IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR., Defendant-Appellant, Cross-Appellee, - against - STATE OF FLORIDA, Plaintiff-Appellee, Cross-Appellant.	Case No. 74,663

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

APPELLANT'S REPLY BRIEF AND ANSWER BRIEF ON THE CROSS APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

POINT I. The State's contention that the jury recommendation should be given less weight because the "overall impact" of the mitigating evidence presented at resentencing was negative is based on a tortuous and often flatly inaccurate reading of the record and on evidence implicitly rejected by the sentencing judge. The trial court found that Zeigler had a good prison record and was an asset as an inmate, and the State's contention to the contrary is based on evidence rejected by the trial court. The State's additional assertions -- that the character witnesses admitted to "not really knowing" Zeigler; that witnesses acknowledged Zeigler's "effeminate" characteristics and rumors of his homosexuality; that the testimony regarding his excellent relationship with the black community was "discredited"; and that the trial court found the mitigating evidence to be "invalid" -- are all factually incorrect, and none of them was a part of the lower court's findings in its decision overriding the jury's recommendation of a sentence of life imprisonment.

POINT II. The State's brief does not show any reason why the jury's recommendation of life should not be followed. The defendant's arguments attacking the trial court's findings of aggravating circumstances and urging that the jury recommendation be given special weight under the particular circumstances of this case are not procedurally barred, since this Court expressly remanded the case for a "new" sentencing hearing, and these

issues were pressed below. The aggravating factors found by the trial court do not support an override of the life recommendation, and the mitigating evidence presented at the resentencing hearing -- proving Zeigler's lack of a prior conviction, outstanding prison record and exceptional character -- provides a sufficient basis for that recommendation, particularly in light of the possibility that residual doubt existed as to Zeigler's guilt which may have persuaded reasonable jurors that a punishment so final as death was not called for. Tedder v. State, 322 So.2d 908 (Fla. 1975)

ANSWER BRIEF ON CROSS APPEAL. The trial court's decision not to consider the "cold, calculated" aggravating factor at sentencing was clearly correct under the circumstances of this case. Since Zeigler had a reasonable expectation of being sentenced in a constitutional manner at his original sentencing hearing in 1976 in accordance with the law in effect at that time, he should not now be penalized by the fact that a sentencing error at the original trial required a remand for resentencing. Moreover, Article X, Section 9 of the Florida Constitution seems very clearly to prohibit consideration of aggravating circumstances added to the statute after the original sentence. The State's brief does not respond to either one of these arguments. This Court's decisions finding retroactive application of the "cold, calculated" aggravating circumstance to be constitutional as a general principle have nothing to do with this case, since the trial court explicitly recognized the

authority of these decisions (although suggesting that they be re-evaluated in light of a recent United States Supreme court decision), and limited its holding to the particular circumstances here.

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APPELLANT'S REPLY BRIEF
AND ANSWERING BRIEF ON THE CROSS APPEAL

At page 15 of our Initial Brief on Appeal ("Initial Brief"), we put the question which lies at the heart of this appeal: "Given the substantial body of mitigating evidence in the record and the jury's advisory verdict, how can it be said that 'virtually no reasonable person could differ' with the death sentence?"

The State's principal answer to that question comes in the form of its remarkable contention, appearing in a variety of forms throughout its brief, that the "overall impact" of the mitigating evidence was "negative" (see, e.g., Answer Brief of Appellee, hereinafter "Answer Brief," pp. 11, 16-18, 19-20), and, had it been heard by the jury, might have led to an advisory sentence of death rather than life imprisonment (see, e.g., Answer Brief at 20). It finds support for that proposition in a tortuous, sometimes flatly inaccurate treatment of the mitigating

evidence and in reliance on other evidence which the sentencing judge implicitly rejected and certainly did not use. When that smokescreen is blown away, the mitigating evidence gives strong support to the jury's recommendation of life.

I.

THE STATE'S CONTENTION THAT THE OVERALL IMPACT OF EVIDENCE TAKEN AT THE SENTENCING HEARING WAS "NEGATIVE" IS BASELESS

A. The State's Brief Relies Heavily on Testimony Implicitly Rejected by the Sentencing Judge

The State argues that Zeigler's prison record was "marred" by his conduct in 1977 while on death row, and that therefore "[t]he jury recommendation should be given less weight since the passage of time has demonstrated Zeigler's true character." (Answer Brief at 17, 33) The only support offered for these contentions is the testimony at resentencing of one of Zeigler's former fellow death row inmates (regarding an alleged plot to procure a false confession) which the trial court did not so much as once refer to, much less rely upon, in its Sentencing Order. (Answer Brief at 17-18, 33) In fact, after hearing this testimony and weighing it against Zeigler's nearly immaculate prison record, the trial court found that Zeigler has "a good prison record"; that he "appears to have adapted well to prison life"; and that he is "an asset as an inmate." (R. 568-69) Clearly, it was the State's evidence on this subject, and not

Zeigler's, that was discredited by the court.[1]

B. The State's Brief Relies on Distortions and Outright Misrepresentations of the Record

The State contends that the "friends"[2] who testified on Zeigler's behalf "admitted that if Zeigler had committed the murders they did not know him at all." (Answer Brief at 18) This contention is erroneous. In fact, only one of the twelve character witnesses ever made such a statement. (B. Giddens, R. 238) Other witnesses refused outright to acceed to the strong pressure of the state on cross-examination to qualify their entirely favorable testimony in this rather opaque manner. (See Hollenbeck, R. 252 ("I can only testify to the character of Mr. Zeigler as I know it.")); D. Giddens, R. 234 ("The Court system convicted Tommy. I have not . . . I'm not going to argue with the Court."))

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[1] The State's brief is referring on this point to the testimony of one Eddie Odom, who had considerable prison experience before arriving on death row. (R. 371-372) Odom even claimed that Zeigler confessed to him (apparently in 1977) that he had killed his wife, although he conceded that no one else was present at the time, that he had no idea where he was when he heard this supposed confession, and that Zeigler had also claimed to have been "framed." (R. 369-370) Odom had not reported that "confession" to anyone else until he began working with the State's representatives in preparation for his appearance at Zeigler's resentencing. (R. 370) One of the State's investigators testified that he had spent a considerable amount of time with Odom in the year and a half before the sentencing hearing. (R. 398) Odom's death sentence had been reduced to life (R. 375), and the State Attorney had "offered their support towards a clemency proceeding for my testimony" (R. 378). It is no wonder that the sentencing judge did not pay any attention to him in his Sentencing Order.

[2] The state's generalized description of all of the character witnesses as "friends" of Zeigler's is inaccurate. (See infra Section II.C.1; Initial Brief at 32-34)

The most outrageous of the State's gambits is its effort -- for whatever reason -- to depict Zeigler as a homosexual, although there had been no evidence to that effect at the trial, nor evidence that sexual preference might have had anything whatsoever to do with the murders. We have already referred to the Odom "testimony," but that is only one piece of the State's scandalous handling of this subject. The Answer Brief asserts that one of the psychiatrist witnesses presented by the defense "characterized Zeigler as effeminate" (p. 6) and that "[a] defense witness, Richard Smith, also had heard rumors about Zeigler's homosexuality" (p. 8).

Both assertions are outrageous. But the first one is especially so. And it is false.

The psychiatrist, Dr. Wilder, never made any statement even resembling the one attributed to him. The reference to Zeigler's "effeminate" characteristics is found only in a question posed to Dr. Wilder by the State's counsel on cross-examination based on a prison psychiatrist's report, to which Dr. Wilder had replied that the report "[d]oesn't tell me anything" and explained why. (R. 133-35) The second contention is at best a deceptive half-truth. Smith's testimony was that he heard rumors of Zeigler's homosexuality only after Zeigler's arrest, not before; and he characterized them as part of "all this crap." (R. 264-65)

As to the State's claim that evidence of Zeigler's excellent relationship with the black community is "discredited"

by his conviction of murdering a black man -- Charles Mays -- in order to avoid responsibility for the other murders (Answer Brief at 18), the jury had all the facts before it when it made its recommendation that Zeigler be sentenced to life: the evidence regarding the murder of Mays, as well as the 1976 testimony of Rev. DeSha, who said in 1989 that "Tommy was the best entree I could have at that time with the black community." (R. 211) The additional evidence on this subject presented at the resentencing hearing provided further support for the jury's recommendation of life.

C. The State is Wrong in Asserting that the Sentencing Judge Found the Mitigating Evidence to be Invalid

The State's brief winds up its assault on the truth by contending that the trial court found very little of the nonstatutory mitigating evidence to be "valid." (Answer Brief at 18) Nowhere, however, is such a statement to be found in the trial court's Sentencing Order. What the trial court did find was that portions of that evidence were "hearsay" and "uncorroborated" (R. 568), and we demonstrate below those inaccurate characterizations do not resolve the question of what weight should be given that evidence. It is enough to say here that the court's statements do not by any definition constitute a finding that the nonstatutory mitigating evidence was somehow "invalid." And they certainly do not constitute a finding, as the State would have it, that the evidence presented at resentencing was "detrimental to Zeigler rather than helpful." (Answer Brief at 20)

II.

THE STATE'S BRIEF, LIKE THE SENTENCING ORDER, FAILS TO SHOW THAT THERE IS NO REASONABLE BASIS FOR THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT

A. There is No Procedural Bar to Defendant's Contentions Here

The State argues that Zeigler is procedurally barred from attacking the 1976 trial court's findings of aggravating circumstances which were affirmed by this Court in its 1981 review. (Answer Brief at 11, 24-25) See, Zeigler v. State, 402 So.2d 365 (Fla. 1981). The same argument was made to the sentencing judge, and rejected by him. (R. 1105) The short answer to it is that this Court vacated the death sentence and ordered a new sentencing, Zeigler v. Dugger, 524 So.2d 419, 421 (Fla. 1988), so that when the resentencing hearing began the posture of the case was as if none of the 1976 findings had been made. See, Lucas v. State, 490 So.2d 943, 946 (Fla. 1986); Mann v. State, 453 So.2d 784, 786 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985).

The Answer Brief also contends that Zeigler is barred from urging in this Court that the particular circumstances of this case give special weight to the jury's recommendation of life imprisonment, because "[t]hese issues were not raised at the trial level [and] are procedurally barred." (Answer Brief at 14; Initial Brief at 12-13.) This contention is clearly wrong. Zeigler's defense raised the Tedder issue early, often, and vigorously during the proceedings below and expressly made the

point that the jury which recommended life had seen the evidence and heard the witnesses. (R. 544, 553-54, 557-58) It sufficiently called this issue to the trial court's attention so as to "apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal," which is all that was required. Williams v. State, 414 So.2d 509, 511 (Fla. 1982), quoting Castor v. State, 365 So.2d 701 (Fla. 1978).[3]

B. Analysis of the Statutory Aggravating Factors Present in this Case Does Not Support the Conclusion that the Jury's Recommendation Did Not Have a Reasonable Basis

1. Heinous, Atrocious or Cruel. The State's brief does not attempt to defend the trial judge's finding that Charles Mays was beaten savagely "while still alive and struggling." (R. 567) It does assert that Mr. Mays suffered injuries to his right hand "indicating he was trying to ward off his attacker." (Answer Brief at 25) But, as we pointed out in our Initial Brief (p. 22), the only testimony to that effect at trial had been stricken and the jury instructed to disregard it. (TT 286-87)[4]

The State's response to our recitation of reported cases which demonstrate that the "heinous, atrocious or cruel" aggravating circumstance has not been applied in a rational or

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[3] This case is not at all like Ventura v. State, 15 FLW S190 (Fla. April 5, 1990), on which the State's brief relies. Ventura had failed to bring a specific fact before the trial court, and so was barred from arguing its existence on appeal. Id. at 5192.

[4] In the portion of the transcript cited by the State in support of this argument (TT 248), the suggestion that Mays' injuries might have been defensive in nature was made in a proffer of evidence outside the presence of the jury.

consistent manner is to brush it off with citations to Smalley v. State, 546 So.2d 720 (Fla. 1989) and Brown v. State, 15 FLW S165 (Fla. March 22, 1990). Those decisions, however, do not address the issue presented in our opening brief (at 22-25). For example, while the Smalley decision refers to Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 70 L.Ed.2d 754 (1984) -- in which this Court held that the fact that the victim lived "for a couple of hours in undoubted pain" after being shot did not make the "heinous, atrocious or cruel" aggravating factor applicable -- to support its conclusion that this aggravating factor has been rationally applied, it does not address the contradiction presented by the decision handed down just three weeks earlier in Mason v. State, 438 So.2d 374, 379 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), where this Court had upheld an "especially heinous" finding because the victim lived one to ten minutes after being stabbed.

2. Pecuniary Gain. The Answer Brief misses the point when it seeks to support the sentencing judge's "pecuniary gain" finding by pointing out that "[t]he estate shrinkage if Eunice died first was only $6,000. . ." and that "[t]he estate shrinkage Zeigler refers to in his initial brief is that which would occur if Zeigler died first." (Answer Brief at 28) The point is that prudent estate planning called for adequate insurance on both husband and wife to protect the estate against shrinkage regardless of the sequence of their deaths. And that is the plan

Zeigler followed.

This Court should entirely disregard the State's argument that "[t]he family lawyer was not told about the policies even though he had discussed estate planning with Zeigler." (Answer Brief at 28) The implication is that such behavior should be seen as casting suspicion on Zeigler's professed motives; but the trial judge would not permit defense counsel to have the family lawyer explain his statement that "it was not unusual" for Zeigler to act on his advice without informing him. (R. 72-73)[5]

3. Avoiding Lawful Arrest. The State cannot have it two ways by arguing both that Mr. Mays was killed for the purpose of pecuniary gain, and that the dominant motive for that murder was to avoid arrest by the elimination of a witness. See, Menendez v. State, 368 So.2d 1278 (Fla. 1979). (Appeal Brief at 27-28) The string of cases cited at pages 29-31 of the Answer Brief is not to the contrary. Indeed, Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 109 S.Ct. 1578, 103 L.Ed.2d

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[5] The "pecuniary gain" cases cited by the State (Answer Brief at 28-29) involved far stronger evidence that the murder was committed for the purpose of collecting death benefits than does the case at bar. See Ventura v. State, 15 FLW S190 (Fla. April 5, 1990) (extensive testimony from co-conspirator that the murder was a contract killing for the purpose of collecting life insurance); Cailler v. State, 523 So.2d 158 (Fla. 1988) (testimony from defendant's boyfriend that defendant had informed him, in explaining why she wanted to kill her husband rather than divorce him, that she was the beneficiary of her husband's life insurance policy); Buenoano v. State, 527 So.2d 194 (Fla. 1988) (where defendant was accused of poisoning her husband in order to collect life insurance proceeds, a witness had testified at trial that the defendant had expressly proposed the same course of action to her in an earlier conversation).

944 (1989), makes the point that circumstantial proof of the "avoid arrest" aggravator requires that there be "'no logical reason' for the victim's . . . killing 'except for the purpose of murdering him to prevent detection.'" Id. at 276, quoting Routly v. State, 440 So.2d 1257, 1264. In the present case, according to the theory of the State's successful prosecution of it, the "logical reason" for the death of Mr. Mays, which is to be inferred from all the circumstances was that he was murdered as part of Zeigler's scheme to collect insurance on his wife's life.

4. Previous Conviction. In our Initial Brief, we contended that it was arbitrary and capricious for the sentencing judge to find that Zeigler's convictions in the same trial for four murders committed contemporaneously constitute a "previous conviction" of a violent felony, and that such a finding is inconsistent with the language of the statute as a matter of common understanding. (Initial Brief at 28-29) The State simply responds, and the defendant does not deny, that this Court has held the "previously convicted" aggravating circumstances to include crimes committed contemporaneously with the capital offense. (Answer Brief at 31) Neither the State nor any court, however, has yet succeeded in drawing a logical distinction between such a definition of "previous" convictions and the definition given "prior" criminal activity under § 921.141(6)(a), Fla. Stat., which has been held not to include contemporaneous crimes. Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988), cert. denied, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). Defendant

submits that these arbitrary and conflicting definitions violate his rights under the United States and Florida Constitutions.

Contrary to the State's position (Answer Brief at 32), if one of the aggravating factors should be stricken by this Court, then the jury's recommendation of life should be treated as conclusive. See, Elledge v. State, 346 So.2d 998 (Fla. 1977). The State's cases are inapposite, since no mitigating circumstances at all had been found in most of these cases. See, Reed v. State, 15 FLW S115, S117 (Fla. March 1, 1990) (four aggravating factors balanced against a "total absence" of mitigating circumstances); Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984), cert. denied 469 U.S. 873, 105 S.Ct. 299, 83 L.Ed.2d 158 (1984) (three aggravating circumstances and "nothing in mitigation"); Rogers v. State, 511 So.2d 526, 534-35 (Fla. 1988), cert. denied, 484 U.S. 1020, 108 S.Ct.733, 98 L.Ed.2d 681 (1988) (no statutory mitigating circumstances found). Elledge expressly held that a death sentence cannot be affirmed whenever there exist mitigating circumstances in the record upon which the jury could reasonably have based a recommendation of life in the absence of the stricken aggravating circumstances. Id. at 1003.

C. The State's Answer Brief Fails to Justify the Trial Court's Dismissal of Non-Statutory Mitigating Evidence

This Court's recent decision in Campbell v. State, 15 FLW S342 (Fla. June 14, 1990) set forth guidelines governing the consideration of mitigating factors in order to "promote the uniform application of mitigating circumstances in reaching the individualized decision required by law." For the reasons set

forth in our Initial Brief, which the State fails to refute, the trial court's Sentencing Order does not meet the minimum standard of rationality and specificity embodied in these guidelines.

Campbell requires that "[w]hen addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence," and that "in order to facilitate appellate review, [it] must expressly consider in its written order each established mitigating circumstance." Moreover, the court "must find as a mitigating circumstance each factor that has been reasonably established by the evidence and is mitigating in nature," with "mitigating" defined to include evidence of contribution to community or society, a good prison record, and charitable or humanitarian deeds. Id. at S344 and n. 6. The trial court's Sentencing Order, filled as it is with overbroad generalities, unsupported assertions, and arbitrary disregard of valid evidence, comes nowhere close to weighing the defendant's mitigating evidence with the care required by Campbell.

1. The character evidence. The State reiterates the trial court's assertion that the character witnesses' testimony is "uncorroborated hearsay." But it does not respond to our showing that this conclusion had no basis in either fact or law. (Initial Brief at 31-38) There we demonstrated, and the State does not contest, that large portions of that testimony were both

corroborated and based upon personal knowledge.[6] Nor does the State provide any basis in law as to why the sentencing judge should be permitted to entirely write off the defendant's mitigating evidence on these grounds alone. To the contrary, the Florida sentencing statute expressly permits the use of hearsay during the penalty phase. §921.141(a), Fla. Stat. Moreover, the court below made no findings and provided no analysis as to the actual reliability of that testimony.

The State also reiterates the trial court's unsupported, generalized finding that the character witnesses were "friends" of Zeigler's, and in addition alleges that each had a "potential bias." (Answer Brief at 33) Yet in so saying, it simply ignores the facts set forth in the Initial Brief, which demonstrate the error of those characterizations as generalities.[7] (Initial Brief, 32-34)

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[6] Connie Crawford and Donald Giddens corroborated one another's testimony as to Zeigler's practice of buying groceries and paying electric bills for those who could not afford them. (R. 227-28, 273) Theodore Van Deventer corroborated Oscilla James' testimony that Zeigler had testified as a character witness for her husband. (R. 80, 282-84) Van Deventer also corroborated the testimony of Richard Smith that Zeigler had been "instrumental" in community improvement projects. (R. 79, 262; Initial Brief at 34-35) Van Deventer, the Rev. DeSha, Donald Giddens, and Oscilla James all testified based on personal knowledge. (R. 74-77; 208-15, 227-28, 281-82) (Initial Brief at 35-36)

[7] Dr. Melvin Biggs, a prison minister who is a strong believer in capital punishment, stated that he generally refuses to be a witness on behalf of inmates because he "would rather stay away from that sort of thing." (R. 293-94) Oscilla James is a black woman of limited financial means who had occasional business dealings with Zeigler in the mostly segregated town of Winter Garden. (R. 210-11, 283)

The State's brief supports the trial court's finding that "the testimony at best established Zeigler's character as no more good or compassionate than the average individual." (R. 568; Answer Brief at 34) But its argument not only fails to offer any analysis refuting the defendant's showing as to the exceptional nature of his good deeds, but once again misrepresents a portion of the evidence upon which that argument is predicated. The State claims that "the record shows that Oscilla James was the wife of a black bar owner who [sic] Zeigler helped move his bar." (Answer Brief at 33) In fact, the record shows Ms. James testified about Zeigler's courageous act of taking the stand as a character witness for her husband who had been accused -- wrongly, it was determined in the hearing -- of drug dealing. (R. 282-84; Initial Brief at 33-34)

Despite the trial court's discretionary power in the matter of mitigating circumstances, its findings about those circumstances must be set forth with specificity. Campbell v. State, supra; Morgan v. State, 453 So.2d 394, 397 (Fla. 1984). (Answer Brief at 34-35) In particular, the State has failed to demonstrate that the trial court's written findings were set forth with the higher level of specificity required where the court overrides a jury recommendation of life.[8] Thompson v. State, 328 So.2d 1, 5 (Fla. 1976); Hall v. State, 381 So.2d 683,

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[8] Unlike the present case, the cases cited by the State for the proposition that the trial court has discretion in finding mitigating circumstances (Answer Brief at 34-35) involved, with one exception, circumstances in which either the jury had recommended death or the sentencing jury had been waived.

684 (Fla. 1978). (Initial Brief at 38-39) The severe and recurring distortions of the record by the State in this case underscore the need for clear and particularized findings of fact by the trial court.

2. The evidence of behavior in prison. The State's only response to the argument in the Initial Brief that the trial court failed to give weight to the evidence that Zeigler was a model prisoner is that Zeigler's prison record was "marred" by the incident in which he allegedly sought to procure false testimony. As discussed above, this contention is contrary to the express findings of the trial judge, who stated in his Sentencing Order that Zeigler had "a good prison record" and that he "appears to have adapted well to prison life and is an asset as an inmate."

Under Campbell, "a mitigating factor once formed cannot be dismissed as having no weight." Id. at S344. Since the trial court found this mitigating factor to exist, it must be weighed as additional support for the jury's recommendation of life. When weighed together with the other mitigating circumstances established by the defendant's evidence, it provides a sufficiently reasonable basis for the life recommendation so as to require that it be upheld.

D. The State's Answer Brief Fails to Justify the Sentencing Judge's Override of the Jury's Recommendation of a Life Sentence

The mitigating evidence presented at resentencing, coupled with the evidence presented at the original trial,

clearly provides a reasonable basis for the recommendation of life by twelve reasonable jurors.[9] Under such circumstances, that recommendation is determinative. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Tedder v. State, 322 So.2d 908 (Fla. 1975). (Initial Brief at 16)

The trial court's discretion to find or not find a specific mitigating circumstance (Answer Brief at 18-19) remains bounded by Tedder and does not permit it to override a jury verdict where a reasonable jury could have found that mitigating circumstances existed, even if the court might have reached a different conclusion. Fead v. State, 512 So.2d 176 (Fla. 1987), quoting Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987) (jury override impermissible unless "there are no valid mitigating factors discernable from the record upon which the jury could have based its recommendation'"). (Initial Brief at 14) The cases cited by the State are not to the contrary, since in all but one of them either the jury had recommended death, or the

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[9] The State takes issue with the statement in the Initial Brief that the jury verdict was unanimous (Initial Brief at 13), arguing that "there is nothing in the record to support" such a claim. (Answer Brief at 17) The trial judge specifically stated at a pretrial hearing that "not having any idea what the actual vote was, I think the only logical thing the court could do is assume it's unanimous," and that he would "assume that the jury, as a whole, has reached the recommendation of life and give that the strongest possible weight that I can." (R. 629) Later, towards the close of the resentencing hearing, he said: ". . . there is no evidence as to what the actual vote was. The only thing in the record is that a majority of them, whatever that majority may be, could be 12 - zero, could be 6 - 6, voted for life imprisonment. As I indicated, I take that with the strongest presumption." (R. 554-555)

defendant had waived sentencing by a jury altogether.[10] A sentencing court's discretion is limited moreover by the requirement in Campbell v. State, supra, that it "must find as a mitigating circumstance" any factor reasonably established by the evidence in the record. Id. at S344 (emphasis supplied).

Nor is it significant that jury overrides in some other cases have been affirmed on appeal (Answer Brief at 20-21), since the cases in question all differed substantially from Zeigler's. In every case cited by the State, the trial court had found that there existed no mitigating factors at all. In the present case, by contrast, the trial court specifically found two mitigating circumstances (no significant history of prior criminal activity and good prison record).

Moreover, in the cases cited by the State in which the defense presented any mitigating evidence at all, the court had in most instances made specific findings against the alleged

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[10] See Cook v. State, 542 So.2d 964 (Fla. 1989) (recommendation of death); Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985) (waiver of sentencing jury); Quince v. State, 414 So.2d 185 (Fla. 1982), cert. denied 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982) (waiver of sentencing jury); Hudson v. State, 538 So.2d 829 (Fla. 1989), cert. denied 58 U.S.L.W. 3219, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989) (recommendation of death); Scull v. State, 533 So.2d 1137 (Fla. 1988), cert. denied, 57 U.S.L.W. 3705, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989) (recommendation of death); Hargrave v. State, 366 So.2d 1 (Fla. 1979), cert. denied 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed. 2d 176 (1979) (recommendation of death). Although Porter v. State, 429 So.2d 293 (Fla. 1983) involved an override of a jury's recommendation of life, it is not analogous to the case at bar since the judge had access to evidence which the jury did not, and there was a specific finding that the jury may have been swayed by an improper argument by the defense. (Id. at 296)

facts on which the mitigating circumstances were predicated. See Thompson v. State, 553 So.2d 153 (Fla. 1989), cert. denied, Thompson v. Florida, 58 U.S.L.W. 3724, 109 L.Ed.2d 521 (1990) (defendant argued mitigating circumstances of comparative culpability of other defendants and diminished capacity; court found that defendant was more culpable than co-defendants and that alleged brain damage did not exist)[11]; Stevens v. State, 419 So.2d 1058 (Fla. 1982) (defendant argued mitigating circumstances of comparative culpability of other defendants and action under the substantial domination of another; court found that defendant was equally culpable and had acted independently); Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1981) (defendant argued as mitigating circumstance theory that he had only been an accomplice to the crime; court found that he had acted alone); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981) (defendant argued mitigating circumstances of action under extreme mental or emotional disturbance; court found that this condition had not been established with any degree of medical certainty).

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[11] The Thompson sentencing order stands in vivid contrast to the one we have here in terms of the findings made to support a death sentence. In rejecting the defendant's contention that he suffered from organic brain damage, the Court spent ten paragraphs analyzing the testimony of the one witness proffered by the defendant in support of this contention. It described in its written findings how it had evaluated the validity of each psychological test performed on the defendant and the conclusions drawn therefrom, and discussed in detail a multitude of facts that had been elicited from the witness on cross-examination. (Id. at 156-57)

Here, on the other hand, the sentencing judge made no adverse findings as to the actual facts on which the mitigating circumstances were predicated. He did not find any lapses in Zeigler's excellent prison record; he made no findings that Zeigler had not paid bills for his impecunious tenants, that he had not risked community criticism to testify on behalf of a black man of limited means in his community, that he had not been instrumental in community improvement projects, or that he had not performed any other of the good deeds to which his witnesses testified. He simply chose to discount the weight given those facts, even though a jury might reasonably have relied on them.

In a number of cases not cited by the State, this Court has reversed jury overrides where mitigating factors had been found, even when as many as five aggravating factors had been proven, and in cases where all of the mitigating evidence was non-statutory. See, e.g., Carter v. State, 15 FLW S255 (Fla. April 26, 1990) (trial court found five aggravating factors; jury override reversed because jury could reasonably have relied on testimony proffered in support of one statutory mitigating factor); Hallman v. State, 15 FLW S207 (Fla. April 12, 1990) (trial court found four aggravating factors and no statutory mitigating factors; jury override reversed based on evidence of non-statutory mitigating factors, including testimony as to the defendant's exemplary work record, good disciplinary record in prison, and good character); Morris v. State, 15 FLW S84 (Fla. February 22, 1990) (court found one aggravating factor and no

mitigating factors; jury override reversed based on the "totality of the circumstances").

It is not of any consequence that juries in cases which had some facts similar to those in the instant case have on occasion recommended death. (Answer Brief at 21-22) That a different jury in a different case came to a different conclusion has no bearing whatsoever on the standard of review which applies once a recommendation of life has been made. The jury in this case, acting on the particular evidence presented in this case, recommended against the death penalty. The evidence provides a reasonable basis for that decision, and it does not matter that another also reasonable jury might have differed. The recommendation has been made, and the mitigating evidence in the record requires that it be upheld.

Finally, we demonstrated in the Initial Brief that the law leaves some room for the jury's consideration of residual doubt it may have had as to Zeigler's guilt, citing in support decisions in which the Eleventh Circuit and other courts had implied that such doubt is a legitimate factor to be considered in the penalty phase. (Initial Brief at 17-19) In any event, it was shown, the trial judge committed an error in apparently basing his sentence in part on the conclusions set forth in his Sentencing Order that "[a] review of the transcript and evidence in this case clearly supports the jury's verdicts," and that "[t]here is no basis for the Defendant's contention that there was a reasonable hypothesis of innocence," after having entered

an in limine order precluding the defendant from introducing evidence of residual doubt. (R. 565) (Initial Brief at 19-20) The State responds only by citing the Florida decisions in which residual doubt was not permitted as a mitigating circumstance and the United States Supreme Court's decision in Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1989). (Answer Brief at 22-23)

Franklin v. Lynaugh, as demonstrated in the Initial Brief, does not, as the State would have it, "reject[] residual doubt as a mitigating consideration." (Answer Brief at 22) Rather, it holds only that for the time being each state is left with a measure of discretion to determine whether to permit consideration of this mitigating factor in the penalty phase of a capital case. It does not follow that there can be no case in which the principles of individualized sentencing embodied in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) require that evidence of residual doubt be considered. A blanket prohibition on the consideration of such evidence, without regard to the individual merits of each case, may indeed be unconstitutional under the Eighth Amendment to the United States Constitution. (Initial Brief at 17-18)

A number of courts which have considered this rule have at least implicitly recognized the common sense notion that evidence which is sufficient to convince a reasonable person of guilt beyond a reasonable doubt may nevertheless still fall short

of persuading that same person that punishment so final and irrevocable as death is appropriate. King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985); Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984), cert. denied, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 151 (1985). (Initial Brief at 18)

The State fails entirely to respond to our showing in the Initial Brief that the sentencing judge himself appears to have considered and rejected residual doubt as a factor for consideration in sentencing after having prohibited Zeigler from introducing any evidence or even making any argument as to such doubt. For the court to thus rely on the supposed clarity of the evidence in support of the sentence of death while simultaneously excluding evidence of residual doubt violated the defendant's right to due process under the Fourteenth Amendment to the United States Constitution (Initial Brief at 19-20). See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1972) (trial court's error in excluding evidence favorable to defendants, when viewed in conjunction with other errors, constituted a violation of due process).

The injustice of refusing to permit consideration of the issue of residual doubt is highlighted by the "statement" in the State's Answer Brief itself, which emphasizes several facts as to which the evidence proffered during the guilt phase of Zeigler's trial was at least ambiguous. Thus, the State asserts that the "hot" guns said to have been purchased by Zeigler were

"delivered to Zeigler" (Answer Brief at 1), although Edward Williams testified that he delivered the guns to Eunice Zeigler. (TT 1267-68) Moreover, it summarizes the evidence as showing that Zeigler took Mays and Felton Thomas to an orange grove to fire the guns used in the killings in order "to get the two to handle . . . the weapons in the bag" (Answer Brief at 2), without, however, advising this Court that the State's fingerprint expert had testified at trial that the weapons were "pretty well wiped clean" at the time she examined them. (TT at 1135-36) (See also Initial Brief at 19 n. 11 for other unresolved questions about the trial evidence) Clearly, reasonable jurors could have concluded from these evidentiary anomalies that although the evidence persuaded them of guilt beyond a reasonable doubt, it did not so thoroughly foreclose the possibility of innocence as to permit a conclusion that death was the only appropriate penalty.

CONCLUSION OF REPLY BRIEF

The record of this case contains more than enough mitigating evidence to provide a reasonable basis for the jury's recommendation of life imprisonment. In an effort to avoid the consequences of that under the Tedder standard, the State was compelled to resort to its tactic of attempting to depict the "overall impact" of that evidence as "negative." There is not the slightest suggestion of that in the Sentencing Order, or anywhere else in the record, and instead, the State has resorted to evidence rejected by the sentencing judge and to distortions and outright misrepresentations. Accordingly, the death sentence should be vacated, and this Court should impose a sentence in accordance with the jury's recommendation.

ANSWER BRIEF ON CROSS APPEAL

The trial court held that application of the "cold, calculated and premeditated" aggravating circumstance, § 921.141(5)(i), in the particular circumstances of Zeigler's case would violate the ex post facto clause of the United States Constitution. Specifically, the court below found that since the jury had recommended life prior to the time this aggravating circumstance was added to the sentencing statute, consideration of that circumstance on resentencing would "diminish[] the effect of the jury's advisory verdict." (R. 1136)

This ruling was clearly correct in light of Lee v. State, 340 So.2d 474 (Fla. 1976), which held in essence that a sentence of death should not be the result of something so capricious as the timing of sentencing procedures. In that case, the defendant's sentence of death had been individually reduced by the trial court to life shortly after Furman v. Georgia, 408 U.S. 238 (1972), and he was thus not affected by a subsequent blanket ruling reducing all pre-Furman death sentences to life. When the defendant was subsequently sentenced to death at a resentencing hearing, this Court vacated that sentence on equal protection grounds, holding that it was improper for "the question of whether a person should live or be put to death by the State [to] be determined by the legal procedures of when his request for reduction of sentence was made." Zeigler's situation is indistinguishable from Lee's, since it would be a violation of equal protection for a court to apply to Zeigler an aggravating

factor that was not applied to other defendants who were sentenced in 1976 under the capital sentencing statute.

The severity of Zeigler's sentence should therefore not be in any way governed by the timing of his resentencing. Since Zeigler had a reasonable expectation of being sentenced in a constitutional manner in 1976 and in accordance with the law in effect at that time, he should not now be penalized by the fact that an error in the original sentencing proceeding required remand for a resentencing proceeding. If, as a result of the statute's amendment in 1979, the resentencing judge were to consider an aggravating factor which had not been available to the 1976 jury, the defendant might be depriving pro tanto of the benefit of that jury's life recommendation.

An independent ground for applying the pre-1979 sentencing statute in this case is Article X, Section 9 of the Florida Constitution, which states:

> "repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

That unambiguous language would seem very clearly to prohibit consideration of aggravating circumstances added to the statute after the crime.[12] Indeed, the Florida Constitution appears to

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[12] Although this Court rejected a similar claim in Justus v. State, 438 So.2d 358, 368 (Fla. 1983), cert. denied, 465 U.S. 1052, 104 S.Ct. 1332, 74 L.Ed.2d 726 (1984), it apparently did so in reliance on Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980), which did not address the applicability of Article X, Section 9 to the "cold, calculated" aggravating circumstance. In Dobbert, the defendant had challenged Florida's death penalty statute as a whole based on that provision, and the court had rejected that particular challenge as being without merit.

be even more expansive in this regard than the United States Constitution in that it does not require that the law "disadvantage" the defendant, as is required in order to prove a violation of the United States Constitution ex post facto clause,[13] but only that it "affect" him. As observed in Raines v. State, 28 So. 57, 58 (Fla. 1900),

> "The effect of this constitutional provision is to give all criminal legislation a prospective effectiveness."

The State, in its cross-appeal, does not challenge either one of these grounds for the lower court's ruling. Rather, it argues more generally the irrelevant point that the ex post facto clause of the United States Constitution does not void the applicability of the "cold, calculated" aggravating circumstance to crimes committed prior to its incorporation into the statute.

This argument is misdirected. The trial court did not purport to decide the broad question of whether the "cold, calculated" aggravating circumstance can ever be constitutionally applied to a crime committed before its enactment. Its ruling goes only to the narrow issue of whether this factor can be retroactively applied at resentencing so as to diminish the effect of a jury recommendation of life in the original proceeding. (R. 1135-36) It specifically held that it "recognizes the principal of stare decisis and is not determining the constitutionality of applying Fla. Stat. § 921.131(5)(i) to a

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[13] Weaver v. Graham, 450 U.S. 24, 29 (1981).

crime committed before enactment of this provision." The cases cited by the State in which this Court upheld in general the constitutionality of retroactive application of the "cold, calculated" factor therefore have no bearing on the particular issue decided by the trial court below, since none of those decisions involved application of that factor at resentencing. In any event, the State should not be heard to argue, as it does in its Answer Brief, that the "cold, calculated" aggravating circumstance does not disadvantage the defendant when it has itself explicitly argued elsewhere in its Answer Brief that this circumstance ought to have been considered by the trial judge as a factor outweighing the mitigating circumstances so as to require imposition of the death penalty. (Answer Brief at 22, 32)

The State's assertion that Stano v. Dugger, Case Number 88-425-Civ-Orl-19, M.D. Fla., May 18, 1988 cannot "support" the court's ruling because it is a decision of an "intermediate" [sic] federal court on rehearing (Answer Brief at 39) is likewise based on a misinterpretation of the trial court's ruling. The trial court never purported to rely on that case as authority for its decision. Its only mention of Stano is in its statement that "in light of Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) and Stano v. Dugger . . . , it would encourage reconsideration" of the more general issue of whether retroactive application of the "cold, calculated"

aggravating circumstance is constitutional under any circumstances.[14]

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[14] Recent decisions on this issue indeed suggest that such reconsideration may be in order. Although in Combs v. State, 403 So.2d 418, cert. denied 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1981), this Court upheld the constitutionality of retroactive application of the "cold, calculated" aggravating circumstance, Combs preceded the decision of the United States Supreme Court in Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), in which it was held that the ex post facto clause prohibited application of revised sentencing guidelines to a crime committed before the revision was put into effect. Stano v. Dugger, supra correctly observed that since the "cold, calculated" aggravating circumstance "deals with the quantum of punishment that may be imposed" and "could disadvantage a criminal defendant on trial for his or her life," its retroactive application is unconstitutional under Weaver v. Graham, 450 U.S. 24 (1981). The State is simply wrong in its assertion that consideration of this aggravating circumstance "adds nothing new" to the sentencing process where premeditation was part of the underlying crime. (Answer Brief at 38) Since non-statutory aggravating factors may not be considered in the sentencing process, consideration of premeditation at sentencing was not possible prior to the inclusion of the "cold, calculated" aggravating circumstance in the statute.

CONCLUSION OF ANSWER BRIEF

Since application of the "cold, calculated" aggravating circumstance at Zeigler's resentencing would diminish the effect of the jury's advisory verdict, and would be in violation of Article X Section 9 of the Florida Constitution, the trial judge's ruling precluding evidence and consideration of this aggravating circumstance should be affirmed.

Dated: June 19, 1990

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Barbara C. Davis, Esq., Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, on this 19th day of June, 1990.

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