IN THE SUPREME COURT OF FLORIDA

ROBERT PATRICK CRAIG,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,642

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

ROBERT PATRICK CRAIG, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 82,642

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

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

R = The instant record on appeal

T = Transcripts from the instant record on appeal

SR = The supplemental record on appeal

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

STATEMENT OF THE CASE

The defendant was charged with and convicted of the July 1981, first degree murders of John Eubanks and Walton Robert Farmer. Craig v. State, 510 So.2d 857 (Fla. 1987). (SR 6-8) The original jury recommended that the defendant receive a sentence of life imprisonment for the killing of John Eubanks (which was perpetrated by the co-defendant, Robert Schmidt) and a sentence of death for the killing of Farmer. Id. (SR 9-10)

The original trial judge, the Honorable C. Welborn Daniel, Jr., Judge of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Lake County, overruled the jury recommendation of life imprisonment on the Eubanks murder and followed the recommendation of death for the Farmer murder in sentencing the defendant to two death sentences. Id. Regarding the murder of John Eubanks, the original judge found the aggravating circumstances of (1) the murder was committed for financial gain; (2) the murder was especially wicked, atrocious, or cruel; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Id. (SR 11-33) In mitigation, the original judge found that the defendant had no significant history of prior criminal activity. Id. (SR 11-33)

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

murder of John Eubanks; (2) the murder was committed for financial gain; (3) the murder was especially wicked, atrocious, or cruel; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (SR 11-33) The trial court rejected all mitigating circumstances. Id. (SR 11-33)

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

On remand, the case was reassigned to the Honorable Don F. Briggs, Judge of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Lake County, since Judge Daniel had retired from the bench and was engaged in the private practice of law. Judge Briggs denied the defendant's motion to empanel a new jury and ordered that the resentencing would be held before the judge only, without a new jury. Craig v. State, 620 So.2d 174, 175 (Fla. 1993) (hereinafter Craig II). Following a limited sentencing hearing in which the new trial judge heard only evidence of the defendant's good conduct in jail and prison and relied on the original trial and penalty phase transcripts, the trial court again imposed two death sentences. Id. The new

sentencing judge found the existence of four aggravating circumstances for each count: (1) the defendant was previously convicted of a capital felony, to-wit: the other contemporaneous murder; (2) the murders were committed to avoid a lawful arrest; (3) the murders were committed for pecuniary gain; and (4) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (SR 44-46, 48-50) These findings included aggravating factors not found (and not even argued by the state) in the first sentencing, to-wit: that the murders were committed to avoid a lawful arrest and, as to the murder of John Eubanks (Count I), that the defendant had previously been convicted of the murder of Walton Robert Farmer. (SR 45, 48-49)

Regarding the mitigating circumstances, the replacement judge found a lack of significant history of prior criminal activity, which he gave only little weight, and that the defendant exhibited good behavior during his incarceration from the time of his arrest through the trial and resentencing, which he assigned very little weight. (R 46, 50, 53) In imposing the death sentence on Count I (Eubanks), the court rejected the jury's life recommendation, simply evoking the language of Tedder v. State, 322 So.2d 908 (Fla. 1975), that "the circumstances of the murder dictate that the sentence of death is the only appropriate sentence, that being 'so clear and convincing that virtually no reasonable person could defer.'" (sic) (SR 53-54)

On appeal from the first remand, the appellant raised

various errors including the propriety of the death sentences, the finding of additional aggravating factors not previously found in the first proceeding, and the court's limitation on evidence which could be presented to the court. Craig II, supra at 175-176. This Court did not rule on these issues, instead vacating both death sentences on the authority of Corbett v. State, 602 So.2d 1241, 1244 (Fla. 1992), since the new judge did not hear the same evidence as did the advisory jury. The Court remanded for an entirely new penalty phase hearing before a new jury which would recommend a sentence for Count II (since the original life recommendation as to Count I would continue in effect), and for resentencing by the judge as to both counts. Craig II, supra at 176.

On this second remand (from which the instant appeal follows), a new jury was empaneled to hear the evidence and recommend a sentence for only the first-degree murder of Robert Farmer. The defense filed motions to exclude evidence concerning the defendant's theft of cattle from John Eubanks, arguing that such thefts were irrelevant to any aggravating circumstances pertaining to the Farmer murder, and to preclude consideration of pecuniary gain and cold, calculated, and premeditated as aggravating circumstances. (R 149-151, 154-155, 587-590) The trial court initially deferred ruling on these motions, but later denied the defense requests to exclude this evidence. (T 320, 322-323, 372, 727, 785-786) The trial court allowed, over defense hearsay objection, evidence that John Eubanks had told a

business associate, William Nelson, that he was going to replace Robert Craig as the foreman of the ranch with Robert Farmer, where there was no evidence that Craig knew of such conversation. (T 391-392) The court ruled that the hearsay was admissible under the state of mind of the declarant exception to the hearsay rule. (T 391-392) The defense sought jury instructions which listed the specific non-statutory mitigating circumstances on which the defendant was relying; however, the court denied such requests. (R 687-690; T 730-731, 740-741, 787)

During the penalty phase testimony, a co-perpetrator of the crimes, Robert Schmidt, (whom the defendant claims was the leading force in the crimes and whose shots killed both men), testified as to his and the defendant's involvement in the crimes. During his testimony he explained that he had been given a deal to second degree murder convictions in exchange for his testimony. (T 471) The prosecutor went to great lengths examining Schmidt regarding his current life sentences, where, despite a presumptive parole release date of March 1995, it did not appear that he would be released at that time since the prosecutor had personally successfully blocked earlier parole three times. (T 471-472) Therefore, the jury was given the impression that Schmidt would most likely remain incarcerated for a long period of time. (T 471-472) The prosecutor also argued this "fact" to the jury, telling them that Schmidt knew the prosecutor had blocked his release three times and knows that he is "not going to be getting out of this." (T 795) After the hearing,

however, the defense discovered that Schmidt was already on work release, which the Department of Corrections had described as the "road to release." (R 737-742; T 897-900, 904-906) The defendant thus sought a new penalty phase hearing before a new jury since the jury had been misled as to this crucial fact which was directly related to mitigating factors the defense had argued; and sought a continuance of the sentencing for an evidentiary hearing on the matter. (R 737-742; T 892, 897-900, 904-906) During argument on the motion, the prosecutor admitted that he knew that Schmidt was already on work release prior to the penalty phase testimony, but merely argued that the defense could have discovered this fact for themselves as well. (T 902) The court, ruling that there was no discovery or Brady violation since the defense could have discovered the information itself, denied the defendant's motions. (T 892, 906)

The jury, after hearing the evidence and argument of counsel, recommended by a vote of seven-to-five that the defendant be sentenced to death for the murder of Robert Farmer (Count II). (R 696) The trial court followed that recommendation and overrode the original jury's life recommendation on Count I, and sentenced Robert Craig to two consecutive death sentences. (R 772-781) In his findings of fact, the trial court found four aggravating circumstances as to each count: (1) the defendant was previously convicted of a capital felony, to-wit: the other contemporaneous murder for which he was also being sentenced to death; (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, calculated, and premeditated manner without any pretense of moral or legal justification. (R 747-749, 758-760)

As to the mitigating circumstances, the trial court found: (1) the defendant's lack of significant prior criminal activity, but the court found this to be of **"slight** weight;" (2) the defendant's age of 23 and a mental age of 16-18, which the court found to be of **"very, very slight** weight;" (3) the defendant's good attitude and good conduct while awaiting trial in jail, to which the court assigned **"very slight** weight;" (4) the plea bargain and disparate sentence of the co-defendant Schmidt, which the court found to be of **"very, very, slight** weight;" (5) the defendant's remorse, which the court accorded **"very slight** weight;" (6) the defendant's low intelligence level, which the court gave **"very, very slight** weight;" (7) the defendant's hard work habits and skill development while in prison, to which the court assigned **"very slight** weight;" (8) the defendant's childhood background which included Craig being forced by his father to quit school in the 11th grade to work on the family farm and that his father was a strict disciplinarian, but the court gave this factor **"very very slight** weight;" (9) the good relationship Craig has with his family and in-laws, including counseling of his younger relatives, which the court gave **"very, very slight** weight;" (10) the defendant's status as a good prisoner who has developed additional skills in prison and thus

has shown a good possibility of rehabilitation, which the court accorded **"slight** weight;" (11) the defendant's religious nature since the time of his arrest, which the court assigned **"very, very slight** weight;" (12) the defendant's "unimpeachable" good character, which the court accorded **"very, very, slight** weight;" (13) the undisputed lack of prior violence of the defendant, which the court found to be of **"very, very slight** weight;" and (14) the defendant's positive personality traits, which the court found to be cumulative of other mitigating factors and accorded "in a cumulative manner, **very, very slight** weight." (R 749-757, 761-769) Regarding other mitigation argued by the defense, the court rejected: (1) the defendant was an accomplice in the murders committed by another and his participation was relatively minor; (2) the defendant acted under extreme duress or under the substantial domination of another; (3) the offer of a plea bargain to Craig and his rejection of it; (4) Robert Craig's full cooperation with the police; (5) the defendant's use of cocaine; (6) Craig's minor participation in the killings; (7) the defendant's confused mental state at the time of the killings; (8) the use of evidence which was obtained in violation of the defendant's fifth and sixth amendments rights; and (9) the domination of the defendant by Robert Schmidt. (R 749-757, 761-769)

In rejecting the original jury's life recommendation on Count I, the trial court again simply evoked the language of Tedder v. State, that "the circumstances of the murder dictate that the sentence of death is the only appropriate sentence, that

being so clear and convincing that virtually no reasonable person could differ." (R 769-770)

A notice of appeal was timely filed. (R 793) This appeal follows.

STATEMENT OF THE FACTS

On July 21, 1981, John Eubanks went to a ranch that he owned which was run by the defendant, Robert Craig. (T 371-372, 386-387, 674-675; PR 682-683, 685, 693) Robert Schmidt was also employed at the ranch as a laborer. (T 372-373, 441-442, 676; PR 691-692) Eubanks had told his wife and his secretary about some problems that he was having at the ranch with the defendant. (T 375-378; PR 683, 693) Eubanks planned to conduct a cattle count at the ranch since he believed that the defendant and Schmidt had stolen some of his cattle. (T 375, 389, 450-452; PR 778, 922, 1484)

During the cattle count that day, Craig and Schmidt were alone with Eubanks several times with no mention of killing him and with nothing happening to him on those occasions. (T 478-482, 683-686) While Eubanks was engaged in the cattle count along with Schmidt and Craig, Walton Farmer arrived at the ranch to talk to Eubanks. (T 350, 450-453, 686-690; PR 933, 1484) Unbeknownst to Craig and Schmidt, Eubanks had offered Farmer a job. (T 392-393, 478-479, 680-681; PR 715) While Eubanks and Farmer were in a remote area of the ranch with Schmidt and the defendant, they were shot and killed. (PR 945-953, 1409-1418) Two versions of the crime subsequently came to light.

In his statement to police two days after the incident[1] and again at the original trial and the instant resentencing,

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

Robert Craig told what happened in the remote area of the ranch. Eubanks was engaged in the cattle count when he was joined by Farmer. (T 686-690; PR 1404-1406, 1409-1410, 2709-2710) Schmidt told the defendant that since Eubanks knew about the missing cattle, they were in big trouble and would have to kill both Eubanks and Farmer. (T 694-695; PR 1396-1397, 1410, 2710-2711) Craig did not believe that Schmidt was serious and told Schmidt that he would not be able to do that. (T 694-695, 723-724; PR 1410, 2710)

The defendant was with Farmer and, some distance away and out of sight of the defendant, Schmidt was with Eubanks. (T 691-692; PR 1413, 2711) Craig heard Schmidt shoot twice. (T 692-693; PR 1413) Farmer and the defendant started running and Schmidt came into view, firing a couple of shots and yelling, "Shoot! Shoot!" (T 693-694; PR 1414-1416, 1488) The defendant, out of fear, fell to the ground and, with his eyes closed, fired in Farmer's direction three times. (T 694-696, 723-725; PR 1414, 1486-1489, 2713) Everything happened so fast that the defendant just automatically shot without really thinking about it. (T 696, 723-725; PR 1414, 2713, 2973-2974)

When Craig opened his eyes, he saw Farmer on the ground. (T 695; PR 1417) Schmidt walked past Craig and, standing over Farmer, shot the victim in the head. (T 695-696; PR 1416-1417) Craig asked Schmidt about Eubanks, and Schmidt replied that Eubanks was dead. (PR 1418)

Schmidt threatened to kill the defendant if he told

anyone and indicated that they would have to dispose of the victims' vehicles. (T 695-697; PR 1418, 2714) With the defendant following in the ranch truck, Schmidt first drove Farmer's jeep to Clermont and then drove Eubanks' automobile to Belleview. (T 697; PR 1419-1420, 2714-2715) Schmidt told the defendant that they would that night take the bodies to Wall Sink, a large, deep sinkhole in neighboring Sumter County. (PR 1420, 2716)

At Schmidt's directions, the two men loaded cement blocks, plywood, bales of straw, a rope and an old blanket onto the ranch pick-up truck. (PR 1423-1426, 2716) Schmidt took Eubanks' and Farmer's hats and wallets and put them into a paper bag. (PR 1426-1427, 1494) The two men loaded the bodies onto the truck, covered them with the plywood and straw, and drove to Wall Sink. (PR 1428-1432) There, after cutting the lock on the fence and riving near the sinkhole, Schmidt directed the unloading of the bodies. (PR 1437-1440, 2716-2717)

At trial and at the second resentencing, Robert Schmidt testified for the state, as a part of a deal allowing him to plead guilty to two counts of second degree murder and dropping charges against his wife who had hidden the murder weapon. (T 471-478; PR 999-1001, 1018-1024,1048-1051) Schmidt's version of the incident was that the defendant had been the instigator. (T 453-456; PR 935-937) Schmidt testified that the defendant told him that they would have to kill Eubanks and Farmer since Eubanks knew of the cattle theft. (T 453-456; PR 935) At the original trial, Schmidt testified that there was no discussion as

to any details regarding killing the men. (PR 941) However at the resentencing, Schmidt testified that Craig told him that they would kill the two men after luring them into a back hammock and further that Craig ordered Schmidt to fully load his gun. (T 454-456)

It was Schmidt's version that while at the remote area of the ranch with Eubanks, Schmidt heard the defendant (who was out of sight with Farmer) yell to him, "Hey, Bob!," and then heard the defendant shoot first. (T 457-458; PR 945) Schmidt shot Eubanks twice in the back of the head. (T 458, 484-485; PR 946-948) Schmidt then claimed that the defendant ordered Schmidt to shoot Farmer in the head since Farmer was still alive, which he did. (T 459-461; PR 950-952) Robert Schmidt then said that the defendant took a few bills from Eubanks' wallet. (T 461; PR 954, 959) Later that night, the two men disposed of the bodies at the sinkhole, Schmidt claiming that the defendant directed the actions. (T 461-468; PR 961-962, 967-974)

Robert Schmidt admitted that he considered himself to be a leader, rather than a follower. (T 490-491) Following Schmidt's original trial testimony, as he was leaving the stand, he was observed to give the defendant a look and a gesture, mouthing the words, "Got you." (T 607-609)

On July 22, 1981, Schmidt and Craig washed the bed of the pick-up truck and changed the tires on the truck. (T 469, 700; PR 982-986, 1474, 1477, 1479) The police and several acquaintances of Farmer gathered at the ranch that morning to

search for the missing Farmer. (PR 1470-1472) Craig, "running from a nightmare," afraid of crossing Schmidt, and not knowing what to do, told a deputy that Farmer had left about 5:00 p.m. the previous day and that Eubanks had left a short time later. (T 699-700; PR 1471-1472)

Police investigation into the victims' disappearance led to the arrest of Schmidt and the defendant for cattle theft. (T 471; PR 2157-2159, 2185, 2368, 2375-2377, 2414-2415) After the police took five psychological stress evaluations of the defendant, Craig admitted to selling some of the Eubanks' cattle. (PR 2161, 2183, 2191, 2378-2379) Several hours later, after repeated questioning, after hiding the defendant from a bondsman and an attorney who were on their way to bail the defendant out of jail on the theft charge, after appealing to the defendant's conscience by telling him the victims deserved a "Christian burial," after slamming a chair in front of the defendant and confronting the defendant, and without re-advising the defendant of his Miranda rights, the sheriff obtained a statement from the defendant admitting his involvement in the deaths of Eubanks and Farmer. (PR 2166-2167, 2212-2218, 2247, 2249, 2305-2306, 2311-2313, 2329, 2419-2420, 2428, 2438, 2498, 2504-2506, 2534-2540, 2548) This statement, the trial court eventually ruled, was not freely and voluntarily given after a knowing and intelligent waiver of his rights. (PR 595, 2005 a)

During this involuntary statement, the defendant agreed to lead the police to the sight where the bodies had been dis-

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

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

After Craig's statement and co-operation with the police, Schmidt and the defendant were charged with murder. (T 475-478) Schmidt, angry with the defendant because of his co-operation with the police, threatened to inflict physical harm on Craig. (T 478)

The medical examiner testified that Eubanks died from the two gunshot wounds to the head. (T 520; PR 1273-1282) These wounds, ballistics tests showed, were inflicted by Robert Schmidt's gun. (T 555-557; PR 1147-1149) Farmer had received six

wounds: one, a grazing wound to the arm; a second to the left rear side; a third to the right arm; another to the right arm, which also entered the abdomen; a shot entering the chest and lung; and a final wound to the left rear skull. (T 525-529; PR 1283-1296) The cause of death was the shot to the head; however the bullet wounds to the abdomen and chest were potentially serious. (T 532, 536; PR 1291-1297, 1305) Ballistics tests showed that the gunshot wound to the head was caused by Schmidt's gun. (T 534-535, 555-557; PR 1349-1351) A bullet recovered from Farmer's side could have been fired by the defendant's gun. (T 560; PR 1352-1353)

The defendant presented evidence of the defendant's character and background, including testimony that Craig was a good husband, son, and brother, a hard worker, a kind, gentle man who helped others in need, and was a follower, especially of Robert Schmidt, whom he idolized. (T 567-568, 580-582, 584-585, 590, 598, 604, 636-638, 640, 676, 758-761, 781) Schmidt, on the other hand, was very aggressive; he always talked of killing or hurting people. (T 641-643 676) Craig never owned any guns (in fact, he hated them) prior to meeting Schmidt; he became interested in them and started buying them shortly after meeting Schmidt. (T 487, 569, 580-581, 585, 591, 606-607, 640-641, 677-678) The defendant did not like hunting, prior to his association with Schmidt; killing a bird or an animal made Craig sick to his stomach. (T 609-610) Craig was also extremely and genuinely remorseful over what had happened. (T 576-577, 644, 704) On the

other hand, Robert Schmidt was the leader, a braggart, and a rude, violent person. (T 570-572) A pastor, who was in favor of the death penalty and knows a con man when he sees one, travelled all night from a conference in Alabama, just to testify for the defendant that Craig was a sincere, kind Christian man, who was genuinely sincere in his Christian beliefs. (T 759-762)

Additionally, the defense presented testimony of jailers from the Lake County Jail, where the defendant had been incarcerated from his arrest until his original sentencing. The jailers reported having absolutely no trouble with the defendant, who had a good attitude and was extremely likeable. (T 631, 648) Robert Craig, they said, was one of the nicest persons they had ever met, a very worthwhile person. (T 632, 648) The defendant never had any disputes or problems with other inmates, which was highly unusual for inmates housed in this wing. (T 631, 648) He got along well with all of the guards and, in fact, came to the aid of an officer during a fight in the jail. (T 632) The jailers stated that they would not mind at all if Craig was released from prison and would come to live in their neighborhoods. (T 632-633, 649) One jailer testified that it was highly unusual for him to make such a statement about an inmate, recalling, "I've never met a person like him. He's a nice guy. I never could understand the situation." (T 649) Another deputy opined, "If all of them [inmates] were like him, I wouldn't have a job." (T 632) Craig has adjusted well to prison, bettering himself there through his studies, his religion, and his art-

work. (T 572-577, 582, 592-593, 599, 605, 643-645, 701-704, 761-762) He has helped his family since being imprisoned by advising his niece and nephew not to get involved in drugs and stealing and not to do what he had done. (T 599-600)

Sergeant Clyde Blevins, a former death-row guard from Florida State Prison, testified via a deposition to perpetuate testimony that he has known the defendant since Craig first was housed on death row in 1982. (T 614) Robert Craig was a likeable person who followed the rules and never gave anyone trouble. (T 615) In fact, Sgt. Blevins called the defendant the nicest death-row inmate he had ever met. (T 615-616) Blevins stated that Craig was quite different from the other death row inmates. (T 616) The defendant was always polite, always had a kind word to say, never used profanity, was always neat (keeping his cell very clean), and was always doing something worthwhile (such as reading, drawing, or cleaning his cell). (T 615-616, 626-628) He had a lot of respect for officers and other personnel. (T 616)

Craig would help the prison guards in any way he possibly could. (T 615-616) The defendant would assist the guards by letting them know of any problems of which security should be aware, such as the presence of contraband. (T 616-617) He did this at great risk to himself since fellow inmates do not approve of snitches. (T 617-618)

Robert Craig also was always helping other inmates. (T 618) After first obtaining permission to do so, the defendant would share his food with the less fortunate and he would help

them with legal work. (T 618-619) Craig respected the corrections officers and his fellow inmates; they, in turn, respected him. (T 619)

Unlike the concern he felt when transporting other inmates, Sergeant Blevins never worried when he had to remove the defendant's handcuffs when moving him. (T 619-620) The guards never found any contraband in the defendant's cell. (T 620) If the defendant were ever released to society, Blevins believes that he would never be any problem to society and that he would "do good for himself." (T 620-621) Blevins believes Craig would be a help to a lot of people if he were ever released. (T 621-622) Blevins would have no problem, "not a bit in the world," if the defendant moved in next door to him (as opposed to most of the inmates whom he would not want to live in the same town). (T 621-622)

Psychologist Dr. Harry Krop testified that, in his many years of experience working in capital cases, he found it quite extraordinary that corrections officers would testify positively on behalf of a death row inmate, such as had occurred in the defendant's case. (T 779) Similarly, Chief Assistant Public Defender Mike Johnson testified that in his experience in capital litigation it was highly unusual for prison guards and jailers to testify on behalf of a person facing the death penalty. (T 663-664)

Dr. Krop determined that the defendant had a mental age of between sixteen and eighteen. (T 781) There appeared to be no

evidence of any personality disorder and the defendant was coping well with his situation and had a positive attitude. (T 773-777) Craig exhibits a positive attitude, with no anti-social tendencies (as opposed to the norm of death-row inmates, who are usually diagnosed as having anti-social personality disorders). (T 775-778)

The behavior observed by correctional officers was consistent with the doctor's diagnosis of the defendant, that of a generally passive individual, who is compliant and responds to authority well. (T 772-774) The doctor opined that the defendant would fit quite well in the general prison population. (T 772-773, 779, 781) The defendant has pursued positive things in jail, such as drawing, writing letters, and having visits, to maintain his positive attitude, showing that the defendant has the ability to learn and would not be a management problem. (T 777-779)

Additionally, the doctor's observations of the defendant indicate he genuinely feels remorse for the crimes. (T 778-781) Craig is a non-assertive, passive individual, who was "more vulnerable to being led and influenced by the other [Schmidt] than the other way around." (T 781)

SUMMARY OF ARGUMENTS

Point I. The prosecutor knew prior to the penalty phase that co-defendant Robert Schmidt, whose bullets killed both victims, and who testified against the defendant, was currently on work release -- his "road to release." Yet this evidence was deliberately withheld from the jury and the defense. The prosecutor's act of misleading the jury as to a material fact and trial court's denial of the defense request a new penalty phase (or at least an evidentiary hearing) deprived the defendant of his rights to due process of law, a fair jury trial, and the effective assistance of counsel, and renders his death sentences cruel and unusual punishment and a violation of equal protection.

Point II. Over defense objections, the court permitted the state to present to the jury evidence of matters which were irrelevant to the sentencing verdict for the murder of Walton Farmer (the only matter the jury was to consider), and argue to the jury factors which solely pertained to the killing of John Eubanks, not the killing of Walton Farmer. The presentation and argument of these irrelevant matters for the jury's consideration violated the defendant's constitutional rights.

Point III. The admission of hearsay statements and the use of this evidence to establish aggravating factors violated the defendant's federal and Florida constitutional rights to a fair trial, confrontation of witnesses, and due process of law, and render the death sentences cruel and unusual punishment.

Point IV. The failure to give independent instructions

to the jury identifying each valid mitigating circumstance that has been recognized by law and which is supported by the evidence, after timely request by the defendant, results in vague and confusing jury instructions which are biased in favor of imposition of the death penalty and thus unconstitutional.

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

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

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING A NEW PENALTY PHASE WHERE THE PROSECUTOR DELIBERATELY MISLED THE JURY CONCERNING A MATERIAL FACT, THE DISPARATE TREATMENT OF THE CO-DEFENDANT WHO ACTUALLY COMMITTED BOTH MURDERS.

The Oath of Admission to the Florida Bar states, in part, that an attorney "will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law . . . ." Oath of Admission to The Florida Bar, Florida Rules of Court, p. 951 (West Publishing Co. 1994). See also Dosdourian v. Carsten, 624 So.2d 241, 244 (Fla. 1993); The Florida Bar v. Schaub, 618 So.2d 202 (Fla. 1993); Rules 4-3.3(a)(1), 4-3.3(a)(2), 4-3.3(a)(4), 4-3.4(e), 4-8.4(c), Rules of Professional Conduct. Furthermore, prosecutors have a separate duty placed upon them to seek justice and not merely convictions or enhanced penalties; thus they may not mislead a court or jury by presenting inaccurate or incomplete statements of fact or law, by withholding facts from the defense and the tribunal, or by arguing untruthful inferences to the fact-finders. See Barber v. State, 592 So.2d 330 (Fla. 2d DCA 1992). See also Garcia v. State, 622 So.2d 1325, 1331-1332 (Fla. 1993); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). In discussing improper prosecutorial arguments to a jury, the first district ruled:

> It is the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to effect the fairness and impartiality to which the accused is entitled. His duty is not to obtain convictions but seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.

Cochran v. State, 280 So.2d 42, 43 (Fla. 1st DCA 1973).

The prosecutor is also an administrator of justice and a servant of the law, having the obligation to not only enforce the rights of the public but also to guard the rights of the accused. State v. Lozano, 616 So.2d 73, 78 n. 5 (Fla. 1st DCA 1993).

> The [government] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful [result] as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935); quoted in (and applied to state prosecutors in) Webster v. Rees, 729 F.2d 1078,

1081 (6th Cir. 1984). See also The Florida Bar v. Schaub, supra; Nowitzke v. State, 572 So.2d 1346, 1356 (Fla. 1990); Rule 4-3.8, Florida Rules of Professional Conduct; American Bar Association, Standards for Criminal Justice: The Prosecution Function, §§3-1.2(c), 3-2.8(a), 3-5.6(a), 3-5.8(a) (3d ed. 1992), **reprinted at** 50 CrL 2061 (March 4, 1992).

The prosecuting attorney in the instant case has struck "foul blows" in obtaining the death sentences here. He has deliberately withheld pertinent information from the defense and consciously presented incomplete, inaccurate, and misleading evidence and argument to the advisory jury. The prosecutor presented evidence and argument that the parole of Robert Schmidt (the man who actually caused the deaths to occur) had been blocked repeatedly 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:**

> Q [by the prosecutor]. What happened to your [two first degree murder] charges?
>
> A [by Robert Schmidt]. Due to a plea bargain, I had them reduced to second degree murder if I would give truthful testimony in the murders of John Smith Eubanks and Robert Walton Farmer.
>
> Q. Did you plead guilty to second degree murder?
>
> A. Yes, sir, I did, two counts.
>
> Q. And what was the sentence imposed on you by the judge?

A. Six months to life and six months to life, consecutive.

* * *

Q. You're currently eligible for parole?

A. Yes, sir, I am in March of 1995.

Q. Have I appeared at your last three parole hearings?

A. Yes, sir, you've successfully stopped my parole.

Q. Have I given you any reason to believe that either I or the State Attorney's Office will not continue to make every effort to block your parole?

A. No, I think you told my attorney you would continue to stop my parole the best that you could.

Q. You don't expect any further benefit from the State Attorney's Office for testifying here today?

A. No, sir, nothing.

(T 471-472) And during closing argument to the jury, the prosecutor stated:

MR. RIDGWAY [the prosecutor]: . . . I will tell you this, if you believe Robert Craig, if you believe that when he took that stand and described for you the events of July 21st, 1981, that what he told you was the truth and whole truth, then you must return a recommendation of life. If you find that he didn't tell you the truth and you find that the truth is what Robert Schmidt told you, then it's a whole other matter.

Robert Schmidt is a bad man, and I'm not here to tell you he's a nice guy. Nobody in their right mind would want him living next to them if he ever gets out of prison but that isn't the ques-

> tion. The question is when he took the stand and told you the same thing he told another jury in 1981, was he telling you the truth.
>
> In trying to decide between Robert Schmidt on the one hand and Robert Craig on the other as to who you can believe, I think there are several things you can look to. Now, the cross examination of Robert Schmidt Miss Blair asked him that in 1981 he was facing a possible death sentence himself, yes, he was. He was facing a possible first degree murder conviction, yes, he was, that gave him a very powerful motive to lie, yes, it did, but for Robert Schmidt that motive is no longer there but for Robert Craig it is very much there. Robert Craig had the same motivation to lie today than Robert Schmidt ever would have had and that Robert Schmidt no longer has.
>
> Now, Robert Schmidt could be prosecuted for perjury if he came in and lied to you and that might or might not affect his parole date but that's a very weak incentive to lie compared to the one that Robert Craig has.
>
> Robert Schmidt told you I know you blocked my parole three times. I know you're going to be there trying to do it again, **I know I'm not going to be getting out of this**, but I'll tell it to you one more time. So when you consider the motives here of who has the motive to tell the truth and who does not, weigh that.

(T 794-795) In fact, however, Schmidt knew and the prosecutor did, too, that Schmidt **is** "going to be getting out of this." The prosecutor admitted after the penalty phase hearing that he knew prior to the hearing and before he presented his evidence and argument to the jury that Schmidt was already on work release, or, as the Department of Corrections calls it, "the road to release." (T 897, 899, 902, 904; R 742) But this evidence was withheld from the jury. This prosecutor allowed the misleading

and incomplete evidence to go to the advisory jury without presenting the whole truth and, in fact, subjugating the truth by arguing that Schmidt, the actual perpetrator of the two murders, would not be getting out. (T 471-472, 794-795) This violated the defendant's rights to due process, a fair jury trial, effective assistance of counsel, and to be free from cruel and unusual punishment as guaranteed by the federal and Florida constitutions.

Failure of a prosecutor to correct material false statements of a witness and to use that evidence to obtain a conviction or enhance a sentence violates the defendant's due process and fair trial rights. Giglio v. United States, 405 U.S. 150 (1972); United States v. Bagley, 473 U.S. 667 (1985). When the witness conceals his or her status and/or conceals the extent of bias against a defendant through misleading or false testimony, the prosecutor has a duty to correct that testimony and not utilize it to obtain the conviction or enhanced sentence. Giglio, supra; Bagley, supra; United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989)

If there is a reasonable possibility that the false evidence may have affected the judgment of the jury, a new trial is required. Giglio, 405 U.S. at 154 (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959); Routly v. State, 590 So.2d 397, 400 (Fla. 1991). "The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently

conceal such facts from the jury." Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir. 1983); Routly, supra at 400.

The failure of the prosecutor to "fully inform" the jury of the facts concerning a testifying witness's status and possible bias misleads the jury as to the facts bearing on the credibility of the witness and constitutes a denial of due process. Armstrong v. State, 399 So.2d 953, 960 (Fla. 1981); Moore v. State, 623 So.2d 608, 609 (Fla. 4th DCA 1993). See also Gorham v. State, 597 So.2d 782, 784-785 (Fla. 1992). The jury in this case was "misled as to the degree of favorableness" of the co-perpetrator's plea and actual sentences served in exchange for his testimony, "thus the jury was unable to adequately assess [his] credibility." Moore v. State, supra.

Additionally, 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. See Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979); Slater v. State, 316 So.2d 539 (Fla. 1975). Concealing the fact that the co-perpetrator is currently 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 equally culpable co-perpetrator and denies due process, a fair trial, effective assistance of counsel, and renders the death sentences cruel and unusual.

To establish reversible error, the defendant must show

that: (1) the testimony and/or argument was false and misleading; (2) the prosecutor knew the testimony and/or argument was false or misleading; and (3) the statement was material. Giglio, supra; Routly v. State, supra at 400; United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989). As detailed above, the statement and argument were both false and misleading to the jury; the co-perpetrator is on the road to release and will not spend much more time in prison. The prosecutor knew that they were false and misleading; he admitted to knowing Schmidt was on work release prior to his questioning of Schmidt and prior to his argument to the jury. The statements were material as they affected the jury's view of Schmidt's credibility and the true disparity of sentencing for the culpable Schmidt. The prosecutor even admitted that the jury's sentencing verdict should turn on whether the jury believed or disbelieved Schmidt. While perhaps not a true Brady or discovery violation since, as the trial court ruled, defense counsel might have been able to discover the information prior to the penalty phase hearing, the deliberate falsehoods perpetrated by the prosecutor nonetheless violated Giglio and the defendant's due process and fair trial rights because there is no requirement under this theory of error that the matters were not readily accessible to the defense. See Routly v. State, 590 So.2d at 399-400 (difference between Brady violation and Giglio violation). The resultant sentences are therefore tainted and rendered cruel and unusual punishment.

In a similar situation from a civil context where

secret agreements with one or more of multiple defendants are withheld from the jury, the Court wrote, "The search for the truth, in order to give justice to the litigants, is the primary duty of the courts." Secrets as to the true standing of the participants "can tend to mislead judges and juries, and border on collusion." Ward v. Ochoa, 284 So.2d 385, 387 (Fla. 1973). Schmidt, with the knowledge and connivance of the prosecutor, deliberately concealed the fact that he was already on the road to release. The prosecutor's duty to search for the truth was completely and utterly abandoned when he engaged in such conduct designed to delude the fact-finder. "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office." Bertolotti v. State, supra at 133. The conduct of the prosecutor here in withholding such evidence and presenting falsely misleading information to the advisory jury demonstrates a complete lack of regard for the role of the prosecutor and is subversive of the basic and sublime principle that the purpose of our system of justice is to seek the truth. No legal proceeding which is infected by conduct of this kind can be approved. A new penalty phase trial is required.[2]

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[2]In the alternative, if this Court feels that there are not enough facts developed below in order to show reversible error, then, rather than affirm, this Court must remand for an evidentiary hearing on the issue, which hearing the defense requested of the trial court, but was refused. (T 892, 900) See Pender v. State, 432 So.2d 800, 802 (Fla. 1st DCA 1983) (the defense must be given an opportunity to be heard and permitted to proffer or present evidence).

POINT II.

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE, OVER DEFENSE OBJECTIONS, EVIDENCE OF MATTERS WHICH WERE IRRELEVANT TO THE JURY'S CONSIDERATION OF AN ADVISORY SENTENCING VERDICT FOR THE MURDER OF WALTON FARMER, IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

Over defense objections, the court permitted the state to present to the jury evidence of the defendant's alleged cattle theft from John Eubanks which was irrelevant to the sentencing verdict for the murder of Walton Farmer (the only matter the jury was to consider). The state was also permitted then to argue these matters to the jury as evidence of the aggravating factors of pecuniary gain and cold, calculated, and premeditated, when these matters solely pertained to the killing of John Eubanks, not the killing of Walton Farmer, from whom nothing was taken, and who just happened onto the ranch that day. The presentation and argument of these irrelevant matters for the jury's consideration violated the defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9, 16, and 17 of the Florida Constitution.

The Evidence Code provides that relevant evidence is admissible and, by implication, that irrelevant evidence is

inadmissible. §90.402, Fla. Stat. (1993). Relevant evidence is defined by statute as "evidence tending to prove or disprove a material fact." §90.401, Fla. Stat. (1993). "When evidence is offered to prove a fact which is not a matter in issue, it is said to be immaterial," and hence is not admissible. Ehrhardt, Florida Evidence, §401.1 (1994 Edition).

> Relevancy is founded on materiality, the nexus between a fact being proved and a disputed issue, and probativeness, the effect this evidence would have on the existence of that fact.

Barrett v. State, 605 So.2d 560, 561 (Fla. 4th DCA 1992).

Here, the evidence the state presented over objection and its argument based on that evidence was not relevant to any issue which the advisory jury was called upon to decide. The jury was empaneled to consider only the sentencing for the killing of Robert Farmer, not the murder of John Eubanks (since the defendant had already received a life recommendation for that conviction). Evidence of the alleged cattle thefts from John Eubanks is totally irrelevant to any aggravating factors regarding the killing of Robert Farmer. While the rules of evidence are relaxed somewhat in penalty phase proceedings, evidence which is irrelevant to the aggravating or mitigating factors pending before the jury is still inadmissible. §921.141(1), Fla. Stat. (1993).

In Derrick v. State, 581 So.2d 31 (Fla. 1991), this Court affirmed this basic principle, holding that evidence that the defendant had told someone that he would kill again was

inadmissible since it was not relevant to any statutory aggravating circumstances surrounding the murder.

> We agree with Derrick that James's testimony was erroneously admitted and constitutes reversible error. The statement was not relevant to show Derrick's guilt because guilt is not at issue in the penalty phase of a trial. Therefore, the state must show that the statement is relevant to an issue properly considered in the penalty phase. . . . The testimony was not relevant to any . . . aggravating factor.

Id. at 36. Similarly, in the instant case, where none of the thefts were from Farmer, the evidence did not relate to any aggravating factors concerning the Farmer killing. The introduction of this evidence and the prosecutor's argument regarding the thefts were irrelevant to the advisory verdict concerning the Farmer murder and should have been excluded. See also South Carolina v. Gathers, 490 U.S. 805, 810-811 (1989). A new penalty phase, without the offending evidence and argument, is required.

POINT III.

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE, OVER DEFENSE OBJECTIONS, HEARSAY TESTIMONY, IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

Over the defendant's hearsay objection, the court permitted the state to introduce into evidence hearsay testimony that one of the victims (John Eubanks) had told a business associate that he intended to replace Craig as the foreman of the ranch. (T 391-392) This was admitted under the "declarant's state of mind" exception to the hearsay rule, despite there being no evidence showing that the statement was communicated to the defendant and the declarant's state of mind was therefore irrelevant to any issues in the penalty phase trial. The admission of the statement and the use of this evidence to establish aggravating factors violated the defendant's federal and Florida constitutional rights to a fair trial, confrontation of witnesses, and due process of law, and render the death sentences cruel and unusual punishment.

Subsection 90.801(1)(c), Florida Statutes (1993), defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In the absence of an applicable exception, hearsay evidence is inadmis-

sible. §90.802, Fla. Stat. (1993). The victim's statements here were admitted over objection to prove the truth of the matter asserted, that Eubanks intended to fire the defendant and replace him with Farmer. There was no evidence ever presented to show that Craig had been informed of these statements; indeed it appears that quite the contrary is true, Eubanks did not want his secretary to tell Craig anything about the incorrectness of the cattle count.

The state argued and the trial court ruled that the statements were admissible under the state of mind exception to the hearsay rule. §90.803(3)(a), Fla. Stat. (1993). It is well settled, however, that the state of mind exception to the hearsay rule allows the admission of extra-judicial statements only if the declarant's state of mind or subsequent actions are at issue in a particular case. Correll v. State, 523 So.2d 562, 565 (Fla. 1988); §90.803 (3)(a), Fla. Stat. (1993). John Eubanks' state of mind was not at issue and his statements cannot be used to prove Craig's state of mind. Correll v. State, supra at 565; Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983); Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982); Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980).

> The State suggests that if the statements were hearsay, an exception to the prohibition of their admission exists because they were used to prove a state of mind. In Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982), the district court correctly held that statements of a victim cannot be used to prove the state of mind or motive of a defendant because the hearsay exception created by

> subsection 90.803(3)(a), Florida Statutes (1989), does not apply to such a situation. We conclude, therefore, that the admission of the detectives' testimony as to statements made by the victim was error.

Hodges v. State, 595 So.2d 929, 931 (Fla. 1992).

This case is virtually identical to the situation in Hodges, supra, and Correll, supra. As the second district explained:

> It is well settled that the state of mind exception codified in section 90.803(3)(a) admits qualifying extrajudicial statements only if the declarant's state of mind or performance of an intended act is at issue in the particular case. [citations omitted] It is equally clear that a homicide victim's state of mind prior to the fatal incident generally is neither at issue nor probative of any material issue raised in a murder prosecution. [citation omitted] Moreover, even if the victim's state of mind is relevant under the particular facts of the case, the prejudice inherent in developing such evidence frequently outweighs the need for its introduction. See United States v. Brown, 490 F.2d 758, 762-67 (D.C. Cir. 1973).
>
> While exceptions exist to this general rule of inadmissibility, such as where the victim's state of mind is both relevant and necessary to rebut the defendant's claim of self-defense or his assertion that the decedent committed suicide or suffered an accidental death while toying with the murder weapon, [citations omitted], none of these exceptions applies in the instant case. Conversely, under the circumstances, we must conclude that [the victim's] state of mind constituted a collateral concern which was of little consequence in determining the identity of her killer. Even if we were to find [the victim's] state of mind relevant to this contro-

> versy, we still would deem the challenged evidence inadmissible. Certainly the danger that the jury would misuse this evidence for the impermissible purpose of imputing a state of mind to appellant (specifically, rage resulting from a confrontation, and thus a motive for murder) outweighs the minimal importance of establishing the true purpose of [the victim's] visit. As case law makes clear, evidence cannot be admitted under the state of mind exception to prove the state of mind or motive of someone other than the declarant. United States v. Brown, 490 F.2d at 722; Hunt, 429 So.2d at 813; Bailey, 419 So.2d at 722; Van Zant [v. State, 372 So.2d 502 (Fla. 1st DCA 1979)] at 504. Accordingly, we believe that the trial court erred in admitting the challenged testimony of these four witnesses.

Fleming v. State, 457 So.2d 499, 501-502 (Fla. 2d DCA 1984).

Notwithstanding the language of Section 921.141(1), Florida Statutes (1993), it is clear that a defendant has the right to cross-examine and to confront witnesses during the penalty phase of a capital trial. It goes without saying that a statute cannot divest a citizen of constitutional rights. In Engle v. State, 438 So.2d 803 (Fla. 1983), this Court clarified any doubt as to whether the Sixth Amendment applies to the penalty phase of a capital trial:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge. Although a defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of trial of the criminal proceeding.

Engle, 438 So.2d at 813-814.

It is therefore clear that Section 921.141(1), Florida Statutes (1993), does not provide carte blanche authority for the State to present hearsay testimony from police officers in a manner that totally defeats the state and federal constitutional rights to confrontation and meaningful cross-examination. See Walton v. State, 481 So.2d 1197, 1200 (Fla. 1986) ("The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is applicable not only in the guilt phase, but in the penalty and sentencing phases as well."). Even the statute puts clear restrictions on the use of hearsay evidence.

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. . . .

§921.141(1), Fla. Stat. (1993) (emphasis supplied).

The introduction of the hearsay cannot be said to be harmless error in this case. The prosecutor argued this matter to the advisory jury and the trial court's sentencing order recites facts that are supported solely by this hearsay. (T 803, 807, 812; R 744-748, 758-769)

Thus, the admission of this hearsay and its use to establish the defendant's state of mind (motive) and aggravating factors was reversible error. A new penalty phase is required.

POINT IV.

IN CONTRAVENTION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE NONSTATUTORY MITIGATING CIRCUMSTANCES WHICH WERE SUPPORTED BY THE EVIDENCE AND THE LAW AFTER A SPECIFIC REQUEST BY THE APPELLANT.

Prior to the penalty phase, defense counsel sought to amend the standard jury instructions whereby the jury would receive separate instructions on valid nonstatutory mitigating circumstances for which evidence had been presented. (R 687-688; T 730-731, 740-741, 787) The trial court denied the request and instructed the jury that, in addition to statutory mitigators, the only mitigating circumstance that they may consider (if established by the evidence) is the singular circumstance of "number five, any other aspect of the Defendant's character, record, or background and any other circumstances of the offense." (R 688; T 740-741, 745, 835)

It is beyond dispute that the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), requires that in capital cases the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less then death. Eddings, 452 U.S. at 110. A defendant's performance in prison and his potential for rehabilitation have

been recognized as such bona fide mitigating factors.

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 275, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) The court has therefore held the evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, Jurek v. Texas, supra; see also Barefoot v. Estelle, 463 U.S. 880, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration.

Skipper v. South Carolina, 476 U.S. 1, 5 (1986).

Previously, the standard jury instructions were deemed faulty because they were reasonably understood to limit mitigating circumstances to those expressly contained in Section 921.141(6), Florida Statutes. See Hitchcock v. Dugger, 481 U.S. 393 (1987). In an effort to clarify that a jury or trial judge is not limited in the things that may be considered in mitigation, the list of mitigating factors contained in the standard jury instructions now conclude with, "among the mitigating circumstances you may consider, if established by the evidence, are: . . . (8) Any other aspect of the defendant's character or record, and any other circumstance of the offense." Fla.Std.Jury

Instructions in Criminal Cases, 2d Ed., p. 80-81.

From these instructions, the jury may reasonably conclude that all mitigating factors other than those expressly provided for by statute may only be considered as a single factor, as opposed to considering each segment individually and attaching individual weight of each nonstatutory factor. This distorts the weighing process in favor of imposition of the death penalty in violation of the Fifth, Eighth, and Fourteenth Amendments. The law set forth in Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), exemplifies the constitutional error that occurs when the sentencer arbitrarily fails to consider valid mitigation in the belief that, though adequately proved as a matter of fact, that fact does not qualify in the sentencer's mind as bona fide mitigation. In Campbell, the trial court felt that a defendant's deprived and abusive childhood was not a mitigating factor at all, even though it was not controverted that Campbell had been abused as a child. Id. at 419, fn. 2. Because all trial courts were experiencing problems in properly applying mitigating circumstances, this Court explained that the sentencer must weigh certain mitigating considerations as a matter of law if any of the following were proved to exist as a matter of fact:

1) Abused or deprived childhood.

2) Contribution to community or society.

3) Remorse and potential for rehabilitation.

4) Disparate treatment of equally culpable codefendant.

5) Charitable or humanitarian deeds.

Campbell, 571 So.2d at 419, fn. 4.

If trial judges, who are presumed to know the law and their responsibility to consider these factors under Florida law, were unconstitutionally, categorically rejecting a defendant's abused childhood and potential for rehabilitation as mitigating considerations under the rationale that even though they exist as a matter of fact they are not felt to be mitigating, so too are Florida citizens. They are entitled to be instructed on the law just as this Court instructed the trial judges in Campbell. When there is a timely and specific written request as was made here, what earthly justification can there be for not fully and fairly instructing the jury in the same manner that this Court found it necessary to instruct trial judges who were improperly rejecting valid mitigating considerations that were adequately proved to exist, but which were not viewed as "mitigating" to that individual judge?

Here, the trial judge was expressly, properly asked in writing to instruct the jury on the law as this Court explained it in Campbell. (R 687-688; T 730-731, 740-741, 787). The rejection of that instruction in the context of this case, where overwhelming competent evidence was presented that Robert Patrick Craig had an abusive childhood, has a great potential for rehabilitation, and has been a model prisoner, among other things (see Point VI, infra), was an arbitrary abuse of discretion which denied due process and a fair sentencing recommendation where the judge indicated previously to the jury that, at the conclusion of

the case, the court would expressly instruct the jury on all considerations that must be weighed to make a correct and lawful sentencing determination. The omission of this or a substantially similarly specific instruction renders this death sentence arbitrary and capricious in violation of Amendments V, VI, VIII, and XIV, and Art. I, §§ 9, 16, 17 & 22, Florida Constitution.

It is constitutionally required for trial judges to weigh uncontroverted mitigating evidence in opposition of the death sentence. So, too, is it thus necessary for the jury in Florida to be required to weigh such uncontroverted mitigating evidence. It was incumbent and necessary for the trial court to so instruct this jury under these facts upon timely, written request. Where the statutes and/or caselaw have previously, expressly recognized the mitigating worth of a particular feature or consideration, such as a defendant having an abused childhood and/or a potential for rehabilitation, the failure of the court to so instruct the jury that such factors are mitigating if proved to exist is a denial of due process and a fair proceeding which results in arbitrary and capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Art. I, Sections 9, 16, 17 and 22 of the Florida Constitution.

The precise question presented is whether the foregoing "catch-all" instruction is sufficient to inform the jury that a particular circumstance can properly be considered when defense counsel requests that the jury be specifically instructed that a

particular factor adequately supported by the evidence, is valid mitigation under the law. The "catch-all" instructs the jury generally that it may consider any factor of the defendant's character or the crime which mitigates imposition of the offense. See Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986). See Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) (proper to instruct on all circumstances for which evidence had been presented). It is nonetheless appropriate -- indeed, it is essential -- that the jury be informed by the trial judge that a particular consideration as a matter of law, whether or not recognized expressly by statute, constitutes valid mitigation.

The failure to give independent instructions to the jury identifying each valid mitigating circumstance that has been recognized by law and which is supported by the evidence, after timely request by the defendant, results in vague and confusing jury instructions which are biased in favor of imposition of the death penalty. As such, the recommendation has been made in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The defendant is absolutely entitled to have the jury accurately and fairly instructed on all factors that properly mitigate against imposition of the death penalty. The trial court is the only entity to give the jury instructions on its lawful function. Unless the court instructs the jury that these considerations may properly be used by them in determining whether the death penalty is warranted, the jury

may conclude that these factors previously recognized by the courts as valid mitigating are baseless. Worse, the jury may suspect that a defense attorney is attempting to mislead them about the propriety of a factor and thereby lose faith in his credibility. It is imperative that the trial judge adequately and completely define such considerations under the law when timely requested. Because the trial court erred in refusing the timely request by defense counsel to instruct the jury on valid nonstatutory mitigating circumstances that had been established by the evidence, Craig's death sentences must be reversed and the matter remanded for a new penalty proceeding before a new jury.

POINT V.

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

When the defendant was first sentenced, the trial judge found that the state had proved the existence of three statutory aggravating factors for Count I (Eubanks killing) and four statutory aggravating factors for Count II (Farmer killing). The existence of other specifically enumerated statutory aggravating factors was not proved. (SR 11-33)

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

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

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

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

DOUBLE JEOPARDY

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

penalty did not violate the double jeopardy clause.

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

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

The Eleventh Circuit Court of Appeals has ruled that these principles apply where the state attempts to seek the death penalty on additional factors not argued at a previous sentencing

hearing. Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988) cert. dismissed Zant v. Godfrey, 487 U.S. 1264 (1988); Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985) cert denied, 476 U.S. 1123 (1986).

In the instant case, at the original sentencing, the trial court made specific findings listing which aggravating factors had been proven by the state. On the original appeal, this Court left undisturbed these findings, except for striking the finding of heinous, atrocious, or cruel. Craig v. State, supra. Unlike the situation in Poland, the findings are in fact an acquittal barring the state from seeking their application upon re-sentencing. It is important to note that at the first re-sentencing the state offered no new evidence to support these aggravating circumstances, instead simply relying on the transcript of the first trial and sentencing. Therefore if the evidence was found insufficient before, it was also insufficient in appeal number two. (Since in the second appeal, this Court reversed the death sentences for a new penalty phase because there was a substitute judge who had not heard the evidence, this Court did not find it necessary to address this issue in the second appeal.) Furthermore, the state did not even argue these two newly-found aggravating factors to the jury or the court in the first sentencing proceeding.

CONSIDERATIONS OF FUNDAMENTAL FAIRNESS

Even if this Court declines to accept the foregoing reasoning, it is respectfully submitted that consideration of fundamental fairness and the need to avoid piecemeal litigation

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

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

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

> The state is not seeking here to submit new evidence of a new aggravating factor, but

> rather is relying on old evidence to satisfy a new aggravating factor. Fundamental fairness concerns do not dissipate in that situation. If the state knew the facts and failed to allege an aggravating factor on the basis of those facts at the first trial, it should not thereafter be able to submit that factor to the jury on retrial.

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

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

The appellant recognizes that this Court in Preston v. State, 607 So.2d 404 (Fla. 1992), has rejected a similar claim. However, the appellant asks this Court to recede from it for the above-stated reasons, or find that it does not apply to the instant case for the following reasons. In rejecting this

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

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

This Court must strike these newly-found aggravating circumstances and remand the case to the trial court for reconsideration of the sentence without them. Such relief is appropriate because fundamental fairness requires it, because the trial judge exceeded the mandate of this Court in Craig v. State, 564 So.2d 120 (Fla. 1990), and because the court otherwise violated principles of law of the case, res judicata, due process of law, and double jeopardy, and has rendered Florida's death penalty scheme arbitrary and capricious.

POINT VI.

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

The trial court, following this Court's remand, found the presence of four aggravating circumstances for each offense (finding an additional two for Count I and an additional one for Count II over the original sentencing order -- see Point V, supra). (R 747-748, 758-760) Regarding the mitigating circumstances, the judge rejected several factors argued by the defense and found many other items in mitigation but considered them to be of either **"slight** weight," **"very slight** weight," or **"very, very slight** weight." (R 749-757, 761-769) In rejecting the original jury's life recommendation on Count I, the trial court simply evoked the language of Tedder v. State, that "the circumstances of the murder dictate that the sentence of death is the only appropriate sentence, that being so clear and convincing that virtually no reasonable person could differ," without explaining why this was so. (R 769-770)

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

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

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

The trial court's sentencing order is sparse, to say the least, with its factual support, especially in rejecting unrebutted mitigating factors, or assigning them "slight," "very slight," or "very, very slight" weight. The aggravating factors are supported by very cursory facts only, not giving any detail as to rejection of some facts and blind acceptance of others, the "findings of fact" contain little analysis and very little application of the specific facts of the case and the conflicting evidence presented at the trial; the weighing of mitigating circumstances is conclusory only. The death sentences cannot be affirmed on the basis of such insufficient written findings. To uphold such sentences on the basis of this order would deny the

defendant his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

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

Id.; Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Although the Court considered the sentencing order sufficient (but barely) in Rhodes, the Court cautioned that henceforth trial judges must use greater care in preparing their sentencing orders so that it is clear to the reviewing court just how the trial judge arrived at the decision to impose death over life. As the Court held in Mann v. State, 420 So.2d 578, 581 (Fla. 1982), the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found."

Here, the judge's analysis is not of "unmistakable clarity" and it cannot be said that he "fulfilled that responsibility" of weighing the aggravating circumstances against the mitigating factors calling for life. The findings provide no clue as to what standard the court used in weighing the factors, why it found some aggravating factors despite substantial evidence to the contrary (see section D, infra), why it summarily rejected mitigators which had been unrefuted (see section C, infra), why it gave some mitigating circumstances only little or very little weight when the evidence of those factors was substantial and where those factors have been used to justify a reduction of a death sentence to life (see sections C and E, infra), and why it summarily rejected the jury's recommendation of life for Count I (see section E, infra). The death sentences must be reversed on this basis alone. Santos v. State, 591 So.2d 160 (Fla. 1991) [death sentence reversed for new sentencing where

record not clear that trial court adhered to the procedure required by Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), and Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990), and reaffirmed in Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991)]; Lamb v. State, 532 So.2d 1051 (Fla. 1988) (death sentence reversed and remanded where unclear whether court had properly considered all mitigating evidence); Mann v. State, supra; Lucas v. State, supra.

In a line of cases commencing with Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that a trial court may not refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant in a capital case. The Lockett holding is based on the distinct peculiarity of the death penalty. An individualized decision is essential in every capital case. Locket, 438 U.S. at 604-605. The Supreme Court has consistently reiterated the Lockett holding. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986).

In Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990) and Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990), this Court held that, where uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. This Court will not tolerate a trial court's unexplained rejection of substantial and/or uncontroverted evidence. See, e.g., Santos v. State, 591 So.2d 160 (Fla. 1991) and Hall v. State, 614 So.2d 473, 478-9 (Fla. 1993).

While the relative weight to be given each mitigating factor is within the province of the sentencing court, a valid mitigating circumstance cannot be dismissed as having no weight. Dailey v. State, 594 So.2d 254 (Fla. 1991). See also Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982).

Since the clarification by this Court concerning the proper treatment of mitigating evidence, counsel has noticed a disturbing trend in trial courts' sentencing orders. In dealing with mitigating factors, trial courts (as did the sentencing judge in Appellant's case) frequently find that a mitigating circumstance exists, but unilaterally give the factor very little weight. Craig's trial judge concluded that **fourteen** mitigating circumstances applied to **each** of the two murders. (R 749-57, 761-69) However, the trial court attributed virtually **no** weight to the plethora of mitigating factors. The court decided that two of the mitigating factors deserved only "slight weight," three of the factors warranted "very slight weight," and the remaining nine factors were entitled to "very, very slight weight." (R 749-57, 761-69) In light of the minuscule weight allotted to the numerous mitigating circumstances, it is no surprise that the trial court concluded that the aggravating circumstances "clearly and substantially outweigh the mitigating circumstances" thus warranting the ultimate sanction. (R 769-70)

While the Lockett doctrine is clearly violated by the explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved tacitly, as in this

case. By refusing to give Appellant's uncontroverted, mitigating evidence any substantial weight, the trial court has vaulted this state's capital jurisprudence back to the unconstitutional days prior to Hitchcock v. Dugger, 481 U.S. 393 (1987).

Prior to Hitchcock, this Court adopted a "mere presentation" standard wherein a defendant's death sentence would be upheld where the trial court permitted the defendant to present and argue a variety of nonstatutory mitigating evidence. Hitchcock v. State, 432 So.2d 42, 44 (Fla. 1983). The United States Supreme Court rejected this "mere presentation" standard, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing the mitigating evidence presented. Hitchcock v. Dugger, supra. Since Hitchcock, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where there was explicit evidence that consideration of mitigating factors was restricted. E.g., Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987).

The recent trend of trial courts attaching no real weight to uncontested mitigating evidence, results in a *de facto* return to the "mere presentation" practice condemned in Hitchcock v. Dugger. Appellant's trial court's refusal to give any significant weight to Appellant's uncontroverted mitigating evidence violates the dictates of Lockett and its progeny. By allowing trial courts unfettered discretion in determining what weight to give mitigating evidence, trial judges can effectively accomplish

an "end run" around the constitutional requirement that capital sentencings should be individualized. Appellant's trial judge has effectively failed to consider mitigating evidence within the statutory and constitutional framework.

The result is especially egregious in the context of the jury's life recommendation on Count I. When a jury recommends life, a trial court may not override the jury unless there is an absence of mitigating evidence that will support a reasonable finding that death is inappropriate. Tedder v. State, 322 So.2d 908 (Fla. 1975). Tedder, in and of itself, suggests that trial judges should not have unlimited discretion to ignore uncontroverted mitigating evidence in a Florida capital trial. By giving "slight weight," "very slight weight," and "very, very slight weight" to valid, substantial mitigation, trial judges can effectively ignore life recommendations, Lockett, and the constitutional requirement that capital sentencings must be individualized. The trial court's refusal to give any significant weight to valid, mitigating evidence, calls into question the constitutionality of Florida's death penalty scheme. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const.

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

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court set out the proper formula for addressing the weighing of mitigating and aggravating circumstances. In Campbell, the

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

> [T]he trial court's first task . . . is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether thy are of sufficient weight to counterbalance the aggravating factors.

The record here shows clearly that the trial court below failed to adhere to the procedure required by Rogers and Campbell, supra, and reaffirmed by the United States Supreme Court in Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). The trial court inexplicably rejected

without explanation unrebutted evidence of mitigating factors and gave merely slight, very slight, or very, very slight weight to extremely significant factors that, "in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Rogers v. State, supra. See also Santos v. State, 591 So.2d 160, 163-164 (Fla. 1991). Because of this failure on the trial court's part, the sentences must be reversed and the case remanded for resentencing. Santos, supra. (see section A, supra.)

The specific problems with the court's weighing of the particular mitigating and aggravating factors will be discussed in detail below.

C. Mitigating Factors.

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

1. Lack of significant history of prior criminal activity.

Section 921.141(6)(a), Florida Statutes, provides that a lack of significant history of prior criminal activity constitutes a mitigating circumstance. See Scull v. State, 533 So.2d

1137, 1143 (Fla. 1988). In this instant case, the trial court found this factor, but, without explanation, gave it only "slight weight" despite the extensive evidence of the defendant's non-aggressive, crime-free background up until the age of 23, when the instant series of events occurred. As this Court stated in State v. Dixon, supra, 283 So.2d at 9:

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

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

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

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

2. Acted under substantial domination of another person.

A second statutory mitigating factor is established where the defendant acted under duress or under substantial domination of anther person pursuant to Section 921.141(6)(e), Florida Statutes. See Stokes v. State, 403 So.2d 377 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Jackson v. State, 366 So.2d 752 (Fla. 1978). Where this mitigator is present, even where the jury has recommended death, a death sentence may be disproportionate. See, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989). A review of the record, including the presentence investigation that was originally done prior to the first sentencing and the trial and resentencing testimony, establishes that Robert Schmidt, Craig's co-defendant, was actually the leader and that Craig acted under the substantial domination of Schmidt.

Although Schmidt verbally stated that he was not the leader, the entire record demonstrates that in fact he was. The PSI report states that Officer Michael Whitaker and Sheriff Jamie Adams both stated that Schmidt was the "worst" of the two. Officer Whitaker was one of the arresting officers and had significant contact with both Schmidt and Craig. Sheriff Adams stated, according to the PSI, that Schmidt was "the most cold blooded and vicious" of the two co-defendants. There was strong evidence to support this factor including Dr. Harry Krop's testimony that Robert Craig's personality type suggests that domination could occur; Reverend William Doyle Bell's testimony

concerning the fact that Robert Craig appeared to be an easily led individual; and the testimony of a number of other individuals concerning Robert Craig's passivity.

Additionally, Craig's testimony concerning the events that occurred on the day of the murders is much more credible than Schmidt's testimony. The only evidence that Craig was a dominant figure comes from Schmidt's testimony. However, the physical evidence presented at trial and the testimony of the medical examiner and the forensics expert make it clear that Schmidt did not tell the truth at trial.

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

According to Schmidt's completely uncorroborated testimony, on the day that Eubanks and Farmer were murdered:

Eubanks, Craig and Schmidt were going to "count cows" (PR 926); Schmidt remained alone and Eubanks and Craig worked together counting cows. This lasted approximately two and one-half to three hours. (PR 926) If the defendant had been the dominant actor and desired to kill Eubanks, he had ample opportunity at this point, long before Farmer came on the scene. It started raining and Craig and Eubanks ran to Eubank's car and Schmidt ran to his truck. (PR 928) They began discussing the fact that the cattle were not all there. (PR 928-929) Craig and Eubanks decided to look for strays around Clear Lake and told Schmidt to meet them on the other side of Clear Lake after they had finished walking around looking for fresh cow manure or cattle. (PR 933) Farmer arrived and Schmidt introduced himself and they went together to look for Eubanks and Craig. (PR 933) They met up with Eubanks and Craig. (PR 935) Craig and Schmidt began riding together in the truck and Eubanks and Farmer went together in Farmer's Jeep to continue looking for strays. (PR 935) According to Schmidt, Craig said when he got into the truck that Eubanks knew about the cattle and stated "we will have to kill both of them because both of them know...." (PR 935) Schmidt said he couldn't shoot anyone. (PR 936) He did not think that they would actually kill them. (PR 939) They went to the hammock and saw Farmer and Eubanks and Craig yelled that there was fresh cow manure in the hammock. (PR 942-943) They walked into the hammock in a line. (PR 943) They began walking out Craig and Schmidt were still acting like they were looking for fresh cow manure.

(PR 944) He was behind Eubanks and Craig and Farmer were over to his side about thirty or forty feet. Craig was following Farmer out. (PR 944) Again according to Schmidt, he and Eubanks were out of the hammock when he heard Craig yell, "Hey Bob," and he yelled back, "What, Bob?," and then heard Craig begin shooting. (PR 945) Schmidt further testified that he did not draw his pistol until after he heard the second shot. (PR 946) He testified there was more shooting after he drew his pistol and it was after the heard the third shot that he shot Eubanks. (PR 946) He testified that Eubanks was walking in front of him, he shot Eubanks twice in the head and that Eubanks' head was turning when he fired the second shot. (PR 947) He testified that he heard two more shots (PR 948), that he heard Craig shout for him to come into the woods (PR 949), that Farmer was laying on the ground face down (PR 950), that Craig forced him to shoot Farmer in the head (PR 952) and that Craig screamed curses at him and told him to shoot Farmer. (PR 952) This testimony, especially the final portion totally belies all that we know about Robert Craig from the record before this Court. Craig is non-violent, Craig is passive, Craig is not the hunter who was used to shooting at things, Craig was not the type to swear. Schmidt, on the other hand, **is** the violent individual, with the offensive, aggressive personality.

In contrast, Craig testified that there had never been any discussion of eliminating Eubanks. (PR 1396) He testified that on July 21, the day of the murders, Schmidt stated that they

would have to shoot Eubanks. (PR 1396) He testified that it was after Eubanks walked around Clear Lake with Craig and he got back in the truck with Schmidt, that Schmidt asked if Craig and Eubanks had discussed the cattle and **Schmidt** stated "we are going to have to shoot him". (PR 1397) Craig testified that he did not believe that Schmidt actually meant that he wanted them to kill Eubanks because "he [Schmidt] always talked about killing people, and cutting people, this and that." (PR 1397) Craig and Eubanks had been alone at Clear Lake for more than a hour prior to meeting back up with Schmidt and Farmer. (PR 1405) (This is consistent with Schmidt's testimony). He had his gun with him during that period of time. (PR 1405) After he teamed up with Schmidt, Farmer and Eubanks drove off to continue searching for strays. (PR 1411-1412) They were standing near the hammock waiting for Farmer and Eubanks. Craig stood in the hammock because it was muggy and hot. Schmidt called out to Farmer and Eubanks that they were "over there". Farmer and Eubanks walked into the hammock. There was no discussion of fresh signs of cow manure in the hammock. (PR 1411-1412) Craig admits that he fired shots at Farmer, however, the facts are quite a bit different than those recounted by Schmidt (and Craig's version matches the physical evidence, his personality traits compared to those of Schmidt, and common sense). (PR 1412-1413) They were all in the hammock talking and Schmidt and Eubanks started walking out and Farmer and Craig stayed in talking about saddles. (PR 1413) Craig stopped "to go to the bathroom". After he finished "going

to the bathroom", he started walking and that was when he heard the two shots. (PR 1413) When he heard the two shots, he looked up and saw Farmer who looked as if he had "seen something" and started running back "toward an angle" and Craig started running too. (PR 1414) Craig heard someone running around toward them through the bushes and saw Schmidt. Schmidt fired two more shots, which passed close by Craig's head. After these shots were fired, Craig fell down and reached for his gun. Craig pulled his gun and Schmidt hollered for Craig to shoot. Craig shut his eyes and fired in the direction of Farmer. He thought he fired three times. (PR 1414) Farmer was on the ground and Schmidt walked over to him, stood above him and shot him in the head. (PR 1417) Craig did not know if his shots hit Farmer because he had closed his eyes. (PR 1417)

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

wounds in various parts of his body and there was a final wound in his head. The doctor testified that the last bullet which was fired into Farmer's body was the bullet which was fired into his head. (PR 1305) The doctor testified that the wounds in Farmer's body were defensive wounds. (PR 1314)

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

It is inconsistent with Craig's history to come to the conclusion that he was the one who pressed for violence rather than Schmidt. Additionally, Craig's credibility is much greater than that of Schmidt. When Schmidt's testimony is considered, it does not comport with the evidence. Schmidt's testimony would require the court to believe that Eubanks would have remained facing away from him with his back turned to an armed man after hearing gunshots fired within a few feet. Schmidt admits that he was directly behind Eubanks. He admits that Craig and Farmer were thirty to forty feet to the side of Eubanks and Schmidt. He would have the court believe that Eubanks continued to face forward with his back toward Schmidt after hearing guns fired to the side. It makes more sense that Eubanks would have turned his head to look in the direction that the gun shots were fired. However, the medical examiner's testimony make it clear that the first bullet entered the exact center of the back of Eubanks'

head. The second bullet entered his head from the side. In contrast, the wounds for Farmer's body were defensive wounds. It makes logical sense that defensive sounds would have been the result of a man turning in fear or flight after hearing gun shots. Thus, the evidence supports Craig's story that Schmidt fired the first shot. If Schmidt distorted the truth with regard to when and who fired the first shot, then clearly the Court should look more carefully at his other testimony. Clearly, his testimony that the defendant was the leader is not supported by this record. The testimony of a witness of questionable credibility is insufficient on which to base a rejection of this factor. See Smith v. State, 403 So.2d 933 (Fla. 1981). See also Jackson v. State, 575 So.2d 181 (Fla. 1991); Cooper v. State, 581 So.2d 49 (Fla. 1991); Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991); and Pentecost v. State, 545 So.2d 861 (Fla. 1989), in which cases this Court, in reversing the death sentences based in part on this mitigator, either questioned the credibility of a witness used to refute this mitigating factor, or found it unclear from the facts who was the dominant actor.

Craig was a follower and was under Schmidt's domination. Many witnesses recounted that Craig never used guns and was never violent until he met Schmidt, that Schmidt became his hero, that Schmidt was an extremely violent personality with a tendency to want to "kill niggers" and a desire to dominate any group in which he was found. This is substantiated by the

testimony of *every* person who had contact with Schmidt. That includes the officers as well as the family witnesses.

Craig would not go hunting because he did not want to own a gun and could not kill even an animal without getting sick. During relatives' visits to Craig's home when Schmidt was present, Schmidt ignored requests made by Craig that he not drink beer in the presence of the Moodys, and that Schmidt was disrespectful. Craig was shy; whereas Schmidt constantly drank and bragged. Schmidt talked constantly about fights in which he had been involved. Schmidt swore constantly and Craig asked Schmidt to stop swearing in front of the Moodys and the women and that Schmidt refused to do what Craig asked of him. Schmidt was dominant in all conversations and Craig was an easy going type of person who is more of a follower than a leader. This factor has clearly been established by unrefuted evidence (other than the self-serving testimony of the lying, domineering, and already on work release Schmidt.)

3. Age of the defendant.

The age of the defendant is an additional statutory mitigating factor under Section 921.141(6)(g), Florida Statutes. Although Robert Craig was 23 years old, the trial testimony of his family, coupled with Dr. Harry Krop's testimony that the defendant had a mental age of sixteen to eighteen years old made it clear that he was naive and his age should have been considered as a serious mitigating factor. This Court has approved as

mitigation ages close to that of the defendant, especially when coupled with other factors, such as lack of prior record, the defendant's upbringing, or his emotional immaturity, in reversing death sentences. See Derrick v. State, 581 So.2d 31 (Fla. 1991); Hegwood v. State, 575 So.2d 170 (Fla. 1991); Cochran v. State, 547 So.2d 928 (Fla. 1989); Freeman v. State, 547 So.2d 125 (Fla. 1989); Songer v. State, 544 So.2d 1010 (Fla. 1989). The trial court's unexplained assignment of "very, very slight weight" to this factor, therefore, cannot stand; it is a substantial factor in the defendant's background and circumstances surrounding the offenses.

4. Under extreme emotional distress.

Section 921.141(6)(b), Florida Statutes, provides a mitigating factor if the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. There is evidence that Craig was heavily using cocaine. Voluntary intoxication has been accepted as a basis for the statutory mitigating circumstance of extreme emotional or mental disturbance. See Kampff v. State, 371 So.2d 1007 (Fla. 1979). When coupled with his fear that his employer had learned of his cattle rustling activities and his fear of the dominant, violent, and threatening Schmidt, the drug use may have caused extreme mental or emotional disturbance. In this case, clearly there is sufficient evidence to establish that Craig acted under extreme mental or emotional disturbance. See also Nibert v.

State, 574 So.2d 1059 (Fla. 1990) (wherein the Court specifically held that the defendant's alcoholism and drinking at the time of the killing support a finding of extreme disturbance and substantial impairment, which, when coupled with the defendant's remorse and good potential for rehabilitation, require a life sentence). Dr. Harry Krop's proffered testimony was that the circumstances could have caused extreme mental or emotional disturbance.

Nonstatutory Mitigating Circumstances.

1. Good attitude and good conduct in jail and prison.

Good attitude and good conduct while awaiting trial is a relevant mitigating factor. See Skipper v. South Carolina, 476 U.S. 1 (1986); Craig v. State, 510 So.2d 857 (Fla. 1987); Valle v. State, 502 So.2d 1225 (Fla. 1987); Delap v. State, 440 So.2d 1242 (Fla. 1983). The good attitude and conduct may occur prior to trial or while on death row. See Delap v. State, supra. The record in this case is undisputed that Craig has a good attitude and was a model prisoner. Accordingly, this mitigating circumstance must be held to be established and has substantial weight. See Nibert v. State, supra.

The record paints a portrait of Robert Craig as an exemplary inmate; clearly, as noted in the record, there has never been an outpouring of support for a defendant from jailers and death-row corrections officers such as was witnessed in this case. All who testified made it clear that Robert Craig actually

positively impacts the system by teaching other inmates to read, helping other inmates adjust in the prison atmosphere, and helping corrections officers to avoid problematic situations. Both capital attorney Michael Johnson and Dr. Krop testified that this degree of support by corrections officers was unheard of in cases involving death penalty sentences.

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

Sergeant Blevins, formerly of death-row, testified that for most of the inmates he would not want to live in the same town with them; but in the defendant's case, he would have no problem if the defendant moved next door to him. Blevins and the jail guards saw no problem with the defendant possibly being placed in general population (should his death sentences be reduced). And Blevins believes that the defendant would never be any problem again to society, would do good for himself, and

would be a help to a lot of people if ever he were released. Dr. Harry Krop confirmed the corrections officers' testimony, saying that his psychological testing shows that the defendant should be a model prisoner and would have no problems in the general prison population. Additionally, the pre-sentence investigation report already in the record establishes that he had a good attitude during the investigation and was actually helpful to officers.

While the trial court did find this factor, it assigned it "very slight weight." The testimony presented in the case shows that this minimal finding is a miscarriage of justice and makes a mockery of the capital weighing process. (See section A, supra.) Robert Craig deserves true credit for what he has made of himself in confinement.

2. Sentence of co-defendant.

The sentence of a co-defendant is also a factor which can be considered as a mitigating factor. See Cailler v. State, 523 So.2d 158 (Fla. 1988); Bassett v. State, 449 So.2d 803 (Fla. 1984); Slater v. State, 316 So.2d 539 (Fla. 1975); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Gafford v. State, 387 So.2d 333 (Fla. 1980); Messer v. State, 403 So.2d 341 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1981). The arresting officer's statements which are found in the pre-sentence investigation establish that the defendants were at least equally culpable. It appears that Schmidt was more culpable than Craig. The statements in the PSI that Schmidt was the most cold blooded of

the two and review of the entire court record which reveals that Schmidt's testimony was not supported by the physical evidence in the record support a finding that Schmidt was more culpable than Craig. Under these circumstances, it would be both inequitable and a violation of the principles enunciated by the Florida Supreme Court to sentence Craig to death while Schmidt is now eligible for parole, and is already on work release, a factor deliberately hidden from the jury by the prosecution. (See Point I, supra.) See Cailler v. State, supra; Bassett v. State, supra; Slater v. State, supra; Malloy v. State, supra. See also arguments made in conjunction with the mitigating factor of "under the substantial domination of another," supra.

3. Cooperation with the police.

Full cooperation with the police provides a basis for mitigation. See Washington v. State, 362 So.2d 658 (Fla. 1975); Perry v. State, 522 So.2d 817 (Fla. 1988). Sheriff Noel Griffin stated in the pre-sentence investigation that Craig had shown them where the bodies were and that they could not have found the bodies without him. The record clearly establishes that Craig cooperated with the police. This mitigating factor must be considered since it is uncontradicted. See Nibert v. State, supra. While there may not have been specific evidence of this mitigating factor presented at the resentencing hearing, ample, undisputed evidence is presented in the original trial transcript and was heard by the jury who recommended life imprisonment for

Count I (which jury recommendation is still controlling in this case and which recommendation is, for this reason and others, not unreasonable). While the court found this factor, it gave it only "very, very slight weight." For the reasons expressed above and in section A of this point, such a finding is untenable.

4. Defendant is contrite and remorseful.

Genuine remorse is a factor which may be considered as a mitigating factor in a death penalty case. See McCrae v. State, 582 So.2d 613 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Pope v. State, 561 So.2d 554 (Fla. 1990); Morris v. State, 557 So.2d 27 (Fla. 1990). Dr. Harry Krop and others testified without contradiction that the defendant genuinely felt remorse for the crimes. Robert Craig even stated that if giving his life could bring back the lives of John Eubanks and Bobby Farmer that he would be happy to do so. But, their lives cannot be restored, and taking the life of the defendant who is genuinely remorseful and who has benefitted and can continue to benefit others cannot be countenanced. Again, the trial court, for some unexpressed reason, assigned this substantial mitigation only "very slight weight." This finding must be corrected and great weight given it. (See section A, supra.)

5. Intelligence.

The fact that the defendant has a below normal intelligence is a mitigating factor. See Downs v. State, 574 So.2d 1095 (Fla. 1991); Morris v. State, 557 So.2d 27 (Fla. 1990); Minks v. State, 336 So.2d 1142 (Fla. 1976); Neary v. State, supra. Dr. Krop's testimony established that Robert Craig is of below average intelligence. The trial court, in giving this factor only "very, very slight weight," relied on the standard for insanity, that Craig knew right from wrong, which should have no applicability regarding this mitigating factor. See Ferguson v. State, 417 So.2d 631 (Fla. 1982).

6. Defendant is a hard worker.

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

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

7. Substance abuse.

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

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

8. Good family man.

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

There is an abundance of evidence concerning his relationships with his family and friends. These facts are uncontradicted. The testimony of all who know the defendant is uncontradicted and establish that Craig was a good family man.

He counsels his niece and nephew not to follow in his footsteps and, even though in prison, continues to have a positive influence on those whose lives he touches. In no other case has there been such an outpouring of love and affection for the defendant and the goodness of which he is capable. This factor is thus entitled to significant weight, rather than the "very, very slight weight" afforded it by the trial court.

9. Abusive and Deprived Childhood.

This has been recognized as a factor which may be considered by the court in determining mitigation. Shue v. State, 366 So.2d 387 (Fla. 1978); Livingston v. State, 565 So.2d 1288 (Fla. 1988); Lara v. State, 464 So.2d 1173 (Fla. 1985); Freeman v. State, 547 So.2d 125 (Fla. 1989); Campbell v. State, supra; Nibert v. State, supra. There was testimony to this effect from Annie Greenfelder and John Craig. John Craig recalled seeing Robert Craig cowering before his father when he was eighteen years old because his father raised his fist toward Robert Craig. Dr. Krop also testified to the fact that it appeared that there was abuse during Robert Craig's formative years. Robert Craig testified that his father physically abused him.

The defendant also had a deprived childhood and poor upbringing. See Thompson v. State, 456 So.2d 444 (Fla. 1984); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Lara v. State, supra; Herring v. State, 446 So.2d 1049 (Fla. 1984); Shue v. State,

supra; Nibert v. State, supra; White v. State, 446 So.2d 1031 (Fla. 1984); Scott v. State, 411 So.2d 866 (Fla. 1982); Holsworth v. State, 522 So.2d 348 (Fla. 1988). The testimony of Dr. Krop, Annie Greenfelder and John Craig, as well as Robert Craig's testimony, established that Robert Craig moved frequently during his childhood which prevented him from being able to make close friends outside of his family. Annie Greenfelder testified that neither parent provided Robert Craig with a proper role model. Craig was forced by his father to quit school in order to work on the family farm and was never permitted to engage in extra-curricular activities.

Again without explanation, the trial court afforded this substantial factor "very, very slight weight." Such a finding cannot be affirmed. (See section A, supra.)

10. Able to be Rehabilitated.

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

Expert psychological testimony from Dr. Krop indicated that the defendant is extremely rehabilitable. The testimony of his jailers adds substantially to this testimony since Craig was

so well adjusted during the time that they supervised him. Clyde Blevins, a death row corrections officer, testified that Craig has adjusted well to prison life and has been extremely helpful and that he feels he could help other people if he were released. Clyde Blevins testified that he would not mind having Craig live next door to him. This factor is undisputed. Craig would make a contribution in an open prison population. Craig would not be a management problem. Craig has a good support system. Craig displays no anti-social tendencies. Again, this is a factor which must be taken as proven, see Nibert v. State, supra, and is entitled to great weight, rather than slight weight. (See section A).

11. Specific good deeds.

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

Craig offered unrebutted evidence of a number of good deeds. Included among the testimony is that of Wood Capell, an unrelated elderly man, could testify that when Mr. Capell was at a restaurant and had a broken leg and was on crutches, Craig came from across the restaurant to help him get seated. He did not know Craig at that time. Anne Belle Craig testified that Robert Craig's history of helping others less fortunate than himself began even when he was a young man. He helped a town drunk that

everyone laughed at when no one else would help him. Wood Capell, Dupree Moody and Catherine Moody also testified about the good deeds of Robert Craig with regard to the Moody's neighbors and friends.

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

The fact that the defendant was not the one who actually killed the victims is a mitigating factor. DuBoise v. State, 520 So.2d 260 (Fla. 1982). This factor is increasingly important when the evidence presented at trial is reviewed. In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court considered two types of cases that occurred at opposite ends of the felony murder spectrum and held that under certain circumstances the person who was not the trigger man should not be subject to the death penalty. In DuBoise, the Florida Supreme Court set a standard that is that the defendant must be a major participant in the felony committed combined with reckless indifference to human life. See also Tison v. Arizona, 481 U.S. 137 (1987); Cooper v. State, 581 So.2d 49 (Fla. 1991). Here, it is clear that Craig's testimony is more credible than that of Schmidt. Additionally, it is undisputed at trial that Craig was not the one whose bullet actually killed the victim. Clearly, Craig had no contact with the killing of Eubanks. The medical examiner testified that Craig's bullet did not kill Farmer. This factor is undisputed and should be considered by the court. See Nibert v. State, supra. See also the argument concerning under

the substantial domination of another.

13. Defendant has become a strong Christian and has displayed Christian values since his arrest.

This factor is a strong mitigating factor. See Lockett, supra; Hooper, supra. The testimony of the Reverend William Doyle Bell was that Robert Craig has strong Christian values. Reverend Bell also testified that he has encountered the "jailhouse christian" and that Robert Craig does not appear to be of that type. Reverend Bell testified that Robert Craig's Christian values appeared to be genuine. This is also supported by the testimony of Catherine Moody and the cards that were made by Robert Craig and sent to Catherine Moody which indicate strong Christian values. The appellant is at a loss to determine what more evidence the trial court can expect in order for it to have given this factor the weight it deserves, rather than the "very, very slight weight" which it afforded this factor. See section A, supra.

D. Statutory Aggravating Factors

1. Previous conviction of a prior violent felony.

As already argued in Point V, supra, the court should be precluded from finding this aggravating factor for the Eubanks killing when it was not initially found in the original sentencing proceeding. Additionally, the killing of Eubanks should not be applied to the defendant as an aggravator for the Farmer

killing since, as discussed in detail throughout this brief, the defendant had only a limited role in the killing of Eubanks. Hallman v. State, 560 So.2d 223 (Fla. 1990). Moreover, it is illogical and fundamentally unfair to allow each contemporaneous murder conviction to be an aggravator of the other.

Although this Court has recognized that contemporaneous convictions prior to sentencing can qualify for this factor, see King v. State, 390 So.2d 315 (Fla. 1980), this Court has placed a limitation on said finding. In Wasko v. State, 505 So.2d 1314, 1317-1318 (Fla. 1987), this Court adopted a new policy that if there is but one incident and one victim, then contemporaneous crimes cannot be used as a prior violent felony. The appellant submits that the Wasko decision does not go far enough. Contemporaneous convictions arising out of a single incident should not be permitted to be considered regardless of the number of victims. The rationale of Wasko seems to be that contemporaneous convictions should not be used if the incidents are not separated in time, but are rather a single incident; it makes no sense for this rationale to require only a single victim. "Prior" means "prior," not "different victims even though at the same time." See also State v. Barnes, 595 So.2d 22, 25 (Fla. 1992) (Kogan, Barkett, JJ. concurring), wherein the Supreme Court allowed for habitual offender status to be found based on multiple convictions which were imposed on the same day. However, the concurring opinion notes that it believes this holding to be true only if the "prior convictions" arose out of separate incidents and

not out of a single incident. That same rationale should apply here -- multiple episodes equals prior convictions for violent felonies; a single incident (whether or not there is one victim or many) does not equate with "prior" convictions for violent felonies.

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

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

Merely because the robbery victim knows the defendant does not establish this dominant motive requirement. Bruno v. State, 574 So.2d 76 (Fla. 1991); Caruthers v. State, supra. Such was the only competent evidence presented here. The only other evidence presented as to this factor comes from the co-defendant Schmidt, whose testimony is not credible (as has been explained in detail previously in this brief). If the defendant had wished

to avoid apprehension for the cattle theft by killing Eubanks, he had ample opportunity prior to Farmer's arrival on the scene to kill him. Additionally, the killing of Eubanks was accomplished by the co-defendant. (See additionally argument contained in mitigation portion of brief dealing with under the domination of another and that the killing was accomplished by another.) Moreover, the defendant had no such motive for killing Farmer, who was not aware of the cattle thefts when he arrived on the scene.

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

3. The murders were committed for pecuniary gain.

Just as the killing of Farmer was not accomplished to avoid arrest, so too was it not committed for pecuniary gain. There is simply no evidence to support any contention that the defendant got anything of monetary value from the death of Farmer. This aggravating factor is limited in its application to

situations where the sole or primary motive for the killings is in order to obtain monetary gain. See Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). It applies only where the defendant receives something of value during the crime or as a direct result following the crime. McCray v. State, 416 So.2d 804 (Fla. 1982). Where the items had already been stolen prior to the killings, as here, it cannot be found. Id. Regarding the contention that the defendant wanted Eubanks out of the way so he could have control of the ranch, is totally unsupported by competent, substantial evidence. It depends entirely upon the credibility of Schmidt's testimony regarding an ongoing scheme to kill Eubanks. As noted over and over again in this brief, Schmidt's testimony is too incredible and speculative to be the sole basis for an aggravating factor.

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

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

does not support the truthfulness of Schmidt's testimony. Where the record is less than conclusive as to the details of the homicides, this Court has held that it is error to find this factor. Hamilton v. State, 547 So.2d 630 (Fla. 1989).

Furthermore, the evidence which does exist, shows that there was not a prearranged plan to kill. Holton v. State, 573 So.2d 284, 292 (Fla. 1990); Dolinsky v. State, 576 So.2d 271 (Fla. 1991). Finally, the Court has held that it is error to find this circumstance where the killing resulted merely from a chance encounter, as that occurred between the defendant and Farmer.

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

In imposing the death sentence on Count I (Eubanks), the court rejected the jury's life recommendation, simply paying lip service to the language of Tedder v. State, 322 So.2d 908 (Fla. 1975), that "the circumstances of the murder dictate that the sentence of death is the only appropriate sentence, that being 'so clear and convincing that virtually no reasonable person could differ.'" As argued in Point VI, §A, supra, this order is entirely insufficient since it does not provide reasoned judgment for justification of the override. In McCrae v. State, 582 So.2d 613 (Fla. 1991), and Buford v. State, 570 So.2d 923 (Fla. 1990), this Court reversed capital sentences which it had previously affirmed on direct appeal and which it had previously found were justified despite jury life recommendations. When

those cases were sent back for consideration of new evidence, the Court ruled that its prior approval of the jury override no longer has any effect. The Court ruled that the reasonableness of the jury life recommendation would thereafter be reviewed on the basis of whether either the new or the old evidence would support the life recommendation. Id.

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

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

Capital trial attorney Michael Johnson and Dr. Harry Krop testified that Robert Craig's support by correction officers is significantly different than that of any other Death Row inmate encountered by either of these seasoned veterans of death penalty cases. This testimony is significant. The fact that the

corrections officers who came forward and testified about Robert Craig's character and ability to fit into the prison population is unprecedented is significant. It accentuates the difference between Robert Craig and other Death Row inmates, which is also demonstrated by Robert Craig's desire to help his fellow man and his unselfish sharing with other inmates of both material things and his knowledge (there was testimony that he taught other inmates to read and paint). The correction officers made it clear that Robert Craig has put his life on the line to help assure their safety. Dr. Krop testified that Robert Craig exhibited true remorse, unlike other inmates he had encountered, for the appropriate reason that John Eubanks and Bobby Farmer are dead, not for the reason that he is incarcerated. The correction officers uniformly testified that Robert Craig is respectful and does not show the resentment that other inmates show. All of this points to a man who has learned from his mistakes. Given this difference and given the fact that the appropriateness of the death penalty in this case depends entirely upon belief of the testimony of Robert Schmidt, a man who has admitted that he would do anything to avoid jail time, it would be disproportionate to sentence Robert Craig to death. Additionally, when the evidence in this case is considered in relation to other cases involving Death Row inmates, it is clear that Robert Craig should not be sentenced to death. With regard to the killing of John Eubanks, the undisputed testimony shows that Robert Craig was not present or in sight of Robert Schmidt or John Eubanks at the time

that John Eubanks was killed. Robert Craig had been alone and armed in a desolate wooded area with John Eubanks for several hours prior to the time that John Eubanks was killed. Nothing happened to John Eubanks during the time that he was alone with Robert Craig. Within only moments of being alone with Robert Schmidt, John Eubanks had been shot twice in the back of the head. With regard to Bobby Farmer, the undisputed evidence shows that Robert Craig had not spoken to Bobby Farmer at any time during the day prior to the time that they were in the hammock. The state failed to introduce any evidence that Robert Craig had knowledge of the possibility that Bobby Farmer would take his job. Robert Schmidt's testimony concerning how Schmidt came to be alone with John Eubanks is illogical. Robert Schmidt testified that John Eubanks became angry because he could not find any cow manure in the hammock and began walking by perimeter, and was followed by Robert Schmidt. If Bobby Farmer were to be a replacement for Robert Craig and John Eubanks began walking angrily toward the perimeter it would appear that Bobby Farmer would have followed John Eubanks instead of staying with Robert Craig. Again, Robert Craig's version of what happened on July 21, 1981, is more credible. If Robert Craig's version of what happened on that date is accurate, or even partially accurate, it becomes even clearer that the death penalty in this case would be disproportionate.

When this court follows the formula set out in Campbell v. State, supra, it is without doubt that the only possible

conclusion is that the state cannot support sentences of death. The proper mitigating factors clearly outweigh the appropriate aggravating factors, if any. The punishment must be reduced to life imprisonment on both counts.

CONCLUSION

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

Respectfully submitted,

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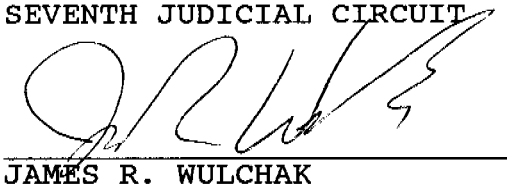
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Robert P. Craig, #083717 (41-2037-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 25th day of August, 1994.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER