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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

Point I. This point was not addressed on the merits in the appellant's petition for extraordinary writs. 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 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.

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.

The appellee contends that because this Court denied Craig's pre-resentencing petition for writ of mandamus, prohibition, or other writ, the issue presented herein and in Points II and III (as numbered by the Appellant) have already addressed **on the merits** by this Court's denial. (Appellee's brief, pp. 4-5, 9) It is well-settled, however, that a decision summarily denying a petition for an extraordinary writ is **not** a ruling on the merits, as these writs are entirely **discretionary** with the Court. Art. V., §3 (b), (7) & (8), Fla. Const.; Fla. R. App. P. 9.030 (a) (3); Dickinson v. Stone, 251 So.2d 268 (Fla. 1971); City of DeLand v. State ex rel. Watts, 423 So.2d 529 (Fla. 5th DCA 1982); Gordon v. Savage, 383 So.2d 646 (Fla. 5th DCA 1980). These writs are **extraordinary** remedies which will be granted only where irreparable damage will result which could not be corrected in the ordinary course of an appeal, and will not lie to correct mere error at the trial level. English v. McCrary, 348 So.2d 293 (Fla. 1977) (a court will not grant this interlocutory relief and will deny the petition if final review by appeal would provide an adequate remedy); Dickinson v. Stone, supra; State ex rel. Haft

v. Adams, 238 So.2d 843 (Fla. 1970). Since such review is discretionary, the denial of the petition does not become the law of the case (as erroneously argued by the appellee) and this Court should now reach the merits of these issues for the first time on this direct appeal. See also Fyman v. State, 450 So.2d 1250, 1252 n.3 (Fla. 2d DCA 1984).

The state further makes the argument that the trial judge on the remand does not have to reweigh the evidence as the original trial judge already did that and this Court already approved that weighing process. (Appellee's brief, p. 6)[1] If this is the case, then why bother with the reversal and remand? What is the purpose of the new sentencing hearing? Did not this Court in the initial appeal reverse the sentences and remand for **"reconsideration** of the sentences of death imposed in this case"? Craig v. State, 510 So.2d 857, 871 (Fla. 1987). The sentencing judge (whether he is the original judge or not) has the constitutional and statutory responsibility to consider each and every factor in mitigation and weigh those factors against the circumstances in aggravation. See, e.g., Campbell v. State, 571 So.2d 415 (Fla. 1990), and the other cases cited in the Initial brief, pp. 24-25, 48-51. Without hearing the original witnesses and evidence which established the other aggravating and mitigating

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[1]The state also claims that "every factual finding in this case has been rendered by a judge who heard the testimony resulting in it." (Appellee's brief, p. 7) This contention ignores the fact that the new judge, without hearing any additional evidence in aggravation, made new factual findings resulting in two additional aggravating circumstances. (See Initial Brief of Appellant, Point IV.)

factors, how can the new sentencing judge be in a position to adequately and accurately judge the demeanor and credibility of those witnesses and evidence? How can the new judge then adequately and accurately weigh those factors in deciding on the appropriate sentence? Failure to hear these witnesses and provide an adequate weighing process renders the sentences here arbitrary and capricious and denies the defendant due process of law. Amend. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, 17, Fla. Const.

Contrary to the state's summary dismissal of Corbett v. State, 17 FLW S355 (Fla. June 11, 1992), as being factually dissimilar (merely because the substitute judge occurred earlier in the process), this Court held in that case that the **sentencing** judge has the single most important job in the capital punishment process, that the **sentencing** judge may not impose a death sentence without articulating his or her reasons for imposing the ultimate punishment, and that the **sentencing** judge has the "unique responsibilities" for "**independent** evaluations and written factual findings concerning aggravating and mitigating circumstances in imposing the death sentence." Corbett v. State, 17 FLW at S357. The **sentencing** judge here is not the original trial judge, but rather Judge Briggs, the substitute judge who has not personally heard the evidence.

The appellee says that simply because **a judge** once upon a time heard some live testimony and weighed some factors (although not all that he should have), and came to a particular

conclusion, the judge who is now dispensing the defendant's death sentences does not have that same "unique responsibility" in making "independent evaluations" and imposing and explaining his completely new capital decisions. The state claims that the new capital sentencer can blindly rely on the cold record and the stale, incomplete factual findings of a previous adjudicator in performing his fresh weighing process. This is not what Corbett conveys; this is not what the constitution demands. The actual sentencer (in this case the new, substitute judge) **must** have personally heard and viewed all of the testimony and evidence before he or she can make the ultimate finding of death. "[F]airness 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." Corbett v. State, 17 FLW at S357. The death sentences, having been unconstitutionally imposed, must be vacated.

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 state, in several places throughout its brief, argues that the matters of sentencing, including finding of aggravating and mitigating factors, overriding the jury recommendation of life, and the weighing process, have already been decided by the first judge and "this court already stated that it found both sentences of death to be appropriate under the law." (Appellee's brief, p. 17; see also Appellee's brief, pp. 8, 18, 20, 24, 26, 28, 31, 32, 34, 35) If this is the case, if the death sentences were already approved by the initial direct appeal, then what was the purpose for the remand? What was the point of spending tens of thousands of dollars and thousands of working hours on the resentencing if it was already preordained on resentencing the death sentence was mandated? Was the whole resentencing process a charade? Of course not.

This is not the law. This is not what this Court has specifically held in appeals from resentencings where the trial court was commanded to reconsider the sentences in light of some legal error or exclusion of evidence. As stated in the initial

brief, 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 had any effect. Additionally, as also argued in the initial brief, and apparently not contested by the state, this Court has held that even though aggravating and mitigating factors were approved or disapproved by this Court in an initial direct appeal, the trial court still must reconsider them anew at the resentencing hearing and 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, including proportionality review. 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. The prior fact-finding and weighing process by the original trial judge, and the prior direct appeal reviewing the **original** weighing process, are extraneous to this resentencing process wherein the new judge is making his own findings of fact and reweighing the evidence [especially if this

Court, as it did in Preston v. State, 17 FLW S242 (Fla. April 16, 1992), rejects the issue in Point IV of the Initial brief and finds that the trial court is writing on a "clean slate"]. Otherwise, if, as stated by the appellee, this Court has already determined that "both sentences of death [are] appropriate under the law" (Appellee's brief, p. 17), then this whole resentencing process, including this appeal, is meaningless.

In its brief, the state also contends that any resolution of factual conflicts in making the capital sentencing determination is solely the responsibility of the trial judge and cannot be overturned on appeal by this Court. (Appellee's brief, p. 19) This statement of law, however, assumes that the sentencing judge was in a position to adequately weigh the testimony by judging the demeanor of the witnesses and their attendant credibility. Where, as here, the substitute sentencing judge did not actual view this testimony (and would not even allow it to be proffered by live witnesses), but merely relied on the same cold record before this Court, his factual findings (and the weight he gave them) should have no more favored status that the abilities of the Justices of this Court to independently weigh the testimony from the same record.

Regarding the new finding by the new trial court that the murder of Farmer would suffice as the aggravating factor of a prior violent felony conviction for sentencing as to the murder of Eubanks, the state argues that just as the Eubanks murder was a previous conviction to the Farmer murder, so should the Farmer

murder be a previous conviction to the Eubanks murder. (Appellee's brief, pp. 19-20) This clearly shows the faultiness of the state's logic; how can both murder convictions be previous to each other? One must be first and the other subsequent. These factors cannot simply be multiplied to be present for each murder; if it can be found to apply in this case, it can only apply to one of the crimes. (See, additionally, Initial brief, pp. 81-82)

Regarding the feelings of Sheriff Adams contained in the pre-sentence investigation referred to in the initial brief, at pages 53-54, and the state's response at page 29 of the appellee's brief, the appellant believes that the state has misinterpreted the section of the PSI cited in the brief. The appellant interprets the language concerning Adams' statement "speaking of co-defendant Schmidt" as referring to the pronoun "He" in the sentence "He was the most cold-blooded and vicious . . . ," and the language concerning that he wanted to make a statement regarding Craig as meaning that he wished to make a statement concerning Craig's sentencing (as opposed to the language therein that he had no statement concerning the investigation) and not referring to the "He" in the quote. (PR 2042) The statements of Investigator Whitaker regarding the defendant's substance abuse can be found at PR 2039 of the previous record.

Concerning the mitigating factor that the defendant is a great prospect for rehabilitation, the appellant submits that in no other case has this Court seen the multitude of testimony,

including that of correctional officers, supporting this factor, which should account for great weight to be given to this factor. Additionally, the state, in discounting this factor, says that "[e]ven if Craig receives two life sentences he would not be eligible for parole for fifty more years, which would put him into his seventies." (Appellee's brief, p. 34) This fact can and should additionally mitigate the sentence in favor of life, as it was held relevant to the sentencing decision in Jones v. State, 569 So.2d 1234, 1239-1140 (Fla. 1990).

The state also contends that "because each case is unique," this Court's decisions in other similar cases apparently should have no meaning in the review of this "unique" case. (Appellee's brief, p. 27) This argument ignores the fact that this Court is charged with the duty to review "each sentence of death issued in this state," Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), and to determine whether all of the circumstances of the case at hand **"warrant** the imposition of our harshest penalty." Fitzpatrick v. State, supra at 812. To hold otherwise, as the state would have this Court do, the legal precedent of this Court regarding aggravating and mitigating factors would have absolutely no meaning and the trial court, and this Court in later cases, would be free to ignore that precedent.

This case represents one of the least aggravated and

most mitigated of death sentences ever to reach this Court for review. Although all first degree murders are a tragedy and regrettable, the sanction of death is reserved for the most aggravated and unmitigated of crimes. State v. Dixon, supra at 17. The "high degree of certainty in . . . substantive proportionality [which] must be maintained in order to insure that the death penalty is administered evenhandedly," Fitzpatrick, supra at 811, is missing in this case, and the death sentences are plainly inappropriate, especially in view of the extensive mitigation surrounding the defendant (both heard by the trial courts and proffered by the defendant). The proper mitigating factors clearly outweigh the appropriate aggravating factors, if any. The punishment must be reduced to life imprisonment on both counts.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the initial brief, 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 12th day of October, 1992.

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