IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Appellant,

v. CASE NO. 74,663

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This court made detailed findings of facts in its opinion on direct appeal. Zeigler v. State, 402 So.2d 365 (Fla. 1981). Those findings were that on Christmas Eve, December 24, 1975, Zeigler's wife, Eunice, and her parents, Perry and Virginia Edwards, were shot to death in the W.T. Zeigler Furniture Store in Winter Garden, Florida. In addition, Charles Mays was beaten and shot to death at the same location. Times of death were all estimated by the medical examiner as within one hour of 8:00 p.m. Zeigler was also shot through the abdomen.

The state's theory of the case was summarized as follows: Edward Williams had known Zeigler and his family for a number of years. Williams testified that in June 1975 Zeigler inquired of him about obtaining a "hot gun." Williams then went to Frank Smith's home and arranged for Smith to purchase two RG revolvers. The revolvers were delivered to Zeigler. Also, during the latter part of 1975 Zeigler purchased a large amount of insurance on Eunice.

Mays and his wife came to Zeigler's furniture store during the morning of December 24 and Mays agreed to meet Zeigler around 7:30 p.m. The store was closed around 6:25 p.m.

Mays left his home around 6:30 p.m. He went to an Oakland beer joint and saw a friend, Felton Thomas, who accompanied Mays to the Zeigler Furniture Store.

According to the state's theory, Zeigler had two appointments on Christmas Eve, one with Mays and one with Edward Williams. Prior to these appointments he took his wife to the store and in

some manner arranged for his parents-in-law to go there. He killed his wife, Eunice, quickly, and for her, unexpectedly, since she was found with her hand in a coat pocket, shot from behind.

Because of the location of her body, Virginia was probably trying to hide among the furniture. Perry probably surprised Zeigler with his strength and stamina as they struggled for some time. After Zeigler subdued Perry and rendered him harmless, Zeigler shot him. Considering the fact that a bullet penetrated Virginia's hand, it was likely she was huddled in a protective position when she was executed.

Zeigler then left the store, returning to meet with Mays who had arrived there at about 7:30. He was probably surprised to see another man, Felton Thomas, with Mays. He took Thomas and Mays to an orange grove to try the guns. The purpose of the trip was to get the two to handle and fire the weapons in the bag. From the grove he returned to the store, but was unsuccessful in getting Mays or Thomas to provide evidence of a break-in. He did, however, get Thomas to cut off the lights in the store. The three returned to Zeigler's home. Zeigler got out, went to the garage, came back and took a box of some kind to Mays and told him to reload the gun. They returned to the store. Zeigler could not persuade Thomas to enter the store, so Thomas lived. When Thomas disappeared, Zeigler returned to his home and picked up Edward Williams. Zeigler had killed Mays.

Zeigler was successful in getting Williams partially inside the back hallway. Zeigler put a gun to Williams' chest and

pulled the trigger three times, but the gun did not fire. Williams said "For God's sake, Tommy, don't kill me," and ran outside, refusing to return to the store. When he was unable to get Williams into the store, Zeigler became desperate and conceived the idea that he would appear uninvolved if he happened to be one of the victims. Accordingly, he shot himself and then called Judge VanDeVenter's residence where he knew the police officers would be.

In 1976, Zeigler was convicted of two counts of first degree murder for the deaths of Eunice Zeigler and Charlie Mays, and two counts of second degree murder for the deaths of Perry and Virginia Edwards. The jury recommended life imprisonment on the first degree murder cases. The trial judge overruled the recommendation and imposed the death sentence on the two counts of first degree murder. Zeigler was sentenced to life imprisonment on each of the second degree murder counts. This court affirmed the convictions and sentences. Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982).

In 1982, the Governor of Florida signed a death warrant, and Zeigler's execution was scheduled for October 22, 1982. After this court denied an application for a stay of execution, Zeigler filed an application for a stay of execution and petition for writ of habeas corpus in the Middle District of Florida. Because one of Zeigler's claims was identical to an issue pending in an Eleventh Circuit en banc case, Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), the district court stayed Zeigler's execution. The district court granted a continuance for Zeigler to exhaust

state remedies, and he filed a state habeas petition alleging nineteen grounds of error. This court remanded the state habeas petition for a hearing on the question of possible bias of the trial judge. Zeigler v. State, 452 So.2d 537 (Fla. 1984). The trial judge denied relief, and his ruling was affirmed by this court in Zeigler v. State, 473 So.2d 203 (Fla. 1985).

Zeigler filed an amended petition for habeas corpus in the Middle District Court which was dismissed on January 3, 1986. A second death warrant was signed which scheduled Zeigler's execution for May 20, 1985. Zeigler filed a motion to vacate in the state circuit court which granted a stay of execution in order to hold an evidentiary hearing. The state appealed, and this court vacated the stay and denied all relief. State v. Zeigler, 494 So.2d 957 (Fla. 1986). Zeigler filed a habeas petition in the Middle District Court which denied the motions for relief from judgment and for leave to file an amended petition. The district court also denied an application for a certificate of probable cause and for a stay pending appeal. The Eleventh Circuit Court of Appeals granted a stay of execution. The case was remanded to the district court to consider sanctions on the lawyers and allow Zeigler time to file an amended petition. Zeigler v. Wainwright, 805 F.2d 1422 (11th Cir. 1986). The petition in the district court was dismissed without prejudice when this court granted resentencing in Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988) pursuant to a petition for state habeas corpus. The reason for remanding the case was because this court was unable to say whether the judge's decision

might have been different had he realized that nonstatutory mitigating circumstances were pertinent. Resentencing was conducted in the circuit court from August 14-17, 1989.

At the original penalty phase hearing in 1976, Zeigler presented testimony from Reverend DeSha that the defendant was active in the church, had a good rapport with the black community, helped the Reverend with the black community, served on church committees, and helped lots of people (TT 2780-85). Dr. Zimmer testified that Zeigler was a compassionate, loyal person who was not a threat to society (TT 2792, 2798).

At the resentencing hearing in 1989, the defense presented testimony from Hardy Vaughn, an insurance advisor who had discussed the possibility of Zeigler buying insurance as early as 1970 (R 32). Vaughn met with Zeigler various times and prepared an estate plan analysis (R 35-36). Zeigler later bought two insurance policies from other brokers without consulting Vaughn (R 43). On cross-examination, Vaughn testified that the estate shrinkage on the $500,000 life insurance on Eunice's life was only $6,000 if she died first (R 49). He also said that Zeigler seemed to be a prudent businessman and $500,000 could have been utilized in a more advantageous manner (R 52). In order to obtain $500,000 on Eunice's life, Zeigler was forced to take out a $250,000 policy on his own life (R 56). Even after Zeigler bought policies from other brokers, he had dinner with Vaughn, but did not tell him of the other policies (R 58).

Theodore VanDeVenter also testified for the defense. Zeigler was his client, and they had discussed wills and estate planning

(R 69-70). Zeigler did not tell VanDeVenter he had purchased $500,000 life insurance on Eunice (R 71). VanDeVenter said that Zeigler was a friend, that he had visited him in prison, and that before the murders Zeigler was ambitious, active in the community, helped others, and a hard worker (R 80, 89). Dr. Wilder evaluated Zeigler on September 1, 1988, and believed that Zeigler was normal and had nothing in his record indicating he would attempt to escape or hurt anyone in prison (R 97, 100-104). Dr. Wilder admitted that psychiatry cannot predict who will kill (R 114). His opinion was based on Zeigler's prison records, not on the fact he had killed four people (R 129). He also admitted that the fact Zeigler had committed four murders made it more likely he would have a potential for other premeditated violent acts (R 131). Although in his opinion Zeigler was not a sociopath, Dr. Wilder admitted that antisocial personality disorders are not always apparent (R 100, 131). He also characterized Zeigler as effeminate (R 132).

Dr. Kirkland believed that Zeigler did not have an antisocial personality disorder, nor was he a danger to fellow inmates or others in a prison environment (R 146, 148). On cross-examination, he admitted that truly dangerous sociopaths are difficult to diagnose and he could have spent time with Zeigler and not seen certain character or personality traits (R 149). In his deposition, Dr. Kirkland stated that only a very bad man would commit the murders (R 151). He also told the court that Zeigler could repeat the performance, as one who has killed before is more capable of killing again (R 153). Dr. Fischer, a

correctional clinical forensic psychologist predicted Zeigler as having a low level of dangerousness with no violent behavior during the past fourteen years of incarceration (R 173). However, he would not have predicted that Zeigler would kill four people (R 184).

Reverend De Sha testified that Zeigler was active in the church and helped him with the black community (R 210). On cross-examination, the Reverend told the court the church is full of hypocrites and a true Christian would not kill (R 223).

The defense also presented testimony from friends and relatives regarding Zeigler's reputation in the community and their relationship with him. However, almost every witness acknowledged that he did not believe Zeigler committed the murders, and, if he had, they did not know him at all (R 234, 238, 252, 262, 278). Pastor Biggs also testified for Zeigler, saying that the latter was cocky when he was first incarcerated, but was now an ideal prisoner (R 314, 317). The pastor said he was aware of the inner workings of death row and familiar with persons on death row (R 291, 300, 303) However, the pastor was not aware of a situation in which Zeigler had devised a plan whereby another death row prisoner would admit to the murders and exonerate him (R 330).

The state presented evidence that when Zeigler was on death row he set up a plan with Eddie Odum in which another death row inmate, Danny Thomas, would confess to the Zeigler murders (R 348). Zeigler wrote letters telling Thomas how to give a convincing confession and relating details of the crime (R 349,

351, 356). Because Zeigler never obtained the money required, the plan was abandoned (R 363). Zeigler told Odum that he killed his wife because she was filing for divorce and alleging homosexual activity (R 364). A defense witness, Richard Smith, also had heard rumors about Zeigler's homosexuality (R 265).

Zeigler testified about his relationship with Eddie Odum, who he claimed forced him to deal drugs in prison (R 435,443). Zeigler admitted to the scheme to have Thomas confess to the murders which did not occur because he could not produce the required money (R 444, 446). The final witness at resentencing was Robert Jones who was the death row supervisor for two to three years. He said Zeigler was a model prisoner (R 506).

The trial judge sentenced Zeigler to death, entering a six-page sentencing order explaining his reasoning (R 1210-1216). The order shows that the judge read the entire transcript of the original trial, including the penalty phase and examined any designated physical evidence (R 1212). After observing that the transcript and evidence supported the guilty verdicts, he found the following aggravating circumstances:

1. Previous conviction of another capital felony;

2. The murder of Charles Mays was to avoid lawful arrest;

3. The murders of Charles Mays and Eunice Zeigler were committed for pecuniary gain; and

4. The murder of Charles Mays was especially heinous, atrocious, or cruel.

The trial judge also stated that he would have found the murders to have been committed in a cold, calculated, and

premeditated manner without any pretense of moral or legal justification; however, he believed this aggravating circumstance was not applicable because it was an ex post facto application.

The court found one statutory mitigating factor: no significant history of prior criminal activity. The nonstatutory mitigation presented involved:

1. Good, compassionate character. The judge found that although several friends testified as to Zeigler's good deeds and reputation, the testimony at best established his character to be no more good or compassionate than society expects of the average individual.

2. Active participation in church and community. The judge found that none of the testimony established unusual participation.

3. Outstanding prison record and adaptation to prison life. The judge found that Zeigler had a good prison record and appeared adapted to prison life and was an asset as an inmate.

4. No suggestion of any propensity for future violent conduct. The judge found the testimony revealed no propensity for spontaneous violent conduct, but found there was no evidence Zeigler would not engage in the cold and calculated violent conduct evidenced by the murders of which he stands convicted.

The court then made a specific finding that the aggravating circumstances outweighed the mitigating circumstances, and no reasonable person could conclude that the mitigating circumstances outweighed the aggravating circumstances. He rejected the jury recommendation of life and imposed a sentence

of death as to both convictions (R 1210-1216). Zeigler appealed the sentence, and the state cross-appealed the amended order precluding evidence and consideration of the cold, calculated, and premeditated aggravating circumstance (R 1225, 1231).

SUMMARY OF ARGUMENT

Point I: This case was remanded for the trial judge to consider nonstatutory mitigating evidence and determine whether his decision to impose the death penalty would have been different had nonstatutory mitigation been considered. The judge considered the mitigating evidence presented and concluded that where the four aggravating circumstances outweighed the mitigating circumstances, no reasonable person could recommend life imprisonment. The evidence presented in mitigation was contradicted to the extent that its overall impact was a negative rather than a positive one. Had the jury been aware of the contradicting testimony, they may not have recommended life. Zeigler's arguments that the jury recommendation should be given greater weight than usual and that the trial court must enter written reasons how the jury erred, are not supported by case law. Lingering or "residual" doubt is not an appropriate nonstatutory mitigating circumstance.

Point II: The issue whether the aggravating circumstance previously affirmed by this court are supported by the evidence, is procedurally barred. The death of Charles Mays was heinous, atrocious and cruel where he was shot twice, then bludgeoned to death. This aggravating circumstance is not applied arbitrarily. The murders of Eunice Zeigler and Charles Mays were for pecuniary gain; i.e., so that Zeigler could collect $500,000 worth of insurance. Charles Mays was killed to avoid arrest and cover up the earlier murders of Zeigler's wife and in-laws. The aggravating circumstance of "prior capital conviction" is

appropriate where a defendant commits two murders. Even if one aggravating factor were stricken, it would not change the outcome.

Point III: The trial court considered all nonstatutory evidence presented. Finding or not finding a specific mitigating circumstance is within the trial court's domain and his ruling should not be disturbed where supported by substantial competent evidence.

Point I on cross appeal: The trial court should have applied the aggravating factor of cold, calculated and premeditated. This court has previously held that applying this aggravating factor to crimes which occurred before the effective date of this statutory change is not an ex post facto violation.

ARGUMENT

I

THE TRIAL JUDGE CONSIDERED THE NONSTATUTORY MITIGATING CIRCUMSTANCES AND IMPOSED THE DEATH PENALTY WHERE NO EVIDENCE WAS PRESENTED WHICH WOULD CHANGE THE ORIGINAL DECISION TO IMPOSE THE DEATH PENALTY AND WHERE NO REASONABLE PERSON WOULD RECOMMEND LIFE IMPRISONMENT.

This court ordered a new sentencing proceeding before a judge alone because:

> There was enough nonstatutory mitigating evidence introduced at the penalty phase proceeding that we are unable to say whether the judge's decision might have been different had he realized that nonstatutory mitigating circumstances were pertinent.

Zeigler v. Dugger, 524 So.2d 419, 421 (Fla. 1988).

This court instructed that both parties should be permitted to introduce any pertinent evidence to assist the judge in the sentencing decision, observing that the original trial judge was now a federal district judge, and a new judge would have to conduct the hearing. Id. at 421. The new trial judge read the entire trial transcript and heard evidence at resentencing, then ruled that the aggravating circumstances outweighed the mitigating circumstances, rejected the jury recommendation of life, and sentenced Zeigler to death.

Zeigler argues the jury advisory sentence of 1976 should be given greater weight than usual because the original sentence and resentencing are separated by thirteen years, the resentencing judge did not have the benefit of observing the witnesses at

trial which the jury observed, and the resentencing judge did not enter specific written findings that the jury had "gone off the deep end." These issues were not raised at the trial level are procedurally barred. See, Ventura v. State, 15 F.L.W. S190 (Fla. April 5, 1990).

The trial judge entered specific written findings of fact which supported the death sentence. Section 921.141(3), Florida Statutes does not require the judge to point to how the jury went "off the deep end" in order to override their recommendation. Rather, the statute requires the judge to support his finding that the death sentence is appropriate with findings of fact based on the aggravating and mitigating circumstances. This is exactly what the trial judge did. Since a jury recommendation is not accompanied by reasons, the trial judge does not know the basis for the recommendation and cannot speculate on the reasons for the recommendation. See Proffitt v. Florida, 428 U.S. 242 (1976); Brown v. State, 473 So.2d 1260, 1271 (Fla. 1985).

The requirement that findings be made by a judge rather than the jury does not violate the Sixth Amendment. Hildwin v. Florida, 109 S. Ct. 2055 (1989). In Spaziano v. Florida, 468 U.S. 447 (1984), the United States Supreme Court examined the Florida sentencing process in capital cases. The Court first observed that there is nothing which even requires a jury determination. 468 U.S. at 459. The Court then addressed the argument that a jury, as the "voice of the community", should be the final sentencer. 468 U.S. at 461. The Court explained that the community voice is heard through the legislature even if it

is not given free rein, since it is the legislature who defines the rule governing imposition of the death penalty. However, the purpose of the death penalty is served when the judge is the final sentencer. The Court endorsed the Florida sentencing structure, including the standard to override a jury recommendation announced in Tedder v. State, 322 So.2d 903 (Fla. 1975). There is nothing arbitrary or discriminatory in the jury override procedure, and the review afforded by the Florida Supreme Court assures that the death penalty is appropriate. 468 U.S. at 466. In Spaziano, the Court upheld the jury override.

Zeigler points to no viable reason the jury recommendation should be given greater weight than usual, except that the resentencing judge was unable to observe the live witnesses at trial. Resentencing is not a retrial of a defendant's guilt or innocence. Chandler v. State, 534 So.2d 701 (Fla. 1988). In Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988), this court instructed the judge to consider nonstatutory mitigating circumstances, which he did after observing the live witnesses presented. If this court had felt it was necessary for the judge to observe the witnesses from the guilt phase in order to determine whether the nonstatutory mitigating circumstances were pertinent, that would have been stated in the order. Zeigler has not informed this court how the demeanor of the live witnesses at the guilt phase would have contributed to the trial court's assessment of the aggravating and mitigating circumstances. The two defense witnesses at the 1976 penalty phase were Reverend DeSha and Dr. Zimmer. Reverend DeSha testified at resentencing,

and the defense presented psychological testimony from two psychiatrists and a correctional clinical forensic psychologist. It is unclear how the judge was prejudiced by having only the "cold record" to analyze the strength and nature of the evidence of conviction, when guilt or innocence was not at issue. The review conducted by the Florida Supreme Court is from the record. The argument Zeigler makes is a "residual doubt" argument which is not recognized in Florida. See, King v. State, 514 So.2d 354 (Fla. 1987).

The fact that the resentencing judge was "on his own" in weighing the credibility and probative value of the witnesses is irrelevant. The resentencing judge properly noted that a jury recommendation of life existed. The purpose of the resentencing hearing was for the judge to consider nonstatutory mitigating circumstances to determine whether his decision would have been different. Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988).

Zeigler urges this court to give even greater weight to the jury recommendation than that given by Tedder. The trial court recognized the importance of the jury recommendation and the Tedder standard and specifically found that after weighing the aggravating and mitigating circumstances, no reasonable person could impose a life sentence. The evidence considered in aggravation was the same as that presented in the 1976 trial. This court previously upheld five aggravating circumstances on this evidence. Zeigler v. State, 402 So.2d 365 (Fla. 1981). The trial judge found there were now four aggravating circumstances, and he should have found cold, calculated and premeditated, also

(See Point I on cross appeal). This court found that the mitigation established in 1976 was insufficient to override the aggravating circumstances, thus rejecting the jury recommendation of life imprisonment. Zeigler v State, 402 So.2d 365, 376 (Fla. 1981). Since Tedder was decided in 1975, this court was well aware of the standard to be applied in override cases. The mitigating evidence presented in 1989 was rebutted and contradicted to the extent its value was less than that presented in 1976. In other words, the resentencing hearing had a negative impact on the weight of the mitigation not only because intervening events showed Zeigler was manipulating people in prison to confess to his crimes, but also because the defense witnesses were totally discredited. Although the defense presented more witnesses quantitatively, their impact was qualitatively negative. The override is even more appropriate since mitigating evidence which may have existed in 1976 is now discounted. The jury recommendation should be given less weight since the passage of time has demonstrated Zeigler's true character and that previous mitigating testimony was unreliable.

Zeigler next argues that the trial court erred in finding no reasonable person could conclude that the mitigating circumstances outweighed the aggravating circumstances. Although he argues that twelve jurors recommended life, there is nothing in the record to support this argument. In fact, defense counsel argued at resentencing that the specific jury vote was unknown (R 555).

The trial judge's order shows that he carefully considered the nonstatutory mitigating circumstances, but that much of the evidence presented was either adverse, inconclusive or irrelevant. For instance, the psychologists could not say that Zeigler would not premeditate further murders or be a threat to society. The friends that testified refused to acknowledge the four murder convictions and admitted that if Zeigler had committed the murders they did not know him at all. The "model prisoner" testimony was rebutted by Zeigler's plan to have Danny Thomas confess to his crimes. Zeigler's concern for the black community is discredited by the facts which show he manipulated three black men and tried to pin the murder on them. He killed one black man in the process, and tried to shoot another, but his gun jammed. Although certain mitigating factors may be valid if supported by the evidence, the trial court found that very little nonstatutory mitigation was valid, and that which did exist was entitled to little weight.

Finding or not finding a specific mitigating circumstance is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion. Cook v. State, 542 So.2d 964, 971 (Fla. 1989); Stano v. State, 460 So.2d 890, 894 (Fla. 1984); Quince v. State, 414 So.2d 185, 187 (Fla. 1982). A trial court has discretion in rejecting mitigating factors. Hudson v. State, 538 So.2d 829 (Fla. 1989); Scull v. State, 533 So.2d 1137 (Fla. 1988); Hargrave v. State, 366 So.2d 1 (Fla. 1979). There is no requirement that a court must find anything in mitigation. Porter v. State, 429 So.2d

293, 296 (Fla. 1983). The trial court determines the weight to be given any mitigating circumstance and whether the circumstance was even established. It is not within the reviewing court's province to revisit or reevaluate the evidence presented as to aggravating or mitigating circumstances. Hudson, supra at 831. This finding should not be disturbed where supported by competent substantial evidence. Bryan v. State, 533 So.2d 744 (Fla. 1988).

In Grossman v. State, 525 So.2d 833 (Fla. 1988), this court discussed the impact of Tedder. The appellant argued that the deference paid to a jury recommendation of death was so great that the jury became the de facto, if not de jure sentencer. This court rejected that argument, stating:

> We are not persuaded that the weight given to the jury's advisory recommendation is so heavy as to make it the de facto sentence. . . . Notwithstanding the jury recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination based on the aggravating and mitigating factors.

Grossman at 840.

As stated in Grossman, this court has upheld jury overrides in many situations. See also, Craig v. State, 510 So.2d 857 (Fla. 1987). The present case presents an interesting situation where the jury considered one set of mitigating circumstances and the resentencing judge another. Zeigler argues that the jury could have recommended a life sentence on the factors presented; however, they did not hear that evidence. In fact, if the jury had been aware of the negative effect of the resentencing hearing, they more probably would have recommended death.

Furthermore, the jury was not aware they could consider the contemporaneous murder as an aggravating circumstance, since that body of case law evolved after 1976. Correll v. State, 523 So.2d 562, 568 (Fla. 1988); Cook v. State, 542 So.2d 964, 970 (Fla. 1989); LeCroy v. State, 533 So.2d 750,755 (Fla. 1988). Neither was the jury aware that the aggravating circumstance of cold, calculated, premeditated could be an aggravating circumstance. (See Point I on cross appeal).

There was no reasonable basis to support the jury's recommendation. Two different judges found that a jury override was required.

Although Zeigler argues that the resentencing judge was even more incorrect in overriding the jury recommendation than the first judge because additional mitigation had been presented, he ignores the fact that if the jury had heard the evidence presented at resentencing, they may have recommended death. The truth of the matter is that the available evidence presented at the resentencing was detrimental to Zeigler rather than helpful, and the second judge had no choice but to again impose a death sentence. Where there are so many aggravating circumstances and so few mitigating circumstances, this court has no choice but to affirm the death sentence. Cooper v. State, 326 So.2d 1133 (Fla. 1976).

As previously stated, this court has upheld jury overrides where the aggravating circumstances outweigh the mitigating circumstances. See Thompson v. State, 553 So.2d 153 (Fla. 1989); Mills v. State, 476 So.2d 172 (Fla. 1985); Spaziano v. State, 433

So.2d 508 (Fla. 1983); Porter v. State, 429 So.2d 293 (Fla. 1983); Stevens v. State, 419 So.2d 1982); Buford v. State, 403 So.2d 943 (Fla. 1981); McCrae v. State, 395 So.2d 1145 (Fla. 1980); Johnson v. State, 393 So.2d 1069 (Fla. 1980). In White v. State, 403 So.2d 331, 340 (Fla. 1981), this court stated:

> Although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision on whether the death penalty should be imposed rests with the trial judge (citations omitted). Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances.

No reasonable jury could have recommended life imprisonment under the circumstances. In Buenoano v. State, 527 So.2d 194 (Fla. 1988), and Byrd v. State, 481 So.2d 468 (Fla. 1985), the jury recommended the death penalty under similar circumstances. In Buenoano, the aggravating circumstances were 1) pecuniary gain; 2) heinous, atrocious, or cruel; 3) cold, calculated and premeditated; and 4) prior conviction of violent felony. Buenoano poisoned her husband to collect insurance proceeds. On collateral review, this court found that the issue whether the trial court erred in rejecting mitigating circumstances was procedurally barred, and that even if evidence of the defendant's impoverished upbringing and dysfunctional psychological state had been presented, the mitigation would not outweight the aggravating circumstances. Buenoano v. Dugger, 15 FLW S196 (Fla. April 4, 1990). The aggravating circumstances in Byrd were 1) pecuniary gain; 2) heinous, atrocious or cruel; 3) cold,

calculated and premeditated. The mitigating circumstance was no significant history of criminal activity. Nonstatutory mitigation was rejected. Byrd killed his wife in order to collect insurance proceeds. The jury recomendation of death in these two cases demonstrate that the trial court followed established precedent in finding that no reasonable person could recommend life imprisonment under these circumstances.

The trial court should have also factored in the aggravating circumstance of cold, calculated, and premeditated, thus giving additional weight to the aggravating circumstances. (See point I on cross appeal). Zeigler also argues that the jury was entitled to consider lingering, or residual doubt, as a mitigating factor. Since the jury recommended a life sentence, this argument is irrelevant. Further, lingering or residual doubt is not a proper consideration. The Florida Supreme Court has consistently held that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance. King v. Dugger, 555 So.2d 355, 358, n.2 (Fla. 1990), citing King v. State, 514 So.2d 354, 358 (Fla. 1987). Likewise the United States Supreme Court has rejected residual doubt as a mitigating consideration. Franklin v. Lynaugh, 108 S. Ct. 2320 (1989). The trial court ruled that guilt or innocence would not be relitigated in the penalty phase (R1133). Resentencing is not a retrial of a defendant's guilt or innocence. Chandler v. State, 534 So.2d 701 (Fla. 1988). This court affirmed the conviction in Zeigler v. State, 402 So.2d 365 (Fla. 1981), noting that although there were certain inconsistencies in the evidence, Zeigler failed to show anything

which purported to be a reasonable hypothesis of innocence. Id. at 377. Yet he continues to relitigate the issue of guilt at every turn of the bend.

II

THE AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL JUDGE WERE SUPPORTED BY THE EVIDENCE.

Zeigler argues that the four aggravating circumstances found by the circuit court were not supported by the facts in the record. The state submits that Zeigler is procedurally barred from challenging the validity of the aggravating factors which have previously been affirmed by this court. The sufficiency of the evidence to support these factors should have been challenged on direct appeal.

In Zeigler v. State, 402 So.2d 365, 375-77 (Fla. 1981), this court found that the following aggravating circumstances were proven to the exclusion of any reasonable doubt:

1) the defendant created a risk of death to many persons;

2) the murder of Charles Mays was committed to cover up the fact he had earlier murdered his wife and in-laws and thus, was committed for the purpose of avoiding or preventing arrest;

3) the murder of Eunice Zeigler was committed for pecuniary gain - i.e., collection of $500,000 in insurance benefits;

4) the murder of Charles Mays was committed in furtherance of the defendant's plan to murder his wife for the money and to have it appear she was killed by Charles Mays and others in perpetration of a robbery or breaking and entering;

5) the murder of Charles Mays was especially heinous, atrocious, and evil.

This court indicated that the murder of Eunice Zeigler was not especially heinous, atrocious, and evil.

The evidence in support of the aggravating circumstances was exactly the same as at the 1976 sentencing. The judge considered the entire transcript of the original trial, including the penalty phase, any physical evidence designated by the parties, items presented at the hearing, and those additional items introduced at the original trial which he deemed necessary for a complete review of the facts (R564-65, 1212). The limited purpose for the resentencing hearing was for the defendant to present nonstatutory mitigation.

The aggravating circumstances found by the trial court after the resentencing hearing were:

1. Previous conviction of another capital felony;

2. The murder of Charles Mays was to avoid lawful arrest;

3. The murders of Charles Mays and Eunice Zeigler were committed for pecuniary gain; and

4. The murder of Charles Mays was especially heinous, atrocious, or cruel.

The judge found that the aggravating factor of heinous, atrocious or cruel did not apply to the murder of Eunice Zeigler since she was killed with a single unexpected gunshot. (R 1210-1216). He did not find there was a risk of death to many persons as the original judge had (R1215). He found that he would have applied cold, calculated and premeditated, except that he had previously ruled such an application would be an ex post facto violation (R1215).

The state submits that Zeigler's challenge to whether the heinous, atrocious, or cruel aggravating circumstance applies to Charles Mays is procedurally barred since this factor was

affirmed on appeal under the same facts. Furthermore, the murder was heinous, atrocious or cruel.

Dr. Ruiz, the Orange County Medical Examiner to whose qualifications the defense stipulated, testified during a proffer at trial that the cause of Charlie Mays' death was blunt force trauma to the head which caused cerebral laceration and hemorrhage (TT 223, 246, 250). Mr. Mays was also shot twice, once from the front and once from the back, but the bullet wounds did not kill him (TT 247, 250, 251). The bullet which exited below the abdomen caused internal bleeding, but not enough bleeding to kill him (TT 252). His right hand had dried abrasions on the dorsal side above the knuckles indicating he was trying to ward off his attacker (TT 248). After the proffer regarding which photos would be introduced, Dr. Ruiz told the jury that Mr. Mays sustained two gunshot wounds and the cause of death was blunt force trauma to the head (TT 267). Mr. Mays did not die from the gunshot wounds which caused internal bleeding (TT 284). The autopsy showed that there were at least eight wounds evidencing blunt force trauma (TT 293-295).

The cases cited by Zeigler are inapposite. Scull v. State, 533 So.2d 1137 (Fla. 1988), involved death by a single blow to the head. Simmons v. State, 419 So.2d 316 (Fla. 1982), and Halliwell v. State, 323 So.2d 557 (Fla. 1975) involve acts after the victim was unconscious which this court had repeatedly held do not support the aggravating circumstance of heinous, atrocious or cruel. See Cochran v. State, 547 So.2d 928, 931 (Fla. 1989), and cases cited therein. Mr. Mays was shot twice then bludgeoned

to death, most probably with the crank found at his side. His face was crushed and fractured (TT 282). The exhibits in the record on appeal show the extent of his injuries. (Volume one, exhibits 33, 34, 43). He was aware of him impending death and had defensive wounds on his hands.

This court has upheld the application of heinous, atrocious or cruel in similar situations. King v. State, 436 So.2d 50 (Fla. 1983) (victim struck on forehead with blunt instrument then shot in head); Routly v. State, 440 So.2d 1257 (victim shot three times, aware of impending death); Melendez v. State, 498 So.2d 1258 (Fla. 1986), (victim shot in head and shoulders and throat slit; knew of impending death); Huff v. State, 495 So.2d 145 (Fla. 1986) (murders of both father and mother were heinous, atrocious or cruel where father turned in his car seat, looked in the back seat at the appellant, placed his hands up in a futile attempt at self defense, and was shot; mother witnessed her son kill his father, and knowing she was about to be killed, received two bullet wounds to the head, was beaten eight or nine times in the head, then fatally shot); Scott v. State, 494 So.2d 1134 (Fla. 1986) (victim aware of impending death, beaten to death). This court has observed that mental anguish alone has been held sufficient to support the heinous, atrocious factor Scott at 1137, citing Preston v. State, 444 So.2d 939 (Fla. 1984) and Routly v. State, 440 So.2d 1257 (Fla. 1983). In Routly, this court cited seven other cases which illustrated that even if death is instantaneous, as by a gunshot wound, the common element that the victim was subjected to agony over the prospect of

impending death made the death penalty appropriate. Routly at 1265. Charles Mays had defensive wounds on his hands and knew he was going to die. He was shot unsuccessfully then beaten to death.

Zeigler next argues that the heinous, atrocious, or cruel aggravating circumstance is applied arbitrarily and capriciously. This court has previously found Maynard v. Cartwright, 486 U.S. 356 (1988), inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. Smalley v. State, 546 So.2d 720 (Fla. 1989); Brown v. State, 15 FLW S165, 166 (Fla. March 22, 1990). The issue of arbitrary and capricious review by the Supreme Court of Florida was put to rest in Proffitt v. Florida, 428 U.S. 242 (1976). Florida's appellate construction holding the term to mean "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" provides sufficient guidance. Bertolotti v. Dugger, 883 F.2d 1503, 1526 (11th Cir. 1989).

The next argument presented is that the deaths of Eunice Zeigler and Charles Mays were not committed for pecuniary gain. The state first asserts that this issue was decided on direct appeal and is procedurally barred. The evidence has not changed. This court found that the murder of Eunice Zeigler was to collect $500,000, and the murder of Charles Mays was committed in furtherance of Zeigler's plan to murder his wife for the money and to have it appear she was killed by Charles Mays and others in perpetration of a robbery or breaking and entering. The evidence presented at resentencing actually supports this court's

finding that Zeigler was surreptitiously acquiring insurance on his wife in order to prepare for her demise.

Hardy Vaughn, to whom Zeigler had talked regarding insurance, was not notified that Zeigler purchased two policies and even went to dinner with Zeigler after the latter purchased policies from others. The two policies on Eunice's life were purchased within two and three months of her death. The testimony showed that $500,000 was an exceptionally high amount of coverage, and more than he had on his life. The estate shrinkage if Eunice died first was only $6,000 on the $500,000. The estate shrinkage Zeigler refers to in his initial brief is that which would occur if Zeigler died first. Although Vaughn may have said $500,000 may not have been unreasonable, he thought the amount was excessive and a prudent businessman would have purchased in a more advantageous manner (R 52). He would have recommended $250,000 on Eunice. The family lawyer was not told about the policies even though he had discussed estate planning with Zeigler.

This court has upheld the pecuniary gain aggravating factor where a party takes out insurance on another's life. In Buenoano v. State, 527 So.2d 194 (Fla. 1988), this court found sufficient evidence to support the aggravating circumstance that the murder was committed for pecuniary gain where, as a result of her husband's death, Buenoano was entitled to receive life insurance proceeds and veteran's benefits. Had Buenoano chosen to end her marriage by divorce, she would not have been entitled to any of this money. Id at 199. In Byrd v. State, 481 So.2d 468 (Fla.

1985), the defendant was the sole beneficiary of a $100,000 life insurance policy. Although Byrd testified that he killed his wife because she refused his request for a divorce, this testimony was rejected by this court. Id. at 474. See also, Ventura v. State, 15 F.L.W. S190 (Fla. April 15, 1990); Cailler v. State, 523 So.2d 158 (Fla. 1988).

This court also found that the murder of Charles Mays was committed to cover up the fact Zeigler had earlier murdered his wife and in-laws and thus, was committed for the purpose of avoiding or preventing a lawful arrest. Zeigler v. State, 402 So.2d 365,376 (Fla. 1981). Zeigler's challenge to this factor is procedurally barred. Zeigler contends that where the victim is not a law enforcement officer, the dominant motive for the murder must be elimination of witnesses. Although this is an accurate statement of the cases cited, case law also shows that where a victim either knows the defendant or could identify him, application of the "avoid arrest" aggravating circumstance is proper. Reed v. State, 15 FLW S115 (Fla. March 1, 1990) (killed victim to keep her from talking); LeCroy v. State, 533 So.2d 750 (Fla. 1988) (killed witness to prevent her from reporting murder of her husband); Swafford v. State, 533 So.2d 270 (Fla. 1988) (convenience store clerk); Harmon v. State, 527 So.2d 182 (Fla. 1988) (victim knew defendant); Atkins v. State, 497 So.2d 1200 (Fla. 1986) (prevent child from disclosing sex acts); Stevens v. State, 419 So.2d 1058 (Fla. 1982) (needed to eliminate victim as possible identifying witness); Adams v. State, 412 So.2d 850 (Fla. 1982) (victim knew defendant and could identify him). See

also, Routly v. State, 440 So.2d 1257, 1262 (Fla. 1983), and cases cited therein. None of the above cases involve law enforcement officers. In Swafford, this court summarized the applicable case law on "avoid arrest" as follows:

> A motive to eliminate potential witnesses to "an antecedent crime" can provide the basis for this aggravating circumstance. Menendez v. State, 419 So.2d 312, 315 n.2 (Fla. 1982). It is not necessary that an arrest be imminent at the time of the murder. See e.g., Herring v. State, 446 So.2d 1049 (Fla.) cert. denied, 469 U.S 989, 105 S. Ct. 396, 83 L.Ed.2d 330 (1984); Riley v. State, 366 So.2d 19 (Fla. 1978).
>
> Although some decisions have approved findings of motive to eliminate witnesses based on admissions of the defendant, Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986); Bottoson v. State, 443 So.2d 962, 963 (Fla. 1983), cert. denied 469 U.S. 873, 105 S. Ct. 223, 83 L.Ed.2d 153 (1984); Johnson v. State, 442 So.2d 185, 188 (Fla. 1983), cert. denied, 466 U.S. 963, 104 S. Ct. 2182, 80 L.Ed.2d 563 (1984), in others the factor has been approved on the basis of circumstantial evidence without any such direct statement. Routly v. State, 440 So.2d 1257, 1263 (Fla. 1983) ("express statement" not required), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed2d 888 (1984). While Swafford's statement to Johnson did not contain any clear reference to his motive for the murder specifically, the circumstances of the murder were similar to those in many cases where the arrest avoidance factor has been approved. E.g., Cave v. State, 476 So.2d 180, 188 (Fla. 1985) (evidence left "no reasonable inference by that the victim was kidnapped from the store and transported some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery"), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed. 2d 993 (1976);

> Routly v. State, 440 So.2d at 1264 ("no logical reason" for the victim's abduction and killing "except for the purpose of murdering him to prevent detection"). Other cases have applied the same reasoning on similar facts. E.g., Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); Martin v. State, 420 So.2d 583 (Fla. 1982), cert. denied, 460 U.S. 1056, 103 S. Ct. 1508, 75 L.Ed.2d 937 (1983); Griffin v. State, 414 So.2d 1025 (Fla. 1982).

Swafford, 533 So.2d 276.

This court has also recognized that the arrest avoidance factor can be supported by circumstantial evidence through inference from the facts shown. Swafford, 533 So.2d 276, n.6. Mays was not just a witness that was eliminated. Zeigler had drawn him into the plan to murder his wife and in-laws. Mays had knowledge which could implicate Zeigler in the murders. Once Mays entered the furniture store, it was obvious what had occurred. Zeigler killed Mays not only because he was a prospective witness to the murders, but because he wanted it to look like Mays had committed the murders. Zeigler killed Mays to keep himself from being implicated in the crimes. This is the very essence of the "avoid arrest" aggravating factor.

Zeigler concedes that the trial court's finding of "prior conviction of capital felony" was proper, but argues that it is arbitrary and capricious to base a death sentence on contemporaneous crimes. This court has repeatedly upheld the "prior conviction" aggravating factor in capital cases. Cook v. State, 542 So.2d 964, 970 (Fla. 1989); LeCroy v. State, 533 So.2d 750, 755 (Fla. 1988); Correll v. State, 523 So.2d 562, 568 (Fla. 1988).

While aggravating factors must be proven beyond a reasonable doubt, evaluating the evidence and resolving factual conflicts are the trial judge's responsibility. When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent substantial evidence to support it. Bryan v. State, 533 So.2d 744 (Fla. 1988); Swafford v. State, 533 So.2d 270, 277 (Fla. 1988).

Even if one aggravating circumstance were stricken, it would not change the sentence. See Reed v. State, 15 FLW S115 (Fla. March 1, 1990); Rogers v. State, 511 So.2d 526 (Fla. 1988); Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984). Additionally, the cold, calculated, and premeditated aggravating circumstance should have been found, thus replacing any stricken factor or adding additional weight to the aggravating factors when none is stricken. (See Point I on cross appeal). See also, Clemons v. Mississippi, 4 FLW Fed. S224 Case No. 88-6873 (March 28, 1990).

III

THE TRIAL COURT CONSIDERED THE NONSTATUTORY MITIGATING EVIDENCE, WEIGHED THAT WHICH WAS ESTABLISHED AGAINST THE AGGRAVATING CIRCUMSTANCES, AND PROPERLY IMPOSED A DEATH SENTENCE.

Zeigler contends that the trial court failed to consider the nonstatutory mitigating circumstances presented at resentencing. The trial court's order belies this contention since it expressly addresses each facet of the evidence presented. The state discredited, contradicted, or refuted each and every bit of testimony offered by the defense. Although the witnesses knew

Zeigler well, they admitted that they did not believe he had committed the murders. Although the judge ruled that evidence of guilt or innocence would not be relitigated, the witnesses persisted in maintaining their belief in Zeigler's innocence. The friends that testified refused to acknowledge the four murder convictions and admitted that if Zeigler had committed the murders they did not know him at all. How can the defense pretend to offer such witnesses opinions as credible, when their vision is jaded by their own blind perceptions of a man who brutally and without conscience killed his wife, her parents, and a friend? The witnesses testified that they were friends of Zeigler (R 77, 226, 249, 258, 270, 285, 292,). The witnesses who did not have social dealings with Zeigler were Reverend DeSha, who also testified that Zeigler was one of 1,000 church members who he never really knew in depth (R 212), and Oscilla James, who the record shows was the wife of a black bar owner who Zeigler helped move his bar (R 210-211,282). Even Zeigler's synopsis shows the potential bias of each witness, including a cousin, business associate, family lawyer, friends, and beneficiaries.

Although he argues he was a model prisoner, his prison record was marred by the incident in which he tried to buy a confession from another inmate. He admitted that he was selling drugs in prison. The psychologists could not say that he would not premeditate further murders or be a threat to society.

The trial court found that although the defense presented several friends who testified as to his good reputation and good deeds, most of the deeds were uncorroborated hearsay presented by

those one would expect to support the defendant. The judge found that the testimony at best established Zeigler's character as no more good or compassionate than the average individual. (R1214). The trial judge found that the none of the testimony regarding church activities established unusual participation. The judge found that Zeigler had a good prison record and had adapted well to prison life. Although the testimony revealed no propensity for spontaneous violent conduct in the future, there was no evidence the defendant would not engage in the cold and calculated violent conduct evidenced by the murders (R1215). The court then made a specific finding that no reasonable person could conclude that the mitigating circumstances would outweigh the aggravating circumstances (R1216).

Finding or not finding a specific mitigating circumstance is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion. Cook v. State, 542 So.2d 964, 971 (Fla. 1989); Stano v. State, 460 So.2d 890, 894 (Fla. 1984); Quince v. State, 414 So.2d 185, 187 (Fla. 1982). A trial court has discretion in rejecting mitigating factors. Hudson v. State, 538 So.2d 829 (Fla. 1989); Scull v. State, 533 So.2d 1137 (Fla. 1988); Hargrave v. State, 366 So.2d 1 (Fla. 1979). There is no requirement that a court must find anything in mitigation. Porter v. State, 429 So.2d 293, 296 (Fla. 1983). The trial court determines the weight to be given any mitigating circumstance and whether the circumstance was even established. It is not within the reviewing court's province to revisit or reevaluate the evidence presented as to

aggravating or mitigating circumstances. Hudson, supra at 831. This finding should not be disturbed where supported by competent substantial evidence. Bryan v. State, 533 So.2d 744 (Fla. 1988).

In a footnote, Zeigler alleges that the trial court shifted the burden of proof to the defendant. This argument has no merit. Preston v. State, 531 So.2d 154 (Fla. 1988); Arango v. State, 411 So.2d 172 (Fla. 1982).

POINT I ON CROSS APPEAL

Zeigler filed a motion to preclude evidence and consideration of the aggravating circumstance of cold, calculated, and premeditated. He argued that application of this aggravating factor violated the ex post facto prohibition because the offenses for which Zeigler was convicted occurred more than 3 1/2 years before this aggravating circumstance was added to Florida's death penalty statute. Although Zeigler recognized that this court upheld retroactive application of the cold, calculated aggravating factor in Combs v. State, 403 So.2d 418 (Fla. 1981), he argued that the case was inapposite because it was not a resentencing case and because it proceeded Miller v. Florida, 107 S. Ct. 2446 (1987). Zeigler also argued that although this court rejected his argument in Justus v. State, 438 So.2d 358, 368 (Fla. 1983), it did so in reliance on Dobbert v. State, 375 So.2d 1069 (Fla. 1979), which did not address the applicability of ex post facto to the cold, calculated aggravating factor (R1038-1043). The trial court granted Zeigler's motion, reasoning that if his decision were made with an additional aggravating circumstance not available for the jury to consider, it would

diminish the effect of the advisory verdict. The trial judge also stated that:

> This Court recognizes the principal of stare decisis and is not determining the constitutionality of applying Fla. Stat. §921.141(5)(i) to a crime committed before enactment of this provision (although in light of Miller v. Florida, 482 U.S. 423 (1987) and Stano v. Dugger, Case Number 88-425-Civ-Orl-19, M.D. Fla., May 18, 1988, it would encourage reconsideration of this issue when appropriate).
>
> This Court has considered and finds that application of Fla. Stat. §921.141(5)(i) to the particular facts of this case would be unconstitutional as a violation of the proscription against ex post facto application of laws.

(R1135-36).

In order for a criminal or penal law to be ex post facto, it must be retrospective, applying to events occurring before its enactment and must disadvantage the offender affected by it. No ex post facto violation occurs when the change effected is merely procedural and does not increase the punishment or change the ingredients of the offense or the ultimate facts necessary to establish guilt. Weaver v. Graham, 450 U.S. 24 (1981). In Miller v. Florida, 107 S.Ct. 2446 (1987), the Court held that the application of revised sentencing guidelines to a defendant whose crimes occurred before their effective date, violated the ex post facto clause because although the law provided for continuous review of the guidelines, it did not warn the defendant of the specific punishment prescribed for his crimes. The defendant was

found to have been disadvantaged by the increase in the presumptive sentence because although the trial judge could have imposed the same sentence under the old guidelines by departing from the presumptive sentence range then in existence, the revised law foreclosed the defendant's ability to challenge the sentence on review because it was within the new presumptive range. The revised sentencing guidelines were not merely a procedural change in the law.

The decision in Miller is not a retroactive change in the law as Miller does not overrule but follows the line of reasoning set forth in Dobbert v. Florida, 432 U.S. 282 (1977). The Court in Dobbert recognized that a criminal does not have the right to be tried in all respects by the law in force when the crime charged was committed. It found the change in law from the old Florida statute which provided that a person convicted of a capital felony was to be punished by death unless mercy was recommended by a majority of the jury to the new statute in which the jury considered aggravating and mitigating circumstances and rendered an advisory decision on the death penalty was procedural and ameliorative and afforded significantly more safeguards to the defendant than did the old statute, so that the new statute did not work an onerous application of an ex post facto change in law. The ex post facto clause looks to the standard of punishment prescribed by statute rather than to the sentence actually imposed. What is forbidden is the application of any new punitive measures to a crime already consummated to the detriment material disadvantage of the wrongdoer. 432 U.S. at

299. In Miller, the defendant received an unreviewable increase in punishment. What was involved in Dobbert was a standard of punishment which met the provisions of the ex post facto clause. The decision below is an anomaly and in derogation of Dobbert, in which the entire statutory scheme was considered. See, Combs v. State, 403 So.2d 418 (Fla. 1981). At the time of the commission of the offense in Dobbert there were no statutory aggravating factors. It is clear from Dobbert that the mere enumeration of the same adds nothing new since the facts of the crime are always before the jury and mercy is hardly precluded as a sentencing consideration. See, Adams v. Wainwright, 764 F.2d 1356, 1369 (11th Cir. 1985).

If the legislature had added an entirely new factor as an aggravating circumstance, then retroactive consideration may violate the prohibition against ex post facto laws as set forth in Weaver v. Graham, 450 U.S. 24 (1981). However, the addition by the legislature of paragraph (i) to section 921.141(5), in fact only reiterates in part what is already present in the elements of premeditated murder, with which petitioner was charged and which the evidence clearly supports. Although consideration of aggravating factors must be limited to those set forth in the statute, Elledge v. State, 346 So.2d 998 (Fla. 1977); Purdy v. State, 343 So.2d 4 (Fla.). The elements of the specific offense charged are and must be inherently part of the circumstances taken into consideration when imposing a sentence in a capital case as well as in other criminal cases. Paragraph (i) only adds to the statute the requirement that in order to

consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crimes for which petitioner stands adjudicated but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant. Combs v. State, 403 So.2d 418, 421 (Fla. 1981).

This court has previously rejected Zeigler's claim. Stano v. Dugger, 524 So.2d 1018, 1019 (Fla. 1988); Preston v. State, 444 So.2d 939 (Fla. 1984); Francis v. State, 473 So.2d 672 (Fla. 1985); Justus v. State, 438 So.2d 348 (Fla. 1983); Smith v. State, 424 So.2d 726 (Fla. 1982); Combs v. State, 403 So.2d 918 (Fla. 1987). See also, Parker v. Dugger, 537 So.2d 972 (Fla. 1988).

Although the trial court cited Stano v. Dugger, U.S. Middle District Case No. 88-425-Civ-Orl-19 to support his ruling, not only is this case a decision of an intermediate federal court, but it is also on rehearing to the Eleventh Circuit Court of Appeals. Stano v. Dugger, being the decision of an intermediate federal court provides no basis for relief under Witt v. State, 387 So.2d 922, 930 (Fla. 1980). The Eleventh Circuit has previously found that subsection (5)(i), allowing the sentencing court to find as an aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification genuinely narrowed the class of persons eligible for the death penalty.

Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988). Since the mere enumeration of this aggravating factor does not alter the substance of the sentencing law to the detriment of capital offenders, there is no ex post facto violation. The "quantum of punishment," i.e., life in prison or death, is unchanged.

CONCLUSION

Based on the above and foregoing arguments and authorities, appellee respectfully requests that this court affirm the order of the trial court imposing the death penalty and reverse the decision of the trial court finding the application of the cold, calculated and premeditated aggravating factor Thomas Zeigler to be ex post facto application.

Respectfully submitted,

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