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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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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'ORDERMEETING THE REQUIREMENTS SET OUT IN CAMPBELL V. STATE, THUS INVALIDATING THE WEIGH-ING PROCESS.

Despite Appellee's reference to the trial court's finding of "aggravating factors" (Brief of Appellee, p. 8), Crump's prior felonies constitute only one aggravating factor. Other than the murder of Areba Smith, which was used as Williams Rule evidence to convict Crump of the murder of Lavinia Clark in this case, Crump's prior record consisted of only one incident which resulted in convictions for three counts of aggravated battery and an aggravated assault, each committed without a firearm. (TR. 533)

Without explanation, Appellee surmised that the trial court rejected the proffered statutory mitigation because "the testimony of the mental health expert was too ambiguous and equivocal to support the finding of mitigators 6(b) and (f)." (Brief of Appellee, p. 9) If Dr. Isaza's testimony was ambiguous, the trial judge should have read Dr. Robert Berland's testimony in the Areba Smith case, submitted to him at resentencing. (See Issue IV, infra. Dr. Berland administered Crump's original psychological tests and evaluated him much closer to the time of the offense. Because he was out-of-town at the time of the penalty trial in this case, and thus unable to testify, Dr. Isaza interviewed Crump and administered further tests to fill in at the last minute for the penalty phase. She reviewed Dr. Berland's test results and notes but was

unable to talk with him because he was out-of-town. (See Issue IV) For these reasons, Dr. Berland's testimony from the Areba Smith trial, which occurred shortly before the trial in this case, would have been helpful in clarifying any ambiguity.

Ponticelli v. State, 593 So. 2d 483 (Fla. 1992), cited by Appellee, is clearly distinguishable. In that case, the trial judge rejected the mental mitigators because the expert witness' opinion was not supported by the facts. The only evidence to support the doctor's opinion was the defendant's use of cocaine and his hyperactivity on the evening of the murders. There was no evidence of drug use on the night of the murders, leaving his hyperactivity the only evidence of mental or emotional problems. Additionally, his planning and actions on the night of the murder evidenced his capacity to appreciate the criminality of his conduct.[1] Moreover, Ponticelli did not even discuss his mental processes with the expert witness.

Although Crump did not discuss the details of the offense with Dr. Isaza, because he did not admit that he committed the offense,[2] he did share his mental processes and feelings with her. He

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[1] Ponticelli told an acquaintance that he intended to kill the two victims for money and cocaine, and showed him the gun. He later told a number of people that he had shot and killed the victims. He told his cellmate that he intentionally asked the victims (brothers) to drive him somewhere to sell cocaine, so that he would not have to kill them 'in front of other people at their home. 593 So. 2d 485-87. There is no evidence of any such thought or planning in this case.

[2] Crump told Dr. Isaza that Clark got in his truck and got very upset with him, and that he then became upset with her because she wanted to go for a longer ride than he intended. (TR. 502)

admitted to hearing "god voices," directing his actions. Furthermore, he took various tests which helped to determine his mental status and establish the mental mitigation. Because Crump was convicted with Williams Rule evidence, no details of the offense are available. Thus, Crump's activities that night (whatever they may have been) do not rebut Dr. Isaza's testimony. In fact, her description of his mental problems are consistant with the crime.

Unlike Ponticelli, whose mental instability was apparently caused by cocaine usage, Crump suffered from mental illness -- paranoid personality disorder and hypervigilance.[3] Unlike cocaine usage, which may only effect the person while he is using the drug, a psychotic or other mental disorder affects the person's thinking all of the time. In any event, Appellant does not agree that Dr. Isaza's testimony was "too equivocal" for the trial court to find the mental mitigation established. (See Issue 11, infra.)

Although, as Appellee pointed out, age 25 is not necessarily a mitigating factor, it may be when the defendant is emotionally

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[3] If Dr. Berland's testimony is considered, it establishes that Crurnp suffered from a severe genetic disturbance and severe brain damage, which rendered him unable to make rational decisions or to exercise the control necessary to conform his behavior to the requirements of law. Because genetic disturbances and brain damage are disorders which affect a person's thinking and behavior all of the time, Crump was under extreme mental or emotional distress when he committed the offense. (2R. 78-80) Crump reluctantly admitted to ideas which were distinctly unrealistic, or psychotic. He believed people were following him or talking about him with the intent to harm him. He had hallucinations and 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 warned 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. (2R. 56)

immature. What we are complaining about is not that the judge failed to find Crump's age mitigating, but that he failed to give any reason for rejecting the mitigator, as required by this Court in its prior opinion in this case. Thus, this Court still cannot determine whether the judge's rejection of this proposed mitigator was supported by the evidence.

Appellee has attempted to direct the Court's attention from this problem by noting that, in Terry v. State, 668 So. 2d 954 (Fla. 1996), cited in our initial brief, this Court found the death penalty disproportionate for a different reason. We did not cite Terry as an example of a case in which age was mitigating, but to support the proposition that age may be mitigating when the defendant's mental and emotional age is less than his chronological age. *See* Terry, 668 So. 2d 954 (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); see also, Sims v. State, 21 Fla. L. Weekly S320, 323 (Fla. July 18, 1996) (no evidence that Sims' mental, emotional, or intellectual age was lower than his chronological age and, without more, age twenty-four is not mitigating); Garcia v. State, 492 So. 2d 360, 367 (Fla.), cert. denied, 479 U.S. 1022 (1986)).

In this case, Crump's mother testified that Crump was a slow learner in school. (R. 458-59) The mental health evidence shows that he was emotionally immature -- for example, he had little impulse control, poor planning ability and judgment, and difficulty establishing relationships with women. These are all signs of

immaturity. That the trial court may have considered, as nonstatutory mitigation, some of the character problems which indicate Crump's emotional immaturity, does not eliminate the judge's duty to determine whether the "age" mitigator applied and to set out reasons for his decision. The judge's lack of specificity is exactly what this Court complained of in its remand of this case for reweighing.[4] See Crump v. State, 654 So. 2d 545 (Fla. 1995).

Appellee finds it "incomprehensible" that there is a "meaningful difference" between the attachment of a list of mitigation proposed by defense counsel to the written sentencing order and the "repetitious retyping" of the list in the middle of the order. This conclusion ignores the purpose behind the Campbell requirement that the judge discuss each proposed mitigator, determine whether it was established and, if so, assign weight to it. When the judge complies with Campbell v. State, 571 So. 2d 415 (Fla. 1990)m it is clear that he actually considered the proposed mitigators. His reasoning should set out his basis for finding each mitigator established, or not established, and for assigning a certain weight to it. When the judge merely attaches a three-page list prepared by defense counsel, finding everything and giving it the same weight (very little), it is not clear that he seriously considered each proposed mitigator to determine how much weigh to assign it.

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[4] Although age *25*, without mental and emotional immaturity, would not generally be found mitigating, in Rhodes v. State, 638 So. 2d 920 (Fla. 1994), the court found the age of 30 to be mitigating.

In fact, the judge's conclusory findings make it appear that the judge was merely attempting to comply with this Court's order in the easiest and safest way he could think of. Because he found all of the mitigation proposed by the defense, the Appellant could not complain that he failed to find the proposed mitigation. By assigning little weight to it; he could support his predetermined decision to again impose the death penalty. Surely some of the mitigators (ie, mental disorders) were deserving of more weight than others (ie, playful child). Accordingly, despite the judge's findings and attached list, we still do not know which mitigating factors the judge seriously considered to be mitigating, if any, or why he did or did not.

Appellee cites the fact that the judge delayed sentencing for six days so that he could read the list to prove that he read it. (Brief of Appellee, pp. 11-12) Of course, this does not prove that he read the list; he may have needed the time only to prepare his sentencing order. Even if he did read the list, or at least looked it over, his order does not evidence any serious weighing of the factors. The purpose of a sentencing order is to assure that the judge seriously considers the aggravating and mitigating factors. As stated by this Court in Campbell, and quoted by Appellee,

> 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 (emphasis added). By merely attaching the list prepared by defense counsel, and treating all proposed mitigation

together, the trial judge failed to expressly evaluate each proposed mitigator to determine if it was established by the evidence and truly mitigating.

Appellee attempted to distinguish Larkins v. State, 655 So. 2d 95 (Fla.1995), because, unlike the judge in Larkins, Crump's trial judge found all of the non-statutory mitigation to be established. Crump's case is like Larkins, however, because both trial judges summarily dismissed the statutorv mental mitigators. In this case, the judge summarily found all of the nonstatutory mitigation, also indicating that he did not make a careful determination-as to which mitigators applied and how much weight to accord each mitigator.

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.

As noted above, Appellant does not agree that Dr. Isaza's testimony was "too equivocal" for the trial court to find the mental mitigation established. Appellee's characterization results from Dr. Isaza's attempt to be honest. She could not honestly say for certain that Crump suffered from specific mental and emotional problems at the exact time he committed the crime because she was not there when the crime was committed. She did testify, however, that, if Crump was with a prostitute and it was taking too long, this could trigger the impulsive reaction he was prone to suffer.[5] (TR. 510) He could become delusional, believing that he was threatened, abused, or mistreated, and would react accordingly. (TR. 511) Crump constantly felt threatened, persecuted or exploited and had a pervasive feeling that he was going to be diminished. (TR. 489) Dr. Isaza's unrebutted opinion, within a reasonable psychological certainty, was that Crump was under the

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[5] Dr. Isaza testified that Crump's judgment was consistently poor. His impulse control was poor. He acted first and reflected later. (TR. 487-88) If he killed someone, he would have done it on the spur of the moment because he was not capable of much planning. (TR. 505-06) Dr. Isaza concluded that Crump suffered from "hyper-vigilance," or a sense of feeling threatened. (TR. 489) If he perceived a threat, he felt persecuted or exploited. When he felt threatened, he might act in a violent way, impulsively and without reflection. (TR. 489) He felt that his manhood depended on his sexual performance. Dr. Isaza also found indications of sporadic hallucinations or hearing "god voices." Crump's symptoms were consistent with a paranoid personality. (TR. 490)

influence 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. 493-94, 510) This is as certain as any mental health expert can be.

Because the characterization of Dr. Isaza's testimony regarding the mental mitigation is at issue in this case it has become necessary to set out her exact testimony. In addition to the testimony quoted by Appellee (brief of Appellee, p. 18-19), Dr. Isaza testified as follows:

> DEFENSE COUNSEL (on direct): Doctor, within the bounds of reasonable psychological certainty, do you have an opinion as to whether Michael Crump at the time of this offense was under the influence of an extreme mental or emotional disturbance?
>
> DR. ISAZA: Yes, in the sense that I described.
>
> Q. Why to you feel that way?
>
> A. Again, on a normal -- in the everyday kind of situation he performed, he has also kind of a stable work history. He's led, for the most part, concerning his educational background and economic background, some kind of stable life. There was no indication from his wife of his cruelty or consistent mental abuse or cruelty or spouse abuse in him. And again, it may be that when he is provoked, that's when the delusional system may set in. At that point, he feels stricken. He has poor impulse control, poor judgment, poor planning, and, as we say in lay terms, loses it even though in normal situations, he seems okay.

(TR. 493) Following this colloquy, Dr. Isaza testified concerning the "impaired capacity" mitigator, as quoted at the top of page 18 of Appellee's brief. On cross-examination, Dr. Isaza testified, just prior to the testimony quoted by Appellee, beginning at the bottom of page 18, as follows:

PROSECUTOR: So, it's your testimony, at the time of that offense, December of 1985, he was under the influence of an extreme emotional or mental disturbance?

DR. ISAZA: Well, my testimony in general -- what I mean is, his unpredictability would probably create an extreme mental situation in different situations, and that would include that particular crime.

(TR. 499-500) Although Crump denied committing the crime, as noted by Appellee, he did describe his brief encounter with Clark when he picked her up in his truck.' (TR. 502)

Following the testimony quoted by Appellee in the middle of page 19 of the brief, concerning Crump's outbursts, poor impulse control, inability to reflect and poor planning ability, the testimony continued as follows:

PROSECUTOR: So, that's why you think he killed her?

DR. ISAZA: That's what I think. I don't know if he killed her or not.

(TR. 503) . . .

PROSECUTOR: Now, you said that at the time of the offense, again, now, this is December, 1985, his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was again substantially impaired?

DR. ISAZA: At the time of offense. In other words, what I'm saying is, based on his personality characteristics, he may be half an hour before this happened, a very normal individual and, at some point, something triggers and we don't know what this something is because, again, that's what I'm saying. It may depend on the situation, and then at that particular-time, he may be impaired.

(TR. 504) Dr. Isaza then agreed with the prosecutor's assertions that Crump was not legally insane or "crazy." (TR. 504-05) The testimony continued,

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[6] **See note 2, supra.**

PROSECUTOR: There's nothing about his outward actions and behavior that would, in any way, manifest itself as bizarre or unusual; is that what you are saying?

DR. ISAZA: Bizarre -- well, there is some unusual characteristics about him not consistent enough to be on a regular basis; for example, the paranoid schizophrenic.

Q. You're not saying that he's incapable of forming -- for the crime of First Degree Murder, are you aware that an element is that it has to be premeditated; it has to be an intentional, conscious premeditated killing?

A. Yes, I am.

Q. And, you're not saying that he was incapable at the time of forming a conscious, intentional premeditation to kill Lavinia Clark?

A. What I'm saying is that based on his intellectual abilities and his personality characteristics, he's not the type of individual to plan, to set down and make a plan, form a plan of going out and, you know, killing someone. It may happen at the spur of the moment by what ever situation may trigger it.

In regular terms, I mean, we all lose our temper, but when someone loses their temper to the point of killing, something is definitely wrong, and that's what I'm saying about his personality characteristics, and that's what I mean about the intensity of the poor impulse control and low frustration intolerance.

(TR. 505-06) Following the statement quoted at the bottom of page 19 of Appellee's brief, concerning the Areba Smith murder, the testimony continued:

PROSECUTOR: So, if there were a pattern, would that have a substantial effect on your findings or your belief that he has an incapability of planning, that he's an impulsive murderer?

DR. ISAZA: There is a difference in terms of the planning. I don't see him, based on the psychological data, as saying, okay, I killed this one this month and then two months later, I'm going to do this again. It may, by some circumstances that I don't know, coincide some of the aspects.

(TR. 507)

Most importantly, Appellee omitted Dr. Isaza's most important testimony, which occurred during rebuttal, and explained her conclusions as to the existence of the statutory mental mitigators:

> DEFENSE COUNSEL: Do you believe, Doctor, that here in March, almost April, 1989, that you can still render an opinion, within the bounds of reasonable psychological certainty, as to what happened in December of 1985 even without full knowledge of the facts surrounding the death of Lavinia Clark?
>
> DR. ISAZA: Based on the psychological data?
>
> Q. Yes.
>
> A. And the interviewing him?
>
> Q. Yes.
>
> A. Yes.
>
> Q. Is this personality. disorder, impulse control problem, planning problem that Michael Crump has, is this a long standing problem, do you believe?
>
> A. Yes, I believe it's chronic.
>
> Q. Chronic. What do you mean by "chronic"?
>
> A. It has been there for as long as -- it has been there for a long time. It's part of his personality makeup.

(TR. 508-09) . . .

> Q. [H]e does suffer from sexual inadequacies?
>
> A. At times.
>
> Q. And, if a person such as Michael Crump engaged the services of a prostitute, and it was taking too long, and either she was taking too long to satisfy Michael, or he was taking too long to satisfy himself, could that trigger this impulsive reaction that you say he suffers from?
>
> A. It could.

Q. You weren't there the night that these ladies were killed, were you?

A. No.

Q. You can't render an exact statement as to what happened, can you?

A. No.

Q. But can you say, within the bounds of reasonable psychological certainty, that he was impaired on the dates of these murders?

A. Impaired in the sense that I described it.

Q. Earlier in your testimony?

A. Yes.

Q. Can similar circumstances that arise, say he was with Lavinia Clark and some sexual dysfunction occurred, could he have the same impulse, poor impulse control that he had with Areba smith?

A. He could. And, it would be consistent with that delusional system that may' be triggered again with certain women, and we may call those women prostitutes.

Q. What do you mean by delusional?

A. The belief . . . at the time that something happens that he's being persecuted, or threatened, or abused, or mistreated in some way perceived and again that's what makes it delusional. It's not really based on reality.

In other words, if the woman, at some point, like in the case that he first described to me, is frustrated because he's taking too long, that may prompt him to say, well, I'm paying you, instead of this low frustration tolerance to the point as he describes it. If she takes a knife, he may feel he has to defend himself. There is a sense of him of constant scanning again, that feeling of constantly having to defend himself.

Q. Whether there's actually a knife or not?

A. Yes.

Q. He perceived that-there was a knife there?

A. That's what he told me.

(TR. 510-12)[7]

As the above testimony illustrates, part of the problem may be with the language. Dr. Isaza's native language is Spanish. She also speaks French, German, Portuguese, Italian, and a little Russian. (TR. 478) Thus, her terminology may be somewhat different than a native English-speaking person. At the second sentencing, defense counsel noted that

> Dr. Isaza had some difficulty with the language. . . . She spoke with a rather heavy accent, and the State cross-examined her heavily about whether Michael Crump was, in fact, at the time of the offense under an extreme emotional disturbance or suffering from an impairment to his mental abilities to control, not insane, not incompetent, but to control his -- conform his actions to law.

(lRS. 12) Thus, it appears that Dr. Isaza may have become somewhat flustered while trying to explain her conclusions to the prosecutor who was trying to discredit her testifmony.

In addition, although her educational background and experience as a clinical psychologist and adjunct professor is excellent (TR. 476-82), Dr. Isaza may not have had much, if any, experience testifying as an expert witness. It is evident that she was trying extremely hard to be precise and honest, rather than saying only what the defense wanted her to say. She tried to explain her

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[7] In reference to this testimony, Appellee noted that Crump told Dr. Isaza that he perceived that the victim had a knife. Although it may be unclear in the testimony, this response was in reference to the murder of Areba Smith, and not this case. In this case, Crump did not admit that he committed the crime. (See Brief of Appellee, p. 20; TR. 502; TR. 512.)

findings in her own words, even though they may not have been the exact words used in the statutes and case law.

Mitigation must only be established to a reasonable degree of certainty, Campbell v. State, 571 So. 2d 415 (Fla. 1990). In the instant case, Dr. Isaza, the only expert who testified, opined that both mental mitigators were established. Although Crump's mental condition was chronic, his symptoms, such as poor impulse control and poor judgement, were sporadic. When provoked, his delusional system could set in. He would feel stricken. In such situations, he would "lose it." On cross-examination, Dr. Isaza admitted that she could not be absolutely certain that Crump's delusional system set in at the time he committed the crime -- she was not there -- although such a conclusion was consistent with her findings. Mr. Crump's delusions were triggered by certain feelings, such as sexual inadequacy or perceived threats to his manhood, which might well occur during a sexual encounter with a prostitute. Obviously, Dr. Isaza could not know what Crump felt at that moment because she could not read his mind. What he told her, however, and what she learned from the testing, confirmed her belief that this was what happened. She concluded, therefore, that Crump's unpredictability would create an extreme mental situation in certain situations, including the crime in this case. (TR. 493, 499-500, 510-12)

Mitigation must only be established to a reasonable certainty. This is precisely the extent to which Dr. Isaza found it established. The trial judge allegedly rejected the statutory mental mitigation, however, because (1) the defendant denied having

committed the offense, and (2) 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 emational 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)

The judge failed to explain his choice of the word "possibly" rather than "probably." Dr. Isaza's testimony, as quoted above and in Appellee's brief, clearly indicates that her conclusion was, at least, that Crump was "probably" emotionally disturbed and was "probably" impaired at the time he committed the offenses. There was absolutely no evidence from which the judge could reasonably conclude that he was only "possibly" disturbed and impaired.

"Probably established" is certainly the equivalent of "established to a reasonable degree of certainty." It is clearly "reasonably established by a greater weight of the evidence," which is the standard cited by the judge in finding the nonstatutory mitigators established, or "more likely than not." (2R. 130) For some reason, the trial judge came to the opposite conclusion. He apparently used the standard of "beyond a reasonable doubt," which should be applied only to aggravating factors. The trial judge failed to explain why he decided that Dr. Isaza's testimony was not sufficient to establish the mental mitigators to a reasonable degree of certainty.

In Robinson v. State, 21 Fla. L. Weekly S499 (Fla. Nov. 21, 1996), this Court noted that, "[w]hile Dr. Berland's and Dr. Kirkland's reports conflict as to appellant's mental and emotional problems, the trial court never discusses whether, or how and why, it may have resolved this conflict against appellant." 21 Fla. L. Weekly at S501. Although in the case at hand, there are no conflicting psychiatric reports, the trial judge apparently found Dr. Isaza's testimony conflicting. As in Robinson, he failed to explain why he chose to resolve the perceived conflict against Crump. His conclusion is clearly contrary to the evidence.

The sentencing judge 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). He may only reject a mitigating circumstance has been proved if the record contains "competent substantial evidence to support the rejection. Nibert 574 So. 2d at 1062; 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). In this case, Dr. Isaza's testimony was sufficient to establish the mental mitigators. The record contained no "positive evidence" to the contrary.

As noted by Appellee (see brief of Appellee, pp. 20-21), the Court in Walls v. State, 641 So. 2d 381, 390-91 (Fla. 1994), and other cited cases, explained that opinion testimony could be rejected by the trial judge if it is not supported by the facts, or if the facts are inconsistent with the opinion. In this case,

however, Dr. Isaza's assessment of Crump's mental problems is entirely consistent with the facts of the case. Crump felt constantly threatened, had a paranoid personality and problems with sexuality, lacked impulse control and judgment, and was at times delusional. This is entirely consistent with his having lost control during a sexual encounter with a prostitute which somehow went awry, because of a perceived threat.'

Furthermore, there is absolutely no support for a conclusion that Dr. Isaza's analysis was untrustworthy. See Farr v. State, 655 so. 2d 448, 449-450 (Fla. 1995). Although she did not see Crump until a day before she testified, Dr. Isaza spent several hours with him, reviewed Dr. Berland's test results, administered follow-up tests, and evaluated all the test results herself. Her credentials are impeccable. Had the judge really doubted the accuracy of her testimony, he could have read Dr. Berland's testimony which is consistent with hers. (See Issue IV).

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[8] Appellee's argument that Crump's assertion that the victim had a knife was rendered "absurd" by the ligature marks on her wrist is based on the misconception that Crump made that statement as to this victim. In fact, that statement was made in regard to the Areba Smith murder, to which Crump admitted. Moreover, the ligature could have been placed on Smith's wrists to move her body rather than prior to her death.. We know that Smith was not abducted with a ligature because a witness saw her voluntarily get into Crump's truck on the night of her murder. (TR. 257) In the case at hand, Dr. Diggs said that although there "appeared to be" ligature impressions on Clark's wrists, he did not include this in the autopsy report because the marks were very faint and left no bruising. (TR. 346) Her body was also moved from where she was strangled with may have accounted for slight ligature marks. Of course, Crump did not contend that Clark had a knife. In fact, he denied killing her.

ISSUE III

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

Appellee argues that the trial judge was not at liberty to ignore or disobey this Court's mandate. Although this Court held that the trial judge did not err by failing to hold an allocution hearing, Crump v. State, 654 So. 2d at 548, it did not hold that the judge was not permitted to allow Crump to make a statement prior to his sentencing, nor did it forbid the judge from allowing arguments of counsel. These are basic rights that apply at all sentencings, in accordance with due process of law.

The judge's denial of Crump's basic right to make a statement and have argument of counsel at sentencing is exacerbated because Michael Crump has never had the sentencing contemplated by Florida Rule of Criminal Procedure 3.780, which governs sentencings in capital cases. The trial judge 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 the first sentencing. He had already prepared his order sentencing Crump to death so could not have considered the arguments. (TR. 690-91)

At Crump's first resentencing,[9] the trial judge allowed argument of counsel and a brief qtatement by the Appellant, but could not have considered them because he immediately sentenced

[9] 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).

Crump to death and filed his pre-prepared sentencing order. (1S. 22) At this second resentencing, although defense counsel filed four pretrial motions, the judge refused to even 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) He never asked whether anyone had anything to say, any reason why he should not pronounce sentence, or any questions. No one spoke but the judge.

Crump has been denied the due process and equal protection accorded other death row inmates whose cases are remanded for resentencing, in violation of the Fifth, Eighth and- Fourteenth Amendments to the United States Constitution.

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.

Appellee argues that Crump had an opportunity to present mitigation, and should not be permitted to reopen the penalty phase. (Brief of Appellee, p. 31) Although Crump did present some mitigation at his one and only penalty proceeding, following his conviction, he did not have the benefit of Dr. Besland's testimony. Unlike many other capital defendant's, he was not permitted to present testimony of his good behavior in prison at either of his resentencings.

In Robinson v. State, 21 Fla. L. Weekly S499 (Fla. Nov. 21, 1996), the Court found that, although the defendant waived the presentation of the mitigation proffered by defense counsel, which included information from Dr. Berland, the trial court erred by failing to consider and weigh this mitigation. In this resentencing, defense counsel also asked'the court to consider testimony by Dr. Berland. He refused to do so, even though the proffered testimony was attached to the motion, was in the file in front of him, and is now in the appellate record. In Robinson, this Court stated as follows:

> It is well settled that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. [Even when the defendant waives consideration

> of the mitigation], "[i]n the end, the trial judge must carefully analyze all the possible statutory and nonstatutory mitigating factors against the established aggravators to ensure that death is appropriate. The judge must not "merely rubber-stamp the state's position."

21 Fla. L. Weekly at S500. Accordingly, in this case, to assure that the death penalty was appropriate, the trial court should have read and considered Dr. Berland's testimony.

Appellee asserts that, had the judge considered Dr. Berland's testimony from another trial, the State would have had no opportunity to cross-examine him as to this case. (Brief of Appellee, p. 31) Dr. Berland's testimony includes cross-examination concerning the Areba Smith case. Because Crump did not admit that he killed Lavinia Clark, it would have done little good for the State to cross-examine Dr. Berland about the crime. Moreover, if the State wanted to cross-examine Dr. Berland, it should not have opposed the holding of a new penalty trial in which Dr. Berland could have testified in person, and been cross-examined.

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.

Appellant relies on the Initial Brief for this issue.

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.

Appellee argues that this Court has never found the death penalty disproportionate for a "serial killer." (Brief of Appellee, p. 37) We wish to point out that Crump is not a serial killer, within the common meaning of the term. Although Crump was convicted of Areba Smith's murder before the trial in this case, the murder actually occurred some months after the murder in this case. There are a number of cases in which a defendant has killed two persons in which this Court has found the death penalty disproportionate. (See cases cited in Initial Brief of Appellant).

Appellee notes that, in some cases, this Court has upheld the death sentence when there was only one aggravator. Although this is true, these cases dealt with more heinous crimes (see, e.g., Cardona v. State, 641 So. 2d 361 (Fla. 1994) (Ana Cardona, with the help of her female lover, systematically tortured, abused and finally murdered Ana Cardona's three-year-old son over an eighteen-month period)), and with little or no mitigation, unlike this case. Even in Ferrell v. State, 680 So. 2d 390 (Fla. 1996), in which the defendant had committed a prior similar murder (Ferguson told the police he was glad he shot the first victim and hoped she died), the mitigation was scanty and merited little weight. In addition, when the trial judge wrote a new sentencing order explaining in detail his reasons for imposing the death penalty; this Court was able to evaluate the findings and affirm the death sentence. In the

case at hand, the trial judge's findings are still too sparse for an adequate proportionality review.

Appellee describes the mitigation in this case as "warm and fuzzy mitigation" of the type this Court approved the little weight given by the trial court in Ferrell. Although some of the non-statutory mitigationinvolveed Crump's positive personality traits, which Appellee calls "warm and fuzzy mitigation," Crump also suffered from serious mental disturbances. He was sometimes delusional and heard "god voices"telling him what to do. He was always paranoid and easily threatened. He perceived danger where there was none which indicates his departure from reality." Although Crump was 25 years old when he committed the homicide, he was a slow learning and emotionally immature. This extensive and substantial mitigation makes the death penalty disproportionate because such mitigation has in the past warranted a life sentence in similar cases such as Cochran, Fitzpatrick, and Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1990).

Although Crump committed another capital felony, it was committed after the instant offense, before Crump was apprehended, and while he suffered from the mental and emotional impairments that caused him to commit this homicide. 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

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[10] Appellee asserts that Crump's mental health expert could only say that Crump "may possibly" have been mentally disturbed. These are the judge's words -- not Dr. Isaza's. Dr. Isaza opined that Crump met the requirements for both mental mitigators. (See Issue II, supra.)

mitigating evidence all in such instances." See Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). This is not true.

To the contrary, this Court must examine the record of each case in which the death penalty is imposed to be sure that its imposition is constitutional and complies with the standards set by the legislature and the courts. Goode v. State, 365 So. 2d 381 (Fla. 1979). "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Fitzpatrick v. State, 527 So. 2d 807, 811 (Fla. 1988). 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 Penn v. State, 574 So. 2d 1079, 1083-84 (Fla. 1991) (based partly on Penn's heavy drug use, court found that this was not one of the least mitigated and most aggravated murders); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990) (trial court incorrectly weighed substantial mitigation; death penalty disproportionate); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1990). Because of the significant mitigation in this case -- especially the mental mitigation -- the death penalty is unwarranted.[11]

Other reasons why the death penalty should be vacated concern the trial court's errors, as described in this and the initial

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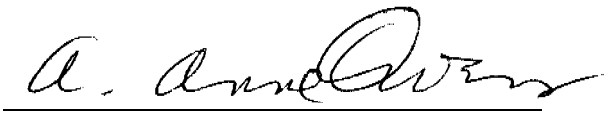
[11] Appellee's final characterization of Crump as an extremely violent man and a serial killer are unwarranted for reasons which should be evident from the evidence and from Appellant's arguments in this issue.

brief, the procedural irregularities, and, most importantly, the fact that Crump has been denied the due process accorded other capital defendants, making his death sentence arbitrary and capricious in violation of the United States Constitution.

More specifically, the trial'judge erred by failing to find the two mental mitigators and substantial nonstatutory mitigation. (See Issue II, supra.) He erred by failing to consider that Crump had behaved well since his incarceration. (See Issue VI, supra.) The jury recommendation is unreliable because the jury was instructed to consider CCP, which this Court found inapplicable. The judge has never written an order in compliance with Campbell, nor has he taken time to seriously consider and weigh the mitigation in this case, to make a reasoned sentencing decision. For these reasons, and others argued above and in our initial brief, imposition of the death penalty in this cse is unconstitutionally arbitrary under the Eighth and Fourteenth amendments to the United States Constitution and article 1, section 17 of the Florida Constitution.

Respectfully submitted,



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APPENDIX

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

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 cemetary.

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

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

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

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

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

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, CIRCUIT JUDGE

Copies furnished to:

State and Defense Counsel

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CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

vs.

MICHAEL TYRONE CRUMP,

Defendant

CASE NO.: 88-4056-D

TRIAL DIVISION 1

1995 SEP -1 P 4:13

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

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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.

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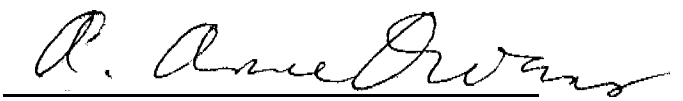
CERTIFICATE OF SERVICE

I certify that a copy of this brief has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 23rd day of December, 1996.



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