IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,972

HENRY ALEXANDER DAVIS,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee

****

AN APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

****

BRIEF OF APPELLEE

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INTRODUCTION

Appellee, The State of Florida, was the prosecution below. Appellant, Henry Alexander Davis, was the defendant. All parties will be referred to as they stood below.

The symbol "(R. *n*)" will be used to refer to the current record on appeal. The symbol "(P.R. *n*)" will refer to the record on appeal in case no. 75,467.[1] The symbol "(B. *n*)" will refer to Defendant's initial brief.

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[1]Defendant's first direct appeal.

STATEMENT OF THE CASE AND FACTS

This is Defendant's second direct appeal from a sentence of death. In an opinion issued in case no. 75,467, on July 16, 1992, this court affirmed his conviction.[2] (R. 223); Davis v. State, 604 So. 2d 794, 799 (Fla. 1992).

A. DIRECT APPEAL PROCEEDINGS

The Court stated the facts as follows:

> On the evening of March 18, 1987, the body of seventy-three year old Joyce Ezell was discovered in the foyer of her house just inside the front door. She had suffered twenty one stab wounds. There were no signs of forced entry. Several items were missing from Ezell's home, including silver serving pieces, her purse and wallet, a pearl handled pistol, some rare coins, jewelry, a ring belonging to her late husband, and her car. Davis was acquainted with Ezell because he had done yard work at her house with his stepfather.
>
> Ezell's neighbor, Harold brown, told police officers that he saw a black man walk up to Ezell's door at approximately 7:15 a.m. March 18. Several days later, Brown identified Davis from a photographic lineup as the man he had seen. Ezell's car was discovered the day of the murder in a sink hole approximately five miles from her residence. Evidence indicated that at least three people had occupied the car recently. Silver serving pieces belonging to the victim were in the trunk. Davis's fingerprints were found on the power window control on the driver's side of the car and on several items recovered from the trunk of the vehicle. Fingerprints taken from inside the victim's house also matched Davis's fingerprints.
>
> John Johnson, an acquaintance of Davis's,

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[2]Six justices concurring; Kogan, J. concurring in the result without opinion. (R. 223)

> testified that he took Davis to a pawn shop the morning after the murder so that Davis could pawn a ring and an old pistol. The description Johnson gave of the pistol matched the pistol missing from Ezell's house. The ring which had belonged to Ezell's late husband, was recovered from the pawn shop.
>
> Davis was arrested on March 20, 1987. He denied committing the murder and said that he had not been in the victim's house or car. He initially said that he had been picking watermelons on the day of the murder but later said that he had been babysitting. A few days after his arrest, Davis told officers that the day before the murder, a black man who looked exactly like him showed him a weapon similar to an ice pick and said that he was going to rob Ezell. Davis said that he saw the man the day after the murder and the man asked him if he had heard what happened. Davis also told the officers that he had seen Ezell at the post office on the day before the murder and he offered to go to her house to put up groceries. He said that he went to her house, put up groceries, then locked her car and left.
>
> Davis was initially found incompetent to stand trial after he performed poorly on certain tests and indicated that he had no recall of events on the day of the murder. He was sent to the Florida State Hospital where he was treated and evaluated for approximately nine months. Upon his release from the hospital, Davis was evaluated again, was found to be competent, and went to trial. After conviction, the trial judge followed the jury's unanimous recommendation and imposed the death penalty for the murder.

(R. 214-215); Davis, at 795-796.[3]

With regard to the sentencing issues, the Court found that the witness elimination aggravating factor was not supported by the evidence. (R. 220); Davis, at 798. The Court also found that the

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[3]Defendant was also found guilty of robbery with a deadly weapon and burglary, and received a consecutive life sentence on each count. (R. 199-203)

trial court had improperly doubled the burglary and pecuniary gain aggravating factors, stating that the factors should have been considered as one. (R. 221); Davis, at 798. The Court then determined that the heinous, atrocious and cruel ("HAC") factor was established beyond a reasonable doubt as follows:

> Davis argues that the evidence does not support the finding that the murder was especially heinous, atrocious, or cruel. We disagree. The medical expert testified that no single wound was sufficient to cause the victim's death. She bled to death from multiple stab wounds. According to the medical examiner's testimony, it was unlikely that the victim was rendered unconscious by the blow she sustained to her head. The victim could have been conscious for thirty to sixty minutes before her death. Other evidence leads to the inference that the victim struggled with her assailant. A witness testified that Davis had scratches on his face the day after the murder and that Davis said that an old lady scratched him. Further, the victim suffered stab wounds to her adam's apple and upper chest, suggesting that she was stabbed while standing up or struggling. We find that the evidence establishes this factor beyond a reasonable doubt.

(R. 219); Davis, at 797.

This court also found no error in the trial court's rejection of the mitigating factors presented and argued by the defense at the sentencing proceedings:

> With respect to mitigation, Davis presented evidence that he suffered from brain damage, perhaps as a result of a fall suffered four months before the murder. Two mental health experts testified that he was under the influence of an extreme mental or emotional disturbance at the time of the murder. The court found insufficient evidence in the record upon which the experts could base such an opinion. In addition, the defense experts opined that Davis's capacity to conform his

conduct to the requirements of the law was substantially impaired. With respect to this testimony, the trial judge found the following:

> [This] proposition is unsupported by any other evidence in the record. The facts reveal that after killing the victim, the Defendant methodically burglarized the home, wiped clean the murder weapon, loaded the car with stolen items, and took steps to hide the car. All of this indicates that the Defendant clearly understood that what he was doing was unlawful. Thus recognizing the nature of his activities there is nothing to demonstrate that he could not conform his conduct to the requirements of the law.

We note that the State presented substantial mental health expert testimony to refute the mental health testimony presented by Davis. Two mental health experts testified that Davis' poor performance on neurological tests and his lack of recall were attributable to malingering. In particular, the psychologist who evaluated Davis during his stay at Florida State Hospital testified that there was no evidence that Davis had suffered organic brain damage, that Davis had suffered no significant head injuries, and that he showed no signs of psychosis. According to her testimony, when Davis felt he was being evaluated, he would start to exhibit memory problems. He showed no problems when he did not suspect he was being evaluated.[2] Even the defense experts acknowledged the possibility that Davis was malingering. Thus, there was competent and substantial evidence which supports the trial judge's findings on Davis' mental status.

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[2] The trial judge also refused to find that Davis was under the substantial domination of another person and his participation in the murder was relatively minor, and that he acted under extreme duress or the substantial domination of another person. The trial judge found that the only basis for these statutory mitigating factors was Davis' unsworn statements to his examining psychologists made years after the

> murder and after he denied any memory of what took place. Davis told defense psychologists that on the morning of the murder, two men drove him to Ezell's house to do yard work. While he was working in the yard, the two men murdered Ezell. After Davis discovered the murder, he panicked and the three men plundered the house. He said that the men told him that they would harm him or his family if he told anyone. The court noted that there was no physical evidence to establish that anyone other than Davis and the victim were in her house.

(R. 221-223); Davis, at 798-799 (footnote in original). Because this court merged the pecuniary gain/burglary factors and found the witness elimination factor to be without evidentiary support, it remanded with the following instruction:

> We remand the case to the trial judge to reweigh the evidence in light of our opinion and to impose the appropriate sentence.

(R. 223); Davis, at 799 (emphasis supplied). No motion for rehearing was filed. Mandate issued on August 17, 1992.[4] (R. 212)

B. PROCEEDINGS ON REMAND

On October 1, 1992, Defendant filed a motion to prohibit imposition of the death penalty, alleging that the HAC factor was unconstitutional because it was vague and overbroad, because the HAC instruction given to the jury was invalid, and because the HAC factor fails to narrow the class of defendants subject to the death penalty. (R. 237-242) Defendant also filed a motion to impanel a

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[4]The Court also rejected Defendant's claims of error with regard to alleged prosecutorial improprieties, finding his contention as to the photo array without merit, his contention regarding his drug use harmless if error at all, and his contention regarding a "Golden Rule" argument at the penalty phase harmless beyond a reasonable doubt. (R. 215-219); Davis, at 796-797.

new jury, alleging that under Espinosa v. Florida, a new jury was required because the original jury had considered invalid aggravating factors; that the original jury had been given an unconstitutionally vague instruction on HAC; that the prosecutor's improper "Golden Rule" argument during the original penalty phase compounded the error in giving the improper instruction; and that an improper instruction was given on principals with regard to felony murder, leaving residual doubt as to whether the jury ever determined that Defendant was the actual killer. (R. 243-250) He filed a memorandum in support of the motion. (R. 251-253)

The trial court continued the reweighing hearing on remand in order to hear and decide Defendant's above motions on October 6, 1992. (R. 254) In support of his motion to impanel a jury, Defendant argued that the court should disregard the limiting language of the mandate because of his belief that the Supreme Court did not have the benefit of Espinosa and Sochor at the time of its decision herein. (R. 257, 277) He argued that Sochor "held that the Florida Supreme Court cannot do what the Florida Supreme Court did in its opinion." (R. 259) The State responded that under the plain language of the mandate, the court was not authorized to impanel a jury. (R. 274) It also pointed out that in Kennedy v. State, which was decided by the Supreme Court on the same day as this case, the Court referred to an Espinosa claim, making it unlikely that this court was unaware of the decision when it issued its opinion. (R. 281)

After Defendant's motion to impanel a jury was denied, he requested to make argument and produce witnesses on the "weight" the trial court was to give the aggravating and mitigating circumstances. There was no suggestion that he wished to offer new evidence:

> I don't want to say what we intended to do in this particular case . . . I think we can present witnesses relevant to the question of what weight to give the aggravating and mitigating circumstances, and we can certainly present argument as to what weight the court should give those factors.

(R. 284) The State had initially taken the position that no evidence should be permitted. (R. 283) After Defendant made the above statement, the state agreed he could present witnesses "limited" to the issue of the weight to be given the factors. (R. 284)

Finally at the hearing, with respect defense argument on the motion to prohibit the imposition of the death penalty, the State again argued that the issue was beyond the scope of the mandate. (R. 293) It also argued that both motions were procedurally barred, as having been decided on the first appeal. (R. 293-294)

Both motions were denied on October 8, 1992. (R. 296)

On October 23, 1992, the State filed motions to preclude Defendant from presenting additional evidence, based on the limiting language of the mandate, and to compel discovery of witnesses if additional evidence was permitted. (R. 301-304)

A hearing was held on the State's motions on November 6, 1992. (R. 305) The court heard argument on the motion to preclude. (R.

315-345) At this hearing, the defense abandoned its previous position of presenting evidence and argument as to the "weight" of the relevant factors. It now argued that it was entitled to present additional evidence, pursuant to R. 3.720, Fla. R. Crim. P. (R. 315) However, Defendant was unwilling to discuss: (a) the names of any proposed witnesses; (b) what, if any, additional or new evidence as to mitigation he wished to present; and (c) why the additional or new evidence had not been presented at the original penalty phase hearing. (R. 303, 317, 321, 322, 324, 327) The defense conceded its reluctance to make a proffer:

> Then you asked me if I was going to present evidence as it relates to new mitigating circumstances. And I hesitated and never did answer because I am trying to remember exactly what mitigating circumstances were argued by the trial attorney in the case.

(R. 344) At no point was a proffer made before the court ruled on the motion to preclude new evidence.

The court concluded it was bound by the mandate and granted the motion to preclude new evidence. (R. 347) It denied the motion to compel as moot. (R. 347) It allowed Defendant to make a proffer outside the presence of the court, with the proviso that if defense counsel wished the court to hear the proffer and had the supporting case law, the court would consider it. (R. 353)

On November 9, 1992, Defendant filed a memorandum in support of a life sentence. (R. 357-364) On November 10, 1992, which had been previously scheduled as the date for the reweighing on remand, Defendant filed a motion for a sentencing hearing. He alleged that he had never really received a sentencing hearing at the original

trial.[5] (R. 282, 365-366) At this time, Defendant also filed a motion for rehearing with respect to the presenting of new evidence. (R. 378-379)

Defendant's motion for rehearing was denied at the November 10, 1992 reweighing hearing. (R. 388, 399) The State then presented argument for imposition of the death penalty. (R. 399-400) Defendant argued for life imprisonment. (R. 400-412) The trial judge delayed its pronouncement of sentence until the following week, to allow the court to digest the arguments and Defendant's memorandum in support of a life sentence. (R.414)

The State subsequently moved to strike Defendant's memorandum in support of a life sentence, because it had not been provided with it until five hours after the end of the November 10, 1992 hearing, and because it argued the very issues which the court had previously ruled were not proper at a reweighing hearing. (R. 420) The State's motion was denied. (R. 422)

On November 17, 1992, the hearing for sentence pronouncement was held. Defense counsel indicated that he had no further presentation to make. Defendant declined to address the court. (R. 430) The court sentenced Defendant to death and filed its sentencing order. (R. 431-437) The sentencing order found two aggravating circumstances: HAC and committed in the course of a burglary. (R. 442-444) It found that the previous mitigating factors offered by Defendant were not supported by the evidence.

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[5]He appended the transcript of the original (January 12, 1990) sentencing hearing to the motion. (R. 367-377, P.R. 1664-1674)

(R. 444-446) It determined that the aggravating circumstances justified the imposition of death and outweighed any mitigating circumstances. (R. 446-447)

Subsequently, on December 1, 3, & 7, 1992, Defendant proffered the testimony of Thomas McClane, MD, Henry Dee, PhD, Richard Jones, MD, Eberto Piniero, MD, Charles Fee, James Ruise and Robert Self before a court reporter. (R. 451-593)

Dr. Thomas McClain had testified on Defendant's behalf at the 1990 penalty phase. He is a physician specializing in psychiatry with subspecialties in forensic psychiatry and psychopharmacology. (R. 82, P.R. 1384) McClain was asked whether in his opinion Defendant was under the influence of extreme emotional disturbance at the time he murdered Ezell. He stated that whether it was extreme or not depended upon whether organic brain damage is considered "extreme." McClain felt that Defendant had organic brain damage and that was an extreme mental disturbance. He supposed everyone would not agree with that. (R. 95, P.R. 1397) McClain did not really have an opinion as to whether Defendant was under the substantial influence of someone else at the time. If Defendant was telling the truth, the "small bits of evidence" would support the tendency to be more likely to come under the influence of others than average. (R. 98, P.R. 1400) McClain was of the opinion that Defendant's capacity to appreciate the criminality of his actions might be slightly but not grossly diminished. His ability to conform his actions to the requirements of the law was substantially diminished. He believed the ability to control his

impulses was impaired at the time of the offense. (R. 99, P.R. 1401)

At the proffer, McClane [sic] testified that he saw Defendant again on September 18, 1992. He interviewed him for an hour, strictly on the competency issue. (R. 455) He reviewed his 1990 findings. (R. 456-457) His opinions since seeing Defendant again "are pretty generally the same." (R. 457) McClane reviewed the report of an EEG done on Defendant by Dr. Piniero in Lakeland on September 25, 1992. (R. 462) The report is consistent with the one Dr. Vroom prepared when Defendant was the state hospital before trial in 1989. (R. 463) They indicate some brain damage in the sense that the functional abnormality in the EEG indicates brain damage of some kind. (R. 464) McClane reiterated his earlier opinion with regard to Defendant's mental condition. (R. 468) He opined that Defendant had a substantial defect in his ability to conform his behavior to the requirements of the law, that is, to control his impulses. He reiterated his earlier opinion that Defendant's brain damage constituted extreme mental disturbance, noting again that not everyone would agree with that position. (R. 468)

If he made the "pretty shaky" assumption that Defendant's story about Bibby and Red was accurate, he would conclude that Defendant was probably under the influence of another at the time of the offense. Without that assumption he was unable to make a conclusion with any reasonable psychiatric certainty. (R. 469)

The second witness at the proffer, Dr. Henry L. Dee had also

testified a witness for the defense during the original penalty phase. (R. 123, P.R. 1327) He is a clinical psychologist with a subspecialty in clinical neuropsychology and child psychology. (R. 124, P.R. 1328) Historically, Defendant tested in the normal range as a child, in the low average when he was somewhat older. Dee would characterize the score he got as low average also. He therefore could not say that the score itself represented a decline. The test does not show any mental retardation. (R. 135, P.R. 1339) Dee believed that Defendant has brain damage, based on his test performance. (R. 151, P.R. 1355) Dee believed Defendant's brain damage would constitute mental disturbance at the time of the crime. He felt that it would be more difficult for Defendant to mold his conduct to the requirements of the law. Defendant said he acted under the substantial domination of another, but Dee had no opinion as to whether that was true or not. (R. 152, P.R. 1356) Dee believed Defendant's ability to conform his conduct to the law was substantially impaired. (R. 153, P.R. 1357) Defendant's IQ was not unusual for the prison community. He is not mentally retarded. (R. 167, P.R. 1371)

Dr. Dee at the proffer additionally testified that he saw Defendant again on September 22, 1992. He gave him the same tests so that he could compare them. Defendant claimed to have had two seizures at Raiford. The prison records showed no references to Defendant having had any seizures. (R. 483) Defendant had added a tatoo to his arm of a pistol with the word "outlaw" on it. Defendant said it pertained to some "club" within the prison

system. (R. 484)

Dee continued to believe that Defendant suffered from brain damage, manifested primarily by a memory impairment. (R. 485) His current testing was consistent with the previous tests. (R. 487) He believes that temporal lobe epilepsy would be considered brain damage. He believes Defendant's mental status would affect his behavior. (R. 497) He believed that Defendant's ability to conform his conduct to the requirements of the law was substantially impaired. He opined that Defendant was under the substantial domination of another at the time. (R. 500) He believed that Defendant was "organically mentally disturbed" at the time of the offense; he declined to say that Defendant was under the influence of extreme emotional or mental distress.

The third witness at the proffer, Dr. Richard Jones, had testified at the 1990 penalty phase regarding the autopsy of victim Joyce Ezell. The victim had suffered 21 stab wounds. The wounds were of variable depth, up to 2 inches. (R. 77, P.R. 1295) The maximum width of the wounds was 2 to 2.5 cm, around one inch. Ezell did not sustain any single wound which would have caused her immediate death. They would have caused her pain. It was extremely difficult to determine how long it took Ezell to lose consciousness, but this time period was between thirty minutes to perhaps an hour or longer, assuming the loss of consciousness was due solely to blood loss. In Jones' opinion her loss of consciousness would have been from blood loss. She would have been able to feel pain from the stab wounds while she was conscious.

(R. 78, P.R. 1296) Ezell also suffered a blunt trauma to the head. There was not much external evidence of it. (R. 79, P.R. 1297)

On cross examination at the penalty phase, Dr. Jones testified that he could not say precisely how long Ezell remained conscious. It is possible she could have gone unconscious immediately. He believed that it was unlikely that the head wound would have caused unconsciousness. (R. 80, P.R. 1298) If she went unconscious immediately, she could have stayed unconscious until her death. (R. 81, P.R. 1299)

At Dr. Jones' proffer, he testified that Mrs. Ezell died from a loss of blood. She also had a subarachnoid hemorrhage to the cerebellum. He did not characterize her wounds as defensive. (R. 515) He did not feel the blow to her head resulted in a loss of consciousness. The head blow could have occurred when her head hit the floor after she was stabbed. (R. 518)

The fourth witness at the proffer, Dr. Eberto Piniero had not previously testified at the penalty phase. The State stipulated that Piniero was an expert in the field on neurology. Piniero saw Defendant on September 25, 1992. He was requested to give his opinion of Defendant by the 10th Circuit P.D. (R. 523) He reviewed Vroom's report. (R. 524) He also reviewed Dr. Kohler's report from when Defendant was at the state hospital before trial. Kohler concluded that Defendant suffered from epilepsy and prescribed Tegretol. (R. 526) Defendant's MRI was normal. The EEG was abnormal as in the previous evaluation by Dr. Vroom. (R.

528)

Piniero concluded that Defendant suffers from temporal lobe epilepsy. (R. 529) He believed Defendant had a memory loss of the incident as a result of postictal amnesia. He did not believe that the crime was committed during a seizure.

Piniero testified that epilepsy is not brain damage in a structural sense, but is so considered in a functional sense. (R. 530) Complex goal oriented behavior is not possible during an epileptic seizure. Piniero did not believe Defendant was having a seizure at the time of the crime. (R. 535) Piniero was unable to say that Defendant was unable to conform his conduct to the requirements of the law at the time of the murder. (R. 534) He would have increased impulsivity. (R. 536)

The fifth witness at the proffer, Charles Fee, had also not testified at the 1990 penalty phase. He was records director for Polk County Public Schools. (R. 554) Defendant's school records were proffered and indicated that Defendant was in exceptional student programs in 7th through 12th grades. (R. 555-556) However, the records showed that Defendant was granted a "standard diploma." (R. 562-563) Although the school records themselves had not been admitted into evidence at the 1990 penalty phase, the mental health experts had reviewed them. (R. 135, P.R. 1339, 1440)

The final two witnesses at the proffer, James Patrick Ruise and Robert H. Self were correctional officers at the Florida State Prison. (R. 575) They work in the recreation yard. They saw

Defendant two hours twice a week at most. (R. 576) As a death row inmate, Defendant is locked up in a single-man cell 24 hours a day, except for the four hours a week in the yard. Under these circumstances, the officers testified that Defendant's general conduct is satisfactory, average. (R. 579) He did, however, get into a fistfight with another death row inmate in the yard. (R. 576) Defendant had thrown a basketball at another inmate and the situation escalated, as they had been arguing all weekend. (R. 577)

This appeal follows.

ISSUES PRESENTED
(RESTATED)

I.

WHETHER THE AGGRAVATING FACTOR OF HEINOUS ATROCIOUS AND CRUEL IS CONSTITUTIONAL?

II.

WHETHER THE TRIAL COURT FULLY COMPLIED WITH THIS COURT'S MANDATE TO "REWEIGH THE EVIDENCE"?

III.

WHETHER THE IMPOSITION OF THE DEATH SENTENCE IN THE INSTANT CASE IS PROPORTIONAL TO DEATH SENTENCES IMPOSED AND AFFIRMED IN OTHER CASES?

SUMMARY OF ARGUMENT

1. Defendant's contention that the HAC aggravating factor is unconstitutionally vague is without merit. This claim was waived because it was not raised at the original trial and not raised on direct appeal. Further, even had the issue been preserved it is without foundation. It is well established that the HAC factor as interpreted by this court is not vague and serves to narrow the class of persons subject to the death penalty. Further, this court has consistently held that the HAC factor was warranted in cases involving the multiple stabbing deaths of conscious victims. As such, under the facts as found below, and approved on the first appeal, the factor was constitutionally applied to Defendant.

2. Defendant next alleges that the trial court did not fulfill its duties prior to resentencing Defendant. He claims error in refusing to impanel a new jury; in refusing to allow Defendant to present new evidence and in failing to do more than "clean up" the previous sentencing order.

The trial court properly refused to hear new evidence or seat a new jury. Under the terms of this court's mandate, it was only to "reweigh" the evidence. Under ample precedent of this court, a mere reweighing does not require the submission of new evidence or the impanelling of a jury.

Defendant alleges that numerous errors at the original

proceeding required the court to swear a new jury. The alleged errors, involving jury instructions and a prosecutorial comment were either waived through lack of preservation, failure to be raised on the first appeal or specifically rejected by this court. The court properly declined to exceed its mandate and seat a jury.

Likewise, the court properly refused to accept new evidence. Based upon the evidence proffered by Defendant, any error was harmless. Nothing in the proffer posed any serious challenge to the factual bases for the court's findings.

Lastly, the allegation that the court did not actually reweigh the evidence is without merit. The court specifically postponed the pronouncement of sentence so that it would have the opportunity to consider the arguments and digest Defendant's written memorandum. As such it is apparent that the court scrupulously followed this court's mandate.

3. Defendant's final contention is that his sentence is disproportionate. This argument is without merit. This court has consistently upheld the imposition of the death penalty in cases where the HAC aggravating factor is based upon a multiple stabbing death of a conscious victim coupled with another aggravating factor and similar findings on mitigation.

Defendant's sentence should be affirmed.

ARGUMENT

I.

THE AGGRAVATING FACTOR OF HEINOUS ATROCIOUS AND CRUEL IS NOT UNCONSTITUTIONAL. (RESTATED)

Defendant contends that the aggravating factor of heinous, atrocious and cruel ("HAC") is unconstitutional because it is vague, overbroad, and arbitrarily applied.[6] This contention has not been preserved and is without merit as will be shown below.

Defendant first contends that he raised this issue before and at the original trial. An examination of the pretrial motions relied on by Defendant, however, reveals that said motions did not address the issue he now presses. These motions did not even mention the HAC factor. The first "Motion to Dismiss" stated, in its entirety, "Florida Statute 921.141 is unconstitutional on its face as applied." (R. 49, P.R. 25) Another "Motion to Dismiss the Penalty Phase" merely alleged, in the same conclusory fashion, that in felony murder cases, all cases begin with one aggravating circumstance, and that "the statutes [s. 782.04, Fla. Stat., read together with s. 921.141] are unconstitutional as applied." (R. 56, P.R. 29)

Likewise, during the penalty phase, Defendant did not present any argument as to the constitutionality of the HAC factor. The only objection by the defense, raised at the penalty phase charge

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[6]He also objects to the jury instruction which was given on the factor. This contention will be discussed in Issue II, below.

conference, was that the jury should not be instructed on this aggravator because there was no evidence to support it. (P.R. 1515)

Finally, on direct appeal to this court, Defendant again did not raise any argument with respect to vagueness, unconstitutionality or jury instructions as to the HAC aggravator.[7] Defendant's only argument on appeal concerning the HAC factor was that there was insufficient evidence to support it.[8]

Thus, Defendant's contentions as to the unconstitutionality of the HAC aggravator are, at this juncture, barred because they were not preserved at trial nor raised on direct appeal. Ventura v. State, 560 So. 2d 217 (Fla. 1990)(issue of constitutionality of death penalty statute procedurally barred where never presented to the trial court); Swafford v. State, 533 So. 2d 278 (Fla. 1988)(attack on constitutionality of capital sentencing law not preserved for review where there was no motion or objection in the lower court); Eutzy v. State, 458 So. 2d 755 (Fla. 1984)(question of constitutionality of statutory capital sentencing provisions not preserved where not presented to trial court); Johnson v. Singletary, 612 So. 2d 577 (Fla. 1993)(contention as to factors not preserved where not raised below); Booker v. State, 441 So. 2d 148

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[7]See Initial Brief of Defendant, case no. 75,467, hereinafter referred to as "Prior Brief".

Pursuant to s. 90.202, Fla. Stat., the State respectfully requests the Court to take judicial notice of its own files and the prior pleadings contained therein.

[8]Prior Brief, at pp. 43-45.

(Fla. 1983)(constitutionality of HAC barred because not raised on direct appeal); Adams v. State, 543 So. 2d 1244 (Fla. 1989)(attack on constitutionality of HAC should have been brought on direct appeal); Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989)(same); Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988)(same);[9] Harvard v. State, 414 So. 2d 1032, 1037 (Fla. 1982)("Further we reject appellant's attempt to seek review of issues in this proceeding [appeal after remand] which could have been raised in the 1977 appeal").

The State also notes that, although not preserved, Defendant's contentions with regard to the constitutionality of the HAC factor are without merit in any event. Defendant first argues that the aggravator is unconstitutional because it fails to genuinely limit the class of persons subject to the death penalty. (B. 43) This contention was explicitly rejected in Sochor v. Florida,[10] where the court held:

> Understanding the [HAC] factor, as applied in [State v.]Dixon,[283 So. 2d 1 (Fla. 1973),] to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," we held in Proffitt v. Florida, 428 U.S. 242, 95 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), that the sentencer had adequate guidance.

Id., 119 L. Ed. 2d, at 339.

Likewise, Defendant's argument that this court has applied

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[9]Although some of these are collateral review cases, Harvard makes it clear that the same principle applies on review after remand.

[10]504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 326 (1992).

the HAC factor in an "inconsistent" manner, "resulting in a lack of guidance to judges," (B. 43) is also without merit. Insofar as Defendant complains of this court's purported inconsistencies in dissimilar factual situations, Sochor is instructive:

> While Sochor responds that the State Supreme Court's interpretation of the heinousness factor has left Florida trial judges without sufficient guidance in other factual situations, we fail to see how that supports the conclusion that the trial judge was without sufficient guidance in the case at hand.

Id., 119 L. Ed. 2d at 339-340.

With respect to this court's review of stabbing cases factually similar to that of Defendant, the State would note that the trial court found the following with regard to the HAC aggravator:

> 2. As an aggravating circumstance to the First Degree Murder of which the Defendant, Henry Alexander Davis, was found guilty by the jury, the Court concludes its commission to have been especially heinous atrocious and cruel. The Court finds this to be established beyond a reasonable doubt. The proof demonstrates the victim to have been a 73 year old, 120 pound, 5 foot tall female who was stabbed 21 times. The medical expert testified that no single wound was sufficient to cause the victim's death. According to the medical examiner's testimony, it is unlikely that the victim was rendered unconscious by the blow she sustained to her head. The victim could have been conscious for thirty to sixty minutes before her death. Other evidence leads to the inference that the victim struggled with her assailant. A witness testified that Davis had scratches on his face the day after the murder and that Davis said that an old lady scratched him. Further, the victim suffered stab wounds to her adam's apple and upper chest suggesting that she was stabbed while she was standing up or struggling. While dying, the Court infers, the victim would have suffered a conscious high degree of pain and

> been aware of her impending death. In stabbing the victim 21 times, the Court concludes that the Defendant deliberately inflicted great physical suffering on the victim. Based upon these considerations, the Court concludes this murder to have been committed in an especially henious [sic], atrocious and cruel manner.

(R. 443-444)

This court's review and subsequent affirmance of this aggravating factor in the first appeal was based upon the following facts and analysis:

> Davis argues that the evidence does not support the finding that the murder was especially heinous, atrocious, or cruel. We disagree. The medical expert testified that no single wound was sufficient to cause the victim's death. She bled to death from multiple stab wounds. According to the medical examiner's testimony, it was unlikely that the victim was rendered unconscious by the blow she sustained to her head. The victim could have been conscious for thirty to sixty minutes before her death. Other evidence leads to the inference that the victim struggled with her assailant. A witness testified that Davis had scratches on his face the day after the murder and that Davis said that an old lady scratched him. Further, the victim suffered stab wounds to her adam's apple and upper chest, suggesting that she was stabbed while standing up or struggling. We find that the evidence establishes this factor beyond a reasonable doubt.

(R. 219); Davis v. State, 604 So. 2d 794, 797 (Fla. 1992).

Contrary to Defendant's argument, the above findings are consistent with this court's repeated holdings that the elements[11]

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[11]The HAC factor must be supported by evidence which:

> set[s] the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

of the HAC aggravator are satisfied where a defendant inflicts multiple stab wounds upon a conscious victim. See, e.g., Atwater v. State, 18 Fla. L. Weekly S496 (September 16, 1993)(stabbed 40 times; conscious for at least two minutes); Jackson v. Dugger, 18 Fla. L. Weekly S485 (September 9, 1993)(stabbed repeatedly); Davis v. State, 620 So. 2d 153 (Fla. 1993)(stabbed twenty-five times); Nibert v. State, 574 So. 2d 1059 (Fla. 1990)(stabbed seventeen times)[12]; Haliburton v. State, 561 So. 2d 248 (Fla. 1990)(stabbed thirty-one times); Hansborough v. State, 509 So. 2d 1081 (Fla. 1987)(stabbed thirty times, many defensive wounds); Floyd v. State, 497 So. 2d 1211 (Fla. 1986)(stabbed twelve times, many defensive wounds); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985)(repeatedly stabbed with two knives); Duest v. State, 462 So. 2d 446 (Fla. 1985)(stabbed eleven times); Lusk v. State, 446 So. 2d 1038 (Fla. 1984)(stabbed three times, bled to death); Morgan v. State, 415 So. 2d 6 (Fla. 1982), cert. den., 459 U.S. 1055, 103 S. Ct. 473, 74 L. Ed. 2d 621 (1982)(stabbed ten times).[13]

Dixon, at 9; approved, Proffit, 428 U.S., at 255-256; reapproved in Sochor, 119 L. Ed. 2d, at 339.

[12]Nibert's death sentence was overturned due to overwhelming mitigating circumstances despite the validity of the aggravating factor.

[13]The factor has also been applied in cases involving a single stab wound, but only where there were other circumstances which rendered the killing conscienceless and unnecessarily torturous. Preston v. State, 607 So. 2d 404 (Fla. 1992)(single stab wound before losing consciousness, but victim forced to drive to a remote location, walk at knifepoint through dark field, and forced to disrobe before killing); Mason v. State, 438 So. 2d 374 (Fla. 1983), cert. den., 465 U.S. 1051, 104 S. Ct. 1330, 79 L. Ed. 2d 725 (1984)(single stab wound, but conscious victim made choking and gurgling sounds while dying after stabbed through heart in bed);

Defendant's reliance on Demps v. State[14] and Peavy v. State[15] to support his contention that the HAC factor is arbitrarily applied in stabbing cases is misplaced. In Demps, the factor was held not to apply despite reference in the opinion to "wounds." The opinion reveals, however, that the trial court based its finding of the HAC factor solely on the loss to the victim (a fellow inmate with Demps) of his right to rejoin society after serving his sentence. Id., at 505, n. 5. Likewise, in Peavy, the Court without discussion found that the evidence of "stab wounds," id., at 201, supported the HAC factor.[16] Defendant argues that the dissenting opinion's contention that the factor was not supported because the victim lost consciousness soon after receiving the wounds shows that the factor is applied arbitrarily. On the contrary, the dissenting opinion shows that the case is consistent with those cited above. If the victim lost consciousness after being wounded, he was of necessity conscious at the time he received the multiple wounds, the precise scenario in which HAC has repeatedly been held to apply. Defendant's claim of inconsistent review by this court resulting in insufficient guidance to Florida

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Breedlove v. State, 413 So. 2d 1 (Fla. 1982), cert. den., 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982)(single stab wound but victim suffered considerable pain and did not die immediately after was attacked in bed while sleeping). Cf., Wilson v. State, 436 So. 2d 908 (Fla. 1983)(single stab wound not HAC without more).

[14] 395 So. 2d 501 (Fla. 1983).

[15] 442 So. 2d 200 (Fla. 1983).

[16]The sentence in Peavy was reversed due to the erroneous finding of another factor.

trial judges is therefore without merit.

In sum, the question of the constitutionality of the HAC aggravator, as argued by Defendant in his brief, has not been preserved and is in any event without merit.

II.

THE TRIAL COURT FULLY COMPLIED WITH THIS COURT'S MANDATE TO "REWEIGH THE EVIDENCE." (RESTATED)

In a tripartite argument, Defendant alleges that the trial court did not fulfill its responsibilities upon remand from this court. He first claims that on remand he was entitled to have a new jury proceeding due to alleged unpreserved errors. These purported errors were either not objected to during the original penalty phase, not raised on appeal, or were found to be harmless beyond a reasonable doubt by this court.

He next contends that he should have been permitted to present new evidence upon remand, due to an unpreserved and meritless claim that "he never really had the sentencing hearing," (B. 59) at the 1990 trial, and that the sentencing rules require the inroduction of new evidence, even on a reweighing.

Finally Defendant argues that the trial judge's findings "do not reflect that he took his responsibilities seriously enough under the guiding principles established by the constitution." (B. 62) As will be demonstrated below, the trial court on remand fully complied with the mandate of this court and Defendant's claims are without merit.

A. DEFENDANT WAS NOT ENTITLED TO A NEW JURY RECOMMENDATION.

Defendant first contends that he was entitled to have a new jury impaneled. However, nothing in the mandate supports this conclusion. On the contrary, this court instructed the trial court

to "reweigh the evidence in light of our opinion." (R. 223); Davis, at 799 (emphasis supplied). In its opinion, this court affirmed the trial court's findings of no mitigating and two aggravating factors: HAC and committed in the course of a burglary. The Court added that the pecuniary gain aggravator should have been merged with the burglary factor. Finally, this court found that the witness elimination factor was without evidentiary support. (R. 220); Davis, at 798.

Initially, the State notes that this court plainly attaches a specific meaning to the term "reweigh" in the context of a remand to the original sentencing judge. That meaning does not contemplate the holding of a new sentencing proceeding. See, e.g., Mann v. State,[17] where this court distinguished a "reweighing" from a "resentencing":

> Mann now claims that our first opinion precluded the state from presenting additional evidence. We disagree.
>
> Our remand directed a new sentencing proceeding, not just a reweighing. In such a proceeding both sides may, if they choose, present additional evidence.

Id.., at 581 (emphasis supplied). Likewise, in Lucas v. State,[18] this court held that a new jury recommendation was not mandated:

> In Lucas II, we remanded for a new sentencing proceeding. Therefore, although we find that the trial judge did not err by not empaneling a new jury, we find that both sides should have been allowed to present additional testimony and

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[17] 453 So. 2d 784 (Fla. 1984), cert. denied, ___ U.S. ___, 105 S. Ct. 940, 83 L. Ed. 2d 953 (1985).

[18] 490 So. 2d 943 (Fla. 1986)(Lucas III).

argument.

Id., at 945 (emphasis supplied).

The obvious import of these cases is that a "reweighing" is not the equivalent of a "new sentencing proceeding," and does not contemplate the swearing of a new jury. See, e.g., Oats v. State,[19] where, on direct appeal this court had found that the trial judge erred in finding three of six aggravating circumstances. On remand, the trial court denied Oats' motion to impanel a jury. On the subsequent appeal, this court rejected Oats' claim that the trial court had erred in failing to impanel a jury to rehear evidence. Oats v. State, 446 So. 2d 90, 96 (Fla. 1984); Oats, 472 So. 2d, at 1145-1146. Inter alia, the trial court had found HAC where there was no evidence to support that aggravator, and had also doubled the pecuniary gain factor with the committed during a robbery factor. On the first appeal this court thus remanded "to the trial court for entry of a new sentencing order." Oats, 446 So. 2d, at 96. See also, Atkins v. State, 497 So. 2d 1200, 1201 (Fla. 1986)("We found no fault with the evidence or argument presented to the jury on the sentencing phase. Accordingly no additional evidence was presented on remand").

Here, this court ordered a "reweighing." Had the Court felt a new jury necessary, the precedent makes it clear that the Court would have so specified. Defendant on direct appeal did not argue the existence of, and this court found, no reversible error with respect to the evidence or argument presented to the jury at the

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[19]472 So. 2d 1143 (Fla. 1985).

original sentencing proceeding. This court thus properly did not order a new "sentencing proceeding" where new evidence would be heard. The trial court is bound to follow the clear terms of the mandate. Santos v. State, 19 Fla. L. Weekly S25 (January 6, 1994). It did not abuse its discretion in failing to swear a new jury or to accept additional evidence.

As shown below, Defendant is in essence arguing that the trial judge should have ignored this court's mandate on the basis of an error this court explicitly found harmless, and on the basis of issues which were not preserved at trial, not presented on direct appeal and which would not have entitled him to a new jury sentencing preceding.

1. The penalty phase instructions.

Defendant first avers he was entitled to a new jury because of alleged defects in the jury instructions at the original penalty phase. In support of this argument he initially contends that because the trial court erroneously "doubled" the pecuniary gain/burglary factors and found the witness elimination factor, he was entitled to a new jury. He also contends that the jury was given an inadequate HAC instruction. None of these contentions would have entitled him to a new jury proceeding.

a. The instructions on the burglary/pecuniary gain and witness elimination aggravating factors.

The state would initially note that Defendant's attempt to

seek review in this appeal after remand of issues which could have been raised on his direct appeal is procedurally barred. Harvard (issues which should have been raised on initial appeal not cognizable on appeal after remand). Defendant's claims based on Espinosa v. Florida[20] could have been raised in the prior appeal of this case. This case was decided on July 16, 1992 -- after Espinosa was decided on June 29, 1992.

Contrary to Defendant's contention, the jury's verdict was not infirm because the jury was instructed on both the pecuniary gain and burglary factors. The instruction of the jury on both factors is not improper. The jury is free to consider either. Castro v. State, 597 So. 2d 259, 261 (Fla. 1992)("When applicable, jury may be instructed on 'doubled' aggravating circumstances since it may find one but not the other to exist"). Defendant was entitled to an instruction that if the jury found both factors present, it must consider them as a single aggravating circumstance; but only if he requested it. Id.

The State would note that Defendant, however, made no such request and thus has waived the issue. At the charge conference, Defendant objected to giving both factors, proposing that one be stricken. (P.R. 1509) Although he proposed six separate instructions with regard to the penalty phase, he did not at any point request a "merger" instruction. (R. 189-195, P.R. 1620-1626) Nor did he object when the jury was charged. Both steps were necessary to preserve the issue:

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[20] ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992).

> [T]he settled rule of Florida procedure is that, in order to preserve an objection to a jury instruction, a party must object after the trial judge has instructed the jury. While the rule is subject to a limited exception for an advance request for a specific jury instruction that is explicitly denied, Sochor gets no benefit from this exception, because he never asked for a specific instruction.

Sochor, 119 L. Ed. 2d, at 338, n. * (citations omitted); see also, Castro, at 261 (defendant must request limiting instruction to preserve "doubling" instruction issue). Defendant thus would not have been entitled to a new jury sentencing even if he had properly raised the issue in the prior appeal. Sochor (instruction issue must be preserved); Harvard (defendant may not raise on remand issue which could have been raised on direct appeal).

Likewise, merely because the trial judge relied on the witness elimination factor, an aggravator which was deemed without evidentiary support by this court, Defendant was not entitled to a new sentencing hearing. Again, Defendant could have raised this issue in this court on direct appeal, but did not, and is thus procedurally barred. Harvard. See also, Johnson v. Singletary, 612 So. 2d 575, n. 2 (Fla. 1993)("The other issues are unquestionably barred. They are . . . (2) that the jury's recommendation was tainted by the consideration of other invalid aggravating factors, including the 'witness elimination' factor," where not previously raised). Moreover, Defendant never objected to the jury instructions given on this factor on any constitutional grounds and thus was not entitled to a new sentencing jury on this issue. Sochor.

Finally, the State would note that even where the jury was instructed on an "invalid aggravator," in the sense that it was without evidentiary support, there is no presumption that the jury erroneously found the factor or weighed it in their advisory sentence. See Sochor, 119 L. Ed. 2d, at 340:

> Because the jury in Florida does not reveal the aggravating factors on which it relies, we cannot know whether the jury actually relied on the coldness factor. If it did not, there was no Eighth Amendment violation. Thus, Sochor implicitly suggests that, if the jury was allowed to rely on any of two or more independent grounds, one of which is infirm, we should presume that the resulting verdict rested on an infirm ground and must be set aside. Just this term, however, we held it no violation of due process that a trial court instructed a jury on two different theories, one supported by the evidence and one not. We reasoned that although the jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the record. We see no occasion for different reasoning here, and accordingly decline to presume jury error.

(Citations omitted). Defendant has thus not demonstrated any basis for impanelling a new sentencing jury on the basis of the jury instructions given on the burglary/pecuniary gain and witness elimination factors.

b. The HAC instruction.

Defendant's final contention regarding the penalty phase instructions is that the jury was given an inadequate HAC instruction, contrary to the holding of Espinosa. This contention has been waived.

The only objection the defense raised at the penalty phase charge conference was that the jury should not be instructed on the HAC aggravator because there was no evidence to support it. (P.R. 1515) Defendant did not in any way object to the proposed language of the HAC instruction at the charge conference, nor did he request a different instruction, despite submitting other proposed penalty phase instructions, one of which was accepted by the trial court. (R. 189-195, P.R. 1620-1626, 192, P.R. 1623) Moreover, at the conclusion of the penalty phase jury charge, not only did Defendant not object to the instructions as given, but, in response to explicit inquiry by the court, he affirmatively stated his approval of the instructions as given. (P.R. 1597)

Finally, on direct appeal to this court, Defendant again did not raise any argument with respect to the vagueness or unconstitutionality of the HAC jury instruction as to the HAC aggravator.[21] Defendant's only argument concerning the HAC factor was that there was insufficient evidence to support it.[22]

Thus, Defendant's contentions as to the unconstitutionality of the HAC instruction are, at this juncture, barred because they were not preserved at trial nor raised on direct appeal. See, Turner v. Dugger,[23] where this court held:

> Finally we note that although the jury was given an instruction on the aggravating circumstances of heinous, atrocious, or cruel

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[21]See Prior Brief.

[22]Prior Brief, at pp. 43-45.

[23]614 So. 2d 1075 (Fla. 1992).

> similar to that which was recently ruled unconstitutionally vague by the Untied States Supreme Court in Espinosa v. Florida, 112 S. Ct. 2926 (1992), Turner failed to object on constitutional or vagueness grounds and thus deprived the trial court of an opportunity to rule on the issue. Turner thus waived the claim. See Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992).

Id., at 1081 (emphasis supplied). See also, Kennedy v. Singletary, 602 So. 2d 1285 (Fla.); cert. denied, 113 S. Ct. 2, 120 L. Ed. 2d 931 (1992)(claim based upon Espinosa procedurally barred, where only objection to jury instruction was to factual applicability, not constitutionality, and claim was not presented on direct appeal); Melendez v. State, 612 So. 2d 1366 (Fla. 1993)(claim based upon Espinosa procedurally barred, where issue was waived on direct appeal due to lack of objection at trial); Sochor (pretrial motion attacking constitutionality of HAC aggravating circumstance was insufficient under Florida law to preserve claim as to constitutionality of jury instruction to which no contemporaneous objection was interposed); Beltran-Lopez v. State, 18 Fla. L. Weekly S469 (Sept. 2, 1993)(seeking through motion in limine to prevent jury from considering factor did not preserve Espinosa claim, where defendant never attacked instruction itself by submitting a limiting instruction or objecting to the instruction as worded); Espinosa v. State, 18 Fla. L. Weekly S470 (Sept. 2, 1993)(same); Remeta v. Dugger, 622 So. 2d 452 (Fla. 1993)(Espinosa claim not preserved for appeal where counsel through motion in limine merely objected to application of the aggravating factors; no objection to the form or purported vagueness of the

factors); Gaskin v. State, 615 So. 2d 679 (Fla. 1993)(where defendant argued at trial against CCP aggravator, but did not object to the vagueness of HAC instruction or request a special instruction, Espinosa claim not preserved for review).

Moreover, the State would submit that even if the issue had been preserved, under the facts of the instant case, as previously found by this court, this murder was heinous, atrocious or cruel beyond a reasonable doubt, under any definition of those terms.[24] Therefore any error in the instruction was harmless beyond a reasonable doubt and did not affect the sentence recommended by the jury. Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993)(where evidence established aggravating factor beyond a reasonable doubt, any error in instruction was harmless); Remeta (same); Melendez (same); Atwater (same). Defendant has thus not demonstrated any basis for impanelling a new sentencing jury on the basis of the jury instruction given on the HAC aggravator.

2. The felony-murder instruction.

Defendant next complains that he was entitled to a new jury because the guilt phase jury instruction did not contain any charge on principals. As a result, he contends, because the jury had a question as to whether or not Defendant had to be the actual killer to be convicted of felony murder, "there remains an open question as to the degree of Appellant's individual culpability for what happened to Joyce Ezell." (B. 55)

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[24](R. 219); Davis, at 797.

Again, this contention has been waived. The original charge as offered by the State did not contain a "principals" charge with regard to first degree felony murder. Defendant did not object to the charge nor propose his own.[25] As such the issue has not been preserved. Sochor (proposed instruction must be specifically presented to and rejected by court to preserve issue). Further it has been waived because Defendant did not raise this issue in his initial appeal. Jackson v. State, 18 Fla. L. Weekly S485, S486 (September 9, 1993)(failure to raise issue on initial appeal, even if preserved below constitutes waiver); Harvard (same); Johnson v. State, 593 So. 2d 206 (Fla. 1992)(same).

Even if it were properly before the court, the issue is without merit. The jury was instructed on felony murder as

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[25]Defendant filed proposed guilt phase instructions which included the first degree felony-murder principals charge. (R. 183, P.R. 1614) However, at the charge conference, counsel waived the first degree felony-murder principals instruction:

> Your Honor, I have prepared a packet of prepared instructions, only one of which I would urge now, I'm satisfied -- essentially the State and I have produced the same instructions on first degree murder with a few minor variations.
>
> Second degree murder on the main second degree count, third degree manslaughter, and I believe those are the only ones. The instruction that I would urge on Your Honor is second degree murder, felony murder instructions which is contained in the standard instructions in which I have submitted in writing to you now.
>
> I urge you that the jury could bring back a verdict of second degree felony murder under the evidence that they have heard.

(P.R. 1116)(emphasis supplied)

follows:

> Before you can find the defendant guilty of first degree felony murder, the State must prove beyond a reasonable doubt:
>
> 1. The person alleged to have been killed is dead.
>
> 2. The death occurred as a consequent [sic] of and while the defendant was engaged in the commission of a crime, was attempting to commit, or was escaping from the immediate scene of a robbery or burglary.
>
> 3. The defendant was the person who actually killed the deceased.
>
> It is not necessary for the State to prove the defendant had a premeditated design or intent to kill.

(P.R. 1228)(emphasis supplied)

The State is at a loss to determine the source of Defendant's alleged "open question." The jurors were instructed to follow the law as it had been given to them in response to their question about felony murder. (P.R. 1281)[26] Thus, assuming they followed the instructions they were given, the jurors could only have found Defendant guilty if they determined that he "actually killed the

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[26]The State proposed giving the standard instruction on principals. (P.R. 1260) The defense objected strenuously, and after extensive discussion, (P.R. 1261-1280) the court responded to the jury:

> Ladies and gentlemen, the Court cannot respond to your question. All I can say to you is this: That you must look to the evidence and the facts as you may find them from the evidence, and the Court's instructions on the law. From those two areas you must arrive at what verdict you believe to be just and correct.

(P.R. 1281) Defendant did not object to that instruction.

deceased."[27] Defendant's position is thus nothing more than sheer speculation which must be rejected. See, Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 707 (1987)(it is "the rule that juries are presumed to follow their instructions"). Defendant is not entitled to a new sentencing hearing on this basis.

3. The "Golden Rule" issue

Defendant also contends that he was entitled to a new jury because of a singular comment made by the prosecutor during his closing argument in the original penalty phase proceeding. This issue has been previously visited and found harmless by this court:

> Next, Davis argues that the trial court erred in denying his motion for mistrial and failing to give a curative instruction after the prosecutor made an improper "Golden Rule" argument.
>
> * * *
>
> Although the comment was improper, we find that under these circumstances a mistrial is not warranted. The remark occurred at the end of a lengthy and otherwise unemotional closing argument. The comment was not so egregious as to fundamentally undermine the reliability of the jury's recommendation. See Pope v. Wainwright, 496 So. 2d 798, 803 (Fla. 1986), cert. denied, 480 U.S. 951 (1987); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). Any error resulting from this single, isolated comment was harmless beyond a reasonable doubt.

(R. 218-219); Davis, at 797. Having been once decided by this

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[27]Alternatively, the jury could have found him guilty of first degree premeditated murder as instructed. (P.R. 1226-1227) In either event, the jury would have had to have found under the instructions given that Defendant himself killed Mrs. Ezell.

court, Defendant may not now revisit this guilt phase issue on appeal from his resentencing. Harvard (issues reviewable on direct appeal will not be considered on appeal from sentence after remand). Defendant is not entitled to a new sentencing hearing on this basis either.

4. Conclusion

In sum Defendant argues that his jury was so tainted that he was unable to receive a fair sentencing proceeding. This contention was not raised on his first appeal.[28] Defendant would have the Court remand his case for yet another sentencing on alleged grounds which could and should have been raised before that mandate issued. The time for filing of a motion for rehearing has long since expired. Moreover, the alleged error would not have entitled Defendant to a new sentencing proceeding, even if the issues had previously been raised in this court. The underlying contentions were specifically found harmless,[29] are entirely without merit,[30] or have clearly been waived.[31] Defendant cites no case which holds that where the trial court has scrupulously followed this court's mandate, he is entitled to have his sentence reversed because an unchallenged mandate was in error. By the

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[28]All of the legal principles which he alleges support his position were established before the opinion in Davis was issued.

[29]The "Golden Rule" issue.

[30]The "open question" as to Defendant's culpability.

[31]The "open question" as to Defendant's culpability and all the guilt and penalty phase jury instruction issues.

terms of the last mandate, Defendant was not entitled to a new jury proceeding. He is not entitled to one now.

B. DEFENDANT WAS NOT ENTITLED TO PRESENT NEW EVIDENCE

Defendant argues that the court erred in not allowing him to present new evidence. He cites a number of contentions which he believes support this argument. He alleges that he was not permitted to present unspecified evidence at his original 1990 sentencing hearing; that he was not permitted to present (at the time, unspecified) new evidence at the 1992 reweighing, and that the trial court was required to allow him to do so under the sentencing rules; he finally claims that the trial court erroneously failed to properly consider his mitigating evidence at the reweighing. These contentions are either procedurally barred, substantively with merit, or both, and are in any event, if error, harmless beyond a reasonable doubt.

As discussed previously at pp. 29-32 the trial judge properly followed the literal terms of the mandate: that it "reweigh the evidence." (R. 223) As noted by the trial judge, (R. 311) it follows that one cannot "reweigh" what one has not previously weighed. A mere reweighing does not entitle a defendant to present new evidence. Mann (reweighing not require new evidence); Atkins (no new evidence were court found no reversible error in evidence or argument at penalty phase); Mikenas v. State, 407 So. 2d 892, 893 (Fla. 1982)(no error in trial court's denial of motion for evidentiary hearing and new advisory jury on remand where "the

evidence itself was not improper, only the manner in which it was considered by the court in its findings of fact");[32] Dougan v. State, 398 So. 2d 439, 440 (Fla. 1981)("Treating the remand as an opportunity to revisit the constitutionality of the death penalty, the bias of the trial judge, the impropriety of articulated aggravating circumstances found in the original sentencing order, and a range of other matters unrelated to our directive, Dougan's counsel endeavored to treat the remand as a full-blown sentencing proceeding. The trial court properly rejected counsel's attempt to expand the proceeding").

Addressing the Defendant's specific contentions, he asserts that he never had a sentencing hearing at his first trial in 1990. This argument was not raised during that trial,[33] and was not raised on his direct appeal. At no point has he suggested what he would have presented to the court had he not been "prevented" from submitting argument or evidence to the court. He makes no proffer in his current brief either. As such Defendant has not preserved the issue and may not raise it now. Jackson v. State (failure to raise issue on direct appeal bars subsequent consideration of issue); Johnson v. State (same).

Even if the issue were properly before the court, the argument is without merit. Defendant's argument was that because the written order was filed with the clerk before he was given the

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[32]This court found no reversible evidentiary error on the direct appeal. Davis.

[33]Counsel conceded below that there had been no contemporaneous objection. (R. 393)

opportunity to present evidence or argument, there was no hearing. At the sentencing hearing before the judge both counsel and Defendant were given an opportunity to address the court. Defendant proclaimed his innocence. Counsel, conceding no legal cause existed to not pronounce sentence, urged the court to impose a life sentence "for the reasons that I cited in my summation to the jury." (R. 374-376, P.R. 1671-1673)

The trial judge thus rejected Defendant's contention, finding that he was not prevented from presenting any evidence at the sentencing hearing:

> THE COURT: I don't mean to be facetious, but are you suggesting that if a presentation had been made upon the Court's inquiry and the Court persuaded that it had merit that the Court could not reach over to the clerk and take the sentence back and reconsider it, the sentence not having been announced on the record?
>
> * * *
>
> I find nothing magic in handing a set of papers to the clerk. If the presentation had come forth and the Court had been persuaded, the prosecutor could have objected until the cows came home and gone over and took that piece of paper back, tore it up and threw it in the trash can, there wouldn't be much that could be done about it, the defense would certainly not object and the defense did not ask the Court to go through any mechanical steps such as that, nor did the defense inform the Court that it was under the belief that it was foreclosed from any further presentation. Obviously, the Court's inquiries of both, the defendant and defense counsel, would have directly suggested that the Court was prepared under the Rules to hear what they had to say and to the extent that things were said before I heard them and took them into consideration.

(R. 397-399)

Finally, assuming, arguendo, that the trial court erred and should have received additional evidence at the original proceeding, such error was harmless beyond a reasonable doubt. First, a two day evidentiary hearing, including extensive argument by counsel had already been held. (P.R. 1089-1565) Defense counsel's only offer at the pronouncement hearing was for the court to consider the arguments he had already made. He plainly did not feel that the court was limiting his ability to present, and in any event, rested on his prior submissions. The motion was properly denied.

Turning to the post-remand proceedings, the State would note that in light of Defendant's argument below, the trial judge did not err in disallowing new evidence at the 1992 reweighing proceeding. First, the record makes it clear that after Defendant's motion to impanel a jury was denied on October 6, 1992, he had only requested to make argument and produce witnesses on the "weight" the trial court was to give the aggravating and mitigating circumstances. There was no suggestion that he wished to offer new evidence:

> I don't want to say what we intended to do in this particular case . . . I think we can present witnesses relevant to the question of what weight to give the aggravating and mitigating circumstances, and we can certainly present argument as to what weight the court should give those factors.

(R. 284) Plainly the court did not understand Defendant to be claiming the right to present new evidence in mitigation. (R. 285) Nor did the State: "I'll agree to that limited like that." (R.

284). Thereafter, the State requested the names of the witnesses. The defense took the position that it would not divulge them. (R. 303)

At the subsequent hearing on the State's Motion to Preclude Defendant from Presenting Additional Evidence, the trial judge several times gave Defendant the opportunity to explain what evidence he wished to present. (R. 317, 321, 322, 327) For example, at R. 324, the court inquired:

> [T]he State should have the opportunity to know just what this is. Why wasn't it brought up before? Was it -- is it newly discovered information? Is it old information? Was it oversight by defense counsel? What was it? Why are we just getting into it now? Why didn't it come up before?

Defendant at no point thereafter informed the court what he wished to present. In response to a pointed question by the court, the closest he came was "That is part of what we intend to do, yes, revisit the original mitigation." (R. 327) Finally, toward the end of the hearing when it appeared the judge was not accepting his position, the defense acknowledged that it had not given the court an indication of what it wanted to present:

> Then you asked me if I was going to present evidence as it relates to new mitigating circumstances. And I hesitated and never did answer because I am trying to remember exactly what mitigating circumstances were argued by the trial attorney in the case.

(R. 344) Despite this frank acknowledgement, the court never was informed as to the specific witnesses or evidence Defendant desired to present.

In Ferguson v. State,[34] this court held "that the trial court did not abuse its discretion in refusing to allow an evidentiary hearing" on remand where the trial court found that the offer of proof was insufficient to warrant reopening the case. Id., at 209. The court gave Defendant numerous opportunities to present such an offer of proof. He declined to advise the court at all of the nature of the evidence he wished to present. As such, it cannot be said that the trial judge abused his discretion by refusing to allow Defendant to present evidence. Id.

Defendant primarily contends that R. 3.780, Fla. R. Crim. P., requires the admission of new evidence at a resentencing. Below, however, he relied primarily on R. 3.720, Fla. R. Crim. P., in support of his argument:

> We believe that Florida Rule of Criminal Procedure 3.720 covers this particular situation . . . The only law relating to resentencing or sentencing, which is where we stand now, is Rule 3.720.

(R. 315) He notes in his brief that the two provisions are analogous. (R. 59) The State would agree to the extent that nothing in either rule requires new evidence or a new jury to be sworn upon remand for reweighing. The cases cited above at pp. 30-32 clearly show that the shape and extent of the proceedings on remand are controlled not by either rule cited by Defendant, but by this court's mandate. Defendant cites no case which holds that the provisions of either rule are mandatory on a remand.

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[34]474 So. 2d 208 (Fla. 1985).

Defendant also alleges that the trial judge's belief that this court had affirmed its findings with regard to the mitigating factors was "highly questionable." (B. 57) The contention is based upon the language of the sentencing order that the aggravating circumstances outweighed the mitigating circumstances. His reasoning is that there thus had to be something to "outweigh." This conclusion is unwarranted.

In his argument to the jury Defendant only argued the mitigating factors which the court specifically rejected in the sentencing order: extreme mental or emotional disturbance;[35] (P.R. 1585)relatively minor participation in the crime;[36] (P.R. 1585-1586) under duress or substantial domination of another;[37] (P.R. 1586-1587) and incapacity to conform to the requirements of the law.[38] (R. 1587) At the 1990 sentencing hearing before the court,

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[35]This factor was found not to be supported by the evidence. (R. 207, P.R. 1637) The finding was affirmed. (R. 221); Davis, at 798.

[36]This factor was found not to be supported by the evidence. (R. 207-208, P.R. 1637-1638) The finding was affirmed. (R. 222); Davis, at 798, n. 2.

[37]This factor was found not to be supported by the evidence. (R. 208, P.R. 1638) The finding was affirmed. (R. 222); Davis, at 798, n. 2.

[38]This factor was found not to be supported by the evidence. (R. 208, P.R. 1638) The finding was affirmed. (R. 221-223); Davis, at 798-799.

The defense's only reference to any other mitigator came near the conclusion of its argument:

> The last one, any other aspect of the defendant's character or record, and any other circumstances of the offense.

Defendant relied solely on "the reasons that I cited in my summation to the jury." (R. 376, P.R. 1673) No written memorandum regarding his sentence was filed prior to the entry of Defendant's original sentence. In short, neither the court nor the jury was provided with any suggestion as to what other mitigators they ought to consider. Nor did Defendant propose what mitigators the court should have considered in his first appeal brief.[39] Nor does he now. (B. 57-58) Under the circumstances he may not now complain. Hodges v. State, 595 So. 2d 935 (Fla. 1992)("defendants share the burden of identifying nonstatutory mitigators, and we will not fault the trial court for not guessing which mitigators Hodges would argue on appeal).[40]

Thus, this contention provides no grounds for the conclusion that the trial court found "something" in mitigation. Plainly, the court did not find any of the mitigating factors presented by Defendant to exist,[41] where it specifically rejected the only mitigators presented for its consideration. This court affirmed

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(R. 1588)

[39]Original brief at 46-48.

[40]Defendant rejected instructions for the remaining statutory mitigating factors; (P.R. 1516-1523) none of his proposed non-standard instructions related to specific mitigating circumstances. (R. 189-195, P.R. 1620-1626)

[41]Note that this was the court's own understanding of what it had done:

> Well let us recall that the court found no mitigation.

(R. 312)

that finding. As the contention itself is meritless, it follows that it does not support his claim that he was entitled to present new evidence.

Finally, the State submits that even if the trial court erred in following the plain language of the mandate and erroneously disallowed the presentation of new evidence, any error was harmless beyond a reasonable doubt. Defendant argued four factors in mitigation at the original trial: that he was under the influence of extreme emotional disturbance at the time of the murder; that Defendant's participation was relatively minor and/or someone else actually committed the murder; that he was under the extreme duress or emotional domination of another person; and that he was unable to conform his actions to the requirements of the law at the time of the murder. The trial judge rejected each of these factors in the original proceeding. This court affirmed. On remand, the court again rejected these four factors. Nothing contained in Defendant's proffer could reasonably have affected the trial court's decision, as the proffered evidence was substantially the same as that presented by Defendant, and rebutted by the State, and found unpersuasive by the trial court at the original penalty phase in 1990.

With regard to the first factor, the trial court found:

> 1. The First Degree Murder for which the Defendant is to be sentenced was not committed while he was under the influence of extreme emotional or mental disturbances. Although experts called by the Defendant voiced the opinion that he was under such influence, the Court having weighed and considered all the evidence in a manner most favorable to the

> Defendant, finds insufficient evidence in the evidence [sic] upon which the experts could base such an opinion. Other than possible unsworn statements of the Defendant, there is simply nothing of credible probative value to support this theory.

(R. 445)[42] Nothing in the proffered testimony would alter this conclusion. Dr. McClane[43] again opined that although not everyone would agree with the position, he felt that Defendant's brain damage constituted extreme mental disturbance. (R. 468) The wording of his opinion was virtually identical to his original testimony. (R. 95, P.R. 1397) Dee, on the other hand, declined to say that he was under the influence of extreme mental or emotional distress at the time of the murder. (R. 501) If anything Dee's proffer testimony in this regard was less favorable to Defendant than before. At trial he did say that Defendant's brain damage constituted emotional disturbance. (R. 152, P.R. 1356)

Although Dee and McClane felt they had more to back up their diagnosis of brain damage, because of Piniero's EEG, (R. 464, 493) the State would submit that this factor would not change the trial court's position. The rebuttal evidence at trial did not rule out some sort of brain dysfunction on the part of Defendant.[44] Dr. Zwingelberg testified, however, even to the extent that Defendant

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[42]This portion of the order is identical to the original order. (R. 207) This court approved the finding. (R. 221-223); Davis, at 798-799.

[43]As noted in Defendant's brief this is the former Dr. McClain.

[44]Dr. Westby discussed the original EEG taken by Dr. Vroom at trial. It showed the same abnormalities as the one performed by Piniero. (P.R. 1433, 1450-1455; R. 493) Dr. Zwingelberg discussed it also. (P.R. 1497-1498)

had any mental deficiency,[45] the type of seizure disorder he suffered from was not causally related to the murder here. (P.R. 1487) Dr. Piniero himself testified that he did not believe that the crime was committed during a seizure. (R. 530) Complex goal oriented behavior, such as murder and the methodical ransacking of a house, is not possible during a seizure. (R. 535) Thus only Dr. McClane remained at the time of the proffer fully in support of this factor. Dr. Dee backpedalled from his original position. Dr. Piniero corroborated the State's witness at trial in testifying that Defendant's disease was not causally related to the events on the day of Joyce Ezell's death. In short, nothing in the proffer would change the court's opinion with regard to this factor.

As to the second factor, the court found:

> 2. The proof viewed most favorably for the Defendant does not support the assertion that another person committed the murder, and that Defendant's participation was relatively minor. The record reflects only the Defendant proposing this version of the events months after the incident and after first claiming no memory of what had taken place. At the scene of the crime there existed no physical evidence to establish the presence of anyone other than the Defendant and the victim. The evidence does suggest at some time after the fact there may have been three occupants of the victim's stolen car, but this is not connected by evidence to the actual killing.

(R. 445)[46] Nothing in the proffer addressed this contention. It

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[45]He felt that Defendant was largely malingering. (P.R. 1487)

[46]This finding is identical to the original finding. (R. 207-208). It should be noted that "residual doubt" is not a valid mitigating factor. Preston v. State, 607 So. 2d 404 (Fla. 1992);

should be noted, however, that Defendant sought, and was granted, production of the latents found at the scene for comparison by an expert. (R. 297-300) Presumably if this examination had corroborated Defendant's contention that he was not acting alone, there would have been a proffer of it. As the proffered testimony did not address this factor, it obviously would not have affected the judge's determination.

With regard to the next mitigator, the court determined:

> 3. The proof fails to show the Defendant to have been under the extreme duress or emotional domination of another person. The only suggestion of such is Defendant's unsworn version revealed to an examining psychologist months after the event. This story is not corroborated by other evidence in the case.

(R. 445)[47] Nothing in the proffer would alter this conclusion. The only evidence in support of this factor at trial was Defendant's unsworn story about Red and Bibby to the doctors. At trial McClane said he did not really have an opinion on this factor, due to the questionable nature of the story. (R. 97, P.R. 1399) At the proffer, Dr. McClane testified that it would be a "pretty shaky" assumption to accept Defendant's story about the accomplices as accurate. (R. 469) Unless the story was accepted as accurate he was unable to offer any opinion on this mitigator with any reasonable psychiatric certainty. (R. 469) At trial Dee said that

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King v. State, 514 So. 2d 354 (Fla. 1987). Furthermore, even if it were, there was no basis for such a doubt here, as discussed above at pp. 36-38.

[47]This is finding is identical to the original finding. (R. 208) This factor was properly rejected. (R. 222); Davis, at 798, n. 2.

Defendant told him he was under the substantial domination of another, but that he had no opinion in that regard. (R. 152, P.R. 1356) At proffer Dee now believes Defendant was under the domination of another, primarily because he found Defendant's story plausible. (R. 500) However, nothing in the proffer refutes the court's observation that there was no evidence that anyone else was at the scene of the crime. And despite Dee's recent conversion to believer, McClane's faith in Defendant's story was weaker than at trial. As pointed out above, Defendant sought, and was granted production of the latents found at the scene for comparison by an expert. (R. 297-300) Presumably if this examination had corroborated Defendant's contention that he was not acting alone, there would have been a proffer of it. There was not. Nothing in the proffer alters the foundation of the judge's finding as to this mitigator.

Finally, the trial judge found:

> 4. Other than the solicited opinions of Defendant's experts that the Defendant's capacity to conform his conduct to the requirements of the law was substantially impaired, the proposition is unsupported by any other evidence in the record. The facts reveal that after killing the victim, the Defendant methodically burglarized the home, wiped clean the murder weapon, loaded the car with stolen items, and took steps to hide the car. All of this indicates that the Defendant clearly understood what he was doing, why he was doing it, and that it was unlawful. Thus recognizing the nature of his activities there is nothing to demonstrate that he could not conform his conduct to the requirements of the law. Further, the suggestion of brain damage is unsubstantiated by competent, credible evidence as well as any relationship such damage had to the Defendant's actions in the case.

(R. 446)[48] With regard to this factor, McClane opined, as he did at trial, that Defendant had a substantial defect in his ability to conform his behavior to the requirements of the law. (R. 468, 99, P.R. 1401) As he did before, Dee concurred in this opinion. (R. 500) However, Piniero was unable to say that Defendant could not conform his actions to the requirements of the law at the time of the murder. (R. 534)

In sum, nothing in this proffer alters the basis for the court's rejection of this factor, i.e., that after killing the victim, the Defendant methodically burglarized the home, wiped clean the murder weapon, loaded the car with stolen items, and took steps to hide the car. All of this indicates that the Defendant clearly understood what he was doing, why he was doing it, and that it was unlawful. (R. 446) It cannot be said that the proffered evidence would have altered the courts findings.

With regard to the remaining witnesses, Fee, the custodian of records for Polk County Schools, presented Defendant's middle and high school records. (R. 554-556) However, Defendant's scholastic history was discussed and available at the original trial by Drs. Dee and Zwingelberg. (R. 135, P.R. 1339, 1440)

The only new evidence presented at the proffer was the testimony of two correctional officers from Florida State Prison. They both worked the recreation yard and saw Defendant at most four hours a week. Even assuming that post-sentence behavior were a

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[48]This finding is identical to the original finding. (R. 208) It was approved. (R. 221-222); Davis, at 798.

valid mitigating factor, the prison testimony could not possibly have changed the court's findings. Despite being in solitary confinement all but four hours a week, Defendant managed to get into a fistfight with another death row inmate. Defendant precipitated the fight by throwing a basketball at him. (R. 575-591) This could hardly be termed mitigating evidence. Thus nothing in this proffer altered the bases for the trial court's findings with regard to the mitigating factors.

Likewise, the only proffered testimony with regard to the aggravating circumstances was that of medical examiner Richard Jones. His testimony was substantially the same as it was at trial. (Cf., R. 77-81, P.R. 1295-1299 & R. 512-518)[49] This court found that Jones' testimony, coupled with non-medical evidence regarding the defensive nature of Ezell's wounds and Defendant's own comments about being scratched by an old lady established the HAC factor beyond a reasonable doubt:

> Other evidence leads to the inference that the victim struggled with her assailant. A witness testified that Davis had scratches on his face the day after the murder and that Davis said that an old lady scratched him. Further, the victim suffered stab wounds to her adam's apple and upper chest, suggesting that she was stabbed while standing up or struggling. We find that the evidence establishes this factor beyond a reasonable doubt.

(R. 219); Davis, at 797.

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[49] Despite Jones' proffer statement regarding defensive wounds (it must be remembered no cross examination was conducted at the proffer), the record supports a the finding of a defensive struggle. Mrs. Ezell was stabbed in her neck and chest as well as in the back and upper back. (P. R. 895)

Viewing the proffer as a whole, no evidence presented at the proffer seriously contradicted the original evidence at trial, and it is plain that any error in refusing to allow Defendant to present new evidence was harmless beyond a reasonable doubt. Wickham v. State, 593 So. 2d 191 (Fla. 1991)(in light of very strong case of aggravation any error in weighing of mitigators was harmless beyond a reasonable doubt, where state controverted some of mitigating evidence); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

C. THE TRIAL COURT CONSCIENTIOUSLY REWEIGHED THE EVIDENCE

Defendant's contention that the court thought its role was simply that of "cleaning up the language" of the sentencing order (B. 63) is totally unfounded. The court undertook its duty seriously: "I would assume all that [the reweighing] is to be done in the light most favorable to the defense. And certainly the Court would intend to do it in that manner." (R. 318)

The contention is further eroded by events at the reweighing hearing, which took place on November 10, 1990. After argument of counsel, the State expressed surprise when the court set the pronouncement of sentence for November 13.[50] The State informed the court that it thought the pronouncement of sentence was going

[50]It was actually conducted on November 17, 1992.

to be same day.[51] (R. 412) The court responded:

> Well, I appreciate that and I'm sorry if I caused any confusion. I'm going to do it on Friday morning and I don't mind articulating why.
>
> I'm still in the process of digesting some of the memorandum that have [sic] been submitted by the defense. I certainly think that the Court needs to reflect on argument that has been made this morning, and therefore, the Court is not comfortable with proceeding this morning and the actual sentencing will occur Friday morning.

(R. 412-413)(emphasis supplied)

Defendant's contention is without merit. A lack of reweighing will not be presumed merely from the similarities of the sentencing orders where the record reflects that the trial court actually considered the arguments presented. Atkins, at 1201; The trial judge took several days to consider the arguments and Defendant's written memorandum. The contention thus is unfounded. Lucas v. State, 613 So. 2d 408 (Fla. 1993)(No abuse of discretion where "judge had two months in which to study Lucas' memorandum and stated that he had done so").

D. CONCLUSION

As the trial court properly complied with the mandate, Defendant's sentence should be affirmed.

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[51]The prosecutor's concern was that he was scheduled to be in Tallahassee on November 13.

III.

THE IMPOSITION OF THE DEATH SENTENCE IN THE INSTANT CASE IS PROPORTIONAL TO DEATH SENTENCES IMPOSED AND AFFIRMED IN OTHER CASES. (RESTATED)

Defendant argues that the imposition of the death penalty in this case is disproportionate when compared to death sentences which this court has set aside in other cases. A careful comparison of other cases, however, compels the conclusion that the instant death sentence is not disproportionate.

The lower court found the existence of two aggravating factors: (1) the murder was especially heinous, atrocious and cruel; and (2) the murder was committed during the course of a burglary committed for pecuniary gain. The court considered and rejected the mitigating circumstances which Defendant proposed. These findings were approved on direct appeal. (R. 219-223); Davis, at 797-799.

This court's recent decision in Taylor v. State,[52] presents highly analogous factors. The sentence of death was affirmed on the basis of the following aggravating factors: (1) murder committed during the course of a burglary and/or sexual battery; (2) murder committed for financial gain; (3) the murder was especially heinous, atrocious, or cruel. The sole nonstatutory mitigation found by the trial court was that the defendant was mildly retarded. There is little difference between Taylor and the instant case.

Other death sentences including similar aggravating factors

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[52]18 Fla. L. Weekly S643 (Dec. 16, 1993).

and minimal or no mitigation have been similarly upheld. See, e.g., Arango v. State, 411 So. 2d 172 (Fla. 1982)(murder especially heinous, atrocious, or cruel; statutory mitigation of total lack of prior criminal activity); Hudson v. State, 538 So. 2d 829 (Fla. 1989)(previous conviction of violent felony; murder committed during armed robbery; minimal weight given to statutory mitigating factors of extreme mental or emotional disturbance, impaired capacity to conform conduct to requirements of law, and age of defendant); Reichman v. State, 581 So. 2d 133 (Fla. 1991)(aggravating factors of murder committed for pecuniary gain and cold calculated and premeditated; minimal nonstatutory mitigation); Cook v. State, 581 So. 2d 141 (Fla. 1991)(murder committed for pecuniary gain and robbery merged into one factor; defendant previously convicted of another capital felony; mitigation included absence of significant prior criminal activity); Freeman v. State, 563 So. 2d 73 (Fla. 1990)(murder committed for pecuniary gain and during burglary merged into one factor; previous violent felony convictions; nonstatutory mitigation including low intelligence and abuse by stepfather).

Defendant attempts to minimize the fact that the murder was heinous, atrocious or cruel. This court, in the prior appeal, found that that factor was supported by the evidence. (R. 219); Davis, at 797. This court also rejected Defendant's current contention that there were no defensive wounds indicative of a struggle with her assailant. Id. This court, in upholding this factor, in addition to emphasizing the multiple stab wounds, stated

that "the victim suffered stab wounds to her adam's apple and upper chest, suggesting that she was stabbed while she was standing up or struggling." Id. Other evidence, scratches on Defendant and his statement that an old lady scratched him support the contention that there had been a struggle. Id. This court also explained the lengthy period of time which Mrs. Ezell may have been conscious after an initial blow to the head and prior to the stabbing. Id.

Defendant urges this court to give little weight to the HAC factor. However, the weight accorded to a particular factor is a matter for the trial court. See, Hudson, at 831 ("It is not within this court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances."). As can be inferred from Taylor, and as specifically noted by the trial judge here, (R. 447) the HAC factor is a highly significant factor.

Defendant also attempts to minimize the other aggravating factor. Cases such as Reichman and Taylor lead to the conclusion that this factor, murder committed for pecuniary gain in the course of a burglary and robbery is far from minimal, especially when joined with another aggravating factor.

The sole purpose of proportionality review "is to consider the circumstances of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So, 2d 312, 315 (Fla. 1982). Reweighing of the individual aggravators in the manner requested by Defendant is beyond the scope of

proportionality review. When the instant case is compared to those cited above, it must be concluded that the sentence herein is proportionate. The cases upon which Defendant relies are invariably cases including a single aggravating circumstance and are therefore inapposite. In addition, they included substantial mitigation. See, e.g., Proffitt v. State, 510 So. 2d 896 (Fla. 1987)(murder committed during burglary; no significant history of criminal activity); Caruthers v. State, 465 So. 2d 497 (Fla. 1985)(murder committed during a robbery; no significant history of criminal activity); Menendez (same).

Accordingly, the imposition of the death penalty herein should be deemed proportionate to the sentences upheld in other cases such as Taylor, Reichman, Hudson, Cook, and Freeman, and Defendant's sentence affirmed.

CONCLUSION

For the foregoing reasons, the sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to ROBERT F. MOELLER, Assistant Public Defender, P.O. Box 9000 -- Drawer PD, Bartow, Florida, 33830, this 3rd day of February, 1994.

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