IN THE SUPREME COURT OF FLORIDA

ROBERT PATRICK CRAIG,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79,209

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the following symbols will be used to designate the record on appeal:

R = The instant record on appeal

SR = The supplemental record on appeal

PR = The record on appeal in the defendant's initial appeal, Case No. 62,184 [for previous record].

STATEMENT OF THE CASE

The defendant was convicted of the July 1981, first degree murders of John Eubanks and Walton Robert Farmer. Craig v. State, 510 So.2d 857 (Fla. 1987). The jury recommended that the defendant receive a sentence of life imprisonment for the killing of John Eubanks (which was perpetrated by the co-defendant, Robert Schmidt) and a sentence of death for the killing of Farmer. Id.

The trial judge, the Honorable C. Welborn Daniel, Jr., Judge of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Lake County, overruled the jury recommendation of life imprisonment on the Eubanks murder and followed the recommendation of death for the Farmer murder in sentencing the defendant to two death sentences. Id. Regarding the murder of John Eubanks, the original judge found the aggravating circumstances of (1) the murder was committed for financial gain; (2) the murder was especially wicked, atrocious, or cruel; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Id. In mitigation, the original judge found that the defendant had no significant history of prior criminal activity. Id.

With regard to the Farmer killing, the trial court originally found in aggravation that (1) at the time of the conviction of the murder, the defendant had previously been convicted of another capital offense, to-wit, the contemporaneous murder of John Eubanks; (2) the murder was committed for finan-

cial gain; (3) the murder was especially wicked, atrocious, or cruel; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court rejected all mitigating circumstances. Id.

On the initial direct appeal, this Court affirmed the convictions, but remanded the case for resentencing before the judge. Id. In so doing, the Court struck the aggravating circumstance of heinous, atrocious, or cruel, and ruled that the trial court had erred in excluding evidence which the defense had sought to present to the judge at the sentencing hearing regarding the defendant's good conduct in jail from the time of his arrest until his sentencing date. Id.

On remand, the original trial judge, C. Welborn Daniel, by then appointed to the Fifth District Court of Appeal, was assigned as a senior judge to consider the defendant's resentencing. (SR 335) Judge Daniel granted the defendant's motion to allow the defendant to present at the resentencing hearing any and all evidence of mitigating factors. (SR 321-322, 326) The court, however, denied the defendant's motion to empanel a new sentencing jury. (SR 318-320, 327-329) Although the court initially denied the defendant's motion to appoint a confidential mental health expert, the court granted a subsequently-filed more specific motion. (R 206-212, 215; SR 323-324, 329-332)

The defendant filed a renewed motion to empanel a new jury. (R 284-285) On July 19, 1991, the Honorable Don F. Briggs,

Judge of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Lake County, as administrative judge of the circuit, noted that Judge Daniel had now retired from the bench and was engaged in the private practice of law, and assigned the case to himself to hear the resentencing. (R 320) In the same order, Judge Briggs ordered that the resentencing would be held before the judge only, without a new jury, and sua sponte ordered that the resentencing hearing evidence would be strictly limited to evidence of the defendant's conduct during incarceration in jail prior to his sentencing, thereby rescinding Judge Daniel's prior order to the contrary. (R 320-321)

The defendant filed motions for reconsideration and clarification of the July 19th order, arguing that, especially since a different judge was to handle the resentencing, all of the evidence must be heard anew and reevaluated so that the judge could weigh the demeanor and credibility of the witnesses, rather than just reading the cold transcripts. (R 324-330) The defendant also requested leave to present evidence from the mental health expert to provide additional evidence of mitigation and further to enhance testimony of jailers regarding the defendant's conduct in jail. (R 330) The court denied the defendant's motion for reconsideration, but granted in part the motion for clarification to allow the mental health expert to testify only to matters related to the defendant's behavior during incarceration. (R 338)

The defendant then filed a motion to allow a proffer of

excluded matters which the defendant wished to present at the resentencing hearing in mitigation and a memorandum detailing some of the items sought to be presented. (R 337, 340-355) Included in the pleading was a new request for a new jury to hear this additional evidence which had not been presented to the original jury. (R 355) Counsel filed a motion for subpoenas to be issued to witnesses which the defense wanted to testify at the resentencing and for the purpose of the proffered testimony. (R 363-364, 378-380) The trial court denied the defendant's request for subpoenas, indicating that the defense could only call those witnesses who would testify to matters within the court's limitation of testimony for resentencing; further, the court denied the request for a live proffer of witnesses, indicating that defense counsel could offer her own summary of witnesses as the proffer rather than live testimony. (R 365-369, 381, 383) As an additional proffer, defense counsel filed depositions of some of the proposed, but excluded, witnesses. (R 377; SR 1-311)

At the resentencing hearing, the court reiterated that it had already ruled "as to the limitations of the resentencing issues to be involved." (R 5) The state presented no additional evidence, instead asking the new resentencing judge to take judicial notice of all previous testimony. (R 6) The judge stated that he had read the entire record. (R 6)

In accordance with the trial court's limitations on resentencing, the defense presented testimony of jailers from the Lake County Jail, where the defendant had been incarcerated from

his arrest until his original sentencing. The jailers reported having absolutely no trouble with the defendant, who had a good attitude and was extremely likeable. (R 8-9, 16-17) Robert Craig, they said, was one of the nicest persons they had ever met, a very worthwhile person. (R 9, 11, 17) The defendant never had any disputes or problems with other inmates. (R 10) He got along well with all of the guards and, in fact, came to the aid of an officer during a fight in the jail. (R 9, 17) The jailers opined that the defendant would be able to fit in fine in a prison open population. (R 10, 17)

The defendant sought to contrast the defendant's agreeable, nonviolent, non-confrontational attitude in jail with that of the co-defendant (whom he has always claimed was the principal violent actor in the killings). (R 17) The court sustained the state's objection to the questioning. (R 18) A defense proffer of the excluded evidence indicated that Robert Schmidt had some attitude problems, giving jailers trouble. (R 18) One jailer characterized Schmidt as a "butthole." (R 18)

The trial court, relaxing its previous restrictions on the resentencing hearing somewhat, allowed the defense to present a deposition to perpetuate testimony of Sergeant Clyde Blevins, a former death-row guard from Florida State Prison, concerning the defendant's conduct while on death-row following his first sentencing. (R 20-21, 37-40) Since the court was changing its previous ruling and since it had declined to issue witness subpoenas for several witnesses who could have testified further

regarding the defendant's conduct while on death row (including relatives, a pen-pal of the defendant, a minister, and a former death-row inmate who had since been released), the defendant moved for a continuance in order to obtain these witnesses for the resentencing hearing. (R 38, 40-44) The trial court denied the motion for a continuance, stating, "I've read your memo, ma'am. I can read. The motion is denied to continue. Next witness." (R 44)

Sergeant Blevins testified that he has known the defendant since Craig first was housed on death row in 1982. (R 22-23) Robert Craig was a likeable person who followed the rules and never gave anyone trouble. (R 23) In fact, Sgt. Blevins called the defendant the nicest death-row inmate he had ever met. (R 23-24) Blevins stated that Craig was quite different from the other death row inmates. (R 24) The defendant was always polite, never used profanity, was always neat (keeping his cell very clean), and was always doing something worthwhile (such as reading, drawing, or cleaning his cell). (R 23-24) He had a lot of respect for officers and other personnel. (R 24)

Craig would help the prison guards in any way he possibly could. (R 24, 26) The defendant would assist the guards by letting them know of any problems of which security should be aware, such as the presence of contraband. (R 23-26) He did this at great risk to himself since fellow inmates do not approve of snitches. (R 26)

Robert Craig also was always helping other inmates. (R

26) After first obtaining permission to do so, the defendant would share his food with the less fortunate and he would help them with legal work. (R 26-27) Craig respected the corrections officers and his fellow inmates; they, in turn, respected him. (R 27)

Unlike the concern he felt when transporting other inmates, Sergeant Blevins never worried when he had to remove the defendant's handcuffs when moving him. (R 28) The guards never found any contraband in the defendant's cell. (R 28) If the defendant were ever released to society, Blevins believes that he would never be any problem to society and that he would "do good for himself." (R 30) Blevins believes Craig would be a help to a lot of people if were ever released. (R 30) Blevins would have no problem, "not a bit in the world," if the defendant moved in next door to him (as opposed to most of the inmates whom he would not want to live in the same town). (R 30)

The court allowed the defense to present evidence from psychologist Dr. Harry Krop, but only as to evidence of the defendant's conduct while in prison. (R 44-74) The court sustained numerous state's objections and excluded any matters outside of this limited area. (R 47-48, 53-55, 57-58, 60, 62-63, 65-74) Dr. Krop testified that, in his many years of experience working in capital cases, he found it quite extraordinary that corrections officers would testify positively on behalf of a death row inmate, such as had occurred in the defendant's case. (R 48-49) The defendant's I.Q. was determined to be 84 - in the

lower range of low average. (R 50) The defendant, he stated, tried very hard on the test, but would get upset with himself if he could not do something successfully. (R 50) There appeared to be no evidence of any personality disorder and the defendant was coping well with his situation and had a positive attitude. (R 51) Craig exhibits a positive attitude, with no anti-social tendencies (as opposed to the norm of death-row inmates, who are usually diagnosed as having anti-social personality disorders). (R 51-52)

The behavior observed by correctional officers was consistent with the doctor's diagnosis of the defendant, that of a generally passive individual, who is compliant and responds to authority well. (R 55-56) The doctor opined that the defendant would fit quite well in the general prison population. (R 56) The defendant has pursued positive things in jail, such as drawing, writing letters, and having visits, to maintain his positive attitude, showing that the defendant has the ability to learn and would not be a management problem. (R 56-59)

Additionally, the doctor's observations of the defendant indicate he genuinely feels remorse for the crimes. (R 60) Craig is a non-assertive, passive individual. (R 61-62)

Following the defense proffer of additional matters which the defendant wished to present, but were excluded by the court from consideration (R 65-74, 78-83, 340-354, 408-439; SR 1-311), the court imposed two consecutive death sentences on the defendant. (R 110-115) The new sentencing judge found the exis-

tence of four aggravating circumstances for each count: (1) the defendant was previously convicted of a capital felony, to-wit: the other contemporaneous murder; (2) the murders were committed to avoid a lawful arrest; (3) the murders were committed for pecuniary gain; and (4) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R 443-445, 447-449) These findings included aggravating factors not found (and not even argued by the state) in the first sentencing, to-wit: that the murders were committed to avoid a lawful arrest and, as to the murder of John Eubanks (Count I), that the defendant had previously been convicted of the murder of Walton Robert Farmer. (R 444, 447-448)

Regarding the mitigating circumstances, the replacement judge found a lack of significant history of prior criminal activity, which he gave only little weight, and that the defendant exhibited good behavior during his incarceration from the time of his arrest through the trial and resentencing, which he assigned very little weight. (R 445-446, 449, 451-452) Despite (or because of) the trial court's limitations on the defendant's presentation of evidence of mitigating circumstances, the court found that the defendant had failed to present competent testimony or evidence to support any other statutory or nonstatutory mitigating circumstance, and thus rejected all other mitigating factors, stating, "The defendant has not proven nor reasonably convinced the undersigned that any other aspect of his character or record or any other circumstance of the offense is a circum-

stance to be considered in mitigation of his sentence." (R 446-447, 449-451) In imposing the death sentence on Count I (Eubanks), the court rejected the jury's life recommendation, simply evoking the language of Tedder v. State, 322 So.2d 908 (Fla. 1975), that "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) (R 452-453)

The defendant filed a motion for rehearing, contending again that a successor judge nay not weigh and compare evidence heard before a prior judge, that the new judge must personally hear all of the evidence from the witnesses, and that the same evidence must also be heard by a new jury. (R 648-649) The trial court denied the motion without comment. (R 647) A notice of appeal was timely filed. (R 687) This appeal follows.

STATEMENT OF THE FACTS

On July 21, 1981, John Eubanks went to a ranch that he owned which was run by the defendant, Robert Craig. (PR 682-683, 685, 693) Robert Schmidt was also employed at the ranch as a laborer. (PR 691-692) Eubanks had told his wife and his secretary about some problems that he was having at the ranch with the defendant. (PR 683, 693) Eubanks planned to conduct a cattle count at the ranch since he believed that the defendant and Schmidt had stolen some of his cattle. (PR 778, 922, 1484)

While Eubanks was engaged in the cattle count along with Schmidt and Craig, Walton Farmer arrived at the ranch to talk to Eubanks. (PR 933, 1484) Eubanks had offered Farmer a job. (PR 715) While Eubanks and Farmer were in a remote area of the ranch with Schmidt and the defendant, they were shot and killed. (PR 945-953, 1409-1418) Two versions of the crime subsequently came to light.

In his statement to police two days after the incident[1] and again at trial, Robert Craig told what happened in the remote area of the ranch. Eubanks was engaged in the cattle count when he was joined by Farmer. (PR 1404-1406, 1409-1410, 2709-2710) Schmidt told the defendant that since Eubanks knew about the missing cattle, they were in big trouble and would have to kill both Eubanks and Farmer. (PR 1396-1397, 1410, 2710-2711) Craig told Schmidt that he would not be able to do that. (PR 1410,

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[1] This statement was suppressed by the trial court on the day of the trial. (PR 2005 a)

2710)

The defendant was with Farmer and, some distance away and out of sight of the defendant, Schmidt was with Eubanks. (PR 1413, 2711) Craig heard Schmidt shoot twice. (PR 1413) Farmer and the defendant started running and Schmidt came into view, firing a couple of shots and yelling, "Shoot! Shoot!" (PR 1414-1416, 1488) The defendant fell to the ground and, with his eyes closed, fired in Farmer's direction three times. (PR 1414, 1486-1489, 2713) Everything happened so fast that the defendant just automatically shot without really thinking about it. (PR 1414, 2713, 2973-2974)

When Craig opened his eyes, he saw Farmer on the ground. (PR 1417) Schmidt walked past Craig and, standing over Farmer, shot the victim in the head. (PR 1416-1417) Craig asked Schmidt about Eubanks, and Schmidt replied that Eubanks was dead. (PR 1418)

Schmidt indicated that they would have to dispose of the victims' vehicles. (PR 1418, 2714) With the defendant following in the ranch truck, Schmidt first drove Farmer's jeep to Clermont and then drove Eubanks' automobile to Belleview. (PR 1419-1420, 2714-2715) Schmidt told the defendant that they would that night take the bodies to Wall Sink, a large, deep sinkhole in neighboring Sumter County. (PR 1420, 2716)

At Schmidt's directions, the two men loaded cement blocks, plywood, bales of straw, a rope and an old blanket onto the ranch pick-up truck. (PR 1423-1426, 2716) Schmidt took

Eubanks' and Farmer's hats and wallets and put them into a paper bag. (PR 1426-1427, 1494) The two men loaded the bodies onto the truck, covered them with the plywood and straw, and drove to Wall Sink. (PR 1428-1432) There, after cutting the lock on the fence and riving near the sinkhole, Schmidt directed the unloading of the bodies. (PR 1437-1440, 2716-2717)

At trial, Robert Schmidt testified for the state, as a part of a deal allowing him to plead guilty to two counts of second degree murder and dropping charges against his wife who had hidden the murder weapon. (PR 999-1001, 1018-1024,1048-1051) Schmidt's version of the incident was that the defendant had been the instigator. (PR 935-937) Schmidt testified that the defendant told him that they would have to kill Eubanks and Farmer since Eubanks knew of the cattle theft. (PR 935) Schmidt also testified that the defendant had one month earlier mentioned killing Eubanks so that Eubanks' widow would be totally dependent upon them to run the ranch. (PR 914-915) There was no discussion as to any details. (PR 941)

It was Schmidt's version that while at the remote area of the ranch with Eubanks, Schmidt heard the defendant (who was out of sight with Farmer) yell to him, Hey, Bob!," and then heard the defendant shoot first. (PR 945) Schmidt shot Eubanks twice in the back of the head. (PR 946-948) Schmidt then claimed that the defendant ordered Schmidt to shoot Farmer in the head since Farmer was still alive, which he did. (PR 950-952) Robert Schmidt then said that the defendant took a few bills from

Eubanks' wallet and looked for Eubanks' coveted shotgun in the trunk of Eubank's car. (PR 954, 959) Later that night, the two men disposed of the bodies at the sinkhole, Schmidt claiming that the defendant directed the actions. (PR 961-962, 967-974)

On July 22, 1981, Schmidt and Craig washed the bed of the pick-up truck and changed the tires on the truck. (PR 982-986, 1474, 1477, 1479) The police and several acquaintances of Farmer gathered at the ranch that morning to search for the missing Farmer. (PR 1470-1472) Craig, "running from a nightmare" and not knowing what to do, told a deputy that Farmer had left about 5:00 p.m. the previous day and that Eubanks had left a short time later. (PR 1471-1472)

Police investigation into the victims' disappearance led to the arrest of Schmidt and the defendant for cattle theft. (PR 2157-2159, 2185, 2368, 2375-2377, 2414-2415) After the police took five psychological stress evaluations of the defendant, Craig admitted to selling some of the Eubanks' cattle. (PR 2161, 2183, 2191, 2378-2379) Several hours later, after repeated questioning, after hiding the defendant from a bondsman and an attorney who were on their way to bail the defendant out of jail on the theft charge, after appealing to the defendant's conscience by telling him the victims deserved a "Christian burial," after slamming a chair in front of the defendant and confronting the defendant, and without readvising the defendant of his Miranda rights, the sheriff obtained a statement from the defendant admitting his involvement in the deaths of Eubanks and

Farmer. (PR 2166-2167, 2212-2218, 2247, 2249, 2305-2306, 2311-2313, 2329, 2419-2420, 2428, 2438, 2498, 2504-2506, 2534-2540, 2548) This statement, the trial court eventually ruled, was not freely and voluntarily given after a knowing and intelligent waiver of his rights. (PR 595, 2005 a)

During this involuntary statement, the defendant agreed to lead the police to the sight where the bodies had been disposed. (PR 2173, 2286-2289, 2389, 2393-2394) It was while en route to the scene, that the sheriff secreted the defendant from an attorney who had been retained his family as his counsel and who had informed the sheriff's department that he demanded all questioning to cease and for the defendant to be returned to the jail. (PR 2173, 2242-2243, 2286-2292, 2323, 2326, 2393-2394, 2555-2571, 2722-2730)

The defendant led the police to Wall Sink, where the bodies were eventually recovered with the help of expert divers (police divers being unable to find the bodies.) (PR 851-854, 869-783, 884, 1052-1061, 2171-2175) Also discovered due to the defendant's help, were items of physical evidence recovered from the Wall Sink area. (PR 853-854, 872-873, 1221-1240) Sheriff Griffin and Captain Brown admitted that, without the defendant's help the bodies and evidence would never have been discovered nor would the crimes have been solved. (PR 884, 2220-2221, 2323, 2441)

At trial, a standing objection was made by defense counsel and noted and overruled by the court concerning the

admission of testimony regarding the bodies and evidence. (PR 597, 1987-1988) The trial court did, however, suppress the fact that the defendant had led police to the scene. (PR 597)

The medical examiner testified that Eubanks died from the two gunshot wounds to the head. (PR 1273-1282) These wounds, ballistics tests showed, were inflicted by Robert Schmidt's gun. (PR 1147-1149) Farmer had received six wounds: one, a grazing wound to the arm; a second to the left rear side; a third to the right arm; another to the right arm, which also entered the abdomen; a shot entering the chest and lung; and a final wound to the left rear skull. (PR 1283-1296) The cause of death was the shot to the head; however the bullet wounds to the abdomen and chest were potentially serious. (PR 1291-1297, 1305) Ballistics tests showed that the gunshot wound to the head was caused by Schmidt's gun. (R 1349-1351) A bullet recovered from Farmer's side could have been fired by the defendant's gun. (PR 1352-1353)

During the penalty phase of the original trial, the defense presented evidence regarding defendant's personal and family life, including the facts that Craig had never been in trouble before; that he was a good, obedient, loving, and gentle husband, son (one of eight children), and son-in-law; that he had voluntarily (at his father's request) quit school in order to provide needed help on his father's farm; that he had a good work record; and that Schmidt was the one who introduced the defendant to guns. (PR 1730-1737, 1744-1746, 1747-1749)

SUMMARY OF ARGUMENT

Point I. Where a new judge replaces the judge who heard the trial testimony, it is improper for that replacement judge to sentence a defendant in a capital case without personally hearing the evidence and weighing the demeanor of the witnesses. Otherwise, the trial court cannot fulfill its constitutional responsibility to make findings of fact and weigh the aggravating and mitigating circumstances based upon the credibility of witnesses. Just as an appellate court cannot evaluate the credibility of witnesses from a "cold" appellate record, so, too, does the reading of the prior record by the new judge provide an adequate vehicle for weighing these factors. Additionally, the new trial judge must hear all of the same evidence heard by the jury recommending a sentence. Otherwise, the new judge cannot pass adequate judgment on the appropriate weight to be given the jury recommendation.

Point II. The trial court impermissibly limited evidence in mitigation which was highly relevant to the issue of sentencing, thereby rendering the defendant's death sentences unconstitutional. The evidence related to both statutory and nonstatutory mitigating factors, and would have helped rebut the findings made by the trial court in its sentencing order.

Point III. The trial court erred in refusing to empanel an new jury as to Count II (Count I already having a life recommendation) to hear relevant mitigating evidence which, as this Court determined on the initial appeal, should have been

considered by the sentencer. Since a jury recommendation carries great weight, the advisory jury and sentencing judge should all of the same relevant evidence in making their respective decisions. Failure to convene a new jury to hear the evidence calls into question the constitutionality under the federal and Florida constitutions of the defendant's two death sentences.

Point IV. The trial court erred in finding the presence of two additional aggravating circumstances on resentencing which were found not to be present in the initial proceeding and which were not even argued to the jury in the first case. The state did not appeal the failure of the original trial judge to refuse to find these factors. Additionally, at the resentencing hearing, the state presented no additional evidence other than relying on the initial record in the case. The findings are precluded by the doctrines of res judicata, law of the case, double jeopardy, and fundamental fairness.

Point V. The trial court erred in making its findings of fact in support of the death sentences where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found inappropriate aggravating circumstances, where the court's override of the jury life recommendation was improper as well as inadequate, and where a comparison to other capital cases reveals that the only appropriate sentences in the instant case are life sentences.

Point VI. The original jury was given an unconstitutionally vague instruction for the aggravating circumstance of

heinous, atrocious, or cruel. Even though this Court struck that aggravating circumstance in the initial appeal, since the jury recommendation of death for Count II is given great deference, that Count must go back for a new jury recommendation without the improper aggravating instruction.

ARGUMENT

POINT I.

THE RESENTENCING JUDGE, WHO DID NOT PRESIDE OVER THE ORIGINAL TRIAL AND PENALTY PHASE, ERRED IN SENTENCING THE DEFENDANT AFTER MERELY REVIEWING THE ORIGINAL TRANSCRIPTS OF THE TRIAL AND WITHOUT HEARING THE TESTIMONY OF WITNESSES PERTINENT TO THE SENTENCING DECISION WHICH WERE HEARD BY THE ORIGINAL SENTENCING JURY.

Following this Court's remand to the trial court for the consideration of additional mitigating evidence, the case was assigned to the original trial judge. This judge, in conformity with the holding of this Court in the initial appeal, refused to limit defense evidence at the resentencing and agreed to allow the defense to present whatever evidence in mitigation it desired. However, prior to the resentencing hearing, the original trial judge retired and entered private practice; hence, a new judge took over the resentencing. This replacement judge, sua sponte, rescinded the original judge's order, by refusing to allow the defendant to present any evidence other than that excluded at the first sentencing hearing, to-wit: evidence of the defendant's good conduct while awaiting trial. The defendant argued to the court that, not having observed the demeanor of the witnesses from the trial and first sentencing, it could not adequately weigh the testimony and make the appropriate evaluation of aggravating and mitigating circumstances intrinsic to the life or death decision. Additionally, the defense argued, the substitute judge must also hear the identical evidence heard by

the sentencing jury. The new judge countered that it would be sufficient for him to merely read the transcript of the original proceedings.

In sentencing the defendant to death without personally hearing and evaluating the testimony of the same witnesses heard by the sentencing jury, Judge Briggs violated Sections 38.12 and 921.141, Florida Statutes (1991), and denied the defendant his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments as well as Article I, Sections 9, 16, and 17 of the Florida Constitution. Section 38.12, Florida Statutes (1989), provides that no parties shall suffer any detriment as the result of the resignation of a judge. The provision reads, in part:

> Upon the resignation, death, or impeachment of any judge, all matters pending before him shall be heard and determined by his successor, and parties making any motion before such judge shall suffer no detriment by reason of his resignation, death, or impeachment. All judges, upon resignation or impeachment, shall file all papers pending before them with the clerk of the court in which the cause is pending . . . .

This statute allows a successor judge, who has not heard the evidence in a pending matter to enter findings or a judgment only after a new trial or hearing. Bradford v. Foundation & Marine Construction Co., 182 So.2d 447 (Fla. 2d DCA 1966). The rationale behind the rule, as expressed in Bradford, centers on the importance of the fact-finder having the opportunity to personally hear and see the witnesses:

> Our adoption of the rule requiring a decision upon the facts from a judge who

> heard the evidence is not to be lightly taken. No one would contend that the permanent absence of a juror, after having heard the evidence and before a verdict is rendered, would not be grounds for a mistrial. Appellate courts lean as heavily upon judge's findings as they do upon jury verdicts. This reliance on a judge, or jury as a trier of fact is in recognition of their opportunity to personally hear the witnesses and observe their demeanor in the act of testifying. The absence of this opportunity leaves a gap in the proper procedure of trial.

Bradford, supra at 449. Consequently, a successor judge cannot render findings and a judgment on a pending matter on the basis of a transcript, unless the parties stipulate to using the transcript for that purpose. See, Bradford, supra; Blitch v. Owens, 519 So.2d 704 (Fla. 2d DCA 1988); Thompkins Land and Housing, Inc. v. White, 431 So.2d 259 (Fla. 2d DCA 1983). Judge Briggs violated these principles when he made findings of fact regarding the aggravating and mitigating circumstances, weighed these findings and the jury's recommendation, and imposed two death sentences without personally hearing the testimony of the witnesses.

While Rule 3.700(c), Florida Rules of Criminal Procedure, allows for regular criminal sentencing to be handled by a different judge who did not preside at the trial if the judge has acquainted himself with the transcript, that rule simply cannot and does not apply in the unique circumstances of a capital case. This is precisely what this Court recognized in Corbett v. State, 17 FLW S355 (Fla. June 11, 1992). In a similar situation involv-

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ing a capital sentencing where the original judge who heard all of the evidence had died prior to imposing sentencing, this Court rejected the applicability of Rule 3.700(c).

In Corbett, 17 FLW at S357, this Court noted that Rule 3.700(c) does not satisfy the very special requirements of a capital sentencing. In a death penalty case, the judge possesses unique fact-finding responsibilities, which make the trial judge's decision paramount. As the Court stated in Corbett:

> The trial judge has the single most important responsibility in the death penalty process. Under this process, a trial judge may not impose the death penalty unless he or she articulates in writing his or her factual findings and reasons for imposing the death penalty. We have recognized the unique responsibilities of the sentencing judge in this regard and the necessity for independent evaluations and written factual findings concerning aggravating and mitigating circumstances in imposing the death sentence.

17 FLW at S357. See also §921.141(3), Fla. Stat. (1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Hall v. State, 381 So.2d 683 (Fla. 1978); Holmes v. State, 374 So.2d 944 (Fla. 1979). The judge's findings of fact and weighing of the aggravating and mitigating circumstances is given great deference on appellate review. See, e.g., Holmes v. State, supra at 950; State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). This Court has consistently emphasized the importance of the findings of fact in support of a death sentence to demonstrate the sentencing judge's reasoned decision based on the evidence. Id. The findings must be clear, complete, thorough,

and accurate. Campbell v. State, supra; Lucas v. State, 568 So.2d 18, 23-24 (Fla. 1990); Mann v. State, 420 So.2d 578, 581 (Fla. 1982).

For these reasons, this Court, in Corbett v. State, supra, recently ruled that a judge who is substituted for the original presiding judge and who does not hear the evidence presented during the trial or penalty phase in a capital case cannot pronounce sentence without first

> conduct[ing] a new sentencing 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. To rule otherwise would make it difficult for a substitute judge to overrule a jury that has heard the testimony and the evidence, particularly one that has recommended a death sentence, because the judge may only rely on a cold record in making his or her evaluation. We conclude that fairness in this difficult area of death penalty proceeding dictates that the judge imposing the sentence should be the same judge who presided over the penalty phase proceeding.

17 FLW at S357. Additionally, as quoted above, this Court held that a new jury must be empaneled so that the sentencing judge and the jury who recommends the sentence will base their respective decisions on the same evidence.

Therefore, Judge Briggs' decision to sentence, based upon findings made from a cold record, deprived Craig of due process of law and renders the death sentences cruel and unusual. The defendant was entitled to be sentenced by a judge who had personally heard the same important witnesses heard by the jury

and who had the opportunity to evaluate the demeanor of the witnesses while they testified in front of the jury whose recommendation he is considering. The death sentences were unconstitutionally imposed in this case.

POINT II.

THE TRIAL COURT ERRED IN PRECLUDING THE DEFENDANT FROM PRESENTING ADDITIONAL EVIDENCE IN MITIGATION AT THE RESENTENCING HEARING, IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

As noted in Point I, supra, the original trial judge granted the defendant's motion for leave to present additional evidence in mitigation of his sentence (beyond the evidence required by this Court's remand). (SR 321-322, 326) However, upon substitution by the new sentencing judge, the court, sua sponte, strictly limited the scope of evidence that would be allowed, ruling that only evidence of the defendant's conduct in jail following his arrest until his sentencing would be permitted. (R 5, 320-321) Defense counsel's attempts to subpoena witnesses who would testify outside the scope of this strict limitation were denied. (R 363-369, 378-381, 383) Defense counsel's questions to witnesses who were called which went beyond the scope of the trial court's limiting order were not permitted. (R 17-18, 40-42, 47-48, 53-54, 57-58, 60, 62-63) While the trial court did relax its limiting order somewhat in the middle of the resentencing hearing by allowing the videotaped testimony of a former death-row guard, the court denied the defendant's motion for a continuance of the proceedings in order to subpoena more witnesses (which subpoenas the court had previously refused to issue). (R 20-21, 37-44)

Defense counsel extensively proffered, orally, in writing, and through the filing of depositions, the matters which would have been offered into evidence had the trial court not limited them in their presentation. (R 18, 65-74, 78-83, 340-355, 377, 417-421, 423-426, 428-434; SR 1-311) The substance of this proffered, but excluded, testimony will be listed in more detail in Point V, infra, where its relevance to the particular mitigating circumstances can be more fully shown. Suffice it here to say that this excluded testimony establishes: that Craig, a very passive, non-violent individual, was under the substantial domination of the principal actor in the offenses, Robert Schmidt, who was a violent and aggressive person, since the defendant idolized him and, despite Craig being the foreman and Schmidt an employee, Schmidt never listened to the defendant's orders or requests (R 17-18, 69-72, 78-82, 340-343, 344-345, 352-353, 417-420; SR 1-13, 26-47, 74-88, 89-108, 122-138, 189-216, 233-293); that the defendant was under the influence of mental or emotional disturbance and drugs and alcohol (R 65-69, 344, 348, 421, 429-430; SR 246-293); that the defendant has a good attitude, is a good prospect for rehabilitation, and has undertaken to help others, before these offenses and even while on death row (including a former death-row inmate who has since been released) (R 40-42, 72-74, 79-83, 346, 349, 424-426, 431-434, 537-601; SR 26-54, 74-88, 100-108, 122-149, 182-188, 294-311); and that the defendant was a hard-worker, a good family man, is extremely remorseful, and cooperated extensively with the police. (R 72-73,

346-349, 352-354, 427-431; SR 55-73, 150-181) The exclusion of this highly relevant evidence in mitigation renders the defendant's death sentences unconstitutional under the federal and Florida constitutions, as violative of the right to a full and fair trial, due process of law, and the prohibition against cruel and unusual punishment.

As this Court held in the defendant's initial appeal "the defendant must be allowed to present for consideration any relevant mitigating evidence." Craig v. State, 510 So.2d 857, 871 (Fla. 1987); citing Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); and Lockett v. Ohio, 438 U.S. 586 (1978). This is so because, in order to make the unique decision about who should live or die, heightened reliability and reasoned judgment is required by constitutional mandates, and the sentencing authority must consider any evidence that is relevant to the sentencing determination, including information about the defendant's character and background and the circumstances of the offense. Id. See also Sumner v. Shuman, 483 U.S. 66, 72-76 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987). As correctly noted in the order of Judge Daniels (the original trial judge) which originally granted leave to introduce the evidence which was later excluded by the successor judge, "The sentencing authority may determine the weight to be given relevant mitigating evidence but may not exclude it from consideration thereby giving it no weight. Eddings v. Oklahoma." (SR 326)

Furthermore, as recently held by this Court in Preston v. State, 17 FLW S252 (Fla. April 16, 1992), a resentencing proceeding is a completely new matter in which "the State and defense start anew," writing on a "clean slate." 17 FLW at S253.

> The basic premise of the sentencing procedure is that the sentencer consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment. See § 921.141(1), Fla. Stat. (1989). This is only accomplished by allowing a resentencing to proceed in every respect as an entirely new proceeding.

17 FLW S254. Therefore, the trial court, where it is to consider some new evidence at a resentencing proceeding, cannot preclude any relevant evidence regarding the nature of the crime or the character of the defendant. See also Teffeteller v. State, 495 So.2d 744 (Fla. 1986)(resentencing should proceed **de novo** on all issues bearing on the proper sentence).

The evidence as outlined above is highly relevant in making the sentencing decision. Evidence showing the defendant acted under the substantial domination of another, that the co-defendant was the aggressive person while the defendant was the passive, easily-led individual, is a statutory mitigating factor and is highly important in determining the punishment of a capital defendant. See Stokes v. State, 403 So.2d 377 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Sumner v. Shuman, 483 U.S. at 78-80. Similarly, evidence showing that the defendant under the influence of mental or emotional disturbance, was an alcoholic, or was under the influence of drugs is relevant

mitigating evidence. See Nibert v. State, 574 So.2d 1059 (Fla. 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Kampff v. State, supra. That the defendant has a good attitude, is a good prospect for rehabilitation, and has undertaken to help others (before the offense and while on death row) are all relevant considerations is the capital sentencing process. See Craig v. State, supra; Brown v. State, 526 So.2d 903 (Fla. 1988); Valle v. State, 502 So.2d 1225 (Fla. 1987); Delap v. State, 440 So.2d 1242 (Fla. 1983); Valle v. Florida, 476 U.S. 1102 (1986); Hooper v. State, 476 So.2d 1253 (Fla. 1985); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Furthermore, the factors that the defendant was a hard-worker, a good family man, is remorseful, and cooperated with the police, all weigh heavily in mitigation. See Morris v. State, 557 So.2d 27 (Fla. 1990); Smalley v. State, supra; Perry v. State, 522 So.2d 817 (Fla. 1988); McCampbell v. State, supra; Walsh v. State, 418 So.2d 1000 (Fla. 1982); Washington v. State, 362 So.2d 658 (Fla. 1975).

Yet, evidence of these relevant factors in mitigation of sentence were excluded from the capital penalty decision. Thus, the resentencing procedure here suffered from the same defect as the initial sentencing process which formed the basis for this Court's reversal and remand. Craig v. State, supra. In conclusion, the words of Woodson v. North Carolina, 428 U.S. 280 (1976), point out the short-comings of a system which can exclude such relevant evidence:

> A process that accords no significance to relevant facets of the character and

> record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

428 U.S. at 304. The trial court in this case was blind to these factors; the relevant individual mitigating factors of the defendant were excluded from consideration. A new sentencing hearing is mandated.

POINT III.

THE TRIAL COURT ERRED IN FAILING TO EMPANEL A NEW ADVISORY JURY TO CONSIDER EVIDENCE RELEVANT TO THE SENTENCING WHICH HAD NOT BEEN HEARD BY THE ORIGINAL JURY, RENDERING THE DEFENDANTS DEATH SENTENCES VIOLATIVE OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, AND 22, OF THE FLORIDA CONSTITUTION.

In addition to the argument raised in Point I, supra, (that a new jury is necessary where a substitute judge who did not hear the evidence is the sentencer in a capital case and will hear the evidence anew), the trial court should have ordered a new advisory jury for other reasons. The trial court erred in refusing to empanel an new jury to hear relevant mitigating evidence which, as this Court determined on the initial appeal, should have been considered by the sentencer. Failure to convene a new jury to hear the evidence calls into question the constitutionality under the federal and Florida constitutions of the defendant's two death sentences.

This Court, in reversing the original sentences imposed in this case, Craig v. State, supra, ruled that relevant mitigating evidence was precluded from consideration by the sentencer. Although the Court's decision ruled that the case only had to go back before the sentencing judge since the original trial counsel had only attempted to present the evidence to the court, nothing in the Court's mandate precluded the trial court from allowing in the interest of justice and judicial economy, a new jury to be

empaneled to hear the additional evidence and recommend a sentence based on that evidence.

In Lucas v. State, 490 So.2d 943 (Fla. 1986), (Lucas' third appeal to this Court), the Court was asked to again vacate the death sentence because the trial court had refused to empanel a new jury to hear new evidence and make a new recommendation. Although this Court had twice previously remanded the case to the trial court for the judge's reconsideration alone, the Court held that the trial court was permitted to empanel a new jury on the remand. Lucas, 490 So.2d at 946.

> Given our varied terminology [in remanding for resentencing], we have allowed trial courts to exercise discretion in resentencing. Elledge, for example, had the benefit of a new jury recommendation, even though we did not specifically direct that a new jury be empaneled. Elledge v. State, 408 So.2d 1021 (Fla. 1981) . . . .

Lucas v. State, 490 So.2d at 945.

This Court determined that a new penalty phase jury was warranted because relevant evidence and argument had not been presented to the first jury. Id. at 946. The Court reasoned that the interests of justice and judicial economy required such action:

> Because we would rather have this case straightened out now rather than, possibly, in the far future in a post-conviction proceeding, we remand for a complete new sentencing proceeding before a newly empaneled jury.

Lucas v. State, 490 So.2d at 946.

For these same reasons, this Court should also now

order the empaneling of a new penalty phase jury in the instant case. This Court vacated the defendant's death sentences because mitigating evidence which the defendant's former trial counsel had sought to present to the court at sentencing was excluded. Even though counsel sought only to present this evidence to the judge alone, that same evidence, as recognized in Skipper v. South Carolina, supra, as being highly relevant mitigation, should also have been presented to the jury for its consideration in making recommendations on the ultimate penalty. Rather than have this case return again for resentencing in the future following a post-conviction proceeding, judicial economy and the interests of justice necessitate that the case be straightened out now, as in Lucas, supra, via a complete new sentencing proceeding before a newly empaneled jury.

It appears from the trial court's order denying a new sentencing jury (R 320-321), that the trial court felt constrained by this Court's mandate to deny a new advisory jury which has heard all the relevant evidence. As noted above, this Court has allowed the trial court to exceed the bounds of its original mandate, especially where the interests of justice require it. See also Preston v. State, supra, 17 FLW at S253-254 and note 2.

Additionally, due process of law and the right to a jury trial under our capital sentencing, as well as the prohibition against cruel and unusual punishment under the federal and Florida constitutions require that a factual determination be

made by the jury to authorize imposition of a more serious sanction based on factual elements of a crime. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). See also Duncan v. Louisiana, 391 U.S. 145, 155-156 (1965). Since a jury recommendation carries great weight, the advisory jury and sentencing judge should hear all of the same relevant evidence in making their respective factual decisions. See Corbett v. State, 17 FLW at S357. See also Riley v. Wainwright, 517 So.2d 656 (Fla. 1987), requiring that the holding of Lockett v. Ohio, supra, that a sentencer be permitted to consider any relevant mitigating evidence, applies not only to the sentencing judge, but also to the jury advisory opinion.

Thus, the excluded evidence should go also to the jury, as well as the judge, for its findings on the penalty issue. To fail to do so invalidates the whole sentencing process and the reliability of the defendant's death sentences.

POINT IV.

THE TRIAL COURT ERRED IN FINDING IMPROPER STATUTORY AGGRAVATING CIRCUMSTANCES WHICH HAD NOT BEEN FOUND BY THE PRIOR TRIAL COURT, SAID CONSIDERATION BEING BARRED BY THE DOCTRINES OF RES JUDICATA, LAW OF THE CASE, DOUBLE JEOPARDY AND FUNDAMENTAL FAIRNESS AND IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, AND 22, OF THE FLORIDA CONSTITUTION.

When the defendant was first sentenced, the trial judge found that the state had proved the existence of three statutory aggravating factors for Count I (Eubanks killing) and four statutory aggravating factors for Count II (Farmer killing). The existence of other specifically enumerated statutory aggravating factors was not proved. (PR 2089-2098, 2101-2106)

On direct appeal, this Court struck the finding of heinous, atrocious, or cruel for each count; the state did not cross-appeal the trial court's express rejection of other statutory aggravating factors. See Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) (successful cross-appeal by state where trial court erroneously rejected statutory aggravating factor). Also, in performing its independent review, this Court did not conclude that other statutory aggravating factors applied. See Echols v. State, 484 So.2d 568, 576-577 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986) (Florida Supreme Court sua sponte applies statutory aggravating factor erroneously overlooked by trial judge). Now, the trial court had found the existence of two new aggravating factors for Count I (the previ-

ous conviction for killing Farmer [even though it had already aggravated Count II for the previous killing of Eubanks], and that the murder was committed to avoid a lawful arrest), and one new aggravator for Count II (the murder was committed to avoid a lawful arrest).

It is axiomatic that the failure of a party to timely contest legal rulings of a trial court results in a procedural bar to subsequent litigation through application of the doctrine of law of the case and/or res judicata, both of which apply with full force here. Greene v. Massey, 384 So.2d 24 (Fla. 1980). See Gaskins v. State, 502 So.2d 1344 (Fla. 2d DCA 1987) (law of the case doctrine precludes re-litigation of all issues necessarily ruled upon by the court, as well as all issues on which an appeal could have been taken.) See also Flinn v. Shields, 545 So.2d 452 (Fla. 3d DCA 1989); Dunham v. Brevard County School Board, 401 So.2d 888 (Fla. 5th DCA 1981). Thus, this Court's ruling that there are only two statutory aggravating factors as to Count I and three aggravators on Count II pertinent to the resentencing is the law of the case. In that regard, the trial court exceeded its jurisdiction by deviating from the mandate expressed in the initial appeal, which was to have the trial court hear and weigh the excluded mitigating evidence against the statutory aggravating factors that had been established and impose an appropriate sanction, and by finding the existence of two new aggravating factors for the Eubanks murder and one new aggravating factor for the Farmer killing. The proceedings

exceeded the mandate, they were improper, and the result requires reversal pursuant to Milton v. Keith, 503 So.2d 1312 (Fla. 3d DCA 1987), Dow Corning Corp. v. Garner, 452 So.2d 1 (Fla. 4th DCA 1984), and Stuart v. Hertz Corp., 381 So.2d 1161 (Fla. 4th DCA 1980).

DOUBLE JEOPARDY

In Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), the defendants were convicted of capital murder. At sentencing, the state sought to prove two aggravating factors: that the murder was done for pecuniary gain and that it was committed in an especially heinous, cruel, or depraved manner. The trial judge found that the first factor was not meant to apply to the type of murder before him but that the second factor was present, and sentenced both defendants to death. The Arizona Supreme Court reversed and held the defendants were entitled to a new trial. It also found there was insufficient evidence to support the finding of the second aggravating factor. On remand, the defendants were again convicted of capital murder. The state alleged the same aggravating factors and the trial judge sentenced both defendants to death after finding both factors present. The Arizona Supreme Court again struck down the finding of the second factor on the ground that the evidence was legally insufficient. It affirmed the death sentences based on the first factor. On certiorari from the Arizona Supreme Court, the United states Supreme Court held

that the second imposition of the death penalty did not violate the double jeopardy clause.

The Court began its analysis with a review of two previous decisions. In Bullington v. Missouri, 451 U.S. 430 (1981), the Court held that a defendant who was sentenced to life in prison after his first trial and succeeded in having his conviction overturned on appeal could not be sentenced to death after being convicted at his second trial. In Arizona v. Ramsey, 467 U.S. 203 (1984), the Court applied these principles to the Arizona sentencing scheme. In Poland, the Court concluded that under the prior cases, the relevant inquiry is whether the sentencing judge or the reviewing court has decided that the prosecution has not proved its case and hence acquitted the defendant.

Applying these principles in Poland, the Court held that at no time had any court found that the prosecution failed to prove its case. While the Arizona Supreme Court did rule that the sole aggravating factor found by the trial court at the first sentencing was not supported by competent, substantial evidence, it also ruled that the trial judge had erred as a matter of law in ruling that the other aggravating factor was not meant to apply to the murder at hand. That court specifically ruled that on retrial, the trial court could properly find this aggravating circumstance to apply.

The Eleventh Circuit Court of Appeals has ruled that these principles apply where the state attempts to seek the death

penalty on additional factors not argued at a previous sentencing hearing. Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988) cert. dismissed Zant v. Godfrey, 487 U.S. 1264, 109 S.Ct 27, 101 L.Ed.2d 977 (1988); Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985) cert denied, 476 U.S. 1123, 106 S.Ct. 1991, 90 L.Ed.2d 672 (1986).

In the instant case, at the original sentencing, the trial court made specific findings listing which aggravating factors had been proven by the state. On the original appeal, this Court left undisturbed these findings, except for striking the finding of heinous, atrocious, or cruel. Craig v. State, supra. Unlike the situation in Poland, the findings are in fact an acquittal barring the state from seeking their application upon re-sentencing. It is important to note, at re-sentencing the state offered no new evidence to support these aggravating circumstances, instead simply relying on the transcript of the first trial and sentencing. Therefore if the evidence was found insufficient before, it must once again be found insufficient. Furthermore, as noted by the trial court, the state did not even argue these two newly-found aggravating factors to the jury or the court in the first sentencing proceeding.

CONSIDERATIONS OF FUNDAMENTAL FAIRNESS

Even if this Court declines to accept the foregoing reasoning, it is respectfully submitted that consideration of fundamental fairness and the need to avoid piecemeal litigation in capital cases require that the only aggravating factors that

can apply here are the statutory aggravating factors found in 1981, and the ones approved on appeal. As noted by the Supreme Court of New Jersey, even though the sentencer's initial rejection of statutory aggravating factors may not constitute an "acquittal" for double jeopardy purposes, it is nonetheless fundamentally unfair for the state to present evidence of new aggravating factors after a defendant succeeds on appeal. State v. Biegenwald, 110 N.J. 521, 542 A.2d 442 (N.J. 1988).

In Biegenwald, the New Jersey Supreme Court, after noting the considerations set forth in Poland v. Arizona, 476 U.S. 147 (1986), Arizona v. Rumsey, 467 U.S. 203 (1984) and Bullington v. Missouri, 451 U.S. 430 (1981), expressly ruled that, double jeopardy considerations aside, fundamental fairness requires that the state, with all its resources, prove all of the statutory aggravating factors of which it has evidence when the matter is first tried. The state will be allowed to prove new aggravating factors "only when it proves to the court that it has discovered new evidence sufficient to establish at re-sentencing a new aggravating factor and that such evidence was unavailable and undiscoverable at trial despite the state's diligent efforts." Biegenwald, 542 A.2d at 452.

Recently, that court again addressed the propriety of permitting re-litigation of aggravating factors that were not initially provided by the state at a defendant's first trial:

> The state is not seeking here to submit new evidence of a new aggravating factor, but rather is relying on old evidence to satisfy a new aggravating factor. Fundamental fair-

> ness concerns do not dissipate in that situation. If the state knew the facts and failed to allege an aggravating factor on the basis of those facts at the first trial, it should not thereafter be able to submit that factor to the jury on retrial.

State v. Cote, 119 N.J. 194, 574 A.2d 957, 973-974 (N.J. 1990).

The rationale behind this is simple: there is no bona fide reason for the state not to pursue, at the time a defendant is initially sentenced, all of the statutory aggravating factors that can arguably apply to a defendant's case. This requirement avoids piecemeal litigation and the unnecessary expenditure of judicial time, labor and resources. Such considerations already play a significant role in Florida's guideline sentencing. See Pope v. State, 561 So.2d 554 (Fla. 1990); State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), and Shull v. Dugger, 515 So.2d 778 (Fla. 1981). They should likewise control in capital sentencing proceedings. To hold otherwise and to allow the state to over and over again try to come up with new aggravators every time the defendant had won some relief on appeal, would render Florida's death penalty scheme arbitrary and capricious, in violation of the proscription on cruel and unusual punishment.

The appellant recognizes that this Court in Preston v. State, 17 FLW S242 (Fla. April 16, 1992), has rejected a similar claim. However, that case is currently pending rehearing by this Court, and the appellant asks this Court to recede from it for the above-stated reasons, or find that it does not apply to the instant case for the following reasons. In rejecting this

argument in Preston, this Court relied on a series of cases from the United States Supreme Court and from other jurisdictions for the proposition that the state is not barred from **offering evidence** on any aggravating circumstances, including those which were specifically not found at an original sentencing proceeding. However, in the instant case, the state presented absolutely no evidence at the resentencing rehearing relying only on the original trial transcripts, and, in fact, the trial court specifically excluded evidence of all factors other than the mitigating evidence of the defendant's good conduct in jail awaiting sentencing, which this Court on the initial appeal had ordered it to consider. (See Point II, supra.) Thus, the situation is the exact same situation which existed at the original sentencing proceeding at which the former trial judge found that the evidence did not support these aggravating circumstances.

It is respectfully submitted that this Court should, under Article 1, Section 9 and 16 of the Florida Constitution, expressly hold that as a matter of fundamental fairness and due process, the state cannot now re-litigate whether statutory aggravating factors exist after those factors have been rejected by the sentencer when a death sentence is initially imposed and when that ruling was uncontested by the state and approved, either expressly or implicitly, by this Court on direct appeal. See Walls v. State, 580 So.2d 131, 133 (Fla. 1991).

This Court must strike these newly-found aggravating circumstances and remand the case to the trial court for recon-

sideration of the sentence without them. Such relief is appropriate because fundamental fairness requires it, because the trial judge exceeded the mandate of this Court in Craig v. State, 564 So.2d 120 (Fla. 1990), and because the court otherwise violated principles of law of the case, res judicata, due process of law, and double jeopardy, and has rendered Florida's death penalty scheme arbitrary and capricious.[2]

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[2]If this Court relies on the "clean slate" rule announced in Preston v. State, supra, to reject the argument in this point of appellant's brief and approve the finding of these additional aggravating factors, then the same rationale must apply to the argument made by appellant in Point II of this brief, supra, allowing the defendant in a resentencing proceeding to also write on a clean slate and present evidence of whatever mitigating factors he so desires, regardless of the limited purpose for which the case was remanded. "What is good for the goose, . . ."

POINT V.

APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED WHERE THE TRIAL COURT'S FINDINGS WERE INSUFFICIENT, WHERE THE COURT FOUND IMPROPER AGGRAVATING FACTORS AND FAILED TO CONSIDER RELEVANT MITIGATING FACTORS, AND WHERE THE OVERRIDE OF THE JURY RECOMMENDATION OF LIFE IMPRISONMENT FOR COUNT I WAS INSUFFICIENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17, OF THE FLORIDA CONSTITUTION.

The trial court, following this Court's remand and by a substitute judge, found the presence of four aggravating circumstances for each offense (finding an additional two for Count I and an additional one for Count II -- see Point IV, supra): (1) the defendant was previously convicted of a capital felony, to-wit: the other contemporaneous murder; (2) the murders were committed to avoid a lawful arrest; (3) the murders were committed for pecuniary gain; and (4) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R 443-445, 447-449) Regarding the mitigating circumstances, the replacement judge found a lack of significant history of prior criminal activity, which he gave only little weight, and that the defendant exhibited good behavior during his incarceration from the time of his arrest through the trial and resentencing, which he assigned very little weight. (R 445-446, 449, 451-452)

While this Court in the initial direct appeal discussed the aggravating and mitigating factors and approved or disap-

proved them, the trial court still must reconsider them anew at the resentencing hearing; this Court also must review the factors anew, not only based on the new mitigating evidence presented, but also on the basis of the current state of the law on capital sentencing. As this Court stated in Proffitt v. State, 510 So.2d 896 (Fla. 1987), "The death sentence law as it now exists, however, controls our review of this resentencing. There have been multiple restrictions and refinements in the death sentencing process, by both the United States Supreme Court and this Court," since this matter was first tried and affirmed, "and we are bound to fairly apply those decisions.

A. The Trial Court's Sentencing Order Is Insufficient In Its Factual Basis To Support The Death Sentences.

The trial court's sentencing order is sparse, to say the least, with its factual support. The aggravating factors are supported by very cursory facts only, the "findings of fact" contain little analysis and very little application of the specific facts of the case and the conflicting evidence presented at the trial; the weighing of mitigating circumstances is conclusory only. The death sentences cannot be affirmed on the basis of such insufficient written findings. To uphold such sentences on the basis of this order would deny the defendant his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

This Court has stressed the importance of issuing

specific written findings of fact in support of aggravation and mitigation in capital cases. Van Royal v. State, 497 So.2d 625 (Fla. 1986); State v. Dixon, 283 So.2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. Lucas v. State, 417 So.2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id. Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to memorialize the trial court's decision. Van Royal v. State, supra at 628. Specific findings of fact are crucial to this Court's meaningful review of death sentences, without which adequate, reasoned review is impossible. Unless the written findings are supported by specific facts, the Supreme Court cannot be assured that the trial court imposed the death sentence on a "well-reasoned application" of the aggravating and mitigating circumstances. Id.; Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Although the Court considered the sentencing order sufficient (but barely) in Rhodes, the Court cautioned that henceforth trial judges must use greater care in preparing their sentencing orders so that it is

clear to the reviewing court just how the trial judge arrived at the decision to impose death over life. As the Court held in Mann v. State, 420 So.2d 578, 581 (Fla. 1982), the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found."

Here, the judge's analysis is not of "unmistakable clarity" and it cannot be said that he "fulfilled that responsibility" of weighing the aggravating circumstances against the mitigating factors calling for life. The findings provide no clue as to what standard the court used in weighing the factors, why it found some aggravating factors despite substantial evidence to the contrary (see section D, infra), why it summarily rejected mitigators which had been unrefuted (see section C, infra), why it gave some mitigating circumstances only little or very little weight when the evidence of those factors was substantial and where those factors have been used to justify a reduction of a death sentence to life (see sections C and E, infra), and why it summarily rejected the jury's recommendation of life for Count I (see section E, infra). The death sentences must be reversed on this basis alone. Santos v. State, 591 So.2d 160 (Fla. 1991) [death sentence reversed for new sentencing where record not clear that trial court adhered to the procedure required by Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), and Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990), and reaffirmed in Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112

L.Ed.2d 812 (1991)]; Lamb v. State, 532 So.2d 1051 (Fla. 1988) (death sentence reversed and remanded where unclear whether court had properly considered all mitigating evidence); Mann v. State, supra; Lucas v. State, supra.

B. The Trial Court's Sentencing Order Fails To Use The Proper Standards For Weighing The Aggravating And Mitigating Factors.

In Campbell v. State, 571 So.2d 419 (Fla. 1991), this Court set out the proper formula for addressing the weighing of mitigating and aggravating circumstances. In Campbell, the Florida Supreme Court held that a trial court "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence". Id., citing Lockett v. Ohio, 438 U.S. 586, 604 (1978); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Where there is uncontroverted evidence of a mitigating circumstance, the trial court must find that the mitigating circumstance has been proven. See Nibert v. State, 574 So.2d 1059 (Fla. 1990); Kight v. State, 512 So.2d 522 (Fla. 1987); Cook v. State, 542 So.2d 954 (Fla. 1989); Pardo v. State, 563 So.2d 77 (Fla. 1990). In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), this Court enunciated a three-part test for weighing evidence:

> [T]he trial court's first task . . . is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., 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. If such factors exist in the record at the time of sentencing, the sentencer must determine whether thy are of sufficient weight to counterbalance the aggravating factors.

The record here shows clearly that the trial court below failed to adhere to the procedure required by Rogers and Campbell, supra, and reaffirmed by the United States Supreme Court in Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). The trial court inexplicably rejected without explanation unrebutted evidence of mitigating factors and gave merely little or very little weight to extremely significant 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." Rogers v. State, supra. See also Santos v. State, 591 So.2d 160, 163-164 (Fla. 1991). Because of this failure on the trial court's part, the sentences must be reversed and the case remanded for resentencing. Santos, supra. The specific problems with the court's weighing of mitigating and aggravating factors will be discussed in detail below.

C. Mitigating Factors.

In this case, it is clear that the evidence of mitigating factors far outweighs any aggravating circumstance that could be proposed by the state. Clearly, under the formula set out in Campbell v. State, the trial court was mandated to find in favor

of the defendant. There is significant evidence of the following mitigating factors:

1. Lack of significant history of prior criminal activity.

Section 921.141(6)(a), Florida Statutes, provides that a lack of significant history of prior criminal activity constitutes a mitigating circumstance. See Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988). In this instant case, the trial court found this factor, but gave it only little weight despite the extensive evidence of the defendant's non-aggressive, crime-free background up until the age of 23, when the instant series of events occurred. As this Court stated in State v. Dixon, supra, 283 So.2d at 9:

> Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance.

Coupled with the defendant's other good background characteristics of non-violence, a good child, a good worker, and a good family man, coupled with his good prospect for rehabilitation and his exemplary conduct while in jail and on death row, this factor helps show the defendant's true character. See McCrae v. State, 582 So.2d 613 (Fla. 1991); Buford v. State, 570 So.2d 923 (Fla. 1990); Bello v. State, 547 So.2d 914 (Fla. 1989); Pentecost v. State, 545 So.2d 861 (Fla. 1989), wherein this factor played a significant part in reversals of the death sentences. This factor still applies despite the contemporaneous crimes of the defendant. In Scull v. State, the Florida Supreme Court held that:

> However, we do not believe that a "history" of prior criminal conduct can be established by contemporaneous crimes and we recede from language in Ruffin to the contrary.

533 So.2d at 1143. Thus, the mitigating factor of lack of prior criminal history is available for both counts and should carry great weight.

2. Acted under substantial domination of another person.

A second statutory mitigating factor is established where the defendant acted under duress or under substantial domination of anther person pursuant to Section 921.141(6)(e), Florida Statutes. See Stokes v. State, 403 So.2d 377 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Jackson v. State, 366 So.2d 752 (Fla. 1978). A review of the record, including the presentence investigation that was originally done prior to the first sentencing and the trial testimony, establishes that Robert Schmidt, Craig's co-defendant, was actually the leader and that Craig acted under the substantial domination of Schmidt.

a. Testimony in record.

Although Schmidt verbally stated that he was not the leader, the entire record demonstrates that in fact he was. The PSI report states that Officer Michael Whitaker and Sheriff Jamie Adams both stated that Schmidt was the "worst" of the two. Officer Whitaker was one of the arresting officers and had significant contact with both Schmidt and Craig. Sheriff Adams

stated, according to the PSI, that Schmidt was "the most cold blooded and vicious" of the two co-defendants.

The testimony of Craig's father and Mrs. Dupree Moody, his former mother-in-law, which are found in the record also substantiate that Craig was a follower and Schmidt was a leader. Craig's father testified that Craig "never did nothing wrong, he always done what he was told..." (PR 1732); that Craig "never shot a gun in his life" (PR 1733); that sometime after Christmas Craig "started talking about Mr. Schmidt, and then he started to have guns" (PR 1735); that the first time he ever saw Craig with a gun in his hand was in February of 1981 (PR 1735-1736); he testified without objection that Craig told him that "it happened so quick, Schmidt was crazy, he didn't understand how it could have happened" (PR 1737); that Craig was "more like a boy of sixteen or seventeen" and that he was "very easy going, gullible" (PR 1738). Mrs. Moody testified at trial that she had never seen Craig with guns or firearms (PR 1745), and she visited Craig and Jane Moody Roundtree on the ranch (PR 1745). Jane Moody Roundtree, his former wife, testified at trial that she had never known Craig to hunt prior to meeting Schmidt (PR 1748), and Craig never hit her or was violent toward her (PR 1749).

Additionally, Craig's testimony concerning the events that occurred on the day of the murders is much more credible than Schmidt's testimony. The only evidence that Craig was a dominant figure comes from Schmidt's testimony. However, the physical evidence presented at trial and the testimony of the

medical examiner and the forensics expert make it clear that Schmidt did not tell the truth at trial.

Schmidt admitted that he participated in rustling cattle with Craig. (PR 910) Schmidt testified that Craig discussed killing Eubanks in order to be better able to continue his rustling activities. (PR 914). According to Schmidt, Craig talked about this "a lot of time." (PR 914) That Schmidt should ascribe these statements to Craig does not comport with the evidence in the record. The record in is undisputed that Craig did not own guns and did not behave in a violent manner at any time prior to meeting Schmidt. The record is undisputed that Schmidt introduced guns to Craig and became Craig's hero. Based upon the undisputed testimony in the record other than Schmidt's testimony, it is clear that Craig was the follower. Schmidt's testimony regarding the events on the day of the murder does not comport with the physical evidence produced at trial.

According to Schmidt's completely uncorroborated testimony, on the day that Eubanks and Farmer were murdered: Eubanks, Craig and Schmidt were going to "count cows" (PR 926); Schmidt remained alone and Eubanks and Craig worked together counting cows. This lasted approximately two and one-half to three hours. (PR 926) If the defendant had been the dominant actor and desired to kill Eubanks, he had ample opportunity at this point, long before Farmer came on the scene. It started raining and Craig and Eubanks ran to Eubank's car and Schmidt ran to his truck (PR 928). They began discussing the fact that the

cattle were not all there (PR 928-929). Craig and Eubanks decided to look for strays around Clear Lake and told Schmidt to meet them on the other side of Clear Lake after they had finished walking around looking for fresh cow manure or cattle (PR 933). Farmer arrived and Schmidt introduced himself and they went together to look for Eubanks and Craig (PR 933). They met up with Eubanks and Craig (PR 935). Craig and Schmidt began riding together in the truck and Eubanks and Farmer went together in Farmer's Jeep to continue looking for strays (PR 935). According to Schmidt, Craig said when he got into the truck that Eubanks knew about the cattle and stated "we will have to kill both of them because both of them know...." (PR 935) Schmidt said he couldn't shoot anyone (PR 936). He did not think that they would actually kill them (PR 939). They went to the hammock and saw Farmer and Eubanks and Craig yelled that there was fresh cow manure in the hammock (PR 942-943). They walked into the hammock in a line (PR 943). They began walking out Craig and Schmidt were still acting like they were looking for fresh cow manure (PR 944). He was behind Eubanks and Craig and Farmer were over to his side about thirty or forty feet. Craig was following Farmer out. (PR 944) Again according to Schmidt, he and Eubanks were out of the hammock when he heard Craig yell, "Hey Bob," and he yelled back, "What, Bob?," and then heard Craig begin shooting (PR 945). Schmidt further testified that he did not draw his pistol until after he heard the second shot (PR 946). He testified there was more shooting after he drew his pistol and it was

after the heard the third shot that he shot Eubanks. (PR 946) He testified that Eubanks was walking in front of him, he shot Eubanks twice in the head and that Eubanks' head was turning when he fired the second shot. (PR 947) He testified that he heard two more shots (PR 948), that he heard Craig shout for him to come into the woods (PR 949), that Farmer was laying on the ground face down (PR 950), that Craig forced him to shoot Farmer in the head (PR 952) and that Craig screamed curses at him and told him to shoot Farmer. (PR 952) This testimony, especially the final portion totally belies all that we know about Robert Craig from the record before this Court. Craig is non-violent, Craig is passive, Craig is not the hunter who was used to shooting at things, Craig was not the type to swear. Schmidt, on the other hand, is the violent individual, with the offensive, aggressive personality.

In contrast, Craig testified that there had never been any discussion of eliminating Eubanks. (PR 1396) He testified that on July 21, the day of the murders, Schmidt stated that they would have to shoot Eubanks. (PR 1396) He testified that it was after Eubanks walked around Clear Lake with Craig and he got back in the truck with Schmidt, that Schmidt asked if Craig and Eubanks had discussed the cattle and **Schmidt** stated "we are going to have to shoot him". (PR 1397) Craig testified that he did not believe that Schmidt actually meant that he wanted them to kill Eubanks because "he [Schmidt] always talked about killing people, and cutting people, this and that." (PR 1397) Craig and

Eubanks had been alone at Clear Lake for more than a hour prior to meeting back up with Schmidt and Farmer. (PR 1405) (This is consistent with Schmidt's testimony). He had his gun with him during that period of time. (PR 1405) After he teamed up with Schmidt, Farmer and Eubanks drove off to continue searching for strays. (PR 1411-1412) They were standing near the hammock waiting for Farmer and Eubanks. Craig stood in the hammock because it was muggy and hot. Schmidt called out to Farmer and Eubanks that they were "over there". Farmer and Eubanks walked into the hammock. There was no discussion of fresh signs of cow manure in the hammock. (PR 1411-1412) Craig admits that he fired shots at Farmer, however, the facts are quite a bit different than those recounted by Schmidt (and Craig's version matches the physical evidence, his personality traits compared to those of Schmidt, and common sense). (PR 1412-1413) They were all in the hammock talking and Schmidt and Eubanks started walking out and Farmer and Craig stayed in talking about saddles. (PR 1413) Craig stopped "to go to the bathroom". After he finished "going to the bathroom", he started walking and that was when he heard the two shots. (PR 1413) When he heard the two shots, he looked up and saw Farmer who looked as if he had "seen something" and started running back "toward an angle" and Craig started running too. (PR 1414) Craig heard someone running around toward them through the bushes and saw Schmidt. Schmidt fired two more shots, which passed close by Craig's head. After these shots were fired, Craig fell down and reached for his gun. Craig

pulled his gun and Schmidt hollered for Craig to shoot. Craig shut his eyes and fired in the direction of Farmer. He thought he fired three times. (PR 1414) Farmer was on the ground and Schmidt walked over to him, stood above him and shot him in the head. (PR 1417) Craig did not know if his shots hit Farmer because he had closed his eyes. (PR 1417)

The testimony of the medical examiner and the forensic experts completely refute Schmidt's testimony and support Craig's testimony. The medical examiner testified that there were two gun shot entrance wounds in Eubank's head. (PR 1273-1274) The first bullet entered the back of his head near the bottom just above the neck. (PR 1273-1274) The second bullet entered behind his left ear. (PR 1274) In contrast, Farmer's wounds were in various parts of his body, the first wound being a graze wound in the shoulder area (PR 1284), there was an entrance wound in the right rear upper arm (PR 1285), there was a secondary entrance wound from that bullet as the bullet passed through the elbow and the forearm through to the abdomen (PR 1288). There were other wounds in various parts of his body and there was a final wound in his head. The doctor testified that the last bullet which was fired into Farmer's body was the bullet which was fired into his head. (PR 1305) The doctor testified that the wounds in Farmer's body were defensive wounds. (PR 1314)

Charles Meyers, the forensic firearms expert, testified that the bullets which entered Eubanks' head were from Schmidt's gun. (PR 1345-1371) He also testified that the bullet which

entered the back of Farmer's head was from the gun owned by Schmidt. (PR 1345-1371)

It is inconsistent with Craig's history to come to the conclusion that he was the one who pressed for violence rather than Schmidt. Additionally, Craig's credibility is much greater than that of Schmidt. When Schmidt's testimony is considered, it does not comport with the evidence. Schmidt's testimony would require the court to believe that Eubanks would have remained facing away from him with his back turned to an armed man after hearing gunshots fired within a few feet. Schmidt admits that he was directly behind Eubanks. He admits that Craig and Farmer were thirty to forty feet to the side of Eubanks and Schmidt. He would have the court believe that Eubanks continued to face forward with his back toward Schmidt after hearing guns fired to the side. It makes more sense that Eubanks would have turned his head to look in the directions that the gun shots were fired. However, the medical examiner's testimony make it clear that the first bullet entered the exact center of the back of Eubank's head. The second bullet entered his head from the side. In contrast, the wounds for Farmer's body were defensive wounds. It makes logical sense that defensive sounds would have been the result of a man turning in fear or flight after hearing gun shots. Thus, the evidence supports Craig's story that Schmidt fired the fist shot. If Schmidt distorted the truth with regard to when and who fired the first shot, then clearly the Court should look more carefully at his other testimony. Clearly, his

testimony that the defendant was the leader is not supported by this record. The testimony of a witness of questionable credibility is insufficient on which to base a rejection of this factor. See Smith v. State, 403 So.2d 933 (Fla. 1981). See also Jackson v. State, 575 So.2d 181 (Fla. 1991); Cooper v. State, 581 So.2d 49 (Fla. 1991); Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991); and Pentecost v. State, 545 So.2d 861 (Fla. 1989), in which cases this Court, in reversing the death sentences based in part on this mitigator, either questioned the credibility of a witness used to refute this mitigating factor, or found it unclear from the facts who was the dominant actor.

b. Proffered testimony[3]

If the court had considered the proffered evidence, it would add substantially to the weight of the evidence that Craig was a follower and was under Schmidt's domination. Many witnesses would offer proffered testimony that Craig never used guns and was never violent until he met Schmidt, that Schmidt became his hero, that Schmidt was an extremely violent personality with a tendency to want to "kill niggers" and a desire to dominate any group in which he was found. This is substantiated by the testimony of every person who had contact with Schmidt. That includes the officers as well as the family witnesses. The

[3]The unrefuted proffered testimony is included here and elsewhere in the mitigating section of this brief to show how it would have related to the statutory and nonstatutory mitigating circumstances and to highlight how egregious it was for the trial court to exclude it from consideration.

following witnesses could have offer testimony as follows:

i. Deputy Randy Swails could testify that he was a Sumter County Sheriff's Deputy at the time and that he aided in the arrest of Schmidt. He can testify that Schmidt was extremely calm at the time of his arrest and stated that he was "in trouble" but "could take care of it". (R 418)

ii. Theresa J. Moody Roundtree, Craig's wife, could testify to the fact that Craig was of a non-violent nature, did not own a gun prior to meeting Schmidt, that Craig had a great admiration of Schmidt and seemed to come under his control after they met, that Craig's personality changed in that he began to shoot guns and carry guns after meeting Schmidt, and that Craig never discussed any plan to kill Eubanks prior to the time of the murders. In contrast, she can testify that Schmidt was extremely aggressive, appeared to be a very "macho" individual, constantly spoke of guns, carried guns, and constantly talked about killing things. She can testify that it was very common for Schmidt to state "lets go kill some niggers", and that Craig was a follower not a leader. (R 418; SR 246-293)

iii. Dupree Moody, Robert Craig's father-in-law, could testify to the fact that Craig would not go hunting with him because he did not want to own a gun or shoot anyone or anything and that during a visit to the Craig's home when Schmidt was present, Schmidt ignored requests made by Craig that he not drink beer in the presence of the Moodys, and that Schmidt was disrespectful. (R 418-419; SR 74-88)

iv. Catherine Moody, Jane Moody Roundtree's mother, could testify that Craig was shy; that Schmidt constantly drank and bragged when she met him; that Schmidt would not allow anyone else to talk; that Schmidt talked constantly about fights in which he had been involved and stated that if he had not left where he had previously lived, he would have probably killed some black people; that Schmidt swore constantly; that Craig asked Schmidt to stop swearing in front of the Moodys and the women and that Schmidt refused to do what Craig asked of him; that Schmidt was dominant in all conversations and that Craig was an easy going type of person who is more of a follower than a leader. (R 419; SR 122-138)

v. Albra Craig, Craig's sister, could testify that Craig was naive and easily manipulated and that he had never owned or shot a gun in his early life. (R 419; SR1-13)

vi. Patricia Craig, Craig's sister, can testify that when they were children and their father used to shoot cattle for them to eat, Craig could not watch and, when his father shot the cattle, he would have to run into the house crying. (R 419; SR 100-108)

vii. William Patrick Craig, Craig's father, can testify that Craig was always quiet, always did everything you asked him to do, that he never had any trouble with Robert Craig; and that Craig spent most of his young life taking care of cows and horses. He can testify that Craig did not use or own fire-arms of any kind until he left home and moved to Lake County and

met Schmidt. He can testify that after Craig met Schmidt, Craig talked about shooting constantly and he appeared to make Schmidt into his hero. (R 419-420; SR 89-99)

viii. William Patrick Craig, Jr., his brother, can testify that Craig never owned guns while he was growing up, never learned to fire guns while he was growing up and was never violent while growing up. (R 420; SR 233-245)

ix. Cathy Moody Lewis, Craig's former sister-in-law, can testify that he is a very friendly and warm person and makes you feel like he cares about you and what has happened to you; that she met Schmidt and he came across as a person who was trying to "feed a bunch of lines" or impress; that Schmidt was a "know it all"; that Schmidt bragged about his knowledge of guns, the number of guns he owned and that he constantly talked about killing black people. He stated to her that if anything was started up with him by a black person, he would shoot them. She can testify that Craig was not a violent type of person. (R 420; SR 189-216)

x. William D. Bell, the reverend at the Lake City Baptist Church, can testify that Robert Craig appears to be easily influenced possibly to win approval from friends. (R 420; SR 26-47)

xi. Mrs. Thomasine Pearson Griffin can testify that prior to moving to Lake County, she knew Craig and he was quiet, insecure, shy, soft-spoken and friendly person. (R 420)

xii. Ronald Fox could testify that the state original-

ly offered a plea agreement to Craig rather than Schmidt, and that the Assistant State Attorney stated his preference would be to convict Schmidt. (R 420)

3. Age of the defendant.

The age of the defendant is an additional statutory mitigating factor under Section 921.141(6)(g), Florida Statutes. Although Robert Craig was 23 years old, the trial testimony of his father when coupled with Dr. Harry Krop's testimony will make it clear that he was naive and his age should have been considered as a mitigating factor. This Court has approved as mitigation ages close to that of the defendant, especially when coupled with other factors, such as lack of prior record, the defendant's upbringing, or his emotional immaturity, in reversing death sentences. See Derrick v. State, 581 So.2d 31 (Fla. 1991); Hegwood v. State, 575 So.2d 170 (Fla. 1991); Cochran v. State, 547 So.2d 928 (Fla. 1989); Freeman v. State, 547 So.2d 125 (Fla. 1989); Songer v. State, 544 So.2d 1010 (Fla. 1989).

4. Under extreme emotional distress.

Section 924.141(6)(b), Florida Statutes, provides a mitigating factor if the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. There is evidence that Craig was heavily using cocaine. Voluntary intoxication has been accepted as a basis for the statutory mitigating circumstance of extreme emotional or mental disturbance. See Kampff v. State, 371 So.2d 1007 (Fla.

1979). When coupled with his fear that his employer had learned of his cattle rustling activities, his strong association with cattle through his childhood activities, the drug use may have caused extreme mental or emotional disturbance. In this case, clearly there is sufficient evidence to establish that Craig acted under extreme mental or emotional disturbance. See also Nibert v. State, 574 So.2d 1059 (Fla. 1990) (wherein the Court specifically held that the defendant's alcoholism and drinking at the time of the killing support a finding of extreme disturbance and substantial impairment, which, when coupled with the defendant's remorse and good potential for rehabilitation, require a life sentence). Dr. Harry Krop's proffered testimony was that the circumstances could have caused extreme mental or emotional disturbance.

Nonstatutory Mitigating Circumstances.

1. Good attitude.

Good attitude and good conduct while awaiting trial is a relevant mitigating factor. See Skipper v. South Carolina, 471 U.S. 1 (1986); Craig v. State, 510 So.2d 857 (Fla. 1987); Valle v. State, 502 So.2d 1225 (Fla. 1987); Delap v. State, 440 So.2d 1242 (Fla. 1983). The good attitude and conduct may occur prior to trial or while on death row. See Delap v. State, supra. The record in this case is undisputed that Craig has a good attitude and was a model prisoner. Accordingly, this mitigating circum-

stance must be held to be established. See Nibert v. State, supra. While the trial court did find this factor, it assigned it "very little weight." The testimony presented in the case shows that this minimal finding is a miscarriage of justice and makes a mockery of the capital weighing process. Robert Craig deserves true credit for what he has made of himself in confinement. The record paints a portrait of Robert Craig as an exemplary inmate; clearly, as noted in the record, there has never been an outpouring of support for a defendant from jailers and death-row corrections officers such as was witnessed in this case. (R 48-49)

a. Testimony in record.

Clearly, the corrections officers' testimony concerning Craig's attitude prior to the sentencing hearing in this case establishes that Craig had a good attitude during that time period. The jailers and death-row guard had absolutely no trouble with the defendant; in fact, he is one of the nicest persons they have ever met. (R 8-11, 16-17, 22-24) Craig always helped the jailers and guards, one time coming to the aid of a jailer who had gotten into a fight in the jail, and aiding officers in security problems, e.g. contraband detection, on death row. (R 9-10, 17, 24-26) Craig was always polite, never swore, and always was engaged in worthwhile activities on death row, such as reading, drawing, writing, and helping his fellow inmates. (R 23-28)

Sergeant Blevins, formerly of death-row, testified that

for most of the inmates he would not want to live in the same town with them; but in the defendant's case, he would have no problem if the defendant moved next door to him. (R 30) Blevins and the jail guards saw no problem with the defendant possibly being placed in general population (should his death sentences be reduced). (R 10, 17, 28-30) And Blevins believes that the defendant would never be any problem again to society, would do good for himself, and would be a help to a lot of people if ever he were released. (R 30) Dr. Harry Krop confirmed the corrections officers' testimony, saying that his psychological testing shows that the defendant should be a model prisoner and would have no problems in the general prison population. (R 51-59) Additionally, the pre-sentence investigation report already in the record establishes that he had a good attitude during the investigation and was actually helpful to officers.

b. Proffered evidence.

i. As opposed to the wonderful attitude and conduct of Robert Craig while in jail, the co-defendant Robert Schmidt exhibited the complete opposite: Schmidt had attitude problems, gave jailers trouble, and was described by one jailer as "a butthole." (R 17-18)

ii. Dupree Moody could testify that he visited Craig in prison and that Craig seems well adjusted. (R 424; SR 74-88)

iii. Carolyn Jenson who is unrelated to Craig could testify that she has corresponded with Craig throughout the time

that he has been in prison. Ms. Jenson could place into evidence the letters written by Craig during the time he was in prison. The letters refer to Craig's reading material which includes a great deal of Christian reading material and evidence concern for the feelings of Mr. and Mrs. Jenson. (R 40-42, 424, 537-601)

iv. Reverend Joe Williams could have testified that during his time of visiting Craig at death row he has shown repentance for the murders, that he has embraced a Christian way of life and does not appear to pose any threat to society. He can testify that Craig has been deeply religious and has been involved with religion during his time in prison. (R 424)

v. Catherine Moody, the defendant's former mother-in-law, could testify that Robert Craig has adjusted well to prison and that he appears to be doing well when she visits him in prison. (R 425; SR 122-138)

vi. Leonard Craig can testify that Craig has been adjusted all of his life and that the has visited Craig about twice a year since he has been in prison and appears to be well adjusted in prison. (R 425; SR 139-149)

vii. Patricia Craig can testified that she had corresponded with Craig during the time he has been in prison and Craig is trying to be positive and look at the bright side of things and not dwell on the past. (R 425; SR 100-108)

viii. William D. Bell, a reverend at the Lake City Baptist Church, has corresponded with Craig since he has been incarcerated and visited him. He can testify that he is not a

person who helps out prisoners on a regular basis but feels that Craig is a deserving human being; he has never been uncomfortable in Craig's presence; that Craig has a strong relationship with the Lord, that they discuss prayer and that Craig has prayed to receive Christ into his heart and asks for forgiveness; that he had received cards from Craig during the time Craig was in prison that were homemade with very intricate drawings; that Craig has become more muscular as a result of working-out and improved his handwriting while in prison; that Craig has learned artistic pursuits while in prison; and that Craig has spent time reading books while in prison. (R 425; SR 26-47)

ix. Counselor Scoggins is a counselor at the Florida State Prison in Starke and he can testify that Craig has not caused problems in prison. (R 426)

x. Stanley Daniel is a counselor at prison and can testify that Craig has not caused problems in prison. (R 426)

xi. Ernie Miller is a former inmate who became acquainted with Craig in prison and can testify about help he received from Craig in prison with learning to read and with Craig providing him with money for food when he did not have money to pay for extra food. (R 426)

xii. Myrtis Begue, a resident of McClenney, Florida, can testify that she has written to Craig while he was in prison and that he is very remorseful over the crime, has changed, and that she believes he is a Christian at this time. (R 426)

xiii. Mrs. Hermie Fields has corresponded with Craig

while he is in prison and can testify that he is remorseful and he deserves another chance. (R 426)

xiv. Michael Johnson and Michael Graves who have interviewed countless witnesses in death penalty cases can testify that the testimony of the corrections officers in this case is outstanding and that they have never heard any testimony concerning a death row inmate which would even approach this. (R 426)

2. Sentence of co-defendant.

The sentence of a co-defendant is also a factor which can be considered as a mitigating factor. See Cailler v. State, 523 So.2d 158 (Fla. 1988); Bassett v. State, 449 So.2d 803 (Fla. 1984); Slater v. State, 316 So.2d 539 (Fla. 1975); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Gafford v. State, 387 So.2d 333 (Fla. 1980); Messer v. State, 403 So.2d 341 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1981). The arresting officer's statements which are found in the pre-sentence investigation establish that the defendants were as least equally culpable. It appears that Schmidt was more culpable than Craig. The statements in the PSI that Schmidt was the most cold blooded of the two and review of the entire court record which reveals that Schmidt's testimony was not supported by the physical evidence in the record support a finding that Schmidt was more culpable than Craig. Under these circumstances, it would be both inequitable and a violation of the principles enunciated by the Florida Supreme Court to sentence Craig to death while Schmidt is now eligible for parole. See Cailler v. State, supra;Bassett v. State, supra; Slater v. State, supra; Malloy v. State, supra. See also arguments made in conjunction with the mitigating factor of "under the substantial domination of another," supra.

3. Cooperation with the police.

Full cooperation with the police provides a basis for mitigation. See Washington v. State, 362 So.2d 658 (Fla. 1975); Perry v. State, 522 So.2d 817 (Fla. 1988). Sheriff Noel Griffin

stated in the pre-sentence investigation that Craig had shown them where the bodies were and that they could not have found the bodies without him.[4] The record clearly establishes that Craig cooperated with the police. This mitigating factor must be considered since it is uncontradicted. See Nibert v. State, supra.

4. Defendant is contrite and remorseful.

Genuine remorse is a factor which may be considered as a mitigating factor in a death penalty case. See McCrae v. State, 582 So.2d 613 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Pope v. State, 551 So.2d 554 (Fla. 1990); Morris v. State, 557 So.2d 27 (Fla. 1990). Dr. Harry Krop testified that the defendant genuinely felt remorse for the crimes. (R 60) Additionally, the proffered testimony of Reverend William D. Bell (R 428; SR 26-47), Reverend Joe A. Williams, Myrtice Begue, and Mrs. Hermie Fields (R 428) could establish that the defendant was contrite and remorseful.

5. Intelligence.

The fact that the defendant has a below normal intelligence is a mitigating factor. See Downs v. State, 574 So.2d 1095

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[4] Officer Whitaker's proffered testimony establishes the same point and that he allowed voluntarily a search of his home and provided them with the gun. Whitaker could testify that he was with Craig when Craig showed where the bodies were found and that Craig was extremely helpful throughout the entire investigation. (R 428; SR 150-181)

(Fla. 1991); Morris v. State, 557 So.2d 27 (Fla. 1990); Minks v. State, 336 So.2d 1142 (Fla. 1976); Neary v. State, supra. Dr. Krop's testimony established that Robert Craig is of below average intelligence. (R 50)

6. Defendant's employment record.

The fact that the defendant has a good employment record is a mitigating factor. See Wright v. State, 586 So.2d 1024 (Fla. 1991); Dolinsky v. State, 576 So.2d 271 (Fla. 1991); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Smalley v. State, supra; White v. State, 446 So.2d 1031 (Fla. 1984); Wilson v. State, 436 So.2d 908 (Fla. 1983). The record is undisputed on this point, and, thus, the court must find this factor has been proven. See Nibert v. State, supra.

a. Record testimony.

The record testimony of Robert Craig, Sr., Craig's father, establishes that Craig was always a good, hard worker. (PR 1730-1737, 1744-1749) There is nothing in the record to dispute this fact, accordingly, the court must consider this mitigating factor.

b. Proffered testimony.

If the court had considered the proffered testimony, it would have greatly enhance the evidence already in the record concerning Craig's employment record. The testimony of Michael Xenakis, Craig's former business partner, would add to the evidence already in the record. Michael Xenakis could testify

that Craig was a hard worker and a good employee; that they had a painting business and that they did excellent work together; that Craig was dedicated to producing excellent work rather than just "getting by and grabbing money"; that Craig had a lot of pride in his work; that Craig had a lot of self respect and often volunteered to do the hardest parts of the work; and that Craig would work on building their client base and business. (R 429; SR 55-73) James Schriver, Craig's former employer at Schriver's Shell of Lake City, could testify that Craig was a good employee. (R 429) Sandra Craig, Craig's sister-in-law, could testify that Craig was a hard worker and worked for his father. (R 429)

7. Substance abuse.

That a defendant is an alcoholic or was under the influence at the time of the homicide is a mitigating factor. Smalley v. State, supra; Masterson v. State, 516 So.2d 256 (Fla. 1987); Feud v. State, 512 So.2d 176 (Fla. 1976); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Ross v. State, 474 So.2d 1170 (Fla. 1989); Norris v State, 429 So.2d 688 (Fla. 1983). See also argument concerning extreme emotional distress.

a. Record evidence.

Here, the evidence in the record including the statements of Officer Whitaker in the pre-sentence investigation indicates that the defendant was a regular cocaine user.

b. Proffered evidence.

Theresa Jane Moody Roundtree, Craig's former wife,

could testify that Craig used cocaine after the murders on the night of the murders and that Craig regularly used cocaine. (R 430; SR 246-293) Cathy Moody Lewis, former sister-in-law, could testify that cocaine was used by Craig after the murder and that Craig had used cocaine in her presence. (R 430; SR 189-216)

8. Good family man.

The fact that the defendant was a good husband and son is a mitigating factor. See Bedford v. State, 589 So.2d 245 (Fla. 1991); Hegwood v. State, 575 So.2d 170 (Fla. 1991); Perry v. State, 522 So.2d 817 (Fla. 1988); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); Feud v. State, supra; Rogers v. State, 511 So.2d 526 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Jacobs v. State, 396 So.2d 713 (Fla. 1981). This factor is established conclusively by undisputed record evidence, and must be found to be proven by the court. See Nibert v. State, supra.

a. Record evidence.

There is an abundance of evidence concerning his relationships with his family and friends. These facts are uncontradicted. The testimony of Jane Moody Roundtree at trial along with the testimony of Craig's father are uncontradicted and establish that Craig was a good family man. (PR 1730-1737, 1744-1746, 1747-1749)

b. Proffered evidence.

The proffered evidence would corroborate that which is already in the record to the effect that Craig is a good family

man. Dupree Moody, Craig's former father-in-law, would testify to the fact that Craig was a good family man and consistently committed good acts for the people in the Lake City area. (R 431; SR 74-88) Catherine Moody, Jane Moody Roundtree's mother, can testify that Craig and her daughter attended church regularly, were baptized together, and that he was a very good family man. (R 431; SR 122-138) Cathy Moody Lewis could testify that Craig was a very good family man who always was considerate of the family's feelings and was always friendly and warm. (R 431; SR 189-216)

9. Able to be Rehabilitated.

The fact that the defendant is a good prospect for rehabilitation is an extremely important mitigating factor. McCrae v. State, 582 So.2d 613 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Brown v. State, 526 So.2d 903 (Fla. 1988); Frances v. Dugger, 514 So.2d 1097 (Fla. 1987); Menendez v. State, 419 So.2d 312 (Fla. 1982); Simmons v. State, 419 So.2d 316 (Fla. 1982).

a. Record evidence.

Expert psychological testimony from Dr. Krop indicated that the defendant is extremely rehabilitable. (R 56-59) Additionally, the testimony of Lt. Melrose, Sgt. Trammel, and Sgt. Blevins adds substantially to this testimony since Craig was so well adjusted during the time that they supervised him. Clyde Blevins, a death row corrections officer, testified as previously

indicated that Craig has adjusted well to prison life and has been extremely helpful and that he feels he could help other people if he were released. Clyde Blevins testified that he would not mind having Craig live next door to him. (R 22-30) This factor is undisputed. Craig would make a contribution in an open prison population. Craig would not be a management problem. Craig has a good support system. Craig displays no anti-social tendencies. (R 51-59) Again, this is a factor which must be taken as proven. See Nibert v. State, supra.

b. Proffered evidence.

The evidence which could be proffered on this point is overwhelming. Dr. Krop would further have testified in detail, if permitted to by the trial court, to his testing of the defendant and to statements of the jail officials which caused him to opine that Craig has a good potential for rehabilitation. (R 72-74) Dupree Moody can testify that he has visited Craig in prison and that Craig is well adjusted. (R 432) Carolyn Jenson, an elderly woman with whom Craig corresponds, could testify that she has regularly corresponded with Craig, has sent Craig reading material, and it is clear he is well adjusted to prison life. Mrs. Jenson could further testify about plaques that Craig made in prison which show that he has attempted to positively learn from his prison life. (R 40-42, 432, 537-601) Reverend Joe A. Williams can testify that Craig does not appear to pose any threat to society and that Craig has been deeply religious during his time in prison. (R 432) Patricia Craig, his sister, can

testify that she has regularly corresponded with him and that he is trying to be positive and learn from his experience and not dwell on the past. (R 432; SR 100-108) William D. Bell, a reverend at the Lake City Baptist Church, has corresponded with Craig and can testify that Craig discusses prayer with him on a regular basis, that he had received cards from Craig that were homemade with very intricate drawings, that he has noticed that Craig has become more muscular as a result of working out and has improved his hand writing while in prison, that Craig has learned artistic pursuits in prison, and that Craig has spend time reading books during his time in prison. (R 432; SR 26-47)

10. Specific good deeds.

Specific good deeds or characteristics are or should be mitigating factors. Lockett v. Ohio, supra; Bedford v. State, 589 So.2d 245 (Fla. 1991); McCrae v. State, 582 So.2d 613 (Fla. 1991); Hooper v. State, 476 So.2d 1253 (Fla. 1985).

Craig could have offered evidence, if the court would have allowed it, of a number of good deeds. Included among the testimony that could be provided would be the following: Ernie Miller, a former inmate at death row, could testify that he has received help form Craig in prison with learning to read and that Craig provided him with money for food when he did not have money to pay for extra food (R 433); Wood Capell, an unrelated elderly man, could testify that when Mr. Capell was at a restaurant and had a broken leg and was on crutches, Craig came from across the

restaurant to help him get seated. He did not know Craig at that time. Wood Capell could further testify that he saw Craig paint the home of an elderly woman, Mrs. Saddle, and that Craig did not charge her for painting the home. (R 433-434; SR 48-54) Carolyn Jenson could testify as to many things that Craig did to help her sister, Ann McGehee. Ann McGehee, an elderly woman, could testify that Craig painted her home for no charge, did many carpentry jobs at her home for no charge, and helped with chores around her home for no charge. He repaired her porch floor, repaired a screen door, helped her move heavy furniture, helped her move heavy flower pots, and helped her perform other chores she could not do because of her disabilities. (R 434)

11. Defendant was not the one who actually killed the victim.

The fact that the defendant was not the one who actually killed the victims is a mitigating factor. DuBoise v. State, 520 So.2d 260 (Fla. 1982) This factor is increasingly important when the evidence presented at trial is reviewed. In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court considered two types of cases that occurred at opposite ends of the felony murder spectrum and held that under certain circumstances the person who was not the trigger man should not be subject to the death penalty. In DuBoise, the Florida Supreme Court set a standard that is that the defendant must be a major participant in the felony committed combined with reckless indifference to human life. See also Tyson v. Arizona, 107 S.Ct.

1676 (1987); Cooper v. State, 581 So.2d 49 (Fla. 1991). Here, it is clear that Craig's testimony is more credible than that of Schmidt. Additionally, it is undisputed at trial that Craig was not the one whose bullet actually killed the victim. Clearly, Craig had no contact with the killing of Eubanks. The medical examiner testified that Craig's bullet did not kill Farmer. This factor is undisputed and should be considered by the court. See Nibert v. State, supra. See also the argument concerning under the substantial domination of another.

D. Statutory Aggravating Factors

1. Previous conviction of a prior violent felony.

As already argued in Point IV, supra, the court should be preclude from finding this aggravating factor for the Eubanks killing when it was not initially found in the original sentencing proceeding. Additionally, the killing of Eubanks should not be applied to the defendant as an aggravator for the Farmer killing since, as discussed in detail throughout this brief, the defendant had only a limited role in the killing of Eubanks. Hallman v. State, 560 So.2d 223 (Fla. 1990). Moreover, it is illogical and fundamentally unfair to allow each contemporaneous murder conviction to be an aggravator of the other.

Although this Court has recognized that contemporaneous convictions prior to sentencing can qualify for this factor, see King v. State, 390 So.2d 315 (Fla. 1980), this Court has placed a

limitation on said finding. In Wasko v. State, 505 So.2d 1314, 1317-1318 (Fla. 1987), this Court adopted a new policy that if there is but one incident and one victim, then contemporaneous crimes cannot be used as a prior violent felony. The appellant submits that the Wasko decision does not go far enough. Contemporaneous convictions arising out of a single incident should not be permitted to be considered regardless of the number of victims. The rationale of Wasko seems to be that contemporaneous convictions should not be used if the incidents are not separated in time, but are rather a single incident; it makes no sense for this rationale to require only a single victim. "Prior" means "prior," not "different victims even though at the same time." See also State v. Barnes, 595 So.2d 22, 25 (Fla. 1992) (Kogan, Barkett, JJ. concurring), wherein the Supreme Court allowed for habitual offender status to be found based on multiple convictions which were imposed on the same day. However, the concurring opinion notes that it believes this holding to be true only if the "prior convictions" arose out of separate incidents and not out of a single incident. That same rationale should apply here -- multiple episodes equals prior convictions for violent felonies; a single incident (whether or not there is one victim or many) does not equate with "prior" convictions for violent felonies.

2. The murders were committed to avoid a lawful arrest.

As argued in Point IV, supra, this factor too should be

stricken since it was not found by the judge in the initial sentencing proceeding and no new evidence was adduced by the state to prove it. Additionally, this factor is not supported by the evidence. In order to be found, it must be shown beyond a reasonable doubt that the dominant or sole motive of the killing was to avoid apprehension. Green v. State, 583 So.2d 647 (Fla. 1991); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978) ("the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.")

Merely because the robbery victim knows the defendant does not establish this dominant motive requirement. Bruno v. State, 574 So.2d 76 (Fla. 1991); Caruthers v. State, supra. Such was the only competent evidence presented here. The only other evidence presented as to this factor comes from the co-defendant Schmidt, whose testimony is not credible (as has been explained in detail previously in this brief). If the defendant 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. Additionally, the killing of Eubanks was accomplished by the co-defendant. (See additionally argument contained in mitigation portion of brief dealing with under the domination of another and that the killing was accomplished by another.) Moreover, the defendant had no such motive for killing Farmer, who was not aware of the cattle thefts when he arrived on the

scene.

This Court has also ruled that it that it is inconsistent to find both this factor (on the ground that the defendant decided only on the spot to kill after the decedent caught him and knew who he was) and cold, calculated, and premeditated (on the ground that the defendant had for some length of time decided to kill the decedent). Derrick v. State, 581 So.2d 31 (Fla. 1991). Moreover, even if this factor is applicable here, it is improper to double it with for pecuniary gain, which applies to the same aspect of the crime. Provence v. State, 337 So.2d 783 (Fla. 1976).

3. The murders were committed for pecuniary gain.

Just as the killing of Farmer was not accomplished to avoid arrest, so too was it not committed for pecuniary gain. There is simply no evidence to support any contention that the defendant got anything of monetary value from the death of Farmer. This aggravating factor is limited in its application to situations where the sole or primary motive for the killings is in order to obtain monetary gain. See Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). It applies only where the defendant receives something of value during the crime or as a direct result following the crime. McCray v. State, 416 So.2d 804 (Fla. 1982). Where the items had already been stolen prior to the killings, as here, it cannot be found. Id. Regarding the contention that the defendant wanted Eubanks out of the way so he could

have control of the ranch, is totally unsupported by competent, substantial evidence. It depends entirely upon the credibility of Schmidt's testimony regarding an ongoing scheme to kill Eubanks. As noted over and over again in this brief, Schmidt's testimony is too incredible and speculative to be the sole basis for an aggravating factor.

4. The murders were committed in a cold, calculated, and premeditated manner.

The "cold calculated" factor is only used in cases showing a careful plan or prearranged design. See Campbell v. State, supra; Rogers v. State, 511 So.2d 526 (Fla. 1987). Again, this finding is entirely dependent upon belief in Schmidt's testimony. Schmidt's testimony is not supported by the physical evidence in the record. The evidence does not establish that Craig committed murder in a cold, calculated and premeditated design. Clearly, there is not sufficient evidence to support a finding of cold and calculated unless the court takes as verbatim truth the testimony of Schmidt. Again, the physical evidence does not support the truthfulness of Schmidt's testimony. Where the record is less than conclusive as to the details of the homicides, this Court has held that it is error to find this factor. Hamilton v. State, 547 So.2d 630 (Fla. 1989).

Furthermore, the evidence which does exist, including the proffered testimony that the defendant merely reacted, rather than planned the killing, shows that there was not a prearranged plan to kill. Holton v. State, 573 So.2d 284, 292 (Fla. 1990);

Dolinsky v. State, 576 So.2d 271 (Fla. 1991). Finally, the Court has held that it is error to find this circumstance where the killing resulted merely from a chance encounter, as that occurred between the defendant and Farmer.

E. Jury Life Recommendation (Count I) And Proportionality Review.

In imposing the death sentence on Count I (Eubanks), the court rejected the jury's life recommendation, simply paying lip service to the language of Tedder v. State, 322 So.2d 908 (Fla. 1975), that "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) (R 452-453). As argued in Point V, §A, supra, this order is entirely insufficient since it does not provide reasoned judgment for justification of the override. In McCrae v. State, 582 So.2d 613 (Fla. 1991), and Buford v. State, 570 So.2d 923 (Fla. 1990), this Court reversed capital sentences which it had previously affirmed on direct appeal and which it had previously found were justified despite jury life recommendations. When those cases were sent back for consideration of new evidence, the Court ruled that its prior approval of the jury override no longer has any effect. The Court ruled that the reasonableness of the jury life recommendation would thereafter be reviewed on the basis of whether either the new or the old evidence would support the life recommendation. Id.

Reviewing the mitigating evidence presented in this

Point of the brief, as compared to the aggravating factors (which the defendant additionally submits are unsupported), clearly shows that there exists a strong basis for the jury life recommendation on the Eubanks killing. This Court is specifically referred to the mitigating portion of this brief for further argument.

These factors, both in light of the life recommendation for Count I and in light of mere proportionality review for Count II, cry out for life sentences. Compare with McCrae v. State, supra; Bedford v. State, supra; Cooper v. State, supra; Craig v. State, 585 So.2d 278 (Fla. 1991); Dolinsky v. State, supra; Douglas v. State, supra; Hegwood v. State, supra; Pentecost v. State, supra; and Smalley v. State, supra, all of which have been discussed throughout the mitigation portion of this brief.

When this court follows the formula set out in Campbell v. State, supra, it is without doubt that the only possible conclusion is that the state cannot support sentences of death. The proper mitigating factors clearly outweigh the appropriate aggravating factors, if any. The punishment must be reduced to life imprisonment on both counts.

POINT VI.

ESPINOSA V. FLORIDA REQUIRES REVERSAL OF CRAIG'S DEATH SENTENCES WITH REMAND FOR A NEW PENALTY PHASE BEFORE A NEW JURY.

At Robert Patrick Craig's 1981 trial, the court instructed the jury on the applicable law at the penalty phase. The instructions on the aggravating circumstances included:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence as to both counts:
>
> * * *
>
> 2. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel,
>
> * * *

(R1767) The above instruction was the only guidance given to the jury as to this particular aggravating circumstance. §921.141(5)(h), Fla.Stat. The jury subsequently returned with a recommendation that Craig be sentenced to death for the murder of Walton Robert Farmer and recommended a life sentence for the murder of John Smith Eubanks. (R1773-74)

For years, this Court has rejected attacks on Florida's standard jury instruction dealing with this particular aggravating circumstance. See, e.g., Smalley v. State, 546 So.2d 720, 722 (Fla. 1989). This Court has repeatedly held Maynard v. Cartwright, 486 U.S. 356 (1988), to be inapplicable to Florida's capital sentencing scheme, since the jury is not "the sentencer"

for Eighth Amendment purposes. Smalley v. State, 546 So.2d at 722.

The United States Supreme Court has recently rejected this reasoning. In Espinosa v. Florida, 51 CrL 3096 (1992), the United States Supreme Court found that a jury instruction identical to the one given to Craig's jury to be unconstitutionally vague. The instruction left the jury with insufficient guidance when to find the existence of the aggravating factor. The Court pointed out that they have held instructions more specific and elaborate than the one given in Espinosa's case unconstitutionally vague. See e.g. Shell v. Mississippi, 498 U.S. ___ (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980).

The United States Supreme Court rejected this Court's reasoning that the aforementioned cases were inapplicable to Florida's death-sentencing scheme. Citing the great deference that a Florida trial court is required to pay to a jury's sentencing recommendation[5], the United States Supreme Court held that even the indirect weighing of an invalid aggravating factor violates the Eighth Amendment. The Court held that, if a weighing state decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances. Espinosa v. Florida, 51 CrL 3096, 3097 (1992).

In Craig's initial direct appeal, this Court agreed

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[5] Tedder v. State, 322 So.2d 908 (Fla. 1975).

that neither murder was especially heinous, atrocious, or cruel.

> We agree, however, with appellant's argument that the murders were not especially heinous, atrocious, or cruel. Although fully premeditated, the murders were carried out quickly by shooting. Based on our interpretation of the statute, we find insufficient support in the evidence for the trial court's finding on this point.

Craig v. State, 510 So.2d 857, 868 (Fla. 1987). Since the jury considered an invalid aggravating circumstance in recommending the death penalty, a new penalty phase is necessary. Espinosa v. Florida, supra.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the sentences of death and, as to Points I, II, III, and VI, remand with directions to hold a new penalty phase (before a new jury as to Count II only since Count I already has a life recommendation), as to Points IV and V, remand for imposition of life sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Robert Patrick Craig, Inmate Number 083717, P.O. Box 747, Starke, FL 32091, this 20th day of July, 1992.

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CHIEF, APPELLATE DIVISION
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