IN THE SUPREME COURT OF FLORIDA

ROBERT PATRICK CRAIG,

Appellant,

v. CASE NO. 82,642

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee takes issue with appellant's argumentative statement in his first paragraph of the statement of the case that the killing of John Eubanks was "perpetrated" by the co-defendant, Robert Schmidt, and to appellant's later reference to Schmidt as one "whom the defense claims was the leading force in the crimes and whose shots killed both men." Initial Brief of Appellant p. 1 and 6. Appellant fails to point out that this court has previously found that Robert Craig's legal responsibility for the murder of Eubanks was not secondary to but was fully equal to that of Schmidt and noted that there was evidence to show that Craig was the planner and instigator of both murders and was the prime mover with regard to the murder of Eubanks. Craig v. State, 510 So. 2d 857, 870 (Fla. 1987). That Craig may now claim that Schmidt was the leading force in the crimes cannot overcome the fact that the jury believed Schmidt's account of the crimes as disclosed in the guilt phase and that the convictions in this case were affirmed by this court in Craig I, supra.

During the penalty phase Robert Schmidt testified as to his and Craig's involvement in the murder. He testified that he was arrested and charged with two counts of first degree murder and was indicted by a grand jury on those charges. He pled guilty to two counts of second degree murder pursuant to a plea bargain in which he was to give truthful testimony regarding the murders of John Smith Eubanks and Robert Walton Farmer. He received consecutive life sentences (T 471). Schmidt indicated he had

previously given truthful testimony and had testified truthfully during the new penalty phase to the best of his knowledge and recall. Schmidt indicated he was eligible for parole in March, 1995. Schmidt acknowledged that the prosecutor had appeared at his last three parole hearings (T 471). Schmidt testified that the prosecutor had successfully stopped his parole and had given him no reason to believe that the State Attorney's office would not continue to make every effort to block his parole. Schmidt indicated the prosecutor had told his attorney he would continue to stop his parole the best that he could. Schmidt indicated he did not expect any further benefit for testifying in the penalty phase (T 472).

STATEMENT OF THE FACTS

The evidence at trial established the following facts, relied upon and recounted by this court in affirming the convictions. John Eubanks employed Craig as manager of a cattle ranch in Lake County. Craig lived at the ranch in a mobile home provided by Eubanks, the owner. Craig hired Robert Schmidt as a helper. Schmidt soon learned that Craig was regularly stealing cattle and selling them. Soon Schmidt began regularly helping Craig transport stolen cattle to market and getting a share of the proceeds. Several months after Schmidt was hired at the ranch, Craig discussed with him the possibility of killing Eubanks. According to Schmidt's testimony at trial, Craig wanted to kill Eubanks because he believed Eubanks' death would enable him to obtain control over the assets of the ranch. There was testimony that Eubanks had been aware of losses of cattle at the

ranch and suspected that Craig was responsible. On the morning of July 21, 1981, Craig and Schmidt returned to the ranch after having sold some cattle at a local market. Eubanks was there indicating that he wanted to inspect the premises and count his cattle. Early that afternoon Walton Farmer arrived at the ranch to meet Eubanks. The evidence showed that the purpose of the meeting was to discuss Farmer's being hired to replace Craig as ranch manager. Schmidt testified at trial that as the four men then proceeded to move about the ranch looking for cattle, Craig told him that Eubanks had figured out that his cattle were being stolen. According to Schmidt's testimony, Craig said that Eubanks and Farmer would have to be killed or else Craig and Schmidt would go to prison. As the four men entered a wooded area looking for signs of cattle, they separated into two pairs, with Craig accompanying Farmer while Schmidt stayed by Eubanks. Schmidt testified that when he heard gunshots from the area where Craig and Farmer were, he, Schmidt, shot Eubanks twice in the back of the head. Then Schmidt responded to Craig's call for assistance and saw Farmer on the ground covered with blood. Craig told Schmidt to shoot Farmer as he was not yet dead. Schmidt did as he was told. Craig and Schmidt then took the victims' cars to nearby towns and left them. That night, they disposed of the bodies in a deep sinkhole, weighting down the bodies with concrete blocks. Craig v. State, 510 So. 2d 857, 859-60 (Fla. 1987). These facts are no less res judicata just because Craig did not get to put on evidence in the penalty phase of good behavior while incarcerated, and a new jury ultimately

was impaneled to recommend a sentence for Farmer's murder. The new jury recommended that Craig be sentenced to death for the murder of Farmer, resolving, again, any conflict in evidence in a manner consistent with the trial evidence. In recounting the facts of the case appellant has neglected to set them out in the light most favorable to the prevailing party.

At the new penalty phase hearing Investigator Whitaker of the Lake County Sheriff's Office testified that Police Chief Johnson of the Webster Police Department found that cattle had been sold at auction by Robert Craig and Robert Schmidt. Cattle had also been sold at the Center Hill Meat Packing Plant, Martin Cattle Market in Ocala and a cow had been traded for items from a pawn shop (T 358-359). Craig had been hired by Eubanks on September 4, 1980 (T 372). Schmidt was first paid to work on the ranch February 2, 1981 (T 374). Testimony and exhibits reflect the following series of transactions (T 711).

Date	No of Head Sold	Payment	Payee	Payor
1/27/81	4	$1,271.58	Craig	Sumter Co. Farmers Mkt(T 396-398)
3/5/81	6	1,415.17	Craig	Mills Auction Market (T 407-408)
4/16/81	4	624.00	Craig	Mills Auction Market (T 409)
5/4/81	2	422.42	Craig	Central Packing Co. (T 432-433)
5/5/81	6	961.93	Craig	Sumter Co. Farmers Market (T 398)
5/16/81	9	1,158.25	Craig	L.Wallace Cobb (T 419)
5/25/81	3	956.20	Schmidt	L.Wallace Cobb (T 421)
6/2/81	9	2,138.19	Craig	Sumter Co. Farmers Mkt (T 399-400)
6/9/81	5	1,074.81	Schmidt	Sumter Co. Farmers Mkt (T 400-403)
6/26/81	5	1,588.95	Schmidt	L.Wallace Cobb (T 420)
7/2/81	18	3,795.92	Craig	Mills Auction Mkt (T 410)
7/9/81	7	1,213.82	Craig	Mills Auction Mkt (T 411)
7/21/81	9	2,047.75	Schmidt	Sumter Co. Farmers Mkt (T 403)

The checks made out to Schmidt were endorsed by both Schmidt and Craig (T 400-403).

Schmidt testified at the new penalty phase hearing that he met Craig in September 1980, at a bowling alley in Leesburg. Craig was shooting pool with his wife. Craig told him he was a ranch foreman for a big ranch. Craig gave him his phone number and told him to get in touch when he came up for bird hunting on the property (T 440-441). Schmidt moved to Sumter County with his family and wife in 1981 (T 439). He contacted Craig. After a while he went to work at Eubanks' ranch digging post holes, spraying cattle for flies, worming cows and stringing fence. It was not a full time job at first and he still laid carpet on and off (T 441-442). Schmidt found out Craig was taking cattle off the ranch and selling them. Schmidt was doing badly. He subsequently helped Craig pen some up and they were sold at a farmer's market. Some were hauled in the four-horse white trailer (T 443-444). Some were hauled by L. T. Manning Live Stock Hauling. Manning hauled cattle approximately five times in 1981. Craig dealt with them and requested they pick up the cattle in the early morning, sometimes at the break of dawn. Loads were taken to the Mills Auction Market in Ocala. There were closer auction houses (T 435-437). Schmidt indicated he had helped Craig steal cattle between five and seven times. They were taken to markets as far away as Webster and Gainesville (T 495). Some of the cattle were sold under Schmidt's name but Craig decided how the money would be split. They cashed the checks. Craig got two-thirds of the share because of his responsibility at the ranch. Schmidt would get a third (T 446). Schmidt recounted one occasion where he had penned up cattle with

Craig. Craig called him and told Schmidt that he had released them because Eubanks had come out and wanted to know why the cows were penned up. Craig told Eubanks they were penned up to be sprayed for flies. The next morning Schmidt saw a trailer there and Craig and the hauling company were loading cows (T 448). On another occasion Schmidt helped deliver cattle to the auction house but was later told by Craig he had picked them up and they hadn't been sold (T 448).

Five or six weeks before the murders, Craig talked to Schmidt about killing Eubanks to confuse Mrs. Eubanks, who didn't know anything about ranching, into turning over all the responsibility for the cows to Craig. Craig would kill Eubanks. They would drive the car to Miami. They would back each other's alibi that they were together and hadn't seen Eubanks (T 449). They would dump Eubanks' body in a sink hole (T 466). On May 23, 1981, John Vernon of Nordic Pawn and Sports in Wildwood traded Craig two guns for a cow (T 498).

Eubanks kept a running inventory of the number of cattle on the ranch. Once a month Craig would report how many cows had died and how many calves had been born and died (T 375). In the middle of July 1981, Eubanks requested a total count of the cattle. He told his assistant that when Craig called in not to let him know the total they had at the office and if there was a difference in figures to ask Craig to do a count again. The inventory was unusual. Craig called the first time and said there were three hundred and sixty-seven animals. When told there was a significant difference in totals, Craig said perhaps

some cattle had wandered into another pasture. Craig called in a second figure of four hundred and two animals on July 15, 1981. Eubanks' figure was thirty to forty animals more (T 375-377). On July 14, 1981, Craig bought a .357 magnum Smith & Wesson from Nordic Pawn and Sports (T 500). On July 17, 1981, William Nelson, who helped Eubanks manage the ranch, rode the farm in a vehicle with Eubanks. Eubanks was counting cattle. There appeared to be some missing (T 390). On July 18th, Craig bought a box of .357 magnum shells at the Nordic Sports Shop in Wildwood (T 494-496). The weekend before his murder Eubanks told Nelson he intended to hire Robert Farmer as ranch manager in place of Craig (T 392).

Schmidt further testified that on July 20, 1981, they ran about forty cattle into the pens and picked out eight or nine good head. They took them to the market in Webster the morning of the 21st. When they returned to the ranch there was a strange vehicle by the holding pens. They unhooked the trailer. They located Eubanks and another person in the fields. Eubanks wanted to count cows (T 450-51). Craig and Eubanks counted. Schmidt counted ones that crossed into fields so they wouldn't get double counted. A couple of hours later Eubanks told Craig the count was short of about one hundred cattle. Schmidt told Craig there was no way they were short a hundred as they had only taken forty or fifty. Craig didn't say anything. They discussed the fact that Eubanks knew they were stealing cows. Eubanks wanted to walk back acreage looking for signs of cows or fresh manure. Craig was to go with Eubanks (T 452). Schmidt went to the

trailer to get a drink of water and tell Jane Craig they would be in for lunch in a little bit. He was to meet them on the other side of Clear Lake (T 452). On the way to the trailer he met up with Bobby Farmer in a brown CJ5 Jeep. He pulled over and Farmer introduced himself. Farmer followed him to the trailer where Schmidt picked him up and took him to where Eubanks and Craig were on the other side of Clear Lake. Farmer and Eubanks then rode together in the jeep. Craig got in the truck with Schmidt. Craig told Schmidt they both knew and they couldn't let them leave the ranch (T 453). Schmidt suggested they wait to see what Eubanks was going to do since it was possible he might only fire them. Craig responded that they would do twenty-five to thirty years in prison for grand theft of cattle. Farmer and Eubanks went around the back of the ranch. When Craig and Schmidt got to the trailer Craig told Schmidt to get his pistol. Schmidt had a .357 Wesson magnum under the seat of his truck. Schmidt told Craig he only had two or three shells in it (T 454). Craig gave Schmidt some shells from a box he had. Schmidt had five rounds in his pistol, as he always kept one empty chamber. Craig loaded his gun the same way. Craig told Schmidt they couldn't let them leave the farm (T 455). Schmidt told him to wait and see what they would do. Craig responded "No, we're going to end up doing twenty, twenty-five years in prison for this." Craig said they would go around to the back, tell them there was fresh cow manure and tracks back there and lure them into the hammock and kill them. Craig went in the trailer and got his .357 magnum Smith & Wesson and carried it in a hip holster. Schmidt carried his in a

shoulder holster. They went to a thick hammock outside the barb wire fence in the back section of the ranch. They heard the jeep and yelled at Farmer to pull over, that there was fresh manure and tracks inside the hammock (T 456). They followed them into the hammock. They walked around a little bit with their heads down looking like they were looking for tracks. John Eubanks kicked the old cow manure and said "This is a bunch of bull shit, let's go." Farmer headed back out in the other direction where the jeep was. Craig went behind him. Schmidt followed Eubanks out of the hammock. At the perimeter road Craig yelled at him "Hey, Bob" (T 457). Schmidt responded "What, Bob?" Schmidt heard two shots from inside the hammock. Schmidt drew his gun and shot Eubanks in the head once. He shot again before Eubanks fell. He had killed Eubanks. In between his two shots he heard three shots. He heard a total of five shots from inside the hammock. Schmidt grabbed Eubanks by the ankles and dragged him into the bushes. He grabbed his hat and glasses and put them by a tree. Craig was yelling to him "Where you at?" Schmidt ran up and down the hammock trying to find the spot he had come out (T 458). He saw Farmer laying on the ground at Craig's feet. He was not moving or breathing and had been shot all over. He appeared dead. Craig hugged Schmidt and told him everything was going to be alright. He said he couldn't tell if Farmer was dead because his hat got in his way. He couldn't tell to shoot him in the head (T 459). Craig kicked Farmer's hat off and told Schmidt to shoot him. Schmidt shot him once. There was no reaction. Farmer had been shot to pieces. He was laying face down (T 460).

Craig hugged him again and told him everything was going to be fine. Craig wanted to know if he thought Eubanks was dead. Schmidt was certain of it and told him he was dead. They gathered up Farmer's hat. Craig went into Eubanks' pocket and got his wallet, took the money out of it and put it back. Craig told him Farmer didn't have anything on him. Craig told Schmidt to get in the jeep and drive it to the blinking light on 27 and he would meet him there after he got some gas in the Ford pickup (T 461). He drove to the light. Craig followed in the pickup to Clermont. Schmidt parked the jeep in front of a restaurant near a citrus tower. The key wouldn't come out of the ignition so he left it there. He got in the pickup and they drove back to the ranch (T 462). Farmer's jeep was ultimately found at the 8 Hotel on highway 27 in Clermont (T 349). They drove to Eubanks' car (T 462). Craig got the keys out of the ignition and opened the trunk. He wanted a .16 gauge Browning shotgun that Eubanks owned but it wasn't in the trunk. Craig handed Schmidt the keys and said "We'll take this one the other way." Schmidt was wearing gloves. They went north on 27 to Belleview to a Winn Dixie or Publix. Schmidt got back in the truck and they went back to the ranch (T 463). Craig told Schmidt to look around his place for bricks and things to tie the bodies down and they would take them to a sink hole. Schmidt went home and looked around. First they wrapped the bodies up in a hunting blanket Schmidt had behind his seat and collected the personal things and put them in a feed bag.

A little before dinner time Schmidt returned to the ranch (T 464). He brought his wife with him. He informed Craig he didn't have any blocks and couldn't take his barbecue grill apart because he had cemented it together. Craig had told Schmidt to wear old clothes he could throw away. Schmidt brought his camouflage outfit, rolled up. Schmidt's wife went shopping with Jane Craig. Schmidt got in the tan Ford. There were bricks, a lasso, and bolt cutters in the back. Craig wanted to use board from the barn to cover the bodies then put in bales of hay in case they got pulled over. They got board from the barn and put it on the truck with some hay. They went back out to the bodies and tied their feet together and loaded Farmer first, then Eubanks into the truck (T 465). They put board on top of them, then bales of hay and drove over to Wall Sink. They had hunted there (T 466). Craig cut the gate with bolt cutters. They drove to the first fence (T 466). They pulled the planks down, cut the barbed wire and drove to the sink hole. They brought the blocks and rope to the hole. They carried Farmer, who was bigger, to within eight or ten feet of the hole. They went back and got Eubanks. Schmidt picked each body up and Craig placed a block and a half on their backs, ran rope around and tied the blocks on the bodies. There was an area where rainwater had created a slide into the sink hole and Schmidt grabbed a tree while they grabbed each body by the waistline and slid it into the sinkhole (T 467). They went back to the holding pen area (T 467). They washed blood off their hands, the tailgate and tag. They drove a mile or two up the road and got out of their clothes. Schmidt

put his hunting outfit on. They drove to Okahumpka and put their clothes in a dumpster under boxes and trash near a little store on the corner (T 468).

Craig picked Schmidt up the next morning and they went to the market in Webster and picked up a check for the nine head of cattle (T 468). Craig told him that twenty five to thirty people had shown up at the ranch the evening before and searched the grounds. Craig said he had them all completely fooled and they were going to come out and go bird hunting with him (T 471). Farmer had been reported missing by his family on July 21, 1981, and was last known to be at Eubanks' ranch. The ranch was searched into the early morning of the 22nd. Members of Farmer's family located a patch of blood in the hammock (T 331-353). Craig and Schmidt next went to the Nordic Pawn Shop as Craig wanted to change the rear tires on the truck so they wouldn't match any tracks at the back of the ranch. He thought the back tires would cover up the front tire tracks as they were driving (T 469). They picked out two mismatched tires and told them they would pay for them as soon as the bank opened. They went to the car wash and sprayed down the back, sides, and underneath where there might be particles of dirt or blood (T 469). They cashed the check, along with Schmidt's payroll check when the bank opened and split the money. They then went to the pawn shop and Craig bought the two tires (T 501). He had the tires changed for five or seven dollars at a small gas station where the turnpike comes off in Wildwood (T 470).

On cross-examination Schmidt indicated that in a fit of anger the night they were arrested he made statements that he would like to inflict physical harm on Craig (T 478). He and Craig both routinely carried guns on the ranch because wild dogs were pulling calves down (T 481). Craig didn't have a lot of guns when Schmidt first met him (T 489). Craig had a .308 British Infield and a small pistol (T 486). Schmidt considered himself a leader only as far as business concerns since he had helpers and employees (T 490). He looked up to Craig who was always his leader (T 490). Schmidt had never been a follower except for this one time (T 491).

The Lake County Sheriff's department found a large spot of blood fifteen to twenty yards into the hammock in a wooded palmetto area. Spots trailed into the field or roadway. There were particles of blue, white, and red fiber. Brush was broken. It appeared that something was dragged from the large area of blood to the opening or roadway. They went back and searched the area with a metal detector and fifteen to twenty feet in found a projectile with hair and matter attached in two inches of sand (T 356). Items of evidence were gathered from the drain at the car wash in Wildwood (T 357). Eubanks' vehicle was recovered from the Winn Dixie parking lot (T 358). The bodies of Farmer and Eubanks were found at Wall Sink off highway 470 at the bottom of the sink hole. The sink hole was thirty feet deep. It was sixty feet from the top of the bank to the water. There were drag marks. There were blue, white and red fibers on broken twigs. Slide marks at the edge of the sink hole indicated something had

been dropped or slid off into the water (T 359-3600. Sheriff's divers could not recover the bodies because of the darkness and depth of water. A U.S. Navy dive team assisted and recovered the two bodies. Farmer was dressed in a western type shirt, blue jeans, boots, and a blue, red and white horse blanket was wrapped around his body, tied with a lariat rope which secured three or four cement blocks to his body. Similar type western blankets and cement blocks were located in the barn at the ranch (T 362-364). Bullet fragments were recovered from the bodies. Craig's weapon was recovered from his residence and sent to the FDLE lab. Schmidt's pistol was recovered from the Lake Yale boat landing some miles outside Eustis on highway 452. Schmidt's mother directed the authorities to the landing. The gun had been in the lake for quite some time. Schmidt's wife was initially charged because she helped her husband conceal the weapon (T 364-369). A count of cattle was done on August 7th and three hundred and seven animals were counted, about one hundred less than Craig had reported and Eubanks' records showed (T 378). Telephone records reflected out of town calls made from the ranch to packing companies, farmer's markets and hauling companies. On March 4th there was a call to Manning Hauling in Ocala; on May 4th to Center Hill Packing Company in Bushnell; and on June 2, 1981, to Sumter County Farmer's Market (T 379-380).

At the time of the murders in July 1981, Robert Schmidt was only twenty years old (T 439). Craig told Schmidt he was twenty-seven years old (T 442). Craig testified, however, that he was twenty-three (T 670).

Although the medical examiner testified that the cause of Farmer's death was the shot to the head, he further opined that Farmer would have died from the other five wounds to his body if left in a remote area unattended (T 533).

On cross-examination Craig's father testified that Craig did not have severe mental or emotional problems growing up, knew what he was doing and understood the consequences of his actions (T 583). His mother testified that growing up Craig never got into any serious trouble, went to school every day and had friends (T 585-586). None of the people he encountered led him astray (T 586). Craig's younger brother, who grew up in the same household, became a dentist. Craig's father was an ambitious man who was self-employed (T 594). The penalty phase witnesses who testified to Craig's nonviolent nature, his good deeds and the fact they didn't know him to own firearms or hunt were largely immediate family members, or Craig's in-laws, the Moodys. It was Jane Craig's brother Don who supposedly saw Robert Schmidt say "Got you" to Craig as he finished testifying at trial (T 609). Schmidt had already been taken back to Tampa when Don Moody testified to that (T 608). It was to Moody Craig supposedly said he didn't want to hunt, didn't like guns and the thought of killing an animal made him sick. The statement was made in the fall of 1980, only months before he fired five shots into Farmer's back (T 610).

Former death row guard Clyde Blevins who testified as to Craig's good behavior on death row was only a relief officer who only saw Craig about twice a week and wasn't even permanently

assigned to the wing (T 622-623). Three of those years he had the midnight shift when prisoners were asleep (T 627).

It was Jane Craig's sister, who was a buddy to Craig, who testified that on the occasions she saw Schmidt he talked about guns and killing Afro-Americans (T 643). She also felt he was a braggart, though (T 642). She also never heard Schmidt give Craig any orders (T 643).

There was testimony in the penalty phase that Craig never had disputes or problems with other prisoners at the Lake County Jail. It was revealed, however that Craig was in an isolated cell (T 648; 650).

It was Robert Craig, himself, who testified about Schmidt's supposed lesser attributes, such as he was aggressive, a braggart, and talked about killing black people. It was also Craig who testified that he looked up to Schmidt, as he knew a lot about guns (T 676). Craig bought his first gun, a .22 RG in Leesburg for protection for his wife who was at the trailer by herself all the time. Craig then became interested in guns (T 677). Craig testified that he used cocaine when he lived at the ranch. He claimed he started taking Eubanks' cattle to provide his wife with the things he felt she should have. He claimed he felt ashamed. He and John Eubanks became friends and he had betrayed John (T 680). Craig claimed he and Schmidt divided the money fifty-fifty (T 680).

On cross-examination Craig testified that before he moved to Lake County he would go to parties on weekends and use cocaine. When he moved to Lake County it is possible he used it

more regularly. No one led him into doing that. It was his own decision (T 704-705). Aside from the things he wanted to provide for his wife, Craig also wanted a new boat and a new motor for the boat. It wasn't until July 21st that he really felt ashamed of having stolen from Eubanks (T 706). When Eubanks counted the cows on July 21st Craig knew they would be short because he had stolen them. He presumed Eubanks knew they were short. Craig, however claimed not to have been worried that Eubanks would find out he had stolen them (T 709). He didn't think about his job being in jeopardy (T 710). Although Schmidt came behind him shooting in his general direction he pointed his gun away from the person shooting at him and shot at an unarmed man, Farmer. Craig believed he shot three times. He did not know why when his gun was found it had five empty cartridge casings in it (T 721).

Pastor William D. Bell has been involved in prison ministries (T 758). The Moodys were members of his church. He has only visited Craig twice over a period of six years (T 759).

Dr. Krop testified that he did not see any evidence of any type of organic brian damage or neuropsychological deficits in Craig (T 776). There was no evidence of any kind of mental illness or any type of personality disorder, including antisocial personality disorder (T 777). Dr. Krop did not testify that Craig now had a mental age of between sixteen and eighteen. He testified that Craig's chronological age at the time of the murder was twenty-two or twenty-three, but his mental age at that time, based on overall I.Q., was somewhere between sixteen and eighteen (T 781). On cross-examination Dr. Krop testified that

it was close to ten years before he became involved in the case (T 782). Craig's I.Q., is low average but within the normal range. He has no psychological problems of any sort. He is articulate and has good verbal skills. He is able to govern his conduct to comport with the rules of society (T 783).

SUMMARY OF THE ARGUMENT

APPEAL

I. The jury was not misled as to the degree of favorableness of the co-perpetrator's plea and actual sentences served in exchange for his testimony by virtue of not being informed of the fact that Schmidt was on work release where the jury knew that Schmidt had come up for parole several times in the past, was due to become parole-eligible again in March, 1995, and was likely to be granted parole at some time in the not too distant future. There was no disparity of treatment received by an accomplice as Craig was the prime mover in the murders of Eubanks and Farmer. The prosecutor did not conceal the fact that Schmidt was on work release and such knowledge was available to the defense as well. The prosecutor did not argue to the jury that Schmidt would not be getting out of prison any time soon. There was no Giglio v. United States, violation since Schmidt never made material false statements and appellant has failed to demonstrate that with knowledge of work release the outcome of the proceedings would have been different.

II. The trial court did not err in admitting into evidence the fact of Craig's cattle-theft scheme as such testimony was relevant to the jury's consideration of the aggravating factors of pecuniary gain and cold, calculated and premeditated murder in their consideration of an advisory sentencing verdict for the murder of Walton Farmer. The fact that nothing was taken from Farmer is hardly controlling. When Farmer appeared as a candidate at the ranch to replace Craig the success of Craig's

cattle-theft scheme required his elimination also. Craig had been preparing for some time for the murder of Eubanks and anyone who may have accompanied Eubanks to the ranch. Craig exhibited heightened premeditation as to the murder of Farmer by concocting a scheme to lure him, as well, as Eubanks to a hammock so that he could shoot him.

III. The sentencing court properly permitted the state to introduce into evidence hearsay testimony that the victim, John Eubanks, had told a business associate that he intended to replace Craig as the foreman of the ranch. Such evidence was relevant to explain Farmer's actual presence at the ranch on the day of the murders and to show that Eubanks acted upon his intent to replace Craig. Such evidence is admissible as a hearsay exception pursuant to section 90.803(3), Florida Statutes (1993).

IV. The trial court gave the standard jury instruction on nonstatutory mitigation and was not required to list the nonstatutory mitigating circumstances in its instructions to the jury.

V. The trial court did not err in finding the statutory aggravating circumstances of a previous conviction for the killing of Robert Farmer and that the murder of Eubanks was committed to avoid a lawful arrest at resentencing which had not been found by the prior sentencing judges. This court directed that a complete new sentencing proceeding should be conducted before a jury and at that point in time the penalty phase proceedings began with a clean slate. A sentencing judge's finding of any particular aggravating factor does not convict a

defendant by requiring the death penalty. Failing to find such factor also does not act as an acquittal, for double jeopardy purposes. Double jeopardy did not bar reimposing Craig's death sentence at the second sentencing proceeding.

VI. The trial court properly found aggravating factors. The killing of Eubanks was properly applied to Craig as an aggravator for the killing of Farmer as contemporaneous convictions prior to sentencing can qualify for this factor. The aggravating factor that the murders were committed to avoid a lawful arrest was properly found by the trial court as Craig was aware that Eubanks knew of his cattle-theft scheme. He was also aware that Eubanks almost always brought people with him to the ranch when he arrived. The dominant motive for the murder of Eubanks was to avoid or prevent the arrest of Craig and Schmidt. The dominant motive for the murder of Farmer was to eliminate any witness both as to the cattle thefts and as to the murder of Eubanks. There is no inconsistency in finding both the avoiding arrest and the cold, calculated and premeditated aggravating factors as there was no "on the spot" decision to kill. This court has approved the simultaneous finding of a murder committed for pecuniary gain and to avoid arrest. Pecuniary gain was a considerable factor in the plot to eliminate Farmer on the day of the murders. Farmer's death, as well as Eubanks', was for the purpose of allowing Craig to continue to siphon off funds from the ranch. When Farmer showed up at the ranch he became every bit as big an impediment in Craig's plan as had Eubanks become as he was at the ranch either as Craig's replacement or as a confident of Eubanks and

would have the same information concerning the cattle thefts that Eubanks had. The cold, calculated and premeditated aggravating factor was properly found. Craig had contemplated, with heightened premeditation, the murder of Eubanks for quite some time. When Farmer arrived at the ranch he discussed the necessity of killing both men, ensured that Schmidt was armed to assist him, and concocted a scheme to lure the two men into a hammock where it would be easier to shoot them undetected. Craig had a careful plan or a prearranged design to kill both men. The sentencing judge considered all available mitigating evidence and the weight to be accorded each mitigator was within the trial court's discretion. No abuse of such discretion has been demonstrated by the appellant. The sentencing judge properly rejected the jury's life recommendation for the murder of Eubanks. Two aggravating factors were applicable that the jury was unaware of: the killing of Farmer, and that the murder was committed to avoid a lawful arrest. The aggravating factors so clearly and convincingly outweighed the marginal mitigation, minuscule in its entirety, that no reasonable person could differ.

CROSS-APPEAL

I. The sentencing court erred in finding the statutory mitigating circumstance that Craig had no significant history of prior criminal activity when, in fact, Craig had been a user of cocaine and had been engaged in cattle theft for quite some period of time preceding the murders.

ARGUMENT

I. THE PROSECUTOR DID NOT DELIBERATELY MISLEAD THE JURY AS TO A MATERIAL FACT, THE DISPARATE TREATMENT OF THE CO-DEFENDANT, AND THE TRIAL COURT DID NOT ERR IN DENYING A NEW PENALTY PHASE.

The crux of appellant's complaint is that the prosecutor presented evidence and argument that the parole of Robert Schmidt had been repeatedly blocked by the prosecutor and that Schmidt would be in prison for a long time to come, despite knowing that Schmidt was already on work release and would, therefore, most likely be released from custody soon. Appellant argues that the jury was misled as to the degree of favorableness of the co-perpetrator's plea and actual sentences served in exchange for his testimony and the jury was unable to adequately assess his credibility. Appellant also notes that the disparity of treatment received by an accomplice, as compared with that of the capital offender being sentenced, is a proper factor to be taken into consideration in a sentencing decision. Appellant further argues that concealing the fact that the co-perpetrator is already on work release and arguing falsely to the jury that he will not be getting out of prison any time soon, also misleads the jury's determination of the disparity in sentences of the at least culpable co-perpetrator and denies due process, a fair trial, effective assistance of counsel and renders the death sentences cruel and unusual.

On direct examination of Schmidt it was brought out that his two first degree murder charges were reduced to second degree murder in exchange for his giving truthful testimony concerning the murders of John Smith Eubanks and Robert Walton Farmer. He

indicated he pled guilty to two counts of second degree murder and received consecutive sentences of six months to life. Schmidt acknowledged that the prosecutor had appeared at his last three parole hearings and successfully stopped his parole and would continue to try to block his parole the best that he could. Schmidt indicated that he was not receiving any benefit from the State Attorney's office for testifying. Schmidt stated that he would be eligible for parole again in March 1995 (T 471-472).

In closing argument the prosecutor told the jury that the question was whether Schmidt was telling the truth when he took the stand and told this jury the same thing he told another jury in 1981. The prosecutor acknowledged that in 1981 Schmidt was facing a possible first degree murder conviction, which gave him a very powerful motive to lie, but that same motive was no longer present. The fact the prosecutor had blocked his parole three times and would try to do it again was largely argued and offered to show that Schmidt was receiving no benefit for his testimony from the State Attorney's office. The crux of the argument was that Schmidt had less motive to lie than Craig, who was still subject to the death penalty (T 794-795).

After the penalty phase had been completed the defense asked for a continuance at the sentencing hearing on September 24, 1993 (T 892). The defense claimed to have just learned that Schmidt was on a work release program and was selling carpet to the public. Mr. Baker, the defense investigator talked with DOC officials and confirmed that Schmidt is in a work release program, the purpose of which is for gradual re-entry into

society (T 894). The defense argued that the prosecutor's statements to the jury were inconsistent with that fact. The defense claimed that the prosecutor had argued that Schmidt had a good chance of spending the rest of his life in jail (T 893-894). Defense counsel indicated that the jury was out for approximately five hours and came back with a 7-5 vote for death and the undisclosed fact that Schmidt was now out on the streets could have impacted their decision (T 892). Counsel requested a continuance, a new trial, and a new jury (T 893). The sentencing judge pointed out to the defense that he had not yet made a sentencing decision and the defense would have an opportunity to make legal argument. The defense indicated it was equating this to a Richardson v. State, 437 So. 2d 1091 (Fla. 1983), violation. The court offered the defense the opportunity to take the testimony of any witness that it wished to put on the stand. The defense asked for a continuance to make Schmidt available (T 895). The prosecutor stated that on July 2, 1993, he had supplied the defense a corrected witness list including supplemental addresses which listed Robert Schmidt as an inmate at Tampa Community Correctional Center in Tampa, Florida, which is where he has always been (T 896). The prosecutor never had Schmidt's DOC file. He learned Schmidt was in a work release center when, shortly before the hearing, he drove down there to interview him (T 897). The prosecutor denied representing to the jury that Schmidt likely was going to spend the rest of his life in prison (T 898). Defense counsel indicated she had previously deposed Schmidt. She had received DOC records on

Craig from the prosecutor. She did not re-depose any witnesses because they both decided there wasn't any real change (T 900). The court properly determined that there was no discovery violation as the information was available to both sides. Schmidt was available on the stand for cross-examination and the question simply wasn't asked. The court further and appropriately found that the issue of Schmidt's sentence, presumptive release date and all other factors regarding his sentence were argued vigorously both to the jury and in the sentencing memorandum. The court concluded that there was no violation and no grounds for a new trial (T 901).

The prosecutor in the present case did not fail to correct material false statements of a witness and he did not use such evidence to obtain a conviction or enhance Craig's sentence in violation of the appellant's due process and fair trial rights. Giglio v. United States, 404 U.S. 150 (1972), and United States v. Bagley, 473 U.S. 667 (1985), are inapposite. Witness Schmidt made no material false statements concerning his sentence. He indicated that he was eligible for parole in March 1995, which is still the case, whether or not he is on a work release program. Schmidt has not yet been released. Schmidt has not concealed his status and is still serving sentences for second degree murder. The fact of work release hardly evidences a bias on the part of Schmidt against Craig. United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989), is a intermediate federal court decision which is not only not binding upon this court, but is also inapposite, as well, under the present facts.

The penalty phase jury in the present case was simply not misled to the degree of favorableness of the co-perpetrator's plea. Work release is an incidence of the authority of the Department of Corrections and of the sentence imposed. It was hardly contemplated in the plea agreement. The jury was quite able to adequately assess the credibility of this parole-eligible convicted felon.

The death sentences in the present case are hardly cruel and unusual. Contrary to the appellant's assertion, the prosecutor did not argue that Schmidt would not be getting out of prison any time soon. The prosecutor pointed out that when Schmidt was facing a first degree murder conviction he had a powerful motive to lie but that motive was not still present, his parole date could be affected for a perjury conviction, and that he was not going to get any further benefit from the state, who had blocked his parole three times (T 794-95).

The jury's determination concerning any possible disparity in sentence was not skewed by the fact that the jury did not know that Schmidt was on work release. There was no disparity in sentence in the first place. While the co-defendant Robert Schmidt was given life sentences, as the trial court noted, there are legitimate, objective differences for not automatically according Craig the same sentence. See, Diaz v. State, 513 So. 2d 1045 (Fla. 1987). The evidence reflects that it was Craig, not Schmidt, who began stealing Eubanks' cattle. In light of the physical evidence the sentencing court properly found that the testimony of Craig was incredible. Craig was older than Schmidt,

both attended approximately the same number of years in school, but Craig was the manager of the ranch and was the planner in the scheme to take over the ranch and to cover up the cattle theft (R 752). Given Craig's primary role in the murders, the mere fact that after years in prison, the co-defendant was on work release would hardly have resulted in the jury finding a disparity in sentence, when Schmidt is still in prison and the jury was aware that he was parole eligible as early as March 1995, and was likely to make parole at some time in the future, since he had come up for it before and been turned down on several occasions. Moreover, Schmidt received the actual sentence that he had bargained for. A jury does not have to be informed of every collateral consequence or incidence of such sentence. Craig's original jury recommended life imprisonment for Eubanks' murder which stood. The trial judge was aware of the work release prior to sentencing Craig. It was argued in the defense sentencing memorandum (R 735).

Appellant has failed to demonstrate under Giglio that the testimony and/or argument was false and misleading, that such information was material, or that the result of the proceeding would have been different.

II. THE TRIAL COURT DID NOT ERR IN ALLOWING INTO EVIDENCE THE FACT OF CRAIG'S CATTLE-THEFT SCHEME AS SUCH TESTIMONY WAS RELEVANT TO THE JURY'S CONSIDERATION OF THE AGGRAVATING FACTORS OF PECUNIARY GAIN AND COLD, CALCULATED AND PREMEDITATED IN THEIR CONSIDERATION OF AN ADVISORY SENTENCING VERDICT FOR THE MURDER OF WALTON FARMER.

The sentencing court permitted the state to present to the jury evidence of Craig's cattle theft from John Eubanks. The

appellant contends that this evidence was irrelevant to the sentencing verdict for the murder of Walton Farmer. Appellant also contends that it was error to permit the state to argue these matters to the jury as evidence of the aggravating factors of pecuniary gain and cold, calculated, and premediated, when such matters pertain solely to the killing of Eubanks, not Farmer, from whom nothing was taken.

Appellant's first premise that such evidence did not relate to the aggravating factors of pecuniary gain and cold, calculated and premeditated is erroneous. The aggravating circumstance that the murders were committed for pecuniary gain was established by testimony concerning the cattle-theft scheme and testimony to the effect that Craig believed that with Eubanks out of the way, the unsupervised control of the ranch would be entrusted to Craig, enabling him to convert all its assets to his own use and benefit. As this court previously noted, when Farmer appeared as a candidate to replace Craig, this scheme required his elimination also. Craig v. State, 510 So. 2d 857, 868 (Fla. 1987). Also, the continuation of Craig's cattle theft scheme would have been jeopardized by allowing a witness to Eubank's murder to live or by allowing Farmer to leave the ranch so he could point out to authorities where Eubanks had last been seen and implicate Craig in his disappearance or murder. The evidence fully supports the fact that Craig planned the murders in advance based on a coldly rational, calculated scheme arrived at for reasons of his interest in maintaining and expanding his position of control over the cattle ranch. See, Craig v. State, 510 So.

2d 857, 868 (Fla. 1987). The appearance of Eubanks and Farmer on the ranch the day of the murder may have caused Craig to act sooner, but the fact remains that all along Craig wanted to gain control over the cattle ranch through the murder of Eubanks and had prepared for the same by buying guns and ammunition, which he distributed to Schmidt, so that the two men could also handle, as well, any unlucky person who have may accompanied Eubanks to the ranch. The murder of Farmer would not have taken place at all but for Craig's cattle theft scheme.

III. THE TRIAL COURT DID NOT ERR IN ALLOWING INTO EVIDENCE OVER DEFENSE OBJECTIONS HEARSAY TESTIMONY OF THE DECLARANT'S EXISTING STATE OF MIND EMOTION, INTENT OR PLAN, WHICH EVIDENCE IS AN EXCEPTION TO THE HEARSAY RULE.

The appellant complains that the sentencing court permitted the state to introduce into evidence hearsay testimony that the victim, John Eubanks, had told a business associate that he intended to replace Craig as the foreman of the ranch (T 391-392).

It is not true, as the appellant contends, that Eubanks' state of mind was irrelevant to any issues in the penalty phase trial. Eubanks indicated that he intended to hire Robert Farmer to replace Robert Craig and such evidence was offered and properly admitted to explain Robert Farmer's actual presence at the ranch on the day of the murders. Such evidence is admissible pursuant to section 90.803(3)(a)1 and 2, Florida Statutes (1993), as it demonstrates that it was Eubanks' actual intent to replace Craig and that such intent was acted upon in securing the presence of Robert Farmer at the ranch on the day of the murders,

which under subsection 2 not only explains Farmer's presence, but indicates that Eubanks acted upon his previous intent. The presence of Eubanks and Farmer at the ranch on the day of the murder is part and parcel of the circumstances of the crime. The counting of the cattle and the presence of Farmer are part of the res gestae of the murder of Farmer. Contrary to the appellant's assertion, Eubanks' statements were not used to prove Craig's state of mind. It is well settled that prior and contemporaneous statements of intent are admissible to prove the person did the act which they said they were going to do. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1982). Since the evidence admitted would fall under a hearsay exception under §90.803(3), Florida Statutes (1993), appellant's argument that he was denied the right to confront witnesses in the penalty phase is not well taken. Since it was established that Eubanks was aware of the fact that Craig was stealing cattle and that Craig was cognizant of Eubanks' knowledge of such stealing and that Farmer was on the ranch the day of the murders assisting Eubanks, any error in the introduction of this evidence was harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

IV. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON NONSTATUTORY MITIGATION.

Prior to the penalty phase defense counsel sought to amend the standard jury instructions in regard to mitigation.[1] The

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[1] Defendant's special requested penalty instruction no. 5 recites as follows:

DEFENDANT'S SPECIAL REQUESTED PENALTY INSTRUCTION NO. 5

Mitigating circumstances are not intended as a justification or excuse for a killing or to reduce it to a lesser degree of crime than first degree murder. Instead, a mitigating

trial court denied the request and instructed the jury in accordance with the standard jury instructions that they could consider "any other aspect of the defendant's character, record, or background and any other circumstances of the offense," as far as nonstatutory mitigation is concerned. (R 688; T 740-741, 745, 835). The position of the trial court was that the standard instruction covered the nonstatutory mitigating circumstances and that the particulars of such were proper topics for closing argument (T 741).

No objection was interposed after the instruction was given (T 843). Appellee would submit that the issue is thereby waived. Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994). In any event, this court has previously indicated that there is no obligation

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circumstance is a fact or group of facts which has one or two purposes: (1) a mitigating circumstance may extenuate or reduce the moral culpability of this defendant for this crime; or (2) a mitigating circumstance may make the defendant less deserving of the extreme punishment of death.

Our law requires consideration of more than just the bare facts of the crime. A mitigating circumstance may stem from any of the diverse frailties of humankind.

In considering Issue Two it would be your duty to consider as a mitigating circumstance any aspect of the defendant's background, character, age, education, environment, behavior and habits which make him less deserving of the extreme punishment of death. Among the mitigating circumstances which you may consider as established by the evidence are:

1. The Defendant has no significant history of prior criminal activity;
2. The Defendant acted under extreme duress or under the substantial domination of another person;
3. The age of the Defendant at the time of the crime;
4. Any other aspect of the Defendant's character or record and any other circumstances of the offense;
5. Good attitude and good conduct while awaiting trial;
6. Plea bargain and sentence of co-defendant;
7. Defendant was a good family man;
8. Specific good deeds or characteristics;
9. Defendant was not the one who actually killed the victim.

You may consider as a mitigating circumstance any circumstance which tends to justify the penalty of life imprisonment or that the defendant contends as a basis for a sentence less than death. (T 687-688).

for a judge to give jury instructions going beyond the approved standard instructions. Wuornos v. State, 19 Fla. L. Weekly S455, 459 (Fla. Sept. 22, 1994). It is clear that Defense Proposed Instruction No. 5 is rife with extraneous verbiage not contemplated by the standard instructions. Furthermore, this court has specifically determined that a trial court is not required to list the nonstatutory mitigating circumstances in its instructions to the jury. Jackson v. State, 530 So. 2d 269 (Fla. 1988); Robinson v. State, 574 So. 2d 108 (Fla. 1991).

V. THE TRIAL COURT DID NOT ERR IN FINDING STATUTORY AGGRAVATING CIRCUMSTANCES AT RESENTENCING WHICH HAD NOT BEEN FOUND BY THE PRIOR SENTENCING JUDGES.

The appellant complains that upon resentencing two new aggravating circumstances were found for the murder of John Smith Eubanks, to-wit, a previous conviction for the killing of Robert Farmer and that the murder of Eubanks was committed to avoid a lawful arrest. The avoid a lawful arrest factor was also newly found upon resentencing for the murder of Farmer. Craig contends that these factors could not be properly found because they are barred by the doctrines of res judicata, law of the case, double jeopardy and fundamental fairness.

This case was originally remanded for reconsideration of the sentences of death because of the intervening decision in Skipper v. South Carolina, 476 U.S. 1 (1986), and to allow the defense to present testimony to the effect that Craig had behaved well during his incarceration, from the time of arrest through trial until the time of the sentencing. The appellant had never attempted to introduce the good behavior evidence before the jury

so this court determined that reconsideration shall be by the trial judge only. Craig v. State, 510 So. 2d 857, 871 (Fla. 1987). At the time of remand the original trial judge, Welborn Daniel, was a district court of appeal judge, but was reappointed to conduct the resentencing. He subsequently left the bench for private practice. Judge Don Briggs took over the case. Judge Briggs did not empanel a new jury and entertained evidence only of Craig's behavior during his incarceration as mandated by Skipper. This court subsequently directed the trial court to conduct a new penalty proceeding and resentence Craig within ninety days of the opinion because a substitute judge had resentenced Craig who had not heard the evidence presented to the original jury during the penalty phase of the trial. In vacating the death sentence again this court directed that a ***complete, new*** sentencing proceeding be conducted before a jury. Craig v. State, 620 So. 2d 174, 176 (Fla. 1993). Appellant overlooks the fact that when a complete and new sentencing proceeding is ordered principles of res judicata and law of the case are not applicable. There is a clean slate as far as aggravation is concerned. There is nothing unfair in this procedure since the defense also gets the opportunity to bombard the trial court again not only with tried but untried and new mitigation, as well, in another effort to avoid the death penalty. It is certainly not unfair, in a case like this, where the appellant has actually sought and obtained a new penalty phase proceeding. Upon the opinion of this court vacating Craig's previous death sentence, Craig again became death-eligible. The presence of

aggravating circumstances serves the purpose of limiting the class of death-eligible defendants. Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990). Aggravators are not "elements of the offense." Walton v. Arizona, 110 S.Ct. 3047 (1990). As the Supreme Court explained in Poland v. Arizona, 476 U.S. 147 (1986), statutory aggravators are neither separate penalties nor crimes, but standards to guide sentencing discretion; therefore, a judge's finding of any particular aggravating factor does not "convict" the defendant by requiring the death penalty. In Poland, the Supreme Court also held that double jeopardy does not bar reimposing the death penalty at a *second* sentencing proceeding, even though the second sentence was partially based on an aggravating circumstance *not found* at the original sentencing proceeding. *Id* at 156-57. Because the judge imposed the death penalty at the first sentencing proceeding, the defendant had no legitimate expectation of escaping capital punishment. Thus, double jeopardy did not bar reimposing the death sentence at the second sentencing proceeding. *Id*. Furthermore, in Hitchcock v. Dugger, 481 U.S. 393 (1987), the Court held that the Double Jeopardy Clause does not bar reimposition of the death penalty when the original death penalty was imposed in error. Contrary to appellant's assertion the original findings are not an acquittal barring the state from seeking their application upon resentencing. Appellant misapprehends the import of Poland. The issue is not whether the evidence is legally insufficient to justify the finding of an aggravating circumstance. The issue is whether the reviewing

court found the evidence legally insufficient to justify imposition of the death penalty. In Preston v. State, 607 So. 2d 404, 408 (Fla. 1992), this court held that because there was no acquittal of the death penalty, i.e., a finding that the state failed to prove its case that the defendant deserved the death penalty, the state was not barred from resubmitting the aggravating factors not found by the judge in the original penalty phase proceeding. Moreover, a trial judge may properly apply the law and is not bound in remand proceedings by a prior legal error. Spaziano v. State, 433 so. 2d 508, 511 (Fla. 1983).

VI. APPELLANT'S DEATH SENTENCES WERE PROPERLY IMPOSED AND THE TRIAL COURT'S FINDINGS WERE SUFFICIENT; THE COURT PROPERLY FOUND AGGRAVATING FACTORS AND CONSIDERED RELEVANT MITIGATING FACTORS, AND THE OVERRIDE OF THE JURY RECOMMENDATION OF LIFE IMPRISONMENT FOR COUNT ONE WAS SUFFICIENT.

The trial court's sentencing order is sufficient in its factual basis and rationale to support the death sentences. Contrary to appellant's assertion, the aggravating factors are not supported by very cursory facts only and the trial judge did not fail to give detail as to the rejection of some facts and acceptance of others. The findings of fact in support of the death penalty includes a subsection entitled General Factual Background (R 743). This subsection sets forth the facts the trial court ascertained from the testimony and found believable, which supports the trial court's subsequent finding of aggravating factors. Very specific and detailed facts accompany the finding of each and every aggravating factor (R 747-749; 758-760).

For purposes of sentencing in a capital case, the trial court may consider record evidence of the circumstances of a prior violent or capital felony in weighing the aggravating factor of a previous conviction of another violent or capital felony. Slawson v. State, 619 So. 2d 255 (Fla. 1993). The evidence in this case reflects that Craig had a primary role in the killing of both Farmer and Eubanks to gain control of the ranch and to avoid going to prison. The killing of Eubanks should properly be applied to Craig as an aggravator for the Farmer killing. 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); Correll v. State, 523 So. 2d 562 (Fla. 1988). It is clear that contemporaneous convictions involving persons other than the homicide victim can be used to prove this aggravating circumstance. LeCroy v. State, 533 So. 2d 750 (Fla. 1988). The import of the decision in Wasko v. State, 505 So. 2d 1314 (Fla. 1987), is that contemporaneous convictions involving other crimes committed on the homicide victim cannot be used to prove this aggravating circumstance. Appellant's theory is interesting but the fact remains that all "incidents" are separate, although some can occur in close proximity of time. There is no reason why a multiple murderer should be rewarded because his violence erupted at contiguous points of time rather than serially.

The aggravating factor that the murders were committed to avoid a lawful arrest was properly found by the trial court (R 758). On July 21, 1981, Craig was aware that Eubanks knew that

cattle were missing. He had further discussed this fact with his co-defendant Schmidt, and had warned that their arrest for the cattle thefts would subject them to imprisonment for twenty-five to thirty years. Eubanks was lured to a remote hammock on his ranch pursuant to a scheme devised by Craig. It is clear that the dominant motive for the murder of Eubanks was to avoid or prevent the arrest of Craig and Schmidt (R 747). Craig's testimony reflects that Eubanks almost always brought people with him to the ranch when he arrived. While Craig might not have known that it was Farmer who was going to be with Eubanks on that day, he almost certainly knew that someone would be with him and that such person would have to be eliminated as well. It is clear, as well, that the dominant motive for the murder of Farmer was to eliminate any witness both as to the cattle thefts and as to the murder of Eubanks (R 758). The issue of the credibility of Schmidt's testimony has been decided by the trial judge and is not an appropriate issue. Derrick v. State, 581 So. 2d 31 (Fla. 1991), is distinguishable. Derrick had confessed that he had to kill the victim because he recognized him. The judge also found the murder to be cold, calculated and premeditated because Derrick hid in the bushes with a knife waiting for the victim and then chased him twenty feet after the original attack to finish killing him. This court reasoned that if Derrick did not decide to kill the victim until he had recognized him, then it seemed unlikely that the facts would support the finding of the heightened premeditation necessary to find the murder was cold, calculated, and premeditated. The issue of recognition is not

present in the instant case. Robert Schmidt testified that as much as a month earlier Craig had talked of killing Eubanks to gain complete control of the ranch. On July 15, 1981, Craig had been ordered to do an inventory of the cattle on the ranch and had come up short. On July 21, 1981, Eubanks appeared at the ranch to do his own count. Craig knew he was about to be found out and told Schmidt that Eubanks knew and that they would go to prison for twenty to thirty years and would have to kill them. The desire to kill Eubanks escalated upon his arriving at the ranch and engaging in the cattle count. There was also some period of time for Craig to reflect and plan after he had decided to kill Eubanks that day. Craig and Schmidt went to the trailer and retrieved weapons. Craig provided Schmidt with extra amunition. They returned to the back side of the ranch and lured the victims into a palmetto hammock and murdered them. Unlike the factual scenario in Derrick, there was not an "on the spot" decision to kill and an immediate acting upon thereafter. In this particular case there had been a pre-existing desire to kill and an escalation of the desire and acting upon such desire when Eubanks came to the ranch on July 21, 1981. The killing in this case was not reflexive. This court has also approved the simultaneous finding of a murder committed for pecuniary gain and to avoid arrest. See, Henry v. State, 586 So. 2d 1033 (Fla. 1991); Hall v. State, 614 So. 2d 473 (Fla. 1993).

While not the dominant motive for the murders the aggravating factor of pecuniary gain was a considerable factor in the plot to eliminate Eubanks' companion, Farmer, on the day of

the murders. As the sentencing judge found, at the time of the offense, Craig was employed by Eubanks as manager of the cattle ranch. Craig knew Eubanks' wife and believed that Eubanks' elimination would enable him to gain control over the ranch and its assets so he could continue to sell cattle for his own benefit. At the time of the killings, Craig knew that Eubanks and Farmer were aware of the missing cattle, and that in order to effectuate his scheme, both men would have to be eliminated. After learning that Farmer was on the ranch, Craig returned to his home with Schmidt, and changed the plan to include Farmer (R 758-759). The ultimate goal of Craig's scheme was to gain control of the assets of the ranch and deceive Eubanks' wife. Craig essentially wanted to become an unknown silent partner in the cattle ranch business. The gain that he would receive was to be able to continue selling cattle and taking the proceeds therefrom and to do so undetected because Eubanks' wife would supposedly not have the wherewithal to discern any discrepancies in the number of cattle on the ranch. Standing in the way of the success of such scheme was not only Eubanks, but Farmer, as well. Farmer's death, as well as Eubanks', was for the purpose of allowing Craig to siphon off funds from the ranch. When Farmer came into possession of the same information that Eubanks had, i.e., that Craig had been stealing cattle, Farmer became every bit as big an impediment in Craig's plan as had Eubanks become. The aggravating factor of pecuniary gain has been proven beyond a reasonable doubt.

The aggravating circumstance that the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification was properly found by the sentencing judge. Craig was the manager of Eubanks' cattle ranch and began stealing cattle shortly after his employment began and prior to the hiring of Schmidt. Eubanks became suspicious of Craig's activities. On one occasion Craig had penned up cattle with Schmidt but released them because Eubanks had come out and wanted to know why the cows were penned up. Craig told him they were penned up to be sprayed for flies (T 448). Five or six weeks before the murders, Craig talked to Schmidt about killing Eubanks to confuse his wife, who didn't know anything about ranching, into turning over all the responsibility for the cattle to Craig. Craig was to kill Eubanks. They would drive the car to Miami. They would then back each others alibi that they were together and hadn't seen Eubanks (T 449). They would dump Eubanks' body in a sinkhole (T 466). On May 23, 1981, John Vernon of Nordic Pawn and Sports in Wildwood traded Craig two guns for a cow (T 498). In the middle of July, 1981, Eubanks requested a cattle count. There was a significant difference in Craig and Eubanks' totals. On July 14, 1981, Craig traded in a .44 magnum revolver for the .357 magnum Smith & Wesson that he used in his part in the murders (T 500). On July 15, 1981, Craig called in a second figure to Eubanks, which did not match Eubanks' figure for the number of cattle at his ranch (T 375-377). On July 17, 1981, Eubanks rode the farm in a vehicle with William Nelson, counting cattle. There

appeared to be some missing (T 390). The next day on July 18, 1981, Craig bought a box of .357 magnum shells at the Nordic Sport Shop in Wildwood (T 494-496). As the sentencing court found, Craig set upon a scheme to secure the elimination of Eubanks so that he could avoid prosecution for stealing the cattle, take advantage of Eubanks' wife, and continue to sell the assets of the ranch for his own benefit. While the thrust of Craig's plan was directed at Eubanks, Craig was also aware that Eubanks was almost always accompanied by a third party when he visited the ranch. It is clear that Craig intended for Farmer to die in the plan as well. When Craig went back to the ranchhouse, he was aware that Farmer was with Eubanks on the ranch, and he plotted to eliminate him. Craig had told Schmidt that they couldn't let them leave the farm (T 455). Craig had contemplated the murder of Eubanks for quite some period of time. When Farmer arrived at the ranch he exhibited the heightened premeditation necessary to find this factor by discussing the necessity of killing both men to avoid prison, ensuring that Schmidt was also armed, and concocting a scheme to lure the two men into a hammock where it would be easier to kill them undetected (T 454; 456). It is clear that Craig planned or arranged to commit the murders before the crimes began. The state properly demonstrated that Craig had a careful plan or prearranged design to kill. See, DeAngelo v. State, 616 So. 2d 440 (Fla. 1993). Such careful plan establishes the heightened premeditation necessary for finding the aggravating factor that the murder was cold, calculated, and premeditated. Clark v. State, 609 So. 2d 513 (Fla. 1992).

Craig's advance procurement of weapons and ammunition was also a clear indication of the existence of this aggravating factor of heightened premeditation. Cf. Cruse v. State, 588 So. 2d 988 (Fla. 1991). Craig had more than ample time during the series of events leading up to the murder to reflect on his actions and their consequences. Cf., Jackson v. State, 522 So. 2d 802 (Fla. 1988). This court has previously found that the announcement of an intention to commit murder and subsequent execution-style shootings sufficiently establishes the cold, calculated, and premeditated factor. Dufour v. State, 495 So. 2d 154 (Fla. 1986). This finding was upheld in a similar case, Koon v. State, 513 So. 2d 1254 (Fla. 1987), where the defendant lured the victim from home, obtained a shotgun before meeting with the victim, and executed the victim with a single shot to the head. Again, the credibility of Schmidt's testimony was a matter for the jury and the judge. Appellant overlooks the fact that the convictions were upheld in this case and that Schmidt's testimony in the guilt phase supports the finding of this aggravator and that this court affirmed the convictions on the strength of Schmidt's testimony. See, Craig v. State, 510 So. 2d 857 (Fla. 1987).

It is clear from the sentencing order that the sentencing judge considered all available mitigating evidence. In accordance with this court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990), the sentencing judge expressly evaluated in a written order each mitigating circumstance proposed by the defendant and determined whether it was supported by evidence and whether it was truly of a mitigating nature. Despite appellant's

constant chanting that Schmidt's version of the events was unbelievable, it is the trial court's duty to decide if mitigators have been established by competent, substantial evidence and to resolve conflicts in evidence in the punishment phase of a capital murder trial. Johnson v. State, 608 So. 2d 4 (Fla. 1992). That duty was ably discharged in the present case. It is also within the trial court's discretion to decide whether a mitigator has been established and the court's decision will not be reversed merely because a defendant reaches a different conclusion. Lucas v. State, 613 So. 2d 408 (Fla. 1992). The weight to be given a mitigator is also left to the trial judge's discretion. Mann v. State, 603 So. 2d 1141 (Fla. 1992); Campbell v. State, 571 So. 2d 415 (Fla. 1990). There is no indication in this case at all that the trial judge refused to weigh or was precluded from weighing the mitigating evidence presented and the decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), is inapposite. Attaching little weight to trivial evidence in mitigation hardly results in a defect or return to the "mere presentation" practice condemned in Hitchcock. Appellant has not demonstrated that the sentencing judge in any way abused his discretion by refusing to give significant weight to uncontroverted, although trivial, mitigation evidence. Moreover, trial courts hardly have unfettered discretion in determining what weight to give mitigating evidence. It is clear that evidence is "mitigating" if, in fairness or totality of a defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the

crime committed. Wickham v. State, 593 So. 2d 191 (Fla. 1991). Where evidence is not especially extenuating and can hardly be said to lessen the degree of moral culpability for the crime committed it is clear that it is entitled to little or slight weight. Such is the case with the mitigation offered by the appellant. Contrary to the appellant's argument, the mere fact that Craig has peppered the balancing process with marginal mitigation of dubious relevance does not mean that the sheer numerical quantity of such minimal mitigation must overcome valid statutory aggravation.

Craig testified that he used cocaine when he lived at the ranch (T 680). On cross examination he indicated that even before he moved to Lake County he would go to parties on weekends and use cocaine. He admitted that when he moved to Lake County it is possible that he used it more regularly. He admitted that no one led him into doing that and that it was his own decision (T 704-705). This court has previously held that evidence of habitual drug use by a defendant could be used by the trial court, for sentencing purposes in a capital case, to diminish the weight given the mitigating factor of no significant history of prior criminal activity. Slawson v. State, 619 So. 2d 255 (Fla. 1993). This prior drug use also shows the defendant's "true character."

Lack of evidence that a first degree murder defendant acted under external provocation precludes finding that he had acted under extreme duress for purposes of mitigating the death sentence. Toole v. State, 479 So. 2d 731 (Fla. 1985). The

sentencing court acted within the parameters of its discretion in rejecting the mitigating circumstance that the defendant was under the substantial domination of another. Craig's cattle rustling preceded Schmidt's presence on the farm. It was Craig who gave the instructions and acted alone in shooting one victim and intimidated the younger Schmidt into shooting the other victim through fear of prison. Craig's entire testimony was incredible, particularly his claim that he fired on Robert Farmer when Schmidt had fired in his direction. Dr. Krop's testimony only suggests that domination could occur. While he indicated that Craig is generally a follower, he has never examined Robert Schmidt to make any determination as to him. Reverend Bell is hardly qualified to make a determination or give opinion testimony as to whether this mitigating factor has been established since he was not even present on the evening of the murders, has no knowledge of what transpired, is not trained in the psychological sciences, and hardly knows Craig. Speculation from arresting officers as to who was the most cold blooded of the two co-defendants hardly establishes this mitigator as such statements are, not only hearsay, but speculative and the very purpose of the penalty phase is to hear testimony and resolve conflicts in evidence so the actual factual scenario leading to the murders can be ascertained and the law pertaining to this mitigating factor applied thereto. The record does not support Craig's contention that he did not own guns prior to meeting Schmidt and that he was introduced to guns by Schmidt who became his hero. Craig testified that he bought his first gun, a .22 RG

in Leesburg for protection for his wife who was at the trailer by herself all the time and he then became interested in guns (T 677). Why he would look up to Schmidt whom he described in the penalty phase as an aggressive braggart who talked about killing black people can only be imagined (T 676). Although appellant makes much of the fact elsewhere that Craig was initially alone with Eubanks and could have murdered him at that time, it makes more sense that Craig would wait until Eubanks drew his conclusions as to the number of missing cattle, where they may have disappeared to, and who was responsible for their disappearance. It hardly makes more sense that Eubanks would have turned his head to look in the direction that the gunshots were fired as appellant suggests. It makes more sense that Eubanks would have hurriedly continued away from the hammock. Evidently Eubanks did turn his head as Schmidt shot him again before he fell (T 458). Contrary to appellant's further assertion, Farmer's wounds were consistent with Schmidt's account of the murder in which Craig told Schmidt that Farmer's hat got in the way and he couldn't "tell to shoot him in the head." (T 459). Craig's apparent lack of proficiency with his firearm hardly indicates that he was not the motivating force in both murders. The witnesses who testified as to Craig's nonviolent nature and Schmidt's supposedly aggressive personality were largely the family members and in-laws of Craig and the trial court could properly assess the credibility of such witnesses. That Schmidt did not have the pandering personality of the incarcerated Craig does not make him the domineering force in

this murderous scenario. Craig has still not explained how it is he came to use cocaine and cattle rustle prior to Schmidt ever coming on the scene. Craig's desire for motor boats and the finer things in life predated Schmidt's arrival at the ranch. The mitigating circumstance of substantial domination of another has simply not been established. See, Jackson v. State, 366 So. 2d 752 (Fla. 1978).

The trial court gave Craig the benefit of the doubt in finding the mitigating factor of his age at the time of the crime but properly accorded it very, very slight weight. Dr. Krop testified that he did not see any evidence of organic brain damage or neuropsychological deficits in Craig (T 776). There was no evidence of any kind of mental illness or personality disorder (T 777). Craig's chronological age at the time of the murder was twenty-three years old, which is hardly mitigating. Dr. Krop's opinion that Craig's mental age was somewhere between sixteen and eighteen was based on Craig's overall I.Q. (T 781). On cross examination, however, Dr. Krop admitted that Craig's I.Q., while low average, was within *normal* range (T 783). Regardless of his mental age, Dr. Krop was of the opinion that Craig is able to govern his conduct to comport with the rules of society (T 783). Thus, there was little basis at all for Dr. Krop's opinion. A trial court has broad discretion in determining the applicability of mitigating circumstances and may accept or reject the testimony of an expert witness. Rose v. State, 617 So. 2d 291 (Fla. 1993). Dr. Krop's conflicting statements and opinions could well have been rejected as far

fetched and unworthy of belief. Nevertheless, the sentencing court gave Craig the benefit of the doubt and since Craig was able to govern his conduct to comport with the rules of society regardless of his mental age, the trial court properly attached very, very slight weight to this mitigating circumstance. This was especially proper since Dr. Krop had not even seen Craig until some ten years after the murders (T 782).

The defense below did not pursue the mitigator of the capital offense being committed while the defendant was under the influence of extreme mental or emotional disturbance and such is the recent hypothesis of appellate counsel. No evidence was introduced that Craig used cocaine at or around the time of the murders so as to precipate some extreme mental or emotional disturbance. Moreover, prior to the day of the murders, Craig had contemplated doing away with Eubanks to gain control of the ranch and had prepared himself for the same. When Eubanks showed up at the ranch and his plan had to be put into action, Craig went about his task with the dogged determination and clarity of mind of someone in pursuit of pecuniary gain at the expense of others. Craig's own expert, Dr. Krop, found no evidence of psychiatric disturbance.

The sentencing judge found the nonstatutory mitigating factor of good attitude and conduct while awaiting trial in jail and appropriately gave it very slight weight (R 752; 763). The trial court also found as a nonstatutory mitigating factor the possibility of Craig's rehabilitation. The court found that the evidence indicated that Craig had been a good prisoner during the

time he had been incarcerated and had developed skills while in prison. The court also properly accorded this mitigating factor slight weight (R 755; 767). Considering the enormity of Craig's deeds, this factor could properly be given little weight. There was also little reason for Craig to have disputes or problems with other prisoners at the Lake County Jail since he was in an *isolated* cell (T 648; 650). That Craig was a snitch is also not a particularly endearing quality. *Former* death row guard, Clyde Blevins, who wouldn't mind living next door to Craig, only saw him about twice a week and wasn't even permanently assigned to his wing. Three of those years he had the midnight shift when prisoners were asleep (T 622-623; 627). The "mockery of the capital weighing process" appellant speaks of would not be in assigning this factor very slight weight but in ignoring the retributive function of capital punishment and finding of undue importance the fact that someone willing to kill out of greed and for filthy lucre while in society could conduct themselves in a less aggressive fashion in an isolated death row atmosphere where status, material possessions, and money are of little consequence and are generally beyond reach. Blevins has not seen the old Craig who could quite likely resurface in general population.

The trial court properly gave the sentence of the codefendant very, very slight weight (R 753; 764). The evidence reflects that it was Craig, not Schmidt, who began stealing Eubanks' cattle. Physical evidence in the case contradicts Craig's story. The sentencing judge properly found that the testimony of Craig was incredible in light of such evidence.

Craig was older than Schmidt, both attended approximately the same number of years in school, but Craig was the manager of the ranch and was the planner in the scheme to take over the ranch and to cover up the cattle thefts. Thus, while the codefendant Robert Schmidt was given life sentences, there are legitimate, objective differences for not automatically according Craig the same sentence. Diaz v. State, 513 So. 2d 1045 (Fla. 1987). As this court previously pointed out on virtually identical penalty phase facts, Craig's legal responsibility for the murder of Eubanks was not secondary to but was fully equal to that of Schmidt. There was evidence to show that Craig was the planner and the instigator of *both* murders. "If Schmidt had been tried for capital felony in the murder of Eubanks, the evidence would have supported a finding in mitigation that he had acted under the domination of Craig." Craig was the prime mover with regard to the murder of Eubanks. Craig v. State, 510 So. 2d 857, 870 (Fla. 1987).

No evidence was introduced regarding the mitigating factor of cooperation with the police. The penalty phase in this case started with a "clean slate." While physical items, testimony about the location and condition of the bodies of the victims, and related physical evidence were properly found to be admissible, appellant was successful in having his confession and incriminating statements, including his statement to the authorities telling them where the bodies had been put excluded from evidence at the trial on the ground that they were illegally obtained. See, Craig v. State, 510 So. 2d 857, 862 (Fla. 1987).

Without such evidence being offered in the penalty phase there was no basis for the judge to find this nonstatutory mitigating factor. Contrary to appellant's assertion, the trial court did not find this factor and give it only "very, very slight weight." The sentencing court actually found that this mitigating factor did not exist (R 753; 765). Any error in failing to find such nonstatutory mitigating factor could only be harmless in view of the remaining minimal mitigation and overwhelming statutory aggravation.

It was within the trial court's discretion to assign very slight weight to the nonstatutory mitigating factor of Craig's remorse. Craig still denies any real intended participation in the murders and his remorse is dubious at best. Craig felt little remorse immediately after the murders as he reached into the dead Eubanks' pocket and took money out of his wallet (T 461).

The trial court properly accorded only very, very slight weight to Craig's intelligence level. The fact that a defendant has a below normal intelligence may be a mitigating factor, see, Downs v. State, 574 So. 2d 1095 (Fla. 1991), however, appellant misrepresents such fact to this court. The evidence did not at all establish that Craig has a *below* normal intelligence. Dr. Krop actually testified that Craig's I.Q. was within the normal range, although low "average." (T 783). That is not the same as having a below normal intelligence. The sentencing judge was also correct in noting that Craig's intelligence did not affect his ability to govern his conduct to comport with the rules of

society (T 783). The ability to differentiate between right and wrong and to understand the consequences of one's actions is relevant in determining the applicability of this nonstatutory mitigator. See, Ponticelli v. State, 593 So. 2d 483 (Fla. 1991).

The trial court properly considered and found as a nonstatutory mitigator that Craig is a hard worker. It was within the discretion of the sentencing judge to accord this factor very slight weight. Craig was also very energetic in his rustling enterprise.

No evidence at all was introduced in the penalty phase to show that Craig was under the influence or suffering the ill effects of any drugs, including cocaine at the time of the murders or that such drugs played any role in the planning and carrying out of the murders. The trial court properly determined that while Craig's use of cocaine was proven it was not a mitigating factor since it was not shown to contribute to the incident in question. Although voluntary intoxication or drug use might be a mitigator in imposing the death sentence, whether it actually is depends upon the particular facts of the case. Johnson v. State, 608 So. 2d 4 (Fla. 1992). As in Johnson, there was too much purposeful conduct on the part of Craig in the present case in committing the two murders for the court to have given any significant weight to his alleged cocaine usage, a self-imposed disability, as a mitigator in determining whether to impose the death sentence.

The sentencing judge found that Craig had established a good relationship with his in-laws after his marriage and that he

was a good family person. The court also found that the evidence reflected that Craig has continued to maintain a relationship with his ex-in-laws and has, at isolated times, provided counseling to younger relatives. The trial court properly gave this factor very, very slight weight (R 755; 767). But for Craig's actions, he may still be married and regularly seeing and assisting all his various family relatives. Good family relationships also usually serve to anchor one from a life of crime.

The trial court properly considered evidence showing that Craig was forced to quit school in the eleventh grade to assist on the family farm and that his father was a strict disciplinarian. Appellant has provided no citations to the record substantiating any extensive abuse of Craig in his childhood in either the statement of the facts or in his argument. In any event, the fact that Craig was able to establish such a warm and enduring relationship with his in-laws, was a good family person, and was able to function in society and be employed would certainly indicate that his childhood had no negative effect upon him in his adult life and bore no relationship to his actions in murdering Eubanks and Farmer. Craig has failed to demonstrate that any childhood trauma was relevant to his character, record or circumstances of the murder so as to afford some basis for reducing the sentence of death. See, Rogers v. State, 511 So. 2d 526 (Fla. 1987).

The trial court properly considered the possiblity of rehabiliation for Craig finding that the evidence indicated that

Craig had been a good prisoner during the time he had been incarcerated and that he has developed some skills while in prison. The trial court acted within its discretion in according this mitigating factor slight weight (R 755; 767). Considering the fact that retribution is a valid penological goal, the trial judge was within his rights in considering the enormity of Craig's deeds as balanced against this *minuscule* mitigation and finding this factor to carry little weight.

Specific good deeds on the part of Craig were presented at the penalty phase and the trial court properly found that aside from his regular use of cocaine and the concoction of a scheme to steal cattle, the evidence indicated that his character was otherwise unimpeachable (R 757; 768). Again, the sentencing judge acted within his discretion in weighing this factor against the aggravation and concluding that it was entitled to very, very slight weight. It is the rare person who manages to live his life without having extended some small kindness to someone around him. But such good deeds are overshadowed by Craig's murderous scheme and the cold-blooded dispatching of Eubanks, who he considered to be a friend, and the unlucky Farmer who just happened to be at the ranch at the wrong time.

Under Florida law, any person who aids, abets, counsels, hires or otherwise procures an offense to be committed and such offense is committed or is attempted to be committed, is a principle in the first degree and may be charged, convicted, and punished as such. Therefore, even though Schmidt did the actual shooting of Eubanks, Craig, as an aider and abettor, was a

principle, guilty of the murder to same degree as if he had wielded the weapon himself. The fact that Schmidt did the shooting does not in any way detract from the blameworthiness of Craig for this aggravated premeditated murder. Craig v. State, 510 So. 2d 857, 870 (Fla. 1987). The sentencing court found that the evidence supported Schmidt's version of events. The recovered guns and bullets in all ways squared with Schmidt's testimony, but directly contradicted Craig's. Additionally, the court found that Craig's version of the events does not comport with common sense. Craig indicated that he heard two shots and then as he and Farmer began to run through the woods Schmidt approached from behind, fired two bullets past Craig and yelled, "shoot, shoot." According to Craig, he then dropped to a defensive position on one knee, closed his eyes and from a distance of twenty feet, shot Farmer three to four times in the back. The court concluded that the physical evidence in the case directly contradicted Craig's version of these facts (R 750; 762). While the medical examiner testified that Craig's bullet did not kill Farmer, he also testified that Farmer would have died from the five wounds inflicted to his body by Craig if left in a remote area unattended (T 533).

The sentencing court properly accorded the factor that Craig has become a strong Christian since his arrest very, very slight weight (R 756; 767). Reverend Bell, who testified as to Craig's Christian values, has only visited Craig twice over a period of six years (T 759).

In imposing the death sentence on Count One for the murder of Eubanks the sentencing judge rejected the jury's life recommendation. The sentencing judge's order reflects that he did not fail or refuse to give adequate consideration to the jury's recommendation. He considered the recommendation and specifically found that the Tedder v. State, 322 So. 2d 908 (Fla. 1975), standard was met. The sentencing judge conscientiously weighed and discussed the evidence and made his decision based on the evidence. In reviewing a trial court's override of a jury's recommendation of a sentence of life imprisonment, this court decides, after considering the totality of the circumstances, whether the life recommendation is reasonable; if it is, the death sentence should be vacated but, if it is not, the death sentence should be affirmed. Cooper v. State, 581 So. 2d 49 (Fla. 1991). Where there is nothing in mitigation to provide reasonable support for a jury's recommendation of a life sentence, a trial court acts properly in overruling the recommendation and in imposing the death penalty for first degree murder. Brown v. State, 473 So. 2d 1260 (Fla. 1985). The jury in this case recommended a sentence of life imprisonment for the murder of Eubanks by a marginal vote of 7 to 5. The jury was probably influenced by the fact that the state witness Schmidt was the direct perpetrator of the killing of Eubanks. The facts of the instant case reflect, however, that Craig was the prime mover with regard to the murder of Eubanks. Even though Schmidt did the actual shooting, Craig, as an aider and abettor, was a principle, guilty of the murder to the same degree as if he had

wielded the weapon himself. Thus, there is no reasonable basis for a jury recommendation premised upon the degree of participation of Schmidt and the fact that Schmidt received sentences of life imprisonment as compared with Craig's death sentences. Where such factor in mitigation is found by the jury, under such circumstances, the sentencing judge is not obliged to follow their recommendation. The jury was also unaware of the aggravating factor of a previous conviction for the killing of Farmer and that the murder was committed to avoid a lawful arrest. Such aggravators were properly considered by the trial judge in making the final sentencing decision. The facts known to the trial judge reasonably supported the sentence of death which should be upheld despite a jury recommendation of life imprisonment in such circustances. In his findings of fact, the sentencing judge found four aggravating circumstances as to each murder: (1) the defendant was previously convicted of a capital felony, to-wit: the other contemporaneous murder for which Craig was also being sentenced; (2) both murders were committed to avoid a lawful arrest; (3) both murders were committed for pecuniary gain; and (4) the murders were committed in a cold, callculated and premeditated manner without any pretense of moral or legal justification (R 747-749, 758-60). As previously argued, Craig's cocaine use should have precluded a finding that he had no significant history of prior criminal activity, and the trial court gave this factor slight weight. The trial court felt that there was little evidence to support the statutory mitigating circumstance of the defendant's age at the time of the

crime. The court properly attached very, very slight weight to this factor, and appropriately so, since it was based on Craig's I.Q., which Dr. Krop later admitted was normal. Furthermore, Craig has no psychological problems of any sort that would render him unable to govern his conduct to comport with the rules of society regardless of any hypothesis as to mental age (T 782-783). The remainder of the nonstatutory mitigating circumstances were appropriately accorded the minuscule weight that they deserved. Craig's courtly ways with family and inlaws and random small acts of kindness pale in contrast to the enormity of his deeds which were fueled by greed. That he may be a good candidate for rehabilitation, is not a factor of such weight that reasonable people could conclude could possibly outweigh proven aggravating factors, particularly in light of the contemporaneous conviction for the Farmer homicide. Cf. Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988). The remainder of the nonstatutory mitigation was marginal at best. The aggravating factors so clearly and convincingly outweighed the mitigating factors that no reasonble persons could differ. The murder was committed to gain control of the victim's assets. The murder of Farmer was part of a plan to cover up Craig's guilt and to allow him to continue controlling the ranch and the dead victim's assets. Cf. Echols v. State, 484 So. 2d 568 (Fla. 1985) (the trial court properly sentenced defendant to death, despite jury's recommendation of life imprisonment, in light of evidence that the murder was committed while the defendant was engaged in robbery and burglary of the home of the victim and his wife, and

that the murder was committed to gain control of the assets of the victim's estate and the defendant had previous convictions); Zeigler v. State, 580 So. 2d 127 (Fla. 1991) (the trial judge properly overrode jury's recommendation of life imprisonment and imposed death penalty for defendant's murder of his wife to obtain insurance proceeds and murder of three other people in an elaborate plan to cover up his guilt; evidence of mitigation was miniscule in comparison with enormity of crimes committed). There was no evidence of mental impairment or an inability to control one's conduct. Craig's actions in committing the murder were not significantly influenced by his childhood experience. Cf. Lara v. State, 464 So. 2d 1173 (Fla. 1985). His prior acts of benevolence pale in comparison to the acts he was willing to perform as a result of greed. That a defendant on death row awaiting a resentencing would be remorseful and cooperative is hardly unusual.

CROSS APPEAL

I. THE SENTENCING COURT ERRED IN FINDING THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

Appellee, the State of Florida has filed in this cause a notice of cross-appeal contesting the trial court's ruling that Craig was entitled to the mitigating circumstance of no significant history of criminal activity. This court has previously held that in a capital case, the mitigating factor of no significant criminal activity may be rebutted by record evidence of criminal activity, including drug activity. Slawson v. State, 619 So. 2d 255 (Fla. 1993). By his own admission,

Craig has been a user of cocaine. He has also engaged in an *on-going* and systematic series of thefts from his employer. The prior thefts were not committed at the same time as the murder, were not part of a single incident, and were not contemporaneous crimes. Cf. Bello v. State, 547 So. 2d 914 (Fla. 1989); Cook v. State, 542 So. 2d 964 (Fla. 1989); Scull v. State, 533 So. 2d 1137 (Fla. 1988). This also constitutes a significant history of prior criminal activity. A defendant need not be convicted or even arrested for his criminal activity to be considered. Lucas v. State, 568 So. 2d 18, n.6 (Fla. 1990); Walton v. State, 547 So. 2d 622 (Fla. 1989); Washington v. State, 362 So. 2d 658 (Fla. 1978).

CONCLUSION

Should this court find any aggravating factor to be inapplicable or misapplied the appellee submits that the remaining aggravators support the death penalty and the case for mitigation is extremely weak and, thus, any error is harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Should the override fall, (and vice versa), Craig still has one remaining death sentence. Based on the above and foregoing argument appellee submits that the death sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by Delivery to James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 28th day of November, 1994.

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