consciousness. (R 848) Ms. Walker was not aware of anything after she lapsed into unconsciousness. (R 850) The cause of death was massive external and internal injuries caused by the two main stab wounds. (R 843)

A palm print was found on the outside of Ms. Walker's

car which matched that of Appellant. **(R 868-869)** A latent print was also found on a cigarette package inside her car and this print also matched Appellant's. **(R 868-869)** Ms. Walker's clothing had no stab marks nor blood stains on them. **(R 875)** It was later determined that a sum of money, food stamps, and cigarettes were missing from the store. (R 876) The missing food stamps were located in Appellant's bedroom at his mother's house. (R **876)** Appellant was convicted of premeditated murder, two counts of felony murder, robbery, and kidnapping. **(R 887, 1980-1984)**

At the time of the offense, Appellant suffered from a substantial drug addiction. **(R 1046,** 1023, **1374, 963, 935, 941)** Four licensed psychologists and/or psychiatrists examined Appellant and came to the same conclusion. (R 922, 963, **1023, 1374)** Appellant's drug usage began at age 10 and progressed from marijuana to amphetamines to cocaine to LSD and finally to PCP. (R 1043-1044) PCP is a particularly dangerous drug because it is so unpredictable. **(R 925,** 964, **1027)** The results from PCP ingestion range from the heavily sedated to the highly agitated and aggressive and almost psychotic reaction. (R 925) Often a person is removed from reality and acts in a bizarre fashion when under the influence of PCP. (R **925, 964, 1029)** For nearly one and a half years immediately preceding the time of the offense, Appellant was heavily using PCP. (R **1024, 923)** Often Appellant would inject PCP two or three times a day. **(R 1044)** On the night of the offense, Appellant was definitely under the

influence of PCP. **(R 912)** Appellant asked his brother and a friend to help him tie off his arm so that he could inject PCP more readily. (R 908)

Donna Houghtaling, a friend of Appellant's, was at his house the evening of the offense. (R 904-905) She smoked marijuana and drank with Appellant until about 12:30 a.m. at which time she and Appellant's brother went into a bedroom and locked the **door.** (R 907) About one hour later, Appellant came to the door and asked his brother to hold his arm so he could raise a vein and thus inject drugs more readily. **(R** 908) Ms. Houghtaling fell asleep and awakened at 4:30 a.m. (R 909) Appellant was in the living room, talking very loudly. He was in a very excited state. (R 909-910) Appellant stated, **"I** did **it"** and was trying to count some money, but was having a difficult time. (R 909) Appellant counted for ten to fifteen minutes but kept coming up with different numbers. (R 910) Appellant could not control his hands. (R 910) In Ms. Houghtaling's opinion, Appellant was definitely under the influence of PCP at that time. (R 912, 915)

Dr. Cliff Levin testified that at the time the offense was committed, Appellant was suffering a mental disorder. **(R 933)** It was his opinion that Appellant had difficulty in conforming his behavior to the confines of law. (R 935) It was also his opinion that although the robbery and kidnapping are very directed and motivated acts, that this was consistent with the perception of the PCP user. (R **938)** The murder, however,

was a rage reaction, that is a reactive psychosis totally removed from reality. (R 938) Dr. Levin believed that at the time of the offense Appellant's judgment was impaired. (R **941)** His ability **to** reason and to process information was not functioning at a normal level. (R **941)** His ability **to** control behavior was significantly impaired. (R 942) Although Appellant was just over twenty years of age, Dr. Levin testified Appellant was **quite** immature for his age. **(R 942-943)** Although Appellant had above-average intelligence, he dropped out of school at age 16, never maintained employment on a steady basis, and still lived at home. (R **943)** This is very consistent with an immature drug-abusing adolescent. (R **943)** Dr. Levin believes that Appellant has very good rehabilitative qualities. (R **945)** His **good** prison record shows that Appellant has his impulses under control. **(R 945)** Appellant has tremendous insight into his drug addiction and his prognosis is very good. **(R** 949, **953)**

Dr. Rufus Vaughn testified that in his opinion at the time of the offense, Appellant's judgment was impaired and his ability to reason was also impaired. (R 956) Appellant could not appreciate the wrongfulness of his actions and was unable to control his behavior due to lack of reasoning ability. (R 966) Appellant's ability to conform his conduct to the requirements of law was significantly impaired. (R 968)

Dr. Gerald Mussenden testified that at the time of the offense, Appellant had little control over his behavior and was extremely disturbed. (R 1032-1033) Appellant's capacity to

appreciate the criminal nature of his actions, was definitely impaired. (R 1033) Appellant's ability to control his behavior was also impaired. (R 1034) Dr. Mussenden also believed that Appellant could function well in a structured setting such as prison. (R 1034) It was his opinion that Appellant's potential for rehabilitation was excellent. (R 1038)

Dr. Harry Krop testified that in his opinion, Appellant's judgment was significantly impaired at the time of the offense. (R 1379) Appellant's ability to reason was impaired and he had very poor impulse control. (R 1379) This made it very hard for Appellant to conform his conduct to that required by society. (R 1380) Dr. Krop believed that Appellant's prognosis for rehabilitation was very positive and that Appellant could function quite well in prison. (R 1383)

Ted Key, a correctional officer at Florida State Prison, testified that he has known Appellant for five to six years. (R 975, 978) During this time, Mr. Key chaired one disciplinary hearing concerning Appellant. (R 978) This involved a very minor offense wherein Appellant was charged with destruction of state property by ripping his state-issued pants. (R 979-980) Mr. Key testified that Appellant's prison record is exemplary. (R 980)

Appellant's mother and father both testified. (R 983, 1004) They testified that their marriage was not a good marriage, a result of Mr. Preston's inability to maintain employment and his drinking problem. (R 984, 1005) When

Appellant was eight years old, the Prestons split. (R 985, 1006) Mr. Preston was a very poor role model for his son. (R 1006) His children simply did not exist for him. (R 986) Appellant was a very good person growing up and very helpful to his mother. (R 988) When Appellant turned eighteen, Mrs. Preston started to develop a social life for herself. (R 988) Mrs. Preston started dating someone seriously in 1976 and often spent two to three nights a week away from the house. (R 989) She further testified that Appellant suffered a bicycle accident in 1972 after which she observed a personality change in Appellant. (R 990)

Appellant testified that he started using drugs at eleven years of age. (R 1043) He used all kinds of drugs and started injecting PCP at the age of fifteen. (R 1044) During the year and a half prior to the offense, Appellant used PCP daily, sometime two to three times per day. (R 1044) Appellant testified that his whole life revolved around drugs. (R 1046) Looking back, Appellant sees how stupid this was and the tragedy that it caused. (R 1046) Appellant realizes he will probably spend the rest of his life in prison, but hopes that he can take advantage of the programs and to somehow better himself. (R 1047)

SUMMARY OF ARGUMENTS

POINT I At the original sentencing proceeding in 1981, the trial court ruled as a matter of law that the aggravating circumstance of avoidance of lawful arrest was not present and that the aggravating circumstance of pecuniary gain merged with the aggravating circumstance of in the course of a felony. These rulings were not appealed by the state and were approved by this Court. Thus, the trial court erred in permitting the state to argue and in finding the presence of these two aggravating circumstances at the second penalty phase hearing. The findings are precluded by the doctrines of res judicata, law of the case, double jeopardy, and fundamental fairness.

POINT II The trial court erred in finding the existence of certain aggravating circumstances. The aggravating circumstance of avoidance of lawful arrest is simply not present in the instant case. The state presented no evidence other than mere conjecture that the motive of the killing was to eliminate a witness. This is insufficient as a matter of law. With regard to the aggravating circumstance of pecuniary gain, this circumstance either merged with the aggravating circumstance of in the course of a felony or was not present since the robbery was already complete. In either case, it was improper to find this as a separate aggravating circumstance. Finally, the aggravating circumstance of heinous, atrocious and cruel is not proved beyond a reasonable doubt. While this Court has

previously approved the finding Appellant presented much more evidence regarding his severe mental disturbance so as to lessen the finding of heinous, atrocious and cruel.

POINT III The trial court erred in admitting into evidence two photographs of the victim which graphically and gruesomely showed wounds which were inflicted after the victim was either dead or had lapsed into unconsciousness. Thus, these photographs had no relevance to any issue of fact before the jury.

POINT IV A trial court may not refuse a capital defendant the right to present any relevant evidence in mitigation. While this Court has ruled that theory of lingering doubt is not available in Florida, the evidence sought to be presented below was directly relevant to statutory mitigating circumstances and thus its exclusion was clear error.

POINT V The trial court erred in refusing to find the mental mitigating factors set forth in the statute. The evidence presented with regard to these factors was overwhelming and uncontradicted. It was also competent and substantial. The failure of the trial court to find these factors in mitigation renders the sentence unlawful.

POINT VI Under the totality of the circumstances, the imposition of the death penalty is proportionally unwarranted in this case. Despite the presence of one or possibly two aggravating circumstances, the overwhelming evidence in mitigation leads to the conclusion that the death penalty is

unwarranted.

POINT VII Florida's statutory aggravating circumstance of heinous, atrocious and cruel is unconstitutional. The Florida statute suffers from the same infirmities condemned by the United States Supreme Court in Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990).

POINT VIII The trial court committed reversible error by refusing to instruct the jury on correct statements of law as requested by defense counsel. These requested instructions were accurate statements of law and were particularly applicable to the facts of the instant case.

POINT I

THE JURY RECOMMENDATION AND DEATH SENTENCE ARE INVALID BECAUSE THEY ARE BASED ON IMPROPER STATUTORY AGGRAVATING CIRCUMSTANCES; CONSIDERATION OF THESE FACTORS IS BARRED BY THE DOCTRINES OF RES JUDICATA, LAW OF THE CASE, DOUBLE JEOPARDY AND FUNDAMENTAL FAIRNESS.

When this matter was first tried, the trial judge found that the state had proved the existence of four statutory aggravating factors, those being that Preston had previously been convicted of another capital offense or felony involving the use or threat of violence to another; the capital felony was committed while Preston was engaged in the commission of a robbery and a kidnapping; the capital felony was especially heinous, atrocious or cruel; and the capital felony was committed in a cold, calculated and premeditated manner without pretence of moral or legal justification. (SR 1-9) The existence of other specifically enumerated statutory aggravating factors was not proved.[1] (SR 1-9)

On direct appeal, this Court upheld the finding of three statutory aggravating factors; the state did not cross-appeal the trial court's express rejection of other statutory aggravating factors. See Pardo v. State, 563 So.2d 77 (Fla. 1990) (successful cross-appeal by state where trial court erroneously rejected statutory aggravating factor). Also, in

[1] With regard to the finding that the capital felony was committed for pecuniary gain, the trial court ruled that this factor would not be given separate consideration, as it merged with aggravating circumstance (d). (SR 3)

performing its independent review, this Court did not conclude that other statutory aggravating factors applied. See Echols v. State, 484 So.2d 568, 576-577 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986) (Florida Supreme Court sua sponte applies statutory aggravating factor erroneously overlooked by trial judge).

It is axiomatic that the failure of a party to timely contest legal rulings of a trial court results in a procedural bar to subsequent litigation through application of the doctrine of law of the case and/or res judicata, both of which apply with full force here. Greene v. Massey, 384 So.2d 24 (Fla. 1980). See Gaskins v. State, 502 So.2d 1344 (Fla. 2d DCA 1987) (law of the case doctrine precludes re-litigation of all issues necessarily ruled upon by the court, as well as all issues on which an appeal could have been taken.) See also Flinn v. Shields, 545 So.2d 452 (Fla. 3d DCA 1989); Dunham v. Brevard County School Board, 401 So.2d 888 (Fla. 5th DCA 1981).

Appellant's prior conviction for a felony involving violence was set aside in a post-conviction proceeding. When this Court determined that a new penalty phase must be conducted, it rejected the state's argument that a vacation of Appellant's prior violent felony conviction constituted harmless error as related to his death sentence:

> In asserting harmless error, the state points to a portion of Preston's trial record which suggests that the judge did not give great weight to the prior violent felony because of its nature. On the other hand, we note that the prosecutor emphasized the

> importance of the prior violent felony in his closing argument to the jury. In addition, only two of the four aggravating circumstances remain because this Court has previously eliminated the finding that the murder was committed in a cold, calculated, and premeditated manner. Further, there was mitigating evidence introduced at the trial, even though no statutory mitigating circumstances were found.

Preston v. State, 564 So.2d 120, 123 (Fla. 1990) (emphasis added)

The state did not suggest that other aggravating factors should come into play in the harmless error analysis or Appellant's re-sentencing. Thus, this Court's ruling that there are only two statutory aggravating factors pertinent to the re-sentencing is the law of the case. In that regard, the trial court exceeded its jurisdiction by deviating from the mandate expressed in Preston v. State, 564 So.2d 120 (Fla. 1990), which was to have the jury weigh the mitigating evidence against the two statutory aggravating factors that had been established and recommend an appropriate sanction. The proceedings exceeded the mandate, they were improper, and the result requires reversal pursuant to Milton v. Keith, 503 So.2d 1312 (Fla. 3d DCA 1987), Dow Corning Corp. v. Garner, 452 So.2d 1 (Fla. 4th DCA 1984), and Stuart v. Hertz Corp., 381 So.2d 1161 (Fla. 4th DCA 1980).

DOUBLE JEOPARDY

In Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), the defendants were convicted of capital murder. At sentencing, the state sought to prove two aggravating

factors: that the murder was done for pecuniary gain and that it was committed in an especially heinous, cruel, or depraved manner. The trial judge found that the first factor was not meant to apply to the type of murder before him but that the second factor was present, and sentenced both defendants to death. The Arizona Supreme Court reversed and held the defendants were entitled to a new trial. It also found there was insufficient evidence to support the finding of the second aggravating factor. On remand, the defendants were again convicted of capital murder. The state alleged the same aggravating factors and the trial judge sentenced both defendants to death after finding both factors present. The Arizona Supreme Court again struck down the finding of the second factor on the ground that the evidence was legally insufficient. It affirmed the death sentences based on the first factor. On certiorari from the Arizona Supreme Court, the United states Supreme Court held that the second imposition of the death penalty did not violate the double jeopardy clause.

The Court began its analysis with a review of two previous decisions. In Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) the Court held that a defendant who was sentenced to life in prison after his first trial and succeeded in having his conviction overturned on appeal could not be sentenced to death after being convicted at his second trial. In Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) the Court applied these principles to the Arizona

sentencing scheme. In Poland, the Court concluded that under the prior cases, the relevant inquiry is whether the sentencing judge or the reviewing court has decided that the prosecution has not proved its case and hence acquitted the defendant.

Applying these principles in Poland, the Court held that at no time had any court found that the prosecution failed to prove its case. While the Arizona Supreme Court did rule that the sole aggravating factor found by the trial court at the first sentencing was not supported by competent, substantial evidence, it also ruled that the trial judge had erred as a matter of law in ruling that the other aggravating factor was not meant to apply to the murder at hand. That court specifically ruled that on retrial, the trial court could properly find this aggravating circumstance to apply.

The Eleventh Circuit Court of Appeals has ruled that these principles apply where the state attempts to seek the death penalty on additional factors not **argued** at a previous sentencing hearing. Godfrey V. Kemp, **836** F.2d **1557** (11th Cir. **1988)** cert. dismissed Zant V. Godfrey, 487 U.S. **1264, 109 S.Ct 27,** 101 L.Ed.2d **977 (1988);** Young V. Kemp, 760 F.2d **1097** (11th **Cir. 1985)** cert denied, **476** U.S. 1123, **106 S.Ct. 1991, 90 L.Ed.2d 672 (1986).**

In the instant case, at the original sentencing, the trial court made the following findings:

> (e) Whether the murder of which the Defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

(§921.141(5) (e) F.S.)

FINDING:

Preston did not commit the murder ~~for the~~ purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

(f) Whether the murder of which the Defendant has been convicted was committed for pecuniary gain. (§921.141(5) (f) F.S.)

FINDING

Preston committed the murder during and/or after the completion of a robbery of the convenience store where the victim was the employee in charge, which robbery was for pecuniary gain; however, this circumstance is not considered as it has been given consideration under the aggravating circumstance (d) above.

(SR 2-3, emphasis added). On the original appeal, this Court left undisturbed these findings. Preston v. State, 444 So.2d 939 (Fla. 1984). Unlike the situation in Poland, the findings are in fact an acquittal barring the state from seeking their application upon re-sentencing. It is important to note, at re-sentencing the state offered no new evidence to support these aggravating circumstances. Therefore if the evidence was found insufficient before, it must once again be found insufficient.

CONSIDERATIONS OF FUNDAMENTAL FAIRNESS

Even if this Court declines to accept the foregoing reasoning, it is respectfully submitted that consideration of fundamental fairness and the need to avoid piecemeal litigation in capital cases require that the only aggravating factors that

can apply here are the statutory aggravating factors found in 1981, the ones approved on appeal and in post-conviction proceedings. As noted by the Supreme Court of New Jersey, even though the sentencer's initial rejection of statutory aggravating factors may not constitute an "acquittal" for double jeopardy purposes, it is none-the-less fundamentally unfair for the state to present evidence of new aggravating factors after a defendant succeeds on appeal. State v. Biesenwald, 110 N.J. 521, 542 A.2d 442 (N.J. 1988).

In Bieqenwald, the New Jersey Supreme Court, after noting the considerations set forth in Poland v. Arizona, 476 U.S. 147 (1986), Arizona v. Rumsey, 467 U.S. 203 (1984) and Bullinston v. Missouri, 451 U.S. 430 (1981), expressly ruled that, double jeopardy considerations aside, fundamental fairness requires that the state, with all its resources, prove all of the statutory aggravating factors of which it has evidence when the matter is first tried. The state will be allowed to prove new aggravating factors "only when it proves to the court that it has discovered new evidence sufficient to establish at re-sentencing a new aggravating factor and that such evidence was unavailable and undiscoverable at trial despite the state's diligent efforts." Biesenwald, 542 A.2d at 452.

Recently, that court again addressed the propriety of permitting re-litigation of aggravating factors that were not initially provided by the state at a defendant's first trial:

> The state is not seeking here to submit new evidence of a new aggravating factor, but

> rather is relying on old evidence to satisfy a new aggravating factor. Fundamental fairness concerns do not dissipate in that situation. If the state knew the facts and failed to allege an aggravating factor on the basis of those facts at the first trial, it should not thereafter be able to submit that factor to the jury on retrial.

State v. Cote, 119 N.J. 194, 574 A.2d 957, 973-974 (N.J. 1990).

The rationale behind this is simple: 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. This requirement avoids piecemeal litigation and the unnecessary expenditure of judicial time, labor and resources. Such considerations already play a significant role in Florida's guideline sentence. See Pope v. State, 561 So.2d 554 (Fla. 1990); State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), and Shull v. Dugger, 515 So.2d 778 (Fla. 1981). They should likewise control in capital sentencing proceedings.

It is respectfully submitted that this Court should, under Article 1, Section 9 and 16 of the Florida Constitution, expressly hold that as a matter of fundamental fairness and due process, the state cannot now re-litigate whether statutory aggravating factors exist after those factors have been rejected by the sentencer when a death sentence is initially imposed and when that ruling was uncontested by the state and approved, either expressly or implicitly, by this Court on direct appeal.

See Walls v. State, 580 So.2d 131, 133 (Fla. 1991).

If this Court finds that the death penalty may be proportionately applied as discussed in Point IV, infra, the instant sentence of death must be vacated and the matter remanded for a new penalty phase to that the jury may determine whether the two statutory aggravating factors outweigh the mitigation. Such relief is appropriate because fundamental fairness requires it, because the trial judge exceeded the mandate of this Court in Preston v. State 564 So.2d 120 (Fla. 1990), and because the court otherwise violated principles of law of the case, res judicata, and double jeopardy.

Appellant respectfully submits, however, that based on the argument set forth in Point IV, imposition of a death sentence is disproportionate in light of the mitigation that was found by the trial court and that otherwise exists without contradiction. Accordingly, the death sentence should be vacated and the matter remanded with directions that a life sentence be imposed.

POINT II

IN VIOLATION TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN FINDING THE EXISTENCE OF CERTAIN AGGRAVATING CIRCUMSTANCES.

A. INTRODUCTION

Following presentation of evidence at the penalty phase, the jury returned an advisory recommendation that the death penalty be imposed. Judge Davis sentenced Appellant to death and in support of this sentence filed written findings of fact. (R 1914-1925) In imposing the death sentence, Judge Davis found four aggravating circumstances: (1) that the capital felony was committed while the defendant was engaged in the commission of a robbery and/or kidnapping; (2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest: (3) that the capital felony was committed for pecuniary gain; and (4) that the capital felony was especially heinous, atrocious and cruel. Appellant concedes the aggravating circumstance that the murder was committed during the course of a robbery and/or kidnapping. Appellant contends that the remaining aggravating circumstances are not supported by competent substantial evidence.

B. THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR (5)(e) THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

As with all aggravating circumstances, this one must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Clark v. State, 443 So.2d 973 (Fla. 1983). This aggravating circumstance is typically found where the evidence clearly demonstrates that the defendant killed a police officer who was attempting to apprehend him. Mikenas v. State, 367 So.2d 606 (Fla. 1978); Ford v. State, 374 So.2d 496 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, this circumstance is not limited to those situations and has been found to exist where civilians were killed. Riley v. State, 366 So.2d 19 (Fla. 1978). In order for a witness elimination motive to support finding the avoidance of arrest circumstance when the victim is not a law enforcement officer, "[p]roof of the requisite intent to avoid arrest and detection must be very strong." Id. at 22. "We have also said that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer unless it is clearly shown that the dominant or only motive for murder was the elimination of witness." Clark, supra at 977. (emphasis added) The fact that a murder victim knew his assailant and would report the crime does not prove this circumstance beyond a reasonable doubt where the victim is not a law enforcement officer. Doyle v. State, 460 So.2d 353 (Fla. 1984)

In numerous cases where this Court has upheld the finding of this aggravating circumstance, the evidence showed that the defendant told someone that the reason for the killing was to eliminate a witness. Lopez v. State, 536 So.2d 226 (Fla.

1988); Remeta v. State, 522 So.2d 825 (Fla. 1988); Wright v. State, 473 So.2d 1277 (Fla. 1985); Maqueira v. State, 16 FLW S599 (Fla. August 29, 1991). However, even in situations such as these, this Court has refused to find the application of this aggravating circumstance. See Dufour v. State, 495 So.2d 154 (Fla. 1986) wherein a witness testified that the defendant told him "anybody hears my voice or sees my face has got to die." In Demss v. State, 395 So.2d 501 (Fla. 1981) this Court held that the evidence that the defendant helped hold the victim while another prison inmate stabbed him in order to eliminate a snitch was insufficient to establish this aggravating circumstance beyond a reasonable doubt. Similarly, in Garron v. State, 528 So.2d 353 (Fla. 1988) this Court reversed the finding even though the evidence showed the defendant shot the victim while she was talking on the telephone with the operator asking for the police. In so ruling, this Court noted that there was no proof as to the motive for the killing.

In the instant case, there was no evidence presented by the state other than its mere argument that this aggravating circumstance applies. On the contrary, there was evidence from the mental health experts who testified that the actions of Appellant were consistent with someone who was high on PCP. (R 938) The evidence is woefully insufficient to support this aggravating circumstance and consequently it must be stricken.

C. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN WHERE SUCH FACTOR CONSTITUTED IMPERMISSIBLE DOUBLING.

In the instant case, the trial court found as separate aggravating circumstances the fact that the murder was committed in the course of a felony, to-wit: robbery and kidnapping and that the murder was committed for pecuniary gain. (R 1915-1916) Appellant submits that the trial court erred in finding both of these aggravating circumstances present.

The controlling legal analysis in this regard is set forth by this Court in Provence v. State, 337 So.2d 783 (Fla. 1976):

> The state argues the existence of two aggravating circumstances, that the murder occurred in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to analytical concepts and can be validly considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a summing of aggravating and mitigating circumstances [citation omitted], we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

Id. at 786. While the trial court attempted to separate the

kidnapping from the robbery, this distinction is artificial. At the time the murder was committed, the robbery was still in progress. Section 812.13(3)(a), Florida Statutes (1989) provides that:

> An act shall be deemed "in the course of committed the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

While technically, Appellant also committed a kidnapping, this kidnapping was actually part of the robbery. If the robbery was deemed to have been completed, then the finding that the murder was committed for pecuniary gain cannot be upheld. If the murder was committed in the flight after the commission of the robbery, then it is improper to count both aggravating circumstances as separate. In either case, these two aggravating circumstances merge and should be counted as a single aggravating circumstance. It must also be noted that in the original sentencing order in 1981, the same trial court on the same evidence found that these two aggravating circumstances merged and could be counted only as a single aggravating circumstance. The state never appealed this finding, although it had the opportunity to do so. This Court should rule that the state is procedurally barred from now arguing the application of separate aggravating circumstances.

D. THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

In finding that this aggravating circumstance applied, the trial court understandably cited to this Court's prior decision approving the finding that the instant murder was

heinous, atrocious and cruel. Preston v. State, 444 So.2d 939 (Fla. 1984). However, at this re-sentencing proceeding, the defense presented significantly more evidence showing that Appellant at the time of the offense, was suffering from drug addiction and was intoxicated on PCP.

Initially, it must be noted that the jury was told that the victim was kidnapped, taken to a field, forced to disrobe, and then killed. The medical evidence showed that the initially wound was made to the victim's throat from behind. The victim immediately lapsed into unconsciousness. The remaining wounds were all inflicted after the victim had either died or at the very least lapsed into unconsciousness. On these facts, there was no basis for the jury to conclude that the instant offense met the test for this aggravating circumstance. It is clear that the fact that wounds were inflicted after death, cannot be considered in determining whether the actual killing was heinous, atrocious and cruel. Halliwell v. State, 323 So.2d 557 (Fla. 1975); Jackson v. State, 451 So.2d 458 (Fla. 1984).

Very recently in Robinson v. State, 574 So.2d 108 (Fla. 1991) this Court disapproved a finding of heinous, atrocious and cruel. In Robinson, the defendant and an accomplice kidnapped the victim, ordered her into the car at gunpoint and handcuffed her. They then took the victim to a cemetery where they sexually assaulted her. Robinson then walked up to the victim, put a gun to her cheek and shot her. This Court in holding that the crime was not heinous, atrocious and cruel noted that the fatal shot to

the victim was not accompanied by additional acts setting it apart from the norm of capital felonies, and there was no evidence that it was committed to cause the victim unnecessary and prolonged suffering. Obviously this Court did not consider the fact that the victim had been abducted at gun-point, handcuffed, taken to a remote area and raped prior to the fatal shot as being additional acts so as to make the actual shooting heinous, atrocious and cruel. In the instant case, the evidence shows that the victim was robbed, abducted and driven to a field two miles away, where she was forced to disrobe. The evidence also shows that the victim was approached from the rear and had her throat slashed which caused her to immediately lapse into unconsciousness and die.

Additionally, this Court has ruled that there is a causal relationship between the mitigating and aggravating circumstances. See Huckaby v. State, 343 So.2d 29 (Fla. 1977); Miller v. State, 373 So.2d 882 (Fla. 1979). Therefore, where the heinous nature of an offense results from a defendant's mental disturbance, the application of HAC is lessened. This is the situation in the instant case. The uncontroverted testimony is that Appellant's drug addiction created the uncontrollable rage in which the murder was committed. (R 939) Thus, this circumstance should not apply.

POINT III

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT ADMITTED PHOTOGRAPHS OF THE VICTIM INTO EVIDENCE OVER OBJECTION WHERE SUCH PHOTOGRAPHS HAD NO RELEVANCE TO ANY ISSUE.

During the sentencing proceeding, the state sought to admit into evidence two photographs of the victim. Defense counsel objected on the grounds that these photographs were not relevant in that the injuries depicted by the photographs were committed after the victim was either dead or rendered unconscious. (R 870-872) The court overruled this objection and admitted the pictures.

Photographs should be received in evidence with great caution. Thomas v. State, 59 So.2d 517 (Fla. 1952). The test for admissibility of photographs is relevancy. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). A photograph is admissible if it properly depicts factual conditions relating to the crime and if it is relevant in that it aids the court and jury in finding the truth. Booker v. State, 397 So.2d 910 (Fla. 1981). Even if photographs are relevant, courts should still be cautious in admitting them if the prejudicial effect is so great that the jury becomes inflamed. Alford v. State, 307 So.2d 433 (Fla. 1975) cert. denied 427 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). In Adams v. State, 412 So.2d 850 (Fla. 1982), this Court noted with approval the trial judge's reasoned judgment in

prohibiting the introduction of "duplicitous photographs."

Applying the foregoing principles to the instant case, it is clear that the trial court erred in admitting the photographs in question into evidence. The photographs showed the body of the victim. These photographs reveal numerous wounds to the body of the victim, including severe injuries to the breasts and vagina of the victim. However, the testimony of the medical examiner revealed that these wounds were inflicted either after the victim died or at the very least after she was rendered unconscious. It was the medical examiner's testimony that the initial wound (and the fatal wound) was the one to the victim's throat. This was administered from the rear in a single cutting action. Because of the severity of the cutting, the victim was immediately rendered unconscious and survived for a very short period of time. The remainder of the injuries so graphically portrayed in the photographs were inflicted post mortem. These wounds are totally irrelevant to any aggravating circumstance. The only conceivable circumstance to which they would apply would be whether the crime was heinous, atrocious and cruel. In this regard, this Court has clearly stated that such post mortem wounds are not relevant to show this circumstance. Jackson v. State, 451 So.2d 458 (Fla. 1984). No other relevance is apparent. Identity was not an issue since this was solely a re-sentencing proceeding. Guilt had already been established. The photographs are undoubtedly graphic and gruesome. The admission was clear error which cannot be deemed harmless in light of the

obvious importance and weight given to the aggravating circumstance of heinous, atrocious and cruel. Appellant is entitled to a new sentencing proceeding.

POINT IV

IN VIOLATION OF THE FIFTH, SIXTH EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO PRESENT EVIDENCE IN MITIGATION WHERE SUCH EVIDENCE WAS DIRECTLY RELEVANT TO STATUTORY MITIGATING CIRCUMSTANCES.

Pursuant to the state's motion in limine, the trial court ruled that the defense would not be able to present any testimony regarding the fact that another **person** may have committed the crime in which Appellant was convicted. **(R 1761-1762, 1792)** Pursuant **to** this ruling, defense counsel, with the agreement of the state, filed with the court affidavits from two witnesses, Steve Hagman and John Yazell in which they recounted conversations they had with Appellant's brother, Scott Preston, to the effect that he, not Appellant, committed the murder. **(R 1041-1042, 1985-1988, 1989-1996)** Appellant maintains that this exclusion of valid mitigating evidence constitutes reversible error.

In every criminal case, the constitution guarantees the right of the accused to have witnesses testify in his favor. Washington V. Texas, 388 **U.S.** 14, **87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967):**

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as

> the prosecution's to the jury so it may decide where the truth lies.

388 U.S. at 19. In capital prosecutions, this rule is reinforced by the principles of mercy found in the Eighth Amendment. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) the court held:

> ... We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604. The United states Supreme Court has made it clear that the sentencer "may not refuse to consider ... any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The Court has consistently reinforced this holding. See Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); McKoy v. North Carolina, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 369 (1990).

This Court has held that "[T]he only limitation on introducing mitigating evidence is that it be relevant to the case at hand ... ." King v. State, 514 So.2d 354, 358 (Fla. 1987) (emphasis added) See also O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989) and Harvard v. State, 486 So.2d 537 (Fla. 1986)

The evidence excluded by the trial court included the testimony of two witnesses who were prepared to testify that Appellant's bother, Scott Preston had admitted to them that he and not Appellant actually killed Earline Walker. The witnesses were prepared to testify as to the details of such admissions by Scott Preston and his admission that he would eventually provide evidence which would clear his brother. The trial court, at the state's request, ruled that such testimony was inadmissible as constituting "lingering doubt." Appellant recognizes that this Court has ruled the theory of lingering doubt is inadmissible in Florida. King v. State, 514 So.2d 354 (Fla. 1987) However, the evidence sought to be presented by the defense below, was not for the purpose of creating lingering doubt, but rather was directly relevant to statutory mitigating circumstances. Section 921.141(6), Florida Statutes (1989) sets forth statutory mitigating circumstances which must be considered by both the jury and the sentencing court. Two of these statutory circumstances are as follows:

> (d) The defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor.
>
> (e) The defendant acted under extreme duress or under the substantial domination of another.

Appellant submits that the excluded testimony was directly relevant to each of these statutory mitigating factors. Appellant would still be guilty of the offenses even if committed by his brother, if in fact he took part in the offenses. Thus,

defense counsel was not attempting to use these affidavits as proof that Appellant was not guilty of the crimes for which he was convicted. Rather, defense counsel only sought to present this testimony as it had bearing on valid statutory mitigating circumstances. The refusal of the trial judge to permit defense counsel to present this testimony constitutes reversible error.

POINT V

THE TRIAL COURT ERRED IN REJECTING STATUTORY MITIGATING FACTORS THAT WERE ESTABLISHED WITHOUT CONTRADICTION AT THE PENALTY PHASE.

The sentencing order of the trial court is attached to this brief as Appendix. Defense counsel advanced three statutory mitigating circumstances, those being: the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance; Appellant's capacity to appreciate the criminality of his conduct or to conform hi5 conduct to the requirements of the law was substantially impaired; and, Appellant's age at the time of the crime. Sections 921.141(b) (f)(g), Florida Statutes (1989). The trial court rejected the first two factors and although he found that Appellant's age at the time of the crime was established as a mitigating factor, he accorded it little weight. (R 1917-1920, 1922-1923) It is respectfully submitted that the trial judge did not apply correct legal standard and otherwise erred by rejecting the statutory mitigating factors. Because they are interrelated, Sections 921.141(6)(b) and (f), Florida Statutes (1989) will be discussed together. See Burch v. State, 343 So.2d 831 (Fla. 1977) and Miller v. State, 373 So.2d 882 (Fla. 1979).

The trial court rejected the application of the statutory mitigating factors with the following findings:

1) Whether the murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

Section 921.141(6)(b), Florida Statutes

FINDING

Preston argues that this factor is established because he contends that he was under the influence of several drugs, including PCP, at the time of the murder, and used drugs regularly prior to the day of the murder. The evidence does reveal that he used drugs regularly, including PCP. Before the Defendant left his home on the night he committed the crimes of robbery, kidnapping and murder, he smoked marijuana and drank alcoholic beverages with his brother Scott Preston and Donna Maxwell Hotaling. However, although Preston asked his brother Scott to assist him in ingesting PCP, this request was refused. There is no evidence in the record that anyone saw Preston ingest PCP the night of the murder. When he returned the next morning, he appeared to be high on PCP, and **expert** witnesses also opined that **some** of his behavior was consistent with PCP ingestion. The only direct evidence that Preston had taken PCP that night, however, was Defendant's own testimony.

Preston's actions the night of the murder also indicate that he was capable of planning and of deliberate thought. He told his brother and Ms. Hotaling that he wanted to commit a robbery to obtain money, and tried to enlist the cooperation of Scott Preston. He robbed the store. He took money and food stamps. He did not kill Ms. Walker at the store, but rather forced her to drive him to another location in her own car. He caused her to drive to a location which was somewhat remote. Once there, he forced her to walk some distance from her car. He required her to disrobe first. Then he inflicted a wound which was certain to be fatal.

The Court therefore concludes that though the evidence does reveal that the Defendant was under the influence of some drugs the night of the murder, he was not intoxicated to the point of extreme mental or emotional disturbance sufficient to establish a legal basis for this statutory mitigating

> circumstance. In fact, although Preston has not argued that this drug use should be considered as a nonstatutory mitigating circumstance, the Court finds that his drug and alcohol use does not even rise to the level of a nonstatutory mitigating circumstance.
>
> 2) Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Section **921.141(6)(f),** Florida Statutes.
>
> FINDING
>
> The Court's analysis regarding the previous mitigating factor is appropriate here. Of particular note is the fact that he took steps to avoid detection, such as committing the murder away from the store, and walking the victim a good distance away from her car before killing her. This evidence indicates that his capacity to appreciate the criminality of his conduct was not substantially impaired. The Court further finds that he was capable of conforming his conduct to the requirements of law. (R 1917-**1920)**

The trial court's findings cannot be sustained. Substantial competent evidence exists to establish a legal basis for the statutory mitigating factors. Four mental health experts testified at the sentence hearing and all were in agreement that the mental mitigating factors were certainly present in the instant case.

Dr. Cliff Levin testified as an expert in psychology and substance abuse addiction. (R **921)** His diagnosis **was** that Appellant suffered from poly-substance dependence, PCP dependence, antisocial personality traits combined with drug

dependency. (R 922) Dr. Levin testified that in his opinion, Appellant indeed had difficulty in conforming his behavior to the confines of law and that he certainly was suffering from a mental disturbance. **(R 935-936)** In his opinion the injuries suffered by Earline Walker were consistent with having been inflicted by someone who was intoxicated on PCP and under a rage reaction. (R 939) Dr. Levin further testified that at the time of the murder Appellant's judgment was impaired and his ability to reason and process information was not functioning at a normal level. (R 941) Appellant's ability to control his behavior was significantly impaired. (R 942)

Dr. Rufus Vaughn testified as an expert in psychiatry and concluded that at the time of the offense, Appellant was suffering from an acute emotional or mental disturbance due to his use of drugs, particularly marijuana and PCP. (R 963) In his opinion, Appellant's judgment was definitely impaired and his ability was also impaired. (R 966) Dr. Vaughn concluded that Appellant could not appreciate the wrongfulness of his actions and was unable to control his behavior due to his lack of reasoning ability. (R 966) Appellant's ability to conform his conduct to the requirements of law was significantly impaired. **(R 968)**

Dr. Harry Krop testified as an expert in psychology and also concluded that Appellant suffered from poly-substance abuse which was beyond mere dependency. (R 1374) Dr. Krop concluded that Appellant's judgment was significantly impaired and that his

ability to reason was also impaired. **(R 1379)** Dr. Krop **was** of the opinion that Appellant could not appreciate the criminality of his actions and was unable to conform his conduct to that required by society. (R **1380)**

Finally, Dr. Gerald Mussenden testified as an expert in psychology and gave his diagnosis that Appellant was a poly-substance abuser and very drug dependent. **(R 1023)** Dr. Mussenden concluded that at the time of the offense, Appellant was under the influence of PCP and had little control over his behavior. (R 1032) Appellant was extremely disturbed and his capacity to appreciate the criminality of his actions was significantly impaired. (R **1032)** Dr. Mussenden also concluded that Appellant's ability to control his behavior was impaired due to his drug addiction. (R 1034)

Donna Houghtaling personally observed Appellant both before and after the offense occurred. She was quite familiar with drug usage, having been a former drug user and abuser herself. It was her opinion that Appellant was definitely under the influence of PCP on the evening of the offense. **(R 912, 915)**

The foregoing evidence was completely uncontroverted. A mitigating circumstance must be reasonably established by the greater weight of the evidence. Campbell v. State, **571 So.2d 415 (Fla. 1990).** Where uncontroverted evidence of a mitigating circumstance has been **presented,** a reasonable quantum of competent proof is required before the circumstance can be said to have been established. Nibert v. State, **574 So.2d 1059** (Fla.

1990) Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. While the trial court may reject the defendant's claim that a mitigating circumstance has been proved, the record must contain "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Id. at 1062 [quoting Kight v. State, 512 So.2d 922, 933 (Fla. 1987)]. This Court has previously held that it is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law. Pardo v. State, 563 So.2d 77 (Fla. 1990)

Appellant presented a large quantum of uncontroverted mitigating evidence regarding the two mental mitigating factors. If this Court approves the trial court's finding with regard to these mental mitigating factors, it is questionable whether the factors could ever be proven as mitigating circumstances. The trial court was bound to accept the uncontroverted competent and substantial evidence. Having failed to do so, this Court must remand for a new sentencing proceeding. Alternatively, this Court should itself conduct a review of the evidence and conclude that these mental mitigating factors were in fact established and were entitled to great weight. See generally Nibert, supra.

POINT VI

IN VIOLATION OF THE EIGHTH **AND** FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF **THE** FLORIDA CONSTITUTION. **THE** IMPOSITION OF **THE DEATH** PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

Under the totality of the circumstances in this case, imposition of the death penalty is proportionally unwarranted. There exists one valid aggravating circumstance, the fact that the crime was committed in the course of a felony and for pecuniary gain. (two circumstances merged as one) Even if this Court approves the application of the heinous, atrocious and cruel aggravating circumstance, there only exists two valid aggravating circumstances. There also exists valid mitigating circumstances, the proof of which is uncontroverted. This Court has noted that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious **crimes."** State v. Dixon, 283 So.2d 1,7 (Fla. 1973); Holsworth v. State, 522 So.2d **348** (Fla. **1988).** A comparison **of** the instant case to other cases decided by this Court leads to the conclusion that the death penalty is not proportionally warranted in this case. Blakelv v. State, 561 So.2d 560 (Fla. **1990)** (death sentence was disproportionate despite finding two aggravating circumstances: heinous, atrocious and cruel and cold, calculated and

premeditated); Livingston v. State, 565 So.2d 1288 (Fla. 1988) (death penalty disproportionate despite finding two aggravating circumstances: previous conviction of a violent felony and commission of the murder during an armed robbery); Farinas v. State, 569 So.2d 425 (Fla. 1990) (death sentence not proportionate where defendant convicted of first degree murder of girlfriend even though trial court properly found two aggravating circumstances: capital felony was committed while defendant was engaged in the commission of a kidnapping and capital felony was especially heinous, atrocious and cruel): Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) (death penalty not proportionate despite finding of five aggravating circumstances and three mitigating circumstances; Wilson v. State, 493 So.2d 1019 (Fla. 1986) (death sentence not proportionately warranted despite trial court's proper finding of two aggravating circumstances and no mitigating circumstances); and Rembert v. State, 445 So.2d 337 (Fla. 1984) (death penalty was disproportional punishment for murder committed in course of a robbery where court found no mitigating circumstances).

The death sentence must be vacated in the instant case and the cause remanded with instructions to impose a life sentence.

POINT VII

THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16 AND 17 OF THE FLORIDA CONSTITUTION.

In Smalley v. State, 546 So.2d 720 (Fla.1989), this Court rejected a claim that Florida's especially heinous, atrocious or cruel statutory aggravating factor ("HAC" factor) is unconstitutionally vague under the Eighth and Fourteenth Amendments because application of that factor by the juries and trial courts is subsequently reviewed and limited on appeal:

> It was because of [the State v. Dixon] narrowing construction that the Supreme Court of the United states upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evident from Maynard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwrisht. 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d 720, 722 (Fla.1989).

Even more recently, however, the United States Supreme Court decided Shell v. Mississippi, 498 U.S. __, 111 S.Ct. __, 112 L.Ed. 2d 1 (1990) and re-affirmed the holding in Maynard v.

Cartwright, 486 U.S. 356, 108 S.Ct 1853, 100 L.Ed.2d 372 (1988). The concurring opinion explained why the limiting constructions being utilized by the various states are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 U.S. __, __, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwrisht, supra, at 363, 100 L.Ed.2d 372, 1108 S.Ct. 1853 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980)(plurality opinion))(emphasis added).

Shell v. Mississippi, 112 L.Ed.2d at 5. Significantly, the terms of the "limiting construction" condemned by the United states Supreme Court in Shell as being too vague are the precise ones used by this Court to review the HAC statutory aggravating factor.

It is respectfully submitted that the limiting construction used by this Court as to this statutory aggravating factor is too indefinite to comport with constitutional

requirements. The definitions of the terms of the HAC aggravating factor do not provide any guidance to the jury when the factor is first weighed in issuing a sentencing recommendation, by the sentencer when the factor is next weighed in conjunction with the recommendation when the sentence is imposed, and finally by this Court when the factor is reviewed and the limiting construction is applied. The inconsistent approval of that factor by this Court under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application.

For instance, recently in Hitchcock v. State, 578 So.2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's." Hitchcock, at 692. Compare this statement to the analysis contained in Mills v. State, 476 So.2d 172, 178 (Fla. 1985):

> In making an analysis of whether the homicide was especially heinous, atrocious and cruel, we must of necessity look to the act itself that brought about the death. It is part of the analysis mandated by section 921.141(1), Florida Statutes which provides for a separate proceeding on the issue of the penalty to be enforced and "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." In this case the death instrumentality was a .410 shotgun fired at close range. Whether death is immediate or whether the victim lingers and suffers is pure fortuity. **The intent and method employed by the wronsdoers is what needs to be examined.** The same factual situation

> was presented in Teffeteller v. State, 439 So.2d 840 where this Court set aside the trial court's finding that the murder was heinous, atrocious and cruel.

Mills, 476 So.2d at 178 (emphasis added).

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393, 402 (1977). "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235, 251 (1983). It is an arbitrary distinction to say that one murder is especially heinous because, for a matter of minutes while being driven approximately two to three miles, a victim perceived that death may be imminent, yet say that another murder was not heinous because, for hours after the fatal wound was inflicted, a victim suffered and waited impending death.

Because the HAC statutory aggravating factor is itself vague, and because the limiting construction used by this Court both facially and as applied is too vague and indefinite to comport with the Eighth and Fourteenth Amendments as set forth in Maynard v. Cartwright, supra, Godfrev v. Georgia, 446 U.S. 420, 100 S.Ct 1759, 64 L.Ed.2d 398 (1980), and Shell v. Mississippi, supra, the instant death sentence imposed in reliance on the HAC statutory factor must be vacated and the matter remanded for a

new penalty phase before a new jury.

POINT VIII

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS BECAUSE OF THE ADMISSION OF IRRELEVANT EVIDENCE DURING THE PENALTY PHASE AND A REFUSAL OF THE TRIAL COURT TO GIVE PROPER REQUESTED JURY INSTRUCTIONS.

During the penalty phase Dr. Garay, a pathologist, testified with regard to his findings during the autopsy he conducted on the victim. (R 840-842) Defense counsel objected to his testimony regarding any injuries inflicted after the victim lost consciousness on the grounds that these were not relevant to any aggravating circumstance. (R 842) The trial court overruled this objection and Dr. Garay testified extensively with regard to the wounds. Dr. Garay testified that the initial wound was the one to the victim's neck and that in his opinion, the victim suffered immediate loss of consciousness and virtually immediate death because of this wound. (R 848-850) The victim was certainly not aware of anything after she lapsed into unconsciousness. (R 850) Over objection, Dr. Garay then testified with regard to the other wounds suffered by the victim including a penetrating stab wound to the upper abdomen that perforated liver, multiple stab wounds to the forehead and at the base of the nose, penetrating stab wounds to each breast, a stab wound to the right flank, a stab wound to the belly, and a stab wound to the vagina which perforated the urinary bladder. (R

843) The state also was permitted to introduce photographs of the victim over objection. (R 870-872)

This Court has held that in the penalty phase of a capital trial, the state is limited to presenting evidence which proves only the enumerated aggravating factors or rebuts mitigating factors argued by the defense. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986); Trawick v. State, 473 So.2d 1235 (Fla. 1985); Dougan v. State, 470 So.2d 697 (Fla. 1985). In the instant case, the state sought to present evidence regarding four aggravating circumstances. The only aggravating circumstance that this objected-to evidence could arguably have any relevance was to whether the crime was especially heinous, atrocious and cruel. It is clear that the evidence is not relevant to proving this aggravating circumstance. Wounds inflicted after death or after the victim lapses into unconsciousness, cannot be considered in determining whether the actual killing was heinous, atrocious and cruel. Halliwell v. State, 323 So.2d 557 (Fla. 1975); Jackson v. State, 451 So.2d 458 (Fla. 1984). The testimony regarding the wounds inflicted after death or after unconsciousness was quite graphic. This testimony was highlighted by the erroneous admission into evidence of photographs of the victim. Given the importance of the finding that the offense was especially heinous, atrocious and cruel, the error complained of cannot be deemed harmless. As this Court stated in Dougan, supra at 701:

> We cannot tell how this improper evidence and argument may have affected the jury. We

> **therefore** vacate Dougan's sentence **and remand** for another complete sentencing hearing for **before** a new jury.

This Court must reach the same conclusion in the instant case and **remand** this cause for a new sentencing hearing before a new jury.

Defense counsel requested numerous special jury instructions, two of which were denied. Appellant contends that the trial court erred in refusing to give the requested instructions. Defense counsel submitted written jury instructions which contained the following two instructions:

> Two aggravating circumstances may not refer to the same aspect of the offense. If you find that two aggravating circumstances are proven beyond a reasonable doubt, but that they refer to the same aspect of the offense, then you should consider them as only one aggravating circumstance.
>
> * * *
>
> It must be emphasized that the procedure to be followed by the jury is not a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances, but rather 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.

(R 1741) These requested instructions are accurate statements of the law. Provence v. State, **337** So.2d **783** (Fla. **1976)** and White v. State, **403** So.2d 331 (Fla. 1981). They were particularly applicable in the instant case especially considering the previous findings of fact by the trial court. **In** the original findings of fact rendered in 1981, the trial court found that the aggravating circumstances in the course of a felony and for

pecuniary gain were merged into one aggravating circumstance. This finding was never appealed by the state and apparently approved by this Court in its original opinion affirming Appellant's death sentence. Despite presenting no further evidence beyond what was presented at the original trial, the state successfully sought an instruction on each of the aggravating circumstances individually. Moreover, the trial judge found both aggravating circumstances to exist this time and counted them as two aggravating circumstances. By refusing to give the requested jury instructions, the trial court in essence deprived defense counsel of making a proper argument to the jury that these two aggravating circumstances should be counted only once. The second requested jury instruction also correctly states the law. It was especially relevant in the instant case because of the four individual aggravating circumstances which the jury was instructed upon as opposed to the three statutory mitigating circumstances plus the catch-all mitigator. It was critical that the jury be told that it was not a mere counting process, but in fact the jury had to engage in reasoned weighing of the relative strengths of the aggravating circumstances versus the mitigating circumstances.

The need for adequate instructions to be given to a jury to guide its recommendation in capital cases was expressly noted by the Court in Gregg v. Georgia, 428 U.S. 153, 192, 193, 96 S.Ct. 2909, 49 L.Ed.2d 859, 885-886 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel

> proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a law suit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law [citations omitted]. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

The information received by Appellant's jury in the form of instructions on the law to be followed in making a penalty recommendation was inadequate to avoid the same infirmities in this death sentence that inhered in death sentences imposed under the pre-Furman statute. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Appellant's death sentence rests in part on the jury's recommendation to the trial judge that the death penalty be imposed. Leduc v. State, 365 So.2d 149 (Fla. 1978). A new sentencing proceeding is required.

CONCLUSION

Based on the foregoing cases, argument and authorities, Appellant respectfully requests this Honorable Court to vacate his death sentence and remand with instructions to impose a sentence of life imprisonment with the mandatory minimum of 25 years before parole eligibility. In the alternative, Appellant requests this Honorable Court to vacate his death sentence and remand the cause for a new penalty phase before a newly empaneled jury.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Robert A. Preston, No. 072593, P. O. Box 747, Starke, FL 32091 on November 6, 1991.

Michael S. Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPRENE COURT OF THE STATE OF FLORIDA

ROBERT A. PRESTON, Appellant,	)	
VS.	)	CASE NO. 78,025
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

A P P E N D I X

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR APPELLANT

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA.

CASE NO. P78-41-CFA

STATE OF FLORIDA,

Plaintiff,

vs.

ROBERT A. PRESTON, JR.

Defendant.
_____/

SENTENCING ORDER

Defendant, Robert A. Preston, Jr., was found guilty of Premeditated Murder, Felony Murder committed during the course of Robbery, Felony Murder committed during the course of Kidnapping, Robbery and Kidnapping, and sentenced to death for the First Degree Murder of Earline Walker. The Conviction and Sentence were affirmed by the Supreme Court of Florida, Preston v. State 444 So.2d 939 (Fla. 1984).

Subsequently, the Supreme Court of Florida vacated the sentence of death and remanded for resentencing. Preston v. State, 564 So.2d 120 (Fla. 1990).

A new penalty phase resentencing commenced on January 28, 1991 and a new resentencing jury returned an advisory verdict recommending imposition of death by a vote of nine (9) to three (3) on February 1, 1991.

Defendant moved for a new penalty phase trial, and this Court granted the motion.

On April 15, 1991, a second resentencing proceeding commenced and on April 19, 1991 the new jury returned an advisory verdict recommending death by a vote of twelve (12).

The Court has considered the evidence presented during the resentencing trial, the argument of counsel for the State and the Defendant, and the entire record of this cause of which judicial notice has been taken and further has evaluated carefully the mitigating and aggravating circumstances, and makes the following findings:

I.

AGGRAVATING CIRCUMSTANCES

The Court finds the following four aggravating circumstances have been proven beyond a reasonable doubt:

1) The capital felony (Murder) was committed while the Defendant was engaged in the commission of, or an attempt to commit kidnapping. Section 921.141(5)(d), Florida Statutes.

Preston committed the murder immediately after committing the crime of robbery and while he was engaged in the commission of the crime of kidnapping.

2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. Section 921.141(5)(e), Florida Statutes.

Earline Walker was the only witness to the robbery and kidnapping. Preston chose not to kill her at the store, which

would have been more consistent with his contention that he killed her because his mental faculties were substantially impaired by drug intoxication. Rather, he forced her to drive him to an out of the way location. Once there, he did not kill her in the car, but rather forced her to walk into a field some distance away from it. He inflicted a wound which was certain to be fatal and was certain to silence Ms. Walker.

The circumstances surrounding Ms. Walker's abduction and murder are strong evidence that Preston committed the murder to eliminate the only witness to his criminal acts. Cave v. State, 476 So.2d 180, 188 (Fla. 1985).

3) The murder was committed for pecuniary gain. Section 921.141(5)(f), Florida Statutes. Preston committed the murder after the robbery of the convenience store. Before the robbery and murder, Preston had planned to obtain money, and did, in fact, after committing his crimes return to his home with several hundred dollars in cash. Smith v. State, 424 So.2d 726 (Fla. 1982). Parker v. State, 476 So.2d 134 (Fla. 1985).

4) The murder was especially heinous, atrocious or cruel. Section 921.141(5)(h), Florida Statutes.

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, trachia, 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 knifepoint 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 and cruel. Preston v. State, 444 So.2d 939 (Fla. 1984), Rivera v. State, 561 So.2d 536 (Fla. 1990).

II.

MITIGATING CIRCUMSTANCES

In considering mitigating circumstances, the Court will address first statutory mitigating circumstances and second, non-statutory mitigating circumstances.

A.

STATUTORY MITIGATING CIRCUMSTANCES

Regarding statutory mitigating circumstances, I make the following findings:

1) Whether the murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance. 921.141(6)(b) Florida Statutes.

FINDING

Preston argues that this factor is established because he contends that he was under the influence of several drugs, including PCP, at the time of the murder, and used drugs regularly prior to the day of the murder. The evidence does reveal that he used drugs regularly, including PCP. Before the Defendant left his home on the night he committed the crimes of robbery, kidnapping and murder, he smoked marijuana and drank alcoholic beverages with his brother Scott Preston and Donna Maxwell Hotaling. However, although Preston asked his brother Scott to assist him in ingesting PCP, this request was refused. There is no evidence in the record that anyone saw Preston ingest PCP the night of the murder. When he returned the next morning, he appeared to be high on PCP, and expert witnesses also opined that some of his behavior was consistent with PCP ingestion. The only direct evidence that Preston had taken PCP that night, however, was Defendant's own testimony.

Preston's actions the night of the murder also indicate that he was capable of planning and of deliberate thought. He told his brother and Ms. Hotaling that he wanted to commit a robbery to obtain money, and tried to enlist the cooperation of Scott Preston. He robbed the store. He took money and food stamps. He did not kill Ms. Walker at the store, but rather forced her to drive him to another location in her own car. He caused her to

drive to a location which was somewhat remote. Once there, he forced her to walk some distance from her car. He required her to disrobe first. Then he inflicted a wound which was certain to be fatal.

The Court therefore concludes that though the evidence does reveal that the Defendant was under the influence of some drugs the night of the murder, he was not intoxicated to the point of extreme mental or emotional disturbance sufficient to establish a legal basis for this statutory mitigating circumstance. In fact, although Preston has not argued that this drug use should be considered as a nonstatutory mitigating circumstance, the Court finds that his drug and alcohol use does not even rise to the level of a nonstatutory mitigating circumstance.

2) Whether the capacity of the Defendant to appreciate the criminality of his conduct OF to conform his conduct to the requirements of law was substantially impaired. Section 921.141(6)(f), Florida Statutes.

FINDING

The Court's analysis regarding the previous mitigating factor is appropriate here. Of particular note is the fact that he took steps to avoid detection, such as committing the murder away from the store, and walking the victim a good distance away from her car before killing her. This evidence indicates that his capacity to appreciate the criminality of his conduct was not

substantially impaired. The Court further finds that he was capable of conforming his conduct to the requirements of law.

3) The age of the Defendant at the time of the crime. 921.141(6)(g) Florida Statutes.

FINDING

The Court finds, by the greater weight of the evidence, that the Defendant's emotional age was not consistent with his chronological age of twenty (20) years, and further finds that his emotional age is an appropriate factor to consider in mitigation of the punishment.

4) Whether the Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. Section 921.141(6)(d) Florida Statutes.

FINDING

Preston was not a mere accomplice, but was the active and aggressive perpetrator of the robbery, the kidnapping, and the murder. Preston was the only person involved in the robbery, kidnapping, and murder. This mitigating circumstance is therefore not supported by the evidence.

B.

NONSTATUTORY MITIGATING CIRCUMSTANCES

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1) Preston had a difficult and neglected childhood.

FINDING

The Court finds that this mitigating circumstance is established by the greater weight of the evidence, and that it is an appropriate factor to be considered in mitigation of the punishment. Campbell v. State, 16 F.L.W. S1 (Dec. 13th, 1990) at Footnote 4.

2) Preston has had a good prison record..

FINDING

The Court finds that this mitigating circumstance is established by the greater weight of the evidence, and that it is an appropriate factor to be considered in mitigation of the punishment. Id.

3) Preston has good potential for rehabilitation.

FINDING

The Court finds that this mitigating circumstance is established by the greater weight of the evidence and that it is an appropriate factor to be considered in mitigation of punishment. Id.

4) Preston has expressed remorse.

FINDING

The Court finds that this mitigating circumstance is established by the greater weight of the evidence, and is an appropriate factor to be considered in mitigation of punishment. Id.

5) Preston was a loving son who possessed other positive qualities.

FINDING

The Court finds that this mitigating circumstance has been established by the greater weight of the evidence, and is an appropriate factor to be considered in mitigation of punishment.

III.

WEIGHING OF MITIGATING CIRCUMSTANCES

The Court will consider the weight of the statutory mitigating circumstances first, and then it will consider the weight of the nonstatutory mitigating circumstances.

A.

STATUTORY MITIGATING CIRCUMSTANCES

1) The Court has found that only one statutory mitigating circumstance exists, that of Defendant's age. However, the Court accords this factor only minimal weight. Defendant was twenty (20) years old at the time of the murder, an age at which, under

the laws of this State, he is considered an adult responsible for his own behavior. He is above average in intelligence. Although he did live at home and his mother provided support for him, this, in the realm of human experience, is not terribly unusual for a twenty (20) year old. There was some evidence that he was lacking in maturity to some degree, but the Court finds that this lack of maturity was not extreme enough to be given any significant weight. The evidence reveals, for example, that the Defendant was mature enough to recognize and carry out his duty to help out around the house.

B.

NONSTATUTORY MITIGATING CIRCUMSTANCES

1) Preston had a difficult and neglected childhood.

Although the evidence revealed that Preston was somewhat neglected and suffered some difficulties during his childhood, these difficulties in the realm of human experience, were far from extreme. The Court therefore, accords only the barest minimum of weight to this mitigating factor.

2) Preston has had a good prison record.

Although the Court finds that this factor has been established, the Court also finds that it does not deserve significant weight.

3) Preston has good potential for rehabilitation.

Although the Court finds that this factor has been established, the Court also finds that it does not deserve significant weight.

4) Preston has expressed remorse.

Preston has stated that he is sorry for what happened to Ms. Walker, but has never admitted guilt. The Court accords this mitigating factor only the barest minimum of weight.

5) Preston was a loving son with other positive qualities.

The Court accords only the barest minimum of weight to this mitigating circumstance as Preston did not possess these traits to any greater degree than most people in our society.

IV.

WEIGHING OF AGGRAVATING CIRCUMSTANCES AGAINST MITIGATING CIRCUMSTANCES

The Court has found that four (4) aggravating circumstances, as specified in Section 921.141(5), Florida Statutes, exist , and finds that these are sufficient to justify the sentence of death. The Court has found that one (1) statutory mitigating circumstance exists, and five (5) nonstatutory mitigating circumstances exist. However, the Court finds that many of these mitigating circumstances should be accorded only the barest scintilla of weight, and that the statutory and nonstatutory mitigating circumstances, even when considered collectively, are far outweighed by the four (4) aggravating circumstances,

considering the crime and the nature of the aggravating circumstances. Indeed, the Court finds that the aggravating circumstances contained in paragraphs I.(1), (the murder was committed while the Defendant was engaged in the commission of kidnapping) and I.(4), (the murder was especially heinous, atrocious or cruel) of this Order, standing alone, are sufficient to outweigh the mitigating circumstances.

WHEREFORE, it is ORDERED:

1. That you, ROBERT A. PRESTON, JR., are hereby sentenced to death in the manner and means as provided by law.

2. That you are remanded to the custody of the Sheriff of Seminole County, Florida, to be delivered to the custody of the Department of Corrections for execution of this sentence according to law.

DONE AND ORDERED in open court at Sanford, Seminole County, Florida this 8th day of May, 1991.

S. JOSEPH DAVIS, JR.
CIRCUIT JUDGE

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