IN THE SUPREME COURT OF FLORIDA

DONNY L. CROOK

Appellant,

vs. **CASE NO. SC94782**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

Appellant, Donny L. Crook, was convicted of the brutal slaying and robbery of 59 year old white Betty Spurlock. On appeal, Crook now asserts that the crime was unpremeditated, that he lacked any significant history of violence and that there was overwhelming and unrebutted evidence in mitigation. Accordingly, he asserts his sentence is disproportionate and should be reduced to life.

The trial court below found three aggravating circumstances: 1) during a sexual battery; 2) pecuniary gain; 3) HAC. (R11: 2028-2030) The trial court found three statutory mitigating circumstances and a number of nonstatutory mitigating factors.

Appellant contends, however, that the three uncontested aggravating factors are outweighed by the mitigation in this case. He maintains that the trial court improperly weighed and considered evidence of Crook's evidence of brain damage and mental retardation. He contends that this evidence was unrefuted and, therefore, improperly rejected by the court below. This Court has repeatedly recognized that the finding of and relative weight to be assigned any aggravating or mitigating circumstance is within the broad discretion of the trial judge.

Further, while Crook maintains that the evidence of brain damage was unrefuted, the evidence shows that Crook had been repeatedly assessed, prior to his commission of the instant murder,

as having a personality disorder. A review of the record in this case supports the trial court's findings and they should not be disturbed on appeal. Further, while the three defense doctors who examined Crook for the penalty phase hearing all found him to have some level of brain damage, none could say the extent of the damage or determine its exact cause or origin. The record shows that the trial court thoroughly assessed all of the evidence before it and made a reasonable determination that the evidence of brain damage or mental retardation should be rejected.

In sum, the appellant's sentence is supported by three very strong aggravating factors. The evidence presented in the instant case established that appellant repeatedly stabbed, beat, stomped and skewered Ms. Spurlock in an attack that lasted several minutes. Ms. Spurlock fought for her life. Balanced against this heinous crime is a laundry list of character traits and aspects of the crime which appellant urged as mitigating evidence. Based upon on the foregoing, this Court must find that appellant's sentence is proportionate.

ARGUMENT

ISSUE

WHETHER APPELLANT'S DEATH SENTENCE IS PROPORTIONATE.

Appellant, Donny L. Crook, was convicted of the brutal slaying and robbery of 59 year old white Betty Spurlock. The evidence showed that during the robbery Crook beat, stabbed, kicked, and stomped Betty Crook until she lapsed into unconsciousness. Crook then took a pool cue and inserted same into the vagina of the victim. The pool cue ripped through the vaginal wall, the pelvic diaphragm, ran parallel with the spine perforating the liver, diaphragm, the lung, the neck, the oral cavity and the base of the victim's skull with such force to shatter the base of the skull, cause massive injury to the brain of the victim and push the tip of the pool cue through Betty Spurlock's forehead. The Medical Examiner opined that the direct cause of death was the shattering of the basal skull by the pool cue.

Nevertheless, appellant asserts that the crime was unpremeditated, that he lacked any significant history of violence and that there was overwhelming and unrebutted evidence in mitigation. Accordingly, he asserts his sentence is disproportionate and should be reduced to life. This position is baseless in fact and law. As the following will establish, the sentence of death was properly imposed.

A. Standard of Review

This Court has described the "proportionality review" conducted by this Court in every death case as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991) (citation omitted) (emphasis added); see also Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). While the existence and number of aggravating or mitigating factors do not prohibit or require a finding that death is disproportionate, this Court nevertheless is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). The purpose of the proportionality review is to compare the case to similar defendants, facts and sentences. Tillman, 591 So. 2d at 169.

B. Appellant's Death Sentence, Supported By Three Weighty Aggravating Factors, Is Proportional Despite The Existence Of Statutory And Non-Statutory Mitigation

The trial court below found three aggravating circumstances: 1) The Capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after

committing a sexual battery; 2) The Capital felony was committed for pecuniary gain; 3) The Capital felony was especially heinous, atrocious, or cruel. (R11: 2028-2030) Appellant does not dispute the existence of these three aggravating factors.

The trial court found three statutory mitigating circumstances: 1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate weight); 2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (moderate weight); 3) the age of the defendant at the time of the offense (slight weight). (R11: 2032- 2036))

The trial court also found in mitigation: dysfunctional but loving family; low I.Q.; learning disabilities; impaired educational experience; bad parents; abject poverty; terrible home life; lack of parental guidance; psychological dysfunction; drug use since age 8; death of family members; left in the care of his two older brothers, both of whom had their own social and physical difficulties, while his mother prostituted herself in Mexican bars; no history of significant violent behavior; did not flee after committing offense; did not resist the police; mercy and compassion may be extended; and remorse.

In his effort to show the sentence is not proportional, appellant attempts to diminish the severity of this murder by

claiming that it was not premeditated and that it may have been simply the result of an uncontrollable rage. Crook did not testify at trial. Given the opportunity at sentencing, Crook did not claim that the killing was the result of an uncontrollable rage. Rather, he told the court that he "didn't kill nobody. [He] just watched her get killed." (R11: 2049) The only *evidence* remotely supporting the rage hypothesis came from statements Crook made to his brother to the effect that, "The money wouldn't come out. I was banging it on the concrete but it wouldn't open. I got pissed off and hit her in the face." (R22: 1870-71) He did not claim that it was an uncontrollable rage or that he did not intend to kill her.

What the evidence shows is that Crook went to the bar with the intent to "do a job." (T15: 633) He took the time to close and lock the front door and turn off the outside lights in order to facilitate the commission of the robbery and murder. (T15: 685, 687, 698-703) The evidence also shows that despite having succeeded in obtaining the cash drawer, Crook beat, stabbed, kicked, and stomped Betty Spurlock until she lapsed into unconsciousness. Despite the fact that Ms. Spurlock was immediately incapacitated allowing him the opportunity to take the money and run, Crook then took the additional time to remove and rearrange Ms. Spurlock's clothing. Having undressed the unconscious victim, Crook then took the additional time and

conscious effort to insert the pool cue through her vagina with such force and purpose that it ripped through the vaginal wall, the pelvic diaphragm, ran parallel with the spine perforating the liver, diaphragm, the lung, the neck, the oral cavity and the base of the victim's skull. Upon hitting the bones at the base of her skull, Crook then applied enough force to shatter the base of the skull, causing massive injury to the brain of the victim and pushing the tip of the pool cue through Betty Spurlock's forehead. (T18: 1123-24, 1128-38, 1141) The purposefulness of this action alone is sufficient to support a conclusion that Betty Spurlock's death was no accident. Cf. Spencer v. State, 645 So.2d 377, 381 (Fla. 1994); Holton v. State, 573 So.2d 284, 289 (Fla. 1990), cert. denied, 500 U.S. 960 (1991) (Premeditation may be established by circumstantial evidence, including the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.)

Assuming, arguendo, that premeditation was not established or that there was evidence to support the hypothesis that this murder was the result of a "rage," the imposition of death is still valid. There is certainly no prohibition against imposing a death sentence for either murders committed during the course of a felony or for purported "rage" killings.

In Mills v. State, 476 So.2d 172 (Fla. 1985), this Court

affirmed Mills sentence of death where Mills' indictment charged him with one count of felony murder (subsection 782.04(1), Florida Statutes (1979)), one count of burglary while armed with a firearm (subsections 810.02(1), 810.02(2)(a), 810.02(2)(b), Florida Statutes (1979)), and one count of aggravated battery with a firearm (subsection 784.045(1)(b), Florida Statutes (1979)). This Court held:

> Mills argues that the factor of the murder having been committed in the course of a burglary should not have been considered in his case since it was submitted to the jury on the theory of felony murder. He contends that to submit this aggravating circumstance to the jury in a felony-murder case renders a finding of aggravation automatic. This, he argues, violates eighth amendment principles of proportionality because under this practice a person found guilty of felony murder is more likely to receive a death sentence than a person found guilty of premeditated murder. See State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). This contention is without merit. The legislative determination that a first-degree murder that occurs in the course of another dangerous felony is an aggravated capital felony is reasonable. State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).
>
> Mills at 178

More recently in Mungin v. State, 667 So.2d 751 (Fla. 1995), this Court affirmed Mungin's death sentence and conviction of first-degree felony murder after finding the evidence insufficient

to support premeditated first degree murder. Id. at 756. Thus, even if Crook was correct and there was no evidence of premeditation, a proposition with which the state strongly disagrees, the imposition of a death sentence is still proper where sufficient aggravation exists.

The allegation that this may have been a "rage" killing and, therefore, the sentence of death was not proportionate is also without merit. As in cases where a death sentenced defendant has alleged that a murder was the result of a "domestic dispute," the possibility that a murder may have been the result of a rage simply negates the cold, calculated and premeditated aggravator. This Court explained in Pooler v. State, 704 So.2d 1375, 1381 (Fla. 1997):

> . . . We have never approved a per se "domestic dispute" exception to the imposition of the death penalty. As we explained in Spencer v. State, 691 So.2d 1062 (Fla.1997), cert. denied, --- U.S. ----, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997), there have been cases involving domestic disputes in which we struck the cold, calculated, and premeditated (CCP) aggravator on the basis that the heated passions involved negated the "cold" element of CCP. (FN5) However, our reason for reversing the death penalty in those cases was that the striking of that aggravator rendered the death sentence disproportionate in light of the overall circumstances.

Pooler v. State, 704 So.2d 1375, 1381 (Fla. 1997); See, also, Walker v. State, 707 So.2d 300 (Fla. 1997).

Since the trial court did not find the cold, calculated and

premeditated factor in this case, Crook's purported rage does not invalidate the sentence imposed.

The trial court did find, however, in addition to during the course of a sexual battery and pecuniary gain, the heinous, atrocious or cruel aggravating factor. This Court has held the heinous, atrocious or cruel aggravator to be one of the strongest aggravators to be considered in this Court's proportionality review. *See* Maxwell v. State, 603 So.2d 490, 493 (Fla. 1992) (". . . the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious, or cruel, or cold, calculated premeditation.")(emphasis supplied). See also Larkins v. State, 739 So.2d 90, 95 (Fla. 1999)(noting that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme..."); See also, Guzman v. State, 721 So.2d 1155 (Fla. 1998)(affirming sentence where victim received nineteen stab wounds to face, skull, back, and chest, and a defensive wound to a finger on his left hand).

In support of the heinous, atrocious or cruel aggravator, the trial court found:

> 3. The Capital felony was especially heinous, atrocious, or cruel.
>
> The evidence is abundantly clear that Betty Spurlock was beaten, stabbed, kicked, and stomped until she could resist her assailant no further and eventually, mercifully lapsed into unconsciousness. The evidence further demonstrated that such

vicious attack was unnecessary to the accomplishment of the taking of money by force or violence from Mrs. Spurlock's custody. Crime scene photos clearly demonstrate that Mrs. Spurlock was immediately incapacitated for a period of time sufficient for Crook to take the money and run.

The Medical Examiner, Dr. Melamud, testified that Mrs. Spurlock was stabbed four times in the neck; she suffered multiple bone fractures of the face including the fracture of both orbits of the eyes and fractures of the mandible-both right and left. Mrs. Spurlock's face, imprinted with multiple patterns of a tennis shoe sole, testified to the stomping actions directed toward the victim.

The blood spatter expert, Leroy Parker, testified that the crime scene demonstrated multiple areas of violence directed toward Mrs. Spurlock. These areas were separate from the location where Mrs. Spurlock fell upon initial knockdown. Parker testified that Mrs. Spurlock regained her feet and attempted to defend herself from attack.

Photographs taken of Mrs. Spurlock's feet revealed that one of the mocassin type shoes she was wearing had come off and when she regained her feet she was standing in her own blood as is evidenced by the blood found on the bottom of her bare foot. Blood patterns on the shirt of Mrs. Spurlock show that the stab wounds occurred after the initial blow and while Mrs. Spurlock was in an upright position. Blood spatter evidence demonstrated that multiple blows were inflicted when Mrs. Spurlock was a target located near floor level in multiple locations with her blood forcefully propelled against the nearby cabinets or freezer.

During interviews with investigators, Crook advised that Mrs. Spurlock was conscious and crying for help.

The facts of this case demonstrate clearly that Mrs. Spurlock was a conscious victim who had a foreknowledge of her death, with extreme anxiety and fear. Sochor v State, 580 So.2d 595 (Fla. 1991). The Courts

> of Florida have consistently held that circumstances involving multiple stab wounds with a conscious victim at the time of stabbing meet the definition of HAC. Davis v. State, 620 So.2d 152, (Fla. 1993); Pittman v. State, 646 So.2d 167, (Fla. 1994). Beating deaths also qualify as circumstances properly considered as heinous, atrocious and cruel. Whitton v. State, 649 So.2d 861 (Fla. 1994); Lawrence v. State, 698 So.2d 1219 (Fla. 1997). Stomping deaths surely cannot be less atrocious.
>
> The Florida Supreme Court has said that the HAC circumstance applies only in cases that evince extreme and outrageous depravity as exemplified by either the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). The court finds that the defendant's actions in this case demonstrate he was conscienceless, pitiless, and unnecessarily torturous to his victim. Richardson v. State, 604 So.2d 1107 (Fla. 1992)
>
> This aggravating factor has been proven beyond a reasonable doubt and has been given great weight by the court.
>
> (R11: 2030-32)

Given the substantial evidence supporting the brutal and unprovoked attack of Betty Spurlock and considering the totality of circumstances surrounding this crime, the sentence was properly imposed.

Appellant contends, however, that the three uncontested aggravating factors are outweighed by the mitigation in this case. He maintains that the trial court improperly weighed and considered evidence of Crook's evidence of brain damage and mental retardation. He contends that this evidence was unrefuted and,

therefore, improperly rejected by the court below.

This Court has repeatedly recognized that the finding of and relative weight to be assigned any aggravating or mitigating circumstance is within the broad discretion of the trial judge. Blanco v. State, 706 So.2d 7, 10 (Fla. 1997), cert. denied, 142 L.Ed.2d 76 (1998); Cole v. State, 701 So.2d 845, 852 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998); Bell v. State, 699 So.2d 674, 678 (Fla. 1997), cert. denied, 118 S.Ct. 1067 (1998). Furthermore, a trial court may reject expert opinion testimony even if that testimony is unrefuted. Jackson v. State, 704 So.2d 500, 506-07 (Fla. 1997). See, also, Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994) ("[T]he finder of fact is not necessarily required to accept [expert] testimony."); Walls v. State, 641 So.2d 381, 390 (Fla. 1994) ("[E]xpert opinion testimony [is] not necessarily binding even if uncontroverted.")

Recently, in Robinson v. State, infra. this Court rejected Robinson's contention that death was a disproportionate penalty and that the trial court failed to consider or gave improper weight to the mitigating evidence that he suffers from brain damage. Reiterating that the weight given to each mitigating factor is a matter which rests within the discretion of the trial court, this Court held with regard to the trial court's findings:

> . . . Here, the trial judge meticulously identified each mitigating circumstance presented by the defense and stated her conclusion as to each mitigator, supplying

facts and reasoning for her conclusions. With regard to the evidence of brain damage, the trial court stated:

> He had a difficult delivery with forceps (so did his brother). At age 3 his umbilical cord attached to his intestine and he was taken to the hospital. He lost blood and consciousness, but recovered. At age 6 he was diagnosed Attention Deficit Disorder (ADD), and was put on 60 milligrams of Ritalin a day. He was on that until, at age 9, he went to a private school that required he be taken off Ritalin. He was, and did well. At age 6 or 7 he almost drowned when a friend tied him up and put him under water like Harry Houdini. His mother saw this and was able to pull him out of the pool and revive him herself. She said he was unconscious when she pulled him out and could have suffered a loss of oxygen. He did not go to the hospital. He began drinking alcohol at age 8; taking drugs at age 14. Later he had a bicycle accident in which he was hit by a car when he had run away from a drug treatment facility in Ocala. He had an injury to the back of his head. He was treated at the Emergency Room. Later he had a job painting the inside of a water tower. He breathed the fumes and there was toxic exposure. He went into convulsions and was unconscious. He was hospitalized. There is no evidence that any one of these injuries or a combination of them caused any permanent brain damage to the extent it would affect his behavior significantly. Dr. Upson said it is more likely that his lifestyle and drugs caused the Defendant's problems. Because he has some frontal lobe damage, this mitigator is given little weight as there is insufficient evidence that it caused the Defendant's conduct.

The trial judge also offered the following summary of her findings:

> SUMMARY OF MITIGATORS: When the dust settles, it is clear that Michael Robinson is a sociopath. The doctors have put the best spin on the test results. There is no doubt that the Defendant has had problems since very early in his life. His homelife was not perfect, but it was not so far from the norm of that day that it explains or justifies the Defendant's aberrant behavior for the past 20 plus years. Perhaps his failure to bond from the very beginning led to his sociopathic personality disorder. If so, none of his accidents or injuries are really relevant. In fact Dr. Upson said he could have mild brain damage or he could be normal. If there were brain damage, he does not know how or if it would have affected his behavior. The doctors also cannot say that any or a combination of his injuries could be responsible for his behavior. Everyone can agree that his extensive drug abuse/addiction is a primary problem and has led to his misconduct. Because his father was an alcoholic, some credence was given to the possibility of his addiction being hereditary. His drug addiction, together with his sociopathic personality disorder are the two primary mitigators and they are weighted heavily. Many of the other mitigators enumerated by the defense were merely offshoots of these two.

We find no abuse of discretion in the trial court's treatment and consideration of the mitigating circumstances. Clearly, the existence of brain damage is a factor which may be considered in mitigation. See DeAngelo v. State, 616 So.2d 440, 442 (Fla.1993). Here, the experts opined that Robinson's tests results indicated the existence of brain damage. However, Dr. Lipman testified that while Robinson's particular brain deficits would interfere with his daily life, "it wouldn't be of a degree that would necessarily keep him from functioning in normal, everyday

> society." Further, neither expert could determine what caused the brain impairment. Although the trial court gave little weight to the existence of brain damage because of the absence of any evidence that it caused Robinson's actions on the night of the murder, the sentencing order clearly reflects that the trial court considered the evidence and weighed it accordingly. The fact that Robinson disagrees with the trial court's conclusion does not warrant reversal. See James v. State, 695 So.2d 1229, 1237 (Fla.) (noting that "[r]eversal is not warranted simply because an appellant draws a different conclusion"), cert. denied, --- U.S. ----, 118 S.Ct. 569, 139 L.Ed.2d 409 (1997).

Robinson v. State, 1999 WL 628777 (Fla. 1999)

In addressing a similar challenge to the defendant's sentence in Freeman v. State, 563 So.2d 73, 77 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991), this Court stated: "The trial judge carefully weighed the aggravating and mitigating circumstances and concluded that death was the appropriate penalty. It is not this Court's function to reweigh these circumstances." (citing Hudson v. State, 563 So.2d 829 (Fla. 1990)).

Appellant's case is similar to Spencer v State, 691 So.2d 1062, 1063 (Fla. 1996), cert. denied, 522 U.S. 884 (1997) where "the defendant was sentenced to death for the first degree murder of his wife Karen Spencer, as well as aggravated assault, aggravated battery, and attempted second degree murder." As aggravating circumstances, the trial court found: "1) Spencer was previously convicted of a violent felony, based upon his contemporaneous convictions for aggravated assault, aggravated

battery, and attempted second degree murder; and 2) "the murder was especially heinous, atrocious, or cruel." The judge found three mitigating circumstances: 1) "the murder was committed while Spencer was under the influence of extreme mental or emotional disturbance; 2) Spencer's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and 3) the existence of a number of non-statutory mitigating factors in Spencer's background, including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, and ability to function in a structured environment that does not contain women." Spencer, 691 So.2d at 1063. The trial court found that the mitigating circumstances did not outweigh the aggravators and this Court affirmed after conducting a proportionality review. See also Pope v. State, 679 So.2d 710 (Fla.), cert. denied, 136 L.Ed.2d 858 (1996)(death sentence proportional for murder of defendant's former girlfriend with aggravating circumstances of prior violent felony convictions and murder committed for pecuniary gain while mitigation included extreme mental or emotional disturbance and the defendant's capacity to conform conduct to the requirements of the law was substantially impaired); Guzman, 721 So.2d at 1155 (affirming sentence where victim received nineteen stab wounds to face, skull, back, and chest, and a defensive wound to a finger on his left hand); Brown v. State, 565 So.2d 304 (Fla.) (death

sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990); Lemon v. State, 456 So.2d 885, 888 (Fla. 1984) (death penalty proportionate where HAC and prior violent felony convictions for attempted murder (stabbing female victim) balanced against serious emotional disturbance at the time of the offense).

Further, while Crook maintains that the evidence of brain damage was unrefuted, the evidence shows that Crook had been repeatedly assessed, prior to his commission of the instant murder, as having a personality disorder. Additionally, as the following shows there was evidence presented that Crook's IQ fell in the low average range. A review of the record in this case supports the trial court's findings and they should not be disturbed on appeal.

Dr. David McCraney testified that he was a neurologist. He saw Crook once for about an hour. He did not know the facts of the crime at the time but during the examination he looked for evidence of frontal lobe damage because of Crook's past behavior. He testified that people with frontal lobe damage typically have rages then don't remember what happened. (R28: 3045-46)

It is interesting to note, however, that during Crook's interview with police officers, Crook only asserted lack of memory when faced with questions concerning *his* culpability but remembered extensive details when attempting to exculpate himself. Compare

Volume 22, pages 2016-2028, 2037-2052, where Crook tells Officer Glisson extensive details of the crime while contending that three "amigos" were responsible for the murder with Volume 23, pages 2193, 2195-2197, 2199, where, when confronted by Detective Murray with the allegation that he had committed the murder, Crook repeatedly claimed he could not remember and that everything went black during the robbery.

Dr. McCraney noted that Crook had been repeatedly diagnosed as having an anti-social personality and explained the distinction between the two types of disorders. (T28: 3050, 3084-85, 3089) He testified that patients with personality disorders are self interested, whereas a brain injured person cannot take his own side in an argument. (R28: 3051) The record in the instant case reflects that Crook repeatedly "took his own side" when hiding his clothing with his friends and when he laid the blame for the crime on the anonymous "three amigos" and alleged that he had tried to save Betty Spurlock from the amigos unprovoked attack.

Dr. McCraney conceded that frontal lobe damage does not have external evidence of injury and that there was a lot of overlapping between personality disorders and organic brain damage. (R28: 3051-52) Dr. McCraney's testing of Crook focused on the nervous system and how his muscles are working. The doctor testified that Crook's tests, done during the one hour examination and interview, showed some frontal lobe abnormalities. (R28: 3055, 3056, 3075).

He noted that Crook's IQ tests from school indicated that Crook's IQ was in the high 70's and that a person with a high 70's IQ can function in society. (R28: 3059,3062) He also noted that even with brain damage, that 90-99% of time Crook can make choices. (R28: 3075) Dr. McCraney conceded that a number of doctors, including Dr. Dolente, reported that the Crook was malingering and that there was evidence of antisocial personality. (R28: 3076-77)

He also admitted that 90% of brain injuries resulting in brain damge are from birth and he had no evidence that Crook had suffered any birth trauma. (R28: 3078) In fact, reports from Crook's previous examinations reflect that there was minimal brain dysfunction, that Donny was aggressive but able but able to monitor it at times, attributed his difficulties to environment and diagnosed him having a conduct disorder. (R28: 3084-85) Crook was seen by examiners as manipulative and antisocial. (R28: 3089)[1] Previous IQ test shows Crook in low average range. (R28: 3095-96) Another evaluation rejected retardation and found that Crook was deliberately attempting to make the evaluator think he was retarded, that he could not read or write. (R28: 3098) The report noted that Crook's behavior shows signs of higher intelligence than his tests indicate. (R28: 3099) Crook was fluid in both English

[1] In a proffer Dr. McCraney noted that reports showed Donny said he enjoyed fighting, hurting people and seeing them bleed. (R28: 3092) The need to hurt people is not associated with frontal lobe damage. He also noted that people with antisocial personalities are prone to malingering and can feign psychiatric illness just as easy as anybody can. (R28: 3092-93)

and Spanish languages. (R28: 3101) Physically, Crook appeared to be normal (R28: 3105)

As possible sources for brain damage the doctor pointed to Crook's car accident in November, 1993. However, Crook denied losing consciousness. Without a loss of consciousness, brain damage is highly unlikely. (R28: 3105-06)

Dr. Thomas McClain, a psychiatrist, testified that he saw Crook twice. (R29: 3138-3141) He diagnosed Crook has having brain damage that is difficult to specify exactly. (R29: 3144) Despite Dr. McCraney's prior testimony that Crook's IQ had been tested in the high 70's, Dr. McClain testified that records show Crook's IQ that has been tested as low as 69 or 62 and as high as the low 70's. (R28: 3145)

Dr. McClain then went over a chart which showed the possible sources for brain damage. These sources included pregnancy and childbirth, substance abuse, socioeconomic deprivation and head trauma. (R29: 3146-3147) Dr. McClain admitted, however, that none of the possible sources definitely caused Crook's alleged brain damage. He admits that the data does not substantiate birth trauma; concedes no evidence of birth trauma or that mom had any health problem. He admitted that Crook's birth was basically a standard caesarean; that almost no criminal meets the idealized standards of life history; concedes that not many migrant worker families do have an ideal background; and that no evidence exists

showing Crook lost consciousness during the automobile accident. (R29: 3148, 3173, 3175-76, 3180, 3190)

Dr. McClain testified that Crook's brain damage could not be documented with physical studies but symptoms indicate it's existence. (R29: 3155) He found Crook to have subtle frontal lobe damage - *subtle meaning difficult to pick up with normal tests* – which interacts with hyperactivity and drug use. (R29: 3157)

Both Dr. Dolente and Dr. McClain agreed that Crook was malingering during their interviews. (R29: 3169) Crook meets the criteria for a severe personality disorder with antisocial traits and other personality traits. (R29: 3170) He conceded, however, that Crook had goal directed behavior; that actions of locking door and later changing and hiding clothes shows there is an appreciation of the criminality of his conduct. (R29: 3197)

Dr Ralph Dolente, a psychologist, testified for the defense that he met with Crook twice. The first time he met with Crook, Crook faked the test. Dr. Dolente left and came back six months later to retest. (R29: 3210) His diagnosis is personality change secondary to recurrent traumatic brain injury with antisocial features along polysubstance abuse and perhaps ADD. (R29: 3207). He found some indications of frontal lobe damage. (R29: 3209)

Dr. Dolente noted that malingering is common in criminal cases, but that the second time he did not seem to be faking. (R29: 3211-12) He found a degree of organicity. (R29: 3220) He opined

that Crook doesn't have memory impairment, he has verbal learning impairment.(R29: 3221) According to Dr. Dolente, Crook's impairment is more behavioral as opposed to cognitive. (R29: 3222) Crook's behavior is probably more one of organic personality disorder secondary to brain injury with aggressive and impulsive features. (R29: 3223) Dr. Dolente agreed that Crook can control his behavior to a degree. He is confident, however, that there is a degree of organicity involved with Crook. (R29: 3226)

Although he could not point to a provoking factor, Dr. Dolente opined that in a case like this if a person is provoked or overstimulated they can easily go in a rage. (R29: 3232) Dr. Dolente thinks Crook appreciates what he does but is unable to control himself to a degree that a person with an intact brain can. So, he concluded, to a degree Crook is unable to control himself. (R29: 3233-34) Dr. Dolente's primary diagnosis is personality change due to traumatic brain injury with antisocial features. (R29: 3238- 39) On the Wechsler test of social judgement Crook scored in the low average range, abstract spacial skills high average range, attention concentration and conceptual tracking falling into low average, non verbal problem solving skills fell into low average range. (R29: 3239-42) Based on the testing, Dr. Dolente could not say the extent of the brain damage. (R29: 3263)

The trial court in the instant case, reviewed the evidence presented and held with regard to the mental mitigating factors:

b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and

c) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

These two statutory mitigating circumstances will be considered together. Both of these bear on the defendant's mental functioning at the time of the offense as it relates to his use of alcohol or controlled substances, his intelligence and any mental illness or impairment.

The defense presented three experts during the penalty phase, Thomas McClane, M.D., P.A., Ralph J. Dolente, Psy.D., and David McCraney, M.D. Each of these experts testified in regard to the existence of these two statutory mental mitigating circumstances and each expert concluded that the circumstances existed in the instant case.

These findings are not surprising when a review is made of the documents that were furnished to the experts for their review in conjunction with their interviews of the defendant and furnished to the court at the sentencing hearing by the defense and designated Medical Records and School Records. The defendant's first psychological evaluation occurred when he was five (5) years and two (2) months old. This report by Charles A. Haskovec, Ph.D. found the defendant has an I.Q. of 76 and a diagnosis of conduct disorder, socialized, non-aggressive and attention deficit disorder with hyperactivity. The defendant's next psychological evaluation conducted when the defendant was eight (8) year, seven (7) months, and twenty-eight (28) days old by Suzanne Huber Martinchalk, M.A. Found the defendant to be an individual with learning disabilities and significant emotional problems. The diagnosis: conduct disorder, undersocialized, aggressive, attention deficit disorder with hyperactivity; and developmental reading disorder.

The next report from Dr. Theodore Greiner, M.D. is from a hospital admission

when the defendant was sixteen (16) years of age. The defendant was admitted to the hospital for making suicidal threats. Upon evaluation the physician's diagnosis was not that the defendant was either suicidal nor homicidal, but that he had a conduct disorder.

The next psychological evaluation of the defendant was conducted by William G. Kremper, Ph.D. in conjunction with the defendant's application for disability benefits when the defendant was eighteen (18) years of age. Dr. Kremper found that the defendant had a full scale I.Q. of 66 and a diagnosistic impression of: organic hallucinosis, alcohol and cocaine abuse, cannabis dependence, antisocial personality disorder, inhalant dependence in remission and mental retardation, mild.

The next psychological evaluation of the defendant was conducted by Roy C. Mercer, Ph.D. when the defendant was nineteen (19) years and seven (7) months old. Dr. Mercer's findings were that the defendant's full scale I.Q. was 75, that he had Borderline Intellectual Functioning, impulsivity, distractibility, poor judgment, and acting out tendencies.

The final mental health records presented are those from the Marge Brewster Center of the Behavioral Health Division of Winter Haven Hospital Inc. The date of evaluation being September 10, 1997. The diagnostic impression being: polysubstance dependence, antisocial personality disorder and psychological stressors from incarceration on the first degree murder charge.

As can be seen throughout the defendant's life he has had a history of inability to conform his conduct to the expectations of society. This would not normally be mitigating since conduct disorder is a condition which cannot be considered in mitigation. Carter v. State, 576 So.2d 1291 at 1292 (Fla. 1989), and there was no actual proof of any brain damage to the defendant.

(R11: 2033—36)

In discussing other mitigating evidence urged by defense

counsel, the court also noted:

> 4. The defendant is borderline mentally retarded. He suffers from learning disabilities which have caused him to have an impaired educational experience and limited intellectual abilities.
>
> The record does not support a finding that the defendant is borderline mentally retarded. Dr. Kremper's report from 7-21-94 finds the defendant to be mentally retarded, mild, however none of the other evidence in this case supports this finding and the court does not find the defendant to be borderline mentally retarded. The court does find however that the defendant's I.Q. is within the low average range of intelligence. The court finds this to be a mitigating circumstance and gives it slight weight.
>
> The record is replete with evidence that the defendant has learning disabilities and as a result had an impaired educational experience. The court finds this to be a mitigating circumstance and gives it slight weight.
>
> (R11: 2038)

As the foregoing demonstrates, the trial court thoroughly assessed all of the evidence before it, including the testimony that appellant's I.Q. was in the mid 70's. As previously noted, the record shows that prior to Dr. Kremper's evaluation, Crook had been seen repeatedly by mental health professionals who uniformly diagnosed him as having conduct or personality disorders. (T28/29: 3084-85, 3093-96, 3098, 3107-08, 3248, 3251) Further, while the three defense doctors who examined Crook for the penalty phase hearing all found him to have some level of brain damage, none could say the extent of the damage or determine its exact cause or

origin. As this Court in Robinson, supra., held, it is not error for a trial court to reject mental health testimony where, as here, the experts testified that particular brain deficits would not keep appellant from functioning in normal, everyday society and where neither expert could determine what caused the brain impairment. The record shows that the trial court thoroughly assessed all of the evidence before it and made a reasonable determination that the evidence of brain damage or mental retardation should be rejected.

Even assuming the trial court's factual findings are incorrect and that this Court finds that Crook suffered from brain damage and that his IQ was borderline mentally retarded versus the low average level found by the trial court, the state maintains that resentencing is not required. As noted above the trial court was clearly aware of *all* of the evidence before him. He found both of the statutory mental mitigators despite the fact that two of the doctors hedged on the extent that Crook satisfied the statutory requirements. (R29: 3197, 3226) compare Bates v. State, 1999 WL 817193, 24 Fla. L. Weekly S471 (Fla. 1999) (trial court's failure to address appellant's prison records in the sentencing order was harmless error); Kilgore v. State, 688 So.2d 895, 901 (Fla. 1996) (trial court's failure to expressly comment on the relationship between Kilgore and Jackson, harmless error, where existence of relationship was presented during the trial and judge was cognizant of factor when weighing the mental health evidence.)

In sum, the appellant's sentence is supported by three very strong aggravating factors. The evidence presented in the instant case established that appellant repeatedly stabbed, beat, stomped and skewered Ms. Spurlock in an attack that lasted several minutes. Ms. Spurlock fought for her life. Balanced against this heinous crime is a laundry list of character traits and aspects of the crime which appellant urged as mitigating evidence. Based upon on the foregoing, this State urges this Court to find that appellant's sentence is proportionate.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831-9000, this _____ day of March, 2000.

COUNSEL FOR APPELLEE