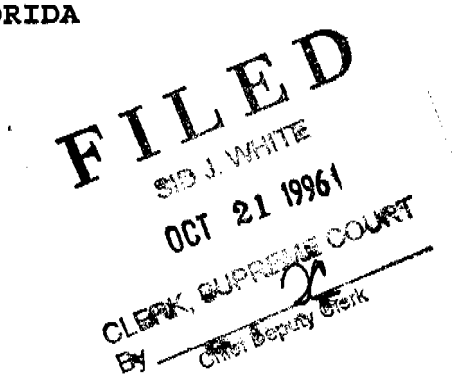
IN THE SUPREME COURT OF FLORIDA



MICHAEL TYRONE CRUMP,

Appe11ant,

vs. CASE NO. 86,733

STATE OF FLORIDA,

Appellee,

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Michael Tyrone Crump was tried and convicted for the first degree murder of Lavinia Clark. In 1993 this Honorable Court affirmed the judgment but remanded to the trial court to reweigh the circumstances and resentence Crump. Crump v. State, 622 So. 2d 963 (Fla. 1993).

The trial court resentenced Crump to death and on appeal this Court again vacated the imposed sentence because of the failure to satisfy the requirements of Campbell v. State, 571 So. 2d 415 (Fla. 1990). The Court also determined that the trial judge did not err in refusing to consider new evidence on remand because a reweighing does not entitle a defendant to present new evidence, and that the judge did not err in failing to hold an allocution hearing before sentencing Crump because, again, this Court had ordered a reweighing of aggravating and mitigating factors and not a new sentencing proceeding. Further, this Court found no merit to the claim that a new penalty proceeding was required because the jury was instructed to consider the CCP factor which this Court had determined on the earlier appeal pot established.

Finally, the court ruled that Crump's contention that a new sentencing proceeding with another jury was required because of

the failure to give a limiting definition for CCP was procedurally barred for Crump's failure to submit a limiting instruction as worded at trial. Two Justices dissented. Justice Grimes opined that the majority's finding of Campbell error placed "form over substance", were at most harmless error and that the requirements of Campbell were "not intended to provide judges with an exercise in composition or creative writing." Justice Wells dissented, opining that the majority's remand order was an inappropriate impediment "in a case where there is no disagreement as to the justice of the result." (R 13-25). Crump v. State, 654 So. 2d 545 (Fla. 1995).

On remand, after inviting counsel to submit a suggested list of statutory and non-statutory mitigating circumstances (which the court attached to its sentencing order), the trial court again imposed a sentence of death finding that the aggravating factor of prior violent felony convictions (first degree murder, three counts of aggravated battery and aggravated assault) outweighed all in mitigation (R 128-133).

The sentencing order recites:

> "1. The jury's 8 to 4 death recommendation should be and is given great weight.
> 2. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence

to the person, to wit: Murder in the First Degree, Aggravated Battery (3 Counts), and Aggravated Assault. This statutory aggravating circumstance was proved beyond a reasonable doubt as evidenced by certified copies of such convictions.

3 The statutory aggravating circumstance should be and is given the greatest weight possible since the Defendant is without a doubt a twice convicted vicious killer who, on two separate occasions, picked the victim up; drove to a secluded area; bound her wrists; manually strangled her to death; and then discarded her nude body near a cemetery.

4. The Defendant failed to reasonably establish statutory mental mitigation at the time he manually strangled the victim to death. In this connection the record reflects that following his conviction by the jury, the Defendant denied having committed the offense and the only reasonable conclusion to be drawn from the testimony of his mental health expert is that he may possibly have been under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may possibly have been substantially impaired.

5. The Defendant failed to reasonably establish by a greater weight of the evidence that his age at the time of the offense (25 years) is truly mitigating in nature.

6. Each non-statutory mitigating circumstance proposed by the Defendant was reasonably established by a greater weight of the evidence, considered to be

mitigating in nature; and given some, but very little, weight.

7. The non-statutory mitigating circumstances, when considered collectively, should be and are given slight weight.

a. The statutory aggravating circumstance clearly outweighs the non-statutory mitigating circumstances and justice demands that the Defendant be sentenced to death.

9. Even if the non-statutory mitigating circumstances were given substantial weight, justice would still demand the death penalty be imposed upon the Defendant since they still would be clearly outweighed by the statutory aggravating circumstance."

(R 128-130).

Crump now appeals,

SUMMARY OF THE ARGUMENT

I. The trial court did not fail to comply with this Court's remand order and to comply with Campbell v. State, 571 So. 2d 415 (Fla. 1990). The lower court attached the defense proffered list of mitigation, found all the non-statutory mitigation suggested and gave it little weight and explained why the court rejected the proffered statutory mitigation.

11. The lower court did not fail to accord sufficient weight to the non-statutory mitigation and the trial court could permissibly reject Dr. Isaza's testimony since it was speculative and based on an incomplete understanding of Crump's record.

III. The lower court did not err in obeying this Court's remand order; this Court's prior decision foreclosed Crump's being permitted to raise additional arguments following remand.

IV. The lower court did not err in failing to consider new evidence of Crump's having adapted well to prison and testimony by Dr. Berland provided in an earlier trial involving a different crime. This issue was foreclosed in Crump's last appeal.

V. The lower court did not reversibly err in obeying this Court's mandate and in denying the defense request to interview jurors or to empanel a new jury.

VI. The sentence of death *is* not disproportionate here, especially since Crump has killed in the past and the mitigation presented is minimal.

ISSUE I

WHETHER THE TRIAL COURT ERRED BY ALLEGEDLY FAILING TO FOLLOW THIS COURT'S MANDATE TO REVIEW THE AGGRAVATING *AND* MITIGATING CIRCUMSTANCES, RESENTENCE CRUMP *AND* FILE A SENTENCING ORDER MEETING THE REQUIREMENTS SET OUT IN CAMPBELL V. STATE, 571 SO. 2D 415 (FLA. 1990).

Appellant contends that the trial judge failed to comply with the requirements of Campbell v. State, 571 So. 2d 415 (Fla. 1990). Prior to resentencing defense counsel, pursuant to the court's request, submitted a suggested list of statutory mitigating circumstances (capital felony committed under the influence of extreme mental or emotional disturbance and capacity to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired and age) and a lengthy (items A through Q) of non-statutory mitigating circumstances (R 131-133).

In his sentencing order the trial court expressly incorporated the list of mitigating circumstances into his sentencing order:

> "A copy of Defendant's Suggested List of Statutory and Non-Statutory Mitigating

Circumstances is attached and made a part of this Sentencing Order."

(R 128).

The court's order -- after listing the aggravating factors of prior convictions of a violent felony, to wit: first degree murder, three counts of aggravated battery and aggravated assault (which remain unchallenged by Crump in this appeal) -- proceeds to articulate the reasons for rejecting the proffered statutory mitigation:

> "4. The Defendant failed to reasonably establish statutory mental mitigation at the time he manually strangled the victim to death. In this connection the record reflects that following his conviction by the jury, the Defendant denied having committed the offense and the only reasonable conclusion to be drawn from the testimony of his mental health expert is that he may possibly have been under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may possibly have been substantially impaired.
>
> 5. The Defendant failed to reasonably establish by a greater weight of the evidence that his age at the time of the offense (25 years) is truly mitigating in nature."

(R 129).

The court then addressed the proffered non-statutory mitigating circumstances and found that they were established by the evidence, found to be mitigating in nature and were 'given some, but very little weight." (R 129-130). The court added:

> "7. The non-statutory mitigating circumstances, when considered collectively, should be and are given slight weight.
> 8. The statutory aggravating circumstance clearly outweighs the non-statutory mitigating circumstances and justice demands that the Defendant be sentenced to death.
> 9. Even if the non-statutory mitigating circumstances were given substantial weight, justice would still demand the death penalty be imposed upon the Defendant since they still would be clearly outweighed by the statutory aggravating circumstance."

(R **130).**

Crump argues that it is unclear and that by 'speculation and guesswork" he could explain what the court probably meant but that is not sufficient. Appellee finds no guesswork necessary to understand the rejection of proffered statutory mental mitigators -- the testimony of the mental health expert was too ambiguous and equivocal to support the finding of mitigators 6(b) and (f). See Ponticelli v. State, 593 So. 2d 483, 490-491 (Fla. 1992),

vacated on other grounds, Ponticelli v. Florida, 121 L.Ed.2d 5, affirmed on remand, 618 So. 2d 154, cert. denied, 126 L.Ed.2d 316 (1993).

Crump also complains that the trial judge rejected the age of twenty-five as a mitigator without assigning a reason; he cites Terry v. State, 668 So. 2d 954 (Fla. 1996) but that decision did not find error in the trial court's rejection of age twenty-one as a mitigation factor but rather held the death penalty disproportionate largely because the defendant's prior violent felony conviction occurred contemporaneously and:

> "This contrasts with the facts of many other cases where the defendant himself actually committed a prior violent felony such as homicide."

(668 So. 2d at 966).

Crump of course had one prior first degree murder plus three aggravated batteries and an aggravated assault (R 128). This Court has frequently rejected age as a mitigating factor even for those younger than twenty-five. See Deaton v. State, 480 So. 2d 1279 (Fla. 1985)(age of eighteen years and ten months); Cooper v. State, 492 So. 2d 1059 (Fla. 1986)(age of eighteen years); Kokal v. State, 492 So. 2d 1317 (Fla. 1986)(age of twenty years). To the extent that appellant may be arguing non-age mitigating

factors such as uncertainty in his sexual relationships, suffice it to say that those were matters asserted in the non-statutory mitigating list which the trial court specifically found to exist and to be mitigating (R 128-133).

Appellant bemoans that the trial court 'did not even bother to list the mitigation he found", but his attachment of the defense list of mitigation -- all of which he found to be present -- performed exactly that function. It is incomprehensible to appellee that there is a meaningful difference between the attachment of a list of mitigation found by the trial judge to the sentencing order and the repetitious retyping of same in the middle of the order. Meaningful appellate review is not improved by insistence on the latter protocol. Crump hints that there is little evidence "that the judge even read the proposed list of non-statutory mitigation." (Brief, p. 22). There is no support for appellant's innuendo; the record reflects that defense counsel filed his proposed list of mitigation on September 1, 1995 (R 117-119). On September 5, 1995, the trial court announced that the defense had filed its list, denied other pending motions because the case had been remanded only to reweigh mitigating circumstances and to resentence him and added:

> "I have not had an opportunity to thoroughly review the proposed mitigating circumstances and we're going to have sentencing next Monday morning unless counselor has a conflict."

(SR 21-22).

Six days later -- on September 11 -- the court filed its sentencing order (R 128); it is absurd to contend the judge did not even read it.

Appellant quotes extensively from this Court's prior decision in this case, but the trial court did comply with the requirements of Campbell. Campbell recites:

> "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature..."

(emphasis supplied)(571 So. 2d at 419).

The court determined that all non-statutory mitigating evidence was supported by the evidence and was of a mitigating nature (R 129-130).

Campbell further recites:

> "The court next must weigh the aggravating circumstances against the mitigating and, in

> order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight."

(emphasis supplied)(Id. at 420).

The trial judge recited that as to each non-statutory mitigating circumstance he had given "some, but very little, weight" (R 130). Even considered collectively the mitigation "should be and are given slight weight." (R 130).

Appellant relies on Larkins v. State, 655 So. 2d 95 (Fla. 1995) but in Larkins this Court stated:

> "...the order does not explain whether it found any mitigating circumstances based on Dee's testimony."

655 So. 2d at 100 [contrasting with the trial judge sub judice finding all the non-statutory mitigating proffered].

In Larkins, unlike the instant case, this Court observed:

> 'Further, the order makes no mention of any of the other mitigating factors asserted by the defendant, including the claim of extreme mental and emotional distress.''

(text at 100). Sub judice the trial judge did mention the mitigation.

Finally in Larkins the trial court apparently misread the testimony of Dr. Dee and erroneously stated that no other mitigating circumstances can be gleaned from the record. 655 So. 2d at 101. Here, the trial court found but to appellant's dismay did not attach sufficient weight to the mitigation.[1] This Court has repeatedly reiterated that the weight to be accorded is for the sentencing judge. See Campbell, supra; Sims v. State, ___ So. 2d , 21 Florida Law Weekly S320, 323 (Fla. 1996); Kilgore v. State, ___ So. 2d ___, 21 Florida Law Weekly S345, 347 (Fla. 1996); Jones V. State, 648 So. 2d 669, 680 (Fla. 1995); Swafford v. State, 533 So. 2d 270, 278 (Fla. 1988); Herring v. State, 446 So. 2d 1049, 1057 (Fla. 1984); Spencer v. State, ___ So. 2d ___, 21 Florida Law Weekly S366 (Fla. 1996); see also Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir. 1992).

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[1] In the instant case Dr. Isaza testified that at the time of the crime appellant "could have been" under extreme mental disturbance" (TR 500), the witness did not know that he was in an absolute sense but the probability is there (TR 500). He also denied committing the offense to her (TR 502) and the witness did not know all the facts about his criminal history (TR 507). The testimony of the witness could be rejected by the fact finder. Walls v. State, 641 So. 2d 381, 390-91 (Fla. 1994); Wuornos v. State, 21 Florida Law Weekly S202 (Fla. 1996).

Appellant cites Ferrell v. State, 653 So. 2d 367 (Fla. 1996) but the lower court complied with Ferrell, providing the list of mitigation considered and found and giving weight to all.[2]

> 'Each non-statutory mitigating circumstance proposed by the Defendant was reasonably established by a greater weight of the evidence; considered to be mitigating in nature; and given some, but very little, weight."

(R 129-130).

Appellant also criticizes the lower court's conclusion that even if given substantial weight the mitigation would still be clearly outweighed by the aggravation. He cites footnote 14 of Geralds v. State, 21 Florida Law Weekly S85 (Fla. 1996). Appellee notes that in Geralds this Court agreed with the trial court's imposition of a sentence of death. Footnote 14 is not a condemnation of a trial court's expression regarding the weight to be accorded -- even if a found aggravator is rejected -- but rather an observation that this Court will not abandon its

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[2]If the appellant is claiming that there is additional mitigation not mentioned in the sentencing order and appendix of defendant's list, defendant must bear the responsibility of not arguing it below. See Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990); Hodges v. State, 595 So. 2d 929, 934-935 (Fla. 1992), vacated on other grounds, Hodges v. Florida, ___ U.S. ___, 121 L.Ed.2d 6 (1992), affirmed on remand, Hodges v. State, 619 So. 2d 272 (Fla. 1993), cert. denied, ___ U.S. ___, 126 L.Ed.2d 460 (1993).

responsibility to perform harmless error analysis simply because the trial judge asserts that death is still the appropriate result. Appellee does not quarrel with this Court's refusal to abdicate its responsibility.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH UNREBUTTED STATUTORY MENTAL MITIGATION, AND FAILED TO ACCORD SUFFICIENT WEIGHT TO THE NONSTATUTORY MITIGATION.

With respect to statutory mental mitigating factors the lower court found:

> "The Defendant failed to reasonably establish statutory mental mitigation at the time he manually strangled the victim to death. In this connection the record reflects that following his conviction by the jury, the Defendant denied having committed the offense and the only reasonable conclusion to be drawn from the testimony of his mental health expert is that he may possibly have been under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may possibly have been substantially impaired."

(R 129).

Appellant complains that the trial court apparently was not overwhelmed by the submitted testimony of psychologist Dr. Isaza (TR 476-512 in Florida Supreme Court Case No. 74,230). He contends that the testimony was unrebutted; it was also insubstantial. With respect to statutory mental mitigation, the entirety of the direct testimony is as follows:

"Q. Doctor, within the bounds of reasonable psychological certainty, do you have an opinion as to whether Michael had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law or was that capacity impaired?

A. As I was saying, the capacity was impaired. We don't know what impaired it at that particular time. But, he's competent.

Q. He's competent in the legal term?

A. Yes, in the legal term.

Q. But impaired.

A. Impaired.

(TR 494).

On cross-examination the witness admitted meeting the defendant the day prior to her testimony and that she had reviewed psychological tests administered two years earlier but had not spoken to the psychologist who administered them (TR 497-498). Then this colloquy followed:

"Q. Well, at the time of the offense, though, that's what you were specifically asked by Mr. Cunningham, and that's a specific statutory mitigating circumstance. So, that's the only thing I'm asking you about because that's really the only thing relevant.

At the time of the offense, which is December of 1985, is it your testimony that in the early morning hours of December 12th, 1985, Lavinia Palmore Clark was in the truck with Michael Tyrone Crump, as the jury has found this jury, was the defendant under extreme mental/emotional disturbance?

A. What I'm trying to explain is that this extreme mental disturbance can occur at

different times. He's unpredictable. So, at that particular time, he probably could have been.

Q. He could have been?

A. He could have been.

Q. You don't know for sure that he was.

A. I don't know that he was in an absolute sense, but the probability is there."

(TR 500).

Clark denied committing the offense to Dr. Isaza (TR 502).

'Q. . . .What extreme emotional, extreme emotional and mental disturbance did he give you reason to believe he was operating under the effects of when Lavinia Clark was in his truck?

A. The temporary outbursts, the poor impulse control, his inability to reflect, the poor planning ability, his inability at some point to stop and think instead of just acting on that impulse."

(TR 503).

When asked if it were inconsistent or incongruent to opine that he had an incapability to plan when ten months later he committed a similar offense, the witness answered:

"I don't know the details of the second murder to see how identical it was. so, I wouldn't know if there was a pattern."

(TR 506).

With respect to Crump's criminal history, Dr. Isaza knew some of the facts "but not all of them in detail" (TR 507). Crump had told her he perceived the victim had a knife (TR 512).

In Walls v. State, 641 So. 2d 381, 390-91 (Fla. 1994) this Honorable Court explained.

> "[23, 24] Eighth, Walls contends that the trial court improperly rejected expert opinion testimony that he was suffering extreme emotional disturbance and that his capacity to conform his conduct to the law's requirements was substantially impaired. In Florida as in many states, a distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. E.g., *Brannen v. State, 94* Fla. 656, 114 So. 429 (1927). This rule applies equally to the penalty phase of a capital trial. *Hardwick,* 521 So.2d at 1076.
>
> [25, 261 Opinion testimony, on the other hand, is not subject to the same rule. *Brannen.* Certain kinds of opinion testimony clearly are admissible--and especially qualified expert opinion testimony--but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve. See *Hardwick, 521* So.2d at 1076. We cannot conclude that the evidence here was anything

> more than debatable.[8] Accordingly,, this Court may not revisit the judge and jury's determination on appeal."

And in footnote 9 the Court added that reasonable persons could conclude that the facts of the murder were inconsistent with the presence of the two mental mitigators and that the experts hedged their statements with equivocal responses. Accord, Wuornos v. State, ___ so. 2d , 21 Florida Law Weekly S202, 203 (Fla. 1996) (In light of the fact that this expert testimony reasonably could be interpreted as inconsistent with the factual evidence, we find no error in the trial court's exercise of its discretion. As we have noted elsewhere, a trial court may reject opinion testimony that cannot be fully squared with the facts at hand); Farr v. State, 656 So. 2d 448, 449-450 (Fla. 1995) (It is within the trial court's discretion to reject either opinion or factual evidence in mitigation where there is record support for the conclusion that it is untrustworthy); Johnson v. State, 660 So. 2d 648, 663 (Fla. 1995).

In the instant case in light of the tentative equivocal nature of the expert witness's testimony (he could have been under emotional disturbance) , in light of the witness's reliance on what the defendant told the witness (appellant denied committing the offense -- TR 502, perceived the victim had a

knife -- TR 512), and since the facts showed manual strangulation of the victim with ligature marks on the wrists consistent with being bound rendering Crump's perception to the expert that the victim had a knife palpably absurd, the trial court did not err in rejecting the presence of the statutory mental mitigators.

Crump next argues that the lower court failed to accord sufficient weight to non-statutory mitigation proffered. In an abundance of caution the trial court invited trial defense counsel to submit in writing every mitigating factor proposed (SR 9). The defense submitted a three-page list of suggested statutory and non-statutory mitigating circumstances (R 117-119). In its Sentencing Order the trial court attached and made a part of its Sentencing Order the defense-submitted list of suggested statutory and non-statutory mitigating circumstances (R 128-133). The lower court additionally recited in its order:

> '6. Each non-statutory mitigating circumstance proposed by the Defendant was reasonably established by a greater weight of the evidence; considered to be mitigating in nature; and given some, but very little, weight.
> 7. The non-statutory mitigating circumstances, when considered collectively, should be and are given slight weight."

(R 129-130).

In his brief Crump mentions that he was raised without a father (Item 2G at R 132), that Crump was a slow learner in school (Item 2A, R 131), was kind, considerate, thoughtful and playful as a child (Item 2b), was helpful to his family and neighbors (Item 2C), had a loving and warm relationship with his family (Item 2E), had no father figure in his formative years (Item 2G at R 132), had the capacity to be warm and caring (Item 2J, R 132). All that was submitted on behalf of the defendant in his suggested list of mitigation was considered -- and found. Appellant now disagrees with the weight accorded to such mitigation. The Constitution is not offended by the failure to give the weight that appellant desires to proffered mitigation. See Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir. 1992); Blystone v. Pennsylvania, 494 U.S. 299, 108 L.Ed.2d 255 (1990). This Court has consistently maintained that the weight to be accorded mitigating factors is for the trial judge. See, e.g., Washington v. State, 653 So. 2d 362 (Fla. 1994)(unanimously approving jury override despite inconsequential non-statutory mitigators as defendant's love for his mother, his school diploma and high school sports activities); Bonifay v. State, ___ So. 2d ___, 21 Florida Law Weekly S301 (Fla. 1996); Ferrell v. State, ___ So. 2d ___, 21 Florida Law Weekly S166 (Fla. 1996) (affirming

death sentence with one aggravator and where little weight was assigned to several mitigators); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989)(It is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it).

Crump quotes extensively from an excerpt in Larkins v. State, 655 So. 2d 95 (Fla. 1995). But here the trial court's sentencing order expressly includes -- and finds the proffered non-statutory mitigation argued by the defense and finds the weight insignificant compared to Crump's history of violent crimes (including another murder). As subsequently explained in Bonifay v. State, ___ so. 2d , 21 Florida Law Weekly S301 (Fla. 1996) in distinguishing Larkins:

> "The trial court expressly evaluated the evidence presented in this mitigator, thus complying with the requirements of Rogers and Campbell. The trial court's determination regarding the establishment and weight afforded to this mitigator is supported by competent, substantial evidence; consequently the sentencing order is sufficient."

(Id. at S302).

As this Court stated in Foster v. State, so. 2d , Florida Law Weekly S324 (Fla. July 18, 1996):

> "The decision as to whether a mitigating circumstance has been established is within

the trial court's discretion. Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 507 U.S. 999, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993). Moreover, expert testimony alone does not require a finding of extreme mental or emotional disturbance. See Prove-no v. State, 497 So. 2d 1177 (Fla. 1986), cert. denied, 481 U.S. 1024, 107 S. ct. 1912, 95 L. Ed. 2d 518 (1987). Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. See Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995). As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. Provenzano, 497 so. 2d at 1184.

* * *

We further note that the sentencing order shows that the trial court found and weighed the nonstatutory mitigating evidence that Foster contends should have been found. Deciding the weight given to a mitigating circumstance is within the discretion of the trial court, and a trial court's decision will not be reversed because an appellant reaches the opposite conclusion. See Dougan v. State, 595 So. 2d 1 (Fla.), cert. denied 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d' 293 (1992). We find no reversible error.

(text at 326-327).

Appellant's claim is meritless.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY FAILING TO ALLOW SENTENCING ARGUMENTS OR TO ALLOW CRTJMP TO MAKE A STATEMENT AT SENTENCING.

This issue is foreclosed by this Court's disposition of the identical issue on Crump's last appeal:[3]

> "[10] We likewise reject Crump's third issue--that the trial court erred in failing to hold an allocution hearing before sentencing Crump--because this Court ordered a re-weighing of the aggravating and mitigating factors and not a new sentencing proceeding. ***See Lucas v. State,*** 613 So. 2d 408 (Fla.1992) (no error to refuse to conduct a new sentencing proceeding ro receive further evidence when this Court's remand was to reconsider and rewrite unclear findings), cert. ***denied,*** ***U.S.*** ___, 114 S.Ct. 136, 126 L.Ed.2d 99 (1993) .

(654 So. 2d at 548). See also Davis v. State, 648 So. 2d 107, 109 (Fla. 1994). The trial court was not at liberty to ignore or disobey this Honorable Court's prior ruling. See Santos v. State, 629 So. 2d 838 (Fla. 1994) (Under the state constitution both binding decision and binding precedential opinion are created to extent that at least four members of Court have joined in opinion and decision).

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[3]Moreover, Crump was provided the opportunity to speak at original sentencing on March 31, 1989 (R 584, Florida Supreme Court Case No. 74,230) and specifically declined the opportunity.

To the extent that appellant may be engaging in an impermissible belated rehearing petition from this Court's prior ruling and demanding that an allocution hearing be afforded when this Court plainly announced that the lower court had not erred in following the earlier order of this Court to reweigh and make its articulations clear in another sentencing order, he is not entitled to relief. The lower court obeyed the mandate order and was not at liberty to disregard this Court's decision.

ISSUE IV

> WHETHER THE TRIAL COURT ERRED BY FAILING TO CONSIDER (1) EVIDENCE THAT COULD BE A BASIS FOR A SENTENCE OTHER THAN DEATH AND (2) THE CHARACTER OF THE DEFENDANT AT THE TIME SENTENCE WAS IMPOSED.

Following this Court's remand to the trial court to reweigh the circumstances and resentencing appellant (R 12-25), the defense filed a renewed motion to consider new evidence, i.e., that appellant had adapted well to the prison lifestyle while incarcerated on death row (R 32) and a renewed motion to consider testimony of psychologist Dr. Berland who had testified for appellant in a prior trial involving a different crime and who did not testify before the jury in this - the Lavinia Clark - homicide (R 34-116).

The trial court denied these motions stating:

> "And the reason for denying these motions is that this case has been remanded to the trial court to reweigh all mitigating circumstances posed by Mr. Crump and then resentence him, and that's exactly what this court is going to do."

(SR 21-22).

On Crump's last appeal to this Court he similarly argued that the trial court erred reversibly by denying his motion to consider new evidence at resentencing and this Court succinctly

rejected the argument. Crump v. State, 654 So. 2d 545, at 548 (Fla. 1995):

> "[8, 9] First, the trial judge did not err in refusing to consider new evidence on remand because we directed the trial court ***'to reweigh the circumstances*** and resentence Crump." *Crump*, 622 So.2d at 973 (emphasis added). As we explained in ***Davis v. State,*** 648 So.2d 107, 109 (Fla.1994), a reweighing does not entitle a defendant to present new evidence. Thus, our cases holding that a defendant must be allowed to present new evidence when the case is remanded for a new sentencing proceeding do not apply to Crump. See Scull v. State, 569 So.2d 1251 (Fla.1990); ***Lucas v. State, 490*** So.2d 943 (Fla.1986).

In the earlier decision of Davis v. State, 648 So. 2d 107, 109 (Fla. 1994, cert. denied, ___ U.S. , 133 L.Ed.2d 50 (1995), the Court declared:

> 'In the instant case, we remanded to the trial court specifically to 'reweigh the evidence in light of our opinion.' Davis, 604 So.2d at 799 (emphasis added). This mandate did not contemplate impaneling a new jury."

Appellant complains -- as he did on the last appeal -- that the trial judge erred in denying the motion to consider testimony of psychologist Berland and the motion asking the court to consider evidence of his good behavior in prison and in essence it was reversible error to obey this Court's remand order.

Appellant has not provided a sufficient reason for this Court to revisit and overrule its prior decisions in Crump and Davis.

The plain meaning of the term "reweighing" is that that which has already been weighed shall be weighed again. None of the cases appellant cites support a different conclusion. On the contrary, the cases which he cites, Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), only stand for the now-unremarkable proposition that the sentencer may not be precluded from considering any relevant evidence proffered in mitigation at sentencing. Here appellant has not alleged, and the record plainly refutes, any claim that he was not permitted to present any evidence in mitigation at the original sentencing hearing. Indeed, Crump presented the testimony of his mother, Mittie Render (OR 458-468); his sister (OR 469-472); a friend Patricia Howard (OR 472-476); and psychologist Dr. Isaza (OR 476-512). As such he presents no basis for the ordering of a second full-blown sentencing hearing or the introduction of other testimony or evidence.[4]

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[4]Appellee notes that the testimony of Dr. Robert Berland proffered by the defense occurred in a trial in July of 1987 (R 83) which was prior to appellant's March 1988 indictment for the instant offense (R 10-11) and thus prior to the prosecutor's

The central tenet of appellant's argument seems to be that at any time the defendant appears before the court that he has a right to urge additional mitigation that must be weighed and considered -- even if the defendant already has been given the opportunity to present his defense at the guilt phase, the opportunity to present his mitigating evidence to the recommending jury and the sentencing judge prior to the imposition of sentence and the reason for his appearance is a remand order from an appellate court for clarification of the trial judge's sentencing order. If that were permitted, a defendant might successfully evade sentencing simply by proffering additional mitigation whenever the court convened to impose sentence. That is not required by the Constitution or any capital precedent. Mr. Crump has had the opportunity to submit his mitigation and as this Court determined on his last appeal he is not entitled to reopen the penalty phase by this Court's

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ability to cross-examine Dr. Berland on matters related to the yet-untried Lavnia Clark prosecution. Indeed, defense counsel in the 1987 trial objected when he thought inquiry was being made about "another case that is pending." (R 107) One wonders when, under appellant's theory of fairness, the state would have the opportunity to question Dr. Berland about the Lavnia Clark homicide.

remand to the lower court for the drafting of a new sentencing order.

There is no authority for the proposition that a remand simply for the trial court to reweigh aggravating and mitigating evidence transforms the case on remand to an entire new proceeding requiring the admissibility of new evidence not presented at the earlier sentencing phase (especially where as here there has been no deprivation of the opportunity at sentencing for the defense to present whatever appropriate mitigation he desired). See, e.g., Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989) (no new evidence where court found no reversible error in evidence or argument at penalty phase); Mikenas v. State, 407 So. 2d 892, 893 (Fla. 1982)(no error in trial court's denial of motion for evidentiary hearing and new advisory jury on remand where "the evidence itself was not improper, only the manner in which it was considered by the court in its findings of fact"); Dougan v. State, 398 So. 2d 439, 440 (Fla. 1981) ("Treating the remand as an opportunity to revisit the constitutionality of the death penalty, the bias of the trial judge, the impropriety of articulated aggravating circumstances found in the original sentencing order, and a range of other matters unrelated to our directive, Dougan's counsel endeavored

to treat the remand as a full-blown sentencing proceeding. The trial court properly rejected counsel's attempt to expand the proceeding").

ISSUE V

WHETHER THE TRIAL COURT ERRED BY FAILING TO PERMIT DEFENSE COUNSEL TO INTERVIEW JURORS AND BY FAILING TO EMPANEL A NEW JURY AND HOLD A NEW PENALTY PROCEEDING BECAUSE THE JURY HAD BEEN INSTRUCTED TO CONSIDER THE CCP FACTOR.

The trial court could not commit reversible error on this point since it felt it appropriate to obey this Court's mandate and not to ignore or disobey the ruling of a superior court. This Court ruled:

> "[11] We also find no merit to Crump's fifth issue that the trial court should have conducted 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. *See Crump*, 622 So.2d at 972. This Court ordered a reweighing in *Crump*, and the trial court followed that mandate.
>
> We also address Crump's fourth issue regarding whether he is entitled to a new penalty proceeding, including a new jury, because the original jury was instructed to consider the cold, calculated, and premeditated aggravating factor without being given a limiting definition. Crump maintains that because this Court found on direct appeal that CCP was not established beyond a reasonable doubt, see id., the trial court's failure to inform the jury of what it must find to apply CCP undermined the reliability of the jury's sentencing recommendation.
>
> [12] Although the trial court gave the jury in 1989 the CCP instruction that has since been found unconstitutionally vague,

> *see Jackson v. State, 648* So.2d 85 (Fla.1994), this claim is procedurally barred. Claims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. The objection at trial must attack the instruction itself, either by submitting a limiting instruction or by making an objection to the instruction as worded. *See Walls v. State, 641* So.2d 381, 387 (Fla.1994), *cert. denied,* --- U.S. ---, 115 S. Ct. 943, 130 L.Ed.2d 887 (1995).
>
> Crump's objection at his 1989 trial to the CCP issue concerned the constitutionality of this aggravating factor and whether CCP applied to Crump's case. Although Crump argued on direct appeal that the instruction was unconstitutionally vague, the issue is procedurally barred because Crump did not submit a limiting instruction or object to the instruction as worded at trial.[5]

(654 So. 2d at 548). Had the trial court ignored or disregarded this Court's ruling it would have been subjected to criticism. Santos v. State, 629 So. 2d 838 (Fla. 1994).

Nonetheless, appellant claims that the lower court should have granted his motion to interview jurors years after the fact presumably to learn the impact of CCP on their deliberations. This would be inappropriate. A juror is not competent to testify as to any matter which inheres in the verdict. Songer v. State, 463 So. 2d 229, 231 (Fla. 1985); Johnson v. State, 593 So. 2d 206, 210 (Fla. 1992); Cave v. State, 476 So. 2d 180, 198 (Fla.

1985) ("To examine the though process of the individual members of a jury divided 7-5 on its recommendation would be a fruitless quagmire which would transfer the acknowledged differences of opinion among the individuals into open court"). F.S. 90.607(2)(b); Mitchell v. State, 527 So. 2d 179, 181 (Fla. 1988).

ISSUE VI

WHETHER A SENTENCE OF DEATH IS DISPROPORTIONATE IN THE INSTANT CASE.

'Appellant is a good man, except that sometimes he kills people.
J. Grimes, concurring in part and dissenting in part, Fead v. State, 512 So. 2d 176, 180 (Fla. 1987).

This is not a case where a defense disproportionality argument finds support in the fact of an override of a jury life recommendation as in Amazon v. State, 587 So. 2d 8 (Fla. 1986) or Ferry v. State, 507 So. 2d 1378 (Fla. 1987). Here, as the trial court noted, the jury recommended death by a vote of eight to four (R 128); this is not a case involving a heated domestic confrontation with a spouse or paramour as in Garron v. State, 528 So. 2d 358 (Fla. 1988) or Wilson v. State, 493 So. 2d 1019 (Fla. 1986) or Santos v. State, 629 So. 2d 838 (Fla. 1994). Rather, Crump is a serial killer who specializes in prostitute victims (Lavnia Clark and Areba Smith) and appellant has cited no decision wherein this Court has approvingly ruled that death is inappropriate and a disproportionate sanction for a serial killer.

Appellant expresses a concern that only one aggravator was found in the instant case by the trial court but this Court has

affirmed previously with a single aggravator. See Duncan v. State, 619 So. 2d 279 (Fla. 1993); Arango v. State, 411 So. 2d 172 (Fla. 1982); Armstrong v. State, 399 So. 2d 953 (Fla. 1981); LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Douglas v. State, 328 So. 2d 18 (Fla. 1976); Gardner v. State, 313 So. 2d 675 (Fla. 1975); Cardona v. State, 641 So. 2d 361 (Fla. 1994); Ferrell v. State, ___ so. 2d , 21 Florida Law Weekly S166 (Fla.1996), supra, wherein the Court explained:

> "Ferrell next argues that his death sentence is disproportionate when compared to other cases involving a single aggravating circumstance. We disagree. Although we have reversed the death penalty in single-aggravator cases where substantial mitigation was present, we have affirmed the penalty despite mitigation in other cases where the lone aggravator was especially weighty. *Compare Songer* v. State, 544 So. 2d 1010 (Fla. 1989) (death sentence reversed where single aggravating factor of "under sentence of imprisonment" was weighed against three statutory and seven nonstatutory mitigators) *with Duncan* v. State, 619 So. 2d 279 (Fla.), *cert. denied,* 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993) (death sentence affirmed where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators) .
>
> In the present case, although the court found a number of mitigating circumstances established, it assigned little weight to each. The lone aggravating circumstance, on the other hand, is weighty. The prior violent felony Ferrell was convicted of committing **was** a second-degree murder bearing

> many of the earmarks of the present crime, as reported in the presentence investigation:
>
> > Circumstances: The female (victim) was slumped in the right front seat of a vehicle. According to witnesses, the suspect later identified as the defendant, was upset with the victim and pulled his vehicle alongside the vehicle in which the victim **was** riding. The defendant allegedly got out of his vehicle carrying a .22 caliber rifle, placed the rifle to his shoulder and state, "Bitch, I'm tired of your fucking me." The defendant then pointed the gun approximately one foot from her head and fired several shots at her head, for a total of eight. Upon the defendant's arrest, he told the police he would take them to the house and give them the gun he used and also stated that he had shot the victim and **was** glad he did and hoped she died.
>
> We find Ferrell's death sentence proportionate to other capital cases. See, e.g., ***Duncan.*** We find Ferrell's sentence commensurate to the crime in light of the similar nature of the prior violent offense. ***Cf.*** King ***v.*** State, 436 So. 2d 50 (Fla. 1983), ***cert. denied, 466*** U.S. 909, 104 S. Ct. 1690, 80 L. Ed. 2d 163 (1984) (death sentence affirmed for shooting live-in girlfriend where prior conviction was for axe-slaying of common law wife).[3]

In Ferrell the trial court had found an overriding single aggravating factor -- conviction of a prior violent felony, a second-degree murder 'bearing many of the earmarks of the present crime" -- a factor which this Court found highly persuasive. Cf. King v. State, 436 So. 2d 50 (Fla. 1983) **(live-in** girlfriend shot

to death in incident following prior axe-slaying of common-law wife). In the instant case, the trial court similarly found as an aggravator appellant's prior felony convictions which included first-degree murder (of prostitute Areba Smith), three counts of aggravated battery and aggravated assault. (R 128) This aggravation history can safely be called "weighty." Certainly, no reasonable person can compare it to the aggravating factor found in Songer v. State, 544 So. 2d 1010 (Fla. 1989) -- under sentence of imprisonment by walking away from a work release job. In this case the trial judge reasoned, correctly the state submits, that this aggravator should be given the "greatest weight possible" since on two separate occasions he has picked up a victim, driven to a secluded area, bound their wrists, manually strangled them and dumped their nude bodies near a cemetery. (R 128-130) As in Ferrell and Duncan, supra, involving a weighty aggravator of prior murder of a fellow inmate, the instant sentence of death should be deemed a proportionate sanction. See also Slawson v. State, 619 So. 2d 255 (Fla. 1992) (death sentence proportionate where only aggravator was conviction for other murders for certain victims); Lindsey v. State, 636 So. 2d 1327 (Fla. 1994) (death sentence proportionate where prior conviction was for second-degree murder).

Appellant acknowledges that the fact of a prior capital conviction is "very significant and deserving of great weight." Brief, p. 79. He argues, however, that there is no automatic affirmance rule mandating affirmance of a death sentence when there has been a prior homicide, citing two jury override cases -- which this case is not -- Cochran v. State, 547 So. 2d 928 (Fla. 1989) and Fead v. State, 512 So. 2d 176 (Fla. 1987) -- and Kramer v. State, 619 So. 2d 274 (Fla. 1993). Kramer involved a defendant who had previously been convicted of attempted murder (not first-degree murder plus three counts of aggravated battery and aggravated assault as Crump has been). This Court further explained:

> "The factors establishing alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structural environment of prison are dispositive here. While substantial competent evidence supports a jury finding of premeditation here, the case goes little beyond that point. The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk."

(619 So. 2d at 278). In contrast the instant case exhibits a man who displays a pattern of premeditated murders of prostitutes whom the perpetrator leave near cemeteries. Whereas the

mitigation present in Kramer to some extent helped explain the homicidal incident (alcoholism, mental stress), the warm and fuzzy mitigation suggested by the defense (kind and playful child, good sense of humor, ability to form bonds, sense of family orientation -- R 131-133) was of the type that this Court approvingly noted that the trial court gave little weight to in Ferrell, supra (impaired, disturbed, under the influence of alcohol, a good worker, good prisoner, remorseful). 21 Fla. Law Weekly S166, fn 2. Even Crump's mental health expert could only hypothesize that 'he may possibly have been under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may possibly have been substantially impaired." (R 128-130)

Appellant's reliance on cases where two people were victims in a single episode is inapposite; Crump was not caught up in a singular bad moment in his life -- he shows a continuing pattern of violence.

Referring to the penalty phase trial testimony of Dr. Isaza that Crump had poor impulse control (OR 487), that witness also acknowledged not having spoken with the psychologist who administered the test (OR 498), Crump denied committing the

murder to Dr. Isaza (OR 502), Dr. Isaza did not know all the facts about Crump's criminal history (OR 507) and appellant's mother and friends had not seen any evidence of emotional or mental problems (OR 463, 468, 471, 476-76). Dr. Isaza's testimony can best be summarized as something is wrong when someone kills someone. (OR 506)

Appellant cites Deangelo v. State, 616 So. 2d 440 (Fla. 1993) where there was significant mental mitigation (bilateral brain damage, delusional paranoid beliefs, psychotic disorders) and there was substantial evidence of an ongoing quarrel between the defendant and the victim who lived in the home; it was similar to the domestic situations where a resulting homicide has led to a reduced sentence. Crump may not obtain this benefit since his victims were strangers (unless capital jurisprudence extends the domestic argument concept to all humanity). Knowles v. State, 632 So. 2d 62 (Fla. 1993) was a single episode involving two victims accompanied by substantial unrebutted mitigation. Clark v. State, 609 So. 2d 513 (Fla. 1992) involved substantial evidence of alcohol abuse and abused childhood, factors missing sub judice.

In Terry v. State, 668 So. 2d 954 (Fla. 1994) after observing that proportionality review is not a numerical

comparison of aggravating and mitigating circumstances, citing Porter v. State, 564 So. 2d 1060 (Fla. 1990) this Court reduced the sentence to life. There was only sufficient evidence to support a felony murder ("there is simply an absence of evidence of premeditation") and:

> ". . . the aggravation is also not extensive given the totality of circumstances."

(668 so. 2d at 965). There the prior violent felony:

> ". . . does not represent an actual violent felony previously committed by Terry, but, rather, a contemporaneous conviction as principal to the aggravated assault simultaneously committed by the codefendant Floyd who pointed an inoperable gun at Mr. Franco."

(Id. at 965). This is hardly comparable to Crump's murder of Areba Smith on another occasion and three counts of aggravated battery and aggravated assault previously. This Court acknowledged in the Terry opinion:

> "This contrasts with the facts of many other cases where the defendant himself actually committed a prior violent felony such as homicide."

(Id. at 966). The instant case is not comparable to Besaraba v. State, 656 So. 2d 441 (Fla. 1995) which presented enormous mental mitigation, the defendant had no significant history of prior

criminal activity and it does not appear that he had killed before.

Appellant cites Hegwood v. State, 575 So. 2d 170 (Fla. 1991), a decision that does no general proportionality analysis but holds that the jury override principles of Tedder v. State, 322 So. 2d 908 (Fla. 1975) were not satisfied. In the instant case the jury voted eight to four for death for Crump.

Appellant cites Geralds v. State, 674 So. 2d 96 (Fla. 1996) where in footnote 14 when discussing whether the lower court's use of CCP constituted harmless error this Court ruled that the trial judge's statement that he would still impose death was not dispositive, While it is sometimes informative for this Court to know the particular weight a specific aggravator or mitigator is given by the sentencing judge, obviously the trial court cannot bind this Court or preclude it from engaging in harmless error analysis. What is more significant is this Court's proportionality discussion in Geralds:

> 'The lack of substantial mitigation in this case compared to the substantial aggravation precludes us from finding that Geralds' sentence of death was disproportionate."

(674 So. 2d at 105). Crump is an extremely violent man; he is a serial killer. With little meaningful mitigation to offer this

Court should concur with the jury's recommendation and conclude that aggravation outweighs mitigation and that death is the appropriate sanction.

CONCLUSION

Based on the foregoing arguments and authorities, the sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to, A. Anne Owens, Assistant Public Defender, P. 0. Box 9000 -- Drawer PD, Bartow, Florida 33831, this 18TH day of October, 1996.

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