

IN THE SUPREME COURT OF FLORIDA

WILLIAM MELVIN WHITE,

Appellant,

v.

Case No. SC00-1148

Lower Tribunal No. CR78-1840

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 13

ARGUMENT 17

 ISSUE I 17

 THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN GRANTING THE STATE’S MOTION IN LIMINE THEREBY PRECLUDING APPELLANT FROM CROSS-EXAMINING A STATE WITNESS REGARDING THE UNDERLYING FACTS OF HIS SUBSEQUENT MURDER CONVICTION.

 ISSUE II 32

 THE STATE ESTABLISHED BEYOND A REASONABLE DOUBT THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED TO DISRUPT OR HINDER THE ENFORCEMENT OF LAWS.

 ISSUE III 38

 THE TRIAL JUDGE PROPERLY REJECTED THE PROPOSED STATUTORY MITIGATING CIRCUMSTANCE THAT APPELLANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

 ISSUE IV 42

 APPELLANT’S DEATH SENTENCE IS PROPORTIONATE.

 ISSUE V 49

 APPELLANT’S CLAIM OF CRUEL AND UNUSUAL PUNISHMENT AS A RESULT OF DELAY BETWEEN CRIME AND EXECUTION IS WITHOUT MERIT.

CONCLUSION 52

CERTIFICATE OF SERVICE 53

CERTIFICATE OF FONT COMPLIANCE 53

TABLE OF AUTHORITIES

<u>Almeida v. State,</u> 748 So. 2d 922 (Fla. 1999)	45
<u>Alston v. State,</u> 723 So. 2d 148 (Fla. 1998)	32, 33
<u>Armstrong v. State,</u> 642 So. 2d 730 (Fla. 1995)	42
<u>Bassett v. State,</u> 449 So. 2d 803 (Fla. 1984)	37
<u>Bonifay v. State,</u> 680 So. 2d 413 (Fla. 1996)	21
<u>Booker v. State,</u> 773 So. 2d 1079 (Fla. 2000)	49, 50
<u>Brown v. State,</u> 473 So. 2d 1260 (Fla. 1985)	42
<u>Campbell v. State,</u> 571 So. 2d 415 (Fla. 1990)	39
<u>Chandler v. State,</u> 534 So. 2d 701 (Fla. 1988)	21
<u>Coleman v. State,</u> 610 So. 2d 1283 (Fla. 1993)	42
<u>Cooper v. State,</u> 739 So. 2d 82 (Fla. 1999)	46, 47
<u>Craig v. State,</u> 510 So. 2d 857 (Fla. 1988)	42
<u>Deaton v. State,</u> 480 So. 2d 1279 (Fla. 1994)	42
<u>Downs v. State,</u> 572 So. 2d 895 (Fla. 1990)	22, 23, 28, 42
<u>Elledge v. State,</u> 706 So. 2d 1340 (Fla. 1997)	49

<u>Espinosa v. State,</u> 589 So. 2d 887 (Fla. 1991), <u>reversed on other grounds,</u> 505 U.S. 1079 (1992)	23
<u>Finney v. State,</u> 660 So. 2d 674 (Fla. 1995)	18
<u>Ford v. Ford,</u> 700 So. 2d 191 (Fla. 4th DCA 1997)	19
<u>Garcia v. State,</u> 492 So. 2d 360 (Fla. 1986)	43
<u>Geralds v. State,</u> 674 So. 2d 96 (Fla. 1996)	36
<u>Green v. State,</u> 583 So. 2d 647 (Fla. 1991)	37
<u>Hall v. State,</u> 614 So. 2d 473 (Fla. 1993)	34, 42
<u>Hill v. State,</u> 515 So. 2d 176 (Fla. 1987)	37, 39, 40
<u>Hitchcock v. Dugger,</u> 481 U.S. 1821 (1987)	3
<u>Holton v. State,</u> 573 So. 2d 284 (Fla. 1990)	37
<u>Huff v. State,</u> 569 So. 2d 1247 (Fla. 1990)	19
<u>Jackson v. State,</u> 570 So. 2d 1388 (Fla. 1st DCA 1990)	19
<u>Johnson v. State,</u> 696 So. 2d 317 (Fla. 1997)	42
<u>King v. State,</u> 431 So. 2d 272 (Fla. 5th DCA 1983)	19
<u>King v. State,</u> 514 So. 2d 354 (Fla. 1987)	21

<u>Knight v. Florida,</u> 120 S. Ct. 459 (1999)	50
<u>Knight v. State,</u> 746 So. 2d 423 (Fla. 1998), <u>cert. denied,</u> 120 S. Ct. 459 (1999)	49, 50
<u>Lucas v. State,</u> 568 So. 2d 18 (Fla. 1990)	18
<u>Mansfield v. State,</u> 758 So. 2d 636 (Fla. 2000)	46
<u>Marek v. State,</u> 492 So. 2d 1055 (Fla. 1994)	42
<u>Nibert v. State,</u> 574 So. 2d 1059 (Fla. 1990)	39
<u>Pomeranz v. State,</u> 634 So. 2d 1145 (Fla. 4th DCA 1994)	24
<u>Porter v. State,</u> 593 So. 2d 1158 (Fla. 2d DCA 1992)	20
<u>Preston v. State,</u> 607 So. 2d 404 (Fla. 1992)	34
<u>Ray v. State,</u> 755 So. 2d 604 (Fla. 2000)	18
<u>Robinson v. State,</u> 610 So. 2d 1288 (Fla. 1994)	42
<u>Rogers v. State,</u> 511 So. 2d 526 (Fla. 1987)	37
<u>Rose v. State,</u> 26 Fla. L. Weekly S210 (Fla. Apr. 5, 2001)	46, 49
<u>Routley v. State,</u> 440 So. 2d 1257 (Fla. 1987)	34, 35
<u>Sheffield v. State,</u> 585 So. 2d 396 (Fla. 1st DCA 1991)	20
<u>Shere v. State,</u> 579 So. 2d 86 (Fla. 1991)	35

<u>Smith v. State,</u> 403 So. 2d 933 (Fla. 1981)	2, 35
<u>State v. DiGuilio,</u> 491 So. 2d 1129 (Fla. 1986)	28, 36
<u>State v. Savino,</u> 567 So. 2d 892 (Fla. 1990)	25, 26
<u>Steinhorst v. Singletary,</u> 638 So. 2d 33 (Fla. 1994)	43
<u>Swafford v. State,</u> 533 So. 2d 270 (Fla. 1988)	34
<u>Tamplimg v. State,</u> 610 So. 2d 100 (Fla. 1st DCA 1992)	19
<u>Teffeteller v. State,</u> 495 So. 2d 744 (Fla. 1986)	21
<u>Tillman v. State,</u> 591 So. 2d 167 (Fla. 1991)	45
<u>Tompkins v. State,</u> 502 So. 2d 415 (Fla. 1986)	24
<u>Traina v. State,</u> 657 So. 2d 1227 (Fla. 4th DCA 1995)	26
<u>Trease v. State,</u> 768 So. 2d 1050 (Fla. 2000)	17, 19, 45, 46
<u>Troedel v. State,</u> 462 So. 2d 392 (Fla. 1984)	42
<u>Valdes v. State,</u> 626 So. 2d 1316 (Fla. 1993)	40
<u>Way v. State,</u> 760 So. 2d 903 (Fla. 2000), <u>cert. denied</u> , 148 L. Ed. 2d 975 (2001)	35, 46
<u>White v. Dugger,</u> 523 So. 2d 140 (Fla.), <u>cert. denied</u> , 488 U.S. 871 (1988)	3, 21, 30, 41, 43

<u>White v. State,</u> 415 So. 2d 719 (Fla.), <u>cert. denied,</u> 459 U.S. 1055 (1982)	. . . . . 2, 30, 35, 41, 43
<u>White v. State,</u> 729 So. 2d 909 (Fla. 1999)	. . . . . 3, 30, 31
<u>Willacy v. State,</u> 696 So. 2d 693 (Fla. 1997)	. . . . . 33
<u>Williamson v. State,</u> 511 So. 2d 289 (Fla. 1988)	. . . . . 42
<u>Woods v. State,</u> 490 So. 2d 24 (Fla. 1986)	. . . . . 42
<u>Zack v. State,</u> 753 So. 2d 9 (Fla.), <u>cert. denied,</u> 121 S. Ct. 143 (2000)	. . . . . 18

OTHER AUTHORITIES CITED

Section 90.404(2) (a), Florida Statutes (2000)	. . . . . 24, 25
Section 90.610, Florida Statutes (2000)	. . . . . 19
Section 921.141(5) (g), Florida Statutes (2000)	. . . . . 32
Section 921.141(6) (e), Florida Statutes (2000)	. . . . . 38

PRELIMINARY STATEMENT

For the purposes of clarity, Appellee will cite to the record in the same manner as Appellant. The six volumes of the record containing court documents and transcripts from the Spencer hearing will be cited to by volume number, followed by "R" to refer to the appropriate page. The twelve volumes containing the penalty phase proceedings will be cited to by volume number, followed by "T" to refer to the appropriate page.

STATEMENT OF THE CASE AND FACTS

In July 1978, an Orange County grand jury indicted Appellant and Richard DiMarino for the first degree murder of Gracie Mae Crawford. (V4, R.155).¹ Richard DiMarino was tried separately and convicted by the jury of the lesser-included offense of third degree murder, for which he was sentenced to 15 years in prison. After being sentenced, DiMarino entered into an agreement with the State whereby he agreed to testify against Appellant and Guy Smith in exchange for concurrent time in prison on other unrelated felony charges. (V8, T.959-61). The State also agreed to remove a tattoo and to transfer DiMarino to an out-of-state prison facility because he feared retaliation from members of the Outlaws motorcycle gang. (V7, T.930-32).

After the original jury returned a guilty verdict of first degree murder, the jury unanimously recommended that Appellant be sentenced to death. The trial judge followed this recommendation and sentenced Appellant to death. On direct appeal, this Court affirmed Appellant's judgment and sentence. See White v. State, 415 So. 2d 719 (Fla.), cert. denied, 459 U.S. 1055 (1982).

In 1983, Appellant filed a motion pursuant to Florida Rule of

¹Another defendant, Guy Ennis Smith, was also charged by separate indictment with the first degree murder of Gracie Mae Crawford. Upon conviction, the trial court overrode the jury's recommendation and sentenced Smith to death. (V8, T.1070). On appeal, this Court reversed the sentence and remanded the case for imposition of a life sentence. See Smith v. State, 403 So. 2d 933 (Fla. 1981).

Criminal Procedure 3.850 attacking his conviction and sentence on several grounds. See White v. State, 729 So. 2d 909 (Fla. 1999) (White II). In 1987, while his 3.850 proceeding was pending, the United States Supreme Court issued its opinion in Hitchcock v. Dugger, 481 U.S. 1821 (1987). Appellant subsequently filed a petition for habeas relief based on Hitchcock. The trial court stayed the 3.850 proceedings until this Court disposed of the habeas petition. This Court rejected Appellant's habeas claim for relief in White v. Dugger, 523 So. 2d 140 (Fla.), cert. denied, 488 U.S. 871 (1988). The trial court subsequently held an evidentiary hearing on the 3.850 claims and denied all relief by order dated April 16, 1996. On appeal from this order, this Court in White II reversed Appellant's sentence and remanded the case with directions to conduct a new sentencing proceeding.

In November 1999, the trial court conducted a new penalty phase proceeding in accordance with this Court's opinion in White II. At this proceeding, the State introduced evidence that Appellant pled guilty to second degree murder in Tennessee after he was originally sentenced to death in Florida in 1978. The plea colloquy from Tennessee was introduced into evidence and it was established that Appellant and another Outlaws gang member, Michael Markham, participated in the murder of Jim Valentino. (V5, T.613-37). As part of the plea agreement, Appellant received a thirty year sentence and Markham was sentenced to twenty years.

The Tennessee prosecutor asserted that the evidence would show that Appellant, Markham, and an unknown individual entered an apartment and chased the victim into a back bedroom. (V5, T.621). The victim was killed in the bedroom and his body was dumped into a river. The State indicated that the medical examiner would testify that the victim had 14 stab wounds, a laceration to the neck, and a laceration in the stomach area. (V5, T.623). The victim died from multiple stab wounds and the autopsy report indicated that there was no evidence of a gunshot wound. (V1, R.3-12).² Appellant, "generally speaking," substantially agreed with the prosecutor's factual basis. (V5, T.631).

In addition to the evidence regarding Appellant's conviction for murder in Tennessee, the State introduced testimony from witnesses from the 1978 trial and victim impact evidence. The evidence established that Appellant, a member of a Kentucky chapter of the Outlaws motorcycle gang, was visiting the Orlando chapter of the Outlaws. On June 5, 1978, Appellant and other members of the Outlaws and their girlfriends went to a local nightclub, the Inferno, where they observed Gracie Mae Crawford dancing seductively to the music of a black performer. (V5, T.658-59; V7,

²Michael Markham testified at the Spencer hearing that he killed the victim by shooting him and "wounding him pretty severely," and by choking the victim to death. (V4, R.110). Markham denied that Appellant assisted in the murder, but claimed that Appellant simply assisted him in disposing of the body. Prior to disposing of the body, Markham claimed that he stabbed the body in an attempt to make it sink in the river. (V4, R.111-12).

T.905-07). Richard DiMarino met the victim and when the club closed, she accompanied DiMarino and other Outlaws back to their clubhouse.³ (V5, T.658-59; V7, T.907). Once at the clubhouse, DiMarino and Guy Smith began beating the victim because she was "a nigger lover." (V7, T.901-11). DiMarino went into a bedroom where Appellant and Renee Nestle were sleeping and woke Appellant up and told him there was a "nigger lover" that needed to be trained in the kitchen. (V7, T.912).

Appellant got dressed and went into the kitchen and joined Guy Smith in beating Ms. Crawford for the next ten to fifteen minutes. (V7, T.913-14). After the beating, Appellant returned to the bedroom and got the keys to Ms. Nestle's car and told her that she was stupid and did not hear anything. (V8, T.1000). Appellant and DiMarino escorted the victim outside and placed her in the front seat of the car in between the two men. As Appellant was getting ready to drive away, Guy Smith approached the driver side of the car and told Appellant to "take care of business," that he "wanted no witnesses." (V7, T.918).

Appellant and DiMarino drove the victim to a remote area and took her outside the car, passed her over a barbed wire fence, and

³Appellant had been asked by law enforcement to leave the nightclub prior to its closing because he created a disturbance. (V8, T.984-85). The officer who encountered Appellant confiscated his knife while speaking with Appellant and his girlfriend, Renee Nestle, but returned the knife when Appellant left the scene. (V8, T.985).

placed her on the ground. Appellant straddled the victim and began repeatedly stabbing the victim with his knife. (V7, T.922-24). Appellant sliced her throat and then told DiMarino to slice her throat also. (V7, T.924). The medical examiner testified that the victim had been stabbed 14 times, including six significant wounds to the chest, and had two slash marks on her throat. (V6, T.733-56). The victim also had a stab wound on her hand indicating a defensive wound. (V6, T.751-55).

As the two men were driving back to the clubhouse from the murder scene, their car ran out of gas at Sea World's parking lot. Three Sea World employees came into contact with the two men. One of the employees, Robert Granec, an ex-law enforcement officer with extensive experience in detecting DUIs, testified that Appellant did not appear intoxicated. (V4, T.584-88). Appellant was not wearing a shirt and had a blood stain on his arm. (V6, T.802). DiMarino was wearing a shirt and none of the employees testified that they observed any bloodstains on his clothes. Mr. Granec observed a knife case on Appellant's belt, but because of the angle, he could not determine whether Appellant had a knife in the sheath. (V4, T.586).

One of the Sea World employees gave the men some gas, and as they were leaving, Appellant told DiMarino that he thought he may have lost his wallet at the murder scene. (V7, T.927-28). Appellant and DiMarino then returned to the scene and grabbed the

dead victim's body and placed her in the trunk of the car. The men moved the spare tire into the backseat in order to place the body in the trunk. The men drove to another isolated area and dumped the body. Renee Nestle testified that when the men returned with her car, it was filthy and the tire had been moved into the backseat. (V8, T.1008-11).⁴

Prior to Richard DiMarino's testimony, the State filed a motion in limine seeking to prevent Appellant from, among other things, cross-examining DiMarino about the details of a subsequent murder he committed with another person in 1990. (V6, T.696-726). After hearing argument from counsel, the trial court ruled that defense counsel could ask DiMarino about his present lifestyle, could inquire if he had any subsequent felony convictions and the type of felony, whether he had negotiated any kind of agreements for a lesser sentence for his testimony against a codefendant, and whether he was on parole or had a suspended sentence at the time of his present testimony. The judge, however, ruled that defense counsel could not delve into the specific facts of the 1990 murder. (V7, T.896-900).

DiMarino testified on direct examination about the events

⁴Ms. Nestle testified that she was in the car when Appellant drove DiMarino to his house after the homicide. Ms. Nestle testified that Appellant had been drinking, "but he knew what he was doing. He was not falling down drunk." (V8, T.1006). Once at DiMarino's house, Appellant and DiMarino washed out the trunk of the car in an attempt to get rid of the blood. (V7, T.929).

leading up to the murder of Gracie Mae Crawford and Appellant's act of stabbing Ms. Crawford 14 times and cutting her throat. (V7, T.901-33). On cross-examination, DiMarino admitted that he pled guilty to another murder in Maryland in 1990 and that he was currently on parole for that offense. (V8, T.953). DiMarino testified that he entered into a plea agreement in Maryland wherein he received a 20 year sentence with ten years suspended. (V8, T.954).

On redirect, the prosecutor asked DiMarino if at the time of the instant crime he had ever seen anyone murdered in the manner in which Appellant committed the murder. (V8, T.971). DiMarino responded that he had not, and that it "was sickening." (V8, T.971). Defense counsel subsequently argued that this line of questioning opened the door for him to question DiMarino regarding the circumstances of the 1990 murder.⁵ The trial judge found that the circumstances of the 1990 murder were different in that it involved an altercation between men where it ended up in a fight and any factual evidence regarding a stabbing murder committed 12 years after the instant murder was not relevant. Accordingly, the trial judge again prevented Appellant from questioning DiMarino regarding the underlying facts of the 1990 murder. (V8, T.975-76).

⁵Defense counsel erroneously states in his brief that DiMarino said he was "shocked" and sickened by the murder. See Initial Brief of Appellant at 4, 26-27. DiMarino only testified that the murder was "sickening." (V8, T.971).

In the mitigation phase of the proceeding, Appellant presented testimony from Richard DiMarino's brother, John "Patches" DiMarino, regarding statements made by Richard DiMarino after the murder. According to John DiMarino, Appellant was drunk and stumbling around at the clubhouse prior to the murder. (V8, T.1057). John DiMarino also claimed that Richard told him after the murder that he had "taken care of some business" and had slit the girl's throat. (V8, T.1058-59). John DiMarino, also an Outlaws member, knew that the phrase "take care of business" meant to commit murder. (V8, T.1064).⁶

Appellant also introduced testimony from numerous witnesses regarding his alcoholism and the problems he encountered with his step-father when he was young. (V8, 1073-74; V9, 1113-83). Appellant's older sister, Nadine Starbird, testified that their family was a happy family until her father passed away and her mother married Melvin White, Sr. (V9, T.1183-87). She testified that Melvin White, Sr. was an alcoholic who often beat her mother and the children. She moved out of the house five years before Appellant was born. (V9, T.1204). Ms. Starbird testified that her mother was a wonderful woman who provided a stable influence for Appellant for the first 15 years of his life until she moved to California. (V9, T.1188, 1204). Within five years, Appellant went

⁶As previously noted, Guy Smith told Appellant immediately before the murder to "take care of business" and make sure there were no witnesses.

out to California to stay with his mother. (V9, T.1204-05).

Appellant's other sister, Carmelita White, was four years older than Appellant and also suffered from the abusive situation of growing up with Melvin White, Sr. as her father. (V9, T.1206-16). He forced her and Appellant to drink alcohol at a young age. (V9, T.1210). Ms. White testified that she moved to California with her mother when Appellant was about 14 years old. Appellant stayed behind with his father for about three years before moving out to California. (V9, T.1218-19).

Appellant's mother testified that she took her children to church and Sunday School when Melvin White Sr. allowed her. (V9, T.1227). When she divorced her husband and moved to California, Appellant stayed behind with his father because he was "tender-hearted" and felt his father's pain. (V9, T.1237).

Appellant also called Dr. Glenn Caddy, a clinical forensic psychologist, to testify about Appellant's mental condition. Dr. Caddy examined Appellant three times and testified that Appellant had an extensive history of alcohol abuse and suffered from organic brain damage as a result of his alcoholism, drug use, and head trauma. (V10, T.1267-69). Despite this brain damage, Appellant has an IQ of 88 which is in the low-normal range. According to Dr. Caddy, two-thirds of the population have an IQ between 90 and 110. (V10, T.1325).

The doctor testified that Appellant had no memory of the

events surrounding the murder because he was in an alcoholic blackout at the time.⁷ (V10, T.1295-99). When asked if Appellant was under the substantial domination of others at the time of the murder, Dr. Caddy testified that, because of numerous factors, Appellant "was a man who was readily available to be influenced by others." (V10, T.1264).

After hearing all of the evidence and closing arguments, the jury returned an advisory verdict recommending death by a vote of 10-2. (V12, T.1503). The trial judge conducted Spencer hearings and ultimately announced its decision to impose the death penalty. (V3, R.68-96; V5, R.484-94). The court found four aggravating factors: (1) Appellant was previously convicted of another felony involving the use or threat of violence to the person; (2) the capital felony was committed while Appellant was engaged in the commission of a kidnapping; (3) the capital felony was especially heinous, atrocious, or cruel; and (4) the capital felony was committed to disrupt or hinder the enforcement of laws. (V5, R.484-86).

In mitigation, the court found that Appellant established the following statutory and nonstatutory circumstances: (1) the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance (little weight); (2)

⁷According to Dr. Caddy, one in ten males in America are alcoholics, and it is "very common" for them to suffer blackouts. (V10, T.1321).

Appellant's poor family background, bad childhood, abuse, parental neglect and family squalor (some weight); (3) Appellant's alcohol and substance abuse at an early age, and extensive history of alcohol and substance abuse (some weight); (4) Appellant suffers from organic brain damage and neurological deficiencies (some weight); (5) Appellant's marginal intelligence or low IQ (little weight); (6) Appellant's intoxication and diminished capacity at the time of the crime (little weight); (7) Appellant was a willing worker and a good employee (some weight); (8) Appellant's lack of future dangerousness (potential for rehabilitation) and good prison record (some weight); (9) Appellant's contribution to the community (very little weight); (10) Appellant's character as a loving person and generosity to others (very little weight). After the court imposed the death penalty, Appellant timely filed a notice of appeal. (V6, R.526).

SUMMARY OF ARGUMENT

Issue I: The trial court acted within its discretion in granting the State's motion in limine seeking to prohibit Appellant from cross-examining a witness regarding the underlying facts of a subsequent, unrelated crime. Appellant sought to question Richard DiMarino regarding the facts of a 1990 murder he committed with another individual in Maryland. The trial judge ruled that defense counsel could question DiMarino regarding the number of felony convictions he had and could identify the type of crimes committed, but defense counsel could not question him regarding the factual details of the 1990 murder. The court properly found that this testimony was inadmissible and not relevant to Appellant's penalty phase proceeding.

Furthermore, the State did not open the door to this testimony on redirect examination when the witness testified that he was "sickened" by Appellant's act of brutally stabbing Ms. Crawford to death. Appellant asserts that evidence showing DiMarino was involved in another stabbing death in 1990 impeaches his testimony that he was "sickened" by Appellant's actions in 1978. Appellant's argument is without merit.

Additionally, even if this Court finds that the trial court abused its discretion in preventing Appellant from questioning DiMarino about the underlying facts of the murder, the State submits the error was harmless. Defense counsel extensively cross-

examined DiMarino and attacked his credibility with his prior convictions. The jury was aware that DiMarino had over 25 felony convictions and had pled guilty in 1990 to a murder in Maryland. Appellant elicited the fact that DiMarino was currently on parole for that offense after receiving a deal from the state whereby he obtained a twenty year sentence with ten years suspended.

Issue II: The trial judge properly found that the murder was committed to disrupt or hinder the enforcement of the laws. The evidence introduced by the State established this aggravating circumstance beyond a reasonable doubt. Prior to the murder, Appellant and two codefendants committed aggravated battery on the victim. Immediately after the beating, a codefendant told Appellant to take care of business, that he did not want any witnesses. The victim in the case knew the defendants and would be able to identify them from previous encounters. Appellant and DiMarino drove the victim to a deserted area where Appellant brutally stabbed the victim 14 times and slit her throat. The trial judge properly found that Appellant committed the murder to avoid discovery and prosecution for the aggravated battery committed earlier at the Outlaws' clubhouse.

Issue III: The trial judge properly rejected the proposed statutory mitigating circumstance that Appellant was acting under extreme duress or under the substantial domination of another person. The law is well settled that a trial court may reject a

defendant's claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection. In this case, there is substantial competent evidence that Appellant was not acting under extreme duress or under the substantial domination of another at the time of the murder. Appellant escorted the victim to his girlfriend's car, initially drove the car away from the clubhouse, passed the victim over a fence once they arrived at the murder scene, provided the murder weapon, and most importantly, stabbed the victim to death. Based on this evidence, the trial court properly found that Appellant was the major participant and was not acting under extreme duress or under the substantial domination of another.

Issue IV: Appellant's death sentence is proportionate to his codefendants' sentences and is proportionate to other capital cases. Appellant's argument that his sentence is disproportionate to codefendant DiMarino's sentence is without merit. This Court has previously rejected this argument and found it permissible to impose different sentences on capital codefendants where their various degrees of participation and culpability are different from one another. Clearly, as this Court has previously found based on the same evidence, Appellant was the executioner in this case and his death sentence is warranted. Furthermore, Appellant's death sentence is proportionate when compared to other capital cases.

Issue V: Appellant claims that executing him after spending over two decades on death row would constitute cruel and unusual punishment. This Court has previously rejected this exact claim in other capital cases. Because no federal or state courts have accepted Appellant's argument, this Court should reject this claim and affirm Appellant's sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN GRANTING THE STATE'S MOTION IN LIMINE THEREBY PRECLUDING APPELLANT FROM CROSS-EXAMINING A STATE WITNESS REGARDING THE UNDERLYING FACTS OF HIS SUBSEQUENT MURDER CONVICTION.

Prior to Richard DiMarino's testimony at the resentencing proceeding, the State filed a motion in limine seeking to prohibit Appellant from questioning DiMarino about the underlying facts of a murder he committed with another individual in Maryland in 1990. The State argued that this evidence was inadmissible evidence of the witness's bad character or propensity. After hearing argument from counsel, the court ruled that Appellant would be allowed to question DiMarino about his prior convictions and could even identify the type of crimes he committed, including the murder in 1990. The trial judge allowed defense counsel to question DiMarino about his current parole status and if he had entered into any agreements in exchange for his testimony against a codefendant in 1990. The court, however, prohibited Appellant from questioning DiMarino about the underlying details of the 1990 murder.

The State first questions whether Appellant has preserved this issue for appellate review based on his failure to proffer the testimony. See Trease v. State, 768 So. 2d 1050 (Fla. 2000) (stating that defendant failed to preserve issue by demonstrating the relevance of the testimony via a proffer). In the instant

case, Appellant informed the court that he wanted to question DiMarino regarding the underlying details of his 1990 murder conviction, but counsel did not state the questions he sought to ask the witness.⁸ Because "it is impossible for the appellate court to determine whether the trial court's ruling was erroneous" without a proffer, Finney v. State, 660 So. 2d 674, 684 (Fla. 1995), this Court should find that Appellant has failed to preserve this issue for appellate review. See also Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990) (holding that a failure to proffer what a witness would have said on cross-examination renders an alleged trial court error unpreserved). Even if Appellant preserved this issue, the State submits that the trial court acted within its sound discretion in granting the State's motion in limine and excluding this inadmissible evidence.

The law is well established that a ruling on the admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla.), cert.

⁸In response to the State's motion in limine, defense counsel proffered numerous questions regarding other areas of his cross-examination of DiMarino, but did not proffer any specific questions regarding the 1990 murder. Counsel indicated that he would ask the witness: (1) if he is currently living free like the rest of society, (2) what he does for a living, (3) does he own his own business, and (4) how he was doing, i.e., "he can go out and get credit just like other law abiding citizens, he can make payments on loans, he can drive new cars. . . ." (V6, T.708, 723).

denied, 121 S. Ct. 143 (2000). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

In the instant case, the trial court acted within its discretion in prohibiting Appellant from questioning Richard DiMarino about the underlying facts of his 1990 murder conviction. Florida Statutes, section 90.610 states that "[a] party may attack the credibility of any witness, . . . , by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted." § 90.610, Fla. Stat. (2000). Florida courts have consistently held that this section allows a party to ask only two questions: (1) Have you ever been convicted of a felony?, and if "yes," (2) How many times? See Jackson v. State, 570 So. 2d 1388, 1390 (Fla. 1st DCA 1990); King v. State, 431 So. 2d 272, 273 (Fla. 5th DCA 1983). Any remarks or questions concerning the details or nature of the prior conviction are inadmissible. Tampling v.

State, 610 So. 2d 100, 102 (Fla. 1st DCA 1992) (finding reversible error where prosecutor asked witness about specific crime during cross-examination); Porter v. State, 593 So. 2d 1158, 1159 (Fla. 2d DCA 1992) (stating that it was improper for the prosecutor to name defendant's prior convictions during cross-examination or to state the nature of the crimes); Sheffield v. State, 585 So. 2d 396, 397 (Fla. 1st DCA 1991) (improper for prosecutor to cross-examine defendant "as to the specific details of his prior felony convictions"). Despite the prohibition against revealing the nature of the crime, the trial court, in an abundance of caution, allowed Appellant to question DiMarino regarding the specific crime, but precluded any questions regarding the details of the murder.

Appellant argues that the trial court's ruling prevented him from presenting evidence relevant to mitigation. Specifically, Appellant argues that evidence of the nature of the 1990 murder was relevant to "assist the jury in determining the relative roles of each participant in Crawford's murder, and the proportionality of their respective sentences." Initial Brief of Appellant at 22. Contrary to Appellant's assertions, the fact that DiMarino participated with another individual in stabbing a man to death during a fight in 1990 is not relevant to determining the relative roles of DiMarino and Appellant in the murder of Ms. Crawford in 1978. The evidence sought to be introduced was simply an attempt

to show DiMarino's bad character or propensity and to argue residual or lingering doubt.

This Court has consistently rejected residual or lingering doubt as a nonstatutory mitigating factor. See White v. Dugger, 523 So. 2d 140, 140-41 (Fla. 1988) (finding that Appellant should not be permitted to argue residual doubt theory on resentencing, and even if so, there is "no legitimate argument" to be made because it is absolutely clear that Appellant killed the victim); Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988) (stating that a resentencing is not a retrial of the defendant's guilt or innocence); King v. State, 514 So. 2d 354, 358 (Fla. 1987). Appellant now asks this Court to ignore precedent so he can present evidence, in the guise of mitigation, that DiMarino rather than Appellant killed the victim.

While it is true that this Court has held that the trial judge has discretion in a resentencing proceeding to allow the jury to hear evidence that will aid it in understanding the facts of the case to render an appropriate advisory sentence, see Bonifay v. State, 680 So. 2d 413 (Fla. 1996); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986), obviously the trial court does not abuse its discretion by refusing to turn a penalty phase proceeding into a guilt phase proceeding (and exceeding the mandate of this Court) or by permitting evidence to confuse or mislead the jury, or by subverting a long line of precedent from this Court that residual

or lingering doubt is not a nonstatutory mitigator. Furthermore, as this Court has previously noted, no legitimate argument can be made as to lingering doubt because it is abundantly clear that Appellant murdered Gracie Mae Crawford.

Appellant argues that the facts of his case are similar to those in Downs v. State, 572 So. 2d 895 (Fla. 1990). In Downs, the trial court refused to allow the defendant to present an alibi witness's testimony at his resentencing hearing because the judge ruled the evidence was only relevant to the issue of guilt and not to the issue of penalty. Id. at 899. Downs sought to introduce the testimony of his grandmother to show that he was not the triggerman of the murder and to impeach a codefendant's testimony that Downs committed the murder. Id. Although the evidence was inextricably intertwined with the issue of Downs's guilt, this Court nevertheless concluded that the judge erred in excluding the alibi evidence because it was relevant to the circumstances of Downs's participation in the crime and was valid mitigation evidence relevant in evaluating the codefendants' various sentences. Downs, 572 So. 2d at 899. Although the trial court erred, this Court found that the error was harmless because Downs succeeded in presenting his theory of defense. Id.

Appellant's case is distinguishable from Downs because the evidence excluded in Downs was markedly different than the evidence Appellant sought to introduce. Appellant's penalty defense, which

he fully presented, included the theory that DiMarino actually stabbed Gracie Mae Crawford and Appellant was too drunk to participate in the crime. Appellant succeeded in introducing into evidence the fact that DiMarino was an "enforcer" for the Outlaws motorcycle gang who would lie when it was convenient to him. Appellant established that DiMarino had over 25 felony convictions and only testified in 1978 against Appellant after having received a deal from the State. More importantly, Appellant was allowed to introduce into evidence the fact that DiMarino committed a murder in 1990 and was currently on parole for the offense. Appellant successfully impeached DiMarino's credibility and was properly prohibited from delving into the details of the 1990 murder. This testimony, unlike the alibi testimony in Downs, was extremely prejudicial and would have only been introduced to show DiMarino's bad character or propensity. See Espinosa v. State, 589 So. 2d 887 (Fla. 1991), reversed on other grounds, 505 U.S. 1079 (1992) (rejecting defendant's claim that trial court erred in refusing to allow him to introduce evidence of codefendant's violent history which defendant claimed supported his defense that codefendant flew into a rage and killed the victims).

Although wide latitude is permitted on cross-examination in a criminal trial, especially when it involves a key state witness, its scope and limitation lies within the sound discretion of the trial court and is not subject to review except for a clear abuse

of discretion. Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986); Pomeranz v. State, 634 So. 2d 1145 (Fla. 4th DCA 1994). In Pomeranz, the court found that the trial judge abused its discretion in denying defense counsel the right to pursue questioning to show that a State's witness faced capital murder charges for his participation in a separate crime which constituted a powerful incentive for the witness to adjust his testimony in the defendant's case. The court indicated that the pendency of potential murder charges was a valid area for inquiry on cross-examination, but did not indicate that defense counsel could elicit details regarding the underlying facts of the murder.

Appellant was entitled to question DiMarino regarding his prior convictions and could reveal any deals or agreements DiMarino entered into with the State in an attempt to show that he would be biased. Defense counsel succeeded in showing that DiMarino was on parole at the time of his testimony and had reasons to adjust his testimony to please the State. The court simply placed a reasonable limitation on how much detail defense counsel could go into when questioning the witness regarding his conviction for second degree murder in 1990. The State submits that the trial court acted within its discretion in prohibiting this testimony.

Appellant also argues that the evidence of DiMarino's subsequent murder was admissible as "reverse Williams rule evidence" under Florida Statutes, section 90.404 because it showed

DiMarino's pattern of killing another person by stabbing the person to death. Appellant asserts that if the jury knew of DiMarino's involvement in another stabbing death, the jury may have doubted his level of involvement in Gracie Mae Crawford's murder. Section 90.404 provides:

Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, *but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.*

§ 90.404(2) (a), Fla. Stat. (2000) (emphasis added).

This Court addressed the proper standard regarding the admissibility of reverse Williams rule evidence in State v. Savino, 567 So. 2d 892 (Fla. 1990). In Savino, the defendant was charged with the first degree murder of his stepson by blunt trauma to the stomach. Id. at 894. In his defense, Savino sought to introduce evidence that his wife, the boy's natural mother, allegedly killed her one-month-old daughter with a blunt instrument seven years previously. Id. The trial judge refused to allow him to introduce this evidence. In upholding the court's discretionary ruling, this Court stated:

The test for admissibility of similar-fact evidence is relevancy. Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959). When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. Drake v. State, 400 So. 2d 1217 (Fla. 1981);

State v. Maisto, 427 So. 2d 1120 (Fla. 3d DCA 1983); Sias v. State, 416 So. 2d 1213 (Fla. 3d DCA), review denied, 424 So. 2d 763 (Fla. 1982). If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. Evidence of bad character or propensity to commit a crime by another would not be admitted; such evidence should benefit a criminal defendant no more than it should benefit the state. Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. These same factors should apply when the defendant offers such evidence.

Id. The Savino court found that the trial court did not abuse its discretion in finding that the wife's alleged abuse of a one-month-old child, in a different state, in a different marriage, and in a different manner was not sufficiently similar to be admissible in Savino's trial.

Likewise, in the instant case, the trial judge found that evidence of a 1990 stabbing murder in Maryland of a biker during a fight at an intersection was irrelevant and not sufficiently similar to be admissible in Appellant's penalty phase. Clearly, a stabbing murder of a man during an altercation twelve years after Gracie Mae Crawford's murder is not the type of "fingerprint" similarity required to be admissible as reverse Williams rule evidence. See also Traina v. State, 657 So. 2d 1227 (Fla. 4th DCA 1995) (stating that evidence of past crime must meet "fingerprint type" of similarity test to be admissible as reverse Williams rule evidence). In this case, the murder was committed in a

premeditated and calculated manner to ensure that Gracie Mae Crawford did not identify the members of the Outlaws who battered her at the clubhouse. The victim was beaten and then driven to an isolated spot and stabbed 14 times and had her throat slashed. This is in stark contrast to the stabbing death of a man during an altercation between rival biker gang members in 1990.⁹ In that case, the victim, a member of a rival motorcycle gang, was beat up at an intersection while stopped at a red light and he died from a single stab wound to the chest. This incident, some twelve years subsequent to Gracie Mae Crawford's murder, clearly does not meet the "fingerprint" type of similarity required to be admissible reverse Williams rule evidence. Because Appellant has failed to establish an abuse of the trial court's discretion in this regard, this Court should affirm the trial judge's ruling.

Appellant's argument that the State opened the door to the introduction of the underlying facts of the 1990 murder is also without merit. On redirect, DiMarino testified that he was "sickened" when he witnessed Appellant stab Gracie Mae Crawford 14 times and slash her throat. Appellant argues that DiMarino's

⁹Appellant introduced a packet of material into the court file, Defendant's Identification A, which included the police report from the Maryland arrest. The police report alleges that DiMarino and another individual were involved in a fist fight with two rival biker gang members at an intersection. One of the two bikers fled and DiMarino and his codefendant continued to strike the remaining victim. The victim, Thomas Bailey, died from a single stab wound to the chest.

testimony that he was "shocked and sickened" by the sight opened the door to the testimony that he subsequently participated in a stabbing murder. Contrary to Appellant's assertion, evidence showing that DiMarino was involved in a stabbing death in 1990 does not "impeach" his testimony that he was "sickened" by Appellant's actions in 1978. As the prosecutor noted to the court, "logically, a murder that occurred . . . in July 1990 would not prepare somebody of seeing a murder that occurred in 1978. It's irrelevant." (V8, T.975). The trial judge correctly agreed with the prosecutor and found that the nature of the murder twelve years later was irrelevant.

Even if this Court finds that the trial court abused its discretion in refusing to permit Appellant to question DiMarino concerning the details of the 1990 murder, the State submits that the error was harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Downs v. State, 572 So. 2d 895 (Fla. 1990). Defense counsel successfully impeached DiMarino and reduced his credibility in the eyes of the jury. Although defense counsel established that DiMarino was a liar and obtained certain advantages from the State for his testimony, the jury obviously found DiMarino's testimony credible given the corroborating testimony from the medical examiner and the Sea World employees.

Doctor Hegert confirmed DiMarino's testimony that Gracie Mae Crawford's body had been moved from the original murder scene.

According to the doctor, the victim's blood would have splashed on the murderer during the infliction of many of the wounds she suffered. Ms. Crawford had a defensive wound on her hand which suggested, as DiMarino said, that she was conscious during the savage attack. Dr. Hegert also confirmed DiMarino's testimony that the victim was severely beaten prior to her murder. DiMarino's testimony that he slit the victim's throat after Appellant had repeatedly stabbed her and slit her throat was bolstered by Dr. Hegert's testimony that the two stab wounds on the victim's neck appeared to be going in different directions.

According to DiMarino, Appellant straddled the victim while she was on the ground, face up, and repeatedly stabbed her. As the medical examiner testified, the murderer would most likely be covered in the victim's blood as a result of the stabbing. The three Sea World employees who observed DiMarino and Appellant immediately after the murder testified that DiMarino was wearing an unbloodied shirt and Appellant had no shirt on and blood on his arm.¹⁰ Obviously, as Dr. Hegert testified, a person who inflicted

¹⁰Appellant was wearing a white T-shirt at the Inferno lounge on the evening of the murder. (V8, T.989). He returned to the clubhouse with Ms. Nestle and got undressed and fell asleep. (V8, T.1023-24). When DiMarino came into the room and woke up Appellant so he could join in the beating of Ms. Crawford, Ms. Nestle testified that Appellant got dressed. (V8, T.998). Although there was no direct testimony that Appellant wore a shirt at the time of the murder, the jury could reasonably infer from the evidence that Appellant put the white T-shirt on he had worn earlier that evening when he got dressed in his bedroom, and subsequently discarded the shirt after the murder prior to encountering the Sea World

14 stab wounds to the victim's body would not have been wearing an unbloodied shirt.

Regarding the credibility issue of DiMarino and the participants' relative culpability, this Court has previously reviewed almost identical evidence from Appellant's original sentencing proceeding and found that "it is absolutely clear that White mercilessly killed the victim," White v. Dugger, 523 So. 2d 140, 140-41 (Fla. 1988), and "was the executioner." White v. State, 415 So. 2d 719, 721 (Fla. 1982). In White v. State, 729 So. 2d 909, 913 (Fla. 1999), this Court reversed Appellant's death sentence and remanded for a new penalty phase. However, in addressing Appellant's Brady and Giglio claims that the State failed to disclose all of the essential details of its deal with DiMarino which resulted in Appellant's inability to adequately impeach DiMarino, this Court approved of the trial court's order denying this claim. The trial court ruled:

[D]efense counsel conducted an excellent cross-examination of DiMarino. [Appellant's] attorney showed the jury that DiMarino had much to gain by his testimony. Defense counsel brought out that DiMarino lied when it was to his benefit, that he obtained a better sentencing deal via his testimony, that he would be kept safe from the Outlaws and that his girlfriend and child would be taken care of. Even though some of the details of the agreement were not presented to the jury, counsel more than sufficiently acquainted the jury with the fact that there was an agreement between DiMarino and the State and counsel introduced most of the agreement's major components. The additional material of which

employees.

[Appellant] now complains would not have added to DiMarino's impeachment. Consequently, this court finds there is no reasonable probability that this evidence, if it had been presented at trial, would have changed the outcome.

White, 729 So. 2d at 913 (quoting the trial court's order denying Appellant's Rule 3.850 motion). This same analysis applies in the instant case. Appellant's inability to introduce evidence of the details of the 1990 murder in Maryland would not have added to DiMarino's impeachment or changed the outcome in any manner. Accordingly, even if the trial court erred in refusing to permit Appellant to introduce this evidence, the error was harmless.

ISSUE II

THE STATE ESTABLISHED BEYOND A REASONABLE DOUBT THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED TO DISRUPT OR HINDER THE ENFORCEMENT OF LAWS.

In imposing Appellant's death sentence, the trial judge found that the State established beyond all reasonable doubt that the capital felony was committed to disrupt or hinder the enforcement of laws. (V5, R.486); see § 921.141(5)(g), Fla. Stat. (2000). Specifically, the judge stated:

The facts of this case establish that Defendant and his co-defendants kidnaped and murdered Gracie Mae Crawford to avoid discovery and prosecution for the battery committed upon her at the Outlaws clubhouse, just prior to the murder. Evidence shows that co-defendant Smith stated that "he wanted no witnesses," so they had to "take care of business." Co-defendant DiMarino knew that this meant they would kill Gracie Mae Crawford to avoid prosecution for the severe beating she received from these three co-defendants. Defendant placed Crawford in the middle of the front seat of Defendant's girlfriend's car; DiMarino then got into the front passenger seat, blocking any possible escape by Crawford. The evidence shows that the victim did not go with Defendant willingly to the place where she was passed over a barbed wire fence and brutally murdered.

(V5, R.486). Appellant argues on appeal that the State's evidence did not support the court's finding that this aggravating circumstance was established beyond a reasonable doubt.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148 (Fla. 1998) reiterated the standard of

review, noting that it "'is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Id. at 160 (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997) (footnotes omitted)).

Appellant argues that the State failed to prove this aggravator because there is no direct evidence that Appellant killed Gracie Mae Crawford in order to eliminate her as a witness to the prior aggravated battery. Appellant acknowledges, however, that codefendant Smith, a regional enforcer for the Outlaws, leaned into the car after the beating at the clubhouse and told Appellant that he "wanted no witnesses" and to "take care of business."¹¹ DiMarino testified that he knew that this meant Ms. Crawford was to be killed and never return home.

Although Appellant did not testify as to his interpretation of this order from the regional enforcer, the State submits that the circumstantial evidence supports the finding that Appellant killed

¹¹Immediately prior to taking the victim out to the car, Appellant went into the bedroom and got the keys to his girlfriend's car and told her, "You're dumb, you're stupid, you didn't hear anything." (V8, T.1000).

Gracie Mae Crawford in order to prevent her from reporting the earlier aggravated battery. This Court has held that the witness elimination aggravating factor may be shown by circumstantial evidence from which the motive may be inferred without direct evidence of the offender's thought processes. Hall v. State, 614 So. 2d 473, 477 (Fla. 1993); Preston v. State, 607 So. 2d 404, 409 (Fla. 1992); Swafford v. State, 533 So. 2d 270, 276 n.6 (Fla. 1988). It is not necessary that intent be proven by evidence of an express statement by the defendant or an accomplice indicating their motives in avoiding arrest. Routley v. State, 440 So. 2d 1257 (Fla. 1987).

In the instant case, however, the State had the benefit of a statement by a codefendant clearly indicating his desire to eliminate Ms. Crawford as a witness to the earlier aggravated battery. Although there is no express statement by Appellant, the facts as found by the trial court support the finding that Appellant killed Gracie Mae Crawford to avoid discovery and prosecution for the aggravated battery committed upon the victim. In Routley, this Court stated that the evidence supported the trial court's finding of the witness elimination aggravator even without an express statement by the defendant indicating his intent.

[T]he defendant knew that the victim knew him and could later provide the police with his identity. Further, the defendant had no logical reason for binding the victim, kidnapping him and driving him to a secluded area except for the purpose of murdering him to prevent detection.

Id. at 1264; see also Shere v. State, 579 So. 2d 86 (Fla. 1991) (stating that substantial competent evidence supported trial court's finding that murder was committed to disrupt or hinder the lawful exercise of law enforcement where the defendants killed victim because they believed the victim had become a witness against them in an unrelated criminal case).

Likewise, in the case at bar, the victim could identify Appellant and his codefendants as the perpetrators of the battery and would be able to provide the police with their identity. There is no logical reason for kidnapping the victim and taking her to a remote area and repeatedly stabbing her except for the purpose of murdering her to avoid detection and prosecution. The evidence in this case is even more persuasive than the facts in Routley. Furthermore, based on very similar evidence, this Court has previously affirmed this aggravator on direct appeal. White v. State, 415 So. 2d 719 (Fla. 1982) (stating that the trial court's finding that the murder of Gracie Mae Crawford was committed to disrupt or hinder the enforcement of laws, i.e., to escape detection and punishment for the crime of aggravated battery, was supported by the evidence); see also Smith v. State, 403 So. 2d 933 (Fla. 1981) (stating that DiMarino's testimony was sufficient for the jury to find that codefendant Smith directed the execution of Crawford to eliminate her as a witness to her battery at the hands of the Outlaws); Way v. State, 760 So. 2d 903, 919-20 (Fla. 2000),

cert. denied, 148 L. Ed. 2d 975 (2001) (“While the Court’s resolution of this issue during Way’s original direct appeal is not dispositive because the finding of a mitigating or aggravating circumstance is not an ‘ultimate fact’ that is binding during the resentencing proceeding, . . ., we previously rejected Way’s very similar argument upon essentially the same evidence.”) (citation omitted).

Even if the court erred in finding that the evidence supported this aggravator, the error is harmless and did not contribute to the trial court’s imposition of the death penalty. Geralds v. State, 674 So. 2d 96 (Fla. 1996); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In Geralds, this Court found that the trial court erred in finding that the cold, calculated, and premeditated aggravator was proven beyond a reasonable doubt, but upheld the death sentence because there was no reasonable likelihood of a life sentence being imposed under the facts of that case. Geralds, 674 So. 2d at 104-05. Specifically, the court found two substantial aggravators and mitigation evidence that the trial judge gave “little weight.” Id.

In the instant case, in addition to the disrupt or hinder the enforcement of the laws aggravator, the trial judge also found three other substantial aggravating circumstances: (1) Appellant was previously convicted of another felony involving the use or threat of violence to the person; (2) the capital felony was

committed while Appellant was engaged in the commission of a kidnapping; and (3) the capital felony was especially heinous, atrocious, or cruel. This Court has previously recognized that the presence of three or more remaining valid aggravators after excising an erroneously-found aggravator will result in harmless error where there is limited mitigation. See Green v. State, 583 So. 2d 647 (Fla. 1991); Holton v. State, 573 So. 2d 284 (Fla. 1990); Hill v. State, 515 So. 2d 176 (Fla. 1987); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Bassett v. State, 449 So. 2d 803 (Fla. 1984). Here, the trial court found two statutory mitigating circumstances and a number of nonstatutory mitigating factors, but ultimately concluded that the aggravating circumstances "greatly outweigh" the mitigating circumstances. Accordingly, the trial judge followed the jury's 10-2 recommendation and imposed the sentence of death. The State submits that even without the disrupt/hinder aggravator, the trial judge would have imposed the death penalty. Thus, any error in finding that this aggravator was established beyond a reasonable doubt was harmless.

ISSUE III

THE TRIAL JUDGE PROPERLY REJECTED THE PROPOSED
STATUTORY MITIGATING CIRCUMSTANCE THAT
APPELLANT ACTED UNDER EXTREME DURESS OR UNDER
THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

Appellant argues that the trial judge erred in rejecting the statutory mitigating circumstance set forth in Florida Statutes, section 921.141(6)(e) stating that it is a mitigating circumstance if the defendant acted under extreme duress or under the substantial domination of another person. In rejecting this mitigator, the trial judge stated:

There was no evidence that Defendant acted under extreme duress. The evidence from other members of the Outlaws showed that Defendant was a follower, not a leader, and because of his alcoholism, could not be depended upon within the organization. Dr. Caddy testified that Defendant "was a man who was readily available to be influenced by others," due to his intoxication, alcoholism, polysubstance abuse and personality variables. The State concedes that Defendant had a need for approval from the other members of the Outlaws which influenced him to be drawn into unlawful activities of the other members. The fact that he was in the company of another Outlaw club member when he committed the murder, to some extent, may have influenced him to carry it out.

However, while Defendant may have been a follower and easily influenced, such evidence is insufficient to establish that Defendant committed this crime under the 'substantial domination' of another. The evidence does not suggest such a leap. While some evidence suggested that the murder may have been Smith's idea, there was no evidence that Defendant was under the substantial domination of anyone at the point where he stabbed the victim. Therefore, the Court rejects the existence of this mitigating circumstance.

(V5, R.488) (emphasis added). Appellee submits that the trial court properly rejected this mitigating factor given the evidence

introduced at the penalty phase proceedings.

Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard of review. Campbell v. State, 571 So. 2d 415, 419 n.5 (Fla. 1990). A trial court "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." Id. at 419 (footnotes omitted). A trial court may reject a defendant's claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

In this case, competent substantial evidence supports the trial judge's rejection of this mitigating factor. Although Dr. Caddy testified that Appellant was easily influenced by others due to his intoxication, alcoholism, polysubstance abuse and personality variables, he was not under extreme duress or the substantial domination of another person at the time of the murder. In Hill v. State, 515 So. 2d 176 (Fla. 1987), this Court addressed the defendant's claim that the trial judge erred in rejecting the statutory mitigating circumstance that Hill was acting under extreme duress or under the substantial domination of another person when he shot the arresting police officers after a bank robbery. Hill argued that his codefendant suggested the bank

robbery, purchased the sunglasses for disguise, and directed actions during the crime. Id. at 178. The evidence, however, established that Hill was armed and his codefendant was not armed. During the robbery, Hill did most of the talking, demanded the money, and threatened the bank tellers. Furthermore, rather than utilizing his chance to escape, Hill chose to help his codefendant by shooting the arresting officers as they attempted to handcuff the codefendant. Id. Under these facts, this Court found that the "substantial domination" mitigating circumstance does not apply. See also Valdes v. State, 626 So. 2d 1316 (Fla. 1993) (rejecting "substantial domination" mitigator where defendant clearly was an equal participant in escape attempt and murder).

In the instant case, Appellant was armed with a knife and there is no evidence that DiMarino was armed with any type of weapon. Appellant obtained the keys to his girlfriend's vehicle and directed the victim into the car. Although codefendant Smith told Appellant that he wanted no witnesses and to take care of business, this direction does not amount to extreme duress or substantial domination. Clearly, Appellant was the main participant in the murder. Appellant and DiMarino assisted the victim over a barbed-wire fence once they reached their intended destination. Once over the fence, Appellant straddled the victim and stabbed her 14 times with a knife and slit her throat. Appellant then told DiMarino to slice her throat. DiMarino

followed Appellant's order and added a second laceration wound to the victim's neck. Based on this evidence showing that Appellant was the major participant, the trial judge properly rejected the proposed mitigator.

Furthermore, Appellant's argument that he was under domination by the Outlaws organization and under the substantial domination of the two codefendants who were "enforcers," is without merit. As this Court has previously found, Appellant was the "executioner," White v. State, 415 So. 2d 719, 720 (Fla. 1982), and the major participant in the murder of Gracie Mae Crawford. This Court has previously stated that "it is absolutely clear that White mercilessly killed the victim." White v. Dugger, 523 So. 2d 140, 140-41 (Fla. 1988). Given the evidence introduced at the new penalty phase, the trial court properly rejected this statutory mitigating circumstance. Because substantial competent evidence supports the trial court's finding, this Court must affirm Appellant's sentence.

ISSUE IV

APPELLANT'S DEATH SENTENCE IS PROPORTIONATE.

Appellant argues that his death sentence is disproportionate to the sentence received by his codefendant, Richard DiMarino. DiMarino was charged with first degree murder, but convicted of the lesser-included offense of third degree murder for which he received a fifteen year sentence. To the extent that Appellant argues this Court must reduce his sentence on proportionality grounds due to his codefendant's sentence, his argument is without merit. This Court has repeatedly upheld death sentences when codefendants that participated in the crime but did not actually kill were sentenced to less than death. See Johnson v. State, 696 So. 2d 317, 326 (Fla. 1997); Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1995); Hall v. State, 614 So. 2d 473, 479 (Fla. 1993); Coleman v. State, 610 So. 2d 1283, 1287-88 (Fla. 1993); Robinson v. State, 610 So. 2d 1288 (Fla. 1994); Downs v. State, 572 So. 2d 895, 901 (Fla. 1991); Williamson v. State, 511 So. 2d 289, 292-93 (Fla. 1988); Craig v. State, 510 So. 2d 857, 870 (Fla. 1988); Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1994); Woods v. State, 490 So. 2d 24, 27 (Fla. 1986); Deaton v. State, 480 So. 2d 1279, 1283 (Fla. 1994); Brown v. State, 473 So. 2d 1260, 1268 (Fla. 1985); Troedel v. State, 462 So. 2d 392, 397 (Fla. 1984). When, as here, codefendants are not equally culpable, the death sentence of the more culpable codefendant is not unequal justice when another

codefendant receives a life sentence or less. Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994) (citing Garcia v. State, 492 So. 2d 360 (Fla. 1986)).

In this case, DiMarino was convicted of the lesser-included offense of third degree murder and was clearly not as culpable as Appellant. As this Court stated on Appellant's original direct appeal:

In affirming the sentence we are fully aware that DiMarino escaped with a conviction of a third-degree murder. While this is fortunate for him, it does not require the reduction of White's sentence. White was the executioner, and his sentence is warranted.

White v. State, 415 So. 2d 719, 721 (Fla. 1982). This Court further noted that the two juries found different culpabilities. White v. Dugger, 523 So. 2d 140, 141 (Fla. 1988). "It is permissible to impose different sentences on capital co-defendants where their various degrees of participation and culpability are different from one another." Id. Because Appellant's sentence is not disproportionate to his codefendant's sentence, this Court should again find that Appellant's death sentence is warranted.

Appellant also argues that his death sentence is disproportionate when considered in relation to other capital cases in which the defendant received a life sentence. The State disagrees. Appellant has four substantial aggravating factors: (1) Appellant was previously convicted of another felony involving the use or threat of violence to the person (a conviction for second

degree murder); (2) the capital felony was committed while Appellant was engaged in the commission of a kidnapping; (3) the capital felony was especially heinous, atrocious, or cruel; and (4) the capital felony was committed to disrupt or hinder the enforcement of laws. In mitigation, the court found that Appellant established the following two statutory circumstances: (1) the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance (little weight) and (2) the existence of any other factors in Appellant's background that would mitigate against the imposition of the death penalty,¹² including (a) Appellant's poor family background, bad childhood, abuse, parental neglect and family squalor (some weight) and (b) Appellant's alcohol and substance abuse at an early age, and extensive history of alcohol and substance abuse (some weight). As for nonstatutory mitigators the court found: (1) Appellant suffers from organic brain damage and neurological deficiencies (some weight); (2) Appellant's marginal intelligence or low IQ (little weight); (3) Appellant's intoxication and diminished capacity at the time of the crime (little weight); (4) Appellant was a willing worker and a good employee (some weight); (5) Appellant's lack of future dangerousness (potential for rehabilitation) and good prison record (some weight); (6)

¹²The trial judge indicated that it was unclear whether this was to be considered as a statutory or nonstatutory mitigator, but determined that he would treat it as a statutory mitigator.

Appellant's contribution to the community (very little weight); (7) Appellant's character as a loving person (very little weight); and (8) generosity to others (very little weight).

This Court has previously stated that proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

Clearly, Appellant's death sentence is proportionate when compared to other cases. In Trease v. State, 768 So. 2d 1050, 1056 (Fla. 2000), this Court rejected the defendant's proportionality claim based on the existence of the following substantial aggravating circumstances: (1) previous violent felony conviction; (2) murder committed during a burglary or robbery; (3) avoid arrest; (4) pecuniary gain; and (5) heinous, atrocious, or cruel. Four of these aggravating circumstances are very similar to those found in the instant case. Although no statutory mitigation was found, the court found nonstatutory mitigation of: (1) child abuse; (2) Trease adjusted well to incarceration and helped prevent an inmate's suicide; and (3) a codefendant received a disparate

sentence. Id. This Court compared Trease's death sentence to other cases and found that his sentence was proportionate. Id. (see cases cited therein); see also Rose v. State, 26 Fla. L. Weekly S210 (Fla. Apr. 5, 2001) (upholding death sentence where there were four aggravators and a number of nonstatutory mitigators); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (upholding death sentence where two aggravators, heinous, atrocious, or cruel and crime committed during the commission of a sexual battery, outweighed five nonstatutory mitigators); Way v. State, 760 So. 2d 903 (Fla. 2000) (finding death penalty sentence proportionate when court found three aggravating circumstances, two statutory mitigators and seven nonstatutory mitigating factors), cert. denied, 148 L. Ed. 2d 975 (2001).

Appellant relies on Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999), in arguing that his sentence is disproportionate. In Cooper, the trial court found three aggravating circumstances: commission of a prior violent felony, commission during a robbery and for pecuniary gain, and cold, calculated, and premeditated. Id. at 85. The trial court found two statutory mitigators: the defendant had no significant history of prior criminal activity and the defendant was 18 years old at the time of the crime, and two nonstatutory mitigators: the defendant had low intelligence and the defendant had an abusive childhood. Id. at 89 nn.5-6. This Court stated that the trial judge found "several" nonstatutory mitigating

factors and concluded that the evidence established brain damage, mental retardation, and mental illness (i.e., paranoid schizophrenia). Id. at 85-86; but see id. at 86-90 (Wells, J., concurring in part and dissenting in part) (stating that the trial judge only found two nonstatutory mitigating circumstances and the majority's "analysis is nothing more than this Court substituting its judgment as to the weight to be given to mitigation evidence under the guise of proportionality review"). This Court reversed Cooper's death sentence based on its finding that it was one of the most mitigated murders reviewed by the Court. Cooper, 739 So. 2d at 86.

The Cooper case is clearly distinguishable from the instant case. In Cooper, this Court found that the defendant suffered from severe mental illness, mental retardation, brain damage, an abusive childhood, and the defendant had no prior criminal record before the murder and was only 18 years old at the time of the murder. In contrast, Appellant was over thirty years old at the time of the murder and had recently participated in an almost identical stabbing murder only six months before the instant case. Although there was evidence that Appellant had an abusive childhood and may have had some level of brain damage, this does not mean that his case is one of the most mitigated. Dr. Caddy testified that Appellant has an IQ of 88, and two-thirds of the population have IQS ranging between 90 and 110. Dr. Caddy also testified that

despite his slight brain damage and alcoholic history, Appellant knew right from wrong. The trial court properly weighed this evidence against the fact that, immediately after this heinous murder, Appellant conversed coherently with Sea World employees and concluded after speaking with them that he and DiMarino needed to go back and move the victim's body and look for Appellant's wallet which he may have inadvertently left at the scene of the murder.

A review of the facts established in the instant case clearly demonstrates the proportionality of the death sentence imposed. The circumstances of this murder compels the imposition of the death penalty. Accordingly, this Court should affirm the trial court's sentence.

ISSUE V

APPELLANT'S CLAIM OF CRUEL AND UNUSUAL
PUNISHMENT AS A RESULT OF DELAY BETWEEN CRIME
AND EXECUTION IS WITHOUT MERIT.

Appellant argues that executing him after spending 22 years on death row would constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution. This argument is without merit and has previously been rejected by this Court. See Rose v. State, 26 Fla. L. Weekly S210 (Fla. Apr. 5, 2001); Booker v. State, 773 So. 2d 1079, 1096 (Fla. 2000); Knight v. State, 746 So. 2d 423, 427 (Fla. 1998), cert. denied, 120 S. Ct. 459 (1999); Elledge v. State, 706 So. 2d 1340, 1342 n.4 (Fla. 1997).

In Booker, this Court rejected an identical argument for a defendant that had spent over two decades on death row. In denying the defendant's claim, the Booker Court relied on its previous opinion in Knight.

Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. See, e.g., White v. Johnson, 79 F.3d 432 (5th Cir. 1996); State v. Smith, 280 Mont. 158, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this precise claim. See State v. Schackart, 190 Ariz. 238, 947 P.2d 315, 336 (Ariz. 1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), cert. denied,

___ U.S. ___, 119 S.Ct. 149, ___ L.Ed.2d ___ (1998).

Booker, 773 So. 2d at 1096 (quoting Knight, 746 So. 2d at 437).

Although recognizing a denial of certiorari is not an adjudication on the merits, Justice Thomas's concurrence in Knight v. Florida, 120 S. Ct. 459 (1999) is enlightening. As opined:

I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.

. . . .

It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence. . . . Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence. See Coleman v. Balkcom, 451 U.S. 949, 952, 101 S. Ct. 2031, 68 L. Ed. 2d 334 (1981) (STEVENS, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"). It is incongruous to arm capital defendants with an arsenal of "constitutional" claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.

Knight, 120 S. Ct. at 459-60 (Thomas, J., concurring). If this Court were to vacate a death sentence merely because of a delay caused by a defendant exercising his constitutional rights, it would be the convicted felon controlling the judicial process, not the courts. Through no fault of its own, the State could be

deprived of a lawful sentence. Accordingly, this Court must find that Appellant's constitutional rights have not been violated and affirm his death sentence.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the trial court's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Chandler R. Muller, Law Offices of Chandler R. Muller, P.A., 1150 Louisiana Avenue, Suite 2, P.O. Box 2128, Winter Park, Florida 32790-8200, on this ____ day of May, 2001.

COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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