IN THE SUPREME COURT OF FLORIDA

WARFIELD RAYMOND WIKE, JR.,

Appellant/Cross-Appellee,

v. CASE NO. 86,537

STATE OF FLORIDA,

Appellee/Cross-Appellant.

_____/

REPLY BRIEF OF APPELLANT/ANSWER BRIEF OF CROSS-APPELLEE

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PRELIMINARY STATEMENT

References to the initial brief of appellant/cross-appellee shall be made as "IB#." References to the answer brief of appellee/initial brief of cross-appellant shall be as "AB/CIB#." Other references shall be in accord with the style set forth in the initial brief of appellant/cross-appellee.

REPLY TO STATE'S STATEMENT OF THE FACTS

The State commits numerous errors in needlessly describing virtually every fact adduced from every witness in this case. Mr. Wike is compelled to point out and correct the State's misstatements, misquotes, exaggerations, opinions, and statements not supported by the cited portions of the record.

- At AB/CIB3, and again at the AB/CIB30, the State says that at a hearing on motions, "the court mentioned that Appellant had sent him a letter in which he claimed to be mentally incompetent." None of the State's record cites demonstrate

that the trial court made any such statement, and in none of the correspondence referred to by the State did Mr. Wike ever claim to be legally incompetent.

- The State reports that defense counsel claimed to have "prepared a trial strategy which is somewhat different from the previous resentencing," AB/CIB4, when in fact defense counsel claimed that "voir dire" would be somewhat different, not a trial strategy, R585.
- The State claims appellant and his counsel "simply disagreed" about what witnesses to call. AB/CIB5. This is the State's opinion, and it mischaracterizes and oversimplifies a very complex situation.
- The State paraphrases the testimony of two witnesses to say that Mr. Wike indicated he had "only" two or three beers in the afternoon and evening preceding the murder. AB/CIB6,7. Neither witness used the word "only" in their testimony regarding this point. R436, 447, 453. The use of the word "only" is an inaccurate and suggestive surmise by the State, especially given that evidence demonstrated Mr. Wike consumed additional intoxicants, T869-71, and the judge even gave weight to the fact that intoxicants had been consumed, R511.
- The State claims a "blue T-shirt with blood on it" was found in the trunk of Mr. Wike's car, AB/CIB10. In fact, the record shows the item merely had "<u>suspected</u> blood stains" on it, T546 (emphasis supplied), and there was no evidence that the T-shirt was examined or tested for blood. The T-shirt

was found in the same trunk as the folding knife which, when tested, proved to have no trace of blood on it. T546-47.

- The State claims Mr. Wike "could not remember what he did the night before" the murder, AB/CIB23, when in fact the record shows that Mr. Wike merely could not remember what he had told a witness, T892.
- The State cites to Mr. Wike's testimony as proof that "He has a felony conviction in every state in which he has lived." AB/CIB23. However, the record to which the State cites merely evinces a leading question by the prosecutor in which the prosecutor alleged that Mr. Wike has convictions in all four states. Mr. Wike's answer was, "No, I don't." T906.
- The State says the judge gave "little weight" to Mr. Wike's age as a mitigating circumstance, AB/CIB27,73, when in fact the record shows the judge gave "little <u>if any weight</u>" to that circumstance, R508-09 (emphasis supplied).
- The State says the judge gave "little weight" to Mr. Wike's "history of alcohol and drug use," AB/CIB27, whereas the record shows the judge gave "<u>some</u> weight" to that factor, R511 (emphasis supplied).
- The State says the judge gave "little weight" to Mr. Wike's "successful adaptation to prison," AB/CIB27, whereas the record shows the judge gave "little <u>or no weight</u>" to that circumstance, R512 (emphasis supplied).
- On the first line at the top of AB/CIB21, the State recites a quote, "molested them in any manner," suggesting that is a

direct quote from Mr. Wike. The quote actually was the prosecutor's question, not Mr. Wike's answer. T869.

- The State says Mr. Wike testified he had "scoliosis of the spine," AB/CIB22, whereas he actually testified that he had "Sherman's disease of the spine," T876.
- The State cites to T981-97 for the contents of the September 8, 1995, hearing. AB/CIB26. The September 8 hearing is reported at R670-702.
- Mr. Wike was indicted on October 12, 1988, R29-32, not November 12, 1988, AB/CIB2.

REPLY ARGUMENT OF APPELLANT

ISSUE I: WHETHER THE COURT ERRONEOUSLY REFUSED TO PERMIT COUNSEL TO WITHDRAW AFTER MR. WIKE'S VIOLENT, PHYSICAL, CRIMINAL ATTACK ON COUNSEL IN OPEN COURT, THEREBY DEPRIVING MR. WIKE OF THE ZEALOUS ASSISTANCE OF LOYAL, CONFLICT-FREE COUNSEL, AND A FAIR PENALTY TRIAL.

The State claims that the trial court analyzed Florida Rule of Professional Conduct 4-1.16 in making its decision. AB/CIB33. But the judge specifically relied on only one portion of that rule, paragraph (b), T827, which is inapposite. There is a major difference between paragraph (b) of rule 4-1.16, the permissive clause on which the judge erroneously relied, and paragraph (a) of rule 4-1.16, the mandatory clause which should have controlled and which should have compelled the judge to grant counsel's motion to withdraw. Mr. Wike explained the distinction in his initial brief. See IB34.

The State casts a net around all of the authorities that fully support Mr. Wike's argument, dismissing them merely by

concluding that "none are even remotely similar to the facts of this case." AB/CIB36. The only dissimilarity between those cases and the one at bar is that the facts in those cases demonstrate personal conflicts far less serious than the violent physical attack that took place here; yet those courts held that relief was constitutionally required. See IB25-30.

The State argues "invited error," AB/CIB36, yet that rule of law and the cases the State relies on have nothing whatsoever to do with the issue at hand. The invited error principle involves what may be heard by the jury in evidence and argument, not whether a serious conflict of interest exists between a client and his legal counsel.

The State makes much ado of Mr. Wike's history in court, especially of his conflict with his attorneys. AB/CIB37. There is no question that a history of conflict existed. However, that pales in comparison to the serious personal conflict that arose when Mr. Wike violently attacked defense counsel. The issue here is whether the violent physical attack rendered defense counsel unable to provide the conflict-free counsel constitutionally required to assure fair and reliable proceedings. The State claims that abuse of discretion applies, AB/CIB36, but the trial court has no discretion to deny a defendant, on trial for his life, the right to a fair penalty trial with conflict-free legal counsel. Mr. Wike's constitutional rights, and the reliability of the proceedings, cannot be thrown out the window purely because of Mr. Wike's conduct -- conduct that could have been

prevented in these proceedings and that can be prevented from recurring.

The State relies on Waterhouse v. State, 596 So. 2d 1008 (Fla.), cert. denied, 506 U.S. 957, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992). AB/CIB38. However, Waterhouse's attorney had not been victimized by his client's violent physical criminal attack. The State also relies on Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990), cert. denied, 500 U.S. 829, 111 S. Ct. 2045, 114 L. Ed. 2d 129 (1991), and Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994), AB/CIB40, but those cases have nothing to do with a conflict of interest claim and shed no light on this issue.

The State implies that when defense counsel stated its "fall back" position that a curative instruction should be given, the defense believed the instruction would be a cure. AB/CIB40-41. The record clearly shows that was not what defense counsel had in mind. Defense counsel wanted individual voir dire, and seeing that motion was being denied, counsel tried to mitigate the damage done by the judge's denial of the defense's request. T844-45. The State also puts the cart before the horse by saying the polling of the entire jury together made subsequent individual voir dire unnecessary. AB/CIB41. Individual voir dire would have made polling the jury unnecessary, not the other way around. Individual voir dire is what counsel requested, and individual voir dire would have enabled the court to conduct damage control.

The State suggests that "defense counsel indicated he was prepared to proceed." AB/CIB42. That misses the point. Defense counsel was prepared to proceed only to the extent that counsel was ordered to do so. Once the court denied the motion to withdraw, counsel had no choice legally or ethically; counsel had to proceed. The only other alternative would have been contempt of court. Moreover, being violently attacked necessarily affects one in ways not instantly recognizable. Prejudice inheres in this extraordinary situation.

ISSUE II: WHETHER THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO MAKE UNDULY PREJUDICIAL DETAILS OF CRIMES COMMITTED UPON A DIFFERENT VICTIM THE FEATURE OF THE PENALTY PHASE IN RE-PRESENTING VIRTUALLY THE ENTIRE GUILT PHASE OF THE TRIAL, THEREBY DEPRIVING MR. WIKE OF A FAIR HEARING IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The State fails to address Mr. Wike's argument, which focuses on very specific details of the evidence introduced in this proceeding, and the impact that inadmissible evidence had. For example, the State fails to explain how the testimony of Dr. Althar, Dr. Montes, and Teresa Ann Wright -- who testified exclusively about Sayeh and her injuries -- was relevant to the aggravating circumstances and was not unduly prejudicial. Because the devil is in the details, the State here has chosen to ask this Court to follow its course by ignoring the details.

The State's argument appears to be that the State can reintroduce every bit of guilt-phase evidence without restriction in a resentencing proceeding, even if the evidence is irrelevant to the aggravating circumstances at issue and even if the unduly prejudicial nature of the evidence far outweighs whatever

probative value it may have. That is not the law, as Mr. Wike has already demonstrated with substantial precedent. IB37-39. See also Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985) (finding error in presentation of "detailed testimony to the jury about the surviving victim's shooting, the injuries she received, and the pain she suffered," to support HAC as to the decedent's murder), cert. denied, 476 U.S. 1143, 106 S. Ct. 2254, 90 L. Ed. 2d 699 (1986).

The only case the State even remotely attempts to factually analogize in support of its position is Espinosa v. State, 589 So. 2d 887 (Fla. 1991), reversed on other grounds, 505 U.S. 112, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). AB/CIB46-47. But to quote the State, "What the [State] fails to appreciate is this was a resentencing," AB/CIB45, whereas Espinosa was the direct appeal of the guilt and penalty phases of a jury trial. All the evidence in Espinosa to which the State refers came out in the guilt portion of Espinosa's trial, so the limitation on irrelevant and unduly prejudicial evidence in a resentencing was never in issue.

ISSUE III: WHETHER THE COURT FUNDAMENTALLY ERRED BY GIVING AGGRAVATING CIRCUMSTANCE INSTRUCTIONS SO VAGUE, OVERBROAD, AND RIFE WITH ERROR THAT INDIVIDUALLY AND COLLECTIVELY THOSE INSTRUCTIONS DENIED MR. WIKE A FAIR PENALTY PHASE IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS IRRESPECTIVE OF WHETHER PARTICULAR INSTRUCTIONS HAD BEEN OBJECTED TO AT TRIAL.

A. The jury instruction on CCP was vague and imprecise in that it failed to adequately define heightened premeditation to this resentencing jury, which never had the benefit of being told what premeditation means under Florida law.

The State does not even attempt to distinguish the fundamental instruction error cases cited by Mr. Wike. Instead, the State relies on Archer v. State, 673 So. 2d 17 (Fla. 1996), AB/CIB51, which is a reasonable doubt instruction case and does not come close to addressing this issue. Archer does not deal with an instruction on a necessary element for which the State carries the ultimate burden of proof beyond a reasonable doubt, whereas the issue here concerns the definition of the heightened premeditation element of CCP. Archer deals with the omission of what this Court said is a non-essential instruction, not the giving of an incomplete essential element instruction. Even with regard to the reasonable doubt instruction, case law abounds finding fundamental error in the giving of an invalid or incomplete reasonable doubt instruction. See, e.g., Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), review denied, 663 So. 2d 632 (Fla. 1995), cert. denied, 116 S. Ct. 1451, 134 L. Ed. 2d 570 (1996).

The State makes the statement that "Appellant having been convicted of first-degree murder, the jury knew that the fact of conviction was not enough, by itself, to support this factor; more was required." AB/CIB52. But this jury knew nothing of the law of premeditation because no form of premeditation had ever been defined for them by the court in any respect at any stage of the proceedings. The judge did not even instruct the jury that Mr. Wike had been convicted of premeditated murder: He instructed them only that Mr. Wike had been convicted of "murder in the first degree." T382; see also T1134.

The State says "Appellant drove to the Rivazfar's home in Pensacola with a blanket, tape, and a knife." AB/CIB52. We do not know that, because the record does not establish where or when any of these items might have been picked up.

B. The jury instruction on HAC was vague and imprecise, and the judge here made a critical error in misreading the standard definition to the jury, thereby allowing jurors to eliminate the need for proof an essential part of this aggravating circumstance.

The State contends that no basis exists for this Court to reconsider its approval of this instruction. AB/CIB54-55. The interest of justice is a sufficient reason. The vagueness of the instruction would be evident upon closer examination and comparison with the cases on which Mr. Wike relied in his initial brief. IB53-58.

The State makes a parenthetical suggestion that the error in the instruction may have been one of a court reporter's clerical mistake. AB/CIB55. In other words, the State makes the ridiculous argument that words appearing in the record do not exist when those words don't serve the State's purposes. In any event, the court reporter certified that this is a "true record" of the proceedings, T1157, and the State has offered nothing to demonstrate otherwise.

C. The instruction as to the prior violent felony aggravating circumstance was so vague and overbroad that it invited the jury to unlawfully quadruple the weight of this single factor; and it unconstitutionally invaded the province of the jury by relieving jurors of their responsibility to find the elements proved.

Mr. Wike relies on the arguments made in his initial brief.

D. The jury instruction as to the avoid lawful arrest aggravator failed to give jurors any guidance as to what the State was required to prove.

The State asserts that Mr. Wike offered no reason to reconsider its decision, AB/CIB60, but that is wrong. First, Mr. Wike asserted that the Court's brief examination of this instruction preceded its decision in Jackson v. State, 648 So. 2d 85 (Fla. 1994), where this Court reversed its own prior case law and held unconstitutional the CCP instruction. Second, justice requires reconsideration of a wrong or questionable decision, especially when a man's life depends on the result. Third, the State merely states its conclusion that the language is not vague, but it offers no reasoned analysis for reaching that conclusion. AB/CIB61. This Court has done much the same thing, for there is scant analysis in this Court's prior decisions regarding this instruction. A thorough examination would reveal the constitutional flaws.

E. The jury should have been instructed not to find both the CCP and avoid lawful arrest aggravators if both were based on the same aspect of the crime.

Mr. Wike relies on the arguments made in his initial brief.

F. Even if not individually preserved or harmful, the cumulative effect of all instruction errors constitutes fundamental error infecting the very heart of the penalty phase trial.

Throughout its arguments on aggravating circumstance instruction errors, the State has asked this Court to examine piecemeal the erroneous instructions without paying any attention at all to the cumulative and fundamental error analyses urged by Mr. Wike. The State also has been unable to distinguish the

fundamental error and cumulative error cases cited by Mr. Wike. These instruction errors cannot be disposed of without addressing the cumulative effect of all the vague and improper instructions, irrespective of whether individual errors were preserved.

ISSUE IV: WHETHER THE COURT ERRONEOUSLY FOUND MURDER COMMITTED TO AVOID LAWFUL ARREST, ERRONEOUSLY DOUBLED THE CCP AND AVOID LAWFUL ARREST AGGRAVATING CIRCUMSTANCES, AND ERRONEOUSLY MADE AMBIGUOUS FINDINGS AS TO THREE MITIGATING CIRCUMSTANCES, THEREBY VIOLATING MR. WIKE'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. The trial judge erroneously found the murder was committed to avoid arrest in the absence of clear and positive proof of motive.

The State tries to draw wholly unsupportable distinctions in the cases Mr. Wike cited in his initial brief. The State distinguishes Knowles v. State, 632 So. 2d 62 (Fla. 1993), by saying there was no antecedent crime "prior to the murder of Carrie Woods." AB/CIB65 n.8. However, the murder of Carrie Woods was the antecedent crime to the subsequent murder of Knowles' father, and it was the application of this factor to the murder of Knowles' father that this court found to be error. The State distinguishes Jackson v. State, 599 So. 2d 103 (Fla.), cert. denied, 506 U.S. 1004, 113 S. Ct. 612, 121 L. Ed. 2d 546 (1992), with the fact that Jackson killed two child witnesses by smoke inhalation rather than gunfire after the two children just witnessed Jackson or his codefendant shoot three people to death. AB/CIB67 n.9. Choosing a different method of killing witnesses is not a material distinction in proving motive. The State claims Dailey v. State, 594 So. 2d 254 (Fla. 1991), is distinguishable by claiming that because this Court found

insufficient evidence to prove a sexual battery upon the murder victim, "there was no proven antecedent crime to which Dailey needed to eliminate a witness." AB/CIB67 n.9. But this Court found there was sufficient evidence to prove attempted sexual battery, 594 So. 2d at 258, so contrary to the State's claim, there was in fact a serious antecedent crime committed upon the murder victim for her to have witnessed.

The State suggests that a motive other than witness elimination must be a "reasonable" motive to render the court's finding legally inadequate. AB/CIB65. The State's narrow and erroneous proposed standard would require this Court to make a Hobson's choice: It must find that either the motives of some murders are reasonable, or no reasonable alternative hypothesis could ever exist. The State's view find no support in logic or precedent. Instead, cases have established the common sense rule that if it would be reasonable to believe that a motive for the murder other than witness elimination may have existed, and that such a hypothesis has not been excluded by the evidence beyond a reasonable doubt, the aggravating circumstance has not been proved as a matter of law. The State failed to meet that test in this case for all the reasons detailed here and in Mr. Wike's initial brief.

The State relies on Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993), Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 507 U.S. 999, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993), Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S. Ct.

1578, 103 L. Ed. 2d 944 (1989), and Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988). AB/CIB66. The State's reliance is misplaced.

In Swafford, this Court noted that witness elimination cases not involving law enforcement break down into those where direct evidence of motive exists, and those where it does not. The first group, direct evidence cases, are those in which the accused (or an accomplice) makes an inculpatory statement or confession before, during, or after the murder, demonstrating not merely an intent to kill but that the sole or dominant motive behind the intent to kill was to eliminate the victim because the victim had witnessed a crime. E.g. Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), cert. denied, 115 S. Ct. 1118, 130 L. Ed. 2d 1081 (1995); Harvey v. State, 529 So. 2d 1083 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989). In the second group, where the proof arises solely from circumstantial evidence, there must be "very strong," "positive," evidence -- with no speculation -- both proving witness elimination was the sole or dominant motive, and showing that such a motive is inconsistent with any other hypothesis of motive that one reasonably might believe exists. E.g. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989).

No direct evidence of motive to kill Sara exists in this case. Mr. Wike never confessed or made any inculpatory statement probative of motive. His only statement was when he told the surviving victim to say her prayers, a fact probative of intent

but that sheds no light whatsoever on motive to kill her sister. The State presented no evidence of motive for this entire criminal episode, and Mr. Wike certainly presented none. Thus, this is purely a circumstantial case of motive. In fact, the motive for any of that night's events is still a mystery. The motive all along well could have been to murder both girls to get back at their mother, with the sexual battery of Sayeh as an afterthought, and the kidnapping done to facilitate murder. The State presented no evidence inconsistent with this reasonable hypothesis. The judge even suggested the evidence showed that the murder of both girls had been the plan at the outset

> If the Defendant's intent was merely to kidnap the minor victims, or even to sexually batter both of said victims, he could have done so and then left the children in an area where they would have easily been found. Instead, the Defendant kidnapped the children from their home, drove across a county line into a rural and heavily wooded area. He sexually battered Sayeh after binding the decedent's hands with tape and even then did not allow the children to go free but continued into even a deeper pine thicket area where he had the children exit the car and march into the woods where the murder of the victim took place.

R506-07; T721-23. If double murder had been the plan all along, there is no clear proof that he formed an independent, dominant motive to kill to eliminate a witness. Because we do not know the motive for Sara's murder, the only thing left is speculation, and this Court has expressly prohibited courts from speculating as to the motive to kill in support of this factor. Scull.

All of the State's cases can be distinguished on the facts because contrary to the evidence in the case at bar, evidence in

each of the other cases showed that the criminal episodes began with motives to commit crimes separate and distinct from murder, while somewhere along the way the criminals devised separate motives to eliminate the victims of those just-committed crimes. In Hall, it is undisputed that Hall's crime began as a plot to steal a car to use in a robbery, so the rape and murder were independently committed and necessarily arose from different motivations. In Swafford, the criminal episode began as a sexual battery. Evidence that Swafford had separate and distinct motives also became apparent from his statement to Earnest Johnson, which showed that he undertook similar episode later on with the clear motive to first rape and then eliminate the witness, a process "you just get used to." 533 So. 2d at 273. In Preston, the crime began as a classic convenience store armed robbery, and, as this Court inferred, a separate motive arose to kidnap and murder the clerk to eliminate her as the sole witness to the robbery. 607 So. 2d at 409. In Correll, the crime began as a plot to murder his ex-wife, Susan Correll, at the home of her mother, Mary Lou Hines. After repeatedly stabbing and killing Susan, Correll encountered Susan's sister, Marybeth Jones, Mary Lou Hines, and the Corrells' five-year-old daughter, Tuesday. Because Tuesday likely witnessed the murders and had had a cordial relationship with her father, this Court found only one reasonable explanation for Tuesday's murder: to eliminate her as a witness. Likewise, Marybeth was the last person killed, so she must have walked in on the murders, causing her to be eliminated as a witness.

Swafford and Hall also are distinguishable because in both cases the defendants made self-inculpatory statements. See Swafford, 533 So. 2d at 273 (statements made to Earnest Johnson about how "you just get used to" killing a woman to prevent her from testifying about kidnapping, raping, and robbing her); Hall v. State, 403 So. 2d 1321, 1323-25 (Fla. 1981) (Hall made inculpatory statement to officer explaining the motive that began his criminal episode, and he testified at trial).

One additional point requires this Court's attention. Hall, a 1993 case, stated and applied an erroneous, overly broad rule of law: "we have uniformly upheld finding this aggravator when the victim is transported to another location and then killed." 614 So. 2d at 477 (emphasis supplied). That is simply not accurate. For example, in both Jackson, 599 So. 2d at 103, a 1992 case, and in Dailey, 594 So. 2d at 254, a 1991 case, the killers transported their victims and then murdered them, yet this Court found no witness elimination proved beyond a reasonable doubt. The result in Hall, and cases like Hall, can hardly be good law when they depend on an erroneous legal rule. Moreover, it is impossible to understand how the transporting of a victim to the place of death is logically connected to, and proves beyond a reasonable doubt, that the motive for murder was witness elimination. Cases like Jackson and Dailey show that such an inference cannot be drawn as a matter of course, and likewise it should not be drawn here.

The State's reliance on Hall and other such cases brings to light an alternative analysis. This Court may find no legitimate

and constitutional way to factually and materially distinguish cases like Jackson and Dailey from cases like Hall in the context of the witness elimination circumstance. The similarity in their relevant facts contrasts with the dissimilarity in their results. The "uniform" application of law announced in Hall simply is not uniform at all, as demonstrated by Dailey and Jackson. Also, despite this Court's condemnation of speculation, e.g. Scull, 533 So. 2d at 1142, it has relied on speculation in affirming the witness elimination circumstance. E.g. Correll, 523 So. 2d at 528 ("It is also likely that Correll's daughter, Tuesday, was a witness to the murders. Since the relationship between Tuesday and her father appeared cordial, it is difficult to see why she was killed except to eliminate her as a witness.") (emphasis supplied). These obvious infirmities suggest that despite this Court's enunciation of purportedly uniform standards, this Court has not provided the kind of uniform, predictable, application of this aggravating circumstance as required by the equal protection, due process, and cruel and/or unusual punishment clauses of the United States and Florida Constitutions. U.S. Const. amends. VIII, XIV; art. I, §§ 2, 9, 17, Fla. Const. Predictability is one of the key requirements in upholding the constitutionality of the death penalty. E.g. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Because of this Court's inability to bring predictability to this area of the law, the factor is unconstitutional on its face and as applied.

B. The error finding murder to avoid arrest was compounded by the court's erroneous doubling of this aggravator with the CCP aggravator.

The State claims Mr. Wike's attack on the improper doubling is procedurally barred, relying on Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991). AB/CIB68. Occhicone does not even discuss doubling. Moreover, this Court has never procedurally barred review of a judge's findings of an aggravating circumstance on direct appeal. The constitutionality of Florida's capital sentencing scheme is dependent in part on this Court's direct and independent review of the judge's findings in aggravation and mitigation, Proffitt v. Florida, 428 U.S. 242, 253, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) ("Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case."), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), specifically including improper doubling, Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977).

As to the merits, the judge in his findings did not distinguish between motive and method, for he relied on precisely the same aspects of the crime for each factor.

C. The trial judge made numerous ambiguous findings as to mitigation.

The State's response misses the issue and again uses paraphrase to misstate the record. The State argues that the

judge "reluctantly found age" but gave it "little weight." AB/CIB73 (emphasis supplied). That is a materially false statement going right to the heart of the issue. We do not know what weight, if any, the judge gave Mr. Wike's age because the judge's sentencing order said he gave Mr. Wike's age "little if any weight." R508-09, 727-28 (emphasis supplied). That is precisely the kind of ambiguity this Court prohibits, Campbell v. State, 571 So. 2d 415 (Fla. 1990), and of which Mr. Wike complains, IB77-78. The State omits any analysis or defense of the multiple ambiguities in the sentencing order.

ANSWER ARGUMENT OF CROSS-APPELLEE

ISSUE: WHETHER THE COURT ABUSED ITS DISCRETION IN DECLINING TO PERMIT THE STATE TO INTRODUCE VICTIM IMPACT EVIDENCE AFTER THE COURT FOUND THE UNDULY PREJUDICIAL EVIDENCE OUTWEIGHED WHAT LITTLE PROBATIVE VALUE IT MIGHT HAVE HAD, AND WHETHER THE STATE FAILED TO PROCEDURALLY PRESERVE THE ISSUE FOR APPELLATE REVIEW AFTER FAILING TO SEEK AND GET A RULING ON THE EVIDENCE WHEN THE STATE PLACED THE PROFFER IN THE RECORD AT THE CLOSE OF THE CASE.

The State's cross-appeal is both defaulted and meritless.

A. The State failed to preserve the issue when it placed a transcript of the proffered evidence in the record at the close of its case without either seeking or getting a contemporaneous ruling on its admissibility.

The State is procedurally barred from raising this claim because it did not timely object, seek, or obtain a ruling from the judge at the time it placed the proffered testimony in the record immediately before resting its case. The issue was raised pretrial on August 15, before the jury was even sworn in. See infra, pp.22-23. At that time the State argued the evidence should be introduced, and the judge denied the motion. T370-376.

During a bench conference on August 16, after the State had put on all of its witnesses, the State decided to place a transcript containing the proffered testimony into the record:

(Bench Conference)

MR. MURRAY [FOR THE STATE]: Judge, at this time I have, will have marked as a proffer concerning the State's prior motion. Objection to this Court's ruling. And in lieu of a live proffer I've tracked from the transcript of the prior proceeding the testimony of the three witnesses and what they have testified to and the area dealt with by the Court and the order that the Court entered adverse to the State. And it is marked as State's Exhibit 79 and it is the testimony that we would intend to elicit.

THE COURT: So you just want it --

MR. MURRAY: As opposed to reading it into the record. And the Court has ruled and instead of taking up time and this is what we would be eliciting, the same testimony, we are proffering that as the testimony that we would offer if the Court had allowed us to question the witnesses.

THE COURT: Any objection?

MR. BARKSDALE: No, sir.

THE COURT: All right I've given this to the clerk.

. . . .

(Bench conference concluded)

MR. MURRAY: Please the Court, Your Honor, at this time the State of Florida will announce rest.

T705-707.

Contemporaneous objections to the introduction or exclusion of evidence must be made when the evidence is offered at trial, and a ruling must be made at that time to preserve the issue for

appeal. Without a timely objection and ruling, there is no judicial decision to review. See, e.g., Lindsey v. State, 636 So. 2d 1327, 1328 (Fla.), cert. denied, 115 S. Ct. 444, 130 L. Ed. 2d 354 (1994); Castor v. State, 365 So. 2d 701 (Fla. 1978). Procedural default rules apply to the State as well as defendants. Dupree v. State, 656 So. 2d 430, 432 (Fla. 1995); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). The State failed to seek or obtain a contemporaneous ruling on the admissibility of the evidence at the appropriate time as required by law, thus waiving the issue for review.

B. Even if this Court reaches the merits, it should find that the trial judge did not abuse his discretion when, after considering the facts of this case, the judge concluded the unduly prejudicial weight of the evidence outweighed whatever probative value it might have had.

If this Court reaches the merits, it should find that the judge did not abuse his discretion on the facts of this case. The State's entire argument is premised on authorities establishing the general admissibility of victim impact evidence. AB/CIB75-87. Those authorities are totally irrelevant because the admissibility of evidence offered by the State in the penalty phase of a capital case is subject to exclusion if its unduly prejudicial nature outweighs its probative value under the particular facts at hand. Mendyk v. State, 545 So. 2d 846, 849 (Fla. 1989) (finding trial court abused its discretion in introducing State's evidence of pornography found in defendant's home, relying in part on section 90.403, Florida Statutes (1987)). The judge expressly excluded the evidence here because of its undue prejudice:

> THE COURT: No, sir. I am finding and I've given this great thought. I am not declaring the [victim impact evidence] statute to be unconstitutional, but I am also weighing the fact of the issue before the court is an appropriate sentence under the circumstances. I think that one of the factors that goes into that is whether or not the prejudicial effect of any evidence outweighs whatever probative value there is.
>
> And I don't believe that the victim impact evidence in this case, the nature of the case and the circumstances of the case as it exists outweighs the prejudicial value. Whatever probative value that would be obtained from the victim impact evidence is more prejudicial than it is probative.
>
> And that's why I decided not to allow it.

T373. Later, after the prosecutor persisted, the judge reiterated his reasons:

> THE COURT: All right. I've made up my mind on this, Mr. Murray.
>
> I feel it is discretionary with the Court and I think in certain circumstances it [introduction of victim impact evidence] may be warranted. Under the circumstances of this case I believe the prejudicial effect would outweigh the probative value. And I think that's another consideration that the Court has to take into light of restricting the victim impact statute.

T375-76. The State offers no argument or precedent to demonstrate that this ruling under these facts constitutes an abuse of discretion.

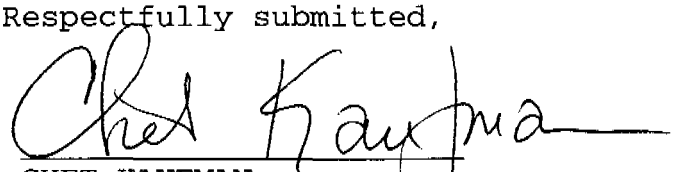
CONCLUSION

For the reasons stated above and in the initial brief of appellant/cross-appellee, this Court should reverse the sentence, remand for sentencing before a jury, and reject the State's cross-appeal.

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been furnished by U.S. Mail to Ms. Sara D. Baggett, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33049; and a copy has furnished by U.S. Mail to Warfield Raymond Wike, Jr., on this 5th day of December, 1996.

Respectfully submitted,



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