IN THE SUPREME COURT OF FLORIDA

DONNY L. CROOK,	:	
Appellant,	:	
vs.	:	Case No. 94,782
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE

Appellant, DONNY L. CROOK, was charged by indictment on April 8, 1996 in Highlands County with the first degree murder of Betty Spurlock, robbery with a deadly weapon, and sexual battery with great force (1/37-40). After a jury trial before Circuit Judge J. David Langford on August 12-27, 1998, appellant was found guilty as charged on all counts (6/1055-57; 27/2927-28). The penalty phase took place on September 14-15, 1998. By a vote of 7-5, the jury recommended a death sentence (7/1165; 29/3326). On November 24, 1998, the trial court sentenced appellant to death for the murder, and imposed concurrent terms of life imprisonment on the remaining counts (11/2017-23,2045-46,2077).

STATEMENT OF THE FACTS

A. Guilt Phase

The Bull Pen is a small neighborhood bar located in Avon Park owned by Don Steenhoven. Betty Spurlock was a longtime employee and was Steenhoven's common-law wife (15/590-91,677-78). On March 14, 1996, Steenhoven called the bar just before 7:00 p.m. to see if Spurlock needed any help. She said it was slow; there were six Mexicans playing pool and four of them were too young to buy beer. An hour later, around ten minutes to eight, Steenhoven stopped by the bar. There were no customers at that time, and they had done very little business, just 18 dollars in sales. [About 85 dollars was typically kept in the till]. They decided to stay open a little longer in case some more customers came in. Steenhoven left to buy lottery tickets, and returned to the bar around 8:45. He knew something was wrong because the cement block with which they usually propped the front door open was sitting outside, and the door was closed. Steenhoven tried the front door and found it locked. [He testified that the door locks from inside]. He went around to the other door at the northeast corner of the building, and entered. The interior lights were off. When he flipped them up, he could see that the bar was in some disarray and things were out of place. He then discovered Betty Spurlock's body in the interior area of the L-shaped bar, by the walk-in cooler door. He called 9-1-1 (15/680-88,696-701,705-06).

Paramedics and law enforcement officers were dispatched to the scene. When they arrived, Don Steenhoven was still on the phone.

Betty Spurlock's body was on the other side of the bar; she was obviously deceased and had no pulse. Her clothing was disarranged, and her hosiery was pulled down to her ankles. A portion of a pool cue was adjacent to the body. The cash drawer was missing from the register. Shoeprints in blood were visible, leading from behind the bar to the door at the back of the establishment. Also observed were bloody shoeprints on the concrete pad outside the back door on the east side of the building (15/580-83,596-600,605, 613-14; 16/883,888-89,895-97,907-10,914; see 14/537,541;25/2565).

Ruby Flowers went to the Bull Pen at 5:30 that evening to get her hair cut by Betty Spurlock. She stayed and talked with Betty until around 8:00. Another lady came into the bar, and five or six Hispanic males came in and played pool. They were still there when she left (15/591-95).

Tammy Satkamp was at the Bull Pen from about 7:00 to 7:30. Betty Spurlock and a woman named Jane were there. Just before Tammy left, five Mexican guys came in. There were drinking beer and playing pool (15/716-18).

The same evening, Eva Johns went to the Presto store with her daughter Rhonda. Eva saw appellant, whom she knew, out front on a bicycle with a case of Old Milwaukee sitting on the handles. Appellant gave her a beer. The case was getting low; there were maybe six or eight beers left. Appellant "looked like he was partying" (15/624-27,633).

Appellant had a brief conversation with Eva and then another with Rhonda. Eva said to him "I thought you lived in Sebring," and

appellant said he was just visiting and came over. Eva overheard him saying to Rhonda something to the effect of "I come to do a job." Eva had no idea what he meant by that (15/628-29,633,643-44).

Later Eva saw appellant again. While she was sitting in a parked car in her daughter's yard, appellant came up the hill on his bicycle. They spoke very briefly. Eva told him she was probably going to go to the Bull Pen later to shoot pool with Tammy Satkamp. Appellant said he was going to the Bull Pen too (15/634-36).

Shortly thereafter, around 8:00 or 8:15, Eva and her family were driving down Selph Street toward the Bull Pen. Thinking that Tammy Satkamp might be there, Eva pulled in front of the open front door and looked inside. She didn't see Tammy; just Betty Spurlock standing by the register and appellant sitting in front of her on a bar stool (15/636-39). Appellant was turned to where he could look straight out the door, and he looked right at her. Eva was sure that he recognized her (15/645-46; see 22/2017; 24/2341,2343).

Melissa Lemay is appellant's cousin. Melissa's husband is David Lemay. Around 9:00 or 9:30 p.m. appellant came to their house on his bicycle. David let him in. Appellant was wearing long jeans, a T-shirt, and white high top tennis shoes. He asked David for a shirt and same shorts, and then went into the bathroom to change clothes. David recalled that Melissa, who had been getting ready to go to bed, came out of the bedroom and got a change of clothes for appellant, while Melissa recalled that when

she came out appellant was already wearing blue jean shorts, along with a T-shirt and white tennis shoes (16/785-91,836-42,859-62). Appellant was in the living room talking to David. Melissa described him as "hyper loud." She thought he was high on rock or paper, because his pupils were so big you could not see his eye color (16/809-10,834).

Appellant asked to stay the night and the Lemays told him he could stay in the garage (16/842).

At around 11:30 p.m., Avon Park police officers Robinson and Loeb were dispatched regarding a prowler call. They stopped a white male on a bicycle -- appellant -- who generally matched the clothing description. According to Detective Robinson, appellant acted very nervous and anxious and kept asking if he was going to be arrested. Robinson didn't detect any odor of alcohol; he acknowledged that one of the signs of drug use is paranoia and jitters. Appellant allowed the officers to check him for weapons or contraband; when he lifted his shirt, Robinson noticed what appeared to be a small spot of blood on his stomach. There was also a scrape on the palm of his hand. Robinson asked him about what happened, and appellant said he had a wreck on his bicycle. That seemed plausible and consistent with the injuries, so Robinson didn't think much about it at the time. Subsequently, however, he communicated his observations to the Sheriff's department in connection with a homicide investigation (15/722-29,732-34).

The next morning, Melissa Lemay went to her garage and woke appellant up. He was wearing the same shorts and tennis shoes, but

no shirt. The two of them loaded his bike into her trunk, and she drove him home to Sebring. During the ride, appellant asked her if David would have gotten rid of his clothes that were in the semi. Melissa asked him why would he do that. When she returned home, Melissa received a phone call from appellant's mother, after which Melissa made a phone call to the Bull Pen Bar (16/791-95,799,818).

David Lemay drives a semi truck which he keeps parked on a side street by his house. The truck has a toolbox compartment, accessible from the outside, which he leaves unlocked (16/836,843-45,867).

Around noon on March 15, Melissa was at the red light on Main Street when she spotted David's truck. She spoke with him on the CB, and then got in the truck with him. She told him about some clothing that might be in the truck, and asked him to throw them away. After the conversation, Melissa went home and David searched his truck and threw away a pair of pants in a dumpster at the BP station. He did not find a shirt (16/800-01,825-26,847,869-70).

After Melissa got home, she learned for the first time of the death of Betty Spurlock. Some sheriff's officers came to her house, and she allowed them to look around. When they asked her about the clothing she was evasive at first, but when directly confronted she gave them the information. The investigators observed some shoeprints in the front yard. Melissa told them the shoeprints were her own and appellant's (16/801-04,822-24,832-33; see 18/1226).

Later that day, David Lemay returned to the dumpster at the BP station with the Sheriff and retrieved the pair of black jeans which he'd thrown away earlier. At first he lied to the officers about how the jeans had come into his possession, but he later told them the truth. When they asked him about the shirt, he said he didn't have it but they were welcome to search the truck. The officers searched once without success; on the second try they found a T-shirt in the toolbox compartment. It was the same T-shirt appellant had been wearing the night before (16/847-52,871-75; see 18/1179-82,1227-32).

On March 15, 1996, appellant was brought by police officers to the emergency room at Highlands Regional Hospital for the collection of hair and blood samples. He was examined by Dr. Richard Spindler, who observed an assortment of scratches and abrasions to his knee, forearm, and hand. These injuries were one or two days old. Dr. Spindler also saw a quarter inch abrasion on the right side of appellant's forehead, with a surrounding half inch swelling (also 1-2 days old)(21/1715-16,1721-22). According to Detective John Murray, appellant told Dr. Spindler that he had banged his head on the air pump at the Texaco station. Appellant had already given Murray two different explanations for the bump on his forehead; that he hit it on a tree limb while riding his bike, and that he hit it on a door frame (23/2150-51; 24/2283-85).

An autopsy was performed on Betty Spurlock, a 59 year old white female, by the associate medical examiner, Dr. Alexander Melamud (17/1089; 18/1118). He determined that she died of

multiple injuries (18/1133), including four stab wounds to the neck (18/1124-25); multiple stab wounds to the abdominal area (18/1119-21); significant head injuries resulting from an undetermined number of blows (18/1123,1138,1145-56); and internal injuries and fractures caused by the insertion of a pool cue (18/1123-26,1130-37). Dr. Melamud also found various small abrasions, bruises, and cuts to the face and body (18/1121-25). There was a big bruise on her left cheek; looking closely Dr. Melamud saw a zigzag pattern, which he thought might be from the sole of a shoe (18/1124). There was an open fracture on the left orbit and forehead frontal bone. Dr. Melamud initially did not know what caused it. Later his assistant saw a protruding object, and they looked and saw the plastic end of a pool cue. A nearly 28 inch section of the pool cue was found inside the body. It had been inserted in the vagina and had gone parallel to the spinal column causing injuries to the many internal organs, then entered the oral and cranial cavities, fracturing the upper jaws. It perforated the left hemisphere of the brain and exited the forehead (18/1123-24,1128-38,1141). The cue stick apparently broke in half when it was attempted to be taken out (18/1130-31).

Dr. Melamud was of the opinion that the stab wounds to the neck and the blunt trauma injuries to the head occurred first, while the stab wounds to the abdomen and the injuries inflicted by the pool cue occurred at the end of the beating. The latter injuries involved only a very small amount of hemorrhage (18/1138, 1149-50,1161). According to Dr. Melamud (in agreement with the

blood spatter expert who testified later), Spurlock was beaten about the head while standing, and at some point she dropped into a prone position (18/1138-40,1166-67). While all of her injuries were inflicted within a comparatively short time, Dr. Melamud testified -- and the prosecutor acknowledged in her closing argument -- that Spurlock was unconscious at the time the pool cue was inserted, and would have experienced no sensations (18/1163, see 25/2573). However, he believed she was still alive at that point (18/1168, see 1160-61).

Leroy Parker, an FDLE crime lab supervisor whose areas of expertise include bloodstain analysis, testified that there were three distinct areas of splash blood -- and thus three impact sites -- behind the counter. At some points during the beating and stabbing, Betty Spurlock was on her feet and blood was being spilled in a downward direction. At some point, blows were directed to her while she was on the floor (20/1637-38,1651-53,1662-68; see 25/2560-64).

The green T-shirt recovered from the toolbox compartment in David Lemay's truck contained a bloodstain which -- according to DNA testing performed by analysts from Cellmark Diagnostics -- was consistent with Betty Spurlock's blood and inconsistent with appellant's own blood (19/1433-36, see 19/1363-64,1389-91). According to the Cellmark population geneticist who reviewed the work done by the analyst who performed the tests, the frequency within the Caucasian population that the blood could have come from someone other than Betty Spurlock is 1 in 660 (19/1465). The black

jeans recovered from the dumpster at the BP station tested positive for the presence of human blood, but no blood-type or DNA could be identified (19/1353-55,1389-91). Luminol processing showed long streaky patterns of blood on the jeans which were similar to what would be produced if a bloody hair swipe went across the material (21/1786-94). Luminol cannot determine blood-type or even whether the blood is human (21/1797).

Four sets of shoeprints were examined and photographed in the investigation. They were located (1) in the area behind the bar; (2) proceeding from the gateway in a curved manner to the east door; (3) from the east door going back around the north side of the building; and (4) at the Lemay residence (20/1597;21/1833-34; see 20/1517-58; 21/1805-23). In the opinion of Detective Tom Ouverson and FDLE analyst Deborah Fertgus, the shoeprints were consistent in their class characteristics with one another, and were consistent with the pattern found on the Nike Air Sonic Flight model shoe (20/1495,1504,1558-72;21/1825-30). No "accidental characteristics" (individualized markings caused by wear or other factors) were observed (21/1828-37), and no shoes were recovered in this case which matched the shoeprints. The Nike Air Sonic Flight was produced around 1993. Some 800,000 pairs were distrib-uted in the United States, and more than that worldwide (20/1507-08; 21/1829).

Within a week after appellant arrived at the Highlands County Jail, correctional officer Terry Hinote overheard a conversation between him and a black inmate in the adjoining cell. All she

heard was appellant saying something about ramming a cue stick up her ass. Ms. Hinote did not document or report the incident. She thought appellant was just talking to brag and make the other inmates think he was tough; the kind of braggadocio that typically goes on in the jail (21/1843-48).

About a week after appellant's arrest, correctional officer Mitchell Hollenbeck overheard a conversation between appellant and his brother James Crook (also an inmate) during an authorized visitation (22/1863-70). James said "Before this goes any further, I've got to know did you do it". Appellant said, "Yeah, I hit her in the head." James asked him if he raped her; appellant said no, that was the other guy. James asked "What other guy?", and appellant replied "Never mind. It doesn't matter[. N]ot now." After hearing some discussion about whether Florida had done away with the electric chair, Officer Hollenbeck was called away from the area. When he returned, he overheard appellant saying "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" (22/1870-71).

After Hollenbeck reported to investigators what he'd heard, it was arranged for appellant and James' next visitation, which occurred on March 29, 1996, to be covertly tape recorded (23/2215; 24/2323-24,2346). [The tape was played to the jury three times; during the testimony of Detective John Murray (23/2222-52), during the prosecutor's closing argument (25/2604-33); and in response to the jury's request during deliberations (27/2846-47,2870-2900).

There are discrepancies in the court reporter's transcripts of the three playings of the tape]. Appellant said "Check out these. Then he either said "I heard that (Inaudible) did it dude" (27/2876) or "I heard that he was talking to you he said that --" (23/2228; 25/2610-11). Appellant continued:

> He said that they don't have no stiff evidence on me. But I told them the truth. I told them that I got the cash register, stuck it in the car. I never got none of the money, man.
>
> JAMES CROOK: You got (Inaudible).
>
> APPELLANT: I got the cash register. I told them about it. I got the cash register. And I told them I brought it out there and drug it but --
>
> JAMES CROOK: Huh?
>
> APPELLANT: I got the cash register. I stuck it in the car, man. But I didn't kill that old lady though, dude.
>
> JAMES CROOK: What?
>
> UNIDENTIFIED SPEAKER: Man, I hope you didn't kill that old lady, dude.

(27/2876; see 23/2228; 25/2611; 24/2327-28).

Appellant told James that a Mexican was arguing with the lady, and started slapping her. Appellant tried to get him to forget about it and leave but he wouldn't. The Mexican had on orange picking gloves. The Mexican popped the lady in the head with the cue stick, and told appellant to get the cash register. Appellant grabbed the register and ran out the door. James told appellant he was concocting that story and it wasn't going to float (23/2247-48; 25/2629-31; 27/2895-96).

Appellant made a series of in-custody statements to Detective Murray and/or Detective Glisson on the 15th, 16th, and 17th of March, 1996. Some portions of the statements were tape recorded; some were not. According to the March 15 statement, he left the bar well before the time the homicide would have occurred (22/1972-76; 23/2142-45). According to the initial March 16th statements, Betty Spurlock's attackers were three Mexican males. Appellant struggled with them trying to help the lady, but he was unsuccessful (22/2018-28,2035-36,2039-41,2049-51; 23/2067-68). Later on the 16th, appellant told Detective Murray that he was outside the bar and when he came back in he saw Spurlock lying on the floor with her pants pulled down. One Mexican was kneeling by her legs. Another Mexican chased appellant out the door (23/2155-58,2172-74; 24/2335-38).

On the 17th, appellant told Detective Glisson that he was sitting on a stool at the bar, and there were a couple of Mexicans in the bar. Apparently referring to Eva Johns and her daughter Rhonda (see 15/645-46; 24/2341,2343), appellant said:

> (Inaudible) with her daughter drive by laughing. They were all drunk.
>
> Q. Can they see. When somebody drives by, can they see in the bar?
>
> A. They drove up and stopped at the front door, looking at me and drove off.

(22/2016-17).

When appellant referred to a fight which occurred a while back at the Bull Pen, Detective Glisson asked:

> Donny, let me try to go back over this. At what time . . . When is the last time that you think that you were in the bar?
>
> A. I don't know. I can't tell time.
>
> Q. All right. I know you can't tell time. Who all was in the bar?
>
> A. Amigos and Betty.

(22/2036-37).

During the interval between statements, appellant started crying and said he didn't want to go to the electric chair. He told Detective Glisson he had been doing cocaine since early in the afternoon, and he'd never done that much cocaine before. He asked her "Since I was on drugs, could it be insane?" (23/2080-81). He asked if he could use the phone and Glisson told him it was too late (23/2081). Detective Murray re-entered the room and said "We know you did it. We just want to know why." Appellant started crying and said it was the drugs, he needed more rock. Appellant said he remembered seeing her counting the money and he remembered having blood on his shirt. Murray put the interview on hold momentarily while he went out and got a recorder (23/2081,2118, 2181-83). Then the statement continued as follows:

> Q. (By Mr. Murray) Donny, did you kill Betty Sue Spurlock?
>
> A. Not that I remember. I don't --
>
> Q. Were you in there? In the bar that night?
>
> A. Yes.
>
> Q. Did you want rock?

A. Yes, I wanted rock. But I don't remember nothing after that. Everything went black.

Q. Did you take her cash register?

A. No. I didn't take the cash register.

Q. Did you take the money?

A. I don't remember. No, I didn't take no money.

Q. Do you remember hitting her?

A. I know I didn't hit the lady. I remember when I walked away she was laying there and she was laying there, and she was dead. And I ran.

Q. When you left she was dead?

A. I seen her laying there. I'm not for sure if she was dead. I ran out of the bar and I was scared.

SHARON GLISSON: Donny, what did you tell me earlier? You said that you and she were in there and you saw her counting money?

A. I seen her counting money. And I turned around and everything went black. And then when I walked away from her and she was laying there and I ran. And I was scared.

Q. (By Mr. Murray) Donny, you have been telling us about these three Mexicans in there. There wasn't three Mexican in there, was there?

A. There was one guy in there.

Q. What happened to him?

A. He left.

Q. And it's just you and then Betty in there alone, right?

A. No. He left after I left.

Q. How did he leave?

A. He left walking.

Q. Out what door?

A. Out the front door.

Q. What door did you leave out of?

A. Out the front door.

Q. That's impossible.

A. Well, that's --

Q. Who locked the door?

A. I don't know. I left out the front door though. I seen Betty counting money. And I turned around and everything went black.

Q. Where were you at when you saw her counting money?

A. I was on this side of the bar.

Q. Okay. Were you high on rock?

A. Yes, I was high.

Q. Were you drinking a little bit?

A. I was drunk.

Q. What were you drinking, beers or liquor or what?

A. I drink some . . . A fifth of Tequila before I went there.

Q. Donny, I'm telling you --

A. And then I was drinking Milwaukee.

Q. Donny, focus on what's happening here and tell the truth.

A. I'm telling you the truth, man. That's the God's honest truth, man. I seen the lady counting money. I turned around, I blacked out. I didn't see nothing. I --

Q. And then the next time you saw her she was dead?

A. I looked again and she was laying there dead. And I ran and I was scared.

SHARON GLISSON: Donny, didn't you tell me earlier that you slipped behind the counter, put your arms up under her to pull her out of the way? Was that the truth?

Okay. You're shaking your head yes. Would you, please, tell me how . . . how that's true, what happened, if you remember dragging her?

A. I remember pulling her away but then I don't remember nothing. Everything was black. I remember seeing her laying there and I ran.

SHARON GLISSON: Yeah. But you went behind the bar. And she is on the ground when you put your arm around her to pull her?

A. No. She was standing up.

SHARON GLISSON: She was standing up?

Q. (By Mr. Murray): Were you pulling her away from the cash drawer?

A. No. I don't remember. Everything was black.

Q. You wanted money, though, right?

A. Well, I wanted money but I didn't --

Q. Why did you want the money?

A. So I can get rock.

Q. Did she say something to you like: Get out of here, or what?

A. No. She didn't say anything to me.

Q. Did you jump over the bar and go through the little flapping door?

A. I don't remember. Everything was black. I don't remember nothing.

Q. But you do remember getting behind the bar and holding her?

A. Yes, sir. And then after that, I don't remember nothing.

Q. And you remember seeing her dead?

A. Yeah. And I run out the bar. I didn't see her dead. I seen her laying there and I ran.

Q. Where was she laying?

A. She was laying in front of the swinging doors.

Q. Do you know where the cooler is?

A. Yes, sir.

Q. Was she anywhere near the cooler?

A. Yeah. When I left out she was in front of the swinging door by the cooler. And I run out and left her there.

Q. And which way was her head?

A. It was this way.

Q. Toward the flapping door?

A. Yes, sir.

Q. Was she naked?

A. Yes, sir.

Q. How much of her body was exposed?

A. All of it, that I remember.

Q. Were her breasts exposed?

A. All of her body. She didn't have no clothes on.

Q. Okay. Did you see any damage to her body?

A. No. I couldn't see too good. Everything was coming back in.

Q. When you left, you left by yourself?

A. I left out right behind the Amigo, the Mexican. I run out behind --

Q. The little guy?

A. I jumped on my bicycle and I went to Melissa's and changed clothes. And then I went back in the living room and went to sleep.

Q. Where is the clothes you took off? Where is the shoes you had on?

A. I had my black boots on. I didn't have no shoes on. I don't wear shoes, I wear black boots. I had a pair of black boots on.

I went back to Melissa's. I put some shorts on. I left from there. And I went back up there and I went back to sleep. I was scared.

Q. Do you remember grabbing her behind the bar?

A. Yeah. But I don't remember killing her, or anything. I was playing . . . Everything was blurry. I couldn't see nothing. Then when I seen her, she was laying there.

(23/2193-99)

In the series of statements made on the 15th, 16th, and 17th, appellant never stated that he killed or beat Betty Spurlock. He told the detectives that he remembered seeing her count the money, remembered grabbing her, and then everything went black. In all of the statements, appellant said there were Mexicans involved, although the number varied (23/2084,2118-19,2193-2203; 24/2317, 2333,2347-48).

On the night of the homicide, a truck containing a grandmother, mother, and daughter passed in front of the Bull Pen. The state called the daughter, Yolanda Lopez; and the defense presented

the testimony of the mother and grandmother, Linda Patterson and Nell Gonzalez.[1] They were driving down Selph Avenue on the way to Winn Dixie (24/2406-07,2433). Yolanda thought it was probably around 6:00 p.m., while Linda and Nell thought it was between 8;00 and 8:15 (24/2380,2406,2430).

Yolanda saw an old beat-up car parked by the side of the building with its trunk open. There was a Mexican by the trunk. There was a ten-speed bike in front of the bar. Through the front door she could see a lady behind the bar. She did not see anyone else inside the bar (24/2377-84).

Linda, who was driving, saw a black Thunderbird with its trunk open backed up to the bar. The passenger side door was open. There was a Mexican standing by the open door and two other Mexicans by the trunk. At the front of the bar was a ten-speed bicycle, and a white male wearing a red bandanna was standing beside it. Linda knows appellant, but with the darkness and the red bandanna, it would have been hard to recognize the person (24/2406-07,2414-20).

Nell saw a black, older model car backed up as close to the Bull Pen as it could get. There were two Mexicans by the open trunk; they were leaning in "like they were getting a tire or something out." A third Mexican was walking up and down the road. Nell also saw appellant, whom she knows, sitting on a bicycle in front of the bar. He had a red bandanna tied around his head.

[1] Due to health problems, the two defense witnesses were unable to appear in court; their testimony was presented by videotape (24/2402,2426).

Nell testified that she and her daughter and granddaughter went on to Winn Dixie and just got some milk. On the way back they passed the Bull Pen again, and saw police cars and flashing lights. The car that had been there was gone (24/2428-35).

The defense moved for judgment of acquittal on all three counts. On the first degree murder charge defense counsel contended, inter alia, that there was insufficient evidence of premeditation (24/2389-90). The prosecutor, after addressing the charges of sexual battery and robbery, argued the murder charge as follows:

> Not only is it clearly within the frame work of a Felony Murder First Degree, that showing a Robbery, speaking to it directly, but also in terms of premeditation. On this record at this time, Your Honor, there is a showing that the front door of the Bull Pen Bar, while all of this happened was locked, locked before this Robbery took place, showing, if you will, the premeditated intent to rob the lady who was seen counting the money, Betty Spurlock.
>
> I think it's also clear on its face, Your Honor, that Felony Murder, Sexual Battery, forcing of a pool cue through the body, from the vagina to forehead, also occurs in this setting clearly on the record at this time.

(24/2394-95) (emphasis supplied).

The trial court denied the motions for judgment of acquittal (24/2395).

In her closing statement to the jury, the prosecutor again made the point that the locking of the front door went to the issue of premeditation of the robbery (25/2580-81). The prosecutor then

suggested to the jury that it could reasonably be inferred from the evidence that this is how the homicide occurred:

> This is a case, however, that seems to be particularly consistent with an acknowledgment that in the course of that Robbery this Defendant got pissed off. Perhaps it was simply the anger generated by having a cash drawer that he couldn't get open. Having in his hand money that he couldn't get to. Perhaps in this case there is another potential for - and excuse my language - but potential for being pissed off.
>
> Let me show you what's marked as State's Exhibit Number 12. You've certainly seen it before. And it is the person of Donny Crook on the 15th day of March, 1996 when he's taken to the hospital and all of his injuries are recorded. And one of the injuries that you see in photograph 12-D. An obvious bump on his head and a laceration associated with it.
>
> And one thing you know about that particular injury is that he explained it to Dr. Spindler and he said, I banged my head on an air compressor at the Texaco Station. Detective Murray kind of shakes his head because he had heard two other explanations for the injury. One was he had hit it on a limb and the other one was he had hit it on a door frame.
>
> A couple things. Betty Spurlock has obvious stab wounds to her neck. She had obvious stab wounds to her abdomen. Dr. Melamud said well, the trauma from the instrument that was involved there, it had one side that was fairly blunt and one side that was fairly sharp. And it seems to come in pairs.
>
> And what do we know about Betty Spurlock and what she had been doing that afternoon? She had been cutting hair. An object, a pair of scissors that might be in her possession. In fact, perhaps used by Betty Spurlock in an attempt to defend herself and taken from her.
>
> Betty Spurlock beaten in this area. One of the things you notice is a pool cue wrapped with tape, a type of an object available for

> Betty Spurlock to wack Donny Crook right across the forehead that evening in her own defense. Sufficient, in fact, to piss off her assailant.
>
> And the carnage begins. As she, in fact, is stomped. The jaws broken, drug and this pool cue, intact at that time, shoved from vagina to forehead. The kind of anger, kind of retaliation well beyond a simple Robbery or Sexual Battery.

(25/2601-03).

The jury was instructed on premeditated murder, and on felony murder with the underlying offenses of robbery and sexual battery (27/2807-09). It returned a general verdict of guilty of first degree murder (count I), as well as guilty verdicts on the separate charges of robbery and sexual battery (counts II and III) (6/1055-57; 27/2928).

B. Penalty Phase

The state introduced a victim impact statement by Betty Spurlock's granddaughter, Christina Perez (28/1969-71; 7/1166). The jury was instructed to consider this evidence only to demonstrate Betty Spurlock's uniqueness as an individual and the resultant loss to the community, and not to consider it in rendering its penalty verdict (28/2967-68; 7/1167). The state announced that it would call no further witnesses at this time (28/2971).

The defense called appellant's mother, Aneitta Crook Bravo (28/2974). Aneitta left home at age fifteen to marry Donny's

daddy, James Crook.[2] When she was growing up, she went to school "[w]henever I could", but she only got as far as the eighth grade, and she cannot read or write well. James had dropped out of school in the third grade (28/2975-76,2979).

Aneitta and James had three sons; James Jr. in 1965, Ronnie in 1968, and Donny in 1976 (28/2977-78). When James Jr. grew up, he got with the wrong people and started doing drugs and stealing (28/2977-78). Ronnie had a lot of physical problems as he was growing up; he was hyperactive, and had hypoglycemia and epileptic fits (28/2978). After the two older boys were born, but several years before Donny's birth, Aneitta and James Sr. separated "because a tow motor fell on his head over at Lake Region and he was crazy" (28/2978-79). Before the injury, James was good and kind; afterwards he was awful. He hurt people, and didn't have any feelings for anybody (29/2979).

Following the separation, James Sr. had the boys at first, but he couldn't handle them, so Aneitta got them back. She was living in Miami, working in a screen factory, but "it was too many problems." James' family wouldn't leave her alone; they fought with her and stole everything she had, so she went back to her family in Alabama (28/2980-81).

In 1975, Aneitta got back together with James. He had told her that he had gotten a divorce from her, but he hadn't. She got pregnant from him, and her family told her that she had to remarry

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[2] In summarizing his mother's testimony, appellant will be referred to by his given name.

him, so they remarried in Avon Park, and Donny was born in a county hospital in Birmingham, Alabama, in January of the following year (28/2978, 2981-83).

While Aneitta was pregnant with Donny, they were continuously on the road from one place to another (28/2982). "After I went back to James, it was two months here, a month there. I couldn't even tell you. Everywhere we went there was problems. He just caused problems" (28/2983). She didn't stay in one place long enough to have a doctor, until she went into labor (28/2982-83). Donny was delivered by C-section, and there were lot of difficulties with the delivery. She and the infant spent two weeks in the hospital, and then went to live in the truck (28/2984).

Asked to explain what she meant, Aneitta said, "It was too cold in the house to keep Donny, so I stayed in the front seat of the truck with Donny to keep him warm" (28/2985). As for her other two children, "I put Ronnie down in the floorboard. And when Jimmy would get too cold, he would come up there with us and sit by the door" (28/2985). This was still in the winter in Alabama, and there was snow on the ground. She told James Sr. she couldn't handle it any more, and they went back to Florida, to Lake County (28/2985).

James wouldn't work, and couldn't work due to his head injury, so Aneitta got welfare and also got a job at the packinghouse. They were living in a trailer over in Mascotte, and the children were left in James' care while she worked (28/2986). James was very abusive to the children, and that included the infant, Donny (28/

2990-91). James also abused Aneitta in front of the children; "one time he beat me with a redwood board and knocked all my teeth out" (29/2990).

When Donny was about three or four months old, James left Aneitta again. One day she came home from work and "there sit Rachel in my house." Rachel was James' girlfriend; he later married her, but it wasn't legal (28/2986-87). James ran off to North Carolina with Rachel, and when he returned he wanted to move back in with Aneitta. When she told him she wasn't going to feed him any more, he got mad and went to HRS. He also had her electricity, water, and gas cut off, telling the utility companies they were moving. Aneitta had no lights in the house, no way of feeding the children, no water to bathe them (28/2988). The oldest boy, Jimmy, got sick, and James' sister broke out all the windows in Aneitta's car (28/2988, 2992):

> Q. [defense counsel]: Okay. Think of the question now, Ms. Bravo. How did HRS get involved in this?
>
> A. HRS come and picked up my kids because I was at the hospital with Jimmy. And I thought that Jimmy had appendicitis. Jimmy is James.
>
> Q. Now, did HRS take all of your children?
>
> A. They didn't get Jimmy. They just got Donny and Ronnie.

(28/2988)

Donny and Ronnie were place in foster care. In the meantime, after she got her car fixed, Aneitta went to Vero Beach to pick oranges. There she met a fellow migrant worker named Artureo Sanchez. They traveled the eastern part of the country, picking

fruits and vegetables in season. They were together for almost two years before the relationship ended, and Artureo was the father of Aneitta's daughter Tonya (28/2989,2991-95,3001).

About 6-8 months after Donny and Ronnie were put in foster care, Aneitta was able to get them back, and the children traveled with her and Artureo (28/2989,2991-96). The older boys were sometimes going to school and sometimes not; when she couldn't get a sitter Jimmy and Ronnie would have to stay home and take care of the babies, Donny and Tonya (28/2996).

After picking tomatoes in Ohio and cutting celery in upstate New York, Aneitta moved to Victoria, Texas and got her own place (28/2994-97). She got a job as a barmaid and later as a cashier, and she also danced as a means of making additional money (28/2997-98). Asked who was taking care of the children, she answered:

> Nobody but me.
>
> Q. And while you are working at the bar who was taking care of them?
>
> A. I'd get baby-sitters.
>
> Q. Do you know who?
>
> A. No. Because I didn't have any baby-sitters. The big kids took care of the little kids.

(28/2998-99).

For the next fifteen years or so, they lived in various locations in Victoria (in south Texas) and in the Dallas/Plano area, with one other brief interval in Mascotte, Florida (28/2999-3000). "The last part of living in Texas, I would go to Dallas. I went different places because I tried to get the kids in a school

where they would go to school. They didn't want to go to school. And I couldn't understand why" (28/3000).

Aneitta testified that Donny was a good baby, but after she got him back from HRS all he wanted to do was cry, and he wouldn't listen (28/3003-04). Then she put him in a migrant daycare center in Ohio, unaware that it was Spanish-speaking. One day she realized her son wasn't speaking English, so she had to learn to communicate with him in Spanish (28/2976,3004).

Soon after she went to Texas, Aneitta met Ascuncio (Santos) Bravo. They lived together for a year "[a]nd then I married Ascuncio because the welfare was going to take my kids again because some kids had beat up Donny with pipes" (28/3004,3001-02). The kids in the neighborhood had beaten him in the head; he was bleeding real bad and had to go to the hospital (28/3004-05).

Santos asked Aneitta to quit the bar and stay home with the kids, and he would work and pay the bills (28/3002). One of the conditions set by the Welfare department was that Donny be enrolled in a Headstart program; they took care of picking him up and bringing him home (28/3005-06).

> Q. . . . Do you know whether or not the Welfare people in Texas made you take Donny to a psychologist or psychiatrist to have him looked at at that early age? Do you remember?
>
> A. I think I did. I sent him to a lot of psychiatrists.

(28/3006)

In kindergarten Donny "erupted the classroom" (28/3007). He was nervous and he couldn't sit still; the doctor put him on

Ritalin (28/3007) Donny failed kindergarten the first time. Eventually they passed him on to first grade because he was getting too old to be in kindergarten (28/3008-09). The next year they moved to the outskirts of town and changed schools, because Donny kept getting in fights (28/3009-10). Donny did even worse in first grade. A lot of times in first and second grade he didn't even go to school, because she didn't have transportation to get him there (28/3010).

Aneitta had gone back to work as a clerk in a convenience store, working various shifts. Asked who was taking care of Donny when he was at home and not in school, Aneitta replied, "I guess one of the older kids, or Sauntral (Phonetically)" (28/3007-08). From the time Donny was four or five years old, and for years thereafter, it was often up to his brothers Jimmy and Ronnie to look out for his physical and emotional well-being, to see that he got his medications, and to teach him what the rules were and to follow them (24/3008,3026-27).

One time when they were painting the house they were living in, Aneitta caught Donny inhaling paint thinner (28/3011).

After a few years her husband Santos got to where he couldn't handle it any more. He left her and the kids and went to Dallas to work. Aneitta went after him to try to get him to come back:

> And I was going up when the kids weren't in school. Because we tried to get them an education but they'd skip school.
>
> He'd come on the weekend and he'd say well, did the kids go to school all week? And I'd tell him yeah. And sometimes they didn't. Because I'd send them to school and then about

> nine or 10:00 they'd come dragging back in the house.

(28/3011-12).

All of the kids did the same thing. She didn't have a car to go see if they were in school. She'd sent them, they didn't make it, and they'd come back saying they were hungry (28/3012).

Eventually, Santos brought the whole family to Plano, outside of Dallas. Throughout the rest of his elementary school years, Donny kept getting in all kinds of trouble (28/3012-13). By the time he was in the sixth grade, he was always just doing what he wanted to do, sniffing paint and getting in problems. Aneitta sent him to school one day and the police brought him home; they said he was on the railroad tracks drinking beer and sniffing paint (28/3013). It got to be more than they could handle. Santos finally just threw up his hands and gave up, and sent Aneitta and the kids back to Victoria, while he remained in the Dallas area (28/3013).

After than, Aneitta often traveled alone to Dallas to try to get Santos to come back and help her with the kids. During these trips the children were unsupervised; "I left them by theirselves. By that time they should have been old enough to take care of theirselves. But they weren't" (28/3014). Ronnie was out of control, so she sent him back to Florida to stay with his daddy, James Crook, but he had to return because he found out that his daddy was dead (28/3014-15).

By the time Donny reached the sixth grade he had attended maybe ten different schools. Asked how many classes he had been thrown out of or required to repeat, Aneitta replied, "More than I

can count." Whenever he would leave one school, she would move to the other side of town to get him in another school (28/3016). She kept being required to come in and meet with teachers; she did that until she got tired of it and then she didn't bother anymore (28/3016-17).

Donny also had to stay out of school "a lot in Texas for getting hit with cars" (28/3018). When he was fourteen, "[h]e was messing around out there on Laurant playing with the school busses", not paying attention, and he ran in front of a moving car and was hit, resulting in a concussion and a broken leg (28/3018-19). Donny dropped out of school in Texas at age fifteen, having gotten only to the eighth grade (28/3018,3023). His siblings, Jimmy, Ronnie, and Tonya, were all dropouts as well (28/3017-18, 3021).

Santos Bravo died when he hit a tractor-trailer. Aneitta didn't think it was accidental; "I think he did it on purpose" (28/3021).

Aneitta moved back to Florida in 1992 or 1993. She put Donny back in school in Avon Park, but he went one day and that was it (28/3017-18). Shortly after they arrived from Texas, Donny "was down playing in the Sebring parking lot", riding his bicycle, and he ran head-on into a car. His head broke the car's windshield. When Aneitta asked him why he did it, he said "I wanted to see how it felt" (28/3020-21).

The defense also called three expert witnesses: a neurologist, Dr. David McCraney; a psychiatrist, Dr. Thomas McClane; and a

clinical psychologist specializing in neuropsychology and brain injury assessment and rehabilitation, Dr. Ralph Dolente. All three testified that the appellant, Donny Crook, suffers from organic brain damage, specifically to the frontal lobe (28/3069-75,3109; 29/3144-45, 3155-57,3164-65, 3201; 29/3207-08,3212,3231-32). Each discussed the causative factors and the behaviors associated with frontal lobe disorders.

Dr. David McCraney is a board certified neurologist (an M.D. specializing in diseases of the brain and nervous system) in private practice in Tampa. He also serves as Medical Director for the Florida Institute for Neurological Rehabilitation, a transitional living facility for patients with brain injuries of a variety of causes (28/3032-35). His work there involves the behavioral aspects of brain injuries (28/3037).

The frontal lobe is the part of the brain most susceptible to injuries and defects. It is involved in planning behavior, directing attention, and controlling impulses. Since the frontal lobe does not control movement, vision, or language to any great extent, a person with such an injury may not give the appearance of being impaired. However, frontal lobe injury affects the person's ability to function within society's norms. "The most common manifestation is that the patient basically loses control over their own behavior" (28/3041-43). There is a subset of brain-injured patients who exhibit what Dr. McCraney calls the "orbital frontal syndrome" (28/3043). [This is the specific neurological condition with which Dr. McCraney diagnosed appellant (28/3069, 3071)].

These patients are irritable and highly distractible; they appear hyper and panicky; and their emotions "may go from sorrow to rage, sometimes in the blink of an eye" (28/3043). However, the single most characteristic feature of orbital frontal lobe injury is impulsivity. This may include violent behavior, sexually inappropriate behavior, stealing, and drug abuse, and it also frequently includes self-destructive behavior; "People with brain injuries are impulsive without even regard to what it's going to do to them-[selves]" (28/3044-45).

Finally, Dr. McCraney testified, people with frontal lobe damage:

> are prone to a certain type of rage attack. It's sometimes called sham rage. S-H-A-M rage. Because it bears little relationship to what incites it.
>
> These patients will fly into rage at the drop of a hat. They may be provoked, although the provocation may be so minor that it's difficult for an observer to establish a relationship.
>
> Observers report that these people are almost animalistic in the way they look. They get this fire in their eyes. They start frothing at the mouth and they just go nuts. I mean, they tear up the house. They whip up on whoever is in the immediate vicinity. Afterwards, when they calm down, they typically claim they don't remember anything about what happened. And the patient's claim of lack of memory often times seems real credible.
>
> The repetivity with which this rage can be turned on and off makes it look almost like an epileptic event. And that's prompted some observers to speculate about whether these rage attacks are seizures. And even though they look like seizures, they probably aren't. However, that sham rage feature is character-

> istic of this type of syndrome. So, I'd say impulsivity and rage.
>
> Q. The impulsivity and rage are two of the features that you look for and see constantly in your treatment of people with frontal lobe damage?
>
> A. That is correct.

(28/3045-46).

People with frontal lobe injuries frequently lack insight into their condition, and it is extremely common for them to resort to self-medication with various street drugs, including cocaine, in order to get rid of the feeling of irritability; "[i]t's like they want to feel comfortable in their own skin" (28/3046-48). This doesn't work, and in fact makes the original problem worse; Dr. McCraney likened it to throwing gasoline on a fire (28/3048-49).

Dr. McCraney next discussed the difference between people with frontal lobe damage and those with antisocial personality disorders. While there is some overlap in behavior, such as impulsivity, lack of remorse, and lack of concern for the needs of others, "I do feel like there's some important differences. And these are some of the criteria that I use in my practice to try to distinguish people with brain injuries from people with character disorders" (28/3049-51). Antisocial individuals consistently act in their own perceived self-interest; they can be mean and nasty, but they can also be pleasant and ingratiating. "[T]hey can turn it on and turn it off at will, depending on what their needs are at the moment":

> Like, for instance, my work at FINR, they always buddy up to me because I have a signif-

> icant amount of influence over when they get discharged from the program. So, they all want to be my friend. This is often the nicest interview I have all day.
>
> Because the brain-injured patients are often mean, hostile, paranoid, irritable, okay. I'm . . . Sometime I feel threatened during these interviews whereas with the antisocial personality types, I never get that from them because they're always acting in their own self-interest.
>
> When we look at impulsive acts, the antisocial personality type is always going to ask "what's in it for me". That's why they're much less likely to engage [in] self-destructive activities, or at least things they perceive as being self-destructive.
>
> I think drug abuse is self-destructive. The patient doesn't see it that way.
>
> But the patient with brain injury will do things that even he doesn't see anything in it for him. All right. So, the person with the antisocial personality disorder may be doing things that I think are destructive but he thinks it's fine.
>
> The brain-injured patient can't take his own side in an argument.

(28/3051-52).

There is also a difference in the nature of the violent acts. Antisocial personality types are often pretty bright individuals, and they can present fairly convincing explanations and rationalizations for their actions. With brain damaged people, on the other hand, you more typically see "this sham rage picture where the intensity of violence appears to have no relationship with the inciting event" (28/3052-54).

The third factor which helps Dr. McCraney to distinguish a brain injured patient from one with a character disorder is the person's history and physical examination (28/3053-54).

People with brain damage, like those with personality disorders, may be prone to malingering and manipulative behavior. Asked by the prosecutor if he comes across these type of folks, Dr. McCraney replied "Are you kidding? This is what we deal with every other Thursday, grand rounds at FINR" (28/3099-3100). Some of the worst con artists he has to deal with are the brain-injured patients at the Institute (28/3108). Thus the fact that appellant is something of a con artist does not change Dr. McCraney's opinion that he is brain damaged (28/3109,3128).

Appellant was referred to Dr. McCraney for a neurological examination, after having previously been evaluated by a psychiatrist and a psychologist, both of whom had raised the concern that something was not right with his brain (28/3055,3114). After reviewing appellant's life history and records, and after performing a series of physical and neurological examinations, Dr. McCraney concluded that appellant is paranoid and impulsive, and that his difficulty arose as a result of organic brain dysfunction rather than any character disorder (28/3071,3109). The specific neurological condition which he diagnosed is orbital frontal syndrome (28/3071).[3] From his examination and review of the

[3] Dr. McCraney testified that the DSM IV does not contain entries for neurological conditions such as orbital frontal syndromes. Using the DSM, appellant "might fit under an impulse control disorder or under organic brain syndrome. But that lacks specificity I would use" (28/3071).

records, Dr. McCraney also concluded that appellant is of subnormal intelligence and is mildly retarded, and that he has suffered from impulsivity from a very early age (28/3057, 3069-70).

The tests have built-in mechanisms to ascertain whether an individual is faking. Dr. McCraney was able to determine that appellant was not trying to fake him out on any neurological findings. "I can't really comment one way or the other on whether he was trying to exaggerate the severity of a psychological illness or not. . . . But at least with regard to brain or nervous system injuries, he didn't try to feign any of those signs during my evaluation" (28/3110-11).

As to the question of causation of appellant's brain damage, Dr. McCraney noted genetic and environmental factors, and also head trauma resulting from the incident at age five when he was beaten with a pipe (28/3060-61, 3117). Most frequently, frontal lobe injuries are congenital. In addition, appellant's problems were likely exacerbated by parental neglect during his early childhood and important formative years, and by his drug abuse from a very early age (28/3061, 3064-65). Dr. McCraney explained:

> [A] child with a bad frontal lobe is difficult to raise under ideal circumstances. I have encountered this in families who had adopted children with genetically determined frontal lobe injuries. But if it's difficult to raise a child like this under ideal circumstances, it's virtually impossible under poor circumstances.

(28/3065).

Regarding the statutory mental mitigating factors, Dr. McCraney testified that appellant's brain disorder has resulted in

extreme emotional disturbance; in fact, one of the worst cases of emotional disturbance he has seen (28/3073). Asked whether appellant's ability to conform his conduct to the requirements of law was substantially impaired, Dr. McCraney replied, "Yes. The hallmark of the type of brain damage that I have diagnosed in this case is an inability to govern your own conduct in certain situations", and this is one of appellant's handicaps (28/3074).

> DR. McCRANEY: . . . So, in some circumstances people with frontal lobe injuries are not able to choose how they are going to act.
>
> Q. [defense counsel]: And what happens in those cases? Is that when you're talking about the sham rage?
>
> A. Exactly.
>
> Q. And is that person truly under control of himself? Can he control what he does when those things occur?
>
> A. No.

(28/3075).

Dr. McCraney found that the circumstances of the homicide (which he had not been privy to at the time he did his neurological examination) were consistent with his diagnosis of brain damage; "the events do appear to conform to this blind animalistic rage that's described with the orbital frontal syndrome" (28/3115, see 28/3079-80, 3113-15).

Dr. Thomas McClane[4] is a general and forensic psychiatrist, with a sub-specialty in the fields of pharmacology and drug

[4] Dr. McClane's name is erroneously spelled McClain in the transcript.

addiction (29/3138-41). He examined appellant on two occasions (29/3141,3143). According to Dr. McClane "[h]is situation was a complex one. At times he seemed to be faking things" (29/3142). From his history, he appeared to have probable neurological brain damage, as well as attention deficit disorder, and possibly other neuropsychological abnormalities. For this reason, Dr. McClane thought it necessary to get both neuropsychological testing (for which he referred him to Dr. Dolente) and an evaluation by a behavioral neurologist (for which he referred him to Dr. McCraney) (29/3142). Dr. McClane testified that he sees about 120 criminal defendants per year, and typically only refers one, two, or three of these to a neurologist (29/3142).

Dr. McClane described appellant as "an unusual case, an unusual person. Different from the run of the mill. More difficult to understand" (19/3142). McClane's overall impression is that of brain damage arising from a combination of causative factors; "[d]ifficult to characterize in the sense of specifying the exact parts of the brain. Not so difficult to characterize in that the behavior patterns are perfectly consistent with diffuse brain damage" (29/3144-45).

Dr. McClane cited five factors (four of which he found to be applicable to appellant) which can cause or contribute to organic brain damage: (1) genetics; (2) pregnancy and birth process (the one which was of little importance in this case); (3) head trauma; (4) neglect and socioeconomic deprivation; and (5) substance abuse (29/3144-48). Regarding genetic factors, appellant has a low IQ

which has been tested in the 60s and low 70s (29/3145). His father couldn't read or write. Both brothers are school dropouts and there is a strong family history of learning disorders. Appellant has been diagnosed by Dr. McClane and others with attention deficit hyperactivity disorder, which is largely genetic (29/3145-46). As far as head trauma, there have been several documented episodes (including the incident at age five when he was severely beaten with a pipe), and some other possible episodes (29/3146). Neglect and deprivation, especially when it occurs very early in life, can cause brain changes resulting in an organic syndrome (29/3147). Appellant, as a child, appeared to have had "a pretty disruptive time of it" in his early years with his mother's absences, inconsistent father figures, occasional troublemaking appearances by the biological father, a lot of violence in the extended family, the family's migrant life-style (29/3161-62). And as to the last factor, substance abuse, appellant "was involved in sniffing or huffing various organic solvents" such as paint thinners and the like. This is well documented to cause brain damage in some people. According to Dr. McClane, "The larger the dose and the more frequent, the more brain damage later" (29/3147-48). Alcohol can also cause serious brain damage in some people, although it may not cause brain damage in other people. In appellant's case:

> [t]here's been significant abuse of other drugs, some with heroin. More commonly for him with cocaine, marijuana, and amphetamines. But alcohol has been the . . . [m]ajor one available and the one that he's used extensively.

(29/3148).

All of these factors -- genetics, environmental deprivation, head trauma, and substance abuse -- can interact with each other and make the resulting brain damage worse (29/3148,3156-57,3161). This, in Dr. McClane's opinion, is the case with appellant; causing microscopic frontal lobe changes which interact with his attention deficit hyperactivity disorder, his long history of substance abuse, and his intoxication at the time of the offense (29/3157).

The factors which Dr. McClane discussed actually cause biochemical and physiological changes in the brain. Sometimes these can be obvious, like a big tumor, "[b]ut when there is diffuse brain damage it's very difficult to pick up by scans and electroencephalography and by neuropsychological testing" (29/3151). In appellant's case, Dr. McClane could not pinpoint the exact location, but he thought it was probably frontal lobe damage (29/3155-57). This is the part of the brain which, when it is working properly, enables people to control their urges and impulses (29/3155-57).

Dr. McClane's bottom-line opinion is that appellant has a personality disorder with antisocial traits, secondary to a combination of brain damage and severely adverse socioeconomic circumstances (29/3149,3201). His intellectual functioning is borderline, meaning "on the border between the low limits of normal and mental retardation" (29/3148-49). In addition, he has attention deficit hyperactivity disorder (29/3149). He has impulsivity and anger control problems, poor judgment, low self-esteem, difficulty in interpersonal relationships, manipulativeness

(29/3149-50). Finally, appellant's brain damage "would render him hypersensitive to the usual negative effects of alcohol and other drugs" (29/3150). The substance abuse would magnify the symptoms you would normally see in a brain-injured person in two ways. First, chronic drug and alcohol abuse may literally increase the degree of brain damage. Second, the effects of intoxication tend to be much greater and more severe in a person who is brain damaged (29/3150-51).

Dr. McClane testified that appellant's problems, including his brain damage, are not curable (29/3159-60). If he had received adequate treatment at an early enough age -- if he had had stability in the home, and regular school attendance, and no drug abuse -- then perhaps "the probabilities would be a little higher of his having a better shot at being a closer to normal person" (29/3160). There is "[n]ot a whole lot" that can be done for somebody like appellant; medication might help some if he stayed off street drugs and alcohol (29/3159,3162). Dr. McClane noted that at the time of the trial appellant was on three different medications: an antidepressant, and antipsychotic, and a pain medication. This explains why he was able to sit through the trial and remain fairly calm and quiet (29/3162).

Regarding the statutory mental mitigating circumstances, Dr. McClane testified that appellant was under extreme mental or emotional distress at the time of the offense (29/3163,3201-02). The conglomeration of factors would make him highly vulnerable to any stressful situation, and he "would tend to overreact, as has

been his history throughout his life" (29/3163). This would be even more so, in light of his intoxication with alcohol and cocaine (29/3163-64).

As to the second mental mitigator, defense counsel asked:

> Would those same factors substantially impair Donny's ability to appreciate the criminality of his conduct?
>
> DR. McCLANE: Yes. It wasn't my opinion that it obliterated that or there might have been an insanity defense here.
>
> Q. Sure. But this isn't insanity?
>
> A. This is not an insanity issue. But nevertheless, his ability to think clearly and appreciate these things, in my opinion, was substantially impaired not only by his intoxication but by his increased sensitivity to intoxication, and all of the factors that I mentioned earlier that have made him what he is today, namely his brain damage problem.
>
> Q. And finally, would his ability to conform his conduct to the requirements of law be substantially impaired based on all of these factors?
>
> A. If his ability to appreciate the criminality of his conduct was substantially impaired, his ability to control his impulses, etcetera, in other words, to conform his behavior, was much more impaired.
>
> It is in general . . . We've just gone through a long litany of discussions of his life where impulsivity and difficulty controlling impulses has been a persistent problem.
>
> As all of us know, from either having something to drink ourselves or watching friends, or enemies, who are intoxicated, we know that most people who are intoxicated have decreased control of their impulses. And somebody who is brain damaged is more sensitive than the average person to that intoxication and to that, that increased difficulty

controlling impulses. So, that's even more impaired, in my opinion.

Q. And those things all fit Donny Crook?

A. I didn't hear you.

Q. That description fits Donny Crook?

A. Yes.

(29/3164-65).

Dr. Ralph Dolente is a clinical psychologist. The bulk of his post-doctorate level experience has been in the areas of brain injury assessment and rehabilitation (29/3204-06). He examined appellant on two occasions, interviewed his mother, and reviewed extensive medical and school records (29/3206-07).

Dr. Dolente testified "I go into assessments open-minded not necessarily expecting to find anything" (29/3209). During the first examination, appellant "essentially blew me off"; trying to fake in an obvious and unsophisticated way (29/3209-10). Dr. Dolente told him "Take care, have a good day" (29/3210). Six months later, he examined appellant again and got an accurate assessment (29/3210-12). After administering a series of tests, Dr. Dolente concluded that appellant is brain damaged in his frontal lobe (29/3209,3212-14). Moreover, there were clear indications in the records that he had organistic brain damage from a very early age. "Organistic" means brain impairment as a result of trauma or some embolic event such as a rupture of a vessel. When appellant was five, he sustained what appeared to be a significant brain injury from being struck on the head with a pipe (29/3208,3214,3216). In addition, Dr. Dolente gleaned from

appellant's mother that he had a history of accidental head injuries and had been banged around a lot as a kid (29/3216,3229).

Even in the most organized and well structured families, it is difficult for parents to cope with the behavior of a brain damaged child (29/3216-17). And appellant's home environment was anything but structured:

> . . . [W]hen a brain is injured, the more structure you can give it, the more structure you can give an individual, the better they will do. In this case, he was very disadvantaged in that sense.

(29/3217).

Appellant grew up in abject poverty and neglect, with early exposure to violence and alcoholism. The family moved frequently, and there was a lot of absenteeism from school. This instability, Dr. Dolente stated, would worsen the symptoms of his brain injury, and would manifest itself in the inappropriate and out-of-control behaviors that are well documented in his background (29/3217-18,3227). Substance abuse also made his problem worse. Appellant was huffing paint thinner and gasoline as early as age eight (29/3218-19,3229).

In school, appellant was put into the emotionally handicapped track and a learning disability track. Dr. Dolente thought that was probably not inappropriate, "[b]ut his problem was more than that. I think it was organically based" (29/3224). Brain damaged children such as appellant are not often identified or treated as such; instead they are placed in programs due to their behavioral problems, and they generally don't do well (29/3225,3228).

Appellant has a record of very poor academic achievement, and he presently reads at a first-grade level (29/3230). He also has attention deficit hyperactivity disorder, but Dr. Dolente does not see this as his major problem (29/3222-23). Rather, his main diagnosis is an organic personality disorder secondary to recurrent, traumatic brain injury, with antisocial and impulsive features, along with polysubstance abuse (29/3207,3223,3238-39,3242-43). Dr. Dolente believes that the specific location of appellant's brain impairment is in the frontal lobe (29/3231).

According to Dr. Dolente, the problem with brain injury is one of being able to conform your behavior and react appropriately. Brain injured people tend to overreact; when provoked or overstimulated they can easily go into a rage and lose control (29/3230-32). Therefore, to a degree, appellant's brain injury, in combination with his socioeconomic deprivation and substance abuse, would have impaired his ability to control his impulses and conform his conduct to the requirements of law (although his ability to appreciate the criminality of his conduct would not necessarily have been impaired) (29/3231,3233-34). Similarly, in such situations, he is "prone to being more under extreme emotional distress than we would be, or an individual, say, who has a fully functioning brain" (29/3233).

On cross-examination of Dr. Dolente, the prosecutor asked:

> You indicated that people with brain damage are prone to stress, if they are provoked.

A. Yes, ma'am. To a degree. More so than, say, folks who didn't have a brain injury. Correct.

Q. Okay, Well, let's go to this particular case, Dr. Dolente. A criminal case. A man sitting on a bar stool looking at the bartender. And he sees her counting money. Is that a provocation?

A. No. I would say, no.

Q. And he sees, by golly, that she's got money and he would like to have some. Is that a provocation?

A. No.

Q. And he gets up and walks over and he locks the door. Is that provocation?

A. No.

Q. And very quickly that bartender is knocked to the floor bleeding. Is that provocation?

A. No. What happened between the time the door was locked and she was knocked to the floor?

Q. Well, to tell you the truth, we are not certain.

A. Not sure.

Q. Because there were two people there. We do know . . .

Have you seen the photographs associated with this case?

A. I have seen the photographs.

Q. Okay. Have you seen the photographs that show, basically, there are clearly three areas of bloodletting?

A. Again, I didn't go over them with fine detail. I just kind of looked at them a little.

Q. Okay. We know by way of the photographs in this case that there is an area of bloodletting suggesting that a person is there, without disturbance, sufficient time to spill blood. Probably twice the size of a gallon pickled egg container. Gallon any kind of container, okay. Sufficient and significant pool of blood.

There is another area which is of disturbed blood. Kind of in the middle of an alleyway that runs behind the bar.

A victim who, apparently, was on her feet by way of the blood on her feet and the blood coming down her shirt. And we know in this area that that victim is stabbed, is beaten to the ground.

Then we know there is another area down towards the little entryway, back behind that counter. And at this area there is a large pool of blood. There's dentures that, in fact, have been kicked from her mouth and a lot of bloodletting.

And then we know that from that location that body is pulled, perhaps, 10 feet away. And her clothing is disarranged.

We know by way of Medical Examiner's report and the blood spatter expert that at this point in time that's a defenseless woman. And her clothing is disarranged and a pool cue is placed in her vagina and driven from her vagina to her brain.

The provocation you see, sir?

A. Again, as you relate that story, I'm not able to point my finger at one specific thing and say this was a trigger. I don't know what happened, obviously. But, obviously, the motive was robbery.

MS. HUGHES: Dr. Dolente, I have no further questions. Thank you, sir.

(29/3263-65).

The defense rested and the prosecutor was asked if she had any rebuttal (29/3266). Although she had indicated the day before that she planned on calling Dr. Kremper -- who had examined appellant at the state's request during the interval between the guilt and penalty phases -- the prosecutor stated "Your Honor, I, in fact, have Dr. Kremper in the hall. Based upon the testimony of Dr. Dolente, the State of Florida will rest at this time" (29/3266-68; see 28/3130; 6/1059,1118-20; 7/1121-23).

In her penalty phase closing argument, the prosecutor acknowledged that the evidence established that appellant "had a terrible home life from a very early age", and that he has some brain damage; "[t]he question is: What weight will you give to that" (29/3284). She argued:

> And I would ask you to consider for yourselves the impact of some of the issues as it regarded brain damage -- as Dr. McCraney said, the presence of a bad brain -- and what it has to do with this case. Which, I believe, if you think about it, there is no perfect world.

(29/3284-85).

On the theme of her cross-examination of Dr. Dolente, the prosecutor argued:

> I would ask for you to consider the testimony of Dr. Dolente. <u>You heard a lot of testimony regarding frontal lobe damage, brain damage and the rages that occur with persons who have this type of brain damage.</u>
>
> And Dr. Dolente, simply responding to the facts of this case and not the history of school records and medical records, but to the facts of this case, what provocation occurred that contributed and controlled and directed the behavior of Donny Crooks on the 14th day of March, 1996? Nothing in the environment

> that said Donny Crooks you have got to decide to commit a Robbery. That was simply provoked by his own self interests in taking from someone else. And, in fact, he got up and locked the door in order to begin.
>
> And what provocation present to control and generate the violent actions towards Betty Spurlock? Dr. Dolente could think of nothing as a trigger, as he put it. And I think that probably is unfair to this Defendant, Donny Crook. Because I believe you probably know, by way of your consideration of the facts of this case, that Betty Spurlock did regain her feet and did try to struggle for her own life. And I would ask you: What weight will you give that when you think about justification for Donny Crooks stabbing her and beating her to the ground? A human being who is fighting for her life, is that a provocation for the violence that you see in this case?

(29/3286-87) (emphasis supplied).

Defense counsel, in closing argument, pointed out that the prosecutor never asked Dr. Dolente whether getting whacked across the forehead with a cue stick (the prosecutor's own guilt phase theory as to the event which sent the assailant into "[t]he kind of anger, kind of retaliation well beyond a simple Robbery or Sexual Battery" (25/2602-03)) could have triggered appellant into a rage (29/3299-3300).

During its deliberations, the jury submitted the following question: "The jury requests information on the life without possibility of parole sentence. Does this actually and really mean that Donny Crook will never get out of jail?" (29/3316). The judge told counsel that, in accordance with Whitfield v. State, 706 So. 2d 1,5 (Fla. 1997), he would simply re-read the jury instruction that the punishment for the crime is either death of life imprison-

ment without the possibility of parole. Defense counsel suggested that Whitfield leaves it to the trial court's discretion, and he initially requested that the judge respond affirmatively to the jury's question, and tell them that "life means life" and there is no mechanism for parole in Florida. Defense counsel subsequently stated that the trial judge's proposal to re-read the instruction was acceptable, and the judge then did so (29/3317-24).

The jury returned an advisory verdict recommending, by a 7-5 vote, that appellant be sentenced to death (29/3326;7/1165).

At the Spencer hearing prior to sentencing, by agreement of the state and the defense, appellant's medical records (7/1247-1319; 8/1320-1514; 9/1515-1640) and school records (9/1641-1709; 10/1710-1904; 11/1905-1995) were submitted for the trial court's review (11/2001,2003,2009). Included in the medical records was a psychological evaluation prepared by Dr. William Kremper -- the expert whom the state had planned to use as a rebuttal witness but ultimately chose not to call -- for a Social Security disability determination in 1994 (7/1250; 8/1432-53). Appellant was tested on the Wechsler Adult Intelligence Scale, resulting in an overall IQ score of 66 (verbal - 62 and performance - 73) (8/1435,1438,1441, 1446). Dr. Kremper's diagnostic impression included organic hallucinosis; alcohol and cocaine abuse; cannabis dependence; antisocial personality disorder; inhalant dependence, in remission; and mental retardation, mild (8/1436,1438). "Mr. Crook was not considered capable of maintaining employment within a competitive work setting due to his severe cognitive, emotional, and behavioral

deficits. He was unable to tolerate routines, had severe verbal memory difficulties and was not considered able to follow simple instructions on a consistent basis. With minor frustration he was likely to become physically aggressive" (8/1436). Appellant was rated as meeting the criteria for an organic mental disorder (8/1437-38) and/or an organic personality disorder (8/1438-39). "Is worried that others will get him. He cannot read or write, has trouble explaining things to others. Argues with everyone, poor impulse control and/or temper control. Easily confused. Marked social and personal/behavi[or]al deficits" (8/1438). The diagnosis was "Organic Mental disorder with polysubstance abuse and antisocial personality disorder. The cl[ient] has had marked social and personal deficits for many years and poor academic skills. The cl[ient] appears to meet the criteria 12.02 and 12.05. Recommend a third party payor" (8/1438). [Category 12.02 is Organic Mental Disorders. Category 12.05 consists of Mental Retardation and Autism (8/1437)].

On November 24, 1998, the trial court sentenced appellant to death for the murder, and imposed concurrent terms of life imprisonment for the robbery and sexual battery (11/2017-23,2045-46,2077). As aggravating factors, the trial court found (1) that the capital felony occurred during the commission of a sexual battery; (2) that it was committed for pecuniary gain, and (3) that it was especially heinous, atrocious, or cruel (11/2028-32). The judge accorded great weight to the HAC aggravator (11/2032).

As statutory mitigating factors, the trial court found (1) appellant's age of 20 at the time of the offense (slight weight); (2) extreme mental or emotional disturbance (moderate weight); and (3) impaired capacity (moderate weight) (11/2033-36). In his findings on the mental mitigating factors, the trial judge commented:

> 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. There were additional factors on the date of the homicide however involving the defendant's use of alcohol and controlled substances. In addition to the defendant's conduct disorder (the term used for a minor), anti-social personality disorder (the term used for an adult), the defendant on the date of the homicide was using alcohol and by his uncorroborated statement was also using cocaine. Indeed the motivation of the robbery in this case was a desire on the defendant's part to acquire more crack cocaine.

(11/2035-36)(emphasis supplied).

As mitigating factors arising from appellant's background, the trial judge found: (4) his love for his family, despite its dysfunctional nature, and their love for him (slight weight); (5) his learning disabilities and impaired educational experience (slight weight); (6) childhood environmental conditions, and both parents were "abysmal failures as parents" (moderate weight); (7) life spent in abject poverty (slight weight); (8) "terrible home life" (moderate weight); (9) absence of a role model (moderate weight); (10) various psychological and social dysfunctions, excluding brain

damage (slight weight); (11) frustration of educational attempts (slight weight); (12) long history of substance abuse (slight weight); (13) traumas involving violent deaths in his family (slight weight); (14) virtual abandonment as a child into the care of his two older brothers, both of whom had their own social and physical difficulties (moderate weight); (15) the absence of any significant history of violence (slight weight) (11/2037-43).[5] As he had stated in his findings on the statutory mental mitigators, the trial judge reiterated his conclusion in his findings on the background mitigators that "[n]o evidence established that the defendant exhibited severe symptoms of brain damage" (11/2041)

SUMMARY OF THE ARGUMENT

Even more so than in Cooper v. State, 739 So. 2d 82 (Fla. 1999), this Court cannot conclude on this record that the present crime is one of the least mitigated first degree murders it has reviewed. The record shows just the opposite. This is not a case which turns on the trial court's, or this Court's, resolution of conflicting evidence. To the contrary, the mitigation here is compelling, unrebutted, and causally connected to the crime. On the critical issue of organic brain damage, and the important issue of borderline mental retardation, the trial court's order simply

[5] The trial judge also found and gave slight weight to several nonstatutory mitigating factors: appellant did not flee the county or the state and did not resist the police; his pretrial and courtroom behavior was good despite his serious emotional problems; and at least one of his taped confessions reflected true remorse for his actions (11/2043-45).

ignores or mischaracterizes the mitigating evidence. This Court is not bound by the trial court's errors of law or fact, and it can properly apply the proportionality standard on this record.

While, as in Cooper, the aggravation prong of the proportionality standard is met in this case, the "least mitigated" prong is clearly not met. In light of (1) appellant's age of 20; (2) his lack of any significant history of violent behavior; (3) his childhood marked by abject poverty, neglect, and deprivation; (4) his borderline mental retardation and severe learning disabilities; (5) his long history of drug and alcohol abuse; (6) his intoxication from alcohol and cocaine at the time of the crime; (7) his organic brain damage, which resulted in extreme mental or emotional disturbance (described by Dr. McCraney as one of the worst cases of emotional disturbance he's seen), and impaired his capacity to control his conduct; (8) the fact that the killing was unpremeditated, and was committed in a rage when appellant became frustrated or was hit by the victim during an unplanned robbery attempt; (9) the closeness of the jury's penalty recommendation (vote 7-5); and (10) the jury's question during deliberations about whether life imprisonment really means life imprisonment, the appropriate sentence in this case is life imprisonment without the possibility of parole.

ARGUMENT

ISSUE

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE IN LIGHT OF THE UNPREMEDITATED NATURE OF THE HOMICIDE, HIS LACK OF ANY SIGNIFICANT HISTORY OF VIOLENCE, AND THE OVERWHELMING AND UNREBUTTED EVIDENCE IN MITIGATION.

A. The Killing was not Premeditated

The killing of Betty Spurlock by appellant was not premeditated.[6] This admittedly does not entitle appellant to any relief with regard to his conviction of first degree murder[7], but -- especially in view of the compelling mitigating evidence -- it is of great importance with regard to the disproportionality of the death sentence.

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[6] For purposes of this appeal, undersigned counsel concedes the issue of identity. No issues challenging the conviction, and no guilt-phase evidentiary issues, are raised in this appeal.

[7] This Court has held that where a conviction of first degree murder is based on a general verdict of guilty, and where the evidence is sufficient on one of two theories (either felony murder or premeditation) but is insufficient on the other theory, the conviction may be upheld. Mungin v. State, 689 So. 2d 1026, 1029-30 (Fla 1995); see also Griffin v. United States, 502 U.S. 46 (1991). While the reasoning of Mungin may be subject to challenge in an appropriate case [see e.g. Justice Anstead's dissenting opinion in Mungin, 689 So. 2d at 1032-37; Commonwealth v. Plunkett, 664 N.E. 2d 833, 837 (Mass. 1996); People v. Guiton, 847 P. 2d 45 (Cal. 1993)], in the instant case appellant was also found guilty on separate counts of robbery and sexual battery. Therefore, while appellant's motion for judgment of acquittal as to premeditated murder should have been granted, it can be assured on the facts of this case that he would have been convicted of first degree murder anyway, on a felony murder theory.

Under Florida law, premeditation means "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." Spinkellink v. State, 313 So. 2d 666 at 670 (Fla. 1975), quoting from McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957). See also Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986); Tien Wang v. State, 426 So. 2d 1004, 1005 (Fla. 3d DCA 1983). Reflection is an integral requirement for premeditation. Waters v. State, 486 So. 2d 614, 615 (Fla. 5th DCA 1986).

Premeditation is "more than a mere intent to kill; it is a fully formed conscious purpose to kill"; this purpose may be formed a moment before the act, but it must also exist for a sufficient length of time to permit reflection. Green v. State, 715 So. 2d 940, 943-44 (Fla. 1998); Norton v. State, 709 So. 2d 97, 92 (Fla. 1997); Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997); Wilson v. State, supra, 493 So. 2d 1021 (Fla. 1986). Circumstances which may be relevant to prove or controvert premeditation include:

> 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.

Green v. State, supra, 715 So. 2d at 944; Holton v. State, 573 So. 2d 284, 289 (Fla. 1990); Larry v. State, 104 So. 2d 352, 354 (Fla. 1958). And, as this Court explained in Coolen:

> While premeditation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). Where the State's proof fails to exclude a reasonable hypothesis

> that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Hall v. State, 403 So. 2d 1319 (Fla. 1981).

606 So. 2d at 741.

In the instant case, the state presented no evidence in the guilt phase to establish that appellant acted with a premeditated design to kill Betty Spurlock, formed upon reflection and deliberation. There was evidence that appellant had been drinking; perhaps as much as a fifth of Tequila and the better part of a case of Old Milwaukee (15/627,633; 23/2195). There was evidence that he was also high on rock cocaine, and when he saw Betty Spurlock counting money he made a spur of the moment choice to rob her so he could get more rock (16/809-10; 23/2080,2193,2195,2197). He locked the front door, which, as the prosecutor argued, goes to premeditation of the robbery (see 15/687,700-02; 24/2394; 25/2581). There were no witnesses to the events immediately preceding the homicide.[8] There was no evidence or statements indicating any preconceived plan to kill.[9] There was no evidence of any previous difficulties between appellant and Spurlock. There was no evidence of a motive for killing her.[10] [If the state argues witness elimination as a

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[8] See Green v. State, supra, 715 So. 2d at 944; Norton v. State, supra, 709 So. 2d at 92; Mungin v. State, 689 So. 2d 1026, 1028 (Fla. 1995); Kirkland v. State, 684 So. 2d 732, 733 (Fla. 1996).

[9] See Green, 715 So. 2d at 944; Mungin, 689 So. 2d at 1029; Kirkland, 684 So. 2d at 735.

[10] See Norton v. State, supra, 709 So. 2d at 92 (while motive is not an essential element of homicide, where proof of premeditation depends on circumstantial evidence, motive or lack of motive may become important).

motive it will be sheer unfounded speculation. At trial, the prosecution never argued any witness elimination theory to the jury or judge, and never even requested a jury instruction in the penalty phase on the witness elimination aggravating factor. Moreover, there was evidence that Eva Johns looked into the open front door of the bar just minutes before the robbery and murder must have taken place, and she and appellant recognized each other (see 15/645-46; 22/2016-17; 24/2341,2343). It would make little sense (assuming appellant even when sober would have the ability to think it all out) to murder Betty Spurlock for the purpose of eliminating her as a witness to her own robbery, when Eva Johns would be able to place him in the bar and incriminate him for both robbery and murder].

Not only did the state's guilt-phase evidence fail to prove premeditation, it was the prosecutor herself -- in her closing statement to the jury -- who provided a theory consistent with an unpremeditated murder. The prosecutor suggested to the jury that it could reasonably infer from the evidence that this is how the homicide occurred:

> This is a case, however, that seems to be particularly consistent with an acknowledgment that in the course of that Robbery this Defendant got pissed off. Perhaps it was simply the anger generated by having a cash drawer that he couldn't get open. Having in his hand money that he couldn't get to. Perhaps in this case there is another potential for - and excuse my language - but potential for being pissed off.
>
> Let me show you what's marked as State's Exhibit Number 12. You've certainly seen it before. And it is the person of Donny Crook

> on the 15th day of March, 1996 when he's taken to the hospital and all of his injuries are recorded. And one of the injuries that you see in photograph 12-D. An obvious bump on his head and a laceration associated with it.
>
> And one thing you know about that particular injury is that he explained it to Dr. Spindler and he said, I banged my head on an air compressor at the Texaco Station. Detective Murray kind of shakes his head because he had heard two other explanations for the injury. One was he had hit it on a limb and the other one was he had hit it on a door frame.
>
> A couple things. Betty Spurlock has obvious stab wounds to her neck. She had obvious stab wounds to her abdomen. Dr. Melamud said well, the trauma from the instrument that was involved there, it had one side that was fairly blunt and one side that was fairly sharp. And it seems to come in pairs.
>
> And what do we know about Betty Spurlock and what she had been doing that afternoon? She had been cutting hair. An object, a pair of scissors that might be in her possession. In fact, perhaps used by Betty Spurlock in an attempt to defend herself and taken from her.
>
> Betty Spurlock beaten in this area. One of the things you notice is <u>a pool cue wrapped with tape, a type of an object available for Betty Spurlock to wack Donny Crook right across the forehead that evening in her own defense. Sufficient, in fact, to piss off her assailant.</u>
>
> And the carnage begins. As she, in fact, is stomped. The jaws broken, drug and this pool cue, intact at that time, shoved from vagina to forehead. The kind of anger, kind of retaliation well beyond a simple Robbery or Sexual Battery.

(25/2601-03).

Where is the necessary evidence of reflection and deliberation? Appellant may have had <u>time</u> to reflect during the course of

this rage attack, if he had paused to think about what he was doing. But merely having time to deliberate is not the same as evidence that the defendant did deliberate. See State v. Bingham, 719 P. 2d 109, 113 (Wash. 1986) (noting that "[o]therwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection"). See also Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988), recognizing that "[a] rage is inconsistent with a premeditated intent to kill someone, and there was no other evidence of premeditation."

The manner in which the homicide was committed, and the nature and manner of the wounds inflicted, are just as consistent, if not more so, with an unpremeditated eruption of rage than with a deliberated murder. No weapons were brought to the scene or procured in advance. See Kirkland v. State, 684 So. 2d 732, 735 (Fla. 1996). As the prosecutor pointed out, the weapons used were those at hand; quite probably when Ms. Spurlock resisted the robbery attempt. The evidence of premeditation in the instant case is significantly less than the evidence which this Court found legally insufficient in Green v. State, supra, 715 So. 2d at 941-44. In Green the murder victim's body showed evidence of stab wounds and blunt trauma, but the cause of death was manual strangulation. Her nearly nude body had been dragged from the side of the road and displayed in the middle of an intersection with her legs spread apart. The state presented several witnesses who testified to hearing Green proclaim in a fit of rage that he was

going to kill the victim. Nevertheless, this Court determined that "the nature of [the victim's] wounds and the testimony regarding Green's alleged statement are insufficient evidence of premeditation in light of the strong evidence militating against a finding of premeditation. See Kirkland, 684 So. 2d at 732 (premeditation not found despite evidence of a prolonged attack against the victim and a history of friction between the victim and the defendant) . . . ." 715 So. 2d at 944.

Also militating against a finding of premeditation in the instant case are appellant's frontal lobe brain damage[11]; his resulting impulsiveness, especially when frustrated; his intoxication from alcohol and cocaine (which worsens the effects of his brain damage); and his exceedingly low intelligence. Most of this evidence came in in the penalty phase rather than the guilt phase, and therefore may not pertain to the motion for judgment of acquittal. However, since undersigned counsel is not challenging the conviction of first degree murder, but is only seeking reversal of appellant's death sentence on proportionality grounds, the penalty phase evidence concerning appellant's mental condition is extremely relevant to the nature and circumstances of the crime.

In other words, the guilt phase evidence both (1) failed to prove premeditation and (2) left open a reasonable hypothesis consistent with an unpremeditated murder. Then, the penalty phase

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[11] Appellant recognizes that the trial court refused to find that brain damage was proven, but this was plain and prejudicial error. The evidence of brain damage, as well as its effects on this crime, was overwhelming and unrebutted. See Part B.

evidence filled in the gap, by explaining how an attack of blind rage triggered by minor frustration was entirely consistent with appellant's life history, his medical condition, and his state of intoxication.

All of the experts in this case reached the same conclusion, that appellant suffers from frontal lobe brain damage. Dr. David McCraney is a board certified neurologist who, in addition to his private practice, serves as medical director of the Florida Institute for Neurological Rehabilitation, a residential facility for brain injured patients. His work there involves the behavioral aspects of brain injuries (28/3032-37). Dr. McCraney diagnosed appellant with orbital frontal syndrome (28/3043,3069,3071). The frontal lobe is the part of the brain which controls the planning of behavior, as well as directing attention and controlling impulses (28/3041). Persons with orbital frontal syndrome are irritable and highly distractible; they appear hyper and panicky; and their emotions "may go from sorrow to rage, sometimes in the blink of an eye" (28/3043). However, the single most characteristic feature of orbital frontal lobe injury is impulsivity.

Dr. McCraney testified that people with frontal lobe damage:

> are prone to a certain type of rage attack. It's sometimes called sham rage. S-H-A-M rage. Because it bears little relationship to what incites it.
>
> These patients will fly into rage at the drop of a hat. They may be provoked, although the provocation may be so minor that it's difficult for an observer to establish a relationship.

> Observers report that these people are almost animalistic in the way they look. They get this fire in their eyes. They start frothing at the mouth and they just go nuts. I mean, they tear up the house. They whip up on whoever is in the immediate vicinity. Afterwards, when they calm down, they typically claim they don't remember anything about what happened. And the patient's claim of lack of memory often times seems real credible.
>
> The repetivity with which this rage can be turned on and off makes it look almost like an epileptic event. And that's prompted some observers to speculate about whether these rage attacks are seizures. And even though they look like seizures, they probably aren't. However, that sham rage feature is characteristic of this type of syndrome. So, I'd say impulsivity and rage.
>
> Q. The impulsivity and rage are two of the features that you look for and see constantly in your treatment of people with frontal lobe damage?
>
> A. That is correct.

(28/3046-46).

With brain damaged people, in contrast to those with antisocial personality disorders, you more typically see "this sham rage picture where the intensity of violence appears to have no relationship with the inciting event" (28/3052-54).

People with frontal lobe injuries frequently lack insight into their condition, and it is extremely common for them to resort to self-medication with various street drugs including cocaine, in order to get rid of the feeling of irritability; "[i]t's like they want to feel comfortable in their own skin" (28/3046-48). This doesn't work, and in fact makes the original problem worse; Dr. McCraney likened it to throwing gasoline on a fire (28/3048-49).

Dr. McCraney testified that appellant's brain disorder has resulted in one of the worst cases of emotional disturbance he has ever seen (28/3073). He also stated, "The hallmark of the type of brain damage that I have diagnosed in this case is an inability to govern your own conduct in certain situations", and this is one of appellant's handicaps (28/3074).

> DR. McCRANEY: . . . So, in some circumstances people with frontal lobe injuries are not able to choose how they are going to act.
>
> Q. [defense counsel]: And what happens in those cases? Is that when you're talking about the sham rage?
>
> A. Exactly.
>
> Q. And is that person truly under control of himself? Can he control what he does when those things occur?
>
> A. No.

(28/3075).

Dr. McCraney found that the circumstances of the homicide (which he had not been privy to at the time he did his neurological examination) were consistent with his diagnosis of brain damage; "the events do appear to conform to this blind animalistic rage that's described with the orbital frontal syndrome" (28/3115, see 28/3079-80, 3113-15).

Dr. Thomas McClane, a psychiatrist with a subspecialty in drug addiction, testified that appellant has diffuse brain damage, primarily affecting the frontal lobe area, from a combination of causes and made worse by his drug and alcohol abuse (29/3138-41,3144-48,3155-57,3161). Appellant's brain damage "would render

him hypersensitive to the usual negative effects of alcohol and other drugs" (29/3150). The substance abuse would magnify the symptoms you would normally see in a brain-injured person in two ways. First, chronic drug and alcohol abuse may literally increase the degree of brain damage. Second, the effects of intoxication tend to be much greater and more severe in a person who is brain damaged (29/3150-51). Appellant, according to Dr. McClane, would be highly vulnerable to any stressful situation and he "would tend to overreact, as has been his history throughout his life" (29/3163). This would be even more so, in light of his intoxication with alcohol and cocaine (29/3163-64).

Dr. Ralph Dolente is a clinical psychologist. The bulk of his post-doctorate level experience has been in the areas of brain injury assessment and rehabilitation (29/3204-06). After administering a series of tests, Dr. Dolente -- like Drs. McCraney and McClane -- concluded that appellant is brain damaged in his frontal lobe (29/3209,3212-14,3231). He testified that brain damaged people tend to overreact; when provoked or overstimulated they can easily go into a rage and lose control (29/3030-32).

Dr. William Kremper evaluated appellant for a Social Security disability determination in 1994, two years before the instant homicide. His report, along with other medical and school records, was submitted to the trial judge by agreement of the state and defense, and was considered in the judge's sentencing order (11/2035). Appellant's overall IQ score was 66, in the category of mild mental retardation (8/1435,1438,1441,1446). "Mr. Crook was

not considered capable of maintaining employment within a competitive work setting due to his severe cognitive, emotional, and behavioral deficits. He was unable to tolerate routines, had severe verbal memory difficulties and was not considered able to follow simple instructions on a consistent basis. With minor frustration he was likely to become physically aggressive" (8/1436) (emphasis supplied). Appellant was rated as meeting the criteria for an organic mental disorder (8/1437-38) and/or an organic personality disorder (8/1438-39). The diagnosis was "Organic Mental disorder with polysubstance abuse and antisocial personality disorder. The cl[ient] has had marked social and personal deficits for many years and poor academic skills. The cl[ient] appears to meet the criteria 12.02 and 12.05. Recommend a third party payor" (8/1438). [Category 12.02 is Organic Mental Disorders. Category 12.05 consists of Mental Retardation and Autism (8/1437)].

In Green v. State, supra, 715 So. 2d at 944, and Kirkland v. State, supra, 684 So. 2d at 735, this Court found that a defendant's exceedingly low intelligence, while not controlling on the question of premeditation, is a factor to be considered. Green's IQ was 73 and, like appellant, his mental condition made him susceptible to act on "impulse, excess, or rage." 715 So. 2d at 943 n. 4. Kirkland's IQ was in the sixties. 684 So. 2d at 735. Appellant's overall IQ scores range from the mid-60s (mild mental retardation) to the mid-70s (borderline) (8/1372,1435,1460; 11/2034-35; 28/3057-58,3069; 29/3145,3148-49). He dropped out of school in the eighth grade, after a history of chronic truancy,

changing schools, repeating grades, and eventual social promotions. On those occasions when he was in school, he was placed in the emotionally handicapped track and the learning disability track, although in Dr. Dolente's opinion this had little benefit because his major problem was brain damage (29/3224-25,3228). He also has ADHD (29/3149,3222-23). He reads on a first grade level (29/3230; see 8/1438). According to Dr. Kremper's disability report, he is incapable of holding a job or following simple instructions, and he is easily confused (8/1436,1438). And -- ancedotally -- when Detective Glisson asked him when was the last time he was in the Bull Pen, his answer was "I don't know. I can't tell time." Glisson replied that she knew he can't tell time (22/2036-37). As in Green and Kirkland, appellant's exceedingly low intelligence is yet another factor militating against a finding of premeditation.

The totality of the guilt phase and penalty phase evidence shows that this was an unplanned, unpremeditated killing which occurred in an explosion of rage. This rage attack was entirely consistent with appellant's brain impairment and his state of intoxication, and with the possible triggering events suggested by the prosecutor.

B. The Trial Court's Erroneous Finding that Organic Brain Damage was Not Proven Undermines the Reliability of the Death Sentence, Since There was Overwhelming and Unrebutted Evidence that (1) Appellant Does Have Organic Brain Damage and (2) the Particular Type of Brain Damage he has was a Major Contributing Factor in the Crime.

In Larkins v. State, 739 So. 2d 90, 94 (Fla. 1999), in which the defendant killed the victim during a robbery:

> . . . the defense presented Dr. Henry L. Dee, a clinical psychologist, who testified about Larkins' extensive history of mental and emotional problems. According to Dr. Dee, Larkins suffers from organic brain damage possibly in both the left and right hemispheres, which affects both his mental and emotional components. Under the mental component, Dr. Dee opined that Larkins has a substantial memory impairment, which ranks him in the lower one percent of the population. Larkins' cerebral damage also affects his emotional component which makes it difficult for him to control his behavior; he is easily irritated by events that would not normally bother other people, and he has poor impulse control. Dr. Dee explained that benign occurrences, such as a baby crying or laughing, could "call forth a great rage" in persons suffering from a mental illness consistent with that suffered by Larkins. Dr. Dee also testified that Larkins has a low average level of intelligence, which means he functions within the lower twenty percent of the population; that he dropped out of school in the fifth or sixth grade; that he has a history of drug and alcohol abuse; and that he had difficulty learning and socializing with others. Based on Larkins' brain impairment, Dr. Dee opined that at the time of the offense, Larkins would have been under the influence of extreme mental and emotional disturbance and his ability to control his actions would have been impaired. <u>All of this evidence was uncontroverted</u>.

(emphasis supplied)

Based on the nature and extent of the aggravating and mitigating circumstances in that case, this Court found that life imprisonment, rather than death, would be the more appropriate sentence.

In the instant case, three mental health experts, two of them specialists in the assessment and rehabilitation of brain injuries, testified without equivocation that appellant suffers from organic

brain damage primarily affecting his frontal lobe (28/3069-75,3109; 29/3144-45,3155-57,3164-65,3201,3212,3231-32). The state presented no evidence to rebut the existence or severity of appellant's brain damage. The state, as it is now permitted to do by Fla.R.Crim.P. 3.202, had appellant examined by Dr. William Kremper, a psychologist who had previously examined appellant (two years before the homicide occurred) for a Social Security disability report. The state had Dr. Kremper in the hallway, but elected not to call him as a witness. This can reasonably be construed as a tacit admission that Dr. Kremper would not have controverted the diagnoses of the other three doctors that appellant is brain damaged. This is especially true in light of the fact that in the 1994 disability determination appellant was found to have an organic mental disorder (8/1437-39). In addition to her tacit acknowledgement, the prosecutor in her closing argument overtly conceded that -- although she didn't think it mattered a whole lot -- appellant's brain damage was proven:

> What you've heard, I believe, shows that Donny Crooks had a terrible home life from a very early age. And I think it's also present on the record that you've heard today that he's got some brain damage.
>
> And now the question is: What weight will you give to that? And I would ask you to consider for yourselves the impact of some of the issues as it regarded brain damage -- as Dr. McCraney said, the presence of a bad brain -- and what it has to do with this case. Which, I believe, if you think about it, there is no perfect world.

(29/3284-85).

In the face of overwhelming and unrebutted evidence establishing not only that appellant has organic brain damage affecting his frontal lobe, but also how that brain damage was a strong causative or contributing factor in escalating a spur-of-the-moment robbery attempt into a homicidal rage, the trial judge inexplicably refused to find that brain damage was proven (11/2036,2041). He refused to find brain damage as a nonstatutory mitigating circumstance (11/2041), and -- although he did find both statutory mental mitigators (giving them only moderate weight) -- he did so based almost exclusively on appellant's use of alcohol and cocaine at the time of the crime (11/2036). The judge found that appellant has a "conduct disorder (the term used for a minor) [and an] anti-social personality disorder (the term used for an adult)", and stated that these cannot be considered in mitigation.[12] The judge further stated

[12] Actually, the trial court was mistaken even as to this. A personality disorder is a serious psychiatric diagnosis. "In any scheme that tries to classify persons in terms of relative mental health, those with personality disorder would fall near the bottom." Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 985. The fact that a defendant suffers from a personality disorder is a valid nonstatutory mitigating circumstance. Eddings v. Oklahoma, 455 U.S. 104 (1982) (antisocial personality disorder); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (borderline personality disorder). In the instant case, the attributes of personality disorder observed by Drs. McClane and Dolente were secondary to, and caused by, appellant's organic brain damage (29/3149,3201, 3207,3223,2238-39,3242-43). In Dr. Kremper's disability report, an organic mental or personality disorder was diagnosed (8/1437039). And Dr. McCraney testified that, while there is some overlap in the behaviors of antisocial personalities and persons with frontal lobe syndrome, there are also significant differences, and appellant's problems are a result of organic brain dysfunction affecting the frontal lobe, rather than any character disorder (28/3049-54,3071, 3109).

"[T]here was no actual proof of any brain damage to the defendant" (11/2036).

In a capital case, the sentencing judge and the reviewing court "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), quoting Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). Accordingly:

> Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. Hardwick v. State, 521 So.2d 1071, 1076 (Fla.), cert.denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). In Rogers v. [v. State, 511 So.2d 526 (Fla. 1987)] we set forth an extensive discussion of the federal cases from which this limitation derives. Rogers, 511 So.2d at 534 (citing Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)). Distilling this case law, we then enunciated a three-part test:
>
> > [T]he trial court's first task . . . is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to

> coun- terbalance the aggravating factors.
>
> Id. (emphasis added). Accord Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990); Cheshire, 568 So.2d at 912; Hardwick, 521 So.2d at 1076.
>
> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, __U.S.__, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.

Santos v. State, 591 So. 2d 160, 164 (Fla. 1991) (emphasis in opinion).

See also Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992).

As reiterated in Walker v. State, 707 So. 2d 300, 318 (Fla. 1997), "[t]his Court has repeatedly held that all mitigating evidence, found anywhere in the record, must be considered and weighed by the trial court in its determination of whether to impose a sentence of death" (emphasis in opinion).[13] Moreover, this

[13] In addition to presenting the evidence of brain damage, defense counsel specifically identified it in his sentencing memorandum to the trial judge, both as an important component of the statutory mental mitigators and as a separate nonstatutory mitigator (7/1203,1214,1217,1223). Therefore, the trial judge was reasonably apprised of brain damage as a mitigator, and his error in rejecting it is preserved for review. See Walker v. State,

Court is not bound to accept the trial court's findings "when . . . they are based on misconstruction of undisputed facts and a misapprehension of law." Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990). Thus, as this Court said in Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993):

> . . . we have made clear that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990); see also Campbell, 571 So.2d at 419. Thus, the trial court erred in failing to find as reasonably established mitigation the two statutory mental mitigating circumstances, plus Knowles' intoxication at the time of the murders, and his organic brain damage.

In the instant case, the evidence of appellant's brain damage was overwhelming, unrebutted, and causally connected to the circumstances of the crime. Appellant was first examined by Dr. McClane, a psychiatrist, who, concluding that he had probable neurological brain damage, deemed it necessary to get both neuropsychological testing (for which he referred him to Dr. Dolente) and an evaluation by a behavioral neurologist (for which he referred him to Dr. McCraney). Dr. McClane testified that, out of the approximately 120 criminal defendants he sees per year, he typically would refer 1-3 to a neurologist (29/3142). Dr. McClane testified that appellant's diffuse brain damage arose from a combination of causative factors, including genetics, neglect and deprivation in infancy and childhood, head trauma, and drug and

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supra, 707 So. 2d at 318; Consalvo v. State, 697 So. 2d 805, 818 (Fla. 1996); Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990).

alcohol abuse (29/3144-48). All of these factors can interact with each other and make the resulting brain damage worse (29/3148,3156-57,3161). They actually cause biochemical and physiological changes in the brain. Sometimes these can be obvious, like a big tumor, "[b]ut when there is diffuse brain damage it's very difficult to pick up by scans and electroencephalography and by neuropsychological testing" (29/ 3151). In appellant's case, Dr. McClane could not pinpoint the exact location, but he thought it was probably frontal lobe damage (29/3155-57).

Appellant was sent to the neurologist, Dr. McCraney. After reviewing appellant's life history and records, and after performing a series of physical and neurological examinations, Dr. McCraney concluded that appellant was paranoid and impulsive, and that his difficulty arose as a result of organic brain dysfunction rather than any character disorder (28/3071,3109). The specific neurological condition which he diagnosed is orbital frontal syndrome (28/3071). Frontal lobe injuries are usually congenital, but other probable contributing factors in appellant's case were parental neglect during his early childhood and formative years, an incident at age five when he was beaten in the head with a pipe, and his drug abuse from a very early age (28/3060-61,3064-65,3117). Dr. McCraney testified that it is difficult to raise a child with a bad frontal lobe even under ideal circumstances. Under poor circumstances it is virtually impossible (28/3065).

Dr. McCraney testified that people with frontal lobe damage are prone to a certain type of rage attack, sometimes called "sham

rage". "Sham" in this context does not mean phony; it is called that because the rage and ensuing violence "bears little relationship to what incites it" (28/3045). This is one of the ways in which persons with frontal lobe syndrome can be distinguished from those with antisocial personality disorders. Antisocial personalities almost always act in their own perceived self-interest, and they can often be ingratiating when it suits their purposes. They can often present fairly convincing explanations and rationalizations for their actions (28/3049-53). With brain damaged people, on the other hand, you more typically see "this sham rage picture where the intensity of violence appears to have no relationship with the inciting event" (28/3052-54). Dr. McCraney explained:

> These patients will fly into rage at the drop of a hat. They may be provoked, although the provocation may be so minor that it's difficult for an observer to establish a relationship.
>
> Observers report that these people are almost animalistic in the way they look. They get this fire in their eyes. They start frothing at the mouth and they just go nuts. I mean, they tear up the house. They whip up on whoever is in the immediate vicinity. Afterwards, when they calm down, they typically claim they don't remember anything about what happened. And the patient's claim of lack of memory often times seems real credible.
>
> The repetivity with which this rage can be turned on and off makes it look almost like an epileptic event. And that's prompted some observers to speculate about whether these rage attacks are seizures. And even though they look like seizures, they probably aren't. However, that sham rage feature is characteristic of this type of syndrome. So, I'd say impulsivity and rage.

> Q. The impulsivity and rage are two of the features that you look for and see constantly in your treatment of people with frontal lobe damage?
>
> A. That is correct.

(28/3046-46).

Dr. McCraney diagnosed appellant with orbital frontal syndrome based on his neurological examination and review of his history and records. Dr. McCraney was not at that time informed of the details of the homicide. Having since learned those details, Dr. McCraney testified that "the events do appear to conform to this blind animalistic rage that's described with the orbital frontal syndrome" (28/3115, see 3079-80,3113-15).

Dr. McCraney, like the other two doctors, directly linked his conclusions regarding the statutory mental mitigating circumstances to brain damage. He testified that appellant's brain disorder has resulted in extreme emotional disturbance; in fact, one of the worst cases of emotional disturbance he has seen (28/3073). [Note that Dr. McCraney is medical director of a residential facility for brain damaged patients, and his work there involves the behavioral aspects of brain injuries]. Regarding whether appellant's ability to conform his conduct to the requirements of law was substantially impaired, Dr. McCraney's answer was yes, and that inability to control one's actions in certain situations is a "hallmark of the type of brain damage that I have diagnosed in this case" (28/3074-75).

Appellant was also sent for neuropsychological testing to Dr. Dolente, a clinical psychologist who concentrates in the areas of

brain injury assessment and rehabilitation. Dr. Dolente testified "I go into assessments open-minded, not necessarily expecting to find anything" (29/3209). Nevertheless -- notwithstanding appellant's obvious and unsophisticated attempts to fake during the first evaluation -- Dr. Dolente got an accurate assessment from the second evaluation, and he, like the other doctors, found brain damage. Specifically, after administering a series of tests, Dr. Dolente concluded that appellant is brain damaged in his frontal lobe (29/3209-14,3231). It was clear to Dr. Dolente that appellant has had organistic brain damage (i.e., brain impairment as a result of trauma or some embolic event such as rupture of a vessel) from a very early age. When he was five, he sustained what appeared to be a significant brain injury from being stuck on the head with a pipe (29/3208,3214,3216).[14] Appellant's unstructured home environ

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[14] The trial court in his sentencing order discounted this by saying:

> There are no medical records to support the allegations of the defendant being beaten in the head with a metal pipe other than by the defendant's or his mother's reports. There are certainly no records presented to document treatment for a head injury sufficient to cause organic brain damage and related behavioral abnormalities

(11/2041).

First of all, the fact that evidence comes from a defendant's mother does not mean it can be ignored, when it is unrebutted and is not inherently unbelievable. [The trial court found several other nonstatutory mitigators based in part on Anietta Crook's testimony (11/2037,2040,2042-43)]. Moreover, the incident was reported at the time it occurred, when appellant was five years old. Dr. Haskovec's 1981 report states "Recently, Donny was hit on the head with an iron pipe and rendered unconscious for a few minutes" (8/1371). Obviously, neither appellant nor his mother had

ment, and the abject poverty and neglect in which he grew up, would have worsened the symptoms of his brain injury, as would his early substance abuse (29/3217-19,3227,3229). He was huffing paint thinner and gasoline as early as age eight (29/3218,3229). Dr. Dolente testified that the problem with brain injury is one of being able to conform your behavior and react appropriately. Brain injured people tend to overreact; when provoked or overstimulated they can easily go into a rage and lose control (29/3230-32). Therefore, appellant would be more prone to extreme emotional distress, and have less capacity to conform his conduct to the requirements of law, than a person with a fully functioning brain would be (29/3233, see 3230-34).

Clearly this is not a case where there was little or no evidence presented to support a claim of brain damage [see Shellito v. State, 701 So. 2d 837, 844 (Fla. 1997)], or where the evidence of brain damage was contradicted by other doctors [see Cooper v. State, 739 So. 2d 82, 86-90 (Fla. 1999) (concurring and dissenting opinion of Justice Wells); Franqui v. State, 699 So. 2d 1312, 1326 (Fla. 1997)].

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any motive to fabricate mitigating circumstances when he was five. In fact, she had a possible motive not to report it, because it resulted in Welfare threatening to take her kids again (28/3001-05). Drs. McCraney, McClane, and Dolente all thought that a five year old kid being beaten unconscious with an iron pipe would be sufficient to cause brain damage or to worsen the brain damage that already existed (28/3060-61,3117; 29/3146; 29/3208,3214,3216).

In Robinson v. State, __So. 2d.__ (Fla. 1999) [24 FLW S393, 396-97], both experts agreed that, while Robinson suffers from mild brain damage, it would not prevent him from functioning normally within everyday society. Also, although Robinson had chronically abused drugs from a young age, there was no evidence that he consumed any drugs or alcohol on the day of the murder. The trial court found organic brain damage as a mitigating factor but gave it little weight. Robinson contended on appeal that the weight given this mitigator was insufficient. This Court, citing Campbell v. State, supra, 571 So. 2d at 420, for the proposition that the weight given to each mitigator is a matter which rests in the trial court's discretion, said:

> 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 test 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, 118 S.Ct. 569 (1997).

(emphasis supplied).

In the instant case, in contrast to Robinson, the trial judge did not weigh the evidence of organic brain damage; he rejected it out of hand. None of the three experts (or four if you count Dr. Kremper) characterized appellant's brain damage as "mild", nor did any of them suggest he could function normally in society. Dr. McCraney said appellant's brain disorder resulted in one of the worst cases of emotional disturbance he's ever seen (28/3073). Dr. Kremper -- two years before the crime occurred -- said:

> Mr. Crook was not considered capable of maintaining employment within a competitive work setting due to his severe cognitive, emotional, and behavioral deficits. He was unable to tolerate routines, had severe verbal memory difficulties and was not considered able to follow simple instructions on a consistent basis. With minor frustration he was likely to become physically aggressive".

(8/1436)

In Robinson, the experts could not determine what caused the mild brain impairment, and one expert, Dr. Upson, was not sure whether he even had brain damage. In the instant case, Drs. McCraney, McClane, and Dolente all explained that appellant's frontal lobe damage was likely caused by genetic factors and the traumatic head injury he sustained at age five, and worsened by neglect and terrible home conditions during his infancy and childhood, and by his early abuse of inhalants, drugs, and alcohol. In Robinson no causal connection was shown between the defendant's mild brain damage and the crime he committed. [Robinson admitted that he calmly and deliberately waited until the victim was asleep

before coldly bludgeoning her to death with a drywall hammer]. In the instant case, all three of the experts -- most vividly Dr. McCraney with his description of the "sham rage" attacks which are characteristic of frontal lobe syndrome patients -- connected appellant's brain damage as being a large part of the reason why this spur-of-the-moment robbery attempt escalated into a homicidal rage attack. [The prosecutor supplied several potential triggering events, including the victim whacking appellant across the forehead with a cue stick]. In Robinson there was no evidence that the defendant consumed any drugs or alcohol on the day of the murder. In the instant case, appellant told detectives he had had a fifth of Tequila and then some Milwaukee before he went to the bar; he was drunk and also high on rock cocaine (23/2195). Appellant's statement is at least partially corroborated by two prosecution witnesses; Eva Johns, who said he had a case of Old Milwaukee sitting on the handles of his bicycle (the case was "getting low", there were only six or eight beers left, and he "looked like he was partying" (15/624-27,633)), and Melissa Lemay, who thought appellant was high on rock or paper when he showed up at her house at 9:00 or 9:30 p.m. because his pupils were so big you could not see his eye color (16/809-10,834). Dr. McClane testified that appellant's tendency to overreact to any stressful situation was caused by his brain damage, and would have been even more so in light of his intoxication with alcohol and cocaine (29/3163-64):

> As all of us know, from either having something to drink ourselves or watching friends, or enemies, who are intoxicated, we know that most people who are intoxicated have

> decreased control of their impulses. And somebody who is brain damaged is more sensitive than the average person to that intoxication and to that, that increased difficulty controlling impulses. So, that's even more impaired, in my opinion.
>
> Q. And those things all fit Donny Crook?
>
> A. I didn't hear you.
>
> Q. That description fits Donny Crook?
>
> A. Yes.

(29/3164-65).

The evidence of brain damage, and its connection to the crime, was thus infinitely weaker in Robinson than in the instant case. Nevertheless, the trial judge in Robinson properly followed the law by finding it as a mitigator and giving it at least some weight, because a reasonable quantum of evidence established its existence. Here, in contrast, despite overwhelming unrebutted evidence establishing a much more severe case of brain damage, and despite the evidence that rage attacks triggered by frustration or stress are characteristic of patients with the specific type of brain damage appellant has, the trial court found that brain damage was not proven, and gave it no weight. This was plain error. Nibert; Santos, Knowles.

In Davis v. State, 698 So. 2d 1182, 1191 (Fla. 1997), this Court wrote:

> It would be unfair to permit a defendant to present mitigating mental health evidence at the penalty phase while denying the State the opportunity to present evidence on the same issue. This became especially so after our decision in Nibert v. State, 574 So.2d 1059 (Fla.1990), wherein we held that a trial court

> must find that a particular mitigating circumstance has been proved whenever the defendant has presented a "`reasonable quantum of competent, uncontroverted evidence'" of that mitigating circumstance. Dillbeck [v. State, 643 So.2d 1027,1030 (Fla. 1994)] (quoting Nibert, 574 So.2d at 1062). We also directed the proposal of a new Rule of Criminal Procedure that would permit the State to have its mental health expert examine a defendant who intends to present at the penalty phase the testimony of a mental health expert who has interviewed the defendant. We subsequently adopted such a rule. See Fla.R.Crim.P. 3.202.

In the instant case, the state had appellant examined by Dr. Kremper pursuant to the Rule, had Dr. Kremper in the hallway and chose not to call him as a witness, and then conceded in closing argument that the evidence established that appellant has some brain damage. See Santos v. State, 629 So. 2d 839, 840 (Fla. 1994) (Santos II) ("During a penalty phase, the trial court can exceed its discretion in failing to find mitigating factors that both the State and the defense concede to exist").

The trial judge's comment that "there was no actual proof of any brain damage to the defendant" (11/2036) is incomprehensible unless the judge meant that the testimony of three experts regarding their diagnosis is not proof; he needed to see pictures of the brain damage. However, as Dr. McClane explained, the biochemical and physiological changes in the brain are not necessarily obvious ones, such as a big tumor; where there is diffuse brain damage it can be very difficult to pick up by scans and electroencephalography and neuropsychological testing (29/3151). Appellant was sent to the neurologist McCraney and the neuropsychologist Dolente, who administered a series of physical

and neurological tests and reviewed appellant's life history and records, before independently reaching the diagnosis that appellant suffers from frontal lobe brain damage. Neither doctor ever indicated that they thought some further medical procedure was necessary, or would yield useful information.

In Spencer v. State, 645 So. 2d 377, 385 (Fla. 1994), this Court wrote:

> Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved. Nibert v. State, 574 So.2d 1059,1062 (Fla. 1990). A trial court may reject a defendant's claim that a mitigating circumstance has been proved if the record contains competent substantial evidence to support the trial court's rejection of the mitigating circumstance. Id.; Kight v. State, 512 So.2d 922, 933 (Fla. 1987), cert.denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988). In this case, the evidence of these mitigating circumstances that was submitted by Spencer was uncontroverted. The trial judge rejected the experts' opinions as speculative and conclusory. However, the experts based their opinions on a battery of psychological and personality tests administered to Spencer, clinical interviews with Spencer, examination of evidence in this case, and a review of Spencer's life history, school records, and military records. Thus, the trial court erred in not finding and weighing these statutory mental mitigating circumstances.

Conversely, in Robinson v. State, supra, 24 FLW at 396, it was the defendant who complained on appeal about the absence of additional testing. This Court disagreed:

> We find no error in the trial court's denial of Robinson's request for the SPECT scan because he has failed to establish any need for such test. According to Dr. Upson. the SPECT scan is used to locate the existence

> of possible brain damage. Both medical experts testified that Robinson suffers from apparent brain damage in the left temporal lobe. As the State points out, unlike the expert in Hoskins, neither doctor testified that the test was necessary to complete their medical opinion; they merely stated that the exam would have been helpful. Thus, the results of the exam would have merely confirmed the doctors' already established opinions, which were substantially accepted by the trial court. Further, according to Dr. Lipman, the scan does not indicate how well a person with possible brain damage functions. He stated that neuropsychological instruments, such as the battery of tests conducted on Robinson, are better at determining the degree in which a person is able to function with brain deficits. Thus, Robinson has failed to make an adequate showing of need for the neurological test requested in this case. We find no error in the trial court's ruling.

(emphasis in opinion).

The state may try to claim "harmless error" premised on the theory that the trial judge, while erroneously concluding that appellant's brain damage wasn't proven, found the two statutory mental mitigators anyway. However, as this Court has long recognized, capital sentencing in Florida is "not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . . ." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). It is clear from the trial court's discussion of the combined statutory mental mitigators that his finding was based almost exclusively on appellant's drug and alcohol use on the night of the

crime (which he then played down by noting that appellant's use of these substances was "entirely voluntary on his part and within his exclusive control") (11/2035-36). The trial court's assessment of the totality of the circumstances of the case, as well as the weight which he accorded the two statutory mental mitigators, as well as the reliability of the death sentence he imposed, were all profoundly affected by his refusal to find and weigh the evidence of appellant's frontal lobe brain damage, and its effects on his behavior on the night of the crime. The state, as beneficiary of the judge's error, cannot meet its burden of showing beyond a reasonable doubt that it couldn't have played a part in his sentencing decision. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Goodwin v. State, __So. 2d__ (Fla. 1999) (case no. 93,805, decided December 16, 1999).

As to the matter of relief, this Court could defer its decision on proportionality, and remand for reweighing and reconsideration of the sentence. Undersigned counsel would submit, however, that as in Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990) there is no need for reweighing because this Court can determine on this record that the death penalty is disproportionate. See Part D of this Point on Appeal.

C. The Trial Court Also Mischaracterized the Evidence Regarding Appellant's Borderline Mental Retardation.

While not as egregious as his refusal to find and weigh the evidence of brain damage, the trial court's finding regarding appellant's IQ is also inaccurate. The sentencing order makes

reference to three IQ tests: the first one taken when appellant was five years old where he scored 76; the second one taken at age 18, in conjunction with Dr. Kremper's disability evaluation, where he had a full scale score of 66; and the third one administered at age 19 by Dr. Mercer, where his full scale score was 75 (11/2034-35). The trial judge then states:

> 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.

(11/2038).

First of all, the judge's statement that none of the other evidence in the case supports Dr. Kremper's finding that appellant is mildly retarded is not entirely correct. Dr. McCraney testified that the results of his neurological examination of appellant were more or less consistent with what he was reading in the records; i.e., "[t]hat he is mildly retarded" (28/3057).

More importantly, even using the highest scores appellant has ever attained, he still falls considerably short of the "low average" range of intelligence. Dr. McClane, noting that his IQ scores all fall in the 60s and 70s, testified that he has border-

line intellectual functioning (29/3145,3148-49). "Borderline means on the border between the low limits of normal and mental retardation" (29/3148-49). The distribution of Wechsler Adult Intelligence Scale IQ categories, and the equivalent percentile rankings,[15] show that half of the population scores in the Normal range, which is between 90 and 110. Dull Normal is 80-90 and Bright Normal is 110-120. Over 80 percent of the population falls within these three ranges. Scores in the 60s are categorized as Mild Retardation, and scores in the 70s are Borderline. Only 10 percent of the population score 81 or lower, and only 5 percent score 75 or lower. The highest score appellant has ever gotten was 76, when he was five years old; his other high score, at age 19, was 75. (Only the bottom 1 percent score 65 or lower; Dr. Kremper had appellant at 66).

In Larkins v. State, 739 So. 2d 90, 94 (Fla. 1999), the psychologist testified that Larkins "has a low average level of intelligence, which means he functions within the lower twenty percent of the population." Appellant -- even using only his highest scores -- is in the lowest five or six percent of the population. In Cooper v. State, 739 So. 2d 82, 85, see 88-89 (Fla. 1999), one expert scored Cooper at 82 (low average) and another expert scored him at 77 (borderline retarded). In Brown v. State, 526 So. 2d 903, 908 (Fla. 1988), an IQ of 70-75 was "classified as borderline defective or just above the level for mild retardation."

[15] These scales are reprinted in Kaplan and Sadock's Comprehensive Textbook of Psychiatry (4th Ed.), at p. 504-05, Figure 12.5-1 and Table 12.5-1.

In Morris v. State, 557 So. 2d 27, 30 (Fla. 1990), the defendant was "borderline retarded with an IQ of approximately seventy-five." In Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998), the defendant's IQ was 76 and he was classified as borderline retarded.[16]

This Court need not accept a trial court's finding when it is based on misconstruction of undisputed facts. Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990). In the instant case, there is no substantial, competent evidence to support the trial judge's conclusion that appellant's IQ is "within the low average range of intelligence." Appellant is, at best, borderline mentally retarded, and that significant fact should have been taken into account in determining the appropriate sentence. As with the issue of his frontal lobe brain damage, this Court should either (1) remand for reweighing and reconsideration of sentence, or (2) determine on the present record that the death sentence is disproportionate.

D. Life Imprisonment is the Appropriate Sentence in this Case.

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first degree murders. Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, __ So. 2d __ (Fla. 1999) [24 FLW S336,339]. "Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to

[16] Jones, like appellant, was also brain damaged, learning disabled, placed in special education classes in school, and reads at a first grade level. 705 So. 2d 1366.

others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders" Cooper, 739 So. 2d at 82; Almeida, 24 FLW at S339.[17]

In the instant case, the jury recommended a death sentence by the narrowest possible margin, 7-5. In view of the jury's question just prior to returning its advisory verdict, "The jury requests information on the life without possibility of parole sentence. Does this actually and really mean that Donny Crook will never get out of jail?" (29/3316), it is entirely possible that if it had been assured that life imprisonment means imprisonment for life, a majority of the jury might have been satisfied that justice could be served in this case without imposing the ultimate penalty. In any event, the closeness of the jury's penalty vote is a relevant factor for this Court to consider in its proportionality determination. See Cooper v. State, supra, 739 So. 2d at 86 (vote of 8-4); Almeida v. State, supra, 24 FLW at S339 (7-5); Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) ("We note that he jury voted for death by the narrowest of margins, seven to five").

Undersigned counsel will concede that, as in Cooper v. State, 739 So. 2d at 85, the aggravation prong of the proportionality

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[17] Proportionality review is a "unique and highly serious function of this Court", which arises from a variety of sources in the Florida Constitution, and "rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); Sinclair v. State, 657 So. 2d 113, 1142 (Fla. 1995); Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Knight v. State, 721 So. 2d 287, 299-300 (Fla. 1998); Woods v. State, 733 So. 2d 980, 990 (Fla. 1999).

standard is satisfied. The trial court characterized the aggravating circumstances as "appalling" (11/2045), and that is certainly true. However, the manner in which a homicide was committed is only a part of the totality of the circumstances, and is not necessarily dispositive of whether death or life imprisonment is the appropriate sentence. See, e.g., Robertson v. State, 699 So. 2d 1343, 1344-45, 1347 (Fla. 1999). It is also significant that all three of the aggravating circumstances (pecuniary gain, HAC, and sexual battery) arose within a matter of minutes.[18] At the time Eva Johns looked into the front door of the bar and saw Betty Spurlock standing by the cash register and appellant sitting in front of her on a bar stool, none of the events had been set in motion. Within minutes, appellant saw Spurlock counting money, and got the idea of robbing her because he needed more rock. He locked the front door, and then during the robbery something happened that caused him to lose control. Maybe, as the prosecutor suggested, Spurlock resisted the robbery with scissors, or hit appellant in the head with a cue stick (causing the bump on his forehead later observed by police officers and Dr. Spindler). Maybe, as the prosecutor also suggested, it was the frustration of not being able to get the cash drawer to open. In any event, appellant went into a rage which, once ignited, he was incapable of controlling. In this condition, he stabbed and beat Spurlock, and then -- while she

[18] Compare Almeida v. State, supra, 24 FLW at S339 (noting that the present crime and the prior capital felonies "all arose from a single brief period of marital crisis that spanned six weeks").

was unconscious, near death, and unable to experience any sensations (18/1163) -- inserted the pool cue and ran it through her body.

In light of the closeness of the jury's vote, it is a fair assumption that the act involving the pool cue is the pivotal reason this case is here on proportionality review instead of being an Anders brief in the Second DCA. Because Dr. Melamud believed the victim was still alive, although near death, at the time, this act constituted both the aggravating circumstance and the separate crime of sexual battery. It is not part of the HAC aggravator, because under Florida law "when the victim becomes unconscious, the circumstances of further acts contributing to [her] death cannot support a finding of heinousness." Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984).

Therefore, while the aspect of this crime involving the pool cue is indeed appalling, this Court must consider the totality of the circumstances, including the mental state of both the victim and the defendant when it took place. According to the state's own medical witness, the victim was unconscious at that point and no longer capable of experiencing pain or fear. Appellant was in a rage and out of control; he is brain damaged, borderline retarded, and was under the influence of alcohol and cocaine (a combination which Dr. McCraney likened to throwing gasoline on a fire).

The second prong of the proportionality standard is that in order to warrant the ultimate penalty the crime must be among the least mitigated of first degree murders. Cooper, 739 So. 2d at 85-

86. In the instant case the unrebutted mitigating evidence is as strong or stronger than in Cooper and Roberston v. State, supra, 699 So. 2d at 1347. Appellant had just turned 20 years old two months prior to the homicide (11/2033). See Almeida, 24 FLW at S339. He had no significant history of violent behavior (11/2043). See Woods v. State, 733 So. 2d 980, 991 (Fla. 1999); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985). Appellant's infancy and childhood were marked by abject poverty, deprivation, and neglect. His parents "were abysmal failure as parents," and as a result of this he "had a terrible home life" (11/2040). [The neurological and psychiatric experts agreed that it is very difficult to raise a brain damaged child even under ideal circumstances, and -- as Aneitta Crook Bravo's testimony painfully reveals -- appellant's upbringing was the opposite of ideal. His first days of infancy were spent in the front seat of a truck because it was too cold in the house. As a baby, he (like his mother and siblings) was physically abused by his natural father. As a toddler he went from a brief stint in foster care to the nomadic life of migrant farmworkers. During that period, and for many years thereafter when they lived in Texas, appellant was left for extended stretches of time in the care of his older brothers Jimmy and Ronnie, who had serious problems of their own. Nobody ever saw to it that appellant or his brothers got to school, or stayed there; they would come dragging back to the house around 9:00 or 10:00 a.m. saying they were hungry. Whenever appellant would flunk out or get

kicked out of a school, Aneitta would move to the other side of town].

Appellant is borderline mentally retarded, suffers from learning disabilities and ADHD, was placed in special education and emotionally handicapped classes, and dropped out of school in the eighth grade after repeated failures and chronic truancy. He reads on a first grade level and apparently cannot even tell time. Two years before the crime, in connection with a Social Security disability determination, appellant was diagnosed with an organic mental and/or personality disorder; he was found to be easily confused, unable to follow simple instructions, and incapable of maintaining employment "due to his severe cognitive, emotional, and behavioral deficits" (8/1436,1438).

All three experts who testified found that appellant suffers from organic brain damage affecting his frontal lobe, which significantly impairs his ability to control his impulses. His brain injury was probably caused by genetics and head trauma, and was worsened by the terrible circumstances in which he was raised, and by his chronic abuse of drugs and alcohol. [Appellant was huffing paint thinner and gasoline as early as age eight; then graduated to street drugs and alcohol]. Each of the three experts testified that appellant's brain damage, exacerbated by his use of cocaine and alcohol on the day and evening of the crime, resulted in extreme emotional disturbance (Dr. McCraney called it one of the worst cases of emotional disturbance he has seen (28/3073)), and

impaired appellant's capacity to conform his conduct to the requirements of law.

To recapitulate, the major categories of mitigation established by the evidence in this case are (1) age of 20; (2) no significant history of violence; (3) childhood marked by neglect and deprivation; (4) borderline retardation and severe learning disabilities; (5) history of drug and alcohol abuse; (6) intoxication from alcohol and cocaine at the time of the crime; (7) organic brain damage resulting in extreme mental or emotional disturbance and impaired capacity; and (8) the homicide was not premeditated, but was committed in a rage when an unplanned robbery attempt was frustrated.

Even more so than in Cooper v. State, supra, 739 So. 2d at 86, this Court cannot conclude on this record that the present crime is one of the least mitigated first degree murders it has reviewed. The record shows just the opposite; the mitigating evidence is compelling, substantially unrebutted, and causally connected to the crime. This is not a case which turns on resolution of conflicting evidence; rather it is a true proportionality case. Thus the basis for the disagreement expressed by the three dissenting Justices in Cooper v. State, supra, 739 So. 2d at 86-90 (Wells, J. concurring in part and dissenting in part) -- that the majority was substituting its judgment for that of the trial court by "pick[ing] and choos[ing] from a cold record the conflicting evidence which the majority believes is persuasive" -- does not exist in the instant case. Here, in contrast to Cooper, virtually all of the mitigating

evidence is unrebutted. The trial judge's sentencing order does not purport to resolve conflicting evidence or to explain why he finds certain experts' opinions more credible than those of other experts. See Robinson v. State, 684 So. 2d 175, 180 (Fla. 1997). On the critical issue of organic brain damage, as well as the important issue of borderline mental retardation, the trial judge's order simply ignores or mischaracterizes the mitigating evidence. This Court is not bound by the trial court's errors of law or fact [Pardo], and it can properly apply the proportionality standard on this record. Compared to other first degree murders and other defendants, this case presents compelling mitigation. The appropriate sentence for Donny Crook is life imprisonment without possibility of parole.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse the death sentence and remand for imposition of a sentence of life imprisonment without possibility of parole.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of March, 2002.

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