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

REPLY BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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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.

The state argues that there is no prohibition against imposing a death sentence for a felony murder or for a rage killing (state's answer brief, p.7). The state analogizes to killings which occur following a domestic dispute (answer brief, p.9-10), another category in which death sentences are often, but not always, found to be disproportionate. Undersigned counsel agrees that the death penalty is not necessarily prohibited for all unpremeditated rage killings. He might even agree that there is no absolute prohibition against a death sentence when a brain damaged and intoxicated defendant, in the course of a spur-of-the-moment robbery attempt, gets whacked in the forehead with a pool cue and flips out, committing a brutal but unplanned murder. Where there is uncontradicted evidence that sudden, furious rage attacks -- completely out of proportion to the triggering event -- are characteristic of people with frontal lobe brain damage such as appellant, as well as uncontradicted evidence that drug and alcohol intoxication magnifies the impulsivity and rage (like throwing gasoline on a fire), the case for a death sentence becomes even weaker. Then, since Florida's death penalty is reserved for only the most

aggravated and the least mitigated of first degree murders,[1] death is clearly disproportionate where -- in addition to the brain damage and the intoxication and the unpremeditated nature of the homicide -- both of the statutory mental mitigators are found to exist; and the defendant is only 20 years old; and he has no significant history of violence; and his childhood was marked by severe poverty, instability, neglect, and deprivation; and he is borderline mentally retarded (IQ scores consistently ranging from mid-60s to mid-70s) and learning disabled; and he has a long history of drug and alcohol abuse; and the jury recommended the death sentence by only a 7-5 vote, after expressing the concern during deliberations whether a life sentence really means life.

The state cannot prevail by isolating each circumstance and arguing that that factor alone does not prohibit a death sentence. Of course it doesn't. It is the totality of the circumstances in this case which make the death sentence disproportionate.

The cases relied on by the state (answer brief, p.13-18) do not support its position. Robinson v. State, __So. 2d__ (Fla. 1999)[24 FLW S393]. which is thoroughly discussed in appellant's initial brief, p.79-83,85-86, actually supports appellant's position, since the evidence of brain damage and its causal or contributing relationship to the homicide was much weaker in Robinson than in the instant case, yet the trial judge in Robinson properly found and weighed it as a mitigating factor. In the

[1] Cooper v. State, 739 So. 2d 82, 85-86 (Fla. 1999); Almeida v. State, 748 So. 2d 922,933 (Fla. 1999).

instant case, where the evidence of appellant's brain damage and its effect on his actions during the crime was uncontradicted and far stronger than in Robinson, the trial judge inexplicably rejected it out of hand; a clear and very harmful violation of the constitutionally-based rule of Campbell[2] and its progeny. The six other cases relied on by the state all pre-date Cooper v. State, 739 So. 2d 82,85-86 (Fla. 1999) and Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999), both of which make it clear that proportionality review consists of two distinct prongs: the death sentence cannot be upheld unless the crime "falls within the category of both (1) the most aggravated, and (2) the least mitigated of [first-degree] murders." However, undersigned counsel would agree that Cooper and Almeida do not make new law, but rather they are a clear restatement of what has been the law for nearly three decades. See State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). Therefore, the state's cases might be applicable if they were factually similar to the instant case. But they aren't.

In Freeman v. State, 563 So. 2d 73, 77 (Fla. 1990), the defendant had previously been convicted of first degree murder, armed robbery, and burglary of a dwelling with an assault, all committed three weeks before the charged homicide. There were no statutory mitigating circumstances (as contrasted with three -- including both mental mitigators -- in the instant case) and "the nonstatutory mitigating circumstances were not compelling". In Spencer v. State, 691 So. 2d 1062, 1065 (Fla. 1996), the death

[2] Campbell v. State, 571 So. 2d 415 (Fla. 1990).

sentence was held to be proportionate based largely upon the aggravating factor of Spencer's prior violent felony convictions, including an attempted second degree murder of his wife (whom he did murder two weeks later), as well as an aggravated battery and an aggravated assault on his stepson. (In the instant case, appellant's lack of any significant history of violence was found as a nonstatutory mitigating factor). In Spencer, the mental mitigators were found but were not given great weight due to other evidence including "Spencer's ability to function in his job and his capacity to plan and carry out his wife's murder." 691 So. 2d at 1065. (In the instant case, the state's retained expert Dr. Kremper -- in a Social Security disability report prepared prior to the homicide -- found that appellant was incapable of maintaining employment due to "his severe cognitive, emotional, and behavioral deficits", including an organic mental disorder, an antisocial personality disorder, alcohol and cocaine abuse, and an overall IQ of 66 (8/1435-39). Moreover, in contrast to Spencer, all of the evidence here was consistent with an unplanned killing, fueled by the effects of alcohol and cocaine on a brain damaged individual, and possibly triggered by a blow to the forehead during an impulsive robbery attempt).

Pope v. State, 679 So. 2d 710 (Fla. 1996) also involved a premeditated murder committed by a person with one or more prior violent felony convictions. In Guzman v. State, 721 So. 2d 1155,1158,1162 (Fla. 1998), the defendant had four aggravating factors, including prior violent felony conviction, "arrayed

against no statutory mitigation and little nonstatutory mitigation." Brown v. State, 565 So. 2d 304,308-09 (Fla. 1990) involved a cold, calculated, preplanned homicide, and the defendant had previously been convicted of a violent felony. The mitigating evidence in Brown consisted largely of severe mental strain resulting from financial and family pressures. In Lemon v. State, 456 So. 2d 885 (Fla. 1984), the defendant murdered a woman with whom he had a relationship; this occurred eight months after his release from prison after serving a sentence for assault with intent to commit first degree murder, in which he stabbed another female victim. There was only one mitigating circumstance found in Lemon -- emotional disturbance -- and there was some question as to the degree of the disturbance, i.e., whether it was extreme. 456 So. 2d at 888.

All of the cases cited by the state involve defendants with prior convictions of violent felonies, and several of the state's cases involve preplanned homicides. In the instant case, all three of the aggravating circumstances arose during the commission of the crime itself -- an impulsive robbery attempt by an intoxicated, brain damaged twenty year old with no significant history of violence. The circumstances of the killing were, as the trial judge properly noted, appalling; but they were also consistent with the experts' unanimous diagnosis of frontal lobe brain damage. As Dr. McCraney stated, "the events do appear to conform to this blind animalistic rage that's described with the orbital frontal syndrome" (28/3115). As for the triggering event, it was the

prosecutor's own hypothesis that Ms. Spurlock, in resisting the robbery attempt, whacked appellant across the forehead with the pool cue, "[a]nd the carnage begins" (25/2601-03). Thus, all six of the state's cases are thoroughly dissimilar to the instant case on the aggravation prong.

On the mitigation prong of the proportionality standard they are even more dissimilar, since none of the cited cases contain anywhere near the quantity or quality of mitigating circumstances as were proven and uncontradicted in the instant case. The state, trying to downgrade the mitigating factors, refers to them as a "laundry list" (answer brief, p.2,28). This is the sort of characterization which might be well taken if the list were composed of items like (1) the defendant is a human being, (2) he plays the harmonica, and (3) he sometimes mowed his grandmother's lawn. To the contrary, the mitigating circumstances in the instant case are significant and compelling. Both statutory mental mitigators were found by all three experts and by the trial judge; Dr. McCraney (who is director of a residential facility for brain injured patients) described it as one of the worst cases of emotional disturbance he has seen (28/3073). The overwhelming and unrebutted evidence established that appellant has frontal lobe brain damage. Of the five common causative factors which can result in brain damage, four of those contributed to appellant's disability; his genetic makeup, an incident at age five when he was severely beaten in the head with a pipe, extreme childhood neglect and deprivation, and drug and alcohol abuse (28/3060-61, 3064-

65,3117; 29/3144-48, 3156-57,3161,3208,3214,3216-19,3227,3229-30). According to Drs. McCraney, McClane, and Dolente, these factors can interact with each other; appellant's terrible home and family situation and his early drug and alcohol abuse would have made his pre-existing brain damage that much worse (28/3061,3064-65; 29/3148,3156-57,3161; 29/3216-19,3227,3229-30). The only one of the five factors which did not play a significant role in appellant's case is pre-natal and birth trauma (19/3146).[3] The state's argument that the trial judge properly rejected the evidence of brain damage due to lack of proof of causation (answer brief, p.26-27) is specious. The experts did not pinpoint a single cause because there were at least four contributing causes, all working on each other to produce a severely brain damaged individual. Even the prosecutor below conceded that appellant's brain damage was proven; "[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).

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[3] The state, in its answer brief (p.20), mistakenly claims that Dr. McCraney "admitted that 90% of brain injuries resulting in brain damage are from birth and he had no evidence that Crook had suffered any birth trauma. (R28:3078)." What Dr. McCraney actually stated was that among children close to 90% of brian injuries are congenital, meaning they are caused by "[e]ither genetic factors or events during pregnancy" (28/3060-61, 3077-78). "A lot of these cases are genetics", while birth trauma "is probably not as important in causing brain damage as we used to think" (28/3061).

The record is devoid of any substantial, competent evidence to rebut the experts' unanimous finding of frontal lobe brain damage, and the trial court erred in rejecting it.

The evidence of brain damage alone is sufficient to distinguish Freeman, Spencer, Pope, Guzman, Brown, and Lemon. So is the statutory mitigating circumstance of appellant's youth (age 20), which was not a factor in any of the cited cases. Add in the two statutory mental mitigators, appellant's pathetic childhood (which was miserable literally from birth)[4], his borderline mental retardation and learning disability, his history of drug and alcohol abuse, and his intoxication at the time of the offense, and it can clearly be seen that this is not among the "least mitigated" of first degree murders. See Cooper v. State, 739 So. 2d 82, 85-86 (Fla. 1999). Consequently, appellant's death sentence should be reduced to life imprisonment without possibility of parole.

Two additional points need to be made. The state appears to be contending that the evidence of brain damage is refuted by the evidence that appellant has a personality disorder (answer brief, p.1-2,18,26). Undersigned counsel agrees that the evidence clearly

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[4] Among the nonstatutory mitigators found by the trial court were childhood environmental conditions, and both parents were "abysmal failures as parents" (moderate weight); life spent in abject poverty (slight weight); "terrible home life" (moderate weight); absence of a role model (moderate weight); and 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). However, the recitation of these factors -- laundry list if you will -- does not convey the desolation of appellant's childhood as eloquently as the testimony of his trainwreck of a mother, Aneitta Crook.

establishes that appellant has a personality disorder; that, in itself, is a serious psychiatric diagnosis[5] and a nonstatutory mitigating circumstance. See Eddings v. Oklahoma, 455 So. 2d 104 (1982); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993); Spencer v. State, 691 So. 2d 1062, 1063 (Fla. 1996). Moreover, none of the evidence in this case suggests that appellant has a personality disorder instead of brain damage. Rather, all four experts (including the state's retained but uncalled expert, Dr. Kremper, whose earlier report was submitted to the trial judge by agreement of both parties) indicate that appellant has a personality disorder on top of his organic brain damage, or secondary to his brain damage (28/3108-09; 29/3149, 3201; 29/3207, 3223, 3238-39, 3242-43; 8/1436-39). As recognized in Kaplan and Sadock's Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 961, all forms of "neurological insult" increase the incidence and severity of personality disorders, and children with even a minimal degree of brain dysfunction "are more at risk for the later development of personality disorder."

Also, the state comments in a footnote that "[i]n a proffer, Dr. McCraney noted that reports showed Donny said he enjoyed fighting, hurting people and seeing them bleed (R28:3092). The need to hurt people is not associated with frontal lobe damage." (state's answer brief, p.20). This statement is taken totally out of context, in an effort to insinuate that appellant has committed

[5] See Kaplan and Sadock's Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 985.

uncharged acts of violence. The state fails to mention that appellant was eight years old at the time he made those statements; he also spread his toys all over the waiting room and refused to pick them up, he would ask to color but when given crayons and paper he didn't use them, and his nose was running (28/3087). Unquestionably he had a "conduct disorder"; i.e., a childhood behavior problem (28/3088-89). The prosecutor requested a proffer, and had Dr. McCraney read the following excerpt from the 1984 school evaluation into the record:

> Donny enjoyed explaining how he enjoys fighting, hurting people and seeing them bleed. He told of specific incidents when he cut someone with a knife and stabbed another person with a pencil. He told stories about seeing a devil underground and about digging in a graveyard. These stories were difficult to understand and lacked a sense of reality.

(28/3092).

Dr. McCraney testified on proffer that the examiner was implying that the child's connection with reality was tenuous when he made those comments. The comments, in McCraney's opinion, were not particularly characteristic of brain damage or antisocial personality disorder; such behavior would more commonly be seen among persons with schizophrenia (which appellant does not have) (28/3092-94). The prosecutor then voluntarily abandoned the proffered line of questioning and did not present it to the jury. (28/3095).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse his 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.

Respectfully submitted,

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