IN THE SUPREME COURT OF FLORIDA

MICHAEL TYRONE CRUMP,

Appellant,

v. Case No. 82,943

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF THE ARGUMENT

As to Issue I: Appellant contends that the trial court erred upon resentencing by refusing to permit him to present new evidence in mitigation at the resentencing. It is the state's contention that the trial court followed this Court's order and that there was no error in his refusal to allow the presentation of additional evidence.

As to Issue II: Appellant contends that the trial court erred in failing to find the statutory mental mitigators of under extreme mental or emotional disturbance and capacity to appreciate the criminality of conduct.

With respect to the mental mitigators, the trial court found that the only reasonably convincing circumstances established by the evidence were that the defendant possessed a few positive character traits and suffered from mental impairment not reaching the statutory standards of mental mitigation. Based on the evidence before it the trial court properly concluded that the one aggravating circumstance of a prior first degree murder outweighed the mitigating circumstances and, therefore, death was the appropriate sentence.

As to Issue III: The remand of this Court was for the trial court to reweigh and resentence appellant. There was no requirement that the Court conduct another sentencing hearing or hear evidence. Similarly, there was no requirement that the trial court allow the defendant to speak.

Furthermore, there is no support for appellant's contention that the trial court was under the mistaken belief that it was only necessary for him to "clean up" his prior order. The trial court clearly understood that it was his responsibility to reweigh the circumstances and resentence the defendant after this Court struck the aggravating circumstance of cold, calculated and premeditated.

As to Issue IV: Appellant concedes that defense counsel did not file a motion requesting a new jury sentencing recommendation, but contends that he suggested at the resentencing that the judge should order a whole new penalty proceeding. This claim is not supported by the record. The trial court correctly sentenced Crump without convening a new jury.

As to Issue V: This Court specifically instructed the trial court to merely reweigh and resentence the defendant. There was no direction that a new jury be empaneled for resentencing. For the trial court to have done so would have clearly gone outside the dictates of the mandate and would have been erroneous. Again, the trial court reweighed the aggravating and mitigating circumstances in light of this Court's striking of CCP and found that the death sentence was properly imposed.

As to Issue VI: The state adamantly maintains that although this Court rejected the trial court's finding that the murder was cold, calculated and premeditated, there is certainly no evidence that either of these killings were simply "impulse" killings

committed in connection with sexual acts. These were premeditated murders and the defendant was convicted of same.

Further, as previously noted, appellant's contention that the defendant was suffering from a mental disorder, was considered by the trial court and only given slight weight. The mental health expert that testified for Crump stated that the defendant may have been out of control and that it is possible that he was disturbed at the time. The cold facts are that in addition to the other assaults for which Crump had been convicted. Crump is a serial killer who was appropriately sentenced to death.

ARGUMENT

ISSUE I

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

After affirming Crump's conviction for first degree murder, this Court struck the cold, calculated and premeditated aggravating factor. Because the trial court's order was unclear as to whether he had found the mental mitigators, this Court vacated the death sentence. The trial judge was directed on remand to reweigh the remaining aggravating circumstance and the statutory and the nonstatutory mitigating circumstances established in the record. Crump v. State, 622 So. 2d 963, 973 (Fla. 1993). After reweighing the aggravating and mitigating circumstances, the trial court again imposed a sentence of death.

Now on appeal, Appellant contends that the trial court erred upon resentencing by refusing to permit him to present new evidence in mitigation at the resentencing. It is the state's contention that the trial court followed this Court's order and that there was no error in his refusal to allow the presentation of additional evidence.

As this Court recognized in Lucas v. State, 490 So. 2d 943, 945 (Fla. 1986), the Court's terminology in remanding for resentencing has varied from case to case. After reviewing this various terminology, this Court concluded that when there is a remand for a new sentencing "proceeding" that the trial court is required to allow additional testimony in argument. However,

when the opinion provides for a remand for reconsideration and there is no direction that a new sentencing proceeding be conducted or that further evidence be received, the trial court may properly refuse to allow the presentation of additional testimony. Lucas v. State, 613 So. 2d 408, 409 (Fla. 1993). See also, Menendez v. State, 419 So. 2d 312 (Fla. 1982); Mikenas v. State, 407 So. 2d 892 (Fla. 1981). cert. denied, 456 U.S. 1011 (1982); Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). In the instant case, this Court directed the trial court as follows:

> . . . 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, in 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.
>
> Id. at 973

As this Court did not direct a "new proceeding," it was within the trial court's discretion to refuse to hear additional evidence. Nevertheless, appellant contends that based on this Court's decision in Scull v. State, 569 So. 2d 1251 (Fla. 1990), wherein this Court held that the trial judge's haste in resentencing Scull without allowing defense counsel time to prepare and present evidence violated Scull's due process rights. This decision is clearly in accord with the foregoing in that the direction in Scull upon remand was for a "new sentencing

proceeding." 569 So. 2d at 1252. Similarly, in Lucas v. State, 490 So. 2d 943 (Fla. 1986), this Court had also remanded for a resentencing proceeding. Thus, in the instant case as in Lucas v. State, 613 So. 2d at 409 (appeal after remand), where the trial judge followed this Court's direction, there is no error in his refusal to allow the presentation of additional testimony.

Furthermore, a review of the additional testimony that counsel sought to present was in no way directed by this Court's prior opinion or affected the sentence in the instant case. Prior to the resentencing in the instant case, counsel filed a motion to consider testimony of prior psychologists. (R 443)[1] In this motion counsel alleged that Dr. Robert Berland testified in the second phase of Crump's trial for the murder of Areba Smith. In the instant cause of action, Dr. Berland was unable to appear and testify due to scheduling conflicts and, therefore, Dr. Isaza examined the defendant and testified during the second phase. Counsel alleged that Dr. Berland's testimony in the prior case was essentially the same as Dr. Isaza in regards to whether the defendant was under extreme mental or emotional distress at the time of the offense. Likewise, the reports were essentially the same in regards to whether the defendant's ability to appreciate the criminality of the conduct and to conform his conduct to the requirements of the law was impaired. (R 43)

---

[1] References to the record will be as follows: "R" refers to the pleadings contained in the instant record on appeal. "T" designates the transcript in the instant record. "Pr" designates the prior record on appeal.

Counsel requested that the Court consider Dr. Berland's testimony in order to substantiate the findings of Dr. Isaza.

At the resentencing hearing, the trial judge inquired of counsel as to why he needed to hear Dr. Berland's testimony when he was alleging that Dr. Berland said the same thing that Dr. Isaza said. (T 12) Counsel alleged that it was because Dr. Isaza had some difficulty with the language and in response to the state's cross-examination she had said, "At the time of the offense. In other words what I'm saying, based upon his personality characteristics, he may be, half an hour before this happened, a very normal individual, and at some point, something triggers, and we don't know what this something is because again, that's what I'm saying; it may depend on the situation at that particular time, he may be impaired." (T 14) Thus, essentially, Crump asserted the trial court should expand this Court's remand because their expert equivocated on cross-examination with regard to Crump's mental state and Dr. Berland's testimony apparently would support what they wished Dr. Isaza had said (T 15).

Appellant also contends that the trial court erred in failing to grant his motion to consider new evidence that the defendant had adapted well to prison life. (R 42) While it is clear that counsel did file a motion to ask the court to consider this evidence, it is not clear that he attempted to argue same to the court during the sentencing hearing. Appellate counsel does a bit of "crystal ball gazing" and suggests that defense counsel attempted to make an argument concerning the admission of this

evidence and was cut off by the trial judge. Initial brief of appellant at page 29. There is nothing in this transcript that would support appellant's claim that he attempted to present Crump's prison record as mitigating evidence. Nevertheless, the Court was given this information. During the sentencing hearing appellant addressed the court and said that he had done well in prison. (T 22) Thus, although, the request to consider additional evidence was outside the scope of the remand and the trial court properly denied the motion to consider it error, if any was harmless. The addition of this insubstantial evidence clearly makes no impact on the potential sentence.

In accordance with this Court's decision in Lucas v. State, 613 So. 2d 408 (Fla. 1992), it is the state's position that the trial court properly followed this Court's direction and that there is no error in his refusal to allow the presentation of additional testimony.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND AND GIVE SIGNIFICANT WEIGHT TO THE STATUTORY MENTAL MITIGATORS.

Appellant contends that the trial court erred in failing to find the statutory mental mitigators of under extreme mental or emotional disturbance and capacity to appreciate the criminality of conduct because there was unrebutted evidence to support the two statutory mental mitigators. He urges that the trial court's conclusion that evidence did not support a finding of mental mitigators is unsupported by the evidence and one can only speculate to the court's reasoning.

It is unnecessary to speculate as to the trial court's reasons because they were clearly provided in the order and at the sentencing hearing. With respect to the mental mitigators, the trial court found that the only reasonably convincing circumstances established by the evidence were that the defendant possessed a few positive character traits and suffered from mental impairment not reaching the statutory standards of mental mitigation. (R 40)

The evidence presented at Crump's trial shows that Dr. Isaza's conclusion was that Crump may have impairments at times but, that it is part of his personality that is unpredictable. On cross-examination Dr. Isaza offered only that Crump "could have been" under extreme mental or emotional disturbance. (Pr 490 - 491, 500) Defense counsel conceded as to the tentative testimony presented by Dr. Isaza in his argument at the

resentencing hearing. (T 13) Furthermore, as the state noted at the resentencing hearing, Dr. Isaza's testimony was refuted by family members who never knew him to have any history of mental or emotional problems. None of the relatives testified that they observed anything that would lead them to believe that he had any type of mental illness. (T 7) As this Court has repeatedly stated, it is within the trial court's discretion to decide whether a mitigator has been established, and the court's decision will not be reversed merely because an appellant reaches a different conclusion. Lucas v. State, 613 So. 2d at 410, citing Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1500, 117 L.Ed.2d 139 (1992). Moreover, whether a mitigator has been established is a question of fact, and a court's findings are presumed correct and will be upheld if supported by the record. Campbell v. State, 571 So. 2d 415 (Fla. 1990). The judge's findings in the instant case are supported by competent, substantial evidence and there is no error in his consideration of the mitigating evidence.

Furthermore, appellant argues that this Court has effectively removed the adjective "extreme" from the statutory circumstance of extreme mental or emotional disturbance. This position is clearly unsupported by the law. In Stewart v. State, 558 So. 2d 416 (Fla. 1990), this Court rejected Stewart's claim that the trial court erred in refusing to delete from the standard jury instructions the qualifiers of "extreme" and "substantially". Similarly, in Walls v. State, 19 Fla. Law

Weekly S 377, S 379 (Fla. July 7, 1994), this Court rejected the defendant's claim that the modifiers limit the consideration of mitigating evidence. The trial judge did not limit the possible mitigating evidence that it considered and it is clear that the court considered Crump's mental state in consideration of both statutory and nonstatutory factors. No error was committed.

Appellant also contends that the trial court failed to consider a number of nonstatutory mitigating aspects of Crump's character. The testimony presented at Crump's trial basically shows that Crump had a childhood and a family, neither one of which was particularly remarkable or mitigating. There is no evidence that Crump was abused or that his childhood was particularly difficult.[2] Nevertheless, the trial court considered this nonstatutory mitigating evidence and found that appellant had some positive character traits to which he gave slight weight. (R 41) This finding was within the trial court's

---

[2] At the penalty phase, appellant's mother testified that Crump was a slow learner in school and that he was kind, considerate and thoughtful and playful. Michael was friendly and outgoing and helped anyone who needed help. (Pr 458 - 60). Crump's sister, Gloria Baker, testified that Michael got along well with the family and did a lot of work around the house. (Pr 466 - 68) Christina Taylor, another of Crump's sisters, testified that Michael visited her during the summers and got along well with her children and helped around the house. (R 468 - 470) Patricia Howard, a neighbor of Crump's sister, testified that Michael visited her frequently when he was a child, talked to her, helped around the house, and baby-sat while she went to the store. He was very good with her four children and she saw no evidence of violence. (Pr 472 - 475) Psychologist Dr. Isaza said there were no reports of child abuse but that the defendant had poor impulse control. (Pr 487)

discretion and appellant has failed to show an abuse of that discretion.

Based on the evidence before it the trial court properly concluded that the one aggravating circumstance of a prior first degree murder outweighed the mitigating circumstances and, therefore, death was the appropriate sentence.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY FAILING TO HOLD AN ALLOCUTION HEARING AND BY SENTENCING CRUMP TO DEATH WITHOUT CONSIDERING HIS STATEMENTS.

This claim has already been addressed under Issue I. The remand of this Court was for the trial court to reweigh and resentence appellant. There was no requirement that the Court conduct another sentencing hearing or hear evidence. Similarly, there was no requirement that the trial court allow the defendant to speak. Nevertheless, and despite the fact that the defendant initially stated that he had nothing to say to the court, the court did allow the defendant to address the court prior to sentencing. (T 20, 22) Furthermore, there is no support for appellant's contention that the trial court was under the mistaken belief that it was only necessary for him to "clean up" his prior order. The trial court clearly understood that it was his responsibility to reweigh the circumstances and resentence the defendant after this Court struck the aggravating circumstance of cold, calculated and premeditated.

And, contrary to appellant's assertion, Grossman v. State, 525 So. 2d 833 (Fla. 1988), is not applicable to the instant case as this Court did not direct a new "sentencing proceeding" but merely instructed the court to reweigh and resentence Crump. As this was not a "proceeding" it was unnecessary for the trial court to follow the dictates of Grossman. Furthermore, there is no evidence that the trial court prepared the written order

before he heard any evidence, argument of counsel or any statement the defendant wished to make. And, finally, as this Court did not order a new proceeding, it was unnecessary for the court to follow the dictates of this Court's opinion in Spencer v. State, 615 So. 2d 688, 690 - 91 (Fla. 1993), wherein this Court outlined the procedures to be used in sentencing phase proceedings. See Lucas v. State, 613 So. 2d 408.

ISSUE IV

WHETHER 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.

Appellant concedes that defense counsel did not file a motion requesting a new jury sentencing recommendation, but contends that he suggested at the resentencing that the judge should order a whole new penalty proceeding. This claim is not supported by the record.

Appellate counsel contends that counsel's reference to Davidson (sic) v. State, 18 Fla. Law Weekly S 139 (Fla. 1993),[3] was in fact a request for a new jury penalty proceeding. An inaccurate reference to a multi-issued case clearly is insufficient to put the court on notice that such a request was being made. Especially when it was in no way shape or form suggested by defense counsel. In fact, in the instant case, when counsel referred to the Davidson case, the court noted that in that case they directed a new penalty hearing and defense counsel conceded that they did not do that in this case and made no argument in support of requesting that the trial court empanel such a jury. (T 19)

Furthermore, in the motion for rehearing after this Court's initial opinion, appellate counsel suggested to this Court that

---

[3] The actual case published at that cite is Davidson Joel James v. State.

this Court remand for imposition of a life sentence or in the alternative that this Court should remand for a new penalty proceeding with a new jury rather than a mere reweighing by the trial judge. (Attached as Exhibit "A", Motion for Rehearing) This claim was apparently rejected when this Court denied appellant's motion for rehearing. (Attached as Exhibit "B") Accordingly, not only is this claim barred as it was not argued to the trial court on remand, but it should also be rejected based on this Court's prior denial of the motion for rehearing.

Appellant also contends that in light of this Court's decision in Jackson v. State, 19 Fla. Law Weekly S 215 (Fla. April 21, 1994) wherein this Court found that the standard jury instruction on cold, calculated and premeditated was unconstitutionally vague, this Court should reconsider its prior decision in the instant case and order a new sentencing phase. It is the state's contention that a new sentencing phase is not warranted because appellant's current challenge to the wording of the instruction is also procedurally barred. Although, Crumb filed a pretrial motion to declare Florida Statute 921.141(5)(i) unconstitutional, he did not object to the specific wording of the instruction. This Court has made it clear that absent such an objection that challenges to the standard jury instructions are procedurally barred. Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 122, 128 L.Ed.2d 678 (1994). Furthermore, even if the trial objections were sufficient, Crump's failure to raise this claim during the

resentencing amounts to a waiver of the claim. Lambrix v. Singletary, 19 Fla. Law Weekly S 330 (Fla. June 16, 1994).

Appellant's contention that this claim might not be procedurally barred because the trial judge may have cut off defense counsel's objection to the wording of the instruction is not supported by the record. Furthermore, even if defense counsel was attempting to object to the wording of the instruction, and assuming an attempt is sufficient to preserve any claim, an objection alone does not preserve a challenge to the wording of the instruction. This Court has made it clear that it is not enough that defense counsel objected to the wording of an instruction, but he must also suggest a proper instruction to be given. Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 122, 128 L.Ed.2d 678 (1994). Thus, while the state adamantly maintains that there is no support in the record for appellant's contention that he actually challenged the wording of the instruction, there also is no evidence in the record that an alternative instruction was requested. Furthermore, in light of this Court's striking of the factor and the trial court's reweighing and resentencing, error, if any, was harmless.

Based on the foregoing, the state urges this Court to find that these claims were procedurally barred or that in the alternative, that a new jury should not have been empaneled.

ISSUE V

WHETHER 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.

This claim was addressed in Issue IV. Additionally, this argument was presented to this Court on Motion for Rehearing and was rejected. This Court specifically instructed the trial court to merely reweigh and resentence the defendant. There was no direction that a new jury be empaneled for resentencing. For the trial court to have done so would have clearly gone outside the dictates of the mandate and would have been erroneous. Again, the trial court reweighed the aggravating and mitigating circumstances in light of this Court's striking of CCP and found that the death sentence was properly imposed.

Although it is not clear, it appears that appellant in addition to arguing that the jury was improperly given a vague instruction on cold, calculated and premeditated he is also arguing that it was improper for them to be given the factor to consider. As this Court recognized in Bowden v. State, 588 So. 2d 225, 237 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1994), the trial court is directed to give jury instructions where there is evidence to support same. In the instant case the state presented substantial evidence to support the cold, calculated and premeditated factor and the trial court did not err in giving this instruction to the jury.

ISSUE VI

WHETHER THE SENTENCE WAS PROPORTIONATE WHERE THE DEFENDANT COMMITTED MULTIPLE HOMICIDES, AND HAD ONLY MINIMAL MITIGATION BALANCED AGAINST THE ONE AGGRAVATING FACTOR OF A PRIOR VIOLENT FELONY.

Appellant contends that the instant murder was committed impulsively and that this Court has afforded great weight to the mental mitigators and to crimes which were committed impulsively while the perpetrators suffered from a mental disorder rendering him temporarily out of control, even in cases in which the defendant killed more than one person. He contends that although he was convicted of killing two women, that both appear to have been impulse killings committed in connection with sexual acts. The state maintains that although this Court rejected the trial court's finding that the murder was cold, calculated and premeditated, there is certainly no evidence that either of these killings were simply "impulse" killings committed in connection with sexual acts.

Further, as previously noted, appellant's contention that the defendant was suffering from a mental disorder, was considered by the trial court and only given slight weight. The mental health expert that testified for Crump stated that the defendant <u>may</u> have been out of control and that it is <u>possible</u> that he was disturbed at the time. The cold facts are that in addition to the other assaults for which Crump had been convicted. (R 40) The defendant committed two very similar murders in a very similar manner. This balanced against the

insignificant evidence presented in mitigation clearly supports the imposition of death.

Nevertheless, appellant contends that since only one aggravating circumstance remains balanced against the trial court's finding of nonstatutory mitigation supports his contention that the instant homicide was not one of the most aggravated first degree murder case.

Proportionality is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). While it is true that this Court has been reluctant to uphold the death sentence where there is only one aggravating circumstance balanced against other mitigating circumstances, this Court has found such cases proportionate where the aggravating circumstance is the prior conviction of first degree murder. In Duncan v. State, 619 So. 2d 279 (Fla. 1993) cert. denied, ___ U.S. ___, 114 S.Ct. 453, 126 L.Ed.2d 385 (1994), this Court stated:

> "Finally, we reject Duncan's claim that death is not proportionately warranted in this case. As noted above, the mitigating factor of under the influence of alcohol and the two statutory mental mitigators were not established in this case. Therefore the cases cited in which the defendant was intoxicated, suffering from drug or alcohol addiction or suffering from extreme mental or emotional disturbance at the time of the murder are distinguishable. [cites omitted] Moreover the cases cited by Duncan do not involve a defendant who previously had been convicted of murder. Comparing the circumstances of this case with those of

> other capital cases, we conclude that death is appropriate. See e.g., Lemon v. State, 456 So. 2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). (death proportionately warranted for defendant who killed a woman with whom he had a relationship after a previous conviction for a similar violent offense). (emphasis added).
>
> Id. at 284.

Similarly, in Slawson v. State, 619 So. 2d 255 (Fla. 1992), cert. denied, ___ U.S. ___, 114 S.Ct. 2765, 129 L.Ed.2d 879 (1994), this Court upheld the imposition of the death penalty in Slawson's case where the only aggravating circumstance was Slawson's conviction for three other murders. In Slawson, as in the instant case, the trial court listed the two mental mitigating factors noting that they existed in the opinion of the defendant's mental health expert and apparently gave them little weight. In the instant case, the trial court did list the mental mitigators and found that the statutory mental mitigators were not established and although he considered it as nonstatutory evidence, he gave it slight weight. Thus, when compared to similar cases, the sentence in the instant case is proportionate. See, also Lindsey v. State, 19 Fla. Law Weekly S 241 (Fla. April 28, 1994).

Even ignoring the fact that appellant is unable to cite to any case where this Court has held that the death sentence is not proportionate for a serial killer, those cases relied on by appellant to support the contention that even where there was a prior conviction of murder are clearly distinguishable from the

instant case. For example, in Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993), the defendant only had a prior conviction for attempted murder. This Court rejected the death penalty because this Court found that the evidence in its worst light suggests nothing more than a spontaneous fight occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk. Accordingly, this Court found the murder was not beyond the norm of the hundreds of capital felonies that this Court has reviewed since the 1970's. Kramer, at 278. Similarly, in Holsworth v. State, 522 So. 2d 348 (Fla. 1988) and Amazon v. State, 487 So. 2d 8 (Fla. 1986), this Court reversed the death sentences where the trial court overrode a life recommendation. Furthermore, in Holsworth, there was only one murder and the defendant was on drugs during the commission of same and in Amazon two murders were committed contemporaneously while the defendant was on drugs.

Appellant also relies on this Court's decision in DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) wherein this Court found only one valid aggravating factor balanced against the history of conflict between the victim and the defendant as well as significant mental mitigation. Again, in the instant case, as in Slawson, the trial court considered the evidence of mental mitigation and gave it only slight weight. In DeAngelo, the case was reversed because this Court considered it to be similar to those domestic situations where there is an ongoing conflict between the parties. In the instant case, there is absolutely no

evidence of any prior connection between Crump and his victims other than they were prostitutes and he was targeting them for homicides.

Similarly, in Knowles v. State, 632 So. 2d 62 (Fla. 1993), this Court reversed the death sentence after striking two of the aggravating factors leaving only one aggravating factor balanced against uncontroverted mitigating circumstances including the mental mitigators. Based on the bizarre circumstances surrounding the two murders and substantial unrebutted mitigating circumstances this Court found that death was not proportionately warranted. And, in Clark v. State, 609 So. 2d 513 (Fla. 1992), this Court also found that the trial court erred in rejecting the mental mitigators and after striking three of the aggravating circumstances, this Court found that death was not warranted in that case.

In the instant case, the trial court considered all of the evidence before it and properly imposed the sentence of death. Despite appellant's characterization of the presence of mental evidence, it is clear that a review of the experts' testimony shows that there was only "possible" mental mitigation present at the time of the murders. Balanced against the fact that Crump is a serial murderer and had a prior conviction for first degree murder, death was the appropriate sentence. Slawson, Duncan.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the decision of the lower court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Candance M. Sabella

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar ID#: 0445071
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 23 day of November, 1994.

C M Sabella

OF COUNSEL FOR APPELLEE.

IN THE SUPREME COURT OF FLORIDA

MICHAEL TYRONE CRUMP :

Appellant, :

vs. : Case No. 74,230

STATE OF FLORIDA, :

Appellee. :

:

MOTION FOR REHEARING

Appellant, MICHAEL TYRONE CRUMP, moves for rehearing in the above-styled cause pursuant to Florida Rule of Appellate Procedure 9.330, and requests that this Court reconsider its decision of June 14, 1993. As grounds therefor, the Appellant cites the following points of law and fact which may have been overlooked or misapprehended in this Court's opinion:

1. This Court vacated Crump's death sentence because the trial court erroneously found the "cold, calculated and premeditated" aggravating factor ("CCP") established, and remanded the case to the trial judge to reweigh the circumstances and resentence Crump. Because the jury was instructed on this aggravating factor, over defense objection (R. 514, 685), its advisory recommendation was tainted; thus, a new penalty phase trial with a new jury should be ordered.

In Omelus v. State, 584 So. 2d 563 (Fla. 1991), this Court reversed for resentencing before a new jury because the trial court erroneously instructed the jury on the "heinous, atrocious and

cruel" aggravating factor ("HAC"). Although the judge correctly did not find this aggravator established in his written sentencing order, the jury may have considered it.

In conducting a 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. This Court concluded that it would be inappropriate to consider hypothetically whether a life override would be affirmed, had the jury not considered this factor and recommended life. Thus, the Court remanded for a new sentencing proceeding with a new jury. 584 So. 2d at 566-67.

The instant case is the same. The judge found both mental mitigators and the nonstatutory mitigation factor. The jury recommended death by an eight to four vote as in Omelus. The prosecutor stressed this factor in her penalty closing, arguing by analogy to the Williams Rule evidence of the murder of Areba Smith.

This Court found that the trial judge erroneously relied on the Williams Rule evidence and the State failed to prove that Crump planned to kill the victim before inviting her into his truck. (Slip Opinion at 19) Thus, the prosecutor's argument that the Williams Rule evidence showed that the instant homicide was cold, calculated and premeditated encouraged the jurors to base their death recommendation on this erroneous factor. The prosecutor argued 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 encounter 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.

(R. 521) The argument was also logically unsound because the killing of Areba Smith did not occur until ten months after the instant homicide. The argument encouraged the jurors to speculate that the killing was cold, calculated and premeditated instead of requiring the state to prove it beyond a reasonable doubt.

More recently, in Archer v. State, 18 Fla. L. Weekly S87 (Fla. Jan. 28, 1993), this Court reversed for a new sentencing proceeding with a new jury for the same reasons. As in Omelus, the HAC aggravating factor could not be applied vicariously. As in Omelus and the instant case, the prosecutor argued the applicability of the aggravating factor to the jury.

An instructional error was held to be reversible error in Jones v. State, 569 So. 2d 1234 (Fla. 1990), because the jury was permitted to consider whether the murder was especially heinous, atrocious or cruel despite a lack of evidentiary support in the record. The Jones Court concluded that the error was not harmless because the jury may have erroneously believed that the defendant's sexual abuse of the corpse supported this factor. 569 So. 2d at 1238-39.

Similarly, in this case, the jury may have believed that the Williams Rule evidence supported the CCP aggravating factor. In fact, because the prosecutor specifically told the jurors to base

their decision on the collateral evidence, at least some of them must have done so. The CCP aggravating factor was not defined to the jury in this case. The jury was not informed of the limiting construction this Court placed on this 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 that is 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").

When the Williams Rule evidence is discounted, the State presented absolutely no evidence as to how the murder was committed other than the medical examiner's testimony that the victim was strangled. This does not show heightened premeditation. The jury could only have speculated to find CCP. It most likely did so based on the prosecutor's argument.

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). Because the jury was erroneously instructed on CCP, with no

limiting definition and improper prosecutorial argument, Crump's death sentence was unreliable, thus violating his constitutional rights under the eighth and fourteenth amendments. If the invalid instruction on CCP is affirmed, the holding will render the death sentence arbitrary and capricious. See Espinosa v. Florida, 120 L. Ed. 2d 854 (Fla. 1992); Godfrey v. Georgia, 498 U.S. 1 (1990).

2. This Court should resolve the problem by vacating Crump's death sentencing and ordering it reduced to life. Without CCP, only one aggravating factor remains. In White v. State, 18 Fla. L. Weekly S184 (Mar. 25, 1993), this Court noted that it affirmed death sentences supported by one aggravating circumstance "only in cases involving 'either nothing or little in mitigation.'" Id. at S186 (quoting Nibert, 574 So. 2d at 1163, and Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)). This case had substantial mitigation. Although the trial judge's order was somewhat ambiguous, he did find and weigh both mental mitigators and the nonstatutory mitigating circumstance.

In Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992), this Court vacated the death penalty in favor of life imprisonment because only one aggravating factor remained and substantial mitigation existed. Although the defense expert testified that the statutory mental mitigating circumstances were inapplicable and the jury recommended death by a ten to two vote, this Court found that the strong nonstatutory mitigation made the death penalty disproportionate. In the instant case, the mental health expert opined that both mental mitigators were applicable and the jury recommen-

dation was eight to four. Thus, the jury must have found even more mitigation than Clark's jury. Accordingly, the Court should also remand this case for imposition of a life sentence.

WHEREFORE, Appellant asks this Court to grant this motion for rehearing. Appellant respectfully requests that this Court remand for imposition of a life sentence. Alternatively, this Court should remand for a new penalty proceeding with a new jury rather than a mere reweighing by the trial judge.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18th day of June, 1993.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

A. ANNE OWENS
Assistant Public Defender
Florida Bar Number 284920
P. O. Box 9000 - Drawer PD
Bartow, FL 33830