IN THE SUPREME COURT OF FLORIDA

JAMES MILTON DAILEY,

Appellant,

v. Case No. 83,160

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement the statement of the case and facts recited by the appellant:

The trial court noted the following facts in finding the murder to be heinous, atrocious, or cruel:

> Shelly Boggio, the victim, was brutally stabbed as she fought frantically and continuously for her life. In addition to the deep stab wounds, she suffered numerous "pricking wounds" on her breast and stomach. She was choked. She was dragged into the waterway and held under water until she drowned.
>
> Dr. Joan Wood, the Medical Examiner, testified that Shelly Boggio suffered the most severe defensive stab wounds she had ever seen in her long career as a medical examiner. Paul Skalnick, a witness during the trial, testified the defendant told him, "No matter how many times I stabbed her, she would not die."
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> Dr. Wood indicated that the "pricking wounds" to the victim's breast and stomach area were caused by painful piercing of the top layer of skin and occurred apart from the actual stab wounds which penetrated the victim's hands, abdomen and neck. These tormenting "pricking wounds" caused pain and suffering to the victim, in addition to the stark terror of the sexual assault.
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> After being stripped nude, subjected to at least attempted sexual battery, tortured with numerous "prick wounds" and severely stabbed over thirty times the victim would not die. Even though suffering excruciating pain, she fought on only to die of drowning.

(R. 248).

SUMMARY OF THE ARGUMENT

I. The trial court properly denied the appellant's motion for a new penalty phase jury. This Court's prior mandate remanded this case for resentencing before the trial judge only. Any suggestion that the jury recommendation was tainted by improper instructions was waived when it was not argued in the appellant's prior appeal. There was no objection to the wording of the instructions at the time of the original sentencing. In addition, as the trial judge found, any error in the heinous, atrocious, or cruel jury instruction was clearly harmless since the facts of this case demonstrated that aggravating factor beyond a reasonable doubt under any definition. Furthermore, the jury's possible consideration of two factors later struck by this Court as unsupported by the evidence does not warrant a new penalty proceeding before a new jury since the original jury is presumed to have rejected the factors not supported by the evidence.

II. The trial court properly weighed the mitigating circumstances argued by the appellant below. The court's resentencing order addresses each factor suggested to the court by the appellant. The order explains which mitigating factors were rejected as unsupported by the evidence, and describes the degree of weight allocated to those factors established in the record. The appellant's disagreement with the trial court's ultimate conclusion that the mitigation did not outweigh the three valid aggravating circumstances is not a basis for resentencing.

III. The trial court properly denied the appellant's motion to recuse the trial judge from the resentencing in this case as legally insufficient. The suggestion that a judge would not be able to follow a mandate and resentence a defendant without considering improper evidence previously considered has been rejected as a legally sufficient basis for recusal. The appellant has not alleged any facts which demonstrate that his constitutional right to a neutral judge was violated in this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW PENALTY PHASE TRIAL.

The appellant initially challenges the trial court's ruling denying his motion for a new penalty phase proceeding before a new jury. According to the appellant, the unanimous jury recommendation to impose the death sentence was flawed because the jury was given vague instructions on three of the aggravating factors, including two factors later struck by this Court as unsupported by the evidence. However, the appellant has waived this issue since he did not raise it in his prior appeal. At no time in the prior appeal did the appellant suggest to this Court that the jury recommendation was tainted by improper instructions or by the consideration of possible aggravating factors which were not supported by the evidence. Therefore, this Court should reject this issue and expressly find it to be procedurally barred.

In Riley v. State, 413 So. 2d 1173 (Fla.), cert. denied, 459 U.S. 981 (1982), this Court was confronted with a similar argument, raised for the first time on appeal from Riley's resentencing before the trial judge. Riley's original death sentence was vacated by this Court because the trial judge had erroneously considered nonstatutory aggravating circumstances; had erroneously found a statutory aggravating circumstance; and had erroneously doubled up two other statutory aggravators that should have been considered as one circumstance. On appeal from the death sentence imposed upon remand, Riley claimed that his jury recommendation had been tainted by consideration of improper aggravating circumstances. This Court held that Riley could not raise this point on appeal, noting that he had not objected during the original penalty phase proceeding; had not made the argument during his first appeal; and had not made the argument in his petition for rehearing after the Court directed a remand to the trial judge. Although the appellant in this case did argue during his resentencing that the jury recommendation had been tainted, unlike Riley, the issue had clearly been waived at that point.

In subsequent post-conviction proceedings, Riley again claimed that his jury recommendation was tainted by the jury's consideration of improper statutory aggravating circumstances. On appeal from the denial of the claim, this Court reiterated that no relief was warranted. Riley v. Wainwright, 433 So. 2d 976 (Fla. 1983). Ultimately, this Court did grant a new penalty phase proceeding before a new jury since the original sentencing jury had been improperly instructed that it could only consider statutory mitigating evidence, and since Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) had to be applied retroactively. See, Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). In doing so, this Court noted that a new jury recommendation was only required where the original recommendation was invalid.

The appellant claims that his motion after remand was sufficiently timely because no lawful death sentence was imposed at the time of the resentencing and the trial court had the opportunity to correct the alleged errors by impaneling a new penalty phase jury. Even though the death sentence had been vacated, however, the jury recommendation was intact and unchallenged when this Court issued its mandate. The trial court's opportunity to correct any alleged instructional error was during the original sentencing hearing, and this opportunity had passed long before this case was remanded for resentencing. Thus, there was no reason or constitutional requirement compelling the trial judge to disregard the mandate and grant a new penalty proceeding on the basis of an issue which might have been, but was not, raised on direct appeal.

Certainly, the purported vagueness of a jury instruction regarding an aggravating circumstance is not a fundamental error which may be raised in the absence of an appropriate objection. In Sochor v. Florida, 504 U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), the United States Supreme Court refused to consider a challenge to the jury instruction on the heinous, atrocious or cruel circumstance because this Court had found the issue had not been preserved for appeal. Although the appellant attempts to argue that the objections to the instructions at his original sentencing were sufficient, he clearly never objected to the specific wording of any of the instructions or offered alternative instructions for the trial judge. Therefore, the issue was not preserved for appellate review. Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993). Furthermore, even if the trial objections were sufficient, the appellant's failure to raise any issue about the jury instructions in his appeal amounted to a waiver. Lambrix v. Singletary, 19 Fla. L. Weekly S330 (Fla. June 16, 1994).

Even if this Court addresses the merits of this claim, the appellant has failed to demonstrate that he was entitled to a new jury recommendation. He suggests that the jury was improperly instructed on three aggravating circumstances: heinous, atrocious, or cruel; cold, calculated, and premeditated; and avoid arrest. As to heinous, atrocious, or cruel, the appellant's jury was given the short instruction found to be unconstitutionally vague in Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). Of course, this Court has recognized that Espinosa was not a change in the law so as to be applied retroactively[1] and defeat any assertion of a procedural bar. Marek v. Singletary, 626 So. 2d 160, 162 (Fla. 1993).

In addition, the giving of the heinous, atrocious or cruel instruction was clearly harmless beyond any reasonable doubt in this case, since, as the court below noted, the facts to support the aggravating circumstance would establish the existence of the

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1 Rehearing of the prior appeal was denied by this Court on March 19, 1992, and Espinosa was decided on June 29, 1992.

factor under any definition. See, Slawson v. State, 619 So. 2d 255 (Fla. 1993). In finding this factor, the trial court stated

> Shelly Boggio, the victim, was brutally stabbed as she fought frantically and continuously for her life. In addition to the deep stab wounds, she suffered numerous "pricking wounds" on her breast and stomach. She was choked. She was dragged into the waterway and held under water until she drowned.
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> Dr. Joan Wood, the Medical Examiner, testified that Shelly Boggio suffered the most severe defensive stab wounds she had ever seen in her long career as a medical examiner. Paul Skalnick, a witness during the trial, testified the defendant told him, "No matter how many times I stabbed her, she would not die."
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> Dr. Wood indicated that the "pricking wounds" to the victim's breast and stomach area were caused by painful piercing of the top layer of skin and occurred apart from the actual stab wounds which penetrated the victim's hands, abdomen and neck. These tormenting "pricking wounds" caused pain and suffering to the victim, in addition to the stark terror of the sexual assault.
>
> After being stripped nude, subjected to at least attempted sexual battery, tortured with numerous "prick wounds" and severely stabbed over thirty times the victim would not die. Even though suffering excruciating pain, she fought on only to die of drowning.

(R. 248). Significantly, the evidence that this murder was heinous, atrocious and cruel was so overwhelming that the applicability of that factor was not even challenged in the appellant's original appeal.

The other two aggravating circumstances also do not warrant a new sentencing jury recommendation. In Sochor, 119 L. Ed. 2d at 340, the United States Supreme Court rejected the suggestion that an Eighth Amendment violation could be predicated on the jury's possible consideration of the cold, calculated, and premeditated factor, although that factor had been found by the trial judge and then struck on appeal by this Court as unsupported by the evidence. Because there were other valid aggravating circumstances upon which the jury recommendation may have been based, the Sochor Court refused to presume that the jury relied on the impermissible factor struck on appeal. The appellant cites Sochor but suggests that the reasoning of that case should not be followed since the prosecutor in this case was persuasive enough to convince the trial judge of the applicability of these two factors. That argument provides no basis to reject Sochor's reasoning, however, since the trial judge in Sochor also found the cold, calculated factor to exist.

The appellant also claims that Sochor's refusal to presume that the jury relied on factors unsupported by the evidence should not be applied in this case since the jury was not properly instructed on the two factors later struck by this Court. This claim is clearly procedurally barred. In Johnson v. Singletary, 612 So. 2d 575 (Fla.), cert. denied, ___ U.S. ___, 123 L. Ed. 2d 667 (1993), this Court noted the requirement under Sochor that courts presume that unsupported factors were not weighed by the jury, as long as the jury was properly instructed. Johnson argued, however, that his jury was not properly instructed since it had been given the heinous, atrocious, or cruel instruction found invalid in Espinosa. This Court held Johnson's claim to be procedurally barred due to Johnson's failure to object to the instruction based on vagueness or other constitutional defect. 612 So. 2d at 577.

In addition, there is no authority to support the assertion that the avoid arrest instruction given to the appellant's jury was unconstitutionally vague. The jury was advised that it could consider as an aggravating circumstance, if established by the evidence, that "the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (OR. 1426-1427). This instruction does not suffer the same constitutional defects identified in the heinous, atrocious or cruel, and cold, calculated and premeditated instructions. No jury would consider that every unjustified, intentional killing was motivated by a desire to avoid arrest, although one might conclude that every such killing was heinous and premeditated.

The appellant argues that the avoid arrest instruction failed to provide sufficient guidance for the jury because it failed to inform the jury of the limiting constructions placed on the factor by this Court. However, the jury was instructed that it must determine the motive for the murder by the phrase "committed for the purpose of" in the instruction. In Jackson v. State, 19 Fla. L. Weekly S215, S217 (Fla. April 21, 1994), this Court noted that the Constitution does not require every court construction of an aggravating factor to be incorporated into a jury instruction defining the factor. The avoid arrest definition given to the appellant's jury used ordinary words which are commonly understood, not subject to misinterpretation or arbitrary application. Thus, the jury was properly instructed as to this factor.

This Court has consistently rejected claims that a trial court should have conducted a new penalty phase proceeding on remand after a death sentence has been vacated when such action was beyond the scope of the appellate mandate. Lucas v. State, 613 So. 2d 408 (Fla. 1992), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 385 (1993); Menendez v. State, 419 So. 2d 312 (Fla. 1982); Mikenas v. State, 407 So. 2d 892 (Fla. 1981), cert. denied, 456 U.S. 1011 (1982); Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). In Oats v. State, 446 So. 2d 90 (Fla. 1984), this Court struck three of the six aggravating factors found by the trial judge. On appeal following reimposition of the death penalty, this Court upheld the judge's refusal to impanel a new jury, since the new jury would be considering essentially the same evidence presented to the original jury. Oats v. State, 472 So. 2d 1143 (Fla.), cert. denied, 474 U.S. 865 (1985). The same is true in the instant case. As in Menendez, the prior opinion in this cause did not identify any error in the evidence or instructions submitted to the original jury. Therefore, no new jury recommendation was required.

In conclusion, the appellant's claims that the court below erred in refusing to impanel a new penalty phase jury and that his original jury was not properly instructed are procedurally barred. In addition, any error in the jury instruction on the heinous, atrocious, or cruel factor was clearly harmless since the facts of this case establish that factor under any definition. Any error in the jury's consideration of the cold, calculated and premeditated factor and the avoid arrest factor is harmless since the jury is presumed to have rejected factors not supported by the evidence, even when those factors were found to exist by the trial judge. This is particularly true since the jury recommendation in this case was unanimous and it is undisputed that there were three valid aggravating circumstances upon which the jury could rely. Consequently, the appellant is not entitled to relief on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES.

The appellant also challenges the trial court's determination that the mitigating circumstances did not outweigh the aggravating circumstances present in this case. Specifically, he claims that the judge failed to properly find and weigh the mitigating evidence presented. Of course, it is the trial court's duty to decide if mitigating factors have been established, and when there is competent, substantial evidence to support a trial court's rejection of mitigators, that rejection must be upheld. Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992), cert. denied, ___ U.S. ___, 124 L. Ed. 2d 273 (1993).

The sentencing memorandum filed by the appellant below identified six specific mitigating circumstances: (1) the appellant's military service, including two or three tours of duty in Viet Nam; (2) the appellant's intoxication at the time of the offense, and his alcohol problem resulting from his Viet Nam service; (3) the suggestion that the co-defendant was actually the perpetrator of the homicide; (4) the appellant was good to his family, helpful around the house, and never showed signs of violence; (5) the appellant helped save the lives of two people earlier in life; and (6) the appellant was under the influence of extreme mental or emotional disturbance, due to his alcohol problem and heavy drinking on the night of the offense (R. 233-

234). The trial court's resentencing order addresses each one of the mitigating circumstances alleged (R. 250-252). This order also addressed mitigation argued at the original sentencing which was not submitted at resentencing, such as the suggestion that the appellant's ability to control his conduct was substantially impaired or that the appellant was acting under the domination of another person (R. 249-250). Clearly, the appellant's dispute is not with the trial judge's consideration of the mitigating evidence, but with the judge's conclusion that the mitigation was not sufficient to outweigh the aggravating circumstances found.

The trial court's findings regarding the mitigation are supported by the record. As to the first factor, the judge gave some weight to the fact that the appellant had served in the Air Force and saw duty in Viet Nam (R. 251). He rejected the suggestion that the appellant had an alcohol problem, let alone one attributable to his military service (R. 251). The most specific testimony of such a condition in the record is the appellant's ex-wife's statement that the appellant's drinking problem had led to their divorce in 1976 (OR. 1364-1365, 1370). The ex-wife also stated that the appellant's drinking was worse after he had been in Viet Nam (OR. 1374-1375). Richard Dollar, the appellant's good buddy that married his ex-wife and adopted his children, testified that Dollar and the appellant drank together numerous times, as drinking was part of life in the service (OR. 1379-1380). However, Dollar could not say that the appellant developed a drinking problem while in the service (OR.

1379-1380). Even where uncontroverted evidence has been presented, there must be a reasonable quantum of competent proof to establish a mitigating circumstance. Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990). Thus, the scant, conclusory testimony that the appellant had a "problem," particularly as neutralized by Dollar's reluctance to acknowledge any problem, did not mandate that the trial judge find as a mitigating circumstance that the appellant had an alcohol disorder attributable to his military service.

The court below also rejected the third factor, that Jack Pearcy was actually the murderer, as unsupported by the evidence. As noted in the resentencing order, the appellant admitted having perpetrated this homicide to several witnesses, including stating that no matter how many times he stabbed the victim, she would not die (R. 251). This circumstance is also refuted by evidence that the appellant returned home following the murder wearing wet pants with no shirt or shoes, while Pearcy was dressed just as he had been when he had left earlier in the evening (R. 251). The rejection of this mitigating factor was proper since it did not meet the standard of being reasonably established by the greater weight of the evidence. See, Nibert, 574 So. 2d at 1061.

The trial court gave partial weight to the fact that the appellant was a good family man and cared for his daughter (R. 251). Little weight was also given to the mitigating circumstance that the appellant was not violent, which was interpreted by the court to mean that the appellant was not violent toward his family (R. 251). The judge declined to assign much weight to the appellant's nonviolent character due to the appellant's prior violent felony conviction (R. 251-252). The appellant's ex-wife characterized the appellant as being violent only when defending women (OR. 1372).

The court below also allowed some weight to the mitigating factor that the appellant saved two people from drowning when he was in high school (R. 252). The appellant claims to be "puzzled" by the court's finding, although it is clear to the undersigned that the court found this to be mitigating, but found it did not appreciably alleviate the seriousness of the appellant's actions in committing this murder (R. 252). The resentencing order expressly recognizes that this factor was given some weight, but did not diminish the horrible nature of the murder committed in this case. Once a mitigating circumstance has been established, the relative weight to be given to the factor is within the province of the sentencing judge. Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990).

Finally, the court rejected the circumstance that the appellant was under the influence of extreme mental or emotional disturbance due to his alcohol problem because of the lack of evidence to support the factor (R. 252). The court gave some, but not much, weight to the fact that the appellant and the victim had been partying and visiting bars on the night of the murder (R. 252). The appellant's argument recites testimony indicating that the appellant had been drinking and using marijuana on the night of the offense. The judge noted this evidence, but also observed that none of the witnesses described the appellant as being intoxicated, under the influence of any substance or suffering from any mental condition (R. 252). In fact, there was no evidence presented indicating what affect, if any, the drinking had on the appellant. To the contrary, witnesses that testified about the appellant's statements describing the offense demonstrated that the appellant's recollections of the circumstances were clear and detailed (R. 252). The mere fact that the appellant was drinking and smoking marijuana several hours before the murder does not establish that he was under the influence of an emotional disturbance, let alone an extreme disturbance.

In Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 385 (1993), this Court noted that this factor requires a mental disturbance less than insanity but more than the emotions of an average man, however inflamed. No such disturbance was demonstrated in this case. In Johnson, 608 So. 2d at 12-13, this Court upheld the trial court's rejection of this factor based on Johnson's drug use, despite testimony that Johnson was a regular drug user and under the influence of amphetamines and marijuana at the time of the offense. The trial court noted that Johnson's acts before and after the murders demonstrated that he knew what he was doing, and although his actions may have been enhanced by the use of drugs, he was not under the influence of extreme mental or emotional disturbance.

Similarly, in Cook v. State, 542 So. 2d 964 (Fla. 1989), this Court affirmed the trial court's rejection of an extreme emotional disturbance although Cook argued that his ingestion of cocaine, marijuana and alcohol caused him to have a diminished capacity. This Court reiterated that finding or not finding a particular mitigating factor to be applicable is within the trial court's domain, and reversal is not warranted simply because the defendant draws a different conclusion. Since there was positive evidence in the record that Cook's mental capacity was not severely diminished on the night of the killings, the trial court's denial of this mitigation was not disturbed on appeal. Positive evidence of the appellant's mental capability, including his actions in disposing of evidence and, as noted by the judge, his ability to specifically recall the details of the offense, was present in this case as well.

The appellant recites isolated passages from the resentencing order out of context in order to convince this Court that the judge below rejected or failed to recognize some of the mitigating evidence presented. For example, the appellant states that "the trial court rejected any mitigating circumstance based upon Dailey's history of alcohol abuse and his consumption of alcohol and marijuana on the day of the offense" and then recites from the point in the resentencing order which was specifically addressing the appellant's proposed mitigating factors that (1) the defendant was in the service and was involved in two or three tours of Viet Nam and (2) the incident occurred while the defendant was intoxicated and he developed a problem with alcohol as a result of his military service in Viet Nam (R. 251). Later in the order, however, the judge accorded "some weight" to the fact that the appellant and the victim had been "partying" and visiting bars together on the night of the offense (R. 252). The court also addressed the lack of evidence that the appellant was under the influence and the fact that the appellant's later statements demonstrated he clearly recalled the night of the offense (R. 252). Thus, the appellant's assertion that the trial judge completely and unreasonably rejected any possible mitigation based on his consumption of alcohol is refuted by the record.

The appellant also claims that the trial court erred in failing to acknowledge as mitigating the appellant's positive character traits of defending women to the point of violence, his potential for rehabilitation, and his talent for carpentry and music. These factors were not included in the written memorandum filed by the defense or argued to the trial judge at the resentencing hearing. As this Court has recognized, the defense must identify for the trial court any specific nonstatutory mitigating factors it is attempting to establish. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). Thus, the appellant cannot fault the court for failing to consider the nonstatutory mitigating evidence which was not brought to the judge's attention.

The appellant's attempt to analogize this case with Lucas is not persuasive, since the court in the instant case specifically reviewed each mitigating circumstance proposed by the defense. A review of the court's resentencing order establishes that the trial judge followed the dictates of Campbell, 571 So. 2d at 419-420, in evaluating the mitigating circumstances identified. The court indicated which factors were rejected as unsupported by the evidence and how much weight was allocated to the truly mitigating evidence, concluding that the mitigation did not outweigh the three valid aggravating circumstances (R. 251-252). Therefore, no resentencing for further consideration of the mitigation evidence is warranted.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISQUALIFY THE SENTENCING JUDGE.

The appellant's final challenge concerns the trial court's denial of the motion to recuse the sentencing judge. The basis of the motion was that the judge had previously rejected mitigating evidence and improperly considered evidence from the trial of the appellant's co-defendant at the original sentencing. However, the trial court's denial of this motion as legally insufficient is clearly supported by the relevant case law. Therefore, the appellant is not entitled to relief on this issue.

In Engle v. Dugger, 576 So. 2d 696, 703 (Fla. 1991), this Court held that the contention that a trial judge could not follow a mandate and resentence a defendant without consideration of improper evidence did not present a sufficient factual basis for recusal. The motion filed below was based on the same suggestion of bias rejected in Engle. This Court has consistently recognized the presumption that a trial judge will follow the law. Dragovich v. State, 492 So. 2d 350, 353 (Fla. 1986). The appellant has not offered any basis to overcome that presumption in the instant case.

The appellant's argument as to this issue acknowledges the wealth of case law against him, yet he asks this Court to consider the motion for recusal not in conjunction with the case law, but in light of the constitutional requirement of judicial neutrality, and the need to avoid even the appearance of judicial bias. However, the Constitution applied with equal force in the numerous cases where this Court has rejected this claim on similar facts. Under the appellant's theory, any time a case is remanded for reconsideration, a new judge must be appointed since the prior judge is unlikely to change his mind, and the "normal human response" is to correct the error without changing the ultimate result. In short, the appellant asks this Court to hold that judges are unable to disregard evidence that should not have been considered previously.

The appellant does not even attempt to show that he was prejudiced by any predisposition of the trial judge. There are no facts to demonstrate that the judge became a direct participant in the proceedings, as in Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993), or otherwise failed to comply with this Court's mandate. Instead, the appellant claims to have reasonably believed that he would not receive a fair sentencing hearing before Judge Penick because, after all, the judge had previously sentenced the appellant to death. Such is not and cannot be a legally sufficient basis for recusal.

In Dragovich, 492 So. 2d at 353, this Court held that affidavits in support of a motion to disqualify a judge must demonstrate actual bias or prejudice. The appellant does not even allege that this standard was met below. Since he has failed to demonstrate any error in the trial court's denial of his motion for recusal, he is not entitled to a new sentencing proceeding on this issue.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the resentencing order rendered by the trial court herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Paul C. Helm, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000--Drawer PD, Bartow, Florida, 33830, this 28th day of September, 1994.

Carol M. Dittmar

CAROL M. DITTMAR

OF COUNSEL FOR APPELLEE