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IN THE SUPREME COURT OF FLORIDA

MICHAEL TYRONE CRUMP, :

Appellant, :

vs. : Case No. 82,943

STATE OF FLORIDA, :

Appellee. :

_____ :

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

# INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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## PRELIMINARY STATEMENT

This appeal is from a resentencing ordered by this Court in Crump v. State, 622 So. 2d 963 (Fla. 1993). The record on appeal from the trial and original sentencing will be referred to by the page number preceded by the letters "TR" (trial record). The record on appeal from the resentencing will be referred to by the page number preceded by the letter "R." The transcript of the resentencing hearing is not numbered consecutively to the rest of the record on appeal, but contains only the court reporter's numbering, from page 1 to page 23. Thus, the resentencing transcript will be referred to by the page number preceded by the letter "T."

## 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 Palmore Clark. (TR. 599-600) Crump was tried by jury March 27-30, 1989, the Honorable M. William Graybill presiding, and found guilty as charged. (TR. 661, 688)

Following the penalty phase, the court instructed the jury to consider as aggravation whether: (1) the defendant was previously convicted of another capital offense or felony involving violence to the person; and (2) the crime was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. (TR. 559-60, 685) He instructed the jury to consider in mitigation whether (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 other 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 the death sentence, rendered the day after the jury's penalty recommendation, the judge found the same aggravating and mitigating factors upon which he instructed the jury. (TR. 690-91)

On June 10, 1993, this Court vacated the death sentence and remanded the case for the trial court to reweigh the aggravating and mitigating circumstances and resentence Crump. (R. 10-34) The

majority 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 nonstatutory mitigating circumstances he found and what weight he gave them. (R. 29-30) See Crump v. State, 622 So. 2d 963, 973 (Fla. 1993).

On remand, the trial court denied defense motions to confirm mitigators, to consider new evidence, and to consider testimony of a prior psychologist. (R. 38-39, 42-44; T. 21) On, November 22, 1993, he again sentenced Crump to death. (R. 49; T. 22) In his written findings, he found as follows:

> 1. The only Aggravating Circumstance established by the evidence and proved beyond a reasonable doubt is that the Defendant was previously convicted of Murder in the First Degree, Aggravated Assault and three counts of Aggravated Battery.[1]
>
> 2. The only reasonably convincing Mitigating Circumstances established by the evidence are that the Defendant possessed a few positive character traits and suffered from mental impairment not reaching the statutory standards of mental mitigation.
>
> 3. Great weight should be given to the Aggravating Circumstance and only slight weight to the Mitigating Circumstances.
>
> 4. The Mitigating Circumstances fail to outweigh the Aggravating Circumstance and the Defendant deserves the death penalty for having again committed Murder in the First Degree.
>
> 5. The Defendant deserves the death penalty even if his mental impairment meets the statutory standards of mental mitigation since the Mitigating Circumstances would still fail to outweigh the Aggravating Circumstance.

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[1] The aggravated assault and three counts of aggravated battery all resulted from one incident, possibly a fight, and were part of the same case. Apparently, there were three different victims. The batteries were committed without a firearm. (TR. 533)

(R. 40-41)

On December 20, 1993, 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)(1)(A)(i). (R. 54) The Public Defender was appointed to represent Crump on December 30, 1993. (R. 53)

## STATEMENT OF THE FACTS

### A. Guilt Phase

On the morning of December 12, 1985, the nude body of Lavinia Palmore Clark was discovered on the north side of Idlewild Avenue in Tampa, along a cemetery. (TR. 186-87) During the investigation, the detectives determined that Ms. Clark was a prostitute and a heavy cocaine user. (TR. 203) Detective Onheiser, Hillsborough Sheriff's Department, worked on the case for about three months before putting the case in the closed or "dead" file. (TR. 199-201)

Detective Robert Parrish of the Tampa Police Department testified that on October 9, 1986, he responded to a homicide scene where he observed the nude body of a black female in a field next to a cemetery.[2] (TR. 245-46) Tire tracks which appeared to be those of a large truck were found at the scene. (TR. 250) Based on a description provided by a witness who had seen Areba Smith get into a truck the night of the homicide, Tampa police officers located the truck, which belonged to Michael Crump, and impounded it. (TR. 257, 261) Tim Whitfield, formerly with the Pinellas County Sheriff's Office, processed the truck with laser equipment. He found hair and fiber evidence. (TR. 280-85) Under the carpet on the passenger's side, he discovered the driver's license of Lavinia Palmore Clark. (TR. 286-87) He found what appeared to be a restraining device wrapped around the gear shift. (TR. 289)

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[2] Evidence concerning the murder of Areba Smith, also a black prostitute, was introduced as Williams Rule evidence over defense objection and denial of a defense motion to exclude it. (TR. 636)

On February 13, 1987, the Appellant, Michael Tyrone Crump, was interviewed at the Tampa Police Department. (TR. 263) During the course of the interview, he admitted choking Areba Smith. (TR. 265) He told police that he picked her up because it started to rain and she wanted a ride to the Boston Bar. During the ride, they discussed sex and agreed on a price of $10.00. They drove to a field by the side of a cemetery. She proceeded to give him a "blow job." Smith became frustrated because it was taking too long. When she pulled out a knife, Crump choked and killed her. (TR. 266-67)

Michael Malone, special agent with the FBI, 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 exhibited exactly the same individual characteristics as the head hair of Lavinia Clark. (TR. 326-27)

Charles Diggs, medical examiner, testified that he performed an autopsy on Lavinia Clark. (TR. 339-42) The cause of death was strangulation. (TR. 342-43) She had a bruise on her scalp behind the ear and two bruises beneath the skin on the top of her head, indicating that she may have been struck on the head. There was slight hemorrhaging in the abdominal wall. No alcohol or drugs were present in her blood. Dr. Diggs took vaginal swabs but turned them over to law enforcement. (TR. 343-44) 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)

Some time after closing the Clark file, Detective Onheiser was contacted by the Tampa Police Department concerning Michael Crump. Onheiser interviewed Crump on February 4, 1987. (TR. 355) Crump told him 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)

Crump did not remember exactly what he and Clark argued about. There was no struggle other than his pushing her out of his truck. She left behind her purse. He discarded it, keeping only her driver's license. He didn't know why he kept the license. He saw Clark's picture in the newspaper later on. He hid the license behind the electric meter box at his house. When they moved, he hid it under the carpet in his truck. (TR. 359)

The defense did not present a case. (TR. 366) Following closing arguments and jury instructions, the jury found Michael Crump guilty of first-degree murder. (TR. 439)

**B. Penalty Phase**

At penalty phase the following day, Mittie Render, the Appellant's mother, 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) She moved out of the house when Michael was seven but kept in close contact. 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 twins were four years old. (TR. 467)

Another sister, Christina Taylor, never lived at home when Michael was growing up but went by daily. 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) Patricia Howard was a neighbor of Christina Taylor in St. Petersburg. (TR. 472-73) Although currently a teacher, Ms. Howard was formerly a social worker with HRS. (TR. 474) She testified that 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 very good with her four children. (TR. 474-75) She saw no evidence of violence in Michael. (TR. 475)

Dr. Maria Elena Isaza, a clinical psychologist and adjunct professor at the University of South Florida, was provided with raw data and test results from Dr. Berland. (TR. 226-28) Dr. Isaza testified that Berland administered tests to Crump in 1987. She had not spoken with Dr. Berland. (TR. 498) On cross-examination, the State 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 in mitigation during the penalty phase.

Dr. Berland was unable to testify because he was out-of-town. (TR. 226) She first saw Crump the day prior to her testimony, after his conviction in this case. (TR. 483-84, 497) She interviewed Crump 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 figure. (TR. 487) Dr. Isaza said that, although Crump first comes across as a very mean, tough, intimidating individual, when you talk with him he has the capacity to be warm and caring. He is only comfortable, however, 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 any 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 a feeling that his manhood depended on his sexual performance. (TR. 490) Crump told Dr. Isaza

that he was shy and had difficulty establishing relationships with women. (TR. 509) Crump's symptoms were consistent with a paranoid personality disorder. (TR. 490)

According to Dr. Isaza, 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 suffered from. (TR. 510) He could become delusional, believing that he was threatened, abused, or mistreated. (TR. 511)

## SUMMARY OF THE ARGUMENT

Michael Crump has never had the sentencing hearing contemplated by Florida Rule of Criminal Procedure 3.780, which governs sentencing proceedings in capital cases. When he was originally sentenced to death, the trial court held the sentencing hearing the day after the penalty verdict was rendered, sentencing Michael Crump to death before counsel had time to adequately prepare for sentencing, and before he had time to reflect on the sentence. The judge had already prepared his order sentencing Appellant to death prior to the hearing, and so was in no position to consider any evidence or arguments made. He filed his findings supporting the death sentence contemporaneously. (TR. 690-91) (See Issue III)

Additionally, because Dr. Robert Berland was out-of-town during Crump's original penalty proceeding, the judge and jury did not have the benefit of his testimony concerning his prior testing and evaluation of Crump. Dr. Maria Elena Isaza, a clinical psychologist and professor at the University of South Florida, filled in for him 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 was found invalid by this Court on direct appeal. Crump v. State, 622 So. 2d 963 (Fla. 1993). (See Issues IV and V) Thus, the judge's sparse initial sentencing order was based on a less than adequate jury recommendation and sentencing evidence, and was made with little time for reflection.

The trial judge did the same thing at Crump's resentencing. He prepared his almost equally sparse sentencing order prior to the resentencing and refused to hear new evidence. (See Issues I and III) 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. (See Issue III) The trial judge merely clarified his prior finding that the mental mitigators "may have" been established, finding instead that Crump's mental impairment constituted non-statutory mental mitigation, and expanded his previous reliance on the "catchall" nonstatutory mitigator, to state that Crump had "a few" unspecified "positive character traits."

Defense counsel filed a pretrial motion requesting that the trial court consider Dr. Berland's testimony from Crump's other capital case. Because Dr. Berland was unable to testify in the penalty phase of Crump's original trial, and because this Court remanded the case specifically so that the judge could clarify his indecisive written findings concerning the mental mitigation, it was especially important for the court to consider Dr. Berland's testimony. Although the prosecutor told the judge that she had no objection to his considering Dr. Robert Berland's testimony from Crump's penalty trial in his other capital case, the judge still refused to consider it. (T. 4, 11, 21) (See Issue I(A))

Defense counsel also filed a motion to introduce evidence that Crump had adjusted well to prison life. The prosecutor objected to evidence concerning Crump's behavior in prison only because she had

not called the prison and had no way to rebut it, and not because she thought it was inadmissible. Had the trial court allowed the evidence and scheduled an allocution hearing to consider it, the prosecutor would have had time to investigate Crump's prison record, thus mooting her objection. (See Issues I(B) and III)

Perhaps because he refused to hear defense counsel's proffered mitigating evidence, as is required by due process and by this Court, or perhaps because he already had his mind made up,[3] the trial court failed to give sufficient weight to the mitigating factors. (See Issue II) Although Dr. Isaza's unrebutted testimony showed that the two statutory mitigators were met, the trial court found them to be nonstatutory mitigation, not rising to the level of statutory mitigation. As further nonstatutory mitigation, he found that Crump had "a few positive character traits." He did not specify them or discuss any of the mitigation as to which the witnesses testified, as has been required by this Court.

Defense counsel suggested at sentencing that the judge should order a whole new penalty proceeding because the invalid CCP instruction tainted the jury's recommendation. (See Issue V) Unfortunately, the trial judge believed that all he was required to do was to reweigh the circumstances and bring Crump back to court and resentence him. He said he was not even required to appoint counsel and hold a hearing. Thus, he was obviously not inclined to

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[3] That the judge was predisposed to sentence Crump to death is evidenced by his final written finding -- that Crump deserved death even if the mental mitigation met the statutory requirements. In other words, he would sentence Crump to death "no matter what."

entertain a motion for a new penalty proceeding.

Although it is true that this Court did not order a new penalty proceeding in Crump's previous appeal, neither did it specifically prohibit such a proceeding. Moreover, it is clearly required now because of this Court's more recent decision in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. Apr. 21, 1994). The weighing of an invalid aggravating circumstance violates the Eighth Amendment. Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 858 (1992). It would be better to have the case straightened out now than, possibly, in a future post-conviction proceeding. (See Issue IV) Accordingly, this court should remand for a complete new sentencing proceeding before a newly empaneled jury. (See Issues IV and V)

After this Court struck the CCP aggravator, the trial court was left with only one aggravating circumstance. He refused to reconsider other aggravators, finding only the one aggravator (prior violent felony) and several nonstatutory mitigators including the two mental mitigators which he consider as nonstatutory mitigation. His final mitigator -- a few positive character traits -- actually encompassed a number of factors that this Court has found mitigating. 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. Thus, death is not proportionately warranted in this case. Crump's death sentence should be vacated and the case remanded for a life sentence. (See Issue VI)

## ARGUMENT

### ISSUE I

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

This Court affirmed Crump's conviction for first-degree murder, but vacated his death sentence and remanded the case to the trial judge to "reweigh the circumstances and resentence Crump." Crump v. State, 622 So. 2d 963, 973 (Fla. 1993). Although the trial judge purported to reweigh the aggravating and mitigating circumstances before again sentencing Crump to death, he refused to allow the defense to present any mitigating evidence, denying the defense motions to consider (1) evidence that Crump had adjusted well to prison life, and (2) the testimony of Dr. Robert M. Berland concerning Crump's mental mitigation. (R. 42-44, T. 21) Accordingly, if Crump's sentence is not reduced to life, this Court must vacate his death sentence and remand the case for resentencing.[4]

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 if the trial court refuses to allow a defendant to present matters in mitigation, the

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[4] See the proportionality argument in Issue VI, infra, as to why Crump's sentence should be reduced to life. If a resentencing is ordered instead, however, it should be a new penalty proceeding with a new jury for reasons discussed in Issues IV and V, infra.

case must be remanded for a sentencing hearing and resentencing. Hargis v. State, 451 So. 2d 551 (Fla. 5th DCA 1984); Miller v. State, 435 So. 2d 258 (Fla. 3d DCA 1983). Because the need for the trial court to have all available information before sentencing is even more important where, as here, the defendant is faced with the ultimate sanction of death, a separate criminal procedure rule governs the presentation of evidence in capital sentencing hearings. Florida Rule of Criminal Procedure 3.780 reads as follows:

**RULE 3.780 SENTENCING HEARING FOR CAPITAL CASES**

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

Thus, the rule 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). 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); O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989). "[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).

The evidence Appellant proffered was certainly relevant to the sentence he should receive. He wanted to present psychological evidence to support the statutory mental mitigators which is precisely the type of evidence this Court has found mitigating in numerous cases. See, e.g., DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (sentence reduced to life based, in part, on Dr. Robert M. Berland's testimony concerning defendant's mental disorders); 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) (remanded for trial court to consider mental mitigation). Crump also wanted to present evidence of his good behavior in prison since he had been on death row, evidence of the type which, again, has been consistently recognized by the courts as valid mitigation. See, e.g., Skipper v. South Carolina, 476 U.S. 1 (1986); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Valle v. State, 502 So. 2d 1225 (Fla. 1987).

This Court has determined that the defense must be permitted to present new evidence in mitigation at a resentencing. See, e.g., Lucas v. State, 490 So. 2d 943 (Fla. 1986). In Lucas, the trial judge refused Lucas' requests 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 trial judge erred by not allowing him to present additional mitigating evidence. Id. at 945. This Court held that both sides should have been allowed to present additional testimony and argument at the resentencing proceeding.

Similarly, 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.

> 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. Accordingly, this Court determined that the totality of events leading up to Scull's resentencing violated the basic requirements of due process. The appearance of irregularity so permeated the proceedings as to justify suspicion of unfairness which, the Court held, was "as much a violation of due process as actual bias would be." Id.

On Petition for Clarification, the Scull Court attached the following clarification:

> On remand there will be no need of empaneling a new penalty-phase jury. The new proceedings will be before the judge. This is because the errors that required the present remand occurred after the penalty-phase jury already had completed its deliberations and made its recommendation. Obviously, these errors did not taint the jury's advisory role below.
>
> At the penalty phase on remand, the defendant will be entitled to present to the judge any new mitigating evidence he wishes and also will be entitled to rely upon any other mitigating evidence available in the record as it now exists. Likewise, the state will be entitled to present any new aggravating evidence it wishes and also may rely upon aggravating factors already established in the present record. If mitigating or aggravating evidence already exists in this record, there will be no need of either the defense or the state reproducing it through "live" testimony before the judge on remand. Both sides may rely upon the transcripts to this end.

569 So. 2d at 1253 (emphasis added).

The above directive from this Court sets out the requirements for a resentencing. Clearly, the trial court is required to allow the defendant to present any new mitigating evidence he wishes. In the instant case, the trial court erred by disallowing the mitigating evidence proffered by defense counsel and by rushing to resentence Crump to death.[5] 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."

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[5] Reading between the lines, it appears that, in this case, the judge refused to consider the mitigating evidence proffered by defense counsel because he had already prepared his written sentencing order and did not want to take time to schedule another hearing, consider further evidence, and revise his written order. This same judge originally sentenced Crump to death the day after the jury recommendation and had already prepared his order prior to that sentencing hearing. (TR. 586, 695)

In this case, Crump never really had the sentencing hearing contemplated by the rules of criminal procedure before he was originally sentenced to death on March 31, 1989 (TR. 586), because, as in the instant resentencing, the trial judge had already prepared his order sentencing Appellant to death prior to the hearing, and so was in no position to consider any evidence or arguments that Appellant made. He held the sentencing hearing the day after the penalty verdict was rendered, sentencing Michael Crump to death before defense counsel had time to adequately prepare for sentencing, and before he had time to reflect on the sentence. (TR. 586, 695) He filed his written findings contemporaneously. (TR. 690-91) Thus, the judge's sparse initial sentencing order was based on made without the benefit of sentencing evidence and with little time for reflection.

The trial judge did the same thing this time. He prepared his almost equally sparse sentencing order prior to the resentencing and refused to hear new evidence.[6] 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. (See Issue III, infra.)

At the resentencing hearing, the prosecutor agreed with defense counsel that Crump should be permitted to present new

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[6] The trial judge merely clarified his findings concerning the mental mitigation, finding that Crump's mental impairment constituted nonstatutory mental mitigation rather than that the statutory mental mitigators "may have" been established, and expanded his reliance on the "catchall" statutory mitigator to state that Crump had "a few" unspecified "positive personality traits." (TR. 690-91, R. 40-41)

evidence pertaining to what weight the court should give to the aggravating and mitigating circumstances. (T. 4) Although she told the judge that she had no objection to his considering Dr. Robert Berland's testimony from Crump's penalty trial in his other capital case, the judge still refused to consider it. (T. 4, 11, 21) She objected to evidence concerning Crump's behavior in prison only because she had not called the prison and had no way to rebut it, and not because she thought it was inadmissible. Had the trial court allowed the evidence and scheduled an allocution hearing to consider it, the prosecutor would have had time to investigate Crump's prison record, thus mooting her objection.

(A) The trial court erred by denying the defense motion to consider Dr. Berland's testimony from Crump's prior trial.

In remanding this case for resentencing, this Court noted that the sentencing order was unclear as to the statutory mitigating circumstances found by the trial court. 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.

Defense counsel filed a pre-hearing "Motion to Consider Testimony of Prior Psychologist." He advised the court that Dr. Robert

Berland testified in the second phase of Crump's prior murder trial (the Areba Smith case for which he received a life sentence). At Crump's original trial in this case, Dr. Berland was unable to testify due to a scheduling conflict. Thus, Dr. Isaza evaluated and tested Crump in the late afternoon on the day before the penalty proceeding, and testified in place of Dr. Berland. Defense counsel represented at Crump's resentencing that Dr. Berland's testimony in the prior case was essentially the same as Dr. Isaza's testimony concerning the issue of whether Crump was under extreme mental and emotional distress at the time of the offense, and whether Crump's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was impaired. Because the trial judge stated in his original order that Crump proved that he "may" have been under extreme mental and emotional distress, and that his ability to appreciate the criminality of his conduct "may" have been substantially impaired, Dr. Berland's prior testimony and report would have substantiated the findings of Dr. Isaza that the two statutory mental mitigators were established. (R. 43-44)

Additionally, because Berland had tested and interviewed Crump in 1987, much closer to the time of the offenses, and had testified at the earlier penalty proceeding at which Crump received a life recommendation, Dr. Berland would certainly have added the much needed detail so that the trial judge could have made a more reliable and reasoned decision as to whether the mental mitigators were applicable. At the first sentencing hearing, defense counsel

had testified that Crump was a paranoid schizophrenic and Dr. Isaza had testified that he had a paranoid personality disorder. (TR. 582) Because Dr. Berland's testing and examination were much more extensive (Dr. Isaza was called in at the last minute and evaluated Crump the evening before penalty phase), his testimony would certainly have been more detailed and helpful. The judge apparently was not interested in making a reasoned decision, however, but only in clearing up the indecisive language in his prior order so it would pass muster with this Court.

At the sentencing hearing, although the prosecutor said she had no objection to the judge's consideration of Dr. Berland's prior testimony (T. 4), the judge stated:

> Now the State is saying that at this type of a hearing, the Court may consider Defendant's Motion to Consider New Evidence. I'm not certain that's correct. But if that is correct, Ms. Cox, well, then the State, a fortiori, must agree that the Court can consider the testimony of psychologist Robert M. Berland because, in essence, that would be new evidence, but you objected to that. But it's immaterial. [Note that the prosecutor said she did not object to it. (T. 4)] All Dr. Berland, according to this motion, would testify to is essentially the same thing that Dr. Isaza testified to. (T. 11)

When defense counsel asked to argue this further, the following transpired:

> THE COURT: I already said what if I consider Berland, it's the same thing that Dr. Isaza said. Why do I have to hear anymore, except you got two doctors that said the same thing?
>
> MR. CUNNINGHAM: Except the Court, in its findings, said we prove that Mr. Crump may have --
>
> THE COURT: No, I did not. I said possibly may.
>
> MR. CUNNINGHAM: The appellate court decision hung on the word "may."

THE COURT: I can't help what the appellate court did. I know what I found, and now I've been ordered to reweigh the circumstances and forget "planned" killing.

MR. CUNNINGHAM: In regards to Dr. Berland's testimony, that motion is aimed at backing up what Dr. Isaza said. If the Court recalls, Dr. Isaza had some difficulty with the language, I believe. 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.

I went through the transcript. Dr. Isaza, in the transcript, clearly states that it was in her opinion . . . within the bounds of reasonable psychological certainty that he was or probably was, which is within the bounds of reasonable, probable certainty, under an extreme mental distress at the time and impaired to the point where he could not control his -- the second . . . mitigator that the Court consider . . . she answered.

What I'm trying to explain . . . that this extreme emotional disturbance can occur at different times. He's unpredictable. So at that particular time, he probably could have been, referring back to, under an extreme emotional disturbance. (T. 12-13)

Defense counsel continued trying to explain what Dr. Isaza said that caused the judge to pick up on the word "may."[7] (T. 14) His obvious implication was that Dr. Berland's testimony would help clarify the matter for the judge who seemed undecided when he wrote his sentencing order. The judge denied the motion. (T. 21)

As defense counsel tried to explain, the point of this Court's remand was for the trial judge to determine whether the mental

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[7] It is virtually impossible for any expert to say for certain that a defendant who suffers from mental illness triggered by certain situations was afflicted with the disorder at the time of the killing, because the expert was not there when the killing occurred. Generally, as was the case here, there are no witnesses to the murder, and certainly none who can make a mental diagnosis.

mitigators were applicable, what nonstatutory mitigation he considered and the weight he gave it, while excluding from his consideration the inapplicable CCP aggravating factor:

> The sentencing order is unclear as to the statutory mitigating circumstances found by the trial court. The sentencing order shows 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 also shows that the trial judge considered "[a]ny other aspect of [Crump's] character or record, and any other circumstance of the offense as evidenced by expert and lay testimony in the case."
>
> 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. After reviewing the sentencing order and the record, we cannot determine that the trial judge's error in finding the cold, calculated and premeditated aggravating circumstance was harmless. Thus, the instant case must be remanded to the trial judge to reweigh the remaining aggravating circumstance and the statutory and nonstatutory mitigating circumstances established in the record.

Crump, 622 So. 2d at 973 (footnotes omitted). Despite this Court's mandate, the judge's sentencing order was not much more detailed this time. Although he clarified that he found that Crump suffered from mental impairment not reaching the statutory standard of mental mitigation,[8] he did not specify what other nonstatutory

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[8] We assume the judge meant that he found both statutory mental mitigators but in a lesser degree than that required for "statutory" mitigation. This, of course, is not the correct standard. See Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) ("[I]t would clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say.")

mitigation he found except to say that Crump exhibited "a few positive character traits." (R. 40-41)

Had the trial judge agreed to consider Dr. Berland's testimony, he would have had a basis to clear up his prior uncertainty as to whether, and to what extent, the mental mitigation was established and, perhaps, would have been able to write a clearer and more precise sentencing order.[9] Instead, he merely expanded his previous order slightly.[10] Although he wrote that he would not change his mind even if the mental mitigation met the level

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[9] 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.

Although Dr. Isaza describe Crump's mental problem similarly to Dr. Dee's description of Carter's symptoms, she did not discuss whether Crump had organic brain damage. Defense counsel believed that she had some difficulty with the language. (T. 12-13) Had the trial judge agreed to read Dr. Berland's testimony, he might have better understood Crump's mental disorder.

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

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.

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)

The resentencing order is set out on page 3, infra.

required for statutory mitigation, had he read Dr. Berland's testimony, he might have found more extensive mitigation. This Court is not aided in its proportionality review by knowing that, even if he had found that the two mental mitigators rose to the statutory level, he still would not change his mind.

As this Court held, "the 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) (emphasis added); 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 two statutory mental mitigators, including 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 mitigating in a number of cases. See, e.g., DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993) ("More importantly, DeAngelo presented significant mental mitigation."); Scott v. State, 603 So. 2d 1275 (Fla. 1992); Carter v. State, 560 So. 2d 1166 (Fla. 1990) (override improper because defendant's mental capacity, psychological state and childhood abuse provided reasonable basis to support jury's life recommendation); 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) (new sentencing proceedings mandated in cases that entail psychiatric evaluations which are so grossly insufficient that they

ignore clear indications of mental retardation or organic brain damage). Psychiatric testimony is always relevant to the sentencing in a capital case. This particular evidence had already been admitted in another capital case involving the same defendant. In other words, the court had no reason to exclude the evidence.

This error was clearly not harmless. Had the trial court considered Dr. Berland's testimony, he might have found that the two mental mitigators "reached the level of statutory mitigation," and might have found other nonstatutory mitigation. Even if he did not, or if, as he stated in his order, it would not have changed his sentence,[11] this Court would have had Dr. Berland's testimony to review and perhaps a clearer and more detailed written sentencing order to review. This court would more easily be able to make a proportionality analysis and remand for a life sentence. Moreover, the denial of due process is never harmless.

> (B) The trial court erred by denying Crump's motion to consider evidence that he adjusted well to prison life and was not a behavioral problem.

Prior to the resentencing hearing, defense counsel filed a "Motion to Consider New Evidence," alleging that Crump had adapted

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[11] The judge's statement that even if the mental mitigation reached the level of statutory mitigation, he would still sentence Crump to death is reminiscent of the boiler-plate language used by many judges in their sentencing guidelines departure orders. This Court expressly disapproved boiler-plate findings such as "if any one departure reason is sustained on appeal, the sentence would be the same," finding that it does not satisfy the standard set forth in Albritton v. State, 476 So. 2d 158 (Fla. 1985). See Mathis v. State, 515 So. 2d 514, 215 n.1 (Fla. 1987); Griffis v. State, 509 So. 2d 1104 (Fla. 1987). Certainly, then such reasonless boiler-plate would not sustain a sentence of death.

well to prison life and that testimony would establish his adjustment. He asked the trial court to consider evidence of Crump's adjustment to prison life. (R. 42) At the sentencing hearing, the prosecutor agreed with defense counsel that the trial court could consider new evidence but said she was not in a position to say whether the judge should consider the evidence concerning Crump's adjustment to prison because she did not know what the evidence consisted of. She had not called the prison, so objected to the introduction of evidence "absent my ability to refute it." (T. 4)

Although defense counsel attempted to make further argument concerning admission of this evidence, the judge misunderstood what he was leading into and cut him off. (T. 17) When he cited to Songer v. State,[12] the court interrupted him, and told him that, despite the State's suggestion, he would not consider applying the "heinous, atrocious and cruel" ("HAC") aggravating factor. Songer deals not with HAC, but with the mitigating nature of evidence that the defendant has adjusted well to prison life.

Evidence of the defendant's good prison record must be considered in mitigation. Skipper v. South Carolina, 476 U.S. 1 (1986) (reversed because trial court excluded evidence that defendant behaved well in jail); Kramer v. State, 619 So. 2d 274, 276 & n.1, 278 (Fla. 1993) (that Kramer was a model prisoner and good worker during prior incarceration implies potential for

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[12] In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court found that Songer's history of adapting well to prison life and using his time for self-improvement was a mitigating factor.

rehabilitation and productivity in prison); Songer v. State, 544 So. 2d 1010 (Fla. 1989) (trial court erred by excluding evidence of defendant's exemplary adjustment to prison life and rehabilitation while in prison); Craig v. State, 510 So. 2d 857 (Fla. 1987) (remanded for resentencing because trial judge excluded evidence that defendant behaved well while in jail awaiting trial and sentencing); Valle v. State, 502 So. 2d 1225 (Fla. 1987) (remanded for new jury recommendation and resentencing because trial court erroneously 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 a life or death sentence. His sentence was reduced to life.

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." (T. 22) This is exactly the kind of evidence this Court found mitigating in Songer, 544 So. 2d 1010.

* * * * *

The judge expressed his interpretation of this Court's mandate as follows:

> The Supreme Court of Florida did not order a new penalty phase hearing. They did not even order that this Court reappoint Mr. Cunningham to represent Mr. Crump. They did not even order this Court to conduct a hearing. They merely directed the trial judge to reweigh the circumstances and resentence the defendant.
>
> It's obvious to this Court since I was the trial judge

> that all I had to do was writ Mr. Crump back from the Florida State Prison and resentence him after reweighing the circumstances. But, in an abundance of caution, I chose to reappoint Mr. Cunningham to represent Mr. Crump and we have a hearing as to a proper sentence, whether he should be sentenced to the electric chair or whether he should be sentenced to life imprisonment without the possibility of parole for 25 years.

(T. 10)

Despite the hearing, however, the judge refused to allow new evidence and prepared his order prior to hearing arguments of counsel and the Appellant's statement, which shows that he did not engage in a reasoned judgment in weighing the aggravating and mitigating circumstances. (See Issue III, infra.) Because the evidence proffered by defense counsel was expressly relevant, based on case law cited earlier in this issue, and because the trial court is clearly required to consider all mitigating evidence, see Parker v. Dugger, 498 U.S. 308; Scull, 569 So. 2d at 1253; Lucas, 490 So. 2d at 945; Fla. R. Crim. P. 3.780, if Crump's sentence is not reduced to life (see Issue VI), he must be given a new sentencing hearing in accordance with due process.

## ISSUE II

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

The sentencer must be allowed to consider and give effect to mitigating evidence relevant to the defendant's background and character precisely because the punishment should be directly related to the personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989). 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); Amend. VIII, U.S. Const.; Amend XIV, U.S. Const. To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's record and cannot ignore evidence of mitigating circumstances. Parker v. Dugger, 498 U.S. 308, 321 (1991).

To insure the proper consideration of evidence of mitigating circumstances this Court determined that the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence and whether nonstatutory factors are truly mitigating in nature. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). If the evidence reasonably establishes a given mitigating factor (question of fact) and if the factor is mitigating in nature (question of law), the judge must find it as a mitigating circumstance and weigh it against the aggravating factors. The judge's decision must be supported by "sufficient

competent evidence in the record." The Campbell Court held that the trial judge must, in his written sentencing order, expressly evaluate every statutory and nonstatutory mitigating factor proposed by the defendant. Id. In this case, the 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; Kight 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).

Defense counsel filed a "Motion to Confirm Mitigators" prior to the resentencing. (R. 38-39) In his prior sentencing order, the judge found that the two statutory mental mitigators "may" have

been proven. Defense counsel argued that the testimony of the expert psychologist (Dr. Isaza) was unrefuted. See Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (when reasonable quantum of competent, uncontroverted evidence of mitigating circumstance is presented, trial court must find mitigating circumstance established).

At the sentencing hearing, the prosecutor agreed that the judge should consider evidence put on at the original trial and decide what weight, if any, to give to it. (T. 4-5) The trial judge said, "And the Motion to Confirm Mitigators, the Court just doesn't understand what that means. The Court is required to make specific findings of aggravating factors and mitigating factors. So I don't know what that means. (T. 11)

Defense counsel argued in support of his motion that Dr. Isaza said that Crump might be perfectly normal an hour before and something triggered him and this happened. The State put on no psychiatric or medical testimony. Even after the prosecutor cross-examined Dr. Isaza, attempting to discredit her testimony, she still believed Crump was impaired at the time of the offenses. (T. 14-15) Defense counsel wanted the judge to confirm that the mental mitigators were established in the absence of any contradictory evidence. (R. 16-17) The judge denied the motion. (T. 21)

In his sentencing order, the judge stated 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." (R. 40) We do not

disagree with the mitigation found by the court, but only with the "slight" weight given it and judge's failure to set out the many nonstatutory mitigators presented, and unrebutted, by the lay witnesses, and described merely as "a few positive character traits" by the judge.

Dr. Isaza, the only mental health expert who testified at Crump's trial, said that Michael 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) Although there was unrebutted evidence to support the two statutory mental mitigators, the judge found that they did not "reach the statutory standard" for the statutory mental mitigating factors. His conclusions are not supported by the evidence, and one can only speculate as to his reasoning. The record of the penalty phase testimony in the instant case contains much convincing and uncontroverted factual testimony by Dr. Isaza concerning Crump's mental and emotional incapacities. See Santos, 591 So. 2d at 163 (psychological experts supported conclusions with "unrebutted factual testimony").

This Court has effectively removed the adjective "extreme" from the statutory circumstance:

> [I]t would clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Lockett; Rogers. Any other rule would render Florida's death penalty statute unconstitutional.

Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). Thus, the trial court was required to consider and give weight to the statutory mental mitigators despite his belief that they did not "reach" the statutory level. Although he gave them "slight" weight, mental mitigation must be accorded a significant amount of weight based on this court's decisions. See, e.g., 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).

The record also contains a number of nonstatutory mitigating aspects of Crump's character which the judge did not mention in his order except for his reference to "a few positive character traits." 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 testified that he was a good son. She said he was kind, considerate, and friendly, and helped anyone who needed help. Michael's two sisters testified that he got along well with the family and did a lot of work around the house. A friend of one of Crump's sisters also testified that Crump was helpful and got along well with her children. (TR. 463-75) A desire to help others was found mitigating in Songer v. State, 544 So. 2d 1010, 1012 (Fla. 1989). See also Campbell, 511 So. 2d at 419 n.4; Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984).

In Maxwell v. State, 603 So. 2d 490 (Fla. 1992), the defendant shot a man playing golf when he protested giving up a ring from his wife. 603 So. 2d at 493 (Grimes, J., dissenting). This Court remanded for resentencing due to Hitchcock error.[13] The case involved two aggravating factors and at least five mitigating factors. Mitigation approved by this Court included many factors also apparent from the penalty phase testimony in Crump's case. Maxwell's neighbor testified that Maxwell had helped her repeatedly since she was eleven years old; another neighbor testified that Maxwell frequently helped him with his six children and yard work and that he was good with children; another neighbor testified that Maxwell had been "a good boy and neighbor" and would volunteer to help with work around her house. 603 So. 2d at 491.

Maxwell, an illegitimate child, was raised by his grandmother until she became too ill to care for him. He then lived with his father. He helped his father with housework and chores. He was good with the neighborhood children.[14] He was raised in poverty, without proper guidance, in an unstable home. 603 So. 2d at 491-92. This Court found that the evidence established as valid nonstatutory mitigators that (1) Maxwell had been good earlier in life and was the product of parental neglect; (2) had a disadvantaged youth; (3) had potential for rehabilitation and might be productive in prison, as supported by positive personality traits and good deeds

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[13] Hitchcock v. Dugger, 481 U.S. 393 (1987).

[14] This Court noted that the State did not controvert Maxwell's father's testimony although appellate counsel attempted to discredit some of the mitigating evidence. 603 So. 2d at 492.

he had done; (4) was a hard worker who helped his family and others; and (5) family and friends believed he was a good prospect for rehabilitation and that he had been friendly and helpful to others and good with children. 603 So. 2d at 492.

In the case at hand, 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." She said Michael was friendly and outgoing and helped anyone who needed help. (TR. 459-60) Crump's sister testified that 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) Another sister never lived at home when Michael was growing up but went by daily. 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) Her neighbor in St. Petersburg, formerly a social worker with HRS, testified that 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 very good with her four children. (TR. 472-75) She saw no evidence of violence in Michael. (TR. 475) Accordingly, the five nonstatutory mitigators attributed to Maxwell, and accorded significant weight by this Court, also apply to Michael Crump.

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

v. State, 574 So. 2d 1059, 1061-62 (Fla. 1990); 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, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987); see also Eddings v. Oklahoma, 455 U.S. at 107, 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, 19 Fla. L. Weekly S390, 392 (Fla. Aug. 11, 1994) (defendant's capacity to form loving relationships with family and friends worthy of jury's consideration as mitigation).

Michael Crump grew up without a father or any father figure. (TR. 487) His sisters were both much older than Crump. One sister and her family lived with Crump and his mother until Crump was seven years old. (TR. 463-66) The other sister never lived at home while Crump was growing up. (TR. 468) Crump told Dr. Isaza that he was shy and had difficulty establishing relationships with women. Thus, he began engaging prostitutes at the age of sixteen. (TR. 509) Dr. Isaza said that his feelings of manhood depended on his sexual performance. (TR. 490) Surely, his lack of a father figure played a part in this problems. The trial court's failure to expressly identify, evaluate, find, and weigh all of the unrefuted nonstatutory mitigating circumstances established by the evidence was reversible error requiring remand. Nibert, 574 So. 2d at 1062; Campbell, 571 So. 2d at 419.

As in the case at hand,[15] the State, Maxwell, tried to discredit the mitigating evidence. This Court stated that,

> 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 the instant case, Dr. Isaza's testimony may have left some questions unanswered. Nevertheless, she firmly stated, without rebuttal, that it was her belief 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.[16] (TR. 494, 510)

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

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[15] In this case, the prosecutor tried to discredit Dr. Isaza during the original penalty phase (TR. 497-507) and again at the resentencing proceeding. (T. 7)

[16] The unanswered questions pertained to whether Dr. Isaza could determine positively that Crump was afflicted with the mental illness she described while he was committing the murders. It is virtually impossible for anyone to be one hundred percent certain in such a case without being there. See note 6, supra.

by Rogers, Campbell, and Parker.[17] 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).

The sentencing order in a capital case must reflect that a determination as to which aggravating and mitigating circumstances apply under the facts of the particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert denied sub nom., 416 U.S. 943 (1974). 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.

The trial court summarily disposed of the evidence of non-statutory mitigating circumstances by stating that "[t]he only reasonably convincing Mitigating Circumstances established by the

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[17] On remand, the trial court again imposed death. This Court vacated the death sentence and remanded the case for a life sentence because the mitigation clearly outweighed the remaining aggravating factor of the other contemporaneous murder. Santos v. State, 629 So. 2d 838 (Fla. 1994).

evidence are that the Defendant possessed a few positive character traits and suffered from mental impairment not reaching the statutory standards of mental mitigation." The judge also stated 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." This indicates that the judge did not really consider the mitigation at all.

As discussed in Issue I, supra, the trial court refused to consider additional evidence at sentencing. Had he agreed to hear this relevant 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 also "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. The judge also could have read additional psychological testimony by Dr. Berland which would have better enabled him to determine whether the two statutory mental mitigators were established. He refused to consider this evidence.

The court below concluded that the one aggravating circumstance outweighed all of the mitigating circumstances reflected in the record. (R. 40-41) His conclusion is not supported by any analysis that might establish that he engaged in a rational

weighing process before deciding what sentence to impose. If it were sufficient for the sentencing judge to say only that the aggravating factors outweighed the mitigating factors, this Court's opinions in Campbell and Rogers would be meaningless.

Because the trial court failed to adequately consider and discuss all of the mitigation presented by the defense, Michael 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); Eddings 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 to due process and to be free from cruel and unusual punishment, guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

## ISSUE III

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

It does no good to allow counsel to make a sentencing argument and to give the defendant an opportunity to be heard if the judge has already decided to sentence the defendant to death and prepared his written sentencing order. In the case at hand, the judge held no presentencing hearing, sometimes called an "allocution" hearing, prior to sentencing Crump to death. Defense counsel nor Crump were allowed to present additional mitigation. (See Issue I, supra.) Although defense counsel made a sentencing argument and Crump himself made a short appeal to the court, the trial judge had already made up his mind as to the sentence. The trial judge allowed argument at the sentencing hearing, but sentenced Crump to death the moment Crump finished his short request that the judge consider certain factors in reweighing the aggravating and mitigating circumstances. (T. 22) He did not pause to consider anything argued at the hearing. He obviously had the sentencing order prepared because he announced his decision without reflection and filed the order the same day.

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. In a dialogue with counsel, the judge also expressed his belief that all this Court's opinion mandated was cleaning up his order:

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

(T. 10) As in Lucas, this case must be remanded for the required reasoned reweighing and a resentencing, according Crump due process of law. The denial of due process, especially in a capital case, is never harmless.

In Grossman v. State, 525 So. 2d 833 (Fla. 1988), this Court established a rule of procedure requiring that all written orders imposing a death sentence be prepared prior to sentencing and filed concurrently with the oral pronouncement. Grossman does not mean, however, that the written order must, or even may, be prepared before the court has heard any evidence, argument of counsel, or any statement the defendant wishes to make. See Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993) ("[W]e did not perceive that our decision [in Grossman] would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard.")

In Spencer, 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) 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.

Although defense counsel filed motions which, if granted, would have required a further sentencing hearing, the judge's comments, quoted above, indicate he did not believe an evidentiary hearing was required. (T. 10) Thus, although the judge held a resentencing, he had already reweighed the factors and written his sentencing order without the benefit of further evidence, argument of counsel, or comments from the Appellant. Although he appointed counsel to represent Crump, it was of no benefit to Crump because the judge had already made up his mind what he was going to do. He only appointed counsel "in an abundance of caution," apparently trying to avoid another reversal.

In Armstrong v. State, 19 Fla. L. Weekly S399 (Fla. Aug. 11, 1994), this Court rejected the appellant's claim that the trial court had prepared his sentencing order before hearing the arguments presented. The Court distinguished Spencer, in part,

because Spencer was tried several years after Armstrong; the judge allowed the appellant to present evidence at sentencing; and the trial court had already heard most of the arguments at the trial or motion for new trial, or they were without merit. The Court held that Spencer was to be applied prospectively only, unless there was a showing of prejudice. 19 Fla. L. Weekly at S399-400.

Spencer was decided on March 18, 1993. The resentencing in this case was held on November 22, 1993. Thus, the trial court had ample opportunity to be aware of Spencer's requirements. Additionally, unlike Armstrong, Crump was **not** allowed to present evidence at sentencing. The judge was **not** aware of the evidence he refused to hear, and had not heard Crump's brief plea for reconsideration; nor were counsel's arguments meritless. Accordingly, based upon this Court's analysis in Armstrong, Crump was denied due process and a fair resentencing hearing.

In Rhodes v. State, 19 Fla. L. Weekly S254 (Fla. May 5, 1994), the Court also rejected a claim that, contrary to this Court's decision in Spencer, 615 So. 2d at 690-91, Rhodes was deprived of an opportunity to be heard personally prior to sentencing. Rhodes is also clearly distinguishable. In Rhodes, the jury returned its penalty recommendation on February 14; Rhodes was given an opportunity to address the court at a March 17 hearing when he confirmed that there were no other witnesses, evidence or testimony that he wished to present; and sentencing did not take place until March 20. In this case, the trial court held only one resentencing hearing and did not allow Crump to present evidence or testimony.

Although the resentencing was, of necessity, held long after the jury recommendation from the original trial, the first sentencing in Crump's case was held the day following the jury recommendation. (TR. 586) Thus, unlike Rhodes, Crump did not have an opportunity to address the court or to present evidence or argument before the sentencing order was prepared at either sentencing.

Additionally, because Dr. Robert Berland was out-of-town during Crump's original penalty proceeding, the judge and jury did not have the benefit of his testimony concerning his prior testing and examination of Crump. Instead, Dr. Maria Elena Isaza filled in for him the last minute and, accordingly, was not as well informed or prepared.[18] (TR. 483-84) Moreover, the jury was instructed to consider the "cold, calculated and premeditated" aggravating factor, which was later found invalid by this Court, Crump v. State, 622 So. 2d 963 (Fla. 1993), with no limiting definition. (See Issues IV and V, infra.) Thus, the judge's sparse initial sentencing order was based on a less than adequate jury recommendation, no sentencing evidence, and with little time for reflection.

Florida Rule of Procedure 3.780, which governs sentencing in capital proceedings, requires that the state and defendant be permitted to present evidence of an aggravating or mitigating nature consistent with the requirements of section 921.141, Florida Statutes. This procedure was not followed here. Crump was not

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[18] For this reason, and because this Court remanded the case for the judge to clarify his indecisive written findings concerning the mental mitigation, it was especially important for the court to consider Dr. Berland's testimony.

afforded the opportunity to present evidence, submit argument of counsel, or to be heard personally regarding his sentence prior to the judge's decision. If the judge spent any time reflecting on the sentence, he did so without the benefit or further testimony, evidence or arguments of counsel.

In his written sentencing order, the court stated, with no reasoning or facts to support his conclusion, that the "Mitigating Circumstances fail to outweigh the Aggravating Circumstance and the Defendant deserves the death penalty for having again committed Murder in the First Degree." He then stated that Crump deserved the death penalty even if his mental impairment met the statutory standards of mental mitigation since the Mitigating Circumstances would still fail to outweigh the Aggravating Circumstance." (R. 40-41) The court's language shows that the judge was determined to sentence Crump to death no matter what mitigation was shown. He did no real weighing. He did not need to listen to evidence because his mind was made up.

The court condemned Crump to death without considering his presentation, evidence or arguments of counsel. Thus, he was not sentenced in accordance with Spencer, 615 So. 2d at 690-91, or with principles of fundamental fairness or due process. The procedure in this case violated Crump's constitutional right to due process and subjected him to cruel and unusual punishment, in violation of Article I, sections 9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

## ISSUE IV

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

Although defense counsel did not file a motion requesting a new jury sentencing recommendation, he suggested at sentencing that the judge should order a whole new penalty proceeding. He cited James v. State, 615 So. 2d 668 (Fla. 1993),[19] in which this Court ordered a new jury penalty proceeding because, although the trial court's consideration of an invalid aggravator was harmless error, the Court could not say beyond a reasonable doubt that the invalid instruction did not affect the jury's recommendation. 615 So. 2d at 669. In response to the suggestion, Crump's sentencing judge said, "Well, the court didn't do that here." (T. 18-20)

It would have been futile for defense counsel to further pursue this issue because of the judge's earlier tirade, during which he stated that he only appointed counsel out of "an abundance of caution" and all he was required to do was reweigh the circumstances and bring Crump back to court and resentence him. He said he was not even required to hold a hearing. (T. 10) Thus, he was not inclined to entertain a motion for a new penalty proceeding.

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[19] Because defense counsel was not wearing his glasses, he incorrectly cited this case using the defendant's first name instead of his last name. The defendant's name was Davidson Joel James. He told the court that the case was Davidson v. State, 18 Fla. L. Weekly S139 (Fla. 1993). Counsel had the case in front of him, however, had the court wished to look at it.

Although it is true that this Court did not order a new penalty proceeding in Crump's previous appeal, neither did it specifically prohibit such a proceeding.[20] Moreover, it is clearly required now because of this Court's decision in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. Apr. 21, 1994) (CCP standard jury instruction unconstitutionally vague). The jury at Crump's penalty trial was instructed on the CCP aggravating factor, over defense objection, without a limiting definition as required by this Court in Jackson. Moreover, the error was not harmless because this Court struck CCP on direct appeal, as not established beyond a reasonable doubt by the evidence.

The weighing of an invalid aggravating circumstance violates the Eighth Amendment. Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 858 (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. Id. 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. 120 L. Ed. 2d at 858-59. Because the sentencing judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly

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[20] In Elledge v. State, 346 So. 2d 998, 1004 (Fla. 1977), this Court "remanded to the trial court for a new sentencing trial to be held in accordance with the views expressed herein," because the trial court had considered as a nonstatutory aggravating factor evidence concerning an alleged murder for which the defendant which had not resulted in a conviction at the time of the trial. Elledge had the benefit of a new jury recommendation even though the Court did not direct that a new jury be empaneled. Elledge v. State, 408 So. 2d 1021 (Fla. 1981), cert. denied, 459 U.S. 981 (1982).

weighs the invalid circumstance. 120 L. Ed. 2d at 859. The result of this process is error because it creates the potential for arbitrariness in imposing the death penalty. Id. The point of Espinosa is that the jury must be informed of the limiting construction of an otherwise vague aggravating circumstance, and failure to do so renders the sentencing process arbitrary and unreliable. See also Hitchcock v. State, 614 So. 2d 483 (Fla. 1993) (remanded for new penalty proceeding because court gave erroneous HAC instruction).

In Jackson v. State, 19 Fla. L. Weekly S215, S216-17 (Fla. April 21, 1994), this Court, citing Espinosa, ruled that the standard "cold, calculated and premeditated" jury instruction, which simply repeats the language of the statute, is unconstitutionally vague because it does not inform the jury of the limiting construction this Court has given the CCP factor. In Jackson, this Court recognized that, under Florida's sentencing scheme which requires that the trial court give great weight to the jury's recommendation, "the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." 19 Fla. L. Weekly at S216 (quoting from Espinosa). 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, 19 Fla. L. Weekly at S216 (citing Espinosa).

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 S217; see also Sochor v. State,

619 So. 2d 285, 290-91 (Fla. 1993) (Espinosa claims do not amount to fundamental error and are procedurally barred unless defense objects to the vagueness of instructions). In this case, trial counsel filed a "Motion to Declare Statute Unconstitutional Because CCP Aggravating Factor Too Vague." (TR. 643) The trial judge denied the motion. (TR. 835). Defense counsel also objected to the court's instructing the jury on the CCP aggravating factor during the penalty proceeding. The record indicates, however, that some conversation took place off the record, making it unclear exactly what defense counsel argued. The dialogue was as follows:

> THE COURT: Mr. Cunningham, it is my understanding that you object to the aggravating factor, quote, the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, end quote.
>
> MR. CUNNINGHAM: That's correct, Your Honor, based upon Cannidy v. State, and its progeny.
>
> THE COURT: The Court has reviewed the Cannidy case, as well as numerous other cases, involving that particular aggravating circumstance. Your objection is overruled, and your record is protected. Do you have any other objections to the Court's instructions to the jury or the form advisory sentences?
>
> MR. CUNNINGHAM: The court doesn't need to hear from me then on the factual issues of a heightened premeditation as argued in the--
>
> THE COURT: No, I know what your argument is. The record speaks for itself. You have objected to the giving of that instruction as an aggravating circumstance, and I have overruled it. So, your record is protected.

(TR. 514)

The trial judge instructed the jury on the cold, calculated and premeditated aggravating circumstance, § 921.141(5)(i), Fla.

Stat. (1987), in the language of the standard instruction:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(TR. 560) Defense counsel renewed his objection "concerning the cold, calculated and premeditated" aggravating factor at the end of jury instructions. (TR. 564) Because the CCP aggravating factor was not defined for the jurors in this case, they were not informed of the limiting construction this Court placed on the CCP aggravating factor in cases such as Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) (requires careful plan or prearranged design); Nibert v. State, 508 So. 2d 1 (Fla. 1987) (requires coldblooded intent to kill more contemplative, more methodical, more controlled than that necessary to sustain first-degree murder conviction); and Preston v. State, 444 So. 2d 939, 946-47 (Fla. 1984) (requires "particularly lengthy, methodical or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator").

Undersigned appellate counsel argued on direct appeal that the CCP instruction given was unconstitutionally vague. See Crump, 622 So. 2d at 972.[21] Thus, appellate counsel clearly preserved the issue as required by this Court in Jackson. Undersigned appellate counsel also included this argument in a Motion for Rehearing filed in response to this Court's opinion in this case.

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[21] See ISSUE VIII of Appellant's Brief on direct appeal, entitled "THE TRIAL COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE JURY OF THE LIMITING CONSTRUCTION THIS COURT HAS PLACED ON THIS AGGRAVATING FACTOR."

This Court has held that the use of an unconstitutionally vague instruction on HAC or CCP is harmless error when the facts of the case establish the presence of the factor under any definition of the terms and beyond a reasonable doubt. See Fennie v. State, 19 Fla. L. Weekly S370, 372 (Fla. July 7, 1994) (CCP applicable under any definition); Thompson v. State, 619 So. 2d 261, 267 (Fla.), cert. denied, 126 L. Ed. 2d 378 (1993); Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993). This is not a case in which the facts of the case established the presence of the CCP factor under any definition of the terms and beyond a reasonable doubt. Conversely, this Court agreed on direct appeal that the factor was not established beyond a reasonable doubt on direct appeal and vacated the death sentence, remanding the case for reweighing and resentencing. Crump v. State, 622 So. 2d 963, 972 (Fla. 1993). 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. It was not harmless beyond a reasonable doubt.

In Johnston v. State, 19 Fla. L. Weekly S340 (Fla. June 23, 1994), the Court rejected a challenge to the constitutionality of the HAC jury instruction in his case. This Court found the claim procedurally barred because trial counsel failed to object to the HAC instruction or request a different instruction, and appellate counsel failed to challenge the instruction on direct appeal. The Court found that any error was harmless, even if not procedurally

barred, because the crime was HAC under any definition of the term. 19 Fla. L. Weekly at S341.

The instant case is somewhat distinguishable because appellate counsel did preserve the issue on direct appeal, and the error would not be harmless because this Court found that the crime was not CCP. Additionally, trial counsel did make an attempt to preserve the issue although it is unclear exactly what he was attempting to argue. The dialogue between the judge and defense counsel, quoted earlier in this issue, infers that some sort of communication took place prior to the discussion on the record. Moreover, because the judge twice assured defense counsel that his "record was protected" he may have cut short counsel's argument. The judge may inadvertently have prevented him from further preserving this issue. (TR. 514)

In the Florida scheme of attaching great importance to the penalty phase jury recommendation, it is critical that the jury be given adequate guidance. When, as here, the jury is given incorrect or inadequate instruction as to the definition of the cold, calculated, and premeditated aggravating factor, its decision may be based on caprice or emotion or an incomplete understanding of the law. Although a Florida jury recommendation is advisory rather than mandatory, it is a "critical factor" in determining whether a death sentence is imposed. Because the jury was instructed on CCP, with no definition given, Crump's death sentence was unreliable, thus violating his constitutional rights under the eighth and fourteenth amendments.

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; see also 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 by procedure). In Crump's sentence is not reduced to life (see Issue VI, infra), the Court should do the same in this case.

## ISSUE V

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

Even prior to Espinosa and Jackson, this Court reversed cases in some situations where the jury was instructed on invalid aggravating circumstances. In Omelus v. State, 584 So. 2d 563 (Fla. 1991), for example, this Court reversed for resentencing before a new jury because the trial court erroneously instructed the jury on the HAC factor, even though he did not find this aggravator established in his written sentencing order. In conducting its harmless error inquiry, the Omelus Court noted that the prosecutor strenuously argued the applicability of the invalid factor. The judge found one mitigating factor and the jury recommended death by an eight to four vote. 584 So. 2d at 566-67; see also Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (reversed for resentencing with new jury for same reason); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) (reversed for new jury penalty proceeding).

The instant case is the same. The prosecutor stressed the CCP factor in her penalty closing, arguing by analogy to Williams Rule evidence presented concerning the Areba Smith murder, as follows:

> This wasn't a mere chance encounter. And, how do we know that? How do we know it was cold, calculated, and premeditated? Because we look to the circumstances of the killing of Areba Smith ten months later. And although Lavinia Clark was a total stranger to Michael Crump, there's no doubt that this was an en-

> counter that he had thought about, that he had planned, that he anticipated and he prepared himself for by bringing along this device, and, possibly, by making this device.

(TR. 521) The argument was logically unsound to begin with 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.

Defense counsel objected to the court's instructing the jury on the CCP aggravating factor during the penalty proceeding. (TR. 514) Over his objection, the judge instructed the jury on the cold, calculated and premeditated aggravating circumstance in the language of the standard instruction. (TR. 560) Defense counsel renewed his objection at the end of jury instructions. (TR. 564) Undersigned appellate counsel argued this issue on direct appeal. This Court found that CCP was not supported by the evidence and remanded for the trial judge to reweigh the aggravating and mitigation circumstances without considering CCP, and resentence Crump. See Crump, 622 So. 2d at 973. Undersigned appellate counsel filed a Motion for Rehearing filed in response to this Court's opinion in Crump, requesting that this Court go even further and remand for a new penalty proceeding with a newly empaneled jury because the CCP jury instruction tainted the jury recommendation, upon which the judge relied.

Crump's sentencing judge found both mental mitigators even

though he ruled that they did not reach to the level of statutory mitigators. He also found that Crump had some positive character traits, thus finding other nonstatutory mitigation. As in Omelus, Crump's jury recommended death by only an eight to four vote.

In Jones v. State, 569 So. 2d 1234, 1238-39 (Fla. 1990), this Court also 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 (quoted above) telling the jurors to base their decision on the collateral evidence.

In the Florida scheme of attaching great importance to the jury recommendation, it is critical that the jury be given adequate guidance. When, as here, the jury is given an invalid instruction, its decision may be based on the invalid aggravating factor. 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, "the 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 improper

prosecutorial argument 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. If the death sentence, based in part on the tainted jury recommendation, is affirmed, the holding will render the death sentence arbitrary and capricious. See Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L. Ed. 2d 854 (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).

## 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.

This Court has accorded great weight to the mitigation in crimes committed impulsively while the perpetrator suffered from a mental disorder rendering him temporarily out of control, even in cases in which the defendant killed more than one person. See e.g., Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993) (disturbed defendant lost emotional control and killed victim after having killed another man in a similar fashion); Holsworth v. State, 522 So. 2d 348 (Fla. 1988) (conduct of defendant who burglarized home and stabbed a mother and daughter, killing daughter, was affected by drugs and alcohol and psychological disturbance); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (woman and her eleven-year-old daughter were stabbed and sexually battered during burglary); Miller v. State, 373 So. 2d 882 (Fla. 1979), on remand, 399 So. 2d 472 (Fla. 2d DCA 1981).

Although Michael Crump was convicted of killing two women, both appear to have been impulse killings committed in connection with sexual acts. The record contains no specifics concerning the strangling of Lavinia Clark because Crump's conviction was based on Williams Rule[22] 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)

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

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" she was performing on him was taking too long. (TR. 266-67) Crump told the judge at sentencing that all of his offenses were "in compliance with me being threatened or attacked in some kind of way." (T. 22)

Dr. Isaza supported this conclusion by testifying 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." Crump had a difficult sexual development and adjustment -- a feeling of sexual inadequacy or a feeling that his manhood depended on his sexual performance. (TR. 490) His's symptoms were consistent with a paranoid personality disorder. (TR. 490)

Dr. Isaza also testified that Crump has very poor impulse control. (TR. 487-88) He is not capable of much planning; thus, if he killed someone, he would have done it on the spur of the moment. (TR. 505-06) When he feels threatened, he believes he is being persecuted, exploited and diminished, and may react violently, impulsively and without reflection. He appeared to be extremely sensitive to rejection and criticism, especially from women. (TR. 489) Thus, Michael Crump apparently killed Lavinia Clark because of something she said or which threatened or attacked him literally or in his mind, causing him to lose control. Crump told the judge at resentencing that his crimes resulted from his being threatened

or attacked in some way. (T. 22)

According to Dr. Isaza, Crump was under the influence of extreme mental and 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 requirements of 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 suffered from. (TR. 510) He could become delusional, believing that he was threatened, abused, or mistreated. (TR. 511) Accordingly, the unrebutted evidence showed that Crump committed the two homicides impulsively while temporarily out of control. Whether he was actually threatened or only believed he was threatened because of his mental problems, he was unable to control his impulsive reaction. Thus, his culpability is lessened and his crimes are not deserving of the death penalty.

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. He refused to find the "heinous, atrocious or cruel" factor[23] and this Court struck the "cold,

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[23] This Court has refused to apply an additional aggravator that the trial court did not instruct on or find, and which the State did not cross appeal. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (contemporaneous murder conviction). Additionally, the Court will not apply an additional aggravating factor not found by the judge unless it is unquestionably established on the record and subject to no factual dispute. DeAngelo v. State, 616 So. 2d 440,

calculated and premeditated" factor which are "the more serious factors." Maxwell v. State, 603 So. 2d 490, 493 & n.4 (Fla. 1992).[24] Substantial mental and other nonstatutory mitigation was established and was unrebutted. Clearly, the instant homicide was not one of the most aggravated first-degree murder cases.

The judge found only one aggravating circumstance and at least three mitigating circumstances, lumping all of the non-mental mitigation together as "positive character traits." Actually, there were at least six or eight nonstatutory aggravators which this Court has found to be mitigating. (See Issue II, supra.) 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); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

In several fairly recent cases, this Court has affirmed death sentences with only one aggravating factor. These cases are clearly distinguishable, however, because of the extremely heinous

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443 (Fla. 1993) (evidence of HAC was arguable because state failed to prove that victim was conscious during killing; she may have been unconscious due to choking or being hit on head). In this case, the victim had bruises indicating that she may have been hit over the head, so she too may have been unconscious. The trial judge refused to find HAC and the State did not cross-appeal.

[24] In Fitzpatrick v. State, 527 So. 2d 809, 818 (Fla. 1988), in which the Court reduced the death sentence to life despite a jury recommendation of death, five aggravating factors and only three mitigators, the Court noted that the "heinous, atrocious and cruel" factor and the "cold, calculated and premeditated" factor were conspicuously absent.

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 contemptoraneous 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. 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 no evidence in the record showed that Duncan was drinking at the time of the homicide, or 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 to him by the defense, in accordance with Campbell, 571 So. 2d at 419. 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, 19 Fla. L. Weekly S241 (Fla. April 28, 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.

A third case in which this Court affirmed a conviction with only one aggravating factor is Cardona v. State, 19 Fla. L. Weekly

S301 (Fla. June 2, 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.[25]

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[25] 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 Peggy Wood, her husband Gerald, their two children, Jennifer, four, and Glendon, three, and Peggy's eight and one-half month fetus. Peggy was shot twice and cut from the base of the sternum to the pelvic area. Still conscious when found by her mother, Peggy died a short time

There are many more cases where this Court sustained only one aggravating factor and reduced the sentence to life. See, e.g., Knowles v. State, 632 So. 2d 62 (Fla. 1993); Santos v. State, 629 So. 2d 838 (Fla. 1993); 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 v. State, 574 So. 2d 1059 (Fla. 1990); Penn v. State, 574 So. 2d 1079 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Ross v. State, 474 So. 2d 1170 (Fla. 1985). There were many other such cases, prior to these, in which the sentences were reduced to life. In a number of these cases the aggravating factor found was HAC, one of the most serious aggravators. Maxwell, 603 So. 2d at 493 & n.4. See, e.g., Douglas; Nibert; Penn; Smalley. In DeAngelo and Klokok (defendant killed daughter to spite wife), this Court upheld a finding of CCP, but still remanded for life.

A few of the more recent cases in which this Court reduced the penalty to life because only one aggravating factor applied and the

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later. Gerald Wood and the two children died from gunshot wounds. The unborn baby was found at the foot of the couch with two gunshot wounds and lacerations caused by the 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 court's determination that the four murders outweighed the mitigation in the sentencing order. Id. at 260.

It is apparent from the facts of the Slawson case that it bears no resemblance to Crump as to proportionality or otherwise.

defendant presented substantial mitigation are notable for their comparison value:

In DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), 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 in mitigation that DeAngelo had served as a volunteer fire-fighter, that he served his country in the army, and that he confessed to the crime. "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, a mental illness which caused paranoid thinking, episodes of depression and mania, intensified hallucinations and delusions, irritability, explosiveness, and chronic anger."[26] Id. at 443. Although the trial judge rejected the statutory mental mitigating factors of extreme mental or emotional disturbance and the inability to conform his conduct to the requirements of the law, he found that DeAngelo did have the

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[26] Again, many of these character traits were included in Dr. Isaza's description of Crump's mental disorder, suggesting that Crump may also suffer from organic brain damage. Had the trial court agreed to consider Dr. Berland's testimony, both he and this Court might have the necessary information to evaluate Crump's mental impairment. Obviously, someone who strangles two women during casual sexual encounters suffers from a serious mental disorder.

mental health disorders Dr. Berland described and that the disorders were treatable. Id.

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 has a limited education, had on occasion been intoxicated on drugs and alcohol, had two failed marriages, a low intelligence, poor memory, 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 mitigating circumstances, including the mental mitigators. Based on the "bizarre circumstances" surrounding the

two murders and the substantial unrebutted mitigation established, this Court found death was not proportionately warranted. The case at hand is not dissimilar as to the aggravators and mitigators, and Crump had a number of more positive attributes in 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 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 testified that the statutory mitigating circumstances were not applicable, this Court found that the strong nonstatutory mitigation made the death penalty disproportionate in this case, even though Clark's jury recommended death by a ten to two vote.

In the instant case, Crump did kill for a monetary reason, but due to mental impairment that triggered a violent reaction. The defense expert found that both mental mitigators applied, and defense witnesses cited other nonstatutory mitigation. The jury recommendation was eight to four despite the prior capital felony aggravator and their improper consideration of the CCP factor which this Court found inapplicable. Thus, the jury must have found more mitigation than did Clark's jury. Accordingly, the Court should also remand this case for imposition of 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 Kramer v. State, 619 So. 2d 274 (Fla. 1993), this Court remanded for a life sentence even though the defendant had committed 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).

In mitigation, the judge found that Kramer was under the influence of mental or emotional distress and that his capacity to conform his conduct to the requirements of law was severely impaired, but did not believe the mental problems were serious enough to meet either of the two statutory mental mitigators. 619 So. 2d at 276, 287 (Grimes, J., dissenting). The trial court also found that Kramer suffered from alcoholism and was a model prisoner and 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 ofmurder 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 fight or 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, and 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 aggravating and mitigating factors, but found that the extensive mitigation in the case 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 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 his ability to conform his conduct to the requirements of law severely 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.[27] The case would then be nearly identical to Cochran's except that Crump, 25, was older than Cochran, 18, and had more extensive mitigation.

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[27] Crump's jury was also improperly instructed. The trial judge erroneously instructed 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.

In Hegwood 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 trial court found six aggravating factors, one of which merged into another, and one statutory mitigator -- the defendant's youth. In the instant case, the defendant had fewer aggravators -- only one -- and much more mitigation. The only factors favoring Hegwood were his age and the jury recommendation. Hegwood's life recommendation was six to six and Crump's death recommendation was eight to four. Thus, the difference was only two jurors.

The death penalty has been upheld in very few cases where the mental mitigators were found. See e.g., Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Miller v. State, 373 So. 2d 882 (Fla. 1979), on remand, 399 So. 2d 472 (Fla. 2d DCA 1981); and other cases discussed supra. 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) (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) (several mitigating factors effectively outweighed remaining valid

aggravating circumstances); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (mitigation outweighed five aggravators). Because of the significant unrebutted mitigation in Crump's case, the death penalty is unwarranted.

Unfortunately, Dr. Isaza was not able to go into too much detail about Crump's mental problems because she saw Crump for the first and only time the day before the original penalty proceeding. Other than the one interview, she had to rely on Dr. Berland's prior testing and notes. Because Dr. Berland was out-of-town and the time was so short, she was not even able to discuss the case with him. Had the judge considered Dr. Berland's testimony in Crump's earlier case, he might well have found that both mental mitigators rose to the statutory level. (See Issue II, supra.) Even though the judge did not think the mental mitigators rose to the level of statutory mitigation, the unrebutted psychiatric testimony that both statutory mental mitigators were established, with the myriad of nonstatutory mitigation, was enough to outweigh the single aggravating factor.

This Court 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 Supreme Court has consistently overturned cases in which the mitigating evidence was ignored. Id. (citing Hitchcock; Eddings; Lockett). More than one homicide conviction does not automatically mandate the death penalty. See

e.g., Kramer v. State, 619 So. 2d 274 (Fla. 1993); Cochran v. State, 547 So. 2d 928 (Fla. 1989); Fead v. State, 512 So. 2d 176 (Fla. 1987) (override improper despite prior murder conviction).

Although the Court affirmed the death sentence in Duncan, discussed above, in part because of a prior murder, it vacated the death sentence in Kramer, also discussed above, who had committed a prior murder and also had two aggravating circumstances. Both had jury death recommendations. 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) (defendant killed wife and man he believed raped her); Santos, 629 So. 2d 838 (defendant killed former live-in girlfriend and their two-year-old child); Maulden v. State, 617 So. 2d 298 (Fla. 1993) (defendant killed ex-wife and boyfriend); Garron v. State, 528 So. 2d 353 (Fla. 1988) (defendant killed wife and step-daughter); Masterson v. State, 516 So. 2d 256 (Fla. 1987) (defendant murdered two people in their 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 during burglary); Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (defendant killed father and five-year-old nephew and tried to kill stepmother). All of these defendants presented mental mitigation as did Michael Crump.

Just before the judge pronounced the death sentence, Crump asked him to reweigh the factors considering 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. (T. 22) Of course, the judge did not consider Crump's plea because he had already decided the sentence and rendered it immediately after Crump's statement. The final paragraph (5) of the sentencing order shows that the judge was determined to sentence Crump to death no matter what mitigation was shown. His "boiler-plate-like" finding, that Crump "deserves the death penalty even if his mental impairment meets the statutory standards of mental mitigation since the Mitigating Circumstances would still fail to outweigh the Aggravating Circumstance" (R. 41), shows that he did no real weighing in this case. He sentenced Crump to death without a thought.

"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. Although the trial judge's order was again somewhat sparse, he found and weighed both mental mitigators as nonstatutory mitigation, and found positive character traits as further nonstatutory mitigation. Although he did not enumerate them, Crump's positive character traits, all of which have been found mitigating by this Court, include (1) the ability to form loving relationships with family and friends; (2) a hard worker who helped family and neighbors; (3) a difficult childhood without a father figure; (4) a "slow learner" in school; (5) had been good earlier in life; (6) potential for rehabilitation, and might be productive in prison as supported by positive personality traits; (7) friendly, considerate, thoughtful and helpful to others; and (8) was good with children.[28] 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.[29]

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[28] Cases supporting the mitigating nature of these character traits are cited in Issue II, supra.

[29] 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

For the reasons set out in Issue VI, Crump's sentence should be reduced to life in prison. If it is not, then for reasons discussed in Issues IV and V, Crump should be given a new sentencing with a newly empaneled jury. If the Court does not grant that relief, then, the case must at least be remanded for resentencing by the trial judge with an evidentiary hearing, pursuant to Issues I, II, and III.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of the Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 3rd day of September, 1994.

Respectfully submitted,

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