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

REPLY BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

The Appellant relies on the Statements of Case and Facts as contained in its Initial Brief as a correct, complete, and unbiased statement of the evidence presented at the original guilt phase trial and at the new penalty phase hearing. A great deal of the state's version of the facts comes from the original opinion of this Court in 1987 and thus ignores evidence presented at the new penalty phase which shed further light on the circumstances of the crime, pointed out inconsistencies and inaccuracies in Schmidt's version of the killings, and supplied a more detailed look into the character of Robert Schmidt. This evidence was not available when this Court issued its first opinion in this case back in 1987, Craig v. State, 510 So.2d 857 (Fla. 1987), on which the state seeks to rely as THE only facts of the crimes. Because of the different and expanded testimony present-

ed at the new penalty phase, the facts contained in this Court's 1987 opinion are not, as contended by the state (Appellee's Answer Brief, pp. 1-4), res judicata and are, in fact, inaccurate and incomplete. See Huff v. State, 495 So.2d 145, 151 (Fla. 1986), wherein this Court noted that making a previous case's factual findings conclusive and not subject to refutation by evidence at the new proceeding would be manifestly unfair. Therefore, the new penalty phase evidence can and should modify the testimony and evidence presented at the original trial. See also McCrae v. State, 582 So.2d 613, 615 (Fla. 1991); Buford v. State, 570 So.2d 923, 924 (Fla. 1990), wherein this Court held that following a remand for a new penalty consideration, the courts "must weigh all the evidence, old **and new** . . . ." (emphasis added). As pointed out in the Statement of Facts in the appellant's initial brief, Schmidt's version of events differed between what he initially testified to at the original guilt phase and that of his testimony at the new penalty phase. (Appellant's Initial Brief, pp. 13-14) Additionally, new evidence was presented at the new penalty phase as to Schmidt's character which further casts doubts on his testimony, his credibility, and especially whether Schmidt is a follower, as indicated in the original appeal, or, as evidence indicated at the new penalty phase, really a leader and the driving force.

Further, in the state's version of the case and facts, the state claims that we can know that the original jury must have "believed Schmidt's account of the crimes," merely because

the defendant Craig was convicted of first degree murder. This is simply not true. The original jury could have convicted Craig of first degree murder even on Craig's account of the crimes under the principal theory. So the fact that they convicted him of first degree murder does not mean that they totally believed Schmidt and disbelieved Craig. In fact, the original jury's life recommendation regarding the Eubanks' killing would seem to indicate that they believed Schmidt was more culpable for that killing than Craig.

Additionally, the state somehow takes exception to the fact that the killing of Eubanks was perpetrated by Robert Schmidt. (Appellee's Answer Brief, p. 1) This fact is undisputable: **Schmidt**, not Craig, shot and killed Eubanks at a location some distance away from Craig and Farmer. (T 458) The fact also remains that it was **Schmidt**'s bullet, shooting Farmer in the head, that actually killed Farmer according to medical and ballistic testimony. (T 532-536, 555-557; PR 1291-1297, 1305, 1349-1351) It appears that the state, by recounting Schmidt's **inaccurate** belief that Farmer was already dead before he shot him (Appellee's Answer Brief, p. 9), is trying to confuse the fact that Farmer was still alive until Schmidt shot him point blank in the head. Moreover, it is also a true fact that Craig claims that Schmidt was the leading force in the killings, for which claim there is ample evidentiary support, notwithstanding Schmidt's contradictory claims. As urged above, these facts can and should be revisited in this new proceeding based upon the

expanded testimony presented, especially the additional undisputed testimony regarding Schmidt's character as a leader and a violent person.

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.

Cross Appeal. The trial court did not err in finding the mitigating circumstance of lack of a **significant** history of

prior criminal activity. The contemporaneous crimes of cattle theft and drug usage do not call for a rejection of this factor since the defendant led a model life for 23 years without engaging in criminal activity.

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 state makes the absurd claim in its summary of the argument and in its argument that the assistant state attorney "did not argue that Schmidt would not be getting out soon." (Appellee's Answer Brief, pp. 19, 27) He clearly did make such a statement. A clear reading of the statements of both Schmidt and the prosecutor, which were both set forth in the Initial Brief of Appellant, pp. 26-28, shows that the prosecutor did indeed argue to the jury that Schmidt was, in the prosecutor's own words, **"not going to be getting out of this."** (T 794-795) It was never revealed to the jury, despite the prosecutor's and Schmidt's knowledge of the fact, that Schmidt was already on work release, the road to release. This factor, if disclosed to the jury, could well have made a difference in the jury recommendation which was a bare majority (seven to five) in favor of death.

In concluding its argument on this point, the state contends that Craig cannot prevail on this point because he cannot show that "the result of the proceeding **would have been** different." (Appellee's Answer Brief, p. 28) This is not a correct statement of the law. Rather, as accurately stated in the initial brief, the correct standard is whether the misleading testimony and nondisclosed information "**could . . . in any**

reasonable likelihood have affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 154 (1972), **quoting from** Napue v. Illinois, 360 U.S. 264, 271 (1959). See also Routly v. State, 590 So.2d 397, 400 (Fla. 1991). The jury was entitled to know of the extreme disparity of Schmidt's sentences, that he was already on work release. There is a "reasonable likelihood" that, had the jury known this, it could have affected at least one more juror into voting for life (either because of the extreme disparity of sentences or because of the further eroded credibility of Schmidt), which would have resulted in a life recommendation, rather than one for death.

As correctly contended and more fully spelled out in the initial brief, pp. 30-32, the testimony of Schmidt and the argument of the prosecutor 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. The deliberate falsehoods perpetrated by the prosecutor therefore violated Giglio and the defendant's due process and fair trial rights. (See cases cited in the Initial Brief.) The resultant sentences

are therefore tainted and rendered cruel and unusual punishment.

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.

The state argues that the extensive evidence of the cattle thefts **from John Eubanks** (the sentencing for which was not before the new jury) is somehow relevant to the killing of **Robert Farmer** (which was the sole matter before the new sentencing jury). They argue that this evidence is relevant to the aggravating factors of pecuniary gain and CCP as to the killing of Robert Farmer since "Farmer appeared as a candidate to replace Craig." (Appellee's Answer Brief, p. 29) This might be true **if** the defendant knew that Farmer was going to be hired as his replacement. However, there is absolutely no evidence that Craig knew this. Although other associates of Eubanks knew of his decision to replace Craig with Farmer, this fact was not revealed to Craig or Schmidt. See also Point III of the Initial Brief of Appellant where it is pointed out that this testimony of Eubanks' state of mind was hearsay and was thus inadmissible to attempt to prove Craig's state of mind (e.g., whether Craig committed the murder for pecuniary gain or whether he had the heightened

premeditation to establish CCP), especially where Craig did not know of it. Farmer simply showed up that day on the ranch. Nothing was taken from him and his death was not the subject of heightened premeditation. The cattle thefts from Eubanks does not show that Farmer's death, committed after the thefts, was for pecuniary gain and cannot somehow equate to heightened premeditation in the Farmer killing.

Here, where the new sentencing 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), the evidence of the alleged cattle thefts from John Eubanks is totally irrelevant to any aggravating factors regarding the killing of Robert Farmer, the only issue which the advisory jury was called upon to decide. The evidence should have been excluded; 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.

The state claims in this point that the hearsay statements of Eubanks objected hereto "were not used to prove Craig's state of mind." (Appellee's Answer Brief, p. 31) Such a claim is totally outrageous since elsewhere in its brief (especially Points II and VI), the state uses this hearsay precisely for that reason, to show that Craig intended the killing of Farmer for pecuniary gain and possessed heightened premeditation since Eubanks was going to replace Craig with Farmer as the ranch foreman (a fact which comes only from this hearsay testimony and a fact which was not known to the defendant). The declarant's (Eubanks') state of mind or his subsequent actions are not at issue in this particular case and cannot be used to prove Craig's state of mind. This hearsay is thus inadmissible. Correll v. State, 523 So.2d 562, 565 (Fla. 1988); §90.803(3)(a), Fla. Stat. (1993). See also the further argument and cases presented in the Initial Brief of Appellant, pp. 36-40, which cases the state never even mentions or attempts to distinguish in its brief. The admission of this hearsay and its use to establish the defendant's state of mind (motive) and aggravating factors relating to

the defendant's state of mind (pecuniary gain and heightened premeditation) are reversible error requiring a new penalty phase.

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 appellee contends in its brief that the defendant did not pursue the defendant's mental or emotional state as a mitigator. (Appellee's brief, p. 49) However, it is clear from the court's sentencing order (R 756) and the defendant's sentencing memorandum (R 723, paragraph 4; R 725-726, paragraphs 11 and 13; and R 730, paragraph 21), that such argument was presented below.

The state also argues in its brief that the mitigating evidence presented by the defense which was routinely given "slight," "very slight,", or "very, very slight" weight by the trial court was "trivial evidence" and "marginal mitigation of dubious value." (Appellee's Answer Brief, pp. 44-45) Such an argument completely ignores the fact that, as presented in the Initial Brief of Appellant, and in the trial attorney's sentencing memorandum, these mitigating matters have been found to be substantial in reducing other's death sentences to life imprisonment. (Appellant's Initial Brief, pp. 66-89, 94-97) Additional-

ly, the nature of the testimony and the support received by Craig from even his jailers demonstrates that this evidence is no where near "trivial," "marginal," or "of dubious value," as the state claims. As argued further in the initial brief, this Court has never seen a case where there exists such testimony of a strong nature in mitigation, especially from those who normally would not testify in support of inmates, such as the jailers and former guard. 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; his willingness to put his life on the line to help assure the jailers' safety; his true remorse over the deaths of John Eubanks and Bobby Farmer (not like other inmates' remorse, which is largely over the fact that they are incarcerated); and Craig's respectful nature in prison, which does not show the resentment that other inmates show. All of this points to a man who has substantial, not "trivial," mitigation; 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.

CROSS APPEAL.

THE TRIAL COURT DID NOT ERR IN FINDING THE STATUTORY CIRCUMSTANCE THAT THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

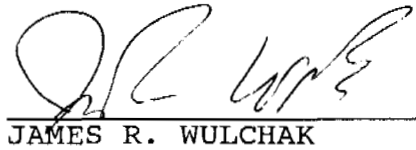
The state contends in a separate point on a cross appeal that the trial court should not have found at all the mitigating factor of "lack of a significant history of criminal activity." This point has already been addressed in Point VI (C) (1) of Appellant's Initial Brief, pp. 66-67, wherein the appellant argues that this factor should have been accorded more than "slight weight." While the defendant had engaged in the contemporaneous crimes of cattle theft and drug usage on the ranch, such facts do not rise to the level of "**significant** history of prior criminal activity," and do not lessen the extensive evidence of Craig's non-aggressive, crime-free background up until the age of 23, when the instant series of events occurred. See State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988), and the other cases cited in the Appellant's Initial Brief, pp. 66-67. The trial court's factual determination of this mitigating factor is supported by substantial, competent evidence. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). In fact, as urged in the initial brief, this factor should have been given greater weight by the trial court.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the Initial Brief of Appellant, 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. Further, the appellant requests that this Court reject the state's argument presented on cross appeal.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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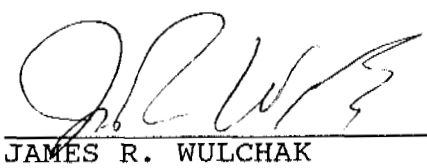
CERTIFICATE OF SERVICE

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 1st day of February, 1995.



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