IN THE SUPREME COURT OF FLORIDA

MICHAEL TYRONE CRUMP, :

Appellant, :

vs. : Case No. 82,943

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

A. ANNE OWENS
Assistant Public Defender
FLORIDA BAR NUMBER 284920

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(813) 534-4200

ATTORNEYS FOR APPELLANT

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ISSUE I

THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S MOTION TO CONSIDER NEW EVIDENCE AT THE RESENTENCING.

In Lucas v. State, 613 So. 2d 408, 409 (Fla. 1992), cited by Appellee, this Court reversed because the written findings were unclear, and directed the trial court to "reconsider and rewrite those findings." Essentially, then, the trial judge in Lucas was told merely to rewrite his findings, spelling out his reasoning. In this case, the judge was ordered to "reweigh the circumstances and resentence Crump," Crump v. State, 622 So. 2d 963, 973 (Fla. 1993), which envisions somewhat more than rewriting his findings. "Reweighing" and "resentencing" require the judge to reconsider his sentence -- not merely to edit his order to support the sentence he already imposed. The trial judge in Crump's case attempted to satisfy this Court's mandate by deleting his finding of CCP, as ordered; clarifying his unclear findings concerning the statutory mental mitigators by classifying them as nonstatutory mitigation; and expanding his reliance on the "catchall" statutory mitigator by stating that Crump had "a few" unspecified "positive personality traits." (R. 40-41) The new page-and-a-half order is nearly as sparse as the original order (see Appendix to this brief), and the defendant was afforded no more due process than he received at his original sentencing -- little if any.

In the more recent case of Davis v. State, 19 Fla. L. Weekly S576 (Fla. Nov. 10, 1994), this Court held that its order remanding the case to the trial judge to "reweigh the evidence in light of

our opinion and to impose the appropriate sentence," did not require the trial judge to consider additional mitigating evidence on remand because it was merely a "reweighing." Although the language in Davis is similar to that in the case at hand, the opinion in Crump expands the order. Although the Court ordered the trial judge to "reweigh the circumstances and resentence Crump," the opinion, in its entirety, broadened the order by requiring that the judge reconsider the mitigation. In remanding, this Court noted that the sentencing order was unclear. The judge's findings were that Crump "may have possibly" committed the capital felony while under the influence of extreme mental or emotional disturbance, and that Crump's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law "may have possibly" been substantially impaired. The sentencing order was sparse because it failed to specify what statutory and nonstatutory mitigating circumstances the trial judge found and what weight he gave the circumstances. See Crump v. State, 622 So. 2d at 973.

In order to clarify his findings as to the mental mitigators, the trial court was required to reconsider the mitigation in this case. A problem noted by counsel at resentencing was the lack of clarity of the mental expert at the original penalty proceeding, called in at the last minutes to replace Dr. Robert Berland, with little time for preparation, little knowledge of the case, and, possibly, a problem with the language. Thus, defense counsel asked the judge to read Dr. Berland's testimony from another case involving the same defendant, to help him better understand the

mental mitigation. Although this would not have been extremely time-consuming, and would undoubtedly have greatly increased the judge's understanding of Crump's mental capabilities and incapacities, the judge was in a rush to impose the death penalty and refused to take the time.

This case is distinguishable from Lucas and Davis, discussed above, because of the trial court's total failure to afford the defendant due process of law. In Lucas, the trial court had two months to study the defendant's sentencing memorandum. He then postponed sentencing for a week to study the State's sentencing memorandum. He reread and studied the record and reviewed Lucas' prison records,[1] which had been submitted to him, and wrote an eighteen-page order. Thus, he made a conscientious effort to reconsider and reweigh the circumstances before deciding on the proper sentence.

In Davis, although this Court did not discuss what the trial judge considered or what he included in his order in any detail, it noted that "the sentencing order and the record on remand reflect that the trial court conscientiously reweighed the evidence in accordance with the Court's directives." 19 Fla. L. Weekly, at 577. In the case at hand, the record and the trial judge's order show the opposite. Rather than conscientiously reweighing the evidence, the judge merely attempted to clean up his order to pass muster with this Court, changing as little as possible.

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[1] In the instant case, the court also refused to consider evidence that Crump had adjusted well to prison. See Issue I in Initial Brief of Appellant.

Furthermore, Crump has never had the sentencing contemplated by the Florida Rules of Criminal Procedure,[2] because the trial judge failed to afford him due process during his first sentencing. (TR. 586) He held the original sentencing the day after the penalty verdict was rendered, sentencing Michael Crump to death before defense counsel had time to adequately prepare for sentencing, and before the judge had time to reflect on the sentence. (TR. 586, 695) Even worse, the trial judge prepared his order sentencing Appellant to death prior to the hearing, and so was in no position to consider any evidence or arguments made by counsel. (TR. 690-91)

The trial judge did the same thing on resentencing. He prepared his almost equally sparse sentencing order prior to the resentencing and refused to hear evidence. Although he allowed argument of counsel and a brief statement by the Appellant, he did

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[2] Florida Rule of Criminal Procedure 3.780, which governs sentencing in capital cases, reads as follows:

> (a) In all proceedings based upon section 921.141, Florida Statutes, the state and the defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statute. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.
>
> (b) The trial judge shall permit rebuttal testimony.
>
> (c) Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first.

Thus, the rule **requires** the court to entertain evidence relevant to the sentence the defendant should receive. See also § 921.141(1), Fla. Stat. (1993).

not consider them because he sentenced Crump to death immediately thereafter and filed his pre-prepared sentencing order. See Issue III, infra. The record contains no evidence that the judge ever reweighed or reconsidered Crump's sentence. He merely edited his order in an attempt to comply with this Court's mandate, and then held a superficial hearing, allowing no further evidence, in an attempt to meet the requirements of law. This was not due process.

In effect, our argument is that the trial judge should have used his common sense. Even if this Court's mandate did not specifically require that he hear and consider additional evidence at the resentencing, the judge should have realized that his duty was to provide due process to this defendant. Accordingly, because he lacked sufficient information to made a reasoned determination of the strength of the mental mitigation, he should have seized upon the opportunity to read Dr. Berland's testimony, to better understand Crump's mental problems prior to making the determination.[3] After all, the trial judge's goal should have been to properly sentence Crump in accordance with fairness, due process and equal justice, rather than to merely jump through the hoops necessary to get Crump's death sentence affirmed by this Court with the least amount of time and effort.

Appellee apparently misapprehended our argument concerning Scull v. State, 569 So. 2d 1261 (Fla. 1990), wherein this Court held that the trial judge's haste in resentencing Scull violated

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[3] It was not Crump's fault that Dr. Berland was out of town on the day of his penalty proceeding and he should not be punished for it -- especially not by an undeserved death sentence.

Scull's due process rights. Appellee correctly noted that this Court ordered a "resentencing proceeding" in Scull. This Court's complaint with Scull's resentencing, however, was not the judge's refusal to allow new evidence, but his haste in denying the defense motions and resentencing Scull three days after defense counsel returned from vacation, without giving her time to prepare. As in the instant case, the totality of events denied Scull due process:

> One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, Sec. 9, Fla. Const. While we often have said that "due process" is capable of no precise definition, e.g. Gilmer v. Bird, 15 Fla. 410 (1875), there nevertheless are certain well-defined rights clearly subsumed within the meaning of the term.
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> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel. Munch v. Davis, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See Art. I, Sec. 9, Fla. Const.

569 So. 2d at 1252. The appearance of irregularity so permeated the proceedings as to justify suspicion of unfairness which, the Court held, was "as much a violation of due process as actual bias would be." Id.

The total failure of due process in our case is worse because the trial judge failed to hold an allocution hearing prior to the

sentencing, thus, deciding to impose the death sentence and preparing his order before hearing evidence and arguments. A hearing is useless when it occurs only after the sentencing decision has been made and put in writing.

This error is not only in violation of Florida law. Due process is required by the Fifth and Fourteenth Amendments to the United States Constitution. In furtherance of due process, the United States Supreme Court has held that the sentencer in a capital case may not refuse to consider any relevant evidence which the defense offers as a reason for imposing a sentence less than death. Parker v. Dugger, 498 U.S. 308 (1991); McCleskey v. Kemp, 481 U.S. 279 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). In this case, although the judge may have listened at the sentencing hearings, he refused to consider any evidence or arguments presented by either side. He did not engage in a reasoned judgment by weighing the aggravating and mitigating circumstances. The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 114 (1982); Amend. VIII, U.S. Const.; Amend XIV, U.S. Const. Crump's death sentence was rendered in an arbitrary and capricious fashion, in violation of the Eighth and Fourteenth Amendments. If his sentence is not reduced to life pursuant to the argument in Issue VI, infra, he must be resentenced in accordance with due process.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO FIND AND GIVE SIGNIFICANT WEIGHT TO THE UNREBUTTED MITIGATING EVIDENCE AS REQUIRED BY THIS COURT, THUS INVALIDATING THE WEIGHING PROCESS.

For the reasons discussed in Issue I, supra, the trial court failed to consider the mitigation or arguments presented at either sentencing, at all. Although he may have briefly considered the testimony at penalty phase, his original order shows clearly that he was uncertain whether the mental mitigators were established or, at least, to what extent. As Appellee suggests, this may have been because Dr. Isaza's testimony was unclear which, in turn, may have been because she was called in the day before the penalty phase to substitute for Dr. Berland who was out of town.

At the resentencing, defense counsel gave the trial judge an opportunity to better understand the mitigation so that he could make a well-reasoned decision as to whether the statutory mental mitigators were established, and what weight to afford them, by reading Dr. Berland's testimony about this same defendant, given at another trial. Dr. Berland had evaluated and tested the defendant and, without a doubt, had a much better understanding of Crump's mental problems. It was only because Dr. Berland was unavailable on the day of the penalty proceeding that Dr. Isaza testified at all. Defense counsel not only offered the judge an opportunity to read Dr. Berland's testimony, but made a motion requesting that he do so. The trial judge refused. Instead, he imposed the death penalty in an arbitrary and capricious manner, in violation of the

Eighth and Fourteenth Amendments to the United States Constitution.[4] Without further evidence or information, he could not possibly have had any better understanding of the mitigation than when he entered his first order, at which time he was, perhaps understandably, undecided as to the existence of the statutory mental mitigators, based on Dr. Isaza's unclear testimony. (See Issue I, supra, at p. 5.)

The sentencing order in a capital case must reflect that a determination as to which aggravating and mitigating circumstances apply under the facts of the particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied sub nom., 416 U.S. 943 (1974). The judge must set out written reasons for finding aggravating and mitigating factors and weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. The record must clearly reflect that the did so. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992); Santos, 591 So. 2d 160 (Fla. 1991); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (trial judge must, in written order, expressly evaluate every statutory and nonstatutory mitigating factor proposed by defendant); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982); Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). In this case, the trial court summarily disposed of the

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[4] To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's record and cannot ignore evidence of mitigating circumstances. Parker v. Dugger, 498 U.S. 308, 321 (1991).

evidence of nonstatutory mitigating circumstances by stating that the defendant "possessed a few positive character traits and suffered from mental impairment not reaching the statutory standards of mental mitigation." (See order in Appendix to this brief.)

This Court gave the judge a second opportunity to comply with these often reiterated requirements by remanding the case and ordering that the trial judge reconsider his sentence and make a more detailed order. This Court opined that, "[t]he sentencing order in the instant case is sparse because it fails to specify what statutory and nonstatutory mitigating circumstances the trial judge found and what weight he gave these circumstances in determining whether to impose a death sentence." Crump, 622 So. 2d at 973. Despite this Court's mandate, the judge's second sentencing order was almost equally sparse. He again failed to set out the unrebutted nonstatutory mitigators presented by the witnesses, instead lumping them into a category he describing merely as "a few positive character traits." (R. 40-41) This clearly fails to meet the requirements set out by this Court.[5] See Maxwell, 603 So. 2d

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[5] The record contains numerous nonstatutory mitigating aspects of Crump's character which have been approved by this Court, and which the judge did not mention in his order. Crump was raised without a father (TR. 487); was a slow learner in school; and was described by his mother as kind, considerate, thoughtful, friendly, outgoing and helpful to anyone who needed help. (TR. 458-60) Crump's sisters testified that Michael got along well with children and family and did a lot of work around the house. (TR. 466-75) As discussed in Issue I, supra, had the judge agreed to consider additional evidence, he would also have had evidence that Crump adjusted well to prison, which has found mitigating. Skipper v. South Carolina, 476 U.S. 1, 4-7 (1986); Kramer v. State, 619 So. 2d 274, 276 & n.1, 278 (Fla. 1993); Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). In fact, Crump told him, at the resentencing, that his disciplinary record was good. (T. 22)

at 492 (must construe evidence in favor of any reasonable theory advanced by defendant to extent evidence was uncontroverted), and other cases cited above.

Appellee disagrees with our argument that this Court has effectively removed the adjective "extreme" from the statutory circumstance of "extreme mental or emotional disturbance," citing Stewart v. State, 558 So. 2d 416 (Fla. 1990), and Walls v. State, 19 Fla. L. Weekly S377, 379 (Fla. July 7, 1994). Those cases hold only that it is not error for the trial judge to refuse to delete the word "extreme" from the statutory definition of the mitigating factor (Stewart), or to give a further definition of the mitigator (Walls). We are not arguing here that the trial judge erred in instructing the jury on the mental mitigators. Instead, we are arguing that the trial judge erred if, as it appears, he determined that the mental mitigation did not meet the statutory requirement merely because the impairment was not sufficiently "extreme." The law does not require that the judge accord more weight to statutory mitigators than "mere" nonstatutory mitigation. To the contrary, nonstatutory mitigation is statutory mitigation under the statutory mitigator which includes "any other aspect of the defendant's character or record or any other circumstance of the offense."

In Walls, cited by Appellee, this Court reaffirmed its prior holding that "it would clearly be unconstitutional for the state to restrict the trial court's consideration solely to 'extreme' emotional disturbances." 19 Fla. L. Weekly S377 (citing Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990)). While rejecting the

defendant's argument that the jury should have been given a special jury instruction on the mental disturbance mitigator, the Walls Court reiterated that, "[o]ur law does establish that all evidence of mental disturbance or impairment is relevant if it may have some bearing on the crime or the defendant's character." 19 Fla. L. Weekly at S379 (citing Cheshire). Thus, the Court makes the same distinction we are attempting to make here. It is not the instruction which is objectionable, but the trial judge's apparent belief that the mental mitigator is not "statutory," and, thus, of little weight, merely because he has not described it as "extreme." The word "extreme" is clearly an arbitrary term with no precise definition. Because no clear line can be drawn between extreme and non-extreme mental disturbance, the opinion of an expert, or even a judge, as to whether a mental disturbance is "extreme," is only subjective determination.

Finally, Appellee argues that Crump's family members refuted the testimony of Dr. Isaza concerning Crump's mental problems. None of Crump's family members were trained in psychology. Because they were unable to recognize his complex mental problems had no bearing on whether or not they existed. If lay testimony were the equivalent of expert psychiatric testimony, psychologists would be of no use or purpose. Clearly this is not true.

The judge refused to allow the defense to present evidence that Crump had adjusted well to prison. (See Issue I, supra.) Although Michael Crump told the judge at sentencing that he had a good disciplinary record in prison -- which was unrefuted -- the

judge did not even acknowledge his brief comments with a response (T. 22), nor did he mention Crump's statements in his order.[6]

Because the trial court failed to identify, evaluate, find and weigh the unrefuted nonstatutory mitigating circumstances established by the evidence, Crump's sentence of death was unconstitutionally imposed. See Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (court must find and weigh any mitigating circumstance established by "reasonable quantum of competent, uncontroverted evidence"); Campbell, 571 So. 2d at 419. To uphold Crump's death sentence on the basis of the order entered herein would deny Crump his basic constitutional rights to due process and to be free from cruel and unusual punishment, guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. According, this error requires that the sentence be vacated and the case remanded for resentencing.

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[6] Although the judge allowed Crump to speak at the end of the resentencing, he did not consider what Crump said in determining the sentence. He could not have done so, of course, because he had already prepared his order.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO HOLD AN ALLOCATION HEARING AND BY SENTENCING CRUMP TO DEATH WITHOUT CONSIDERING HIS ARGUMENT.

Appellee argues that this Court's mandate did not require a "sentencing hearing" or contemplate that the defendant be allowed to speak. In fact, Appellee argues that the resentencing was not even a "proceeding."[7] Apparently, Appellee agrees with the trial judge who stated as follows:

> The Supreme Court of Florida did not order a new penalty phase hearing. They did not even order that this Court reappoint Mr. Cunningham to represent Mr. Crump. They did not even order this Court to conduct a hearing. They merely directed the trial judge to reweigh the circumstances and resentence the defendant.
>
> It's obvious to this Court since I was the trial judge that all I had to do was writ Mr. Crump back from the Florida State Prison and resentence him after reweighing the circumstances. But, in an abundance of caution, I chose to reappoint Mr. Cunningham to represent Mr. Crump and we have a hearing as to a proper sentence, whether he should be sentenced to the electric chair or whether he should be sentenced to life imprisonment without the possibility of parole for 25 years.

(T. 10) Had the judge merely "writted" Michael Crump back from death row, called him into the courtroom and resentenced him to

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[7] A "proceeding" is defined in Black's Law Dictionary (rev'd 4th ed. 1968), p. 1368, as "regular and orderly progress in form of law; including all possible steps in an action from its commencement to the execution of judgment." Surely then, a resentencing hearing is a "proceeding." Florida Rule of Procedure 3.780, which governs sentencing in capital proceedings, requires that the state and defendant be permitted to present evidence of an aggravating or mitigating nature consistent with the requirements of section 921.141, Florida Statutes. The rule was not followed in this case.

death without a lawyer, he would have violated both Florida law and the United States and Florida constitutions. Furthermore, despite Appellee's argument that "there is no support for appellant's contention that the trial court was under the mistaken belief that it was only necessary for him to 'clean up' his prior order,"[8] the trial judge's tirade, quoted on the immediately preceding page, clearly evidences this mistaken belief.

Appellee also argues that there is no evidence that the trial court prepared the written order before he heard any evidence, arguments of counsel, or any statement the defendant wished to make. Of course, we know that he sentenced Crump before hearing evidence because he refused to hear any evidence. (See Issue I, supra.) We know that he had prepared his written order in advance because he sentenced Crump to death the moment Crump finished his short request that the judge consider certain factors in reweighing the aggravating and mitigating circumstances. (T. 22) He announced his decision without pausing to take a breath, and filed his written order the same day. The order does not reflect anything that took place at resentencing. Nothing in the record or order demonstrates that the judge engaged in a reasoned reconsideration. The judge merely opined, without setting out any reasoning or facts to support his conclusion, that the "Mitigating Circumstances fail to outweigh the Aggravating Circumstance and the Defendant deserves the death penalty for having again committed Murder in the First Degree." (R. 40-41; Appendix to this brief) This clearly "tends to

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[8] See Brief of Appellee at p. 13.

negate any supposition that he used reasoned judgment in reweighing the factors." Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982).

Because the trial court condemned Crump to death without considering his presentation, evidence or arguments of counsel, Crump was not sentenced in accordance with Florida Rule of Criminal Procedure 3.780; section 921.141, Florida Statutes; this Court's requirements as set out in Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993); or with principles of fundamental fairness or due process. The procedure in this case violated Crump's constitutional right to due process and subjected him to cruel and unusual punishment, in violation of Article I, sections 9 and 17 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution. The denial of due process at a proceeding pursuant to which the defendant is sentenced to death is certainly not harmless. If Michael Crump's death sentence is not reduced to life because the death sentence is not proportionally warranted in this case, resentencing is required.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO EMPANEL A NEW JURY AND HOLD A NEW PENALTY PROCEEDING BECAUSE THE ORIGINAL JURY WAS INSTRUCTED TO CONSIDER THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR WITHOUT BEING GIVEN A LIMITING DEFINITION.

Appellee argues that defense counsel's reference to a multi-issued case was insufficient to put the court on notice that he was requesting that the court empanel a new jury for a new penalty proceeding. See James v. State, 615 So. 2d 668, 669 (Fla. 1993),[9] (Court ordered whole new penalty proceeding because it could not say beyond a reasonable doubt that invalid instruction did not affect jury's recommendation.) Nevertheless, it is clear that the trial judge understood the defense request because he responded, "Well, the court didn't do that here." (T. 18-20) Thus, the judge was clearly "on notice." He made it equally clear that he was not inclined to entertain a motion for a new penalty proceeding.[10]

Appellee also notes that this Court rejected the Appellant's request for a new jury penalty proceeding by denying his motion for rehearing following this Court's initial opinion. The motion for rehearing was denied on September 3, 1993,[11] however, which was prior to this Court's decision in Jackson v. State, 19 Fla. L.

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[9] As Appellee noted, defense counsel incorrectly cited this case using the defendant's first name (Davidson) instead of his last name. Counsel had the case in front of him, however, had the court wished to see it.

[10] See judge's comments (T. 10), quoted at p. 14, supra.

[11] See Brief of Appellee, at pp. 15-16, and Exhibits "A" and "B" to Appellee's brief.

Weekly S215 (Fla. Apr. 21, 1994), which held that the CCP standard jury instruction was unconstitutionally vague. The jury at Crump's penalty trial was instructed on the CCP aggravating factor, over defense objection, without a limiting definition as required by this Court in Jackson. Because this Court struck CCP on direct appeal, as not established beyond a reasonable doubt, the error was not harmless. See also Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L.Ed. 2d 854, 858 (1992) (weighing of invalid aggravating circumstance violates Eighth Amendment).

Although this Court rejected a similar argument in Davis v. State, 19 Fla. L. Weekly S576, 577 (Fla. Nov. 10, 1994), the case is distinguishable because it did not involve the "cold, calculated and premeditated" aggravating factor. Instead, the jury in Davis was instructed on the "avoiding lawful arrest" aggravating factor which this Court later held was not supported by the evidence. The Davis jury was not as likely to have been misled by the instruction because the instruction itself was not unconstitutionally vague, as is the "CCP" instruction. When the jury is instructed that it may consider a vague aggravating circumstance such as "CCP," it must be presumed that the jury found and weighed the invalid circumstance. Espinosa, 120 L.Ed. 2d at 858-59. Because the sentencing judge is required to give great weight to the jury recommendation, the court then indirectly weighs the invalid circumstance. 120 L.Ed. 2d at 859. The result creates the potential for arbitrariness in the imposition of the death penalty. Accordingly, if the jury is not given a limiting construction of an otherwise vague aggravating

circumstance such as "CCP," the sentencing process is rendered arbitrary and unreliable. See id.; Jackson, 19 Fla. L. Weekly at S216; Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

Appellee argues that this issue was not preserved because, despite a pretrial motion to declare section 921.141(5)(i) of the Florida Statutes unconstitutional, defense counsel did not object to the specific wording of the instruction and suggest a proper instruction to be given, Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993), cert. denied, 128 L.Ed. 2d 678 (1994); and defense counsel failed to raise this claim during resentencing. In the more recent case of Walls v. State, 19 Fla. L. Weekly S377 (Fla. July 7, 1994), this Court, citing Jackson, stated that, "[t]o preserve the error for appellate review, it is necessary both to make a specific objection or request an alternative instruction at trial, and to raise the issue on appeal" Id. at 378 (emphasis on "or" added; emphasis on "and" in original). Although defense counsel did not request a specific alternate instruction in this case, he did object to the standard instruction on CCP. He not only filed a "Motion to Declare Statute Unconstitutional Because CCP Aggravating Factor Too Vague" (TR. 643), but also objected to the court's instructing the jury on the CCP aggravating factor during the penalty proceeding:

> THE COURT: Mr. Cunningham, it is my understanding that you object to the aggravating factor, quote, the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, end quote.

> MR. CUNNINGHAM: That's correct, Your Honor, based upon Cannidy v. State [sic], and its progeny.
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> THE COURT: The Court has reviewed the Cannidy case, as well as numerous other cases, involving that particular aggravating circumstance. Your objection is overruled, and your record is protected. Do you have any other objections to the Court's instructions to the jury or the form advisory sentences?
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> MR. CUNNINGHAM: The court doesn't need to hear from me then on the factual issues of a heightened premeditation as argued in the--
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> THE COURT: No, I know what your argument is. The record speaks for itself. You have objected to the giving of that instruction as an aggravating circumstance, and I have overruled it. So, your record is protected.

(TR. 514) Although, as Appellee suggests, the defense argument is not clear, the judge twice told defense counsel that his record was protected, thus dissuading him from making further argument on this issue. Furthermore, the dialogue infers that an off the record communication took place prior to the recorded discussion.

Defense counsel renewed his objection "concerning the cold, calculated and premeditated" aggravating factor at the end of jury instructions. (TR. 564) Undersigned appellate counsel argued on direct appeal that the CCP instruction given was unconstitutionally vague, see Crump, 622 So. 2d at 972, thus preserving the issue as required by this Court in Jackson. Undersigned appellate counsel also included this argument in the motion for rehearing filed in response to this Court's opinion in this case. (See Exhibit "B" to Brief of Appellee).

Although a Florida jury recommendation is advisory rather than

mandatory, it is a "critical factor" in determining whether a death sentence is imposed. Accordingly, it is critical that the jury be given adequate guidance. Because the jury was given an inadequate definition of the cold, calculated, and premeditated aggravating factor, its sentencing recommendation was based on an incomplete understanding of the law. It cannot be suggested that the jury would not have considered the CCP aggravating circumstance based on the facts of this case because the trial judge erroneously relied on it in his original sentencing order. It must, then, be harmful error which requires a new jury recommendation.

Under the circumstance of this case, the court's failure to adequately inform the jury of what they must find to apply the CCP aggravating factor clearly undermined the reliability of the jury's sentencing recommendation, and created an unacceptable risk of arbitrariness in the imposition of the death penalty. See Riley v. Wainwright, 517 So. 2d 656, 658-59 (Fla. 1988) (if jury recommendation upon which judge must rely results from unconstitutional procedure, entire sentencing process is tainted). If Crump's sentence is not reduced to life (see Issue VI, infra), the Court should order a new penalty proceeding with a newly empaneled jury, despite its failure to do so initially, so that the case will be straightened out now rather than at some future date pursuant to a post-conviction proceeding. See Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986).

ISSUE V

THE TRIAL COURT ERRED BY FAILING TO EMPANEL A NEW JURY AND HOLD A NEW PENALTY PROCEEDING BECAUSE THE ORIGINAL JURY WAS INSTRUCTED TO CONSIDER THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR WHICH THIS COURT DETERMINED ON DIRECT APPEAL WAS NOT ESTABLISHED.

While suggesting that it was unclear in our initial brief in this case, Appellee correctly observed that Appellant is arguing that the jury should not have been instructed on the "cold, calculated and premeditated" aggravating factor at all. That is what distinguishes this issue from Issue IV, supra. In other words, Appellant is arguing both that (1) the jury should not have been instructed on CCP at all (Issue V); and that (2) the CCP instruction given was unconstitutionally vague (Issue IV). Both issues require a new sentencing proceeding with a newly empaneled jury.

Appellee correctly argues that the trial court is directed to give jury instructions where there is evidence to support them. In this case, however, there was no evidence to support a finding of the CCP aggravating factor. Moreover, the jury may have speculated that Crump premeditated this crime based on the Williams Rule[12] or collateral crime evidence. This is likely because the prosecutor stressed the CCP factor in her penalty closing, arguing by analogy to the Williams Rule evidence. (TR. 521) Because this Court ruled that the judge should not have relied on the Williams Rule evidence to speculate that Crump premeditated the crime, Crump, 622 So. 2d

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[12] See Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959); § 90.404(2)(a), Fla. Stat. (1993).

at 973, the jurors should not have been instructed to consider the CCP factor, thus reinforcing the prosecutor's argument.[13]

In Jones v. State, 569 So. 2d 1234, 1238-39 (Fla. 1990), this Court reversed because the jury was permitted to consider HAC despite its lack of evidentiary support, noting that the jury may have erroneously believed the defendant's sexual abuse of the corpse supported the factor. Similarly, in this case, the jury probably believed the Williams Rule evidence supported the CCP aggravating factor, in light of the prosecutor's closing argument. Accord Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); Omelus v. State, 584 So. 2d 563 (Fla. 1991) (same). That the jury must have relied on the evidence from the other homicide to find CCP in this case distinguishes it from those in which this Court has found that the jury was properly instructed on a factor that the judge or this Court found not to be established. As in Omelus, Crump's jurors recommended death by an eight to four vote. Had they not considered CCP, the recommendation could easily have gone the other way.

Defense counsel properly preserved this issue, as discussed in Issue IV, supra. If this Court affirms Crump's death sentence, based in part on the tainted jury recommendation, the holding will render the death sentence arbitrary and capricious, in violation of the Eighth and Fourteenth Amendments. See Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed. 2d 854 (Fla. 1992) (neither judge nor jury should be permitted to weigh invalid aggravator).

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[13] See quotation of prosecutor's argument in Issue V, at pp. 58-59, of Appellant's initial brief.

ISSUE VI

A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THE COURT HAS REDUCED THE PENALTY TO LIFE.

As discussed in our initial brief, Duncan v. State, 619 So. 2d 279 (Fla. 1993), cited by Appellee, is distinguishable from this case, due primarily to the heinousness of both murders in Duncan. Although this Court affirmed Duncan's death sentence despite the finding of only the "prior violent felony" aggravator, Duncan's prior violent felonies included a contemporaneous attack on the victim's daughter, and the prior axe murder of a fellow inmate who was sitting on the commode at the time. Duncan's murder of his fiance was not spontaneous; he hid a kitchen knife in his jacket pocket prior to stabbing her from behind. 619 So. 2d at 280-81. Thus, both murders in Duncan were more aggravated than those in Crump's case.

Duncan's jury unanimously recommended the death sentence, whereas the recommendation in Crump's case was eight to four. Little or nothing mitigated Duncan's offense. Neither of the mental mitigators applied, Duncan, 619 So. 2d at 283, as contrasted with Crump's case, in which, according to the defense expert's unrebutted testimony, Crump's mental impairment was the direct cause of both homicides. The judge found that the mental mitigators constituted nonstatutory mitigation, and found other nonstatutory mitigation established.

Similarly, Appellant previously distinguished both Lindsey v. State, 19 Fla. L. Weekly S241 (Fla. April 28, 1994) (defendant

killed live-in girlfriend and her brother, and had a prior second-degree murder conviction balanced by no mitigation other than poor health), and Slawson v. State, 619 So. 2d 255 (Fla. 1993), a horribly gruesome mass murder in no way comparable to this one. Slawson killed a husband and wife and two small children. The wife, cut from the base of the sternum to the pelvic area, was still conscious when found by her mother; her unborn baby was found with two gunshot wounds and lacerations caused by the injuries to the mother. Although the trial court found only the "another capital felony" aggravator as to three family members, he found both HAC and a prior violent felony as to the wife. He found some mental mitigation but gave it little weight. Id. at 260.

Appellee observed that Appellant was "unable to cite to any case where this Court has held that the death sentence is not proportionate for a serial killer."[14] Although Appellee apparently believes that this Court will be swayed by such a label, the prior killing of one person does not make Crump what is commonly known as a "serial killer." "Serial" implies a "series," or a string of things or events, and generally implies more than two. Had the evidence of the prior killing not been admitted, Crump could not even have been prosecuted for this offense, a fact which the prosecutor admitted at trial.

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[14] Brief of Appellee, at p. 21. Again at page 24, Appellee concludes that "Crump is a serial murderer and had a prior conviction for first degree murder. . ." Although Appellee uses the word "and," these are not two things. Although Crump had a prior conviction for first degree murder, no evidence suggested that he is a serial killer.

Moreover, the case of Kramer v. State, 619 So. 2d 274 (Fla. 1993), discussed in Appellant's initial brief and again below, involves a prior murder which is just as similar to the one of which Kramer was later convicted as was Crump's. Kramer's first victim did not die until after Kramer was convicted of attempted murder. Crump's "first" victim was not killed until ten months after the instant homicide. Depending on one's personal definition of a two-person "series," several other cases cited by Appellant should qualify. See e.g., Cochran v. State, 547 So. 2d 928 (Fla. 1989) (sentence reduced to life despite prior homicide); Fead v. State, 512 So. 2d 176 (Fla. 1987) (same).

Similarly, Appellee was unable to cite any case in which only one aggravator was upheld and substantial mitigation was found, including mental mitigation, which did not ultimately result in a life sentence. Although a few cases had mitigation approaching that found in Crump's case, those cases were distinguished in our initial brief based upon the sheer brutality of the murders involved. There is no evidence that either of the crimes committed by Crump were tortuous or brutal. As to the killing in this case, there is no evidence at all except for the medical examiner's testimony that the victim died of strangulation and may have been hit over the head. Thus, we do not even know whether she was conscious when strangled.

Appellee attempts to distinguish Kramer v. State, 619 So. 2d 274 (Fla. 1993), wherein this Court remanded for a life sentence even though the defendant had committed a prior similar murder,

because Kramer was convicted only of attempted murder. This was only because the first victim lingered and had not yet died at the time of Kramer's conviction. Additionally, Kramer's trial judge found two aggravating factors -- not one. In addition to the prior violent felony, the trial court found that the murder was "heinous, atrocious and cruel." The State produced evidence that the victim suffered defensive wounds and had been attacked while in passive positions, including lying face down. The jury recommended death by a vote of nine to three. 619 So. 2d at 275-76. In the prior case, Kramer beat the victim (ultimately, to death) with a concrete block within two hundred feet of where the murder in the later case took place. 619 So. 2d at 278 (Grimes, J., dissenting).

Kramer's victim had been drinking with him prior to the murder. Crump's victim was a prostitute known as a cocaine user who apparently agreed to accompany him somewhere for a sexual purpose. It appears that they had a disagreement as did Kramer and his victim. (TR. 356-59) As in Crump's case, Kramer's judge found the mental mitigators, but determined that they did not establish the two statutory mental mitigators. 619 So. 2d at 276, 287 (Grimes, J., dissenting). This Court found that the murder in Kramer was not beyond the norm of capital felonies. 619 So. 2d at 278. The same is true in this case.

Appellant noted, and Appellee reiterated, that, in DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), this Court remanded for a life sentence, in part because the trial judge found only one aggravator -- the murder was "cold, calculated and premeditated." 616 So. 2d

at 443. Although Appellee stated that DeAngelo had significant mental mitigation, the court did not find that DeAngelo's mental impairment established the statutory mental mitigators; thus, the mitigation was, at best, no greater than Crump's.

We have not found, nor has Appellee cited, a single case in which this Court affirmed a death sentence with only one aggravating factor where the mitigation was as substantial as Crump's, even without Dr. Berland's testimony. Conversely, this Court has reduced the penalty to life in a myriad of cases involving only one aggravating factor, some of which involved more than one homicide. See, e.g., Knowles v. State, 632 So. 2d 62 (Fla. 1993) (defendant shot and killed ten-year-old girl, then his father); Santos v. State, 629 So. 2d 838 (Fla. 1993) (killed a mother and small daughter); Clark v. State, 609 So. 2d 513 (Fla. 1992) (killed victim to get the man's job). Many other such cases are cited in our initial brief.

To suggest that death is always justified when a defendant previously has been convicted of murder is "tantamount to saying the judge need not consider the mitigating evidence at all in such instances." Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). A prior homicide does not automatically require imposition of the death penalty. See e.g., Kramer v. State, 619 So. 2d 274 (Fla. 1993); Cochran, 547 So. 2d 928 (penalty reduced to life despite three aggravating factors, including a prior homicide, in light of extensive mitigation); Fead v. State, 512 So. 2d 176 (Fla. 1987) (prior murder conviction).

In many other cases, the sentence has been reduced to life where the defendant killed more than one person contemporaneously. See e.g., Hegwood v. State, 575 So. 2d 170 (Fla. 1991) (three "Wendy's" employees killed; five aggravators and only one statutory mitigator -- defendant's youth); Garron v. State, 528 So. 2d 353 (Fla. 1988) (killed wife and step-daughter); Masterson v. State, 516 So. 2d 256 (Fla. 1987) (murdered two people); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (sexually battered and stabbed mother and eleven year-old daughter during burglary).

The arbitrary and capricious imposition of the death penalty violates both the United States and Florida Constitutions. Furman, 408 U.S. 238; Dixon, 283 So. 2d 1. This is not one of the "unmitigated" first degree murder cases for which death is the proper penalty. Cf. Dixon, 283 So. 2d at 7. Crump's moral culpability is simply not great enough to deserve a sentence of death. Thus, this Court should vacate Crump's death sentencing and order the sentence reduced to life, which would undoubtedly be imposed consecutively to the life sentence he is already serving.

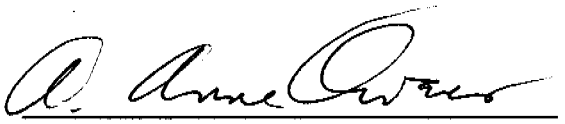
CONCLUSION

For the reasons set out above, Crump's death sentence should be vacated and the the trial court ordered to sentence him to life in prison. If the Court does not do so, however, Crump should be given a new sentencing with a newly empaneled jury. The case must at the very least be remanded for resentencing by the trial judge after an evidentiary sentencing hearing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Esq., Office of Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of January, 1995.

Respectfully submitted,



A. ANNE OWENS
Assistant Public Defender
Florida Bar Number 284920
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

/aao

APPENDIX

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA)
vs.)
MICHAEL TYRONE CRUMP,)
Defendant.)

Case No. 88-4056-D
TRIAL DIVISION 1

FILED
NOV 22 1993
RICHARD AKE, CLERK

FINDINGS IN SUPPORT OF DEATH PENALTY

The jury found the Defendant guilty of Murder in the First Degree and recommended the death sentence by a vote of eight to four. The Court imposed the death sentence and, on automatic review, the Supreme Court of Florida affirmed the conviction, vacated the death sentence and remanded the case with directions to the trial judge to reweigh the circumstances and resentence the Defendant. The reason for the case being remanded requires the Court to no longer consider that the murder was a planned killing.

After reweighing the circumstances, the Court finds as follows:

1. The only Aggravating Circumstance established by the evidence and proved beyond a reasonable doubt is that the Defendant was previously convicted of Murder in the First Degree, Aggravated Assault and three counts of Aggravated Battery.

2. The only reasonably convincing Mitigating Circumstances established by the evidence are that the Defendant possessed a few positive character traits and suffered from mental impairment not reaching the statutory standards of mental mitigation.

3. Great weight should be given to the Aggravating Circum-

stance and only slight weight to the Mitigating Circumstances.

4. The Mitigating Circumstances fail to outweigh the Aggravating Circumstance and the Defendant deserves the death penalty for having again committed Murder in the First Degree.

5. The Defendant deserves the death penalty even if his mental impairment meets the statutory standards of mental mitigation since the Mitigating Circumstances would still fail to outweigh the Aggravating Circumstance.

DONE in Open Court at Tampa, Hillsborough County, Florida, contemporaneous with the imposition of the death penalty upon the defendant, this 22nd day of November, 1993.

M. WM. GRAYBILL, CIRCUIT JUDGE

Copies furnished to State and Defense counsel