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 BREVARD COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Florida 32114
(904)252-3367

ATTORNEY FOR APPELLANT

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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

Appellee argues that the prior sentence which was vacated on appeal is a nullity and therefor the resentencing should proceed de novo on all issues bearing on the proper sentence which the jury recommends to be imposed. Further, Appellee argues that since the defendant was permitted to present additional mitigating evidence, there is no reason why the state cannot proceed to prove other aggravating circumstances which were not presented in the first sentencing. This argument, however, is specious. First, the state did not present any new evidence to support the new aggravating circumstances. Rather,

the state only presented its argument, which is just that: araument. This cannot be substituted for hard evidence. Second, the state never sought to appeal the trial court's previous determination that the aggravating circumstances in the course of a felony and for pecuniary gain merged and could only be considered as a single aggravating circumstance. If, as a matter of law, this finding was erroneous, it was incumbent upon the state to appeal. Failing to do this, the state cannot be heard to complain now. Third, Appellant did present significantly more evidence in mitigation. Because of this, the trial court's findings with regarding to the mitigating circumstances should not be approved simply because this Court approved the previous findings.

With regard to fundamental fairness, the state argues that since Appellant is apparently guilty of "piecemeal" litigation, that he should not be heard to complain about the state's actions. Once again, this argument misses the mark. The fact that Appellant proceeded to attack a previous conviction which was used as an aggravating circumstance and was eventually successful in doing so, only points out that an accused on death row without resources is forced often to rely on volunteer lawyers or overworked appointed lawyers in hopes of achieving some measure of success. These impediments simply to not apply where the state is concerned. The state, with all its infinite resources, should be required to present all its evidence in a single trial and/or appellate setting. To allow the state to

"sandbag" as it is doing in this case, makes a mockery of the entire system. Therefore, fundamental fairness dictates that Appellant's sentence of death be vacated.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

The state argues that this issue is not preserved for appeal because the defense never sought to introduce the evidence on any other grounds other than lingering doubt. This is simply untrue. The defense was going to present this evidence during its case-in-chief at the resentencing proceeding. It was at the state's suggestion, that the trial court ruled that this evidence was inadmissible in that it constituted lingering doubt. This was the ruling of the trial court and it is this ruling excluding the evidence that the defense is now appealing. The evidence certainly has relevance in that it shows that another person actually committed this crime. It is true that such evidence has some characteristics of "lingering doubt" but this fact does not render this evidence inadmissible. The probative value of such evidence clearly outweighs any prejudice that the state may suffer. As argued in the initial brief, this evidence is clearly relevant to two statutory mitigating circumstances. As with the case of gory photographs, the test for admissibility of this type of evidence should be relevance. That this evidence has such relevance is beyond question.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN REJECTING STATUTORY MITIGATING FACTORS THAT WERE ESTABLISHED WITHOUT CONTRADICTION AT THE PENALTY PHASE.

The state argues that the trial court correctly rejected the mitigating evidence presented by Appellant. In so doing, the state argues that since none of the experts had ever examined Appellant while he was under the influence of PCP and since none of them saw him at the time of the offense, their testimony is merely speculative and was properly rejected by the trial court. This argument is ludicrous. Rarely, if ever, are psychiatric experts present to observe a person commit a crime. Yet, pursuant to the state's reasoning, this factor renders such psychiatric testimony speculative and therefore should be rejected. If the state's argument is to be accepted, psychiatric testimony should be excluded in every case where the psychiatrist or psychologist is not present to observe the crime being committed. This should also apply to the state's psychiatrists and psychologists since they are never present at the time the crime is committed either. This Court can see just how ridiculous the state's argument is in this regard.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

Appellee argues that the evidence concerning the injuries inflicted after the victim had died was properly admitted since it demonstrated the deliberate nature of the crime and refuted Appellant's claim that he was in a PCP induced frenzy. Appellant suggests that neither of these factors is proved by the evidence in question. The state further argues that since the defense questioned three of its own experts about these post-mortem wounds, Appellant should not be heard to complain. Such reasoning is baffling. Because the trial court overruled the defense objection to this testimony, the state in fact presented the evidence concerning these injuries inflicted after the victim was dead. Only because of this ruling, and in an effort to minimize the impact of such evidence, the defense counsel questioned its own experts about these wounds. There is simply no indication that had the defense counsel been successful in seeking to exclude such evidence, that the line of questioning would have been pursued with the defense witnesses.

With regard to the trial court's refusal to give the

two requested jury instructions, Appellee's arguments are that they are not correct statements of the law and are confusing. Neither contention is true. The two requested jury instructions are accurate statements of the law pursuant to Provence v. State, 337 So.2d 783 (Fla. 1976) and White v. State, 403 So.2d 331 (Fla. 1981). They are not confusing in any manner. They certainly are neither incorrect nor confusing simply because Appellee has stated they are. Appellee has not shown how in fact the requested instructions are incorrect or are confusing. The fact remains that such requested instructions were highly relevant to the facts of this case and that a refusal of the trial court to give these requested instructions constituted reversible error.

CONCLUSION

Based on the reasons and authorities presented in this brief as well as in the initial brief, Appellant respectfully requests this Honorable Court to vacate his death sentence and remand with instructions to impose a sentence of life imprisonment with a 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 impaneled jury.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Michael S Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 267082
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

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 January 13, 1992.

Michael S Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER