IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR., Defendant-Appellant, Cross-Appellee, - against - STATE OF FLORIDA, Plaintiff-Appellee, Cross-Appellant.	Case No. 74,663

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELANT

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JURISDICTION

This is an appeal from a resentencing order imposing the death sentence for two convictions of first degree murder. This Court has jurisdiction under Fla. R. App. P. 9.030(a)(1)(A).[1]

STATEMENT OF THE CASE

Appellant ("Zeigler") was convicted of two counts of first degree, and two of second degree, murder in July of 1976, for the killings of his wife, his wife's parents and Mr. Charles Mays on Christmas Eve of 1975 in a furniture store he owned in Winter Garden. Although the jury recommended life imprisonment, the trial judge overrode the recommendation and imposed the death

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[1] The State has cross-appealed from the Circuit Court's order precluding evidence of the "cold, calculated" aggravating circumstance set forth in § 921.141(5)(i), Florida Statutes.

sentence. This Court affirmed in Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982).

Zeigler's petition for habeas corpus relief on the authority of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), was granted by this Court on April 7, 1988 because, "there was every indication that at the time of sentencing the trial judge believed that nonstatutory mitigating evidence was not a proper consideration. 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).[2] The death sentence was vacated and the case remanded to the Circuit Court, whose sentencing order of August 17, 1989 is the subject of this appeal.[3]

Because the trial jury had already given an advisory verdict of life imprisonment, resentencing was had before the judge only. Zeigler v. Dugger, 524 So.2d at 421. And since the original trial judge had moved to the federal bench, a new judge was assigned to the matter. Id. A change of venue from Duval

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[2] Zeigler's case has been before this court on two other occasions: Zeigler v. State, 452 So.2d 537 (Fla. 1984) and State v. Zeigler, 494 So.2d 957 (Fla. 1986).

[3] A Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850 remains pending in the Circuit Court. Judge Formet has deferred any action on that motion pending final judgment on the resentencing.

(where the trial had been held) to Orange County was made on stipulation of the parties. (R. 828)[4]

Zeigler made various pre-trial motions, including a motion to preclude evidence and consideration of the "cold, calculated" aggravating circumstance (§ 921.141 (5)(i)), Fla. Stat.) (R. 1038-1044); a motion to declare the "heinous, atrocious and cruel" aggravating circumstance (§ 921.141(5)(h), Fla. Stat.) unconstitutional (R. 1045-1051); and a motion to dissolve the injunction entered by the original trial judge prohibiting interviews of jurors. (R. 1052-1054) The State moved to preclude evidence and argument of guilt or innocence at the resentencing hearing. (R. 1066) Following a hearing on these motions (R. 582-618, 624-629), the Circuit Court granted Zeigler's motion to preclude evidence and consideration of the "cold calculated" aggravating circumstance, because it had not been available for consideration by the jury (R. 1126-1127 and 1135-1136),[5] and also granted the State's motion to preclude evidence and argument of guilt or innocence. (R. 1133) The court denied Zeigler's other motions. (R. 1124-1125, 1132)

The resentencing hearing began before Honorable Gary L. Formet, Circuit Judge, on August 14, 1989 and concluded with his

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[4] References to the transcript and record of the resentencing proceedings will be preceded by an "R"; to the trial transcript of Zeigler's original trial in 1976, by the letters "TT".

[5] See, also, the Circuit Court's Amended Order of March 2, 1989. (R. 1135-1136) This Court denied the State's Petition for a Writ of Certiorari on this issue on March 10, 1989. Order in Case No. 73,778.

sentencing order of August 17th. In addition to the evidence presented at the hearing, Judge Formet had read the entire transcript of the original trial, including the penalty phase. (R. 564-565)

The defense presented three expert witnesses, who testified that Zeigler is not a threat to others; eight witnesses to his character, reputation and conduct; three witnesses to his adjustment to life on death row and his character and behavior there; and one witness whose testimony concerned the reasonableness of Zeigler's purchase of life insurance policies on his wife prior to her murder.[6] The State presented two witnesses, whose testimony is not referred to in the sentencing order at all, and relied primarily on the circumstances of the four murders of which Zeigler had been convicted for its evidence of aggravating factors.

Judge Formet found four aggravating circumstances:

(1) Previous conviction of another capital felony because, "Contemporaneously, the defendant was found guilty of two first degree murders and two second degree murders in this case." (R. 565) § 921.141(5)(b), Fla. Stat.[7]

(2) The murder of Charles Mays was for the purpose of avoiding lawful arrest by making it appear that the other

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[6] Testimony on this subject by another witness was sharply curtailed by the judge. See below at p. 25-27.

[7] The original sentencing judge did not find this aggravating circumstance to exist, although he had referred to it in instructing the jury. (TT 2816)

murders resulted from a robbery attempt. (R. 566) § 921.141(5)(e), Fla. Stat.

(3) Eunice Zeigler and Charles Mays were murdered for pecuniary gain: she, in an attempt to collect $500,000 in insurance on her life; he, in furtherance of that plot, as part of a cover-up scheme. (R. 566-567) § 921.141 (5)(f), Fla. Stat.

(4) The murder of Charles Mays was especially heinous, atrocious or cruel. (R. 567) § 921.141(5)(h), Fla. Stat. Although the first sentencing judge had applied this aggravating circumstance to the murder of Eunice Zeigler as well, Judge Formet concluded otherwise, because, "the evidence indicates she was killed with a single unexpected gunshot and under the law as it has evolved today this killing would not qualify for this aggravating circumstance." (R. 567)[8]

On the other side of the scale, the resentencing judge, like the trial judge, concluded that the evidence established the statutory mitigating circumstance of no significant history of prior criminal activity, (R. 567-568)(§ 921.141(6)(a), Fla. Stat.), despite a youthful brush with the law; and he then reviewed the defense evidence of nonstatutory mitigating

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[8] Judge Formet also rejected as "not sustained by the evidence under the current case law" the previously found aggravating circumstance of "risk of death to many persons." (R. 569) § 921.141(5)(c), Fla. Stat.

circumstances with which the hearing had been primarily concerned:

(1) He dismissed the character evidence as "uncorroborated hearsay" presented by "several friends of the defendant." (R. 568)

(2) Evidence of Zeigler's community and church participation was discounted as not unusual. (R. 568)

(3) Zeigler was found to have a good prison record. "He appears to have adapted well to prison life and is an asset as an inmate." (R. 569)

(4) Judge Formet concluded that the expert testimony showed that Zeigler does not have a propensity for spontaneous violence, but failed to show he "would not engage in the cold and calculated violent conduct evidenced by the murders of which he stands convicted." (R. 569)

Finally, without any supporting findings or further explanation, Judge Formet ". . . [found] that no reasonable person could conclude that the mitigating circumstances outweigh the proven aggravating circumstances and therefore the jury's recommendation of life imprisonment is rejected and a sentence of death as to both convictions is imposed." (R. 570)

STATEMENT OF FACTS

Mr. Zeigler was shot through the abdomen, his wife and her parents were shot to death, and Mr. Charles Mays was bludgeoned to death and shot, all in the Zeigler family furniture store in Winter Garden, on Christmas Eve night of 1975.[9] The defense theory was that three or four men, probably including Mays and two trial witnesses, Felton Thomas and Edward Williams, had attempted to rob the furniture store and that the deaths and the wounding of Zeigler occurred in the ensuing shoot-out and struggle. The prosecution's theory of the case was that Zeigler had killed his wife to collect the proceeds of insurance policies on her life, had killed his in-laws because they were inadvertently present, had killed Mays as part of a scheme to make the other murders appear to be the products of a robbery gone haywire, and had then shot himself in a desperate effort to avoid suspicion when his plan to create a false robbery scene went awry.

As the evidence at the resentencing hearing showed, Zeigler had been well-regarded in the civic and business community of Winter Garden. (R. 75-77, 227, 262, 269-270, 273) Two longtime residents of Winter Garden testified to Zeigler's leading role in projects to improve and beautify the town. (R. 79-80, 236, 262) The pastor of the First Baptist Church of Winter

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[9] Because this case has been before the Court on several other occasions (see citations at page 2 and n. 2), the Statement of Facts is abbreviated and limited to matters relevant to resentencing and this appeal.

Garden told of Zeigler's active role in that congregation, his excellent relationship with the local black community, and his ability to maintain his strong religious convictions in prison. (R. 209-210, 215, 246-247, 318-319) The strength and sincerity of his religious convictions in the years following his conviction were affirmed by a full-time prison minister who has spent substantial time with death row inmates, and who has been relied upon by this court in other proceedings. (R. 293-94) Longtime acquaintances testified to his extraordinary efforts to help those less fortunate in the town. An elderly black woman recounted an incident in which, despite community criticism, he had testified as a character witness for her husband in a proceeding which was eventually dropped. (R. 282-83) Two other witnesses testified about instances in which he had paid bills for his low-income tenants without their ever knowing he had done so. (R. 227-28, 273)

During the time he has spent at Florida State Prison, Zeigler has been a model inmate. (R. 170-171, 506-507) The former death row supervisor at the facility where Zeigler is incarcerated testified that he was an "exceptional" prisoner with an excellent attitude. (R. 506-507) Two psychiatrists and one psychologist testified that Zeigler would not be a danger to the prison staff or other inmates if he were sentenced to life in prison. (R. 104, 122, 148, 172-176)

SUMMARY OF ARGUMENT

POINT I. Especially in the circumstances of this unusual resentencing proceeding, conducted thirteen years after the trial by a judge whose knowledge of the evidence of guilt came entirely from a written transcript, the override of the trial jury's recommendation of life imprisonment in the face of additional non-statutory mitigating evidence which had not been available to the jury, coupled with the judge's failure to make sufficient written findings in support of his sentence, was arbitrary and capricious and denied Zeigler his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16 and 17 of the Florida Constitution. See, Tedder v. State, 322 So.2d 908 (Fla. 1975); Spaziano v. Florida, 468 U.S. 447 (1984). Moreover, since the jurors saw and heard the witnesses who testified on the issue of Zeigler's guilt, and the resentencing judge did not, it was constitutional error for him to substitute his judgment for theirs on the issue of whether the evidence supported a sentence of death or only a conviction of murder beyond a reasonable doubt.

POINT II. The four aggravating circumstances found by the Circuit Court to be applicable to Zeigler are not supported by the facts in the record. The invalidity of any one of these circumstances weighs in favor of reversing the jury override, since even had the jury recommended death a remand would be required under Elledge v. State, 346 S.2d 998 (Fla. 1977).

A. The "heinous, atrocious or cruel" aggravating circumstance set forth in § 921.141(5)(h), Fla. Stat., does not fit the facts of this case, as the evidence at trial indicated that the victim in all probability died of a single blunt trauma wound to the head. See, Simmons v. State, 419 So.2d 316 (Fla. 1982). In any event, this Court should now decide that sub-section (5)(h) is invalid, because it has been applied in an arbitrary and capricious manner in violation of the United Stats and Florida Constitutions. See, Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

B. The resentencing court's conclusion that two of the murders were in furtherance of a scheme for pecuniary gain is not supported by the evidence and was in part a product of the court's improper limitation of defense counsel's examination of an important witness on that subject.

C. It was error as a matter of law to conclude that the murder of Charles Mays was for the purpose of avoiding lawful arrest, since Mr. Mays was not a police officer and was not shown to have been a potential witness. See, Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979).

D. This Court should withdraw from its prior holding that simultaneous convictions can be considered "previous" convictions under the death penalty statute, Correll v. State, 523 So.2d 562, 568 (Fla. 1988), for the same reasons and on the same logic that has led it to conclude that such convictions do

not constitute "prior criminal activity" in Scull v. State, 533 So.2d 1137, 1143, (Fla. 1988).

POINT III. The non-statutory mitigating evidence presented by the defense was not fairly considered by the resentencing judge. His decision to brush aside the testimony of the character witnesses was based on inaccurate generalizations which are contrary to the record. In addition, the judge's superficial treatment of the evidence supporting a life sentence was insufficient in light of the statutory requirement that a death sentence be supported by specific written findings of fact, particularly a sentence which overrides a jury's recommendation of life imprisonment. In view of the trial jury's decision to recommend life, even without the benefit of the supplemental non-statutory mitigating evidence, the resentencing judge acted arbitrarily and capriciously and denied Zeigler his right to be sentenced in accordance with due process, and to freedom from cruel and unusual punishment, when he overrode that recommendation and sentenced Zeigler to death.

ARGUMENT

POINT I

THE DEATH SENTENCE MUST BE VACATED, AND THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT ADOPTED, BECAUSE THE CIRCUIT JUDGE'S DETERMINATION THAT "NO REASONABLE PERSON COULD DIFFER" WITH HIS SENTENCE IS CONTRARY TO THE RECORD AND NOT SUPPORTED BY ADEQUATE FINDINGS AND IS CONSEQUENTLY ARBITRARY AND CAPRICIOUS AND DEPRIVES ZEIGLER OF DUE PROCESS OF LAW IN VIOLATION OF THE FLORIDA AND UNITED STATES CONSTITUTIONS

A. In the Circumstances of this Case, the Jury's Advisory Sentence Should Be Given Even Greater Weight than Usual

The jury in this case saw and heard all of the witnesses who testified on the issue of guilt or innocence, as well as two witnesses who testified about non-statutory mitigating circumstances. After deliberating for almost three days before returning their verdicts of guilt, they spent only twenty-five minutes on the question of life or death; and they voted for life.

The trial judge who overrode the jury recommendation in 1976 had seen and heard those same witnesses. But, in imposing the death sentence, he made plain his belief that non-statutory mitigating factors could not provide a rational basis for the jury's recommendation and that such factors were not relevant to his own task.

The resentencing judge, of course, did not see or hear the witnesses who testified in 1976, but instead relied of necessity on the cold record for his own analysis of the strength and nature of the evidence on which Zeigler had been convicted.

Moreover, he was on his own, without the help of a jury, in weighing the credibility and probative value of the witnesses who appeared before him in the resentencing hearing.

Tedder v. State, 322 So.2d 908 (Fla. 1975) and its progeny teach us that the jury's advisory sentence is a very important part of the sentencing proceeding. Otherwise, "there would be no reason for the legislature to have placed such a requirement in the statute." Thompson v. State, 328 So.2d 1, 5 (Fla. 1976). See, Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (constitutionality of Florida's capital sentencing scheme upheld based on strict construction of Tedder standard). Where, as here, the judge's sentence is separated from the jury's recommendation by a span of thirteen years, and by the differing character and content of the evidence on which each of them relied, an override is improper absent a detailed showing supported "by specific written findings" (§ 921.141(3), Fla. Stat.) that the jury had somehow gone off the deep end. That was not done here.

B. Especially in View of the Non-Statutory Mitigating Evidence Adduced in the Resentencing Proceeding, There is No Basis Whatever for Concluding that "No Reasonable Person Could Differ" with the Sentence of Death

The fact is that twelve reasonable people on the jury concluded that a death sentence was not warranted. Since we do not have a specific finding to the contrary, it is to be presumed that those jurors acted on the basis of a proper consideration of the evidence. Cannady v. State, 427 So.2d 723, 732 (Fla. 1983).

Moreover, it cannot be said in this case that "there are no 'valid mitigating factors discernable from the record upon which the jury could have based its recommendation.'" Fead v. State, 512 So.2d 176 (Fla. 1987), quoting Ferry v. State, 507 So.2d 1373, 1376 (1987).

In addition to the statutory mitigating circumstance of a lack of prior criminal activity (see, State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)), the jury had heard testimony in mitigation by two witnesses, and there is no reason to suppose they may not have been influenced by it (see TT 2781-85, 2793, 2798). Now, as a result of the resentencing hearing, that evidence has been substantially bolstered by more recent witness testimony which the jury did not have the opportunity to consider, and which is entirely consistent with the mitigating evidence that they did hear.[10] This Court has repeatedly held that the sort of facts testified to by the witnesses at of resentencing consitute valid mitigating circumstances. Wasko v. State, 505 So.2d 1314 (Fla. 1987) (good character); Gore v. State, 475 So.2d 1205 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986) (sincere religious belief); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1070, 108 S.Ct. 733. 98 L.Ed.2d 681 (1988)(contributes to community); Fead v. State, 512 So.2d 176 (Fla. 1987)(good prison record, positive personality

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[10] The only witness from the 1976 penalty phase who also testified at the resentencing hearing was the Rev. Krama Fay DeSha. (TT 2779-2786) Mr. Van Deventer had also testified in 1976, but only as a fact witness in the trial proper. (TT 357-367, 2126-2143)

traits); Holsworth v. State, 522 So.2d 348 (Fla. 1988)(potential for rehabilitation and productivity within the prison system).

Given the substantial body of mitigating evidence in the record and the jury's advisory verdict, how can it be said that "virtually no reasonable person could differ" with the death sentence? This Court has frequently held that a trial judge is not justified in overriding a jury's recommendation of life in such circumstances, even where the evidence adduced by the defendant consisted primarily of proof of good character and other non-statutory mitigating circumstances. See, e.g., McCampbell v. State, 421 So.2d 1072, 1075-76 (Fla. 1982) (jury verdict supported by evidence of defendant's good employment record, record as a model prisoner, positive intelligence and personality traits indicating potential for rehabilitation, good family background, and differing disposition of co-defendants' cases); Washington v. State, 432 So.2d 44 (Fla. 1983) (jury verdict supported by evidence of defendant's non-violent character, history of helping support his family, and young age); Irizarry v. State, 496 So.2d 822 (Fla. 1986) (jury verdict supported by evidence that defendant had no significant history of prior criminal activity, as well as various non-statutory mitigating factors).

Is it not reasonable to suppose that a number of rational people -- such as those on the Zeigler jury -- might well conclude that four life sentences, rather than execution, would be appropriate punishment, even for four awful murders,

where the defendant had no prior criminal activity, had been a valued and contributing member of his church and his community, was well-regarded by his neighbors, is not a threat to fellow inmates or correctional officers, and has been a model prisoner in a brutal world? Compare, Torres-Arboledo v. State, 524 So.2d 403, 413 (Fla.), cert. denied, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

The presence of such mitigating evidence in the record, clearly substantial enough to support a recommendation of life by reasonable jurors, requires as a matter of state and federal constitutional law that the recommendation be determinative. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) recognized the Tedder standard as a "significant safeguard" against arbitrary and capricious imposition of the death penalty, and therefore, that a defendant's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution are protected only when this Court "takes that standard seriously." Id. at 465. Even if one were to assume that the original sentencing judge had correctly determined thirteen years ago that the jury had no rational basis for its decision absent consideration of the non-statutory mitigating evidence, he would clearly have been incorrect in making such a determination in light of Hitchcock's requirement that non-statutory mitigating circumstances be given consideration. The resentencing judge was all the more incorrect in making that determinatino after hearing testimony which amplified and

corroborated the mitigating evidence presented to the original sentencing jury. The strict application of the Tedder standard mandated by Spaziano thus requires that the jury's verdict, supported by valid mitigating evidence, be upheld.

C. The Jury was Entitled to Take into Account the Relative Strength of its Conviction about Defendant's Guilt in Arriving at its Advisory Sentence; and Any Uncertainties it May Have Had in that Regard Form a Reasonable Basis for Differing with the Death Sentence

Whatever the state of the law may be as to the use of lingering, or residual, doubt as a mitigating factor (see, e.g., Aldridge v. State, 503 So.2d 1257 (Fla. 1987)), it cannot be disputed that evidence which is sufficient to convince a reasonable person of guilt beyond a reasonable doubt may nevertheless fall short of persuading that same person that so final a judgment as death is the appropriate punishment. See, Spaziano v. Florida, 468 U.S. at 448 n. 34, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Stevens, J., concurring in part and dissenting in part). Indeed, the truth of that proposition would appear to be one of the foundation stones of cases like Lockett v. Ohio, 438 U.S. 586, 38 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), which emphasize the importance of individualized sentencing proceedings under the Eighth and Fourteenth amendments to the United States Constitution.

Thus, in several cases, the United States Court of Appeals for the Eleventh Court has concluded that counsel failed to give effective assistance in a sentencing proceeding by

neglecting to argue that the evidence left room for doubt, especially in circumstantial evidence cases. King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985) ("circumstantial evidence cases are always better candidates for penalty leniency than direct evidence convictions"); Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984), cert. denied, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 151 (1985) (court found ineffective assistance based on counsel's failure to impeach the credibility of key witnesses who contradicted each other, holding that such failure "may not only have affected the outcome of the guilt/innocence phase, [this neglect] may have changed the outcome of the penalty trial" by weakening a potential residual doubt argument). The true direction of the case law in this area might well be expressed in § 210.6(1)(f) of the Model Penal Code, which excludes the death sentence when a court is satisfied that, "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt."

Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), is not to the contrary, since it holds only that for the time being each State is left with discretion to decide whether evidence of residual doubt is to be admitted or excluded at the penalty phase of a capital case. As Georgia's Supreme Court has pointed out, where the controlling statute does not completely define what mitigating circumstances are, "[t]he conclusion is inescapable that the legislature meant to empower

the jury to consider as mitigating anything they found to be mitigating, without limitation or definition." Spivey v. State, 246 S.E.2d 288 (Ga. 1978).

In the present case, the resentencing judge appears to have been trying to cut off this line of argument when he asserted that:

> "A review of the transcript and evidence in this case clearly supports the jury's verdicts. There is no basis for the Defendant's contention that there was a reasonable hypothesis of innocence. . . ." (R. 565)

Even if that were so, of course, it has nothing to do with whether the jury was so overwhelmingly convinced of defendant's guilt that it could not reasonably have voted, as it did, for a life sentence.

Moreover, throughout these proceedings, even during summations (R. 550), the Circuit Judge had refused to allow defense counsel to argue the evidentiary anomalies[11] which may reasonably have been of concern to the jurors when it came time for them to recommend the appropriate penalty. (R. 550) Indeed, on the State's motion, he had entered an in limine order precluding any "argument or evidence . . . as to the issue of the guilt or innocence of the Defendant. . . ." (R. 1133) And, over

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[11] For example, in the crime scene photograph of Charles Mays, a tooth was shown lying on his parka; a forensic dental expert testified that the tooth in the photograph was not the same tooth that was turned over to the defense and which came from Mr. Mays. (TT 518, 1678-79) According to the State's evidence, Charles Mays supposedly drove his van to Zeigler's store that evening believing that he was to pick up a television set (TT 1148); yet the van was parked on the other side of a 6-foot fence adjacent to the store. (TT at 70, 389-399, 416-417)

defense objections, he refused to consider Zeigler's 3.850 Motion to Vacate Judgment and Sentence asserting that the State had withheld important Brady material at the time of trial, which, if disclosed, might well have reinforced any doubts the jurors had about whether the evidence justified a death sentence.[12] Under such circumstances, the court's conclusory assertion comes without having granted the defendant a fair hearing on so important a point.

Although the Circuit Court also refused to allow defense counsel to interview the trial jurors (R. 1132), there are nevertheless indications that their advisory sentence reflected their awareness of the uncertainties inherent in verdicts based on circumstantial evidence, including their own verdicts. The record shows that one juror told the trial judge after the jury's advisory sentence had been rendered that, "I still feel he's innocent." (TT 2838)

The jury's verdict was the result of reasonable people drawing an intelligent distinction between evidence sufficient to convict and evidence sufficient to persuade them that death was the only appropriate penalty. Under such circumstances, it cannot be said that no reasonable person could differ with the Circuit Court's sentence.

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[12] The 3.850 Motion is based on evidence of the State's failure to disclose the identity of known witnesses who would have undermined its theory, including its apparent attempt in one instance to persuade a witness with testimony helpful to the defense to change his story. The motion also sets forth evidence that the State withheld documents containing prior statements of its witnesses, and that it grossly mishandled the gathering of material evidence at the crime scene.

POINT II

A FAIR APPLICATION OF THE STATUTORY AGGRAVATING FACTORS TO THIS CASE DOES NOT SUPPORT THE CONCLUSION THAT "NO RATIONAL PERSON" COULD DIFFER WITH THE DEATH SENTENCE

The four aggravating circumstances found by the Circuit Court to be applicable to Zeigler are not supported by the facts in the record. The invalidity of any one of these circumstances weighs heavily in favor of a conclusion that the jury's recommendation of life should be followed, since even had they recommended death, the rule in Elledge v. State, 346 So.2d 998 (Fla. 1977) would require a remand for resentencing.

A. The Determination that Charles Mays' Murder was "Heinous, Atrocious or Cruel" is Wrong as a Matter of Fact and Law

1. The record does not support this conclusion by the trial judge.

In finding the "heinous, atrocious, or cruel" aggravating circumstance to be present, the resentencing judge described the murder of Mr. Mays as follows: "Charles Mays was shot twice, neither being the cause of death, and while still alive and struggling he was beaten savagely on the head with a blunt instrument." (R. 567)

This characterization is at best an embellishment of the evidence, which was that Mr. Mays died of blunt trauma to the head. (TT 267, 282-283) While he had been struck repeatedly, there was no evidence that he survived the first blow, nor that

he was "struggling."[13] Compare, Scull v. State, 533 So.2d 1137, 1192 (Fla. 1988) cert. denied, 57 U.S.L.W. 3705, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989) (death resulting from a single blow to the head was not heinous, atrocious, or cruel); Simmons v. State, 419 So.2d 316, 319 (Fla. 1982) (bludgeoning death was not heinous, atrocious, or cruel where "[t]here was no evidence that the victim was subjected to repeated blows while living"); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975) (death from a single blow to the head was not heinous, atrocious, or cruel regardless of the fact that the defendant continued to savagely beat and cut the victim after the infliction of the fatal injury).

2. Fla. Stat. § 921.141(5)(h) is vague and overbroad on its face and has been applied in an inconsistent, arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 9, 16 and 17 of the Florida Constitution.

Although Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), upheld the constitutionality of Florida's "especially heinous, atrocious or cruel" statutory aggravating circumstance on the premise that Florida courts would hew to the guidelines set by this Court in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), subsequent experience has shown that this part of the death penalty statute has instead been applied inconsistently and in such manner as to demonstrate that it lacks any genuinely objective standard. Contrary to Proffitt's

[13] The Medical Examiner testified at trial that injuries to Mr. Mays' hand could have been caused by "a blunt instrument." (TT 285-286) He also volunteered, "this could be a defense-type injury," but that remark was stricken. (TT 286-287)

expectation, this aggravating circumstance has not in fact been limited to cases which appear to meet Dixon's announced test of a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," 283 So.2d at 9, and death sentences have consequently been imposed in an arbitrary and capricious fashion which is wholly at odds with the teaching of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2736, 33 L.Ed.2d 346 (1972).

For example, Mason v. State, 438 So.2d 374, 379 (Fla. 1983) cert. denied 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), upheld an "especially heinous" finding because the victim lived one to ten minutes after being stabbed; yet in Tefteller v. State, 439 So.2d 840 (Fla. 1983) cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984), just three weeks later, the Court rejected this circumstance, finding that the fact the victim lived "for a couple of hours in undoubted pain" after being shot "did not set this murder apart from the norm of capital felonies." Id. at 846. The defendant's lack of remorse was used to support an "especially heinous" finding in Sireci v. State, 399 So.2d 964, 971 (Fla. 1981) cert. denied. 456 U.S.984, 102 S.Ct. 2257, 72 L.Ed.2d 863 (1982), but was held irrelevant in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). The "especially heinous" factor was rejected in Middleton v. State, 426 So.2d 548, 552 (Fla. 1982), cert. denied, 46 U.S. 1230, 103 S.Ct. 3573, 77 L.Ed.2d 1413 (1983) because the victim was awakening from a nap and thus was not aware he was going to be shot, but was upheld in Breedlove v. State, 413 So.2d 1, 9 (Fla.), cert.

denied, 453 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982) because the victim was asleep when killed. In Raulerson v. State, 358 So.2d 826, 834 (Fla.), cert. denied, 439 U.S. 959, 99 S.Ct. 369, 58 L.Ed.2d 352 (1978), the Court first upheld the "especially heinous" finding, but after a resentencing, on a second appeal, held that the same finding on the same facts was improper. Raulerson v. State, 420 So.2d 567, 571-72 (Fla. 1982), cert. denied, 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983).

As matters stand today, therefore, virtually any homicide may qualify as having been "especially heinous, atrocious or cruel," and this aggravating circumstance therefore does not "genuinely narrow the class of persons eligible for the death penalty." See, Zant v. Stephens, 462 U.S. 862, 877, 03 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Under similar conditions, the United States Supreme Court struck down this same aggravating circumstance in Oklahoma's death penalty statute as being at odds with the Eighth Amendment. Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). While the Oklahoma Supreme Court had considered various circumstances which might limit use of the provision, it had declined to hold that any of them must be present in a particular case to permit its application and, as Justice White observed, "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Id. at 1859 See, also, State v.

Chaplin, 433 A.2d 327, 330 (Del. Super. Ct. 1981); People v. Superior Court (Engert), 647 P.2d 76, 78 (Cal. 1982); Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 N.C.L. Rev. 941 (1986); Mello, Florida's "Heinous, Atrocious, or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L. Rev. 523 (1984).

B. The Resentencing Judge Committed Error in Concluding that Eunice Zeigler and Charles Mays were Killed For Pecuniary Gain, and He Improperly Limited the Defense in Seeking to Adduce Relevant Evidence on That Point

In determining that Zeigler had killed his wife to collect the proceeds of large insurance policies he had taken out on her life several months before the murders, and that Mr. Mays had been killed as part of that scheme, Judge Formet concluded that:

> ". . . the purchase of $500,000.00 on the life of Eunice Zeigler was not a reasonable and prudent amount for estate planning purposes. . . ."

and emphasized that:

> ". . . the Defendant never advised his estate planning advisor or his attorney of the purchase of the insurance on his wife even though he had many opportunities to do so and both of them had previously discussed estate planning with him." (R. 567)

In reaching the conclusion quoted above, Judge Formet did not make any supporting findings and, in characterizing $500,000 as "not a reasonable and prudent amount" on the life of Eunice Zeigler, did not even give any supporting reasons.

The evidence, however, shows that Zeigler's lawyer and an acquaintance in the life insurance business (an estate

planning advisor) each separately advised Zeigler that life insurance, including insurance on the life of Eunice Zeigler, was a wise estate planning device at that time of high federal estate taxes (1975) for an individual whose assets were tied up in a small family business (the furniture store) and income-producing real estate. (Vaughn, R. 34-42; Van Deventer, R. 69-71) The Circuit Judge did not refer to the defense evidence showing a possible estate shrinkage of $486,000 due primarily to taxes in the event of Mrs. Zeigler's dying after her husband (R. 42) nor to the estate planner's testimony that ". . . it's probably reasonable to say that [$500,000] was not an unreasonable amount of insurance." (Vaughn, R. 44)[14]

Moreover, the court had sharply limited defense counsel's effort to show that it was not at all unusual, and did not constitute a departure from his customary business methods, for Mr. Zeigler to act on his own in implementing the advice he had been given without informing either his counsel or the insurance broker that he had done so. When Theodore Van Deventer, who was Zeigler's long-time lawyer, was on the stand, counsel attempted to make that point and to make it with the necessary vigor and credibility. But, while the witness was allowed to say that "it was not unusual" for Zeigler to act as he did without informing his lawyer (R. 72-73), he was not allowed

[14] Mr. Vaughn testified on cross-examination that he had not gotten to the point of recommending specific amounts of insurance but probably would have recommended "250 or that range" for Mrs. Zeigler. (R. 55) In response to a question from the bench, he thought he and Zeigler might have discussed that range. (R. 61)

to explain why that was so, the judge ruling that, "Anything further would be a personal opinion of the character of Mr. Zeigler." (R. 73) Judge Formet did not even refer to the Van Deventer testimony when he stressed that Zeigler had failed to advise his attorney about the life insurance purchases.

Consequently, the resentencing judge's conclusion that the two first-degree murders were committed for pecuniary gain should be set aside for lack of supporting findings, as contrary to the evidence and because the defense was denied a fair opportunity to refute an inference on which the Court relied heavily, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 16, and 17 of the Florida Constitution. See, Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988) cert. denied, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1983); Simmons v. State, 419 So.2d 316, 318 (Fla. 1982).[15]

C. It Was Error as a Matter of Law to Conclude that the Murder of Charles Mays Was for the Purpose of Avoiding Lawful Arrest, Since He Was Neither a Policeman Nor a Witness

The Circuit Court's conclusion that the aggravating circumstance of a killing to avoid lawful arrest (§ 921.141 (5)(e), Fla. Stat.) was present is not supported by any findings of fact and does not fit the circumstances of this case.

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[15] Judge Formet himself appears to concede doubt about defendant's motive: "A major reason (although probably not the only reason). . . " (R. 566.) The original trial judge, when addressing Zeigler to pass sentence on him, said, "[why] you, sir, wanted to kill your wife may never actually be known." (TT 2863)

Where the victim is not a law enforcement officer, "an intent to avoid lawful arrest is not present . . . unless it is clearly shown that the only dominant motive for the murder was the elimination of witnesses." Menendez v. State, 368 So.2d 1278 (Fla. 1979), citing Riley v. State, 366 So.2d 19, 22 (Fla. 1978). Even under the State's own theory of the case, Mr. Mays was killed as part of a scheme for pecuniary gain and not as a potential witness.

D. Imposition Of The Death Sentence On The Ground, Among Others, That Defendant's Contemporaneous Conviction In the Same Trial Of Two First Degree And Two Second Degree Murders, All Committed At The Same Time And Place, Constituted "Previous" Conviction Of Another Capital Felony Under § 921.141(5)(b), Fla. Stat. Was Arbitrary And Capricious And A Denial Of Due Process Under The Florida And United States Constitutions

The four murders of which Zeigler was convicted all occurred on Christmas Eve of 1975 in the Zeigler furniture store in Winter Garden and within a relatively brief time span. His four convictions came at the same time and in the same trial. While this Court has previously held that such convictions can be considered "previous," each to the others, Correll v. State, 523 So.2d 562, 568 (Fla.), cert. denied, 109 S.Ct. 183 (1988) we respectfully submit that such an application of § 921.141(5)(b), Fla. Stat. is inconsistent with the language of the statute as a matter of common understanding.[16]

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[16] The original sentencing judge expressly found that, "Defendant, at the time he committed the four murders, had not been previously convicted of another capital offense or of a felony involving violence or threat of violence." (Findings of

In its construction of the closely similar statutory mitigating circumstance of "no significant history of prior criminal activity" (§ 921.141(6)(a), Fla. Stat.), this Court has adopted the wholly sensible approach that crimes committed contemporaneously with the homicide are not "prior" criminal activity. Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988) cert. denied, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). Since "prior" and "previous" are simply two words to describe the same state of events, it is arbitrary and capricious to base a death sentence on contemporaneous crimes which are not "prior" but may be said by the courts to be "previous." The court's interpretation was thus in violation of the defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 16 and 17 of the Florida Constitution.

A finding that this -- or any other -- aggravating circumstance is invalid provides further support for the conclusion that the jury's verdict was reasonable. Pursuant to the rule in Tedder and the logic of Elledge v. State, supra, the life recommendation should be followed.

Fact, September 15, 1976, Supplemental Record on [original] Appeal) Judge Formet distinguished that finding on the ground that, "the case law at the time had not evolved to include contemporaneous convictions." (R. 255)

POINT III

THE CIRCUIT COURT'S OFF-HAND DISMISSAL OF THE EVIDENCE OF NON-STATUTORY MITIGATING FACTORS WAS ARBITRARY AND CAPRICIOUS, UNSUPPORTED BY ADEQUATE FINDINGS OF FACT AND CONTRARY TO THE WEIGHT OF THE EVIDENCE

This Court ordered a resentencing hearing in Zeigler's case for the express purpose of insuring proper consideration of non-statutory mitigating circumstances pursuant to Hitchcock. Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988). As a result, the non-statutory mitigating evidence presented at the original trial was powerfully corroborated at the resentencing hearing by that of twelve additional witnesses[17] who spoke in detail about Zeigler's activities and reputation in his community and his record as a model prisoner on death row. Yet the Circuit Court, rather than properly evaluating this testimony in light of the requirement of Hitchcock and Lockett v. Ohio, supra, that a jury be permitted to consider such non-statutory mitigating evidence in recommending life, simply brushed that additional evidence aside with little semblance of fair evaluation, despite Hitchcock and Lockett v. Ohio, supra, in violation of the defendant's rights under the Eighth and Fourteenth Amendments to the United

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[17] One additional character witness, the Rev. Krama Fay DeSha, had also testified at the original sentencing proceeding in 1976. (TT 2779-2786)

States Constitution, and is in violation of Article I, § 9, 16, and 17 of the Florida Constitution.[18]

A. The Character Evidence

The resentencing judge discussed the defense evidence of Zeigler's "good and compassionate" character in language that was almost contemptuous. He characterized the witnesses as "several friends of the Defendant" and their testimony as being largely:

> ". . . uncorroborated hearsay presented by those one would expect to support the Defendant. The testimony at best establishes the Defendant's character to be no more good or compassionate than society expects of the average individual." (R. 568)[19]

Evidence of Zeigler's active participation in church and

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[18] In his sentencing order, Judge Formet imposed the death sentence upon finding that certain aggravating factors had been proven, and that there were "insufficient mitigating circumstances to outweigh the aggravating circumstances." (R. 569-70) In thus formulating the weighing process, the Court placed on him an unconstitutional burden of proving the appropriateness of a life sentence, which is an impermissible presumption of death under the Eighth and Fourteenth Amendments to the United States Constitution. See, Jackson v. Dugger, 837 F.2d 1969 (11th Cir. 1988). The Supreme Court's recent decisions in Blystone v. Pennsylvania, 58 U.S.L.W. 4274 (1990) and Boyde v. California, 88-6613 (March 5, 1990) are not to the contrary. In Blystone, the petitioner had presented no mitigating evidence, and the statute upheld was one which required imposition of the death penalty when there existed no mitigating circumstances to outweigh proven aggravating circumstances. And in Boyde, the instruction in question represented a scheme which permitted a neutral balancing of all circumstances surrounding the crime, rather than permitting only the aggravating circumstances -- and not the mitigating circumstances -- to create a presumption.

[19] Of course, the Florida death penalty statute makes quite clear that hearsay is admissible if it has probative value. § 921.141(1), Fla. Stat. Consequently, the hearsay nature of some of the testimony cannot be said to affect its probative value, and the Circuit Judge did not question its credibility.

community affairs was similarly brushed aside as failing to show "unusual participation in church and community activities." (R. 568)

The witnesses collectively referred to by the court as "several friends" of the defendant were ten people who had long-standing relationships with the defendant in a variety of contexts. Eight of these witnesses (one of whom was his cousin) had known him well prior to the murders through having dealt with him in either a business, church, or community setting, and all but one of them had maintained some contact with him during his years in prison. The other two had come to know Zeigler more recently, during his years on death row, and had visited him frequently during that time. Each of them, notwithstanding the court's assertion to the contrary (R. 586), corroborated the others with respect to Zeigler's deeds and character.

The court's blanket generalization that these witnesses are "friends" of the defendant whom "one would expect to support" him is simply wrong. Some specifically testified that they never had any dealings with him socially (R. 222, 283), and a number of them would have had good reasons <u>not</u> to support him. For example:

- <u>Dr. Melvin Biggs</u>, a full-time prison minister who believes that capital punishment is fully sanctioned in the Bible and that many prisoners whom he has talked to on death row deserve to be executed, testified that Mr. Zeigler deserves to

live. (R. 293-94) Mr. Biggs stated that he generally refuses to be a witness on behalf of inmates because he "would rather stay away from that sort of thing," and that "the only people I'm interested in hanging myself on a limb for is those that I believe are an asset to the population of the prison." (R. 293) The character testimony of Dr. Biggs, who has been visiting the Florida State prison for at least one week per month for over 13 years, and whose primary ministry is to death row inmates, was relied upon by this court in its decision overturning the trial court's sentence of death in Songer v. State, 544 So.2d 1010, 1012 (Fla. 1989).

- Oscilla James, an elderly black woman of limited financial means who lived for years in the semi-rural and mostly segregated town of Winter Garden (R. 210-211), is not the sort of person whom one would ordinarily "expect to support" a well-heeled white businessman from that same community such as Zeigler, and she stated that she had no social dealings with him. (R. 283) Yet Ms. James testified as to how, in the early 1970's, Mr. Zeigler had courageously agreed, despite community criticism, to testify as a character witness when the local beverage department tried

(unsuccessfully) to revoke her husband's liquor license. (R. 282)

Nor was the court accurate in its statement that the character witnesses testified only "in general terms" to Mr. Zeigler's lifetime of helpfulness, kindness, and good deeds. On the contrary, each related events from their past dealings with him with specificity and clarity, often corroborating one another's stories. For example:

- Connie Crawford, a cousin of Zeigler's who had managed his apartment buildings after his arrest, testified that the elderly people living there told her of how Mr. Zeigler had over the years bought groceries and paid electric bills for those who could not afford them, without ever taking public credit for these deeds. (R. 273)
- Donald Giddens, the local utility branch manager who supplied the apartments which Zeigler rented out, corroborated Ms. Crawford's testimony by telling of how Mr. Zeigler would pay his tenants' gas bills "out of his pocket," such that "[t]hey didn't even know about it." (R. 227-28)
- Theodore Van Deventer corroborated Mrs. James' testimony by discussing the specific incident in which Zeigler assisted her husband in a liquor license termination proceeding (R. 80).
- Richard Smith, who had served in the Army Reserve

with Zeigler, described his "instrumental" role in starting a movement to beautify the Winter Garden community. (R. 262) This testimony was also corroborated by that of Mr. Van Deventer. (R. 79)

While it is true that some of these witnesses' testimony, like all testimony about character and reputation, was hearsay, much of it was the product of direct personal knowledge. For example:

- Mr. Van DeVenter, Zeigler's long-time lawyer and friend, based his high opinion of defendant's openness and honesty in dealing with others on their professional and personal dealings together and on his own knowledge of the business affairs of a small community. (R.74-75; 76-77)
- Reverend Krama Fay DeSha, Zeigler's pastor for many years who had performed the marriage ceremony for Mr. and Mrs. Zeigler, had personal knowledge of Zeigler's active participation in the church which formed the basis for his testimony that "[i]f I asked Tommy to do something, he always went out of his way to assist." (R. 210) Moreover, he had personal knowledge "that Tommy was the best entree I could have at that time with the black community" when there were racial tensions in Winter Garden. (R. 211) He has stayed in touch with Zeigler over the years and

has found him not to be embittered and to continue to profess his faith in "the sovereignty of God." (R. 214-215)

- o Mr. Giddens was the direct recipient of Mr. Zeigler's payments of utility bills on behalf of his tenants, and was thus testifying based on personal knowledge that this occurred. (R. 227-28)
- o Mrs. James stated that she had known Zeigler since he was a "small kid" (R. 281), and thus testified of her personal knowledge not only about the liquor license incident, but also that Zeigler never pressed the James' if they became overextended at the furniture store (R. 281), and that he was "a fine fellow," who was "fair in his dealings." (R. 281-82)

The mere fact that these and the other defense character witnesses were willing to come forward at all in such an unpopular cause and after so many years should itself be viewed as strong evidence of Zeigler's character and personality, and the evidence they presented required a more even-handed assessment by the resentencing judge. And to suggest, as did the trial court, that Mr. Zeigler's practice of routinely paying bills for low-income elderly citizens out of his own pocket at best constitutes evidence that "the Defendant's character [is] no more good or compassionate than society expects of the average

individual," is to set such a grossly unrealistic standard for Mr. Zeigler as to indicate a lack of fair consideration of this evidence at all.

Thus, the Circuit Court's decision to lump together the testimony presented by Mr. Zeigler's ten character witnesses and summarily reject it all as "uncorroborated hearsay" in "general terms" from "friends" and supporters was factually in error. Moreover, it was procedurally in error as well since the fact that a portion of the testimony was hearsay -- such as Ms. Crawford's testimony regarding the defendant's assistance to the low-income elderly -- does not alone constitute grounds for disregarding it entirely. The court never provided any basis for a finding that the hearsay testimony of the character witnesses was not credible -- apart from its largely incorrect generalization that these witnesses were people whom "one would expect to support" the defendant -- and certainly never found that any particular witness lacked credibility. Its apparent decision to disregard hearsay testimony simply because it is hearsay clearly contravenes the intent of the capital sentencing statute, which specifically provides that hearsay evidence shall be admissible at a sentencing hearing as a means of ensuring that all evidence relevant to the defendant's character is properly considered. § 921.141(1), Fla. Stat.

Likewise, the court's suggestion that the evidence of Mr. Zeigler's numerous good deeds should be discounted or ignored simply because it was viewed as being "uncorroborated" imposes an

unreasonable and unjustifiable burden on the defendant to produce direct evidence to which he could not conceivably have access after thirteen years. Having provided no specific reason to doubt the contemporaneous recollection of witnesses from Winter Garden as to Mr. Zeigler's deeds in that community, the trial court nevertheless imposed upon the defendant the nearly impossible requirement -- found nowhere in the capital sentencing statute -- that he produce direct evidence of these deeds, all of which took place over thirteen years ago.

The fashion in which the circuit judge discounted evidence of non-statutory mitigating circumstances, based only on erroneous generalizations, was particularly impermissible in light of the statutory requirement that ". . . the determination of the Court shall be supported by specific written findings. . ." § 921.141(3), Fla. Stat. It has repeatedly been held that this provision requires something more than arbitrary and factually unsupported written conclusions. See, Morgan v. State, 453 So.2d 384, 397 (Fla. 1984), quoting Mann v. State, 420 So.2d 578, 581 (Fla. 1982), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1983) (court found written sentencing order insufficiently specific, holding that "[t]he trial judge's findings in regard to the death sentence should be of unmistakable clarity").

This Court has held that a well-supported and well-reasoned sentencing order is particularly crucial where, as here, the trial judge is overriding a jury's recommendation of life.

See, Thompson v. State, 328 So.2d 1, 5 (Fla. 1976) (holding that, since "the advisory opinion of the jury must be given serious consideration, . . . [i]t stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment"); Hall v. State, 381 So.2d 683, 684 (Fla. 1978) (ordering the trial judge to submit a more detailed statement of findings of fact, reasoning that such additional information was necessary to enable this Court to properly review the death sentence in accordance with the requirement that a life recommendation not be overturned absent "facts . . . so clear and convincing that virtually no reasonable person could differ"). The Circuit Court, in disregarding the defendant's mitigating evidence without articulating concrete reasons for doing so, has failed in its statutory duty to provide a sound basis for concluding that the jury acted irrationally. The life recommendation should therefore be followed.

B. The Evidence of Behavior in Prison

The Circuit Judge did not state what, if any, weight he gave to defendant's "outstanding prison record and adaptation to prison life." (R. 568) From all that appears, he gave it none, despite what one might suppose to be the public interest in encouraging and rewarding such behavior. The judge's determination clearly falls short of the requirement that the written findings in favor of the death sentence be set forth with

specificity and clarity. See, Mann v. State, supra (trial judge's sentencing order in capital case held insufficient where, although referring to mitigating testimony of a defense witness, it failed to specify the weight given such testimony).

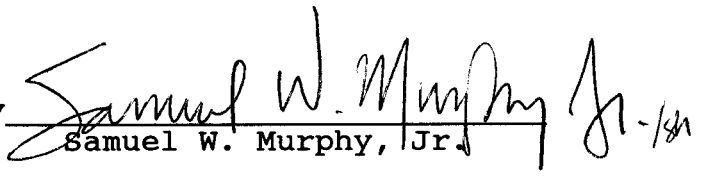
The record strongly supports Judge Formet's characterization of Zeigler's prison record as "outstanding." (R. 568) An experienced corrections officer described him as "exceptional" and "a model prisoner," with an attitude "far above normal." (Jones, R. 506-507) Reverend Biggs, himself an extraordinary man who has conducted a prison ministry for some fourteen years, described the time he spends with Zeigler as "quality time" (R. 295) and told about the help Zeigler has given other death row inmates "to direct them in the right ways." (R. 314-319). Since Zeigler was granted a new sentencing hearing for the express purpose of ensuring fair consideration of precisely this sort of non-statutory mitigating evidence, the Circuit Court cannot be permitted to override the jury's verdict without explaining whether this evidence was given any weight at all.

CONCLUSION

For all the foregoing reasons, the death sentences should be vacated and life sentences imposed in accordance with the jury's recommendation.

Dated: March 9, 1990

Respectfully submitted,

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Margene A. Roper, Esq., Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 on this ninth day of March 1990.

GRETCHEN HOAG