IN THE SUPREME COURT OF FLORIDA

MICHAEL TYRONE CRUMP,

Appellant,

vs.

Case No. 86,733

STATE OF FLORIDA,

Appellee.

_____.

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This appeal is from a resentencing ordered by this Court in Crump v. State, 654 So. 2d 545 (Fla. 1995) (R. 12-25), following the prior resentencing in Crump v. State, 622 So. 2d 963 (Fla. 1993). The record on appeal from Appellant Crump's trial, penalty phase and original sentencing will be referred to by the letters "TR" (trial record), followed by the appropriate page numbers. The record on appeal from the first resentencing will be referenced by the page number preceded by the letter "1R" (first resentencing record), except that the transcript of the actual sentencing proceeding will be referenced by the letters "1RS" (first resentencing sentencing). The record on appeal from this second resentencing will be referenced as "2R" (second resentencing record), followed by the page number. The sentencing proceeding, a two page document, is numbered separately, and will be referenced as "2RS" (second resentencing sentencing), followed by the page numbers. The supplement to this record, which contains the pretrial proceedings -- numbered separately from the original record on appeal -- will be referenced by the letters "SR" (supplemental record), followed by appropriate page numbers. To recap:

(TR.) = references to original trial and sentencing.

(1R.) = references to the first resentencing record

(1RS.) = references to the first

(2R.) = references to this second resentencing record

(2S.) = references to the second resentencing sentencing

(SR.) = references to the supplemental record in this second resentencing (pretrial hearings)

STATEMENT OF THE CASE

On March 23, 1988, a Hillsborough County grand jury indicted the Appellant, MICHAEL TYRONE CRUMP, for the first-degree murder of Lavinia Clark. (2R. 10-11) Crump was tried by jury March 27-30, 1989, the Honorable M. William Graybill presiding, and found guilty as charged. (TR. 661, 688) The trial judge instructed the jury to consider as possible aggravation that: (1) the defendant was previously convicted of another capital offense or felony involving violence; and (2) the crime was cold, calculated and premeditated. (TR. 559-60, 685) He instructed the jury to consider as possible mitigation that (1) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) any other aspect of the defendant's character or record or circumstance of the offense. (TR. 686, 560) The jury recommended death by a vote of eight to four. (TR. 689) In his written findings supporting imposition of the death penalty, the sentencing judge found the same two aggravating circumstances and the same three mitigating circumstances.' (TR. 690-91)

On June 10, 1993, this Court affirmed Crump's conviction, but vacated the death sentence and remanded the case for the trial judge to reweigh the aggravating and mitigating circumstances and

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[1] The trial judge actually found that the mental mitigators "may have been" established; thus, the finding was unclear. This Court remanded for reweighing (without "CCP"), because the judge's order "failed to specify what statutory and nonstatutory mitigating circumstances the trial judge found and what weight he gave the circumstances." Crump v. State, 622 So. 2d at 973.

resentence Crump. The Court found that the State failed to prove the "cold, calculated, and premeditated" aggravating factor beyond a reasonable doubt, and failed to specify what statutory and non-statutory mitigating circumstances he found and what weight he gave them. Crump v. State, 622 So. 2d 963, 973 (Fla. 1993).

On remand, the trial court again sentenced Crump to death. He found that the only aggravating circumstance established beyond a reasonable doubt was Crump's previous conviction for a prior violent ok other capital felony.[2] In mitigation, the trial court found that Crump had a few positive character traits and suffered from mental impairment that did not rise to the level of statutory mental mitigation. He determined that the mitigation did not outweigh the aggravation. Crump, 654 So. 2d at 546. (2R. 12-25)

This Court again vacated Crump's death sentence and remanded for resentencing, holding that the trial court erred by failing to expressly evaluate the mitigation as required by Campbell v. State, 571 So. 2d 415 (Fla. 1990). Id. The Court found that the sentencing order did not satisfy Campbell. The trial court found that:

> 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.
>
> This is not the express evaluation of proposed mitigation that Campbell requires.[3]

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[2] The prior violent felonies established were the first-degree murder of Areba Smith, an aggravated assault and three counts of aggravated battery. They all resulted from the same incident and were committed without a firearm. (TR. 533)

[3] In Campbell, 571 So. 2d at 419 nn.3-4, the Court decided that proposed nonstatutory mitigating circumstances should be dealt with as categories of related conduct, such as abused or deprived

The record from Crump's 1989 trial reflects testimony that Crump was a slow learner; was kind, considerate, thoughtful, and playful; and was a good father and son. Crump's mental health expert, Dr. Maria Elena Isaza, testified that Crump has poor planning ability; is sensitive to criticism and rejection, especially from women; has some feeling of sexual inadequacy; may act impulsively without reflection; has psychological and emotional problems; and could have been under extreme mental disturbance when Lavinia Clark was killed. By characterizing this evidence in broad generalizations -- "a few positive character traits" and "mental impairment"-- the trial judge violated Campbell.

While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different. State v. Dixon, 283 So.2d 1, 17 (Fla. 1973) ("Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation."), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Because it is not clear from the face of the sentencing order in Crump's case precisely what mitigating evidence the trial judge evaluated, we cannot be sure that the trial judge gave proper considerationtothe mitigating evidence Crump presented. See Mann v. State, 420 So.2d 578, 581 (Fla.1982) ("The trial judge's findings in regard to the death penalty should be of unmistakable clarity so that we can properly review them and not speculate as to what he found[.]").

The sentencing order in this case is particularly troublesome because we stated in our opinion remanding the case to the trial court that:

> The 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. While we did not cite to Campbell, we clearly expressed our concern with the original sentencing order.[4] On remand the trial judge found

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childhood, contribution to community. Crump, 654 So. 2d at 546-47,

[4] In a footnote, this Court pointed out that, while Campbell had not yet been decided when Crump was originally sentenced in 1989, it was decided in 1990 and applied to Crump's case on remand. Crump, 654 So. 2d at 548 n.4.

> only one aggravating circumstance. Without a clear understanding of what mitigation the trial judge considered, weighed, and found, we cannot conduct an appropriate proportionality review.

654 So. 2d at 546-47 (footnotes omitted). This Court remanded the case for the trial judge to reweigh the circumstances and resentence Crump, noting that, should he impose the death penalty, "he must prepare a sentencing order that complies with Campbell's direction to expressly evaluate in the written order each mitigating circumstance that a defendant proposes." Id.

On remand, defense counsel filed a (1) Motion for New Sentencing Phase Trial; Motion for Permission to Interview Jurors; Renewed Motion to Consider New Evidence; and a Renewed Motion to Consider Testimony of Prior Psychologist (Dr. Robert M. Berland) , which included a copy of Dr. Berland's penalty phase testimony from Crump's trial in his other capital case. At the trial judge's request (SR. 8-9), defense counsel also filed a Suggested List of Statutory and Non-Statutory Mitigating Circumstances. (2R. 28-119)

Although the judge told counsel at a "mandate hearing" on June 28, 1995, that he would hear arguments of counsel and any statement that the Appellant wished to make at a hearing preceding the actual sentencing (SR. 9), he denied all of the defense motions, refusing to hear any argument, at a pretrial hearing on September 5, 1995. (2R. 28-34; SR. 21) He explained that the case was remanded for the court to reweigh all mitigating circumstances posed by Crump, and to then resentence him, and that was "exactly what this Court is going to do." (SR. 21-22) He had not yet had an opportunity to review the proposed mitigation. He scheduled Crump's sentencing for the following Monday morning. (SR. 22)

On September 11, 1995, the trial judge again sentenced Crump to death at a sentencing "proceeding" which consisted only of his pronouncement of sentence. It was not a "hearing," because no one spoke, or was invited to speak, except the judge. (2S. 3-4) The trial judge filed a written sentencing order on the same date, in which he found one aggravating factor -- that Crump was convicted of a prior violent or other capital felony -- and no statutory mitigation.[5] He attached defense counsel's list of proposed mitigation, stating that he found each of the proposed nonstatutory mitigators "reasonably established by a greater weight of the evidence, considered to be mitigating in nature; and given some, but very little weight." He concluded that the non-statutory mitigators, when considered collectively; "should be and are given slight weight." He noted further that, even if they were given substantial weight, "justice would still demand the death penalty," because the mitigation would still be "clearly outweighed by the statutory aggravating circumstance." (2R. 128-33)

On October 16, 1995, Crump filed a Notice of Appeal to this Court pursuant to Article V, Section 3(b)(1), Florida Constitution, and Florida Rule of Appellate Procedure 9.030 (a)(l)(A)(i). (2R. 135) The Public Defender was appointed October 27, 1995. (2R. 143)

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[5] The judge gave a vague and somewhat confusing explanation as to why the defense failed to establish the statutory mental mitigators, and made no attempt to explain why he did not find the defendant's age mitigating. He allegedly rejected the statutory mental mitigation because the defendant denied having committed the offense, and because "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." (2R. 129)

STATEMENT OF THE FACTS

A. Guilt Phase

On December 12, 1985, the nude body of Lavinia Clark was discovered in Tampa, Florida. (TR. 186-87) During the investigation, detectives determined that Ms. Clark was a prostitute and a heavy cocaine user. (TR. 203) They were unable to solved the crime at that time. Some months later, Michael Crump was arrested in connection with the strangulation of Areba Smith, who was also a black prostitute. While searching Crump's truck for evidence in the Areba Smith case, the officers found Lavinia Clark's driver's license under the carpeting. (TR. 286-87)

Crump confessed to the murder of Areba Smith, but said he killed her only after she pulled a knife.[6] (TR. 265) He told Tampa Detective Onheiser that he once picked up Lavinia Clark near a bar. He offered her a ride and she accepted. She was in his truck for about ten minutes. When they got into an argument, he pulled over to the side of the road and pushed her out of the truck. This was the last time he saw her. (TR. 356-57) She left behind her purse. He discarded it, keeping only her driver's license. He did not know why he kept the license. He saw Clark's picture in the newspaper later. He hid the license under the carpet in his truck (TR. 359), where it was found by police officers after his arrest for Areba Smith's murder. (TR. 286-87)

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[6] Crump told police that he picked up Smith who agreed to an act of prostitution. Smith became frustrated because the "blow job" was taking too long. When she pulled a knife, Crump manually strangled her. (TR. 265-67)

Charles Diggs, medical examiner, performed an autopsy on Lavinia Clark. (TR. 339-42) The cause of death was strangulation. She had a bruise on her scalp behind the ear, and two bruises beneath the skin on the top of her head. This indicated that she may have been struck on the head. (TR. 342-44) Diggs said that there appeared to be ligature impressions on the wrists but he did not include this in the autopsy report because the marks were faint and left no bruising. (TR. 346)

The prosecution introduced evidence concerning the murder of Areba Smith as Williams Rule evidence over defense objection, to convict Crump of Lavinia Clark's similar murder. (TR. 636) The only direct evidence, other than Clark's driver's license, was presented by Michael Malone, an agent with the FBI, who testified concerning the analysis of hairs and fibers. (TR. 313-26) He compared a known hair sample from Lavinia Clark to hair samples submitted in the Areba Smith case. A hair found on the carpet of Crump's truck had the same individual characteristics as the head hair of Lavinia Clark. (TR. 326-27)

B. Penalty Phase

At penalty phase the following day, Crump's mother, Mittie Render, testified that Crump was a slow learner in school. (TR. 458-59) She described her son as "kind, considerate, thoughtful and playful." She said that Michael was friendly and outgoing and helped anyone who needed help. (TR. 459-60)

Crump's sister, Gloria Baker, a licensed practical nurse, testified that she and her family lived with her mother at one time. She helped care for Crump when he was an infant and small

child. (TR. 463-66) Michael got along well with the family and did a lot of work around the house. (TR. 466-68) Baker testified that Crump was presently married and had three daughters. One was ten or eleven and the twins were four years old. (TR. 467)

An older sister, Christina Taylor, said that, after she moved to St. Petersburg, Michael visited her during the summer. He got along well with her children and helped around the house. (TR. 468-70) A neighbor in St. Petersburg, formerly a social worker with HRS, said Michael visited her frequently when he was a child, talked to her, helped around the house, and babysat while she went to the store. He was good with her four children. (TR. 474-75)

Maria Elena Isaza, a clinical psychologist and adjunct professor at the University of South Florida in Tampa, was provided with the raw data and test results collected by Dr. Robert M. Berland who was out-of-town and, thus, unable to testify at penalty phase. (TR. 226-28) Dr. Isaza testified that Dr. Berland administered tests to Crump in 1987. She had not spoken with Dr. Berland about Crump. (TR. 498) The prosecution attempted to impeach Dr. Isaza's credibility by pointing out that she was appointed in this case only four days earlier, for the purpose of testifying during penalty phase, because Dr. Berland was out-of-town. (TR. 226)

Dr. Isaza first saw Crump the day prior to her testimony, after his conviction in this case. (TR. 483-84, 497) She interviewed him and did additional testing for 3 1/2 hours. The testing showed that Crump had poor planning ability. His verbal score was much lower than his performance score which indicated that Crump was "more of a doer than a thinker." His judgment was consistently

poor. Crump had poor impulse control; he acted first and reflected later. He also had poor reflecting ability. (TR. 487-88) Because he was not capable of much planning, if he killed someone, he would have done it on the spur of the moment. (TR. 505-06)

Michael Crump grew up without a father. (TR. 487) He is only comfortable when he trusts someone. If he perceives a threat, he feels persecuted or exploited and anticipates that he will be diminished. He is very sensitive to rejection and criticism, especially from women. When he feels threatened, he may act in a violent way, impulsively and without reflection. (TR. 489)

Dr. Isaza concluded that Crump suffered from "hypervigilance," or a sense of feeling threatened. (TR. 489) She found some indication of sporadic hallucinations or hearing "god voices talking to him." He had difficulties in sexual development and adjustment -- a feeling of sexual inadequacy or that his manhood depended on his sexual performance. (TR. 490) Crump was shy and had difficulty establishing relationships with women. (TR. 509) His symptoms were consistent with a paranoid personality disorder. (TR. 490)

Dr. Isaza's unrebutted opinion was that Crump was under the influence of extreme mental or emotional disturbance at the time of the offense and his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. (TR. 494, 510) She opined that, if Crump was with a prostitute and it was taking too long, this could trigger the impulsive reaction he was prone to suffer. (TR. 510) He could become delusional, believing that he was threatened, abused, or mistreated, and react accordingly. (TR. 511)

SUMMARY OF THE ARGUMENT

Michael Crump has never had the sentencing contemplated by Florida Rule of Criminal Procedure 3.780, which governs sentencings in capital cases. The trial court first sentenced Crump to death the day after the eight to four death recommendation was rendered by the jury, before counsel had time to adequately prepare for sentencing. He prepared his order sentencing Crump to death prior to the hearing, so was in no position to consider evidence, sentencing arguments, or any statement made by Crump. (TR. 690-91) He had little time to reflect on his sentencing decision.

Moreover, because Dr. Robert Berland was out-of-town during Crump's penalty proceeding, the judge and jury did not have the benefit of his testimony concerning the mental mitigation. Dr. Maria Elena Isaza, a clinical psychologist and professor at the University of South Florida, filled in for Berland at the last minute and, thus, was not as well informed or prepared. (TR. 483-84) Moreover, Crump's jury was instructed to consider the "cold, calculated and premeditated" ("CCP") aggravating factor, with no limiting definition. The CCP aggravator, which the jury surely considered, was found invalid by this Court on direct appeal. Crump v. State, 622 So. 2d 963 (Fla. 1993). Thus, the judge's sparse sentencing order was based on a tainted jury recommendation.

At Crump's first resentencing, the trial judge did the same thing.[7] Although he allowed argument of counsel and a brief

[7] This Court remanded the case for reweighing and resentencing because the judge erroneously relied on the CCP aggravator, and failed to specify what mitigation he found or the weight accorded it. Crump v. State, 622 So. 2d 963, 973 (Fla. 1993). .

statement by the Appellant (but no new evidence), he could not have considered them because he immediately sentenced Crump to death and filed his pre-prepared sentencing order. (1S. 22) He revised his prior finding that the mental mitigators "may have" been established, finding instead that Crump's mental impairment constituted nonstatutory mental mitigation. He expanded his previous reliance on the "catchall" nonstatutory mitigator, to state that Crump had "a few" unspecified "positive character traits." (1R. 40-41)

On direct appeal, this Court found that the second sentencing order was equally sparse, and failed to meet the standards set out in Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Thus, the Court ordered a second reweighing and resentencing. Crump v. State, 654 So. 2d 545 (Fla. 1995). It was worse than the first one.

At the second resentencing, the judge allegedly considered a list of proposed mitigators prepared by defense counsel at the judge's request. Although defense counsel filed four pretrial motions, he refused to hear argument on them. He simply denied the defense motions, sentenced Crump to death, and filed his revised written order. (2R. 28-34, 128-30; SR. 21-22; S. 3-4) The written order did not comply with Campbell. (Issue I)

To compound the ongoing lack of due process in this case, the trial judge sentenced Crump to death without asking for or hearing any evidence, arguments of counsel or statements by the Appellant or others. The judge entered the room and pronounced sentence -- death, of course; announced that he was filing his written findings contemporaneously; told Crump he had the right to appeal, and proceeded to fingerprinting. (2S. 3-4) He never asked whether

anyone had anything to say, any reason why he should not pronounce sentence, or any questions. No one spoke, or was invited to speak, except the judge. No one interrupted. Certainly, any sentencing proceeding, and especially one in which the defendant is sentenced to death, requires a certain amount of due process, or at least the appearance of due process. The lack of due process in this case requires that Crump's sentence be reduced to life, or that the case be again remanded for a resentencing proceeding (including evidence and argument) in accordance with due process of law. (Issue III)

Prior to both the first and second resentencings, defense counsel filed pretrial motions requesting that the trial court consider the transcript of Dr. Berland's testimony from Crump's other capital case which was held about a month before the instant trial. Because Dr. Berland was unavailable to testify in Crump's penalty proceeding in this case, and because this Court remanded the case specifically so that the judge could clarify his indecisive written findings concerning the mitigation, Dr. Berland's testimony was especially important. Although, at the first resentencing, the prosecutor told the judge she had no objection to his considering Dr. Robert Berland's testimony, the judge still refused to consider it. (1RS. 4, 11, 21) This Court upheld his refusal because the Court ordered only a reweighing -- not a resentencing -- which did not require new evidence. Crump v. State, 654 So. 2d 545, 547 (Fla. 1995). (Issue IV)

Nevertheless, without the benefit of Dr. Berland's testimony, the judge's written findings were more indecisive and inconclusive the third time. He stated, as in his second order, that Crump

failed to reasonably establish statutory mental mitigation at the time he manually strangled the victim to death. (2R. 129) He did not mention whether it was established at any other time, or whether he considered it nonstatutory mitigation. He went on to say that Crump denied his guilt even after he was found guilty and, as in his first written order, that Crump "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. (2R. 129) (Issues I, II and IV)

Had he granted the defense motion and considered Dr. Berland's written testimony, a copy of which was appended to the motion in front of him, he could have made an informed decision as to whether Crump met the statutory requirements for the mental mitigators at the time of the offense. Instead, he denied the motion without hearing argument and entered another indecisive sentencing order. (Issues I, III, and IV)

Defense counsel also filed a renewed motion to consider new evidence -- that Crump had adjusted well to prison life. The judge denied the motion without hearing argument because this Court ordered only a reweighing. Although the denial is understandable, based on the Court's opinion, it denied Crump the due process and equal protection accorded other death row inmates whose cases are remanded for resentencing. Because the propriety of new evidence depends on the wording of this Court's opinion remanding the case, imposition of the death penalty is arbitrary and capricious in violation of the Eighth and Fourteenth Amendments.

Perhaps because he refused to hear defense counsel's evidence and argument, or perhaps because he already had his mind made up,[8] the trial court failed to give sufficient weight to the mitigating factors. Although Dr. Isaza's unrebutted testimony showed that the two statutory mitigator8 were met, and Dr. Berland's testimony (had he agreed to read it) went even further in explaining Crump's mental limitations, the trial court again found only that they "may have" existed. As nonstatutory mitigation, he found that everything that defense counsel set out in his written memorandum, which he attached to his order, was established. Without mentioning any of it, he considered it and gave it "little" weight. "Collectively," he gave it "slight" weight. He did not specify or discuss any of the mitigation to which the witnesses testified and which defense counsel enumerated, as required by this Court.

The trial judge also denied, without hearing argument, defense counsel's motion asking the judge to order a whole new penalty proceeding because the invalid CCP factor tainted the jury's recommendation. (Issue V) The judge also denied, without hearing argument, Crump's accompanying motion to interview the jurors to determine whether the invalid CCP factor affected the penalty recommendation. Although this Court did not order a new penalty proceeding in Crump's case, and specifically held that it was not required after the first resentencing, Appellant requests that the Court reconsider this argument in light of Jackson v. State, 648

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[8] That the judge was predisposed to sentence Crump to death is evidenced by his final written finding -- that "justice" would require the death penalty even if he gave substantial weight to the mitigation. In other words, he would sentence Crump to death again and again, no matter what he found in his written order.

So. 2d 85 (Fla. 1994), and Espinosa v. Florida, 505 U.S. 1079 (1992), because the jury was not given a limiting definition of CCP which this Court struck on direct appeal.

After this Court struck the CCP aggravator, the trial judge was left with only one aggravating circumstance. He found only the one aggravator (prior violent felony) established, in both his second and third resentencing orders. Certainly, this aggravator deserves substantial weight because Crump was previously convicted of a homicide (which actually occurred subsequent to the instant one). Nevertheless, this Court has never upheld a death sentence based on only one aggravating factor, except when there is little or no mitigation. Such is not the case here. Crump committed these offenses because of his mental disorders, which were beyond his control, rather than for pecuniary gain or to resolve some personal vendetta. Thus, death is not proportionately warranted in this case. Crump's death sentence should be vacated and the case remanded for a life sentence. (Issue VI)

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY FAILING TO FOLLOW THIS COURT'S MANDATE TO RE-WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, RESENTENCE CRUMP, AND FILE A SENTENCING ORDER MEETING THE REQUIREMENTS SET OUT IN CAMPBELL V. STATE, THUS INVALIDATING THE WEIGHING PROCESS.

The sentencing order in a capital case must reflect that the 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). Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose, and the record must be clear that the trial judge "fulfilled that responsibility." Lucas v. State, 417 so. 2d 250, 251 (Fla. 1982). The findings should be of unmistakable clarity so that this Court can properly review them and not speculate as to what he found." Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). The sentencing order prepared by the court below does not pass muster under these principles.

Despite this Court's mandate, the trial judge again failed to comply with the requirements of Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Campbell requires that the trial judge, in his written sentencing order, expressly evaluate each statutory and nonstatutory mitigating factor proposed by the defendant to

determine whether it is supported by the evidence and whether, in the case of nonstatutory mitigators, it is truly mitigating. 571 so. 2d at 419; accord Foster v. State, 654 So. 2d 112, 113 n.3 (Fla. 1995); Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995); Larkins v. State, 655 So. 2d 95, 100-101 (Fla. 1995); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). In his third attempt to comply with this Court's requirements, as set out in Campbell, Rogers, and other cases, the trial Court again failed to expressly evaluate each proposed mitigator.

Prior to the resentencing, the judge requested that defense counsel prepare a list of proposed mitigation. Crump's appointed counsel prepared a list and filed it with the court September 1, 1995. (2R. 131-33) The list was nearly three pages long -- about the same length as the judge's written findings. (2R. 128-30) As statutory mitigation, defense counsel urged the court to consider that (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; that (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) the age of the defendant at the time of the crime. (2R. 131) Defense counsel listed seventeen proposed nonstatutory mitigators, one of which had four parts. (See Appendix B) Thus, the judge was provided with more than twenty proposed mitigators to "expressly evaluate" to determine if they were reasonably established by the greater weight of the evidence and, as to the nonstatutory mitigators, whether they were truly mitigating in nature.

At a hearing held September 5, 1995, the trial judge said that he had not yet had a chance to thoroughly review the proposed mitigating circumstances, and that sentencing would be held on the following Monday morning unless either counsel had a conflict. Neither did. Thus, sentencing was set for 8:30 a.m. on September 11, 1995. On that date, the trial court, without hearing any evidence or arguments (see Issue III, infra), sentenced Crump to death and filed his written order. (2S. 3-4; 2R. 128-30) He attached defense counsel's list of proposed mitigator to his written order, "rubber-stamped" the jury's recommendation, reaffirmed his prior finding of one statutory aggravator -- the prior violent or other capital felony aggravator, and, as to the mitigation, found as follows:

> 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.
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> 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.
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> 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. . . .

(2R. 129-30) He then opined that the one statutory aggravating

circumstance[9] clearly outweighed the non-statutory mitigating circumstances, and that "justice demands that the Defendant be sentenced to death." He attempted to "cover all his bases," by adding that, "[e]ven 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." (2R. 130) Thus ends the sentencing order.

Case law requires that the result of the weighing process be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review. Ferrell, 653 So. 2d at 371. Although the trial judge made conclusory statements in his order, he failed to detail his reasoning as to any of the proposed nonstatutory mitigators.

His reasoning for tentatively rejecting the statutory mental mitigators is unclear. Although undersigned counsel, by "speculation and guesswork," may be able to explain to this Court what the

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[9] The aggravating circumstance was the "prior violent felony" aggravator. The judge wrote that he accorded this aggravator "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." (2R. 128-29) Although the judge's order makes it seem that Crump killed the same victim twice, he actually described the subsequent murder of Areba Smith. There was no evidence as to how the Clark homicide occurred, other than the medical examiner's testimony as to the location and condition of her body. Because Crump was convicted of Clark's murder primarily by Williams rule evidence from Smith's murder, the judge apparently imputed the circumstances of that murder to Clark's murder. He omitted the fact that Crump admitted to strangling Smith, but said that it was because she pulled a knife on him. (TR. 265-67)

trial judge probably meant, this is not sufficient for this Court to make a proportionality decision. As this Court noted in Crump, 654 So. 2d at 547, fair and deliberate consideration by the trial judge is particularly important in a capital case because "death is different." State v. Dixon, 283 So. 2d 1, 17 (Fla. 1973) (Death is a unique punishment in its finality and in total rejection of the possibility of rehabilitation.), cert. denied, 416 U.S. 943 (1974).

Similarly, the judge rejected the Appellant's age of 25 as a statutory mitigator, without giving any reason. Although, by itself, 25 may not be a significant age, Crump's intelligence was borderline. Expert testimony indicated that he was shy and unsure of himself in his sexual relationships. He appeared to have been emotionally immature. Such factors have been found to make an age which would not otherwise be mitigating, of a mitigating nature. Conversely, the defendant's maturity may be a factor in finding that a young age was not particularly mitigating. See,., Terry v. State, 668 So. 2d 954 (Fla. 1996) (court rejected Terry's age of 21 years as a statutory mitigator because no evidence suggested that his mental or emotional age did not match his chronological age, and his age, standing alone, was insignificant). In this case, the judge gave no reason for rejecting Crump's age as a mitigating factor and, thus, this Court cannot determine whether his conclusion was supported by the evidence.

Furthermore, the trial judge did not discuss the nonstatutory mitigation by categories, as required by this Court, or explain which mitigation he gave the most or the least weight to, or set out any reasoning in support of his conclusory findings. He did

not even bother to list the mitigation he found, other than to attached defense counsel's list. (See Appendix A) Other than his conclusory statement that each non-statutory mitigating circumstance proposed by the Defendant was reasonably established, considered to be mitigating in nature, and given some but very little weight, the order contains no evidence that the judge even read the proposed list of nonstatutory mitigation.

In its opinion remanding the case for reweighing and resentencing, this Court stated as follows:

We held in Campbell that:

> 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.

571 So.2d at 419 (footnote omitted) (emphasis added). We decidedthatproposed nonstatutory mitigating circumstances should be dealt with as categories of related conduct such as abused or deprived childhood, contribution to community, etc. Id. at 419 nn.3-4.

The sentencing order in Crump's case does not satisfy Campbell. The trial court found:

> 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.

This is not the express evaluation of proposed mitigation that Campbell requires.

The record from Crump's 1989 trial reflects testimony that Crump was a slow learner; was kind, considerate, thoughtful, and playful; and was a good father and son. Crump's mental health expert, Dr. Maria Elena Isaza, testified that Crump has poor planning ability; is sensitive to criticism and rejection, especially from women; has some feeling of sexual inadequacy; may act impulsively

without reflection; has psychological and emotional problems; and could have been under extreme mental disturbance when Lavinia Clark was killed. By characterizing this evidence in broad generalizations--"a few positive character traits" and "mental impairment"--the trial judge violated Campbell.

While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different. State v. Dixon, 283 So.2d 1, 17 (Fla.1973) ("Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation."), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Because it is not clear from the face of the sentencing order in Crump's case precisely what mitigating evidence the trial judge evaluated, we cannot be sure that the trial judge gave proper considerationtothe mitigating evidence Crump presented. See Mann v. State, 420 So.2d 578, 581 (Fla. 1982) ("The trial judge's findings in regard to the death penalty should be of unmistakable clarity so that we can properly review them and not speculate as to what he found[.]").

The sentencing order in this case is particularly troublesome because we stated in our opinion remanding the case to the trial court that:

> The 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. While we did not cite to Campbell, we clearly expressed our concern with the original sentencing order. On remand the trial judge found only one aggravating circumstance. Without a clear understanding of what mitigation the trial judge considered, weighed, and found, we cannot conduct an appropriate proportionality review.

Thus, we remand this case and direct the trial judge to reweigh the circumstances and resentence Crump. Should the trial judge impose the death penalty, he must prepare a sentencing order that complies with Campbell's direction to expressly evaluate in the written order each mitigating circumstance that a defendant proposes.

* * * * *

Accordingly, we vacate Crump's death sentence and remand for the trial judge to reweigh the circumstances

> and resentence Crump. Should the trial judge impose a death sentence on remand, his sentencing order must comply with Campbell and expressly evaluate the mitigation that Crump proposes.

Crump, 654 So. 2d at 546-48 (footnotes omitted).

Larkins v. State, 655 So. 2d 95 (Fla. 1995), in which this Court remanded for a new sentencing, is similar to the case at hand in some respects and, in fact, cites Crump v. State, 654 So. 2d 545 (Fla. 1995), to support its conclusion that the sentencing order failed to meet the requirements set out in Campbell, Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995), and other cases. In both cases, the sentencing orders were a mere two and one-half pages, with sparse, bare-boned conclusions, unsupported by findings of fact or reasoning. Furthermore, much of the mitigation in Larkins also existed in Crump. In Larkins, this Court found as follows:

> Although the brief sentencing order (two and one-half pages) refers to a portion of Dr. Dee's opinion (i.e., Larkins suffers organic brain damage, and his stressful condition may have caused him to fire the .22-rifle), the order does not explain whether it found any mitigating circumstances based on Dee's testimony.
>
> 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. Instead, the trial court concluded that Dr. Dee was not of the opinion that Larkins' condition was of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law. In fact, Dr. Dee testified that Larkins' organic brain disorder "impairs his capacity to control that conduct whatever he appreciates it to be."
>
> During sentencing, defense counsel also relied on Dr. Dee's testimony to establish other non-statutory mitigating circumstances relating to Larkins' personal history. On appeal Larkins asserts that this testimony and other evidence established that: (1) Larkins' previous conviction was not murder but manslaughter; (2) he was a poor reader; (3) he experienced difficulty in school; (4) he dropped out of school at the fifth or sixth grade; (5)

> the offense was the result of impulsivity and irritability; (6) he drank alcoholic beverage the night of the incident; (7) he functions at the lower 20% of the population in intelligence; (8) he came from a barren cultural background; (9) his memory ranks in the lowest one percent of the population; (10) he has chronic mental problems possibly caused by drugs and alcohol; (11) he is withdrawn and has difficulty establishing relationships. While most of these factors were identified in Dr. Dee's testimony, they were not all separately argued by counsel. However, the sentencing order reflects that the trial court summarily rejected all non-statutory mitigating circumstances: "Since no other mitigating circumstance can be gleaned from the record, the imposition of the death penalty is the appropriate sanction for the offense of First Degree Murder." This finding, as well as the lack of findings on statutory mitigation, is inconsistentwiththe evidence of mitigation contained in the record. . . .

Id. at 100-101. After citing the Campbell requirements, the Court found that Larkins' sentencing order was inadequate because, for example, the order did not "expressly evaluate . . . each mitigating circumstance." This Court concluded that, "[c]learly, the bare-boned sentencing order fails to provide a sufficiently reasoned analysis to enable this Court to make a meaningful proportionality review." Id.

The trial judge's findings in Larkins are also of interest as compared to Crump's case. In Larkins, the trial court concluded that the mental health expert, Dr. Dee, "was not of the opinion that Larkins' condition was of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law." This Court stated that, instead, Dr. Dee testified that Larkins' organic brain disorder "impairs his capacity to control that conduct whatever he appreciates it to be." Id. Thus, the trial court's findings were not consistent with the testimony in the case.

A similar situation exists in Crump. The trial judge has consistently opined that, based upon the testimony of Dr. Isaza at Crump's penalty phase, Crump "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." He set out no specific findings by Dr. Isaza to substantiate his conclusion. As in Larkins, Dr. Isaza's testimony, when considered in its entirely, was to the contrary.

Dr. Isaza testified that Crump was under the influence of extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired. (TR. 494) On cross-examination, the prosecutor was able to get Dr. Isaza to admit that she could not be certain about Crump's mental status at the time he committed the homicides because she did not meet and interview him until a day prior to her penalty phase testimony. In other words, she was not there when Crump committed the homicide, which is true of all mental health experts. Even after this admission, however, Dr. Isaza reaffirmed her belief that Crump was mentally and emotionally disturbed, and substantially impaired, at the time of the offenses.[10] (R. 510) The State presented no expert

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[10] Dr. Berland's testimony, which the trial judge refused to consider (see Issue IV, infra) confirmed this conclusion. In fact, Dr. Berland found that Crump had a combination of brain damage and a genetic disturbance -- each severe, which rendered him unable to make rational decisions about his behavior or to exercise the control necessary to conform his behavior to the requirements of law. This was also the basis for Dr. Berland's conclusion that Crump was under extreme mental or emotional distress when he committed the offense. (2R. 78-80)

witnesses and Dr. Isaza's testimony was and is unrebutted.

The trial judge appeared to have found the mental mitigators at least marginally established in his first sentencing order, although he included the "may have been" language.[11] He found that they were not established to the "statutory level" in his second sentencing order.[12] The third time, he combined his two previous findings. He found both that (1) the defense failed to reasonably establish statutory mental mitigation "at the time [Crump] manually strangled the victim," and that (2) "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

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[11] In his original order, the trial judge found that:

1. The capital felony for which the Defendant is to be sentenced was committed while he may have possibly been under the influence of extreme mental or emotional disturbance as evidenced by expert testimony in the case.

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may have possibly been substantially impaired as evidenced by expert testimony in the case.

3. Any other aspect of the Defendant's character or record, any other circumstance of the offense as evidenced by expert and lay testimony in the case. (TR. 691)

[12] In his second sentencing order, the judge's findings as to the mitigation were even scantier. He found that:

> 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. (1R. 40-41)

to the requirements of law may possibly have been substantially impaired." (2R. 129) The judge's indecision probably results from Dr. Isaza's admission that she could not be certain about Crump's mental condition at the time he committed the crime, because she was not there to evaluate him at that precise hour.

The judge, however, did not cite any of Dr. Isaza's testimony or findings in his order to support his conclusory findings, so there is no way that this Court, or undersigned counsel, can know for certain on what he based his conclusions. In an apparent attempt to justify his conclusions, he noted that Crump denied having committed the offense after his conviction by the jury. He must have drawn this conclusion from Dr. Isaza's testimony because Crump did not testify. In any event, we fail to see the connection between Crump's assertion on innocence and the lack of mental mitigation, unless the judge meant that Crump did not describe his mental state when he committed the crime.[13]

In Ferrell v. State, 653 So. 2d 367 (Fla. 1995), this Court reiterated that the sentencing judge must expressly evaluate each mitigating circumstance proposed by the defendant to determine if the statutory mitigators were reasonably established by the greater weight of the evidence, and if the nonstatutory mitigators were truly mitigating. At least some weight must be given to each established mitigator. The result of this weighing process must be detailed in the written sentencing order and supported by suffi-

[13] What the judge's three attempts at making written findings show is that he is not able to determine whether the mental mitigators were established based on Dr. Isaza's testimony. What better reason could the judge have for considering Dr. Berland's testimony which, this time, he had in front of him. (See Issue IV, infra)

cient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review. Id. at 371. In this Court's remand in Crump, it reiterated that Campbell, 571 So. 2d at 419 nn.3-4, required that proposed nonstatutory mitigating circumstances be dealt with as categories of related conduct, such as abused or deprived childhood, contribution to community, etc. Crump, 654 So. 2d at 546-47.

Defense counsel listed seventeen proposed nonstatutory mitigators, one of which had four parts. The judge was required to "expressly evaluate" these proposed mitigators to determine if they were reasonably established by the greater weight of the evidence and whether they were truly mitigating in nature. Some of these mitigators fit in categories such as deprived childhood or contributions to community, as suggested by this Court. Others could be categorized as good relationships with family, good human values, intellectual and learning disabilities, mental problems, delusions and hallucinations, fears of sexual inadequacy, low self-esteem, uncontrollable impulsivity and hypervigilance, etcetera.[14]

The trial judge failed to describe or categorize the proposed mitigators. Instead, he appended defense counsel's prepared list to his written sentencing order and, to make simplify matters, found all of the proposed mitigators to be established, mitigating in nature, and, of course, deserving of little weight. In this way, he could not be faulted for failing to consider a proposed mitigator -- after all, defense counsel prepared the list. Nor

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[14] See list of proposed nonstatutory mitigation at note 9, and in Appendix A of this brief.

could he be faulted for failing to accord the mitigation some weight; he gave all of it "little weight." Thus, he could impose the death penalty without actually considering each individual proposed mitigator, categorizing it, according it a specified amount of weight, or justifying his findings.

This does not meet the requirements of Campbell. The judge was required to evaluate each category of mitigation and to specify how much weight he accorded it. He must make a "reasoned judgment." Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). Certainly, he did not give exactly the same amount of weight -- very little -- to each proposed mitigator, or category of mitigators. That Crump was a playful child is clearly not deserving of as much weight as his paranoid personality disorder. Because the judge failed to specify how much weight he accorded each mitigator, or on what facts he based his conclusions, this Court still has no basis upon which to determine whether the death penalty is proportionately warranted.

The trial judge noted at the end of his written order that, even if he gave the mitigating circumstances substantial weight, "justice would still demand the death penalty," because the mitigation would still be *'clearly outweighed by the statutory aggravating circumstance." (2R. 128-33) The judge was trying to "cover all his bases," so that his sentencing order would pass muster with this Court. This is tantamount to saying that, if this Court does not like his first finding, he is offering an alternative, hoping that at least one of his findings will suffice, Fortunately, this Court examines the facts and circumstances of each case rather than arbitrarily accepting a sentencing judge's

"alternative finding." See Geralds v. State, 21 Fla. L. Weekly S85 (Fla. Feb. 22, 1996), in which this Court stated as follows:

> The trial judge specifically stated in his sentencing order that he would impose the death penalty even without the cold, calculated, and premeditated aggravator. The judge was well aware, of course, of this Court's previous finding as to this aggravator, and, no doubt, realized that this issue would receive close scrutiny on appeal. Under our harmless error analysis, we independently examine all of the surrounding facts and circumstances and do not base our conclusions on the single subjective opinion of a trial judge. For this reason, we do not rely solely on the trial judge's explicit finding that even if we found the cold, calculated, and premeditated aggravator unsupported by the evidence, the remaining two aggravators would still far outweigh the mitigating factors, making death still an appropriate sentence.

21 Fla. L. Weekly at S85 n.14. Thus, the trial judge's attempt to "cover all his bases" does not preclude this Court's independent analysis of the trial court's reasoning, or lack thereof.

* * * * *

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. For the above reasons, unless Crump's sentence is reduced to life for reasons set out in Issue VI and other parts of this brief, the Court should again vacate Crump's death sentence and remand the case for resentencing in accordance with due process of law.

ISSUE II

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

Despite this Court's mandate, the trial judge failed to find and properly weigh all of the mitigating factors. The court must find that a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). "Once established, a mitigating circumstance may not be given no weight at all." Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991). The trial court may only reject a defendant's claim that a mitigating circumstance has been proved if the record contains "competent substantial evidence to support the rejection of these mitigating circumstances." Nibert 574 So. 2d at 1062; Kisht v. State, 512 So. 2d 922, 933 (Fla. 1987), cert. denied, 485 U.S. 929 (1988); Cook v. State, 542 So. 2d 964, 971 (Fla. 1989) (court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of mitigating circumstance). Every mitigating factor apparent in the entire record, both statutory and nonstatutory, must be considered and weighed in determining the sentence. Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990); accord Santos v. State, 591 So. 2d 160 (Fla. 1991).

It was the trial judge's indecision concerning the establishment of and weight given the mental mitigators (combined with its striking of the CCP aggravator) that caused this Court to remand

the case for reweighing the first time. The order stated 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 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.

The trial court's second stab at sentencing Crump was no better. The trial judge stated only that:

> 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.

(1R. 40-41) This Court described the second sentencing order as "unclear,"[15] The trial court's third attempt was no better.

Despite the unrebutted evidence of mental mitigation, the judge found that the defense failed to establish the statutory mental mitigating factors. His conclusions are not supported by the evidence, and one can only speculate as to his reasoning.

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[15] This Court explained, as follows:

> Because it is not clear from the face of the sentencing order in Crump's case precisely what mitigating evidence the trial judge evaluated, we cannot be sure that the trial judge gave proper consideration to the mitigating evidence Crump presented. See Mann v. State, 420 So.2d 578, 581 (Fla.1982) ("The trial judge's findings in regard to the death penalty should be of unmistakable clarity so that we can properly review them and not speculate as to what he found[.]").

654 So. 2d at 547.

Dr. Isaza, the only expert who testified at Crump's trial, said that Crump was under extreme mental and emotional disturbance at the time of the homicides, and that his capacity to appreciate the criminality of his conduct was substantially impaired. (TR. 494, 510) Her testimony was unrebutted. She said that Crump might be perfectly normal an hour before, something triggered him, and this happened. The State put on no psychiatric testimony. Even after the prosecutor cross-examined Dr. Isaza, attempting to discredit her testimony, she maintained that Crump was impaired at the time of the offenses. The mental mitigators were clearly established in the absence of contradictory evidence.

The sentencing judge is required to find and weigh a mitigating circumstance that is established by "a reasonable quantum of uncontroverted evidence." See Spencer v. State, 645 So. 2d 377, 385 (Fla. 1995); Nibert, 574 So. 2d at 1062. The court may reject a mitigating circumstance only "if the record contains competent substantial evidence to support" the decision. Spencer, at 385.

In Spencer, this Court found that the trial court erred in rejecting Spencer's uncontroverted mitigating evidence. Although the trial judge found the testimony "speculative" and "conclusory," it was based on a battery of tests, clinical interviews, and records of Spencer's past life. Thus, the trial court erred by not finding and weighing the statutory mental mitigating factors. Id.

Dr. Isaza's expert opinion that both mental mitigators existed was also uncontroverted and based on psychological and personality tests which she administered and those administered by Dr. Berland. She also relied on her clinic interview and notes from Berland's

interviews, Crump's personal history, and information about the facts and circumstances of the offense. (TR. 226-27, 483-98) The judge did not suggest that Dr. Isaza's testimony was incompetent nor did he dispute the reasons for any of her conclusions.[16] Thus, as in Spencer, the trial court's rejection of the mental mitigators was error. Spencer, 645 So. 2d at 385.

As in the case at hand,[17] in Maxwell v. State, 603 So. 2d 490 (Fla. 1992), the State tried to discredit the mitigating evidence:

> While we acknowledge that this evidence leaves questions unanswered, we nevertheless must construe it in favor of any reasonable theory advanced by Maxwell to the extent the evidence was uncontroverted at trial. As we stated in Nibert, the court must find and weigh any mitigating circumstance established by "a reasonable quantum of competent, uncontroverted evidence,"

Maxwell, 603 So. 2d at 492 (citation omitted). In this case, Dr. Isaza was honest. She admitted that she could not be certain about Crump's mental condition at the time he committed the crime; she had not yet met him. Nevertheless, she firmly stated, without rebuttal, that it was her belief that Crump was under the influence

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[16] In Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990), the psychologist (Dr. Dee) diagnosed Carter has having organic brain syndrome or brain damage. He described the symptoms of this malady similarly to Dr. Isaza's description of Crump's mental problems. He testified that Carter was abnormally impulsive, which included rage reactions and emotional instability. He had a diminished capacity to reason and plan, and was unable to premeditate. Thus, the description given by Dr. Isaza suggests that, as Dr. Berland concluded, Crump suffered from brain damage.

[17] The prosecutor tried to discredit Dr. Isaza during the original penalty phase (TR. 497-507) and again at the first resentencing proceeding. (1S. 7) The prosecutor tried to take advantage of Dr. Berland's absence by arguing that Dr. Isaza had not examined Crump close to the time of the offense. Although Berland interviewed Crump much closer to the date of the crime, Dr. Isaza reviewed his testing, and did some additional testing in preparation for her testimony. (See Statement of Facts, supra.)

of extreme mental or emotional disturbance at the time of the offense and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. (TR. 494, 510) Thus, as in Maxwell, the evidence must be construed in favor of the reasonable theory advanced by Crump to the extent the evidence was uncontroverted at trial. There was absolutely no evidence presented that Crump did not suffer from the mental problems described by Dr. Isaza, at the time of the offense as well as at all other times.

This Court is not bound to accept the trial court's findings concerning mitigation if the findings are disproved by the evidence. In Santos v. State, 591 So. 2d 160 (Fla. 1991), the trial court rejected without explanation the unrebutted testimony of Santos's psychological experts. This Court conducted its own review of the record and determined that substantial, uncontroverted mitigating evidence was ignored. The Court reversed and remanded Santos for the judge to adhere to the procedure required by Rogers, Campbell, and Parker. On remand, the judge again imposed death. This Court vacated the death sentence and remand for imposition of a life sentence because the mitigation clearly outweighed the one aggravating factor -- the contemporaneous capital felony. Santos v. State, 629 So. 2d 838 (Fla. 1994).

Mental mitigation must be accorded a significant amount of weight based on this Court's previous decisions. See, e.g., Larkins v. State, 655 So. 2d 95 (Fla. 1995); Santos v. State, 629 so. 2d 838 (Fla. 1994); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Carter v.

State, 560 So. 2d 1166 (Fla. 1990); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986). In this case, the circumstances of the crime itself supported the 2expert's findings concerning Crump's mental health. He did not kill someone to rob them, or for other pecuniary gain. He was not seeking revenge except, perhaps, from an imaginary wrong. He was married with three young daughters. No known factors in his life would prompt him to pick up a prostitute and to strangle her. The only apparent reason was the mental health problems described by Dr. Isaza -- feelings of persecution, lack of self-esteem, lack of self-confidence in his relationships with women, paranoia, feelings of sexual inadequacies, delusions, hallucinations and "God voices," causing him to feel threatened and in danger. The most likely reason for the murder was Crump's unwarranted fear -- of something that was probably imaginary -- only in his mind. These serious mental problems, which are the only explanation for the murder, deserve great weight for that reason.

The record also contains a number of nonstatutory mitigating aspects of Crump's character. This Court recognized a number of them in its opinion:

> The record from Crump's 1989 trial reflects testimony that Crump was a slow learner; was kind, considerate, thoughtful, and playful; and was a good father and son. Crump's mental health expert, Dr. Maria Elena Isaza, testified that Crump has poor planning ability; is sensitive to criticism and rejection, especially from women; has some feeling of sexual inadequacy; may act impulsively without reflection; has psychological and emotional problems; and could have been under extreme mental disturbance when Lavinia Clark was killed. . .

Crump, 654 So. 2d at 546-47.

Michael Crump was raised without a father. (TR. 487) His

mother testified that Crump was a slow learner in school. (TR. 458-59) She described her son as "kind, considerate, thoughtful and playful." (TR. 459-60) In Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988), the court noted that a jury recommendation of life might be based in part on evidence that the defendant was "a good father as well as a good son." Michael Crump was married and had three children."' (TR. 469) His mother said he was a good son.

A desire to help others was found mitigating in Sonser v. State, 544 so. 2d 1010, 1012 (Fla. 1989). See also Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992) Campbell, 511 So. 2d at 419 n.4; Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984). Michael's sisters testified that he got along well with the family and did a lot of work around the house. He got along well with children. (TR. 463-75) He helped anyone who needed help. (TR. 463-75) A former neighbor, who was a social worker with HRS, testified that Michael visited her frequently when he was a child, helped around the house, and babysat while she went to the store. He was very good with her four children. (TR. 472-75)

Other decisions of this Court establish that a defendant's disadvantaged family background and/or his traumatic childhood and adolescence are valid nonstatutory mitigating factors. See Nibert, 574 so. 2d at 1061-62; Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989); Brown v. State, 526 So. 2d 903, 907-08, (Fla. 1988); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988); Rogers v. State,

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[18] Notably, Crump had no father, no brothers, and no sons. He was raised by his mother and sister, then married and fathered three daughters. Thus, he was around no male figures during his childhood or his adult life.

511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); see also Eddings v. Oklahoma, 455 U.S. at 115 (evidence of a difficult childhood is mitigating). Crump had the capacity to form loving relationships with his mother, sister, wife and children. (TR. 185-87, 261) See Parker v. State, 641 So. 2d 369 (Fla. 1994) (defendant's capacity to form loving relationships with family and friends worthy of jury's consideration as mitigation).

As discussed in Issue IV, supra, the trial court refused to consider additional evidence at sentencing. Had he agreed to hear this evidence, he would also have considered that Crump adjusted well to prison. Evidence of a defendant's good prison record is 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). Such evidence "necessarily implies a potential for rehabilitation and productivity in a prison setting." Kramer, 619 So. 2d at 276 n.1; Cooper v. Dugger, 526 So. 2d at 902. Additionally, had the judge read Dr. Berland's testimony, he would have been better able to determine whether the statutory mental mitigators were established. (See Issue IV)

The judge stated that, even if the mitigating circumstances were given substantial weight, "justice would still demand the death penalty," because the mitigation would still be "clearly outweighed by the statutory aggravating circumstance." (2R. 128-33) This is similar to a finding he made in his last order,[19] and

[19] In his last sentencing order, the trial judge wrote that Crump deserved 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." (1R. 40-41)

indicates that he did not really consider the mitigation. He had his mind made up. This Court, however, has refused to rely on such "alternative findings." See Geralds, 21Fla. L. Weekly at S85 n14.

In Larkins v. State, 655 So. 2d 95 (Fla. 1995), this Court remanded for a new sentencing because the trial judge failed to properly consider and evaluate the statutory and nonstatutory mitigation. Reversing Larkins for the trial court to properly consider the proposed mitigation, this Court stated as follows:

> Larkins emphasizes that he produced substantial evidence of mitigation, especially mitigation under section 921.141(6)(b), Florida Statutes (1993), which provides that: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," For example, Dr. Dee, a clinical psychologist, testified as follows:
>
> > Defense Counsel: Based upon your testing, your evaluation, your analysis, and the results of your evaluations, did you come to an opinion as to whether Mr. Larkin would have been under the influence of any extreme emotional disturbance back . . . when this offense occurred?
> >
> > Dr. Dee: Well yes. As a matter of fact, I would say that he suffered both a mental and an emotional disturbance.
>
> Although the brief sentencing order (two and one-half pages) refers to a portion of Dr. Dee's opinion (i.e., Larkins suffers organic brain damage, and his stressful condition may have caused him to fire the .22-rifle), the order does not explain whether it found any mitigating circumstances based on Dee's testimony.
>
> 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. Instead, the trial court concluded that Dr. Dee was not of the opinion that Larkins' condition was of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law. In fact, Dr. Dee testified that Larkins' organic brain disorder "impairs his capacity to control that conduct whatever he appreciates it to be."

> During sentencing, defense counsel also relied on Dr. Dee's testimony to establish other non-statutory mitigating circumstances relating to Larkins' personal history. On appeal Larkins asserts that this testimony and other evidence established that: (1) Larkins' previous conviction was not murder but manslaughter; (2) he was a poor reader; (3) he experienced difficulty in school; (4) he dropped out of school at the fifth or sixth grade; (5) the offense was the result of impulsivity and irritability; (6) he drank alcoholic beverage the night of the incident; (7) he functions at the lower 20% of the population in intelligence; (8) he came from a barren cultural background; (9) his memory ranks in the lowest one percent of the population; (10) he has chronic mental problems possibly caused by drugs and alcohol; (11) he is withdrawn and has difficulty establishing relationships. While most of these factors were identified in Dr. Dee's testimony, they were not all separately argued by counsel. However, the sentencing order reflects that the trial court summarily rejected all non-statutory mitigating circumstances: "Since no other mitigating circumstance can be gleaned from the record, the imposition of the death penalty is the appropriate sanction for the offense of First Degree Murder." This finding, as well as the lack of findings on statutory mitigation, is inconsistentwiththe evidence of mitigation contained in the record.

Id. at 100-01. In the case at hand, the trial court "summarily" dismissed the statutory mental mitigation, and found all the nonstatutory mitigation to be established. Because he failed to adequately consider and discuss the mitigation and accord it the weight it deserves, Crump's sentence of death was unconstitutionally imposed in violation of the Eighth and Fourteenth amendments to the United States Constitution. See Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddinss v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Rogers, 511 So. 2d at 534. To uphold Crump's death sentence on the basis of the order entered herein would deny Crump his basic constitutional rights guaranteed by the Eighth and Fourteenth Amendments and Article I of the Florida Constitution.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO ALLOW SENTENCING ARGUMENTS, OR TO ALLOW CRUMP TO MAKE A STATEMENT AT THE SENTENCING HEARING.

"The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 30 the final sentencing process by the judge." Engle v. State, 438 So. 2d 803, 813 (Fla. 1983) (citing Presnell v. Georgia, 439 U.S. 14 (1978); Gardner v. Florida, 430 U.S. 349 (1977); and Green v. Georsia, 442 U.S. 95 (1979)). "Although [a] defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of the criminal proceeding." Id.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddinss v. Oklahoma, 455 U.S. 104, 114 (1982); Amend. VIII, U.S. Const.; Amend XIV, U.S. Const. In reversing this case, this Court noted that, "[w]hile all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different. Crump v. State, 654 So. 2d 545, 547 (Fla. 1995). In Crump's second resentencing in this case, the trial judge sentenced Crump to death without any due process. Crump was not even afforded the right to make a statement. (2S. 3-4) Thus, Crump's death sentence was rendered in an arbitrary and capricious fashion, without due process and in violation of the Fifth, Eighth and Fourteenth Amendments.

The process in which Crump was resentenced to death was bizarre. At a "mandate hearing" on June 28, 1995, the trial judge asked defense counsel to prepared and filed a list of proposed statutory and nonstatutory mitigating circumstances." (SR. 8-9) He informed the parties that he would hear arguments of counsel and any statement the Appellant wished to make at a hearing which would be held prior to the actual sentencing. (SR. 9) Defense counsel filed four motions and the requested list of proposed mitigators on September 1, 1996. (2R. 117-19)

When the hearing date (September 5, 1996) arrived, however, the judge denied all of the defense motions, refusing to hear any argument. (2R. 28-34; SR. 21) He explained that the case was remanded for the trial court to reweigh all mitigating circumstances posed by Crump, and to then resentence him, and that was "exactly what this Court is going to do." (SR. 21-22) He said he had not yet had an opportunity to review the list of proposed mitigation, inquired whether counsel had any conflicts on the following Monday morning, and scheduled Crump's sentencing for September 11, 1996. (SR. 22) Thus, ended the hearing.

On September 11, 1995, the trial judge sentenced Crump to death at a sentencing "proceeding" which consisted only of his pronouncement of sentence. It was not a "hearing," because no one spoke, or was invited to speak, except the judge. (2S. 3-4) Nor was it a proceeding because there was no due process.

The sentencing proceeding in this case is barely more than one page long. It is double-spaced in extra large letters. (See Appendix B) It reads as follows:

P R O C E E D I N G S

THE COURT: The case of State of Florida versus' Michael Tyrone Crump, Case 88-4056-D, Trial Division 1, is on the docket for mandate resentencing. The defendant is present with court-appointed counsel, Attorney Thomas Cunningham, and Assistant State Attorney Karen Cox is present for the State.

It is the Judgment, Order and Sentence of the Court that the defendant is again adjudicated guilty of first Degree Murder, sentenced to death by electrocution as provided by the laws of the State of Florida; order to pay mandatory costs, totaling $253, allowed county jail and state prison credit covering the period March 23, 1988 to date and not ordered to pay restitution as the defendant is indigent.

The defendant is advised of his right to appeal the sentence of the Court by filing written Notice of Appeal with the clerk within the next 30 days and entitled to court-appointed counsel as he is indigent.

The bailiff will fingerprint the defendant in the Court's presence and the clerk will file the original of the Court's written sentencing order and deliver copies to State and Defense counsel.

Mr. Crump has been fingerprinted in the Court's presence. Court's adjourned.

[Proceedings were concluded.]

(2S. 3-4)

* * * * *

In its opinion remanding this case, this Court held that an allocution hearing was not required:

> 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 or 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).

Crump, 654 So. 2d at 548. Thus, Appellant did not expect and are not complaining because a full-fledged sentencing proceeding, with

new evidence and an allocution hearing was required. Nevertheless, Crump did anticipate that the "reweighing proceeding" would be conducted in accordance with due process, that counsel would be asked to make a sentencing argument, and that Crump would be invited to make a statement prior to sentencing,

It seems that a sentencing "hearing" where no one was heard but the judge, is diametrically opposed to the due process required by Florida law and by this Court -- especially when the defendant is being sentenced to death. The trial judge did not inquire as to whether counsel wished to make a sentencing argument, or whether Crump wished to make a statement. Obviously, the trial judge had already made up his mind as to the sentence, prepared his order, and was anxious file it. That's exactly what he did.

The ABA's Criminal Justice Sentencing Standards provide that, at a sentencing hearing "[t]he offender should be permitted the right of allocution." Standard 18-5.17 (a)(iv), ABA Standards for Criminal Justice Sentencing (3d ed. 1994). The accompanying commentary states as follows:

> Subparagraph (a)(iv) continues the common law right of defendants to address sentencing courts directly, generally known as the right of allocution. The right of allocution has ancient origins and is currently recognized by both federal and state law. Its preservation has been encouraged without exception by all recent model codes. The policy behind the right of allocution has more to do with maximizing the perceived equity of the process than with conveying information on which courts may rely in making findings of fact.

Id. at p. 208. Florida Rule of Criminal Procedure Rule 3.720 requires that:

> (a) The court shall inform the defendant of finding of guilt against the defendant and of the judgment and ask the defendant whether there is any lesal cause to show

> why sentence should not be pronounced. The defendant may allege and show as legal cause why sentence should not be pronounced only:
>
> (1) that the defendant is insane;
> (2) that the defendant has been pardoned of the offense for which he or she is about to be sentenced;
> (3) that the defendant is not the same person against whom the verdict, or finding of the court or judgment was rendered; or
> (4) if the defendant is a woman and sentence of death is to be pronounced, that she is pregnant.
>
> (b) The court shall entertain submissions and evidence by the parties that are relevant to the sentence. . . .

Although this rule applies to capital proceedings (see 3.720 (a) (4), above), Florida Rule of Procedure 3.780, also governs sentencing in capital proceedings. Rule 3.780 requires that

> (a) **Evidence.** In all proceedings based on second 921.141, Florida statutes, the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statutes. Each side will be permitted to cross-examine the witnesses presented by the other side. The State will present evidence first.
>
> (b) Rebuttal. The trial judge shall permit rebuttal testimony.
>
> (c) Argument. 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.[20]

* * * * *

In Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993), this Court outlined the procedure to be followed by trial courts in capital cases before sentence is imposed:

> First, the trial judge should hold a hearing to: a)

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[20] In Wike v. State, 648 So. 2d 683, 686-87 (Fla. 1994), this Court determined that the erroneous denial of the defendant's procedural right to conclude the closing argument before the jury during the penalty phase required reversal for a new penalty proceeding. Thus, it is mandatory that the trial judge follow the procedural rules in a death case.

> give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

615 So. 2d at 690-91. This Court has since determined that a reweighing, as opposed to a resentencing proceeding, does not require that the judge hear new evidence, or that an allocution hearing be held. See, e.g., Crump v. State, 654 So. 2d 545 (Fla. 1995); Davis v. State, 648 So. 2d 107, 109 (Fla. 1994) (reweighing does not entitle a defendant to present new evidence).

Perhaps the judge in Crump's case, after telling counsel that he would hold a hearing at which they could make arguments, reread this Court's opinion and decided that none of that was required. His statement when he refused to hear arguments of the defense motions indicates that he had since concluded that he was required only to reweigh the circumstances and resentence Crump to death, and that he would do nothing more than what was required.

Nevertheless, this Court has not yet approved a sentencing in which the judge is free to dispose of the due process requirement of inquiring whether there is any legal cause to show why sentence should not be pronounced. Nor has this Court approved of a sentencing with no arguments of counsel and no opportunity for the defendant to be heard prior to imposition of the death sentence.

Lucas v. State, 417 So. 2d 250 (Fla. 1982), bears some resemblance to the case at hand. The Lucas Court noted that,

> In a dialogue with counsel the trial judge expressed his belief that all this Court mandated was cleaning up the language of his order. Although this statement could have been facetious, it tends to negate any supposition that he used reasoned judgment in reweighing the factors. There is nothing in the record to demonstrate that he engaged in a reasoned consideration.

417 so. 2d at 251. The same is true in this case. This Court remanded the case and directed the trial judge to "reweigh the circumstances and resentence Crump." It stated further that, "[s]hould the trial judge impose the death penalty, he must prepare a sentencing order that complies with Campbell 's direction to expressly evaluate in the written order each mitigating circumstance that a defendant proposes." 654 So. 2d at 547. In its opinion, the Court pointed out that such a remand requires only a "reweighing," as opposed to a "resentencing," despite the above language which mandates that the judge also "resentence" Crump.

Although the Court labeled the remand a "reweighing" rather than a "resentencing proceeding," a "reweighing," of necessity, requires a resentencing. When a judge reweighs aggravators and mitigators, he must also resentence the appellant to either life or death. Thus, a reweighing must always be followed by a resentencing proceeding of some sort.[21]

Moreover, it seems that, in order to reweigh circumstances, a

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[21] 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 is a "proceeding." In this resentencing, the sentencing transcript is titled, "PROCEEDING." (2S. 3)

judge would have to reconsider them to some extent. Argument of counsel is helpful in this process. If the judge is not required to re-evaluate the aggravating and mitigating circumstances, this Court might just as well remand only for the judge to rewrite the sentence order, further explaining his former findings.

This is apparently what the trial judge did in this case. He asked defense counsel to prepare a list of proposed mitigators so that he would not have to go through the record looking for them, and would not miss any of them. To make sure he did not fail to mention any proposed mitigators, he just appended the list to his sentencing order, wrote that he considered them, found them all established, and gave them little weight. Although he failed to "discuss" the proposed mitigation, he apparently thought he had covered all the bases. (See Issue I, supra.)

In this case, Crump never had the sentencing hearing contemplated by the rules of criminal procedure before he was originally sentenced to death on March 31, 1989. (TR. 586) The judge held the sentencing hearing the day after the penalty verdict was rendered, sentencing Michael Crump to death before defense counsel had time to prepare for sentencing. (TR. 586, 695) Thus, the judge's sparse initial sentencing order was made without the benefit of sentencing evidence and little time for reflection.

In remanding this case for resentencing the first time, this Court noted that the sentencing order was unclear. 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. He did the same thing the second time. He prepared his almost equally sparse sentencing order prior to the resentencing and refused to hear new evidence. Although he allowed argument of counsel and a brief statement by the Appellant, he did not consider them because he immediately sentenced Crump to death and filed his pre-prepared sentencing order. (1R.40-41)

The judge proceeded in the same manner the third time, except that, this time, he excluded all participation by counsel and the Appellant. He asked defense counsel for a list of proposed mitigators. Prior to the instant "reweighing and resentencing" proceeding, he prepared his order sentencing Crump to death. He entered the courtroom, sentenced Crump to death, and left.

In Scull v. State, 569 So. 2d 1261 (Fla. 1990), this Court held that the trial judge's haste in resentencing Scull without allowing defense counsel time to prepare and present evidence violated Scull's due process rights. This Court stated:

> 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.
>
> 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 individuale. See Art. I, Sec. 9, Fla. Const.

569 So. 2d at 1262.[22]

Because a "reweighing and resentencing" is also a "proceeding affecting life, liberty, or property," under Scull, it would seem that it must also be conducted according to due process under Florida's Constitution. If "[t]he 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," and if "[d]ue 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," and "embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals," see Art. I, Sec. 9, Fla. Const., then certainly an individual facing an almost certain death sentence must be according the opportunity to be heard, no matter what the proceeding is titled.

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. If Crump's sentence is not reduced to life pursuant to the argument in Issue VI, infra, he must be resentenced in accordance with due process.

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[22] On Petition for Clarification, the Scull Court held that, on remand, the defendant would be permitted to present any new mitigating evidence he wished to present, and to rely on any other mitigating evidence in the record. Likewise, the state would be entitled to present new aggravating evidence and to rely on aggravating factors already in the record. 569 So. 2d at 1253).

ISSUE IV

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 THE SENTENCE WAS IMPOSED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In McKoy v. North Carolina, 494 U.S. 433 (1990), the Court held that capital sentencing schemes which preclude consideration of any mitigating factor unless the jury unanimously agrees on its existence violates the Eighth Amendment. Any aspect of the defendant's character or the circumstances of the offense may be considered as a mitigating factor. Lockett v. Ohio, 438 U.S. 586 (1978); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). Moreover, mitigating factors need not be proved beyond a reasonable doubt. Fla. Std. Jury Instr. (Crim.), at 81; Campbell, 571 So. 2d 656.

In furtherance of the above principles, the United States Supreme Court 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). Moreover, 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). To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's record and cannot ignore evidence of mitigation. Parker v. Dugger, 498 U.S. 308, 321 (1991).

In compliance with this Court's order remanding Crump for "reweighing" and "resentencing," the trial judge refused to allow the defense to present new evidence. Thus, he denied Crump's "Renewed Motion to Consider Testimony of Prior Psychologist (Dr. Robert M. Berland)" (2R. 34-35), which included a copy of Dr. Berland's penalty phase testimony from Crump's trial in his other capital case[23] (2R. 36-116), and his motion asking the Court to consider evidence of Crump's good behavior in prison (2R. 32-33), without hearing any argument, on September 5, 1996. (SR. 21-22)

Because the trial judge complied with this Court's order in refusing to consider new evidence at Crump's resentencing,[24] the trial judge cannot be faulted for his decision. Nonetheless,

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[23] In the motion, counsel alleged that Dr. Berland testified in the second phase of Crump's prior murder trial (the Areba Smith case for which he received a life sentence); that Dr. Berland was unable to testify at Crump's trial in this case because of a scheduling conflict; thus, Dr. Isaza testified in his place; Dr. Berland's testimony in the prior case was essentially the same as that of Dr. Isaza as to whether Crump was under extreme mental and emotional distress and whether Crump's ability to appreciate the criminality of his conduct and conform his conduct to the law was impaired; the judge, in his first written order, found that Crump "may" have been under extreme mental and emotional distress, and that his ability to appreciate and control his conduct "may" have been impaired; thus, Dr. Berland's testimony would substantiate Dr. Isaza's findings and testimony. (R. 34-35)

[24] In Crump v. State, 654 So. 2d at 548, the Court found that

> 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).

Appellant requests that this Court reconsider its decision in light of light of the arguments herein, and in furtherance of justice and due process. This Court has the power to reconsider and correct erroneous rulings notwithstanding that the rulings have become law of the case. Love v. State, 559 So. 2d 198, 200 (Fla. 1990); Preston v. State, 444 So. 2d 939, 942 (Fla. 1984); Strazzula v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965). Reconsideration is warranted in exceptional cases where reliance on the previous decision would result in manifest injustice. Preston, 444 So. 2d at 942.

Moreover, a death sentence is not final until it is affirmed by this Court, or a life sentence imposed. In Foster v. State, 654 so. 2d 112, 115 (Fla. 1995), this Court revisited the issue of whether the crime was "cold, calculated and premeditated," on direct appeal from a resentencing ordered for the trial court to enter a new sentencing order consistent with Rogers and Campbell. 654 So. 2d at 113, 115. The resentencing was on remand from a new sentencing proceeding based on Hitchcock error.[25] On direct appeal from the resentencing, this Court reviewed the record, including the "new evidence" presented at resentencing, to determine whether there was competent, substantial evidence to support the trial court's CCP finding. The opinion went into substantial detail concerning the facts which justified the CCP finding, concluding that it "remained convinced" that the murder was cold, calculated and premeditated. 654 So. 2d at 115.

Until a valid death sentence is imposed, the sentencer should consider the character of the defendant as it exists at the time

[25] Hitchcock v. Dusser, 481 U.S. 393, 398-99 (1987).

the sentence is imposed. Thus, evidence of the defendant's good prison record should be considered in mitigation. Skipper v. South Carolina, 476 U.S. 1 (1986); Kramer v. State, 619 So. 2d 274, 276 & n.1, 278 (Fla. 1993); Sonser v. State, 544 So. 2d 1010 (Fla. 1989); Craig v. State, 510 So. 2d 857 (Fla. 1987); Valle v. State, 502 So. 2d 1225 (Fla. 1987) (remanded for new jury recommendation and resentencing because trialcourterroneously excluded testimony concerning defendant's rehabilitation and conduct in prison). In Menendez v. State, 419 So. 2d 312 (Fla. 1982), testimony at his resentencing that he had demonstrated a capacity for rehabilitation may have made the difference between life and death.

At the last resentencing, just before the judge pronounced sentence, Michael Crump told him that since he had been in the prison system, he had not had "any No. 2 DR's in complying with things that I should do" and was "trying to rehabilitate myself." (lRS. 22) This is exactly the kind of evidence this Court found mitigating in Songer, 544 So. 2d 1010.

"[T]he only limitation on introducing mitigating evidence is that it be relevant to the case at hand . . . ." King v. State, 514 So. 2d 354, 358 (Fla. 1987); see also O'Callaghan v. State, 542 so. 2d 1324 (Fla. 1989). The evidence Appellant proffered was clearly relevant to the sentence he should receive. He wanted to present compelling evidence to substantiate the mental mitigators, and the connection between his criminal behavior and the type of mental problem which produced it. This is precisely the type of evidence this Court has found to be mitigating in a number of cases. See, e.g., DeAngelo v. State, 616 So. 2d 440, 443 (Fla.

1993) (sentence reduced to life based, in part, on Dr. Robert M. Berland's testimony concerning defendant's mental disorders); Scott v. State, 603 So. 2d 1275 (Fla. 1992); Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (sentence reduced to life in part because of mental mitigators established by Dr. Sidney Merin's testimony); Santos v. State, 591 So. 2d 160 (Fla. 1991); Carter v. State, 560 so. 2d 1166 (Fla. 1990); State v. Sireci, 502 So. 2d 1221 (Fla. 1987) (evidentiary hearing required to determine whether two psychiatrists appointed before trial conducted competent evaluations); Mason v. State, 489 So. 2d 734 (Fla. 1986).

In Engle v. State, 438 So. 2d 803 (Fla. 1983), this court noted that, at a capital sentencing, "a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations. Id, at 813 (citing Swan v. State, 322 So. 2d 485 (Fla. 1975). Dr. Berland's transcribed testimony was tantamount to a psychological report. It included cross-examination by Assistant State Attorney Atkinson, known for handling capital cases in the Hillsborough County prosecutor's office. Moreover, the State made no objection to Dr. Berland's testimony and made no request to present any psychiatric or other evidence. In fact, at the prior resentencing, the prosecutor told the judge that she agreed that defense counsel was entitled to present new evidence.

Dr. Berland's testimony was exactly what the trial judge needed to avoid writing another nebulous sentencing order. By comparing the three sentencing orders written by this trial judge, one can see his continued ambiguity concerning the statutory mental

mitigation. In his first order, he found that the mental mitigators "may have been" established.[26] (TR. 690-91) In his second order, he found that, Crump "suffered from mental impairment not reaching the statutory standards of mental mitigation." (1R. 40-41) In his third order, in this resentencing, he combined the two previous findings, concluding that the defense "failed to reasonably establish statutory mental mitigation at the time he manually strangled the victim to death." 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."[27] (2R. 129) The bottom line, therefore, is that the judge is unable to determine whether Crump was mentally impaired at the time of the offense, based upon his interpretation of Dr. Isaza's testimony.

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[26] The trial judge's findings, as to the mental mitigation, were as follows:

> 1. The capital felony for which the Defendant is to be sentence was committed while he may have possibly been under the influence of extreme mental or emotional disturbance as evidenced by expert testimony in the case.
>
> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law may have possibly been substantially impaired as evidenced by expert testimony in the case. (R. 691)

[27] The judge also noted that Crump denied having committed the offense after his conviction by the jury. He must have drawn this conclusion from Dr. Isaza's testimony, because Crump did not testify. In any event, we fail to see what this has to do with whether or not the mental mitigators were established, unless he meant that Crump did not explain why he committed the crime. (2S. 129)

What better reason could the judge have found for considering Dr. Berland's testimony which, this time, he had in front of him.

The problem is that Dr. Isaza, nor the trial judge, were present when Crump committed the crime. Thus, neither they, nor anyone else can say for certain what Crump's mental condition was at the time of the offense. This is true, of course, in every case. No expert witness can be certain. Because there is seldom an eye-witness, and certainly not one with the psychiatric expertise to determine the defendant's mental condition, most expert witnesses extrapolate from the evidence, testing, interviews with the defendant and family members, and other findings, and thus decide, within a medical certainty, what the defendant's mental state was at the time of the offense.

This is what Dr. Berland did. Although he was not present when Crump committed the crimes, he extrapolated that Crump's genetic disturbance and his brain damage (each severe) made him unable to make rational decisions about his behavior or to exercise the control necessary to conform his behavior to the requirements of law. This was also the basis for Dr. Berland's conclusion that Crump was under extreme mental or emotional distress when he committed the offense. (2R. 78-80) Genetic disturbances and brain damage are disorders which affect a person's thinking and behavior all of the time -- thus, they would have affected Crump's behavior at the time he committed the homicide in this case.

Dr. Berland's extensive testimony would have been extremely helpful in determining whether Crump met the required criteria for the statutory mental mitigators. He administered psychological

testing and interviewed Crump in the jail. He reviewed police documents, reports and depositions; and interviewed lay witnesses in the community who knew Crump prior to the offense. (2R. 48) He talked with Crump's sisters, mother, and mother-in-law, who gave him information consistent with his conclusions. (2R. 111, 113)

Dr. Berland testified that Crump reluctantly admitted to ideas which were distinctly unrealistic, or psychotic. For example, he believed that people were following him or talking about him with the intent to harm him. He had hallucinations. He had heard an unknown voice which, at age twenty, he came to recognize as the voice of God, telling him to do things and warning him of things. A deep male authoritative voice would warn him of things which would happen a short time later. He thought people were pointing, yelling, and making threatening gestures as he drove by. He believed he had evidence of conspiracies to harm him. He believed that he could communicate with his wife when they were apart by both of them having the same thoughts simultaneously. (2R. 56)

On the other hand, Crump denied some of the more common psychotic symptoms. He did not believe the TV was talking to or about him. He did not believe he could send his thoughts to others or that others could put thoughts in his head. He denied hearing his name called when alone, or having visions. He denied having manic periods when he could not sleep for days or depressed periods when he felt so listless he could not get out of bed. (2R. 57)

Crump refused to give Dr. Berland pertinent information about people he had known in the community. Dr. Berland told him it looked as though he had something to hide and vaguely suggested

that he might be paranoid. Crump became so angry that he refused to talk to Dr. Berland any more and ended the interview. This indicated that Crump was not faking and did not want to be diagnosed as mentally ill. Dr. Berland said that most fakers say "yes" to every symptom he suggests; Crump did not do so. Thus, he believed Crump's symptoms were genuine. (2R. 57-58)

Dr. Berland administered the Minnesota Multiphasic Personality Inventory (MMPI). (2R. 58-59) He also administered the Rorschach "ink blot" test, the Wechsler Adult Intelligence Scale (WAIS), and the Bender-Gestalt with Cantor's Background Interference Procedure. (2R. 60) The MMPI clearly showed a psychotic profile. Crump had major mental illness of biological origin -- paranoia. As many paranoids do, he tried to hide his mental illness. Nevertheless, the mental illness was obvious from the test. Crump was energized and impulsive and, thus, likely to be dangerous because he would act on his disturbed and bizarre impulses and ideas. (2R. 64)

The WAIS showed that Crump's overall IQ was 86, which is at the bottom of the normal or average range. Thus, his intelligence bordered on the subnormal. Although his verbal IQ was only 78, his performance IQ was 99. Verbal IQ represents left cerebral cortical functioning. The left part of the cerebral cortex is involved with detailed, rational, conscious, voluntary activities. Performance IQ represents the right cerebral cortical functioning. A normal person has uniform functioning throughout the brain. Crump's verbal and performance IQs were very different. (2R. 65-67)

The WAIS test contains eleven subtests which more purely reflect left and right hemispheric functioning. These subtests

showed that the difference between Crump's verbal and performance scores was even more extreme. Based on the subtests, Crump's prorated verbal score was 76 and his prorated performance score was 107. These scores reflected left frontal hemisphere impairment. The configuration of the subtests was very typical of brain damage, and suggested that Crump had been brain damaged for a long time, possibly from birth, or from early childhood. It suggested that Crump also had a right hemisphere deficit, or damage to the right temporal hemisphere. Thus, Crump appeared to have "bilateral brain damage of some significance." (2R. 67-69)

The Bender-Gestault determines brain damage of recent origin. In Crump's case, it showed no evidence of the brain damage which indicated to Dr. Berland that Crump's brain damage was of long duration, originating either prenatally, at birth, or during early childhood. (2R. 70) This is because a person with long-standing brain damage learns to cope with it in some ways, and the Bender-Gestault test is not sensitive enough to overcome the coping mechanism; thus, it will not register long-standing brain damage. (2R. 102) This does not mean that the brain damage does not exist, or that the person is not impaired by it. (2R. 115)

Dr. Berland's diagnosis was that Crump suffered from a number of problems. Principally, he had schizophrenia, paranoid type. He also had brain damage and organic personality syndrome. (2R. 70)

A psychotic disturbance, such as paranoid schizophrenia, is a significant factor in a person's thinking and judgment. It affects the person's ability to make rational judgments. (2R. 72) Although the person may sometimes function normally, a certain circumstance

may provoke a reaction caused by his bizarre thoughts. The person believes the bizarre thoughts because his or her brain does not work right. Chemicals in the brain are out of balance and nerve transmitters and nerve sites don't work properly. How much it shows varies from person to person. (2R. 73)

Paranoid schizophrenics are quick to perceive themselves as mistreated or under attack. They are very vigilant, or inordinately watchful, and careful to take precautions to avoid harm. They are typically afraid of crowds; and careful to avoid letting anyone know they have paranoid thoughts, because they are afraid people may consider them crazy and want to lock them up. (2R. 73-74)

Brain damage commonly creates some thought disorder, "crazy thinking," and/or affective disorders, and mood or emotional disturbances. It diminishes the person's ability to control impulses and to make judgments about whether it is appropriate to do things that come to mind, or to control impulses. (2R. 75)

Dr. Berland opined that Crump was sane at the time of the offense (2R. 75), but harbored delusions. He believed that he was only seeing the tip of the iceberg. Crump made repeated references to intensified, delusional, psychotic religious beliefs. He seemed to have a magical belief that God would intercede on his behalf as to the trial and its outcome. (2R. 78)

Dr. Berland believed Crump was under the influence of extreme mental and emotional disturbance at the time of the offense, that he could appreciate the criminality of his conduct, but his ability to conform his behavior to the law was substantially impaired. He opined that the combination of Crump's genetic disturbance and his

brain damage (each severe) were a significant factor in his behavior. (2R. 78-79) The brain damage made him unable to make rational decisions about his behavior or exercise the control necessary to conform his behavior to the requirements of law. This was also the basis for Dr. Berland's conclusion that Crump was under extreme mental or emotional distress when he committed the offense. (2R. 80)

Berland said that a psychotic paranoid schizophrenic disorder is usually present from birth but does not manifest itself until later. It eventually comes out regardless of the person's life circumstances. He opined that the organic brain damage contributed to Crump's impulsivity and poor judgment, and also to the paranoid disturbance. It was a factor in his becoming psychotic. (2R. 111)

In every criminal case, the Constitution guarantees the right of the accused to have witnesses testify in his favor. Washington v. Texas, 388 U.S. 14 (1967). Florida Rule of Criminal Procedure 3.720(b) requires the court at every sentencing to "[e]ntertain submissions and evidence by the parties which are relevant to the sentence." This provision is mandatory, and should apply to a resentencing as well as an original sentencing, especially when the sentence is death. Florida Rule of Criminal Procedure 3.780, which specifically pertains to capital cases, like its counterpart which pertains to sentencings in general, requires the court to entertain evidence relevant to the sentence the defendant should receive. See also § 921.141(1), Fla. Stat. (1993).

This Court has determined that, although the defense must be permitted to present new evidence in mitigation at a resentencing

proceeding, see, e.g., Scull v. State, 569 So. 2d 1251 (Fla. 1990); Lucas v. State, 490 So. 2d 943 (Fla. 1986), it is not required at a mere "reweighing," see. e.q., Davis v. State, 648 So. 2d 107, 109 (Fla. 1994). The distinction between a reweighing and a resentencing becomes blurred when one considers that a reweighing by definition requires a resentencing, a resentencing by definition requires a proceeding, and a proceeding requires due process.

By analyzing the cases, we have attempted to determine when an evidentiary resentencing proceeding is required and when a mere reweighing, which apparently requires only a new sentencing order and the pronouncement of sentence, is sufficient. Although the Court explained the meaning of the terms "reweighing" and "resentencing," and what each requires, in Lucas v. State, 490 So. 2d 943 (Fla. 1986), the criteria this Court uses to determine whether to remand for reweighing or resentencing remains unclear. In Lucas, this Court stated that:

> Our terminology in remanding for resentencing has varied from case to case. E.g., Douqan v. State, 470 So. 2d 697, 702 (Fla. 1985) (remanded "for a new sentencing hearing with a new jury"); Lucas II, 417 So. 2d at 252 (remanded "to the trial judge to conduct a new sentencing proceeding"); Ross v. State, 386 So. 2d 1191, 1198 (Fla. 1980) (remanded "for sole purpose of allowing the trial court to reconsider the imposition" of the death sentence); Lucas I, 376 So. 2d at 1154 ("remanded for resentencing without benefit of a new sentence recommendation by a jury"); Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979) (remanded "for resentencing by the trial court"); Riley v. State, 366 So. 2d 19, 22 (Fla. 1978) (same as Ross); Elledse v. State, 346 So. 2d 998, 1004 (Fla. 1977) ("remanded to the trial court for a new sentencing trial to be held in accordance with the views expressed herein"). Given our varied terminology, we have allowed trial courts to exercise discretion in resentencing. . . .
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> In Mann v. State, 453 So. 2d 784, 786 (Fla.1984), cert. denied, --- U.S. ----, 105 S.Ct. 940, 83 L.Ed.2d

> 953 (1985), however, we said: "Our remand [Mann v. State, 420 So.2d 578, 581 (Fla. 1982)] directed a new sentencing proceeding, not just a reweighing. In such a proceeding both sides may, if they choose, present additional evidence." In Lucas II we remanded for a new sentencing proceeding. Therefore, although we find that the new trial judge did not err by not empaneling a new jury, we find that both sides should have been allowed to present additional testimony and argument.

490 So. 2d at 945.

It is apparent that a new jury need not be empaneled when the error did not occur until the sentencing by the judge, and did not taint the jury recommendation. For example, when the sentencing order is deficient, as in this case, a new penalty proceeding with a new jury would not be required. The question is when a resentencing proceeding, which requires the judge to hear new evidence is required, and when a reweighing, which does not require the judge to hear new evidence, is required. The cases reveal no criteria upon which the Court bases its decision as to which is required.

In Lucas III, discussed above, the case was remanded by this Court because the trial judge had not exercised a reasoned judgment in weighing the aggravating and mitigating factors on remand. This Court ordered a new sentencing proceeding. 490 So. 2d at 944. The trial judge merely reviewed old transcripts and again sentenced Lucas to death. On appeal, this Court agreed that the trial judge erred by not allowing Lucas to present additional mitigating evidence, and that both sides should have been allowed to present additional testimony and argument at the "resentencing proceeding." Id. at 945. It seems that, in Crump, in which the trial judge erroneously found the CCP factor, and failed to adequately make a reasoned judgment in weighing the aggravators and mitigators, a

sentencing proceeding with new evidence would be just as necessary, if not more so, than in Lucas II.

In Lucas v. State, 613 So. 2d 408 (Fla. 1992) (Lucas IV), however, the Court reversed because the trial court's written findings were unclear, and, for some reason, directed the court only to "reconsider and rewrite those findings." Although the problem seems similar to that in Lucas III, in Lucas IV, the trial court was merely told to rewrite his findings, spelling out his reasoning. Nevertheless, the trial court took 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, which had been submitted to him, and wrote an eighteen-page order.[28] Unlike the case at hand, he made a conscientious effort to properly reconsider and reweigh the circumstances before deciding on the proper sentence.

In the case of Davis v. State, 648 So, 2d 107, 109 (Fla. 1994), this Court found two aggravating factors invalid, and remanded for the trial judge to "reweigh the evidence in light of our opinion and to impose the appropriate sentence." Although this is similar to Lucas II, this Court held that it did not require the trial judge to consider additional mitigating evidence on remand because it was merely a "reweighing."

Crump is more compelling than Davis because, in Crump, the Court not only struck the CCP aggravating factor, but also found

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[28] In the instant case, the court also refused to consider evidence that Crump had adjusted well to prison. (See Issue IV)

the sentencing order confusing and unclear. The trial court was required to both reweigh the mitigators and aggravators after eliminating CCP, and to resentence Crump after reconsidering the mitigation, and clarifying its sentencing order. Although the final mandate was to "reweigh the circumstances and resentence Crump," the opinion in its entirety broadened order by requiring the judge to reconsider the mitigation. See Crump v. State, 622 So. 2d at 973. The need for new evidence is even more compelling now because the trial judge seems as confused now as he was when he wrote his first sentencing order.

In Davis, although the 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." 649 So. 2d at 109. In the case at hand, the record and the court'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.

In Scull v. State, 533 So. 2d 1137 (Fla. 1988), the Court remanded for the trial court to conduct "proceedings without a jury" and to render a new sentencing order, because the judge considered inappropriate aggravators and a victim impact statement. 533 So. 2d at 1143-44. Following remand, in Scull v. State, 569 so. 2d 1261 (Fla. 1990), this Court held that the trial judge's haste in resentencing Scull without allowing defense counsel time to prepare and present evidence violated Scull's due process

rights. Thus, although the problems seem similar to those in Lucas IV, Davis, and Crump, this Court considered the remand as requiring a whole new sentencing proceeding. This Court stated:

> 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.[29]

Because a "reweighing and resentencing" is also a "proceeding affecting life, liberty, or property," under Scull, it would seem that it must also be conducted according to due process under Florida's Constitution. If "[t]he 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," and if "[d]ue process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration

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[29] On Petition for Clarification, the Scull Court held that, on remand, the defendant would be permitted to present any new mitigating evidence he wished to present, and to rely on any other mitigating evidence in the record. Likewise, the state will be entitled to present new aggravating evidence and to rely on aggravating factors already established in the record. 569 So. 2d at 1253 (emphasis added).

of issues advanced by adversarial parties," and "embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals," see Art. I, Sec. 9, Fla. Const., then certainly a defendant facing a death sentencing at a "reweighing and resentencing" proceeding must be according the opportunity to be heard. As this Court stated in Scull, 569 So. 2d at 1252, "Haste has no place in a proceeding in which a person may be sentenced to death,"

This error was clearly not harmless. Had the trial judge considered Dr. Berland's testimony, he might have found the two mental mitigators established and deserving of great weight. Even if it did not change his sentencing decision,[30] this Court might have a clearer and more detailed written sentencing order to review, and would more easily be able to make a proportionality analysis and remand for a life sentence. Accordingly, if Crump's sentence is not reduced to life, this Court must vacate his death sentence and again remand the case for a proper resentencing in accordance with the Eighth and Fourteenth Amendments.

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[30] See Geralds v. State, 21 Fla. L. Weekly S85, 85 n.14 (Fla. Feb. 22, 1996), in which this Court stated that it would not rely solely on the trial judge's finding that even if this Court found the CCP aggravator unsupported by the evidence, the remaining two aggravators would still outweigh the mitigating factors, making death still an appropriate sentence.

ISSUE V

THE TRIAL COURT ERRED BY FAILING TO PERMIT DEFENSE COUNSEL TO INTERVIEW THE JURORS, AND BY FAILING TO EMPANEL A NEW JURY AND HOLD A NEW PENALTY PROCEEDING BECAUSE THE JURY WAS INSTRUCTED TO CONSIDER THE COLD, CALCULATEDAND PREMEDITATED AGGRAVATING FACTOR, WITHOUT A LIMITING INSTRUCTION, AND WHICH THIS COURT FOUND TO BE INAPPLICABLE.

Prior to this second resentencing, defense counsel filed a motion for a new sentencing phase trial with a new jury. (2R. 28-29) He alleged that (1) the trial court had instructed Crump's jury on the CCP aggravating factor; (2) this Court had ruled that the CCP aggravator was invalid; (3) the jury must have considered the CCP jury instruction in reaching its sentencing recommendation; (4) because the jury made no findings as to what aggravators it found or the weight given them, it cannot be determined what weight, if any, the jury gave the CCP aggravator; and (5) the weight accorded this circumstance would have been a deciding factor in the jury's eight to four death recommendation. (2R. 28)

Contemporaneously, defense counsel filed a motion requesting permission to interview the jurors from Crump's trial and penalty phase to determine whether, and to what extent, they relied on the CCP aggravating factor in making their death recommendation. (2R. 30-31) Pursuant to his motion, counsel asked to interview the jurors because (1) the trial court instructed the jury on CCP; (2) the jury recommended death by an eight ta four vote; (3) the defense filed a motion for a new sentencing phase trial; and (4) because this Court found the CCP aggravator invalid, counsel needed to determine what impact, if any, the CCP instruction had on the

jurors' recommendation to impose the death penalty. (2R. 30) The judge refused to hear argument, and denied both motions. (SR. 22)

In its opinion remanding this case, this Court held as follows as to the first of these two defense motions:

> 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.

Crump v. State, 654 So. 2d at 548. Although this Court held that a new penalty phase trial was not warranted, had the judge granted the defense motion to interview jurors, defense counsel might have been able to show that some or all of the eight jurors who voted for the death penalty relied heavily on the invalid CCP aggravating factor, and would not have recommended death otherwise. To make matters worse, the jurors at Crump's penalty trial were instructed on the CCP aggravating factor, over defense objection, without a limiting definition as required by this Court in Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994) (CCP standard jury instruction unconstitutionally vague).

In Foster v. State, 654 So. 2d 112, 115 (Fla. 1995), this Court revisited the issue of whether the crime was "cold, calculated and premeditated," on direct appeal from a resentencing to determine whether the court's failure to give a limiting instruction required reversal or constituted harmless error. This Court reviewed the record, including the "new evidence" presented at resentencing, and determined that there was competent, substantial evidence in the record to support the trial court's CCP finding.

654 So. 2d at 115. Foster supports the proposition that this Court can revisit an issue on resentencing when necessary to ensure that the death penalty is not unconstitutionally imposed in an arbitrary and capricious fashion.

In its opinion remanding for resentencing, this Court also rejected Crump's argument that he should be given a new penalty phase trial with a new jury because the trial court did not give a limiting instruction to the jury. The Court held as follows:

> 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.
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> 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 isunconstitutionally 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, 130 L. Ed.2d 887 (1995).
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> 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.[31]

Crump, 654 So. 2d at 548.

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[31] [fn 5) On direct appeal, this Court declined to address this issue because it found that the State failed to prove CCP beyond a reasonable doubt. Crump, 622 So. 2d at 972.

Although this Court rejected a similar argument in Davis v. State, 648 So. 2d 107, 109 (Fla. 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, it must be presumed that the jury found and weighed the invalid circumstance. Espinosa v. Florida, 505 U.S. 1079 (1992). Because the judge is required to give great weight to the jury recommendation, the court indirectly weighs the invalid circumstance. The result creates the potential for arbitrariness in the imposition of the death penalty. Thus, 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, 648 So. 2d 85; Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

Although, as the Court noted, Crump did not properly preserve this issue by objecting to the CCP instruction and requesting a specific limiting instruction, as the time of Crump's trial (1989), defense counsel apparently did not foresee that this Court would later change its position on the constitutionality of the vague CCP instruction.[32] Even though the unduly vague instruction is not a

[32] The Jackson Court barred claims that the CCP instruction was unconstitutionally vague unless a specific objection was made at trial and pursued on appeal. Id. at 90; see also Sochor v.

valid ground for a new penalty proceeding because it was not properly preserved at trial, it still bears on the likelihood that the jurors erroneously relied on and gave weight to the CCP aggravating factor which this Court found clearly inapplicable. Crump, 622 So. 2d at 972. See e.g., James v. State, 615 So. 2d 668, 669 (Fla. 1993) (Court ordered new jury penalty proceeding because, although the trial court's consideration of an invalid aggravator was harmless error, Court could not say beyond a reasonable doubt that invalid instruction did not affect jury recommendation); Omelus v. State, 584 So. 2d 563 (Fla. 1991) (Court reversed for resentencing before new jury because the trial court erroneously instructed jury on the HAC factor, even though judge did not find aggravator established in his written order); see also Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (reversed for resentencing with new jury for same reason); Bonifav v. State, 626 So. 2d 1310 (Fla. 1993) (reversed for new jury penalty proceeding).

Under these circumstances, 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 imposing the death penalty. Weighing an invalid aggravator

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State, 619 So. 2d 285, 290-91 (Fla. 1993) In this case, although trial counsel did not request a limiting instruction, he filed a pretrial "Motion to Declare Statute Unconstitutional Because CCP Aggravating Factor Too Vague" (TR. 643). He also objected to the court's instructing the jury on the CCP aggravating factor during the penalty proceeding. (TR. 514, 564) Appellatecounselarguedon direct appeal following Crump's original sentencing and after his first resentencing, that the CCP instruction given was unconstitutionally vague. See Crump, 622 So. 2d at 972.

violates the Eighth Amendment. Espinosa v. Florida, 505 U.S. 1079 (1992). An aggravating circumstance is invalid if it is so vague that it leaves the sentencer without sufficient guidance for determining the presence or absence of the factor. When the jury is instructed that it may consider such a vague aggravating circumstance, it must be presumed that the jury found and weighed an invalid circumstance. Because the sentencing judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly weighs the invalid circumstance. The result of this process is error because it creates the potential for arbitrariness in imposing the death penalty. Id.; see also Kearse v. State, 662 So. 2d 677, 686 (Fla. 1985); Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994) (under Florida's sentencing scheme which requires that trial court give great weight to jury recommendation, trial court indirectly weighs invalid aggravating factor that we must presume jury found). Because the indirect weighing of an invalid aggravating factor created the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, the result was error. Jackson, 648 So. 2d at 90 (citing Espinosa).

Because the jurors in this case were not informed of the limiting construction this Court placed on the CCP aggravating factor they would have been unduly influenced by the prosecutor's closing argument. The prosecutor stressed the CCP factor in her penalty closing, arguing by analogy to Williams Rule evidence presented concerning the Areba Smith murder. (TR. 521) The argument was logically unsound because the killing of Areba Smith did not occur until ten months after the instant homicide.

Moreover, this Court found that the trial judge should not have relied on the Williams Rule evidence to show that Crump premeditated the crime, and that the State failed to prove that Crump planned to kill the victim before inviting her into his truck. Crump, 622 So. 2d at 973.

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 in the record. The Court noted that the jury may have erroneously believed the defendant's sexual abuse of the corpse supported the CCP factor. Similarly, in Crump's case, the jury may have believed that the Williams Rule evidence supported the CCP aggravating factor, especially in light of the prosecutor's closing argument telling the jurors to base their decision on the collateral crime evidence.

Precedent for now ordering a new penalty proceeding was established in Lucas v. State, 490 So. 2d 943 (Fla. 1986). In Lucas, the judge refused Lucas' requests for a new jury and, as in this case, for permission to present additional evidence. Instead, the judge reviewed the old transcripts and again sentenced Lucas to death. On appeal Lucas claimed, and this Court agreed, that the judge erred by not allowing him to present additional evidence. Id. at 945. Additionally, in the original proceedings, he instructed the jury only on the statutory mitigating circumstances which, since the original proceedings, had been found to be error. See Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). The Lucas Court decided it would rather have the case straightened out at the time than, possibly, in the far future in

a post-conviction proceeding, so remanded for a completely new sentencing proceeding before a newly empaneled jury. 490 So. 2d at 946. In Crump's sentence is not reduced to life (see Issue VI, infra), the Court should do the same in this case.

In the Florida scheme of attaching great importance to the jury recommendation, it is critical that the jury be given adequate guidance. Although a Florida jury recommendation is advisory rather than mandatory, it is a "critical factor" in determining whether a death sentence is imposed. LaMadline v. State, 303 So. 2d 17, 20 (Fla. 1974); see also Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987) (In Florida, "capital sentencing jury's recommendation is an integral part of the death sentencing process"); Tedder v. State, 322 So. 2d 908 (Fla. 1975) (trial court required to give jury recommendation great weight). Because the jury was erroneously instructed on CCP, with no limiting definition, and because this Court found that CCP was not established, Michael Crump's death sentence was clearly unreliable, thus violating his constitutional rights under the Eighth and Fourteenth amendments. See Espinosa v. Florida, 505 U.S. 1079 (Fla. 1992) (if weighing state such as Florida decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstance); Godfrey v. Georgia, 498 U.S. 1 (1990); Riley v. Wainwright, 517 So. 2d 656, 658-59 (Fla. 1988) (if jury's recommendation, upon which judge must rely, results from unconstitutional procedure, entire sentencing process is tainted).

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.

Part of this court's function in capital appeals is to review the case in light of other decisions to determine whether the punishment is too great. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied sub. nom., 416 U.S. 943 (1974). The trial court found only one aggravating factor in this case -- that Crump committed a prior violent felony -- to which he correctly gave great weight, and a substantial amount of nonstatutory mitigation. Actually, both statutory mental mitigators were supported by substantial unrebutted testimony, and should also have been accorded great weight. Defense counsel enumerated seventeen nonstatutory mitigators which this Court has found to be mitigating, and which the trial court agreed had been established to a reasonably certainty, and were mitigating in nature. He lumped them all together, however, and accorded them "little weight." (See Appendix A) Nevertheless, the statutory and nonstatutory mitigation is significant.

The Court has affirmed death sentences supported by only one aggravating factor only in cases where there is "either nothing or very little in mitigation." White v. State, 616 So. 2d 21 (Fla. 1993); Nibert 574 So. 2d 1059, 1163 (Fla. 1990); Sonser v. State, 544 so. 2d 1010, 1011 (Fla. 1989). This case is not in that category because of the significant mitigation.

The one aggravating factor in this case the prior violent or other capital felony aggravator. Michael Crump was convicted of

killing another prostitute, in a similar manner, some months after the instant homicide. Also supporting the prior violent felony murder are an aggravated assault and three counts of aggravated battery. (2R. 128) These prior felonies are not deserving of much weight, however, because they all resulted from one incident, and were committed without a firearm. (TR. 533) Thus, Crump may have been involved in a fight in which he felt threatened.

The prior capital conviction, however, is admittedly very significant, and deserving of great weight. This Court seldom reduces a sentence to life when the defendant had committed a prior murder. The question, however, is whether the a prior first-degree murder is so significant that no amount of mitigation will outweigh it. It would seem that, if this were the case, Florida's death penalty statute would contain a "two strikes and you're out" provision, mandating the death penalty after a second first-degree murder, to avoid the necessity of having a penalty proceeding and weighing aggravators and mitigators.

This Court has stated that "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). The United States Supreme Court has consistently overturned cases in which the mitigating evidence was ignored. Id. Thus, it appears that more than one homicide conviction does not automatically mandate the death penalty. See e.g., Kramer v. State, 619 So. 2d 274 (Fla. 1993) (defendant killed another man in a similar fashion, but was convicted of attempted

murder before the victim died of his injuries); Cochran v. State, 547 So. 2d 928 (Fla. 1989) (defendant killed man during drug deal four days earlier); Fead v. State, 512 So. 2d 176 (Fla. 1987) (override improper despite defendant's prior murder conviction).

Although the Court affirmed the death sentence in Duncan v. State, 619 So. 2d 279 (Fla. 1993), discussed infra, in part because of a prior murder, it vacated the death sentence in Kramer, 619 So. 2d 274, also discussed infra, who had committed a prior murder and also had two aggravating circumstances. Both had jury death recommendations. In Cochran v. State, 547 So. 2d 928 (Fla. 1989), the jury was not told that the defendant committed another homicide (killed a drug dealer during a robbery) four days before the one for which he was on trial. 547 So. 2d at 934. Without this knowledge, the jury recommended life. The judge imposed the death penalty, primarily because of the second homicide. Reducing the sentence to life, this Court determined that the judge correctly considered the prior homicide in weighing the aggravating and mitigating factors, but found that the extensive mitigation in the case made the jury's recommendation reasonable, despite three valid aggravating factors. 547 So. 2d at 934 (Erlich, C.J., dissenting). Although the Court found the mitigation extensive, the psychiatrist who testified at his penalty trial did not find that Cochran was extremely mentally or emotionally disturbed or that his ability to conform his conduct to the requirements of law was substantially impaired. 547 So. 2d at 928 (Erlich, C.J., dissenting).

This Court has reduced sentences to life in numerous cases in which the defendant killed more than one person contemporaneously.

See e.g., Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (wife and man he believed raped her); Santos, 629 So. 2d 838 (live-in girlfriend and two-year-old child); Maulden v. State, 617 So. 2d 298 (Fla. 1993) (ex-wife and boyfriend); Garron v. State, 528 So. 2d 353 (Fla. 1988) (wife and step-daughter); Masterson v. State, 516 So. 2d 256 (Fla. 1987) (two people in apartment); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (double murder of a mother and her eleven-year-old daughter who were stabbed and sexually battered); Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (father and five-year-old nephew). In all of these cases, the aggravators were outweighed by mitigation, and the sentences were reduced to life.

Although this is obviously a borderline case because of Crump's prior murder conviction, we believe that the sentence should be reduced to life for the following reasons:

1. The trial court found only one aggravating factor and substantial mitigation.

2. Michael Crump committed both murders because of serious mental problems which were beyond his control.

3. The statutory mental mitigators were unrebutted and, although the trial judge refused to consider his testimony, were substantiated by Dr. Berland whose diagnosis was brain damage and a genetic paranoid psychotic disorder.

4. Neither homicide was committed for financial gain. There was no evidence that Crump took anything of value from either of the victims, or was paid by anyone to commit the crimes.

5. The crimes were not premeditated, but were crimes of passion precipitated by a real or imaginary threat. The threat caused a spontaneous, involuntary rage that Crump could not control due to his paranoid personality disorder and other mental problems.

6. The homicides were not contract killings, drug-related killings, or mafia hits; Crump was not involved in organized crime or drug-related activities.

7. Neither of the victims was tortured or mutilated by the defendant. There was no evidence that Crump enjoyed killing.

8. Although Crump was first convicted of the Areba Smith murder, Smith was not actually killed until some months later; thus, although Crump had not previously committed the other capital felony when he killed Clark.

9. Crump was not a "gangster" or a "drifter," but, rather, was a family man, married with three children, a mother and sisters who loved him; he provided for his family and treated them well.

10. Although the trial court refused to hear new evidence, Crump related that he had adjusted well in prison and was not a disciplinary problem.

11. The jurors recommended death by only an 8 to 4 vote; thus, at least four jurors did not believe that the death penalty was warranted in this case, despite their knowledge of Crump's prior murder conviction.

12. Crump received a life recommendation and a life sentence for the subsequent homicide, following a trial at which Dr. Berland testified; thus, if his sentence is reduced to life in this case, he will serve a mandatory minimum of 50 years in prison.

* * * * *

Even in cases in which the defendant killed more than one person, this Court has accorded great weight to mental mitigation when the crime was committed impulsively by a defendant who suffered from a mental disorder rendering him temporarily out of control. See e.g., Santos v. State, 629 So. 2d 838 (Fla. 1993); Maulden, 617 So. 2d 298; Garron v. State, 528 So. 2d 353 (Fla. 1988); Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Amazon v. State, 487 So. 2d 8 (Fla. 1986).

Michael Crump's crimes appear to have been impulse killings committed in connection with sexual acts. Crump suffered from feelings of sexual inadequacy, or that his manhood depended on his sexual performance. (TR. 490) When he felt threatened, he believed he was being persecuted, exploited and diminished, and might react violently, impulsively and without reflection. He was extremely

sensitive to rejection and criticism, especially from women. (TR. 489) Thus, Michael Crump probably killed Lavinia Clark because he felt threatened attacked, either literally or in his mind, and he lost control. (1S. 22) Crump was not capable of much planning; thus, if he killed someone, he would have done it on the spur of the moment. (TR. 505-06)

The record contains no specifics concerning the strangling of Lavinia Clark because Crump's conviction was based on Williams Rule[33] evidence. Crump admitted to the police only that he once picked up Clark in his truck; they had a disagreement; and he stopped and pushed her out of his truck. (TR. 356-57) Crump told the judge at the prior resentencing that his offenses were resulted from his being threatened or attacked in some way. (1RS. 22)

As to his earlier conviction for the subsequent strangling of Areba Smith, the only evidence of motive was Crump's confession that he choked Smith, also a prostitute, after she became frustrated and pulled a knife on him because the "blow job" was taking too long. (TR. 266-67) Dr. Isaza supported this conclusion by her testimony that Crump suffered from "hypervigilance," or a sense of feeling threatened. (TR. 489) He had very poor impulse control. (TR. 487-88) He could become delusional, believing that he was threatened, abused, or mistreated. (TR. 511) Whether he was actually threatened or not, he was unable to control his impulsive reaction. Dr. Isaza found indications of sporadic hallucinations or "God voices talking to him." His symptoms were consistent with

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

a paranoid personality disorder. (TR. 490) Because of these serious mental disorders, Crump's culpability is lessened.

Although this Court has affirmed several death sentences with only one aggravating factor, these cases are clearly distinguishable, however, because of the extremely heinous nature of the murders and/or the total lack of mitigation. In fact, we have not found a single case in which this Court affirmed a death sentence with only one aggravating factor where the mitigation was as substantial as in Crump's case.

In Duncan v. State, 619 So. 2d 279 (Fla. 1993), this Court affirmed the death penalty in a case in which the trial court apparently found only the "prior violent felony" aggravator. Duncan's prior violent felonies included a contemporaneous attack on the victim's daughter and the earlier prior axe murder of a fellow inmate while he was sitting on the commode. Although the trial court apparently did not find HAC, Duncan stabbed his fiance multiple times with a kitchen knife while standing behind her on the porch where she was smoking a cigarette. The victim, who died two hours later, had three life-threatening wounds and three defensive wounds, making the murder more prolonged. Furthermore, Duncan's murder was not spontaneous because he hid a kitchen knife in his jacket pocket prior to going onto the porch. He was angry with his fiance for going out drinking with another man the night before. 619 So. 2d at 280-81. Unlike the instant case, the jury unanimously recommended the death sentence.

Although the trial court apparently found some nonstatutory mitigation, this Court determined, on the State's cross-appeal,

that either of the mental mitigators applied. In light of its finding no support for the mitigators, this Court was not certain whether the trial court purported to "find" the fifteen potential mitigators listed, a number of which were merely the negation of statutory aggravating factors, or whether he just listed, considered and rejected the mitigation suggested by the defense, in accordance with Campbell. Duncan, 619 So. 2d at 283.

Both murders in Duncan were more aggravated than those in this case, even though only one aggravating circumstance was found. More importantly, this Court found no evidence of any mental mitigation. Thus, little or nothing mitigated the offense. In Crump's case, the defense established substantial mitigation including Crump's mental impairment which, according to unrebutted testimony by Dr. Isaza, was the direct cause of both homicides.

Another case in which this Court affirmed a death sentence based on only one aggravating factor was Lindsey v. State, 636 So. 2d 1327 (Fla. 1994). In that case, 65-year-old Lindsey shot and killed his 22-year-old live-in girlfriend and her brother, at close range. Lindsey also had a prior second-degree murder conviction. Although the court found only the prior violent felony aggravator, it was balanced by almost no mitigation -- only that the defendant was in poor health which in no way contributed to the murder or made him a better person. Unlike Crump, Lindsey had no mental mitigation which seems to be the major factor in differentiating between life and death cases with only one aggravating factor.

In Windham v. State, 656 So. 2d 432 (Fla. 1995), the Court affirmed the death penalty in a case in which the defendant killed

three people, including his girlfriend and her mother, and seriously injured a fourth person, for no apparent reason; he simply went on a shooting spree. Although the Court only found one aggravator valid, it found that the mitigation was accorded little weight. 656 so. 2d at 440. Notably, Justice Anstead did not agree that the death penalty was the only possible sentence, and would have remanded in Crump, 622 So. 2d 963. Windham, 656 So. 2d at 441.

Ferrell v. State, 21 Fla. L. Weekly S166 (Fla. April 11, 1996), bears some resemblance to this case because the defendant had committed a prior similar murder. Both victims were girlfriends whom the defendant shot because he was angry with them. Upon his first arrest, he told the police he was glad he shot the victim and hoped she died. The distinction between Ferrell and this case is that, in Ferrell, the nonstatutory mitigation merited little weight. Moreover, the trial judge wrote a new sentencing order explaining in detail his reasons for imposing the death penalty; thus, this Court was able to evaluate the findings and affirm the death sentence. In the case at hand, the trial judge's findings are too sparse for a proportionality review.

One other case in which this Court affirmed a conviction with only one aggravating factor is Cardona v. State, 641 So. 2d 361 (Fla. 1994). Upon reading this horrible case, it is easy to see why the jury recommended death and the Court affirmed the death sentence. Ana Cardona, with the help of her female lover, systematically tortured, abused and finally murdered Ana Cardona's three-year-old son known as "Baby Lollipops." The abuse took place over an eighteen-month period during which Cardona, who referred to

her son as "bad birth," tied the child to a bed, left him in a bathtub with hot or cold water running, or locked him in the closet, After splitting his head open with a baseball bat, she locked the child in the closet where he had been confined for two months. When he screamed at the sight of his mother, she beat him to death. The trial judge found that the murder was '*especially heinous, atrocious or cruel." He found both mental mitigators because of Cardona's loss of wealth and her use of cocaine. She had no major mental illness, however, when she was not on cocaine, and could have taken care of her child between cocaine doses. Understandably, the trial court found that the HAC factor was *'overwhelming and of enormous weight." This Court affirmed, based primarily on the extended period of time the child was subjected to the torture and abuse leading up to his death. The Cardona case is totally unlike Crump's case.[34]

There are many more cases where this Court sustained only one aggravating factor and reduced the sentence to life. See, e.g., Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994); Knowles v. State, 632 So. 2d 62

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[34] Another dissimilar case, in which a proportionality argument was not even made, is Slawson v. State, 619 So. 2d 255 (Fla. 1993). Slawson was convicted of killing a husband and wife, Gerald and Peggy Wood, their two children, and Peggy's eight and one-half month fetus. Still conscious when found by her mother, Peggy died a short time later. The fetus was found with two gunshot wounds and lacerations caused by injuries to the mother. Although the trial court found both HAC and prior violent felony as to Peggy Wood's murder, he found only the "other capital felony" aggravator as to the other three family members. He found mental mitigation but gave it little weight. This Court found no error in the trial judge's determination that the four murders outweighed the mitigation. Id. at 260. It is apparent from the facts of the Slawson case that it bears no resemblance to Crump as to proportionality.

(Fla. 1993); Santos, 629 So. 2d 838; White v. State, 616 So. 2d 21 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Clark v. State, 609 So. 2d 513 (Fla. 1992); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Nibert, 574 So. 2d 1059; Penn v. State, 574 So. 2d 1079 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989); Songer, 544 So. 2d 1010; Ross v. State, 474 So. 2d 1170 (Fla. 1985).

A few cases in which this Court reduced the penalty to life because only one aggravating factor applied and the defendant presented substantial mitigation are notable for comparison value. In DeAngelo, 616 So. 2d 440, for example, this Court found only one valid aggravating factor: that the murder was "cold, calculated and premeditated." In mitigation, the Court found that the history of conflict between the victim and DeAngelo, which ultimately culminated in the killing of a young woman who lived with DeAngelo and his wife, was relevant mitigation. The trial court also found that DeAngelo had served as a volunteer fire-fighter, served in the army, and confessed. "Dr. Berland, an expert in forensic psychology," conducted an extensive examination and diagnosed DeAngelo as having Organic Personality Syndrome and Organic Mood Disturbance, psychotic disorders both of which were caused by brain damage; and Bipolar Disorder . . . which caused paranoid thinking, episodes of depression and mania, intensified hallucinations and delusions, irritability, explosiveness, and chronic anger." Although the judge rejected the statutory mental mitigating factors, he found that DeAngelo had the mental disorders Berland described. Id. at 443.

This Court found that the death penalty was disproportionate because this case was not one of "the most aggravated and unmitigated of most serious crimes." Id. (citing Dixon). The CCP aggravating factor found in DeAngelo is one of the most serious aggravators, at least comparable in weight to the prior capital felony aggravator found in this case. Furthermore, the trial court, as in our case, did not find that the appellant's mental impairment established the statutory mental mitigators; yet, this Court vacated DeAngelo's sentence and remanded for a life sentence.

In Knowles v. State, 632 So. 2d 62 (Fla. 1993), the defendant shot and killed a ten-year-old girl whom he had never met. Knowles then shot his father, pulled him from his truck and threw him to the ground, and left in the truck. The trial court found only one aggravating circumstance in connection with the murder of the child and three aggravating circumstances in connection with the murder of Knowles' father. The trial court rejected the statutory mental mitigating circumstances, but found as nonstatutory mitigating factors that Knowles had a limited education, had been intoxicated on drugs and alcohol, had two failed marriages, low intelligence, inconsistent work habits, and loved his father. This Court struck two of the aggravating factors as to the father and found that the trial court erred in failing to find uncontroverted mitigation, including the mental mitigators. Based on the "bizarre circumstances" surrounding the murders and the substantial unrebutted mitigation, this Court found death was not proportionately warranted. The case at hand is not dissimilar as to the aggravators and mitigators, and Crump had much more mental mitigation.

In Terry v. State, 668 So. 2d 954 (Fla. 1996), this Court reduced Terry's sentence to life despite two aggravating factors (prior violent felony[35] and committed during a robbery\for pecuniary gain) and very little mitigation; in fact, the trial court found no statutory mitigation and rejected Terry's minimal nonstatutory mitigation. This Court concluded, in its proportionality review, "that this homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate." Although the murder took place during the course of a robbery, the circumstances surrounding the actual shooting were unclear. See also, Sinclair v. State, 657 So. 2d 1138 (Fla. 1995) (where appellant robbed and fatally shot a cab driver twice in the head, and Court found only one valid aggravator, no statutory mitigators, and minimal nonstatutory mitigation, this Court vacated death sentence.); Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994) (where appellant walked into a sandwich shap, fatally shot attendant through the head, and robbed the establishment, Court vacated the death sentence, finding only one valid aggravator (the murder was committed in the course of a robbery) and "significant" nonstatutory mitigation.

In Clark v. State, 609 So. 2d at 515-16, the Court vacated the death penalty in favor of life because only one aggravating factor remained and substantial mitigation existed. Clark killed a man so

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[35] The Court noted that the prior violent felony did 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 who pointed an inoperable gun at Mr. Franco. Thus, unlike other prior felonies such as homicides, it did not justify much weight.

that he could get the man's job. He presented uncontroverted evidence of alcohol abuse, emotional disturbance and an abused childhood. Although the defense expert opined that the statutory mitigating circumstances were inapplicable, this Court found that the strong nonstatutory mitigation made the death penalty disproportionate even though Clark's jury recommended death ten to two.

In the instant case, Crump did not kill for a monetary reason, but due to mental impairment. The defense expert found that both mental mitigators applied. The jury recommendation was eight to four despite the prior capital felony aggravator and their improper consideration of CCP, which this Court found inapplicable. Thus, the jury must have found more mitigation than Clark's jury. Thus, the Court should remand this case for a life sentence.

The penalty in other cases in which the courts have found more than one aggravator have also been reduced to life due to extensive mitigation or because the crime is not beyond the norm of capital felonies. Dixon. Some are instructive for comparison value:

In Besaraba v. State, 656 So. 2d 441 (Fla. 1995), the defendant, a homeless man, killed a bus driver and shot another man, apparently because the bus driver would not allow him to drink on the bus. This Court found that the single aggravator -- conviction of a prior violent felony -- was outweighed by the vast amount of mitigation, including serious mental problems, alcohol and drug abuse, a badly deprived childhood, good character and reliable employment; and good behavior in prison. 656 So. at 447.

In Kramer v. State, 619 So. 2d 274 (Fla. 1993), this Court remanded for a life sentence even though the defendant had commit-

ted a prior similar murder. When arrested, Kramer told police that he had gotten into an argument with the victim who pulled a knife. Kramer said he hit the man twice with a rock and threw the knife in a lake. The State produced evidence, however, that the victim suffered defensive wounds and that blood spatter evidence showed that he had been attacked while in passive positions, including lying face down. Kramer had no injuries. The jury recommended death by a vote of nine to three. 619 So. 2d at 275-76.

The trial judge found two aggravating factors: a prior violent felony and that the murder was "heinous, atrocious and cruel." 619 So. 2d at 276. The prior violent felony was an attempted murder conviction for beating another victim with a concrete block within two hundred feet of where the murder in this case took place. That victim also died but only after Kramer's conviction for attempted murder. 619 So. 2d at 278 (Grimes, J., dissenting).

The judge found that Kramer was under the influence of mental or emotional distress and his capacity to conform his conduct to the requirements of law was severely impaired, but did not believe the problems were serious enough to meet the two statutory mental mitigators. 619 So. 2d at 276, 287 (Grimes, J., dissenting). The court found that Kramer suffered from alcoholism and was a model prisoner and a good worker during his prior incarceration. 619 So. 2d at 276. The majority vacated the death penalty and remanded for life because the evidence suggested that the murder resulted from "a spontaneous fight for no discernible reason between a disturbed alcoholic and a man who was legally drunk." Thus, the murder was not beyond the norm of capital felonies. 619 So. 2d at 278.

The same is true in this case. Although Crump was convicted of murder in the other case, the prior murder in Kramer was no less serious because Kramer was convicted of attempted murder before the victim died from his injuries. The other murder of which Crump was convicted actually happened during the year after the homicide in this case. Like Kramer, Crump said the victim in the other murder pulled a knife on him, causing the homicide. Thus, the cases are very similar in that respect.

In Kramer, the court found two aggravators where, in this case, the court found only one. Crump's judge specifically refused to consider the HAC factor which was found by the court in Kramer. Although Kramer's victim was drunk and may have felt less pain because of the alcohol, we do not even know whether Crump's victim was conscious when he killed her. She had no defensive wounds to suggest a struggle. She had bruises on her head and may have been hit over the head prior to the strangulation. (TR. 432-43)

As in Kramer, Crump's actions appeared to have been spontaneous. 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. Although Crump did not admit that he killed Clark, he told the police that he picked her up for prostitution, they had an argument, he stopped and pushed her out of his truck. (TR. 356-59)

In both cases the judges found the two mental mitigators, but did not believe they reached the statutory level. Crump attempted to present evidence, as Kramer did, that he behaved well in prison

and was trying to rehabilitate himself. In this case, however, the judge refused to hear the evidence. Although we have no evidence that Crump was an alcoholic, as was Kramer, Crump had a serious mental disorder that prompted his violent reaction to some unknown threat. Additionally, he presented a myriad of nonstatutory mitigation showing that he had positive character traits including good relationships with his family and neighbors and a desire to help others. This surely outweighs Kramer's mitigation. When compared to Kramer, Crump's death sentence is not proportionately warranted.

In Cochran v. State, 547 So. 2d 928 (Fla. 1989), the jury was not told that the defendant committed another homicide (killed a drug dealer during a robbery) four days before the one for which he was on trial. 547 So. 2d at 934. Without this knowledge, the jury recommended life. The judge, however, imposed the death penalty, primarily because of the second homicide. Reducing the sentence to life, this Court determined that the judge correctly considered the prior homicide in weighing the aggravators and mitigators, but that extensive mitigation made the jury's recommendation reasonable.

This Court sustained three of the four aggravating factors found by Cochran's trial judge. 547 So. 2d at 934 (Erlich, C.J., dissenting). The evidence showed, however, that Cochran had emotional problems and a severe learning disability as a child. At the time of the homicide, he was depressed because the mother of his child had broken off their relationship and prevented him from seeing the child. He was likely to become emotionally disturbed under stress. 547 So. 2d at 932. The psychiatrist who testified at his penalty trial, however, did not find Cochran emotionally

disturbed or that his ability to conform his conduct to the requirements of law was substantially impaired. 547 So. 2d at 928 (Erlich, C.J., dissenting).

Crump was a "slow learner" as a child which indicates that he also had learning problems in school. His mental problems were more serious than Cochran's, and Dr. Isaza opined that both statutory mental mitigators were established. The judge also found them established, although not reaching the level of "statutory" mitigation. Although Crump's juror's recommended death by an eight to four vote, had they not known of the prior murder, they might well have recommended a life sentence, as did Cochran's jury.[36] The case would then be nearly identical to Cochran's except that Crump, 25, was older than Cochran, 18, and had more extensive mitigation.

In Heqwood v. State, 575 So. 2d 170 (Fla. 1991), this Court found that the court erred in overriding a six to six life recommendation where defendant shot and killed three 'Wendy's" employees, because of the defendant's unfortunate and impoverished childhood. The court found five aggravating factors and one statutory mitigator -- the defendant's youth. In Crump's case, the defendant had fewer aggravators -- only one -- and much more mitigation. The only factors favoring Hegwood *were* his age and jury recommendation. Hegwood's life recommendation was six to six and Crump's death recommendation was eight to four. The difference was two jurors.

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[36] Crump's jury was also improperly instructed on the jury on the "cold, calculated and premeditated" aggravating factor which this Court disapproved on direct appeal. Had the jurors been properly instructed, and had they not known of the prior homicide, they might well have recommended life instead of death.

Even when a jury recommends the death penalty, the presence of uncontroverted, substantial mitigation removes the case from the category of "the most aggravated and least mitigated of serious offenses." See e.g., Penn v. State, 574 So. 2d 1079, 1083-84 (Fla. 1991); Nibert v. State, 574 so. 2d 1059, 1063 (Fla. 1990); Livinsston v. State, 565 So. 2d 1288, 1292 (Fla. 1990); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Because of the significant unrebutted mitigation in Crump's case, the death penalty is unwarranted. The unrebutted psychiatric testimony that the statutory mental mitigators were established, and the myriad of non-statutory mitigation, was outweighed the single aggravating factor.

Although the trial judge did not permit the Appellant make a statement at this resentencing, at the prior one, Crump asked the judge to consider that all his previous charges were "in compliance with me being threatened or attacked some kind of way." He said that since he'd been in prison he'd had no No. 2 DR's and had been trying to rehabilitate himself. (1RS. 22)

In Geralds v. State, 21 Fla. L. Weekly S85 n.14 (Fla. Feb. 22, 1996), this Court noted that, even though trial judge stated in his sentencing order that he would impose the death penalty even without the cold, calculated, and premeditated aggravator, this Court would independently examine all of the surrounding facts and circumstances and would not base its conclusions on the single subjective opinion of the trial judge. Thus, the Court would not rely solely on the trial judge's conclusion. Thus, the trial judge's "boiler-plate" language in this case does not preclude this Court's independent analysis of the circumstances of the case.

"The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); accord Dixon, 283 So. 2d at 7 (appropriate that legislature "has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). 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 Court should resolve the numerous problems in this case, which will require at least a new penalty proceeding with a newly empaneled jury, by vacating Crump's death sentencing and ordering it reduced to life. As discussed above, this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving little or nothing in mitigation. Nibert, 574 So. 2d at 1163. This case had substantial mitigation which has been found mitigating by this Court. Accordingly, 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, his sentence should be reduced from death to life in prison without possibility of parole for 25 years.[37]

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[37] Crump is already serving a life sentence without possibility of parole for 25 years for the prior homicide; this sentence could be imposed concurrently or consecutively to that one.

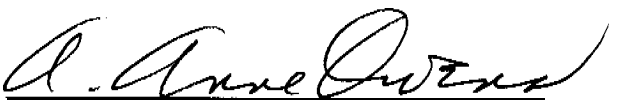
CONCLUSION

Crump's death sentence should be reduced to life because it is disproportionate, based on the extensive mitigation. If the sentence is not reduced to life, however, the sentence must be vacated and the case remanded for a resentencing with due process of law, including the introduction of new evidence, sentencing arguments, and an opportunity for the defendant to be heard. Moreover, the trial court must find the unrebutted statutory mitigators, accord them sufficient weight, and write a sentencing order in compliance with Campbell, as required by this Court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18th day of July, 1996.

Respectfully submitted,



A. ANNE OWENS
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/aao

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

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

Case No. 88-4056-D
TRIAL DIVISION 1

FILED
SEP 11 1995
RICHARD AKE, CLERK

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.

The Court, in support of the death sentence imposed upon the Defendant, finds as follows:

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

A

nature; and given some, but very little, weight,

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.

FILED in Open Court at time of Sentencing this 11th day of September, 1995.

M. William Graybill

M. WILLIAM GRAYBILL, CIRCTJIT JUDGE

Copies furnished to:

State and Defense Counsel

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

STATE OF FLORIDA

vs.

MICHAEL TYRONE CRUMP,

Defendant
_____/

CASE NO.: 88-4056-D

TRIAL DIVISION 1

1955 - 1 FM 4 1

DEFENDANT'S SUGGESTED LIST OF STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES

COMES NOW the Defendant, MICHAEL TYRONE CRUMP, by and through his undersigned attorney and files this his suggested List of Statutory and Non-statutory Mitigating Circumstances, pursuant to a Previous Order of the Court and would urge the court to consider the following statutory and non-statutory mitigating circumstances:

1. Statutory Mitigating Circumstances:

A. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

B. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

C. The age of the defendant at the time of the crime.

2. Non-statutory Mitigating Circumstances:

A. The Defendant was a slow learner.

B. The Defendant was a kind, considerate, thoughtful and playful child.

C. As an adult, the Defendant was helpful to his family and neighbors.

D. The Defendant was friendly and outgoing with a good

sense of humor.

E. . The Defendant had a loving and warm relationship with his family.

F. The Defendant is married and has three minor daughters.

G. The Defendant had no father figure in his formative years.

H. The Defendant has a very poor planning ability.

I. The Defendant has poor impulse control and poor judgment which may be related to learning disabilities.

J. According to Dr. Isaza, although the Defendant has a very tough and intimidating initial appearance, he has the capacity to be warm and caring.

K. While not psychotic, when the Defendant perceives a threat which is pervasive, he has a feeling of being persecuted, exploited or diminished in self-esteem, resulting in mistrust and hypervigilance.

L. Although not incompetent, the Defendant has sporadic hallucinations, i.e. "God voices talking to him".

M. The Defendant had difficulties in sexual development and sexual adjustment, resulting in sexual inadequacies, i.e. "his manhood depends on his performance".

N. Although not incompetent, the Defendant has precursors that are consistent with paranoid personality disorder, i.e. impairments that arise when he is threatened by a sense of rejection, threats, provocation and/or low self-esteem coming to the surface, resulting in impulsive actions taken without

reflection.

0. The Defendant has redeeming factors as a human being as follows:

(1) He can be open and warm.

(2) Psychologically he has the ability to form bonds.

(3) He shows a sense of family orientation.

(4) He has a sense of honesty.

P. When provoked, the Defendant's delusional system sets in.

Q. The Defendant has lead a generally stable life as evidenced by his stable work history and stable family life.

WHEREFORE, the Defendant prays this Honorable Court to consider the above statutory and non-statutory mitigating circumstances in resentencing the Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Karen Cox, Assistant State Attorney, this 1st day of September, 1995.

THOMAS E. CUNNINGHAM, JR., P.A.
THOMAS E. CUNNINGHAM, JR., ESQ.
3802 Bay to Bay Blvd., Suite 11
Tampa, Florida 33629
(813) 839-6554
Florida Bar Number 218030

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

CRIMINAL JUSTICE DNISION

STATE OF FLORIDA

VS. Case No. 88-4056-D

MICHAEL TYRONE CRUMP Trial Division 1

_____/

This cause came on to be heard before the Honorable M. Wm. Graybill, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on September 11, 1995, as follows:

APPEARANCES:

Karen Cox, Assistant State Attorney, 800 E. Kennedy Boulevard, Tampa, Florida, 33602, in behalf of the State;

Thomas E. Cunningham, Jr., Esquire Defender, 3802 Bay to Bay Boulevard, Suite 11, Tampa, Florida, 33629, in behalf of the defendant.

B

INDEX TO PROCEEDINGS

PROCEEDINGS

THE COURT: The case of State of Florida versus Michael Tyrone Crump, Case 88-4056-D, Trial Division 1, is on the docket for mandate resentencing. The defendant is present with court-appointed counsel, Attorney Thomas Cunningham, and Assistant State Attorney Karen Cox is present for the State.

It is the Judgment, Order and Sentence of the Court that the defendant is again adjudicated guilty of First Degree Murder, sentenced to death by electrocution as provided by the laws of the State of Florida; ordered to pay mandatory costs, totaling $253, allowed county jail and state prison credit covering the period March 23, 1988 to date and not ordered to pay restitution as the defendant is indigent.

The defendant is advised of his right to appeal the sentence of the Court by filing written Notice of Appeal with the clerk within the next 30 days and entitled to court-appointed counsel as he is indigent.

The bailiff will fingerprint the defendant in the Court's presence and the clerk will file the original of the Court's written sentencing

order and deliver copies to State and Defense counsel.

Mr. Crump has been fingerprinted in the Court's presence. Court's adjourned.

[Proceedings were concluded.1

CERTIFICATE OF OFFICIAL COURT REPORTER

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, LINDA S. COLLIER, CSR, RPR, CP, CM, Official Court Reporter, Criminal Justice Division, Thirteenth Judicial Circuit of the State of Florida,

DO HEREBY CERTIFY that I was authorized to, and did, report the proceedings and evidence in this hereinbefore-styled cause, as stated in the caption attached, and that the preceding transcript attached hereto is a true, accurate and correct computerized transcription of my report of the proceedings had at said session.

I FURTHER CERTIFY that I am not employed by or related to the parties to this matter nor interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal in Tampa, Hillsborough County, Florida, this 30th day of November, 1995.

Linda S. Collier

Linda S. Collier, RPR, CP, CM,
Notary Public
Official Thirteenth Circuit Court Reporter
Criminal Justice Division