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IN THE SUPREME COURT OF FLORIDA

ROBERT PATRICK CRAIG,

Appellant,

v. CASE NO. 79,209

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Craig's statement of the case and facts with the following additions and corrections:

In August, 1991, Craig filed a petition for a writ of mandamus, prohibition or other writ directing the trial court to conduct an evidentiary hearing and to convene a jury to reconsider the sentencing decision. Craig argued that a number of mitigating factors could be introduced at the sentencing phase trial and that the fact finder should have the advantage of hearing live testimony. The petition was denied by this court on September 19, 1991. *Craig v. Briggs,* Case No. 78,437.

Craig states that Farmer arrived at the ranch after the cattle count had begun, but the testimony demonstrates that Farmer was at the ranch the morning of the murders when Craig and Schmidt returned from their latest trip to sell stolen cattle (R 920-21, 927, 1404).

Schmidt, Craig's codefendant, received two life sentences (R 605-06).

SUMMARY OF ARGUMENT

POINT 1: Craig was properly sentenced by a different judge following a limited remand for consideration of additional mitigating evidence by the trial court only. Appellee first contends that this courts denial of Craig's petition for writ of prohibition or mandamus constitutes law of the case, and the issue is no longer open for consideration. In any event, reversal is not warranted. Every fact before this court was found by a trial court judge who heard the testimony which resulted in the finding. This court already determined that the appropriate sentences were death based on the evidence heard by the jury, and the fact that a different judge heard additional mitigating evidence in no way prejudices Craig.

POINT 2: The trial court did not abuse its discretion in precluding Craig from presenting additional mitigating evidence and in not empaneling a new advisory jury. Craig was never precluded from presenting any mitigating evidence to the original jury. This court specifically remanded this case for reconsideration by the trial court as error did not occur until after the jury rendered its advisory recommendation.

POINT 3: The trial court properly found aggravating factors not found by the original sentencer where evidence of those factors was before the original sentencer. A trial judge may properly apply the law and is not bound in remand proceedings by prior legal error. Defense counsel argued that this was the standard for mitigating factors, and it applies to aggravating factors as well.

POINT 4: The death sentences were properly imposed. The trial court set forth sufficient facts to support the finding of these factors, and all four are applicable to both murders. The trial court did not abuse its discretion in finding, weighing and rejecting mitigating factors, particularly where rejection of the same had already been approved by this court, and the trial court found a mitigating factor on the basis of the only evidence properly before it. There is no reasonable basis for the jury's life recommendation on Count I, and the death sentences are proportionate.

POINT 5: This claim is procedurally barred for failure to raise it in prior proceedings. Error, if any, is harmless.

POINT 1

CRAIG WAS PROPERLY SENTENCED BY A DIFFERENT JUDGE FOLLOWING A LIMITED REMAND FOR CONSIDERATION OF EVIDENCE OF CRAIG'S BEHAVIOR WHILE IN PRISON.

Craig contends that the resentencing judge erred in sentencing him without hearing the testimony of witnesses that was heard by the original trial judge. In August, 1991, Craig filed a petition for a writ of mandamus, prohibition or other writ directing the trial court to conduct an evidentiary hearing and to convene a jury to reconsider the sentencing decision. Craig argued that a number of mitigating factors could be introduced at the sentencing phase trial and that the fact finder should have the advantage of hearing live testimony. The petition was denied by this court on September 19, 1991. *Craig v. Briggs,* Case No. 78,437. Thus, appellee first contends that this court's denial, as opposed to dismissal of the petition, constitutes a ruling on the merits of this issue which became law of the case, and the issue is no longer open for discussion or consideration by this court. *Greene v. Massey,* 384 So.2d 24, 28 (Fla. 1980). Under the "law of the case" doctrine, whatever is once established between the same parties in the same case as the controlling legal rule on a particular issue continues to control throughout any subsequent proceedings. *See, Id.; Strazzulla v. Hendrick,* 177 So.2d 1 (Fla. 1965); *LeCroy v. State,* 533 So.2d 750 (Fla. 1988). *See also, Reyes v. State,* 554 So.2d 625 (Fla. 3d DCA 1989), *rev. denied* 562 So.2d 346 (1990); *Nordqvist v. Nordqvist,* 586 So.2d 1282 (Fla. 3d DCA 1991) (denial of petition for writ of prohibition is ruling

on the merits unless otherwise indicated). *But see, Fryman v. State,* 450 So.2d 1250 (Fla. 2d DCA 1984); *Thomason v. State,* 594 So.2d 310, 312 n.2 (Fla. 4th DCA 1992) (Stone, J., concurring specially).

In any event, reversal is not warranted. Florida Rule of Criminal Procedure 3.700 states:

> (c) In those cases where it is necessary that sentence be pronounced by a judge other than the judge who presided at trial, or accepted the plea, the sentencing judge shall not pass sentence until he shall have acquainted himself with what transpired at the trial on the facts, including any plea discussions, concerning the plea and offense.

In addition, Florida Rule of Criminal Procedure 3.231 provides that if by reason of disability, the judge before whom the trial commenced is unable to proceed with posttrial proceedings, another judge, certifying that he has familiarized himself with the case, may proceed with the disposition of the case. Appellee recognizes that this court recently held that a judge who is substituted before the initial trial on the merits is completed and who does not hear the evidence presented during the penalty phase of the trial must conduct a new proceeding before a jury to assure that both the judge and jury hear the same evidence that will be determinative of whether a defendant lives or dies. *Corbett v. State,* 17 F.L.W. 355 (Fla. June 11, 1992). However, as will be demonstrated, the facts of the instant case are distinguishable from that case, and appellee contends that this distinction renders *Corbett* inapplicable to the instant case, particularly since there is no way that Craig can demonstrate that he was in any way prejudiced.

Every fact before this court was found by a trial court judge who heard the live testimony which led to its finding. This is not a case where a trial court judge had to weigh the evidence and make a credibility determination on the basis of a cold, hard record. The original sentencing judge, who heard the same evidence as the advisory jury, issued a 23 page order wherein he rendered extensive factual and legal findings (PR 2088-2110). The only error this court found in that order was the trial court's legal conclusion that the two murders were heinous, atrocious and cruel. *Craig v. State,* 510 So.2d 857 (Fla. 1987). This court then remanded for consideration of evidence of Craig's behavior while in prison, and a different judge heard the live testimony, made factual findings and determined that this was a mitigating factor entitled to little weight. Since Craig had never attempted to put this evidence before the original jury, there was no evidence to be heard by the same judge and jury.

The fact that a different judge heard the additional evidence does not and cannot change the facts of these murders, does not and cannot change the existence of aggravating factors, and does not and cannot change the rejection of mitigating factors as determined by the judge who heard the same evidence as the advisory jury, and does not and cannot change the fact that this court has already approved those findings. The findings would have been the same had the original judge presided over the remand proceedings, so Craig simply cannot demonstrate that he suffered any detriment. §38.12, Fla. Stat. (1989). It simply

defies logic and reason to find that if the remand proceedings had been held before the original trial court he would have imposed two life sentences because Craig had been a good boy in jail. In this respect, it must be remembered that the original trial court found no reasonable basis for the jury's life recommendation and this court approved that finding.

The parties stipulated to the use of all previous transcripts, the trial court took judicial notice of the record, and the trial court certified that he had familiarized himself with the entire record (R 6, 203, 443). As stated, every factual finding in this case has been rendered by a judge who heard the testimony resulting in it. Consequently, unlike *Corbett, supra,* there is an adequate record for this court to review to determine the propriety of the death sentence. In this respect, appellee would point out that this court can either independently reweigh the factors or conduct a harmless error analysis. *See, Clemons v. Mississippi,* 494 U.S. 738 (1990).

This situation is analogous to a different trial court judge finding in post conviction proceedings, and/or this court approving a finding, that *Hitchcock* error was harmless or that trial counsel was not ineffective for not presenting additional mitigating evidence as the outcome would not have been affected. *See, e.g., Steinhorst v. State,* 574 So.2d 1075 (Fla. 1991) (nonstatutory mitigating evidence that defendant maintained steady employment, was devoted to family, and was intelligent, nonviolent and socially adept would not have affected sentence in light of evidence surrounding the several murders); *Heiney v. State,* 558

So.2d 398 (Fla. 1990) (nonstatutory mitigating evidence that defendant was courteous and cooperative when arrested, did not fight extradition, and was not violent until two days before murder would not have changed sentence, even though jury recommended life). This court already determined that Craig deserved to die based on the evidence that the jury heard, and the fact that additional nonstatutory mitigating evidence heard by a different trial judge does not change this result nor does it render the death sentences unconstitutional or unfair.

POINT 2

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING CRAIG FROM PRESENTING ADDITIONAL EVIDENCE AND IN NOT EMPANELING A NEW ADVISORY JURY.

In Point 2 of his brief, Craig contends that the trial court erred in precluding him from presenting additional mitigating evidence at the "resentencing hearing" (IB 27). In Point 3 of his brief, Craig contends that the trial court erred in failing to empanel a new advisory jury (IB 33). Since these two points are so closely related and have both been addressed in many of the same cases, appellee will respond to them in one point. Appellee first contends, as was argued in Point 1, *supra,* that this court's previous denial of Craig's petition constitutes law of the case. In any event, error has not been demonstrated.

In remanding this case, this court stated:

> The *Skipper* decision requires reconsideration of the sentences of death imposed in this case. Such reconsideration shall be by the trial judge only because appellant did not attempt to introduce the good-behavior evidence before the jury but only sought to present it to the judge before sentencing.

Craig v. State, 510 So.2d 857, 871 (Fla. 1987). As such, the instant proceeding was not a "resentencing hearing", but simply a limited remand so that the trial court could consider and weigh evidence of Craig's good behavior in jail. This was the only evidence Craig had previously been precluded from presenting, and he only sought to present it to the trial court. *Compare, Preston v. State,* 17 F.L.W. 252 (Fla. April 16, 1992) and *Mann v. State,* 453

So.2d 784 (Fla. 1984) with *Ferguson v. State,* 474 So.2d 208 (Fla. 1985) (remand for proper consideration by trial court of mitigating circumstances relating to appellant's mental state and ability to appreciate the criminality of his conduct); *Mikenas v. State,* 407 So.2d 892 (Fla. 1982) (remand for resentencing without jury where evidence itself was not improper, but only manner in which it was considered by trial court in findings of fact); *Oats v. State,* 472 So.2d 1143 (Fla. 1985) (three aggravating factors were improperly considered by trial court so case remanded for entry of a new sentencing order); *Menendez v. State,* 419 So.2d 312 (Fla. 1982) (case remanded for resentencing by trial judge where improper aggravating factors considered); and *Funchess v. State,* 399 So.2d 356 (Fla. 1981), *Dougan v. State,* 398 So.2d 439 (Fla. 1981), and *Songer v. State,* 365 So.2d 696 (Fla. 1978), all of which involved limited remands pursuant to *Gardner v. Florida,* 430 U.S. 349 (1977). Given its varied terminologies in remanding for resentencing, this court has allowed trial courts to exercise discretion in resentencing. *Lucas v. State,* 490 So.2d 943 (Fla. 1986). Appellant contends that the trial court did not abuse its discretion in not permitting Craig to present additional mitigating evidence and in not empaneling a new sentencing jury.

In the first place, Craig was never precluded from presenting any mitigating evidence at the original proceeding, other than the evidence of his behavior in prison, which he sought to introduce only before the trial judge. *See, Mikenas, supra* (defendant had been afforded ample opportunity to present mitigating evidence at original sentencing proceeding). *Compare,*

Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); *Lucas, supra.* The purpose of this court's remand was for the trial court only to hear and weigh the evidence that Craig had been precluded from presenting. While counsel endeavored to treat the remand as a full-blown sentencing proceeding, the trial judge properly rejected this attempt to expand the proceeding. *Dougan, supra; Songer, supra; Funchess, supra.*

Further, the evidence Craig sought to introduce was cumulative to that presented at the original proceeding and available at the original proceeding. At the proceeding before the jury, Craig presented the testimony of his father, mother-in-law, and wife (PR 1730-49). They all testified that Craig is a wonderful, gullible guy who never caused any trouble and was never in any trouble until he met Schmidt. The PSI contained statements from Craig's wife, mother-in-law, father-in-law, sister-in-law, two former employers and his parents (PR 2044-45). In addition, a number of letters written and signed on Craig's behalf were attached to the PSI (PR 2047-87). Simply because Craig's strategy did not result in life sentences the first time does not mean there a basis for a second attempt on a limited remand.

Likewise, the trial court did not abuse its discretion in not empaneling a new advisory jury. Craig states that nothing in this court's language precluded the trial court from empaneling a new jury, but this court's language was very specific on this issue. This court determined that any error in the exclusion of evidence did not affect the jury recommendations since Craig

never attempted to present the evidence at issue to the jury, and specifically stated that reconsideration of sentence "*shall be* by the trial judge only". *Craig, supra* at 871 (emphasis supplied). Thus it is clear beyond a reasonable doubt that the exclusion of the evidence did not affect the jury recommendations, so there was no abuse of discretion in not empaneling a new jury. *Menendez, supra; Mikenas, supra; Riley, supra; Songer, supra; Oats v. State,* 472 So.2d 1143 (Fla. 1985). Where error occurs after the jury gives its recommendation, no purpose would be served by ordering that the defendant be resentenced by a jury. *See, e.g., Funchess v. Wainwright,* 772 F.2d 683, 692 (11th Cir. 1985).

The case relied upon by Craig, *Lucas, supra,* is readily distinguishable. Lucas had been sentenced before this court's opinion in *Songer, supra,* and the jury had only been instructed on the statutory mitigating factors. The case had already been remanded once, and the court determined that rather than face the possibility of future problems, it would simply remand for a complete resentencing at that time. As stated, Craig was not precluded from presenting any mitigating evidence to the jury, nor was the jury restricted in its consideration of mitigating evidence. There is simply no basis for Craig's inference that this case will return for resentencing in the future following post conviction proceedings.

POINT 3

THE TRIAL COURT PROPERLY FOUND AGGRAVATING FACTORS NOT FOUND BY THE ORIGINAL SENTENCER WHERE EVIDENCE OF THOSE AGGRAVATING FACTORS WAS BEFORE THE ORIGINAL SENTENCER.

Craig contends that the trial court erred in finding statutory aggravating factors which had not been found by the prior sentencing judge. Craig contends that consideration of these factors is barred by the doctrines of res judicata, law of the case, double jeopardy and fundamental fairness. Appellee submits that Craig's contentions are without merit as they have previously been rejected by this court.

This court has held that the trial judge may properly apply the law and is not bound in remand proceedings by prior legal error. *Spaziano v. State,* 433 So.2d 508 (Fla. 1983). In that case, this court had remanded to give the defendant the opportunity to explain or deny the contents of the presentence investigation, pursuant to *Gardner v. Florida,* 430 U.S. 349 (1977). In sentencing the defendant, the trial court found as an aggravating factor that the defendant had previously been convicted of a violent felony, which he had not found at the original sentencing proceeding. This court specifically rejected claims, like those presented in the instant case, that consideration of the prior violent felony aggravating factor improperly expanded the scope of the remand proceedings and violated the double jeopardy rule. *Id.* at 510. This court determined that the trial court could have considered the prior conviction in the original proceeding, as evidence of it had been submitted in the initial proceedings, so

the scope of the remand was not expanded. The court further determined that there was no double jeopardy violation, and the defendant had been given a full opportunity to explain or deny the conviction in the resentencing process.

Likewise, in the instant case, evidence of the prior violent felony conviction and evidence supporting the avoid arrest factors was before the original trial court and these factors could have been found at the original proceeding. The additional prior violent felony aggravator found by the trial court in the instant proceeding was the contemporaneous conviction for first degree murder. It certainly cannot be disputed that this evidence was before the original trial court, and this court has held, and so held in the instant case, that this aggravating factor can be established by contemporaneous convictions. *Craig v. State,* 510 So.2d 857, 868 (Fla. 1987). *See also, Correll v. State,* 523 So.2d 562 (Fla. 1988). Consequently, as in *Spaziano, supra,* this aggravating factor was properly found as to the Eubanks murder, just as it had previously been found as to the Farmer murder.

Evidence of the avoid arrest factor was before the trial court as to both murders, and the original sentencing judge's factual findings clearly demonstrate that he found this to be a motive in both murders. As to the Eubanks murder, the trial court stated, in rejecting the mitigating factor that Craig's participation was relatively minor:

> The undersigned also relied upon the evidence presented to establish that a principal motive for the murder of the

> victim was a desire by the defendant to avoid any liability for his past cattle thefts...

(PR 2099). As to the Farmer murder, the trial court stated:

> The evidence conclusively establishes that in order for the defendant to successfully carry through his plan for personal enrichment through future cattle thefts from JOHN SMITH EUBANKS and to successfully cover his past thefts, it became necessary for the defendant to also murder ROBERT WALTON FARMER who, as an innocent victim of circumstances, interrupted the defendant's plan to murder JOHN SMITH EUBANKS by becoming a witness to the fact of the number of missing head of cattle at the Eubank's ranch.

(PR 2102). The trial court also stated:

> The conclusive weight of the evidence establishes that the defendant did, on the day of the murder, determine that ROBERT WALTON FARMER had become an impediment to his plans for financial gain through thefts of cattle from the Eubanks ranch and that he had become an impediment to the successful execution of the defendant's months old plan to murder JOHN SMITH EUBANKS.

(PR 2105). Further, at sentencing, the trial court told Craig:

> Somehow or other you took a position of trust and opportunity that most young people who have quit their formal education in the eleventh grade would have grabbed onto and have grown with, and converted it instead to an instant opportunity to make money, and when about to be caught, planned to avoid being caught.

(PR 2976). Finally, on direct appeal, this court determined that evidence of the cattle thefts was admissible as it was relevant to show Craig's motive for killing Eubanks and Farmer. *Craig, supra* at 863.

A motive to eliminate a potential witness to an antecedent crime can provide the basis for the finding of the avoid arrest aggravator, and it is not necessary that an arrest be immanent at the time of the murder. *Swafford v. State,* 533 So.2d 276 (Fla. 1988). *See also, LeCroy v. State,* 533 So.2d 750 (Fla. 1988); *Correll, supra; Johnson v. State,* 465 So.2d 499 (Fla. 1985). The evidence before the original sentencing court and the facts found by that court as well as this court certainly demonstrate that a dominant motive for both murders was to avoid liability for the prior cattle thefts. Further, the facts also demonstrate that the Farmer murder was committed to eliminate him as a witness to the Eubanks murder, which had been previously planned. The trial court in the instant case properly applied the law on remand and correctly found that this aggravating factor was applicable to both murders. *Spaziano, supra. See also, Ferguson v. State,* 474 So.2d 208, 209 (Fla. 1985)

Appellee would also point out that Craig does not contest the trial court's finding of no significant prior criminal history, which was rejected by the original sentencer as to the Farmer murder. In fact, defense counsel specifically argued that the court was bound to apply the law as it is today and not the law that was applied in the original sentencing proceeding, and pursuant to the intervening decision of *Scull v. State,* 533 So.2d 1137 (Fla. 1988), this factor was applicable to both murders since it could not be rejected on the basis of a contemporaneous conviction (R 99, 409-10). Indeed, this demonstrates that the trial court was following this court's mandate and precedent to

the letter by hearing evidence of Craig's behavior while in jail and in correcting any prior legal errors in the original sentencing order. As Craig states in footnote 2, "'What is good for the goose,...'" (IB 45).

Even if for some reason this court determines that it was error to consider these additional aggravating factors, appellee contends that any error is harmless. *Chapman v. California,* 398 U.S. 18 (1967). This court already stated that it found both sentences of death to be appropriate under the law. *Craig, supra* at 867. Since the only additional mitigating factor, Craig's good behavior in prison, is entitled to little weight, it certainly could not affect the sentences imposed.

POINT 4

THE DEATH SENTENCES WERE PROPERLY IMPOSED.

Craig contends that his death sentences were impermissibly imposed where the trial court's findings are insufficient, improper aggravating factors were found, relevant mitigating factors were not considered, and the override of the jury's life recommendation for Count I was insufficient.

Aggravating factors/sufficiency of order.

Craig argues that the trial court's factual findings with regard to the aggravating factors are insufficient, and further attacks the applicability of the aggravating factors. Appellee first contends that since this court has already determined that the murders were cold, calculated and premeditated, were committed for pecuniary gain, and that the prior violent felony aggravator was applicable to the Farmer murder, the findings that these factors are applicable and supported by the evidence is law of the case. This was not an entirely new sentencing proceeding but simply a limited remand proceeding. *Compare, Preston v. State,* 17 F.L.W. 252 (Fla. April 16, 1992) with *Spaziano, supra.*

In any event, the trial court's findings are proper. Appellee will first set forth the standard for the finding of an aggravating factor, then demonstrate that the trial court's findings with respect to each are sufficient and that each factor found by the trial court is applicable.

When there is a legal basis to support an aggravating factor, a reviewing court will not substitute its judgment for

that of the trial court. *Occhicone v. State,* 570 So.2d 902 (Fla. 1990). The resolution of factual conflicts is solely the responsibility and duty of the trial judge and an appellate court has no authority to reweigh that evidence. *Gunsby v. State,* 574 So.2d 1085 (Fla. 1991). In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a "common-sense inference from the circumstances". *Swafford v. State,* 533 So.2d 270, 277 (Fla. 1988); *Gilliam v. State,* 582 So.2d 610, 612 (Fla. 1991). When a trial judge, mindful of the applicable standard of proof, finds that an aggravating factor has been established, this finding should not be overturned unless there is a lack of competent, substantial evidence to support it. *Bryan v. State,* 533 So.2d 744 (Fla. 1988). The trial court stated that the State had proven and established the aggravating factors beyond a reasonable doubt (R 443, 447), which clearly demonstrates that the trial court applied the correct standard of proof. The facts surrounding these murders and precedent demonstrate that there is a legal basis for each of the aggravating factors found by the trial court, and each is supported by competent, substantial evidence.

Prior violent felony conviction.

In finding that this factor was applicable to each murder, the trial court stated:

> A. At the time of the conviction of the defendant for the premeditated murder of John Smith Eubanks, he had previously been convicted of another capital offense, to-wit: the premeditated murder of Walton Robert Farmer.

* * *

> A. At the time of the conviction of the defendant for the premeditated murder of Walton Robert Farmer, he had previously been convicted of another capital offense, to-wit: the premeditated murder of John Smith Eubanks.

(R 444, 447). Appellee submits that the factual basis for the finding of this factor as to both murders is "of unmistakable clarity", and there certainly is no need to speculate as to what the trial court found. This court has already approved the finding of this factor as to the Farmer murder, and as demonstrated in Point 3, *supra,* it is clearly applicable to the Eubanks murder as well. *Craig v. State,* 510 So.2d 857, 868 (Fla. 1987). This court also stated that Craig's "legal responsibility for the murder of Eubanks was not secondary to but was fully equal to that of Schmidt", and that "there was evidence to show that [Craig] was the planner and the instigator of both murders". *Id.* at 870. The trial court utilized the appropriate standard, the evidence supports this factor, and error has not been demonstrated.

<u>Avoid arrest</u>.

In finding this aggravating factor, the trial court stated:

> B. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. §921.141(5)(e) Fla. Stat. (1981). The original trial judge did not find this circumstance as an aggravating circumstance. However, a review of the record at the resentencing shows that the murder of Eubanks was committed by Craig in an effort to prevent Craig from being prosecuted for the theft of Eubank's cattle. At the time of the

> murders, Craig was aware of Eubanks knowledge of the theft and the evidence supports this aggravating circumstance. Welty v. State, 402 So.2d 1159 (Fla. 1981). While the state did not explicitly urge this as an aggravating factor in its closing arguments, the State did make reference to the aggravating factor on page 8 of Appendix B of the FINDINGS OF FACT AND RECONSTRUCTION OF MISSING RECORD. There the State argued that the murder was committed for the purpose of "securing the possibility of future thefts with very little chance that he (Craig) would ever be detected and brought to justice for those acts." The State, at the resentencing, argued the application of this aggravating circumstance and the Court finds that it has been proven beyond a reasonable doubt.

(R 444). The trial court made the same finding with respect to the Farmer murder (R 447-48). Again, appellee submits that the factual basis for the finding of this factor is quite clear-Craig murdered Eubanks and Farmer to avoid liability for his prior cattle thefts. Appellee further submits, as the state argued below (R 403-04), that Farmer was murdered to eliminate him as a witness to the Eubanks murder.

The situation in the instant case is distinguishable from those in the cases relied upon by Craig. In those cases, the defendants killed the people they contemporaneously robbed, and this court found that this factor did not apply simply because the victim may have been able to identify the defendant. *Bruno v. State,* 574 So.2d 76 (Fla. 1991); *Carruthers v. State,* 465 So.2d 496 (Fla. 1985). In the instant case, Craig committed the murders to cover up his prior crimes. A motive to eliminate a witness to an antecedent crime can provide the basis for this aggravating

factor. *Swafford, supra; Johnston, supra.* While Craig states that this court has stated it is inconsistent to find this factor and cold, calculated and premeditated, he sets forth no reason why both are not applicable in the instant case, and the fact that Craig was trying to cover up an antecedent crime clearly makes these two findings compatible. *See, e.g., Shere v. State,* 579 So.2d 86 (Fla. 1991). Craig also states that if he had wished to avoid apprehension for the cattle theft by killing Eubanks, he had ample opportunity prior to Farmer's arrival on the scene to kill him. According to both Craig and Schmidt's testimony, both Eubanks and Farmer were already at the ranch when Craig returned from selling stolen cattle (R 920-21, 927, 1404). Further, if Eubanks had arrived first and was there alone, this statement certainly provides an additional reason for finding the avoid arrest factor for the Farmer murder, as it demonstrates Farmer was murdered to eliminate him as a witness to the Eubanks murder. *See, LeCroy v. State,* 533 So.2d 750 (Fla. 1988).

Craig also states that it is improper to double this factor with pecuniary gain, as it applies to the same aspect of the crime, but does not explain why so appellee contends that this-bald assertion is insufficient to assert a claim of error. In any event, both factors are applicable. The trial court found that the avoid arrest factor was supported by evidence that Craig committed the murders to cover up his past thefts, and the pecuniary gain factor was supported by evidence that Craig believed Eubanks' and Farmer's deaths would enable him to obtain control over the asset of the ranch and convert them to his use

and benefit (R 445, 449). There is no reason why the facts in this case cannot support multiple aggravating factors which are separate and distinct and not merely restatements of each other. *Echols v. State,* 484 So.2d 568 (Fla. 1985). Craig concocted a murderous scheme whereby his past thefts would be covered up, the witnesses would be eliminated, and he would continue as the manager of the ranch and maintain control over its assets.

Pecuniary gain.

In support of this factor, the trial court found:

> c. The murder of John Smith Eubanks was committed for financial or pecuniary gain. §921.141(5)(f), Fla. Stat. (1981). At the time of the offense, the defendant was engaged as a manager of a cattle ranch owned by John Smith Eubanks. The defendant was engaged in the criminal enterprise of stealing cattle from Eubanks and selling them, for his pecuniary gain. Eubanks became aware of that fact, thus making his death necessary. The defendant believed that Eubanks death would enable him to obtain control over the assets of the ranch and convert them to his own use and benefit.
>
> * * *
>
> C. The murder of Walton Robert Farmer for which the defendant Craig is to be sentenced was committed for financial or pecuniary gain. §921.141(5)(f), Fla. Stat. (1981). At the time of the offense, the defendant was engaged as a manager of a cattle ranch owned by John Smith Eubanks. The defendant was engaged in the criminal enterprise of stealing cattle and selling them for his pecuniary gain. The defendant believed that Eubanks' death would enable him to obtain control over the assets of the ranch and convert them, to his use and benefit. Farmer was a candidate to replace Craig at the ranch and became aware of the criminal enterprise. His death was necessary for

> the thefts to continue and to prevent defendant's incarceration for them.

(R 444-45, 448-49). This court has already found that this aggravating factor is applicable to both murders. In so finding, this court stated:

> The aggravating circumstance that the murders were committed for pecuniary gain was established by testimony concerning the cattle-theft scheme and testimony to the effect that appellant believed that with Eubanks out of the way, the unsupervised control of the ranch would be entrusted to appellant, enabling him to convert all its assets to his own use and benefit. When Farmer appeared as a candidate to replace appellant, this scheme required his elimination also.

Craig, supra at 868. Craig complains that the finding of this factor depends entirely upon the credibility of Schmidt's testimony, and that it is too incredible and speculative to be the sole basis for an aggravating factor. The trial court resolved any factual conflicts, and it is not this court's job to reweigh that evidence. *Gunsby, supra.* This court rejected the same argument on the original appeal, and Craig has set forth no compelling reason to revisit the issue.

Cold, calculated and premeditated.

In finding this factor, the trial court stated:

> D. The murder of John Smith Eubanks by Craig was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141(5)(i) Fla. Stat. (1981) The murder of Eubanks was planned in advance based upon a coldly, rational calculated scheme to allow the defendant to assume control over the ranch and its assets and to avoid

> possible incarceration for the thefts. The defendant planned the murder and the methodology by which the evidence was disguised and hidden.
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> * * *
>
> D. The murder of Walton Robert Farmer by Craig was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141(5)(i) Fla. Stat. (1981) The murder of Farmer was planned in advance based upon a coldly, rational calculated scheme to allow the defendant to assume control over the ranch and its assets and to avoid possible incarceration for the thefts. The defendant planned the murder and the methodology by which the evidence was disguised and hidden.

(R 445, 449). In upholding this factor, this court stated:

> The finding that the murders were committed in a cold and calculated manner without pretense of moral or legal justification is also applicable. The trial judge found that appellant planned the murders in advance based on a coldly rational, calculated scheme arrived at for reasons of his interest in maintaining and expanding his position of control over the cattle ranch. The finding was supported by the evidence. We approve the finding.

Craig, supra at 868. Again, Craig disputes the weight to be given Schmidt's testimony, and points to disputes between it and Craig's testimony. As stated, it is not the function of an appellate court to reweigh and resolve conflicts in the testimony. *Gunsby, supra.*

The trial court set forth sufficient facts to support the finding of these aggravating factors. As has been demonstrated, all four factors are applicable to both murders. As has also been demonstrated, even if the trial court erred in considering

additional aggravating factors, any error is harmless. *See,* Point 3, *supra.* Death is the only appropriate penalty for this cold-blooded double murder.

Mitigating factors.

This case was remanded for consideration of evidence of Craig's behavior while in prison. The trial court heard this evidence, found that it constituted a mitigating factor, and determined that it was entitled to little weight. As demonstrated in Point 2, *supra,* the trial court did not abuse its discretion in not permitting Craig to present additional mitigating evidence, and as such, error cannot be demonstrated in the trial court's failure to weigh mitigating factors which this court has already determined were properly rejected. *Craig, supra* at 871. Craig was never precluded from presenting any other mitigating evidence at the original sentencing, and there is nothing that requires that he be given a second bite of the apple on a limited remand. Again, Craig has split his position when it comes to mitigating as opposed to aggravating circumstances. Just as he argued that the court could not find new aggravating factors but did not dispute the finding of a new mitigating factor, his position in this area appears to be that the trial court cannot find aggravating factors on the basis of the record but can reweigh the evidence and find and weigh mitigating factors.

In any event, the record demonstrates that the trial court was correct in finding that none of this evidence rose to the level of mitigating factors. Deciding whether a mitigating

circumstance has been established is within the trial court's discretion, and reversal is not warranted simply because an appellant draws a different conclusion. *Sireci v. State,* 587 So.2d 450 (Fla. 1991); *Stano v. State,* 460 So.2d 890 (Fla. 1984). It is the trial court's duty to resolve conflicts in the evidence and this court, as the appellate court, has no authority to reweigh that evidence. *Gunsby v. State,* 574 So.2d 1085 (Fla. 1991). "Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." *Lucas v. State,* 568 So.2d 18, 23 (Fla. 1990). This court, as a reviewing and not fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in a particular case, and because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion. *Id.* The trial court must consider whether the facts alleged in mitigation are supported by the evidence, and if so determine whether the established facts are of a kind capable of mitigating the defendant's punishment,[1] then determine whether or not they outweigh the aggravating factors. *Rogers v. State,* 511 So.2d 526 (Fla. 1987). Sentencing is an individualized process, and what may constitute a mitigating factor in one case may not be a relevant mitigating circumstance in another. *Jones v. State,* 580 So.2d 143 (Fla. 1991). The trial court properly determined that the facts before it were either entitled to little weight or

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[1] These are "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed."

were not the type capable of mitigating Craig's punishment, and no abuse of discretion has been demonstrated.

Lack of significant prior criminal history.

The trial court found that Craig had no significant history of prior criminal history, but determined that this was entitled to little weight (R 452). Craig disputes the weight the trial court accorded to this factor, but it is not this court's duty to reweigh the evidence. *Gunsby, supra.* Further, this factor barely exists, and it clearly is entitled to little weight. Craig began rustling cattle in January, 1981, six months before the murders (PR 790), and continued these activities up until the day of the murders (PR 796).[2] In addition, Craig was also purchasing and using cocaine, which also detracts from the weight to be accorded this mitigating factor. Craig has failed to demonstrate that the trial court abused its discretion.

Substantial domination.

This court has already determined that there is evidence that Craig was the planner and instigator of both murders, and also stated that the evidence would have supported a finding that Schmidt was under Craig's domination. *Craig, supra* at 870. Again, Craig is simply pointing to conflicts in the testimony and asking

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[2] According to the testimoy of Callie Owens, Craig sold some 30 cattle, and received over $7000.00 (PR 790-96); according to the testimonmy of Phyllis Hanson Craig sold two head of cattle and received $422.42 (PR 806-07); according to the testimony of Barbara Cannon Craig sold 35 cattle and received over $7000.00 (PR 816-23); according to the testimony of Barbara Marsh Craig and Schmidt sold fifteen head and received over $3,700.00 (PR 1097-99).

this court to reweigh the evidence, which is improper. Further, Craig's characterization of the evidence is inaccurate.

Craig first claims that the PSI states that Officer Whitaker and Sheriff Adams both said that Schmidt was the "worst" of the two, and that Sheriff Adams also said "that Schmidt 'was the most cold blooded and vicious' of the two co-defendants" (IB 53-54). Craig has included no record cite to support this, and appellee can find no statement from Officer Whitaker in the PSI. However, Sheriff Adams' feelings are clearly spelled out as follows:

> He did want to make a statement regarding Craig, that, 'He was the most cold-blooded and vicious of the two' (speaking of co-defendant Schmidt).

(PR 2042). Thus, it is apparent that the Sheriff's comments are directed at Craig as opposed to Schmidt, particularly since he added "that he felt that Craig deserved the electric chair for the offenses committed" (PR 2042).

Craig also states that his father-in-law could testify that Craig would not go hunting with him because he did not want to own a gun or shoot anything (IB 62), but Craig himself testified that he hunted with Eubanks before he even associated with Schmidt (PR 1305). Craig states that his sister could testify that when their father used to shoot cattle for them to eat Craig could not watch and would go run into the house crying (IB 63), but Craig apparently felt no compunction about selling stolen cattle to be slaughtered.

Craig makes much of the "fact", garnered from Craig's friends and family, that Schmidt constantly talked about killing black people, particularly if they were to start a fight with him. The victims in this were not black people, but white people, one of whom employed Craig and provided him with a livelihood, home and transportation, and the murders were not the result of a fight, but were committed pursuant to a well formulated plan that included disposing of the bodies and all evidence.

Finally, contrary to Craig's assertion, Ron Fox could not testify, even if it were true, that the state offered a plea agreement to Craig first, and that the state attorney stated his preference would be to convict Schmidt. Florida Rule of Criminal Procedure 3.172(h) provides that a plea offer is not admissible against the person who made the offer, which in this case would be the state. Further, even though the scope of admissible mitigating evidence has been broadened to the point of no return, plea negotiations can in no way be construed to be any aspect of the defendant's character or record or circumstances of the offense. This court recently rejected a claim that plea negotiations should have been admitted as mitigating evidence. *Happ v. State,* 596 So.2d 991 (Fla. 1992).

Age of the defendant.

Age is not a mitigating factor unless it is relevant to a defendant's moral or emotional maturity and ability to take responsibility for his own acts. *Eutzy v. State,* 458 So.2d 755 (Fla. 1984). Craig was 23 years old, married, and the foreman of

a cattle ranch, so it can hardly be said that age is a mitigating factor.

Under extreme emotional distress.

Craig states there was evidence that he was heavily using cocaine, but again there is no record cite. The only evidence in the original record that appellee can find involving cocaine was that Craig had spent cattle rustling proceeds to purchase some. Craig vehemently objected to this evidence and this court found that its admission was harmless error. *Craig, supra* at 864. Craig also states that Dr. Krop's proffered testimony was that "the circumstances" could have caused extreme mental or emotional disturbance, but again there is no record cite. Dr. Krop did testify, however, that Craig had no substance abuse problem (R 68-69).

Good attitude.

The trial court found that Craig exhibited good behavior during his incarceration, but found that it was entitled to little weight (R 445, 449). It is not this court's job to reweigh the evidence. *Gunsby, supra.* Craig claims that he "deserves true credit for what he has made of himself in prison" (IB 67). This hardly mitigates the fact that he threw away the opportunity to truly make something of himself when he murdered the man who provided him with a job and home.

Sentence of codefendant.

This factor has already been soundly rejected by this court. *Craig, supra* at 870. Again, Craig relies on the statements of Sheriff Adams, but as demonstrated, he has mischaracterized those statements.

Cooperation with police.

Craig did assist the police in finding the bodies, but only after he was caught. Craig's initial help consisted of taking those people searching for the victims everywhere on the ranch but where they had been murdered, and also stating that they had left earlier that afternoon (R 1470-72). Craig's self serving behavior after the fact does not constitute a mitigating factor. In addition, as this court determined, the bodies would have ultimately been located very soon by means of ordinary and routine investigative procedures. *Craig, supra* at 862.

Defendant is contrite and remorseful.

The most significant testimony regarding this factor came from Craig's own lips at sentencing:

> Yes, Your honor. I can understand that the person who does the crime gets Second Degree and the person who doesn't do the crime gets First Degree. Robert Schmidt done the crime, he threatened my life, he shot at me, it just happened so fast that I didn't realize what happened until it was all over with. He gets up on the stand and tells an outright face lie of what happened because I am the one who told what happened so he figures he was going to bring me down with him. And another thing, if I am a threat to society, then everybody in this courtroom is a threat to society. It's just not right. Right now you have my life in your hands right now. And I hope you just hope you make the best judgment in this. What happened was not my fault, it was just like a car wreck or something, it just happened so fast you don't realize--I just hope that you can make the right decision in this case Your Honor.

(PR 2973-74). It appears that Craig's remorse is over his death sentences rather than his crimes.

Intelligence.

Craig has a low average IQ (R 50). Craig is not retarded, he has no organic impairment, and no personality disorder (R 50-51). As stated, Craig was married and the foreman of a cattle ranch. The trial court did not abuse its discretion in determining that this was not a mitigating factor.

Defendant's employment record.

Craig contends that the record is undisputed that he has a good employment record. Craig stole from his employer for six months, taught another employee how to steal from his employer, then gunned down his employer in cold blood. Finding this as a mitigating factor would be like saying that a pedophile is nice to children. Again, the trial court did not abuse its discretion in rejecting this as a mitigating factor.

Substance abuse.

There is no evidence that Craig had a substance abuse problem, and as stated, Dr. Krop's testimony directly refutes this (R 68-69).

Good family man.

Craig claims he is a good husband and son. Craig's acts left two women without husbands and two sons without a father.[3] The testimony establishes Craig's character to be no more good

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[3] While a defendant is entitled to individualized consideration, there is no requirement that he receive that consideration wholly apart from the crimes he committed. Payne v. Tennessee, 111 S.Ct. 2597, 2607 (1991).

than society expects of the average individual. *Zeigler v. State*, 580 So.2d 127 (Fla. 1991).

Able to be rehabilitated.

Craig claims that he is a good prospect for rehabilitation. Even if Craig receives two life sentences he would not even be eligible for parole for fifty more years, which would put him into his seventies. Again, there was no abuse of discretion in not finding that Craig's prospects for rehabilitation mitigate the enormity of his crime.

Specific good deeds.

The fact that Craig has performed some good deeds does not extenuate or reduce the degree of moral culpability for the instant murder, *Rogers, supra,* nor does it in any way ameliorate the enormity of his guilt for these two cold blooded murders. *Lucas, supra.* Craig may have helped some people, but he murdered two others, one of whom was helping him by providing him with a livelihood, a home, and friendship. As stated, Craig's character is no more good than society expects of the average individual. *Zeigler, supra.*

Defendant was not the one who actually killed the victim.

However, as this court found, there was evidence that the defendant was the planner and instigator of both murders. *Craig, supra* at 870.

Life recommendation (Count I) and proportionality review.

In rejecting the jury's life recommendation, the trial court stated:

> 16. As to Court (sic) I, the jury recommended that the defendant Robert Patrick Craig be sentenced to life imprisonment for the premeditated murder of John Smith Eubanks. The Court, in consideration of the above referenced aggravating circumstances and in consideration of the facts of this case, elects to depart from the recommended sentence of the jury. The circumstances of the murder dictate that the sentence of death is the only appropriate sentence, that being so clear and convincing that virtually no reasonable person could defer (sic). Tedder v. State, 322 So.2d 908 (Fla. 1975). Based upon each of the above findings and conclusions it is therefore the sentence of this Court that the defendant Robert Patrick Craig be sentenced to death by electrocution or any other manner provided by law for the murder of John Smith Eubanks.

(R 453).

On direct appeal, this court determined that there was no reasonable basis for the jury's recommendation of life, and remanded for reconsideration of both sentences. The only additional mitigating evidence is Craig's good behavior in prison, which the jury never heard. Appellee asserts it is ridiculous to find that a jury recommendation is reasonable on the basis of evidence that it never heard, even though this court has held contrary, and this case proves that point. It defies logic to find that good behavior in prison is a reasonable basis for a life recommendation, where the same jury has also recommended that Craig be executed, which would certainly preclude good behavior in prison. There is no reasonable basis for the jury's recommendation of life in this case. *Craig, supra; Zeigler, supra* (override proper despite evidence of no significant

prior criminal history, a good prison record, church and community involvement, and good character).

Likewise, the death sentences are proportional.

> The circumstances of this case depict a cold-blooded premeditated double murder. The imposition of the death penalty is not disproportionate to other cases decided by this court.

Porter v. State, 564 So.2d 1060 (Fla. 1990). *See also, Turner v. State*, 530 So.2d 45 (Fla. 1987); *Garcia v. State*, 492 So.2d 360 (Fla. 1986).

POINT 5

THIS CLAIM IS PROCEDURALLY BARRED.

Craig claim that *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), requires a new penalty phase proceeding, since the jury considered an invalid aggravating factor in recommending the death penalty. There was no objection to the jury instruction on heinous, atrocious or cruel in the instant case, no claim regarding it was raised on direct appeal, nor was this asserted as a ground for a new advisory jury below, so appellee contends that the claim is procedurally barred. *Kennedy v. State,* 599 So.2d 991 (Fla. 1992); *Sochor v. State,* 580 So.2d 595 (Fla. 1991); *Sochor v. Florida,* 112 S.Ct. 2114 (1992). This court should reject Craig's attempt to seek review of issues in this proceeding which could have been raised in his earlier appeal. *Harvard v. State,* 414 So.2d 1032 (Fla. 1982).

Even if the claim were cognizable, it would only apply to Count II since the trial court rejected the jury's recommendation as to Count I. Interestingly, on direct appeal, Craig argued that the trial court erred in weighing the strength of the jury recommendation, as it constituted a nonstatutory aggravating factor. This court found that error, if any, was harmless, as both sentences of death were appropriate under the law. *Craig, supra* at 867. The instant trial court judge did not "weigh" the result of the jury's weighing process in reaching its conclusion that death was the appropriate penalty. Rather, after independently weighing the aggravating and mitigating factors, the trial court stated "[a]s to Count II, the trial jury

recommended imposition of the death penalty and the Court *concurs* with that recommendation" (R 453)(emphasis supplied). *See, Baldwin v. Alabama,* 472 U.S. 372, 385 (1985) ("None of these statements indicates that the judge considered the jury's verdict to be a factor that he added, or that he was required to add, to the scale in determining the appropriateness of the death penalty, or that he believed the jury's verdict was entitled to a presumption of correctness"). Consequently, the *Espinosa* "presumption", that the trial court somehow indirectly gave great weight to the jury recommendation while independently weighing the factors, is clearly not present in the instant case.

Further, appellee contends that error, if any, is harmless. A state court may decide for itself whether a death sentence is to be affirmed even though an aggravating factor upon which the jury relied should not have been presented. *Clemons, supra.* One way of determining harmless error is a finding that the result would have been the same if the jury had been properly instructed. *See, Cabana v. Bullock,* 474 U.S. 376 (1986). The trial court reweighed the aggravating and mitigating factors without this factor, and determined that death was still the appropriate penalty. The jury recommended death by a vote of 10-2, and appellee contends that even if it had not been instructed on the heinousness factor, it still would have recommended death. Resentencing is not required.

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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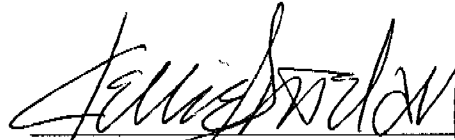
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief has been furnished by hand delivery to James R. Wulchak, Assistant Public Defender, in the Public Defender's in-box at the Fifth District Court of Appeal, this 16th day of September, 1992.



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