IN THE SUPREME COURT OF FLORIDA

WILLIAM MELVIN WHITE,	)	
	)	
Appellant	)	
	)	Case No: SC00-1148
vs.	)	Lower Tribunal No: CR78-1840
	)	
STATE OF FLORIDA,	)	
	)	
Appellee	)	

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

INITIAL BRIEF OF APPELLANT

CHANDLER R. MULLER, OF
LAW OFFICES OF
CHANDLER R. MULLER, P.A.
1150 Louisiana Avenue,Ste.2
P.O. Box 2128
Winter Park, FL 32790-2128
Telephone:(407)647-8200
Facsimile:(407)645-3000
FLORIDA BAR NO: 112381

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

Cases:

United States Supreme Court:

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

Other Authorities:

IN THE SUPREME COURT OF FLORIDA

WILLIAM MELVIN WHITE,	)	
	)	
Appellant,	)	
	)	Case No. SC00-1148
vs.	)	Lower Tribunal No:
	)	CR78-1840
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

STATEMENT OF THE CASE

In July of 1978, an Orange County grand jury returned an indictment against William Melvin White (Appellant), Guy Ennis Smith, and Richard DiMarino for the first-degree murder of Gracie Mae Crawford on June 6, 1978 (Vol. IV, R. 155)[1]. The state tried co-defendant DiMarino, who was convicted of third-degree murder and sentenced to fifteen years in prison, for which he served eight (8) years (Vol. VII, T. 920 and Vol. VIII, T. 953). Smith was tried and convicted of first-degree murder, for which he received a life sentence (Vol. VIII, T. 1070).

After receiving his sentence, DiMarino testified as a state witness at Appellant's trial, implicating Appellant as the person who stabbed Crawford to death. He agreed to testify against Appellant in exchange for concurrent time in prison on other unrelated felony charges, with no sentencing enhancements (Vol. VIII, T. 959-961). The State also agreed to remove his tattoos,

[1] The volumes of the records containing court documents and transcripts of the Spencer Hearings are separately numbered from the volumes containing the penalty phase transcripts. For purposes of clarity, the volumes containing the penalty phase transcripts are referred to by the particular volume number followed by "T" to refer to the particular page number. All other references to the record are designated by the volume number followed by "R" to refer to the page number.

which identified him as a member of the Outlaws Motorcycle Club, and to transfer him out of State to serve his sentence in order to prevent retaliation against him by other Outlaw members (Vol. VII, T. 931).

At the conclusion of Appellant's original trial, the jury found Appellant guilty of first-degree murder and recommended the death penalty. On direct appeal this Honorable Court affirmed Appellant's judgment and sentence. White v. State, 415 So. 2d 719 (Fla.), cert. denied 459 U.S. 1055 (1982).

Appellant later filed a motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure, attacking his conviction and sentence on several grounds. See generally White v. State, 729 So. 2d 909 (Fla. 1999)(White II). After Appellant had served more than twenty years in prison on death row, this Court reversed the denial of his 3.850 motion because the advisory jury in the original trial was improperly instructed to consider only statutory mitigating factors. White II. For that reason, this Court granted Appellant a new penalty proceeding.

Before the new penalty phase commenced, Appellant filed a motion to preclude consideration of the death penalty on the grounds that the excessive delay in his case constituted cruel and unusual punishment (Vol. IV, R. 212-215). He further argued that he suffered prejudice due to the delay because he was unable to locate certain witnesses and other witnesses had died (Vol. IV, R. 214). By written order dated November 15, 1999, the trial court denied this motion (Vol. IV, R. 293-296).

From November 17 to November 19, 1999, the Honorable Margaret T. Waller held a new penalty proceeding in accordance with this Court's mandate in White II (Vol. I-XII, T. 1-1,512). DiMarino again testified against Appellant at this proceeding. Before his testimony, however, the State moved to preclude the defense from questioning DiMarino about the underlying facts of a subsequent murder to which DiMarino pleaded guilty twelve years after Crawford's murder (Vol. VI, T. 696-724). At the time of trial DiMarino was on parole out of Maryland for this subsequent murder, which involved another stabbing death (Vol. VI, T. 699).

The State conceded that Appellant should be allowed to elicit the fact of the murder conviction, as well as DiMarino's status on parole and possible consequences of a violation, as relevant to DiMarino's bias and motive to fabricate his testimony (Vol. VI, T. 696-697). However, the State disputed the propriety of allowing Appellant to elicit the facts underlying the Maryland murder conviction (Vol. VI, T. 698). The State claimed the evidence was irrelevant and constituted improper character evidence (Vol. VI, T. 717).

Appellant argued that the details of the subsequent murder were proper impeachment evidence and were relevant to mitigation, specifically the relative culpability of each co-defendant (Vol. V, T. 692 and Vol. VI, T. 708-719). Over Appellant's objections, the trial court prohibited the defense from cross-examining DiMarino on the facts of the subsequent murder (Vol. VII, T. 895-897). Rather, Appellant was only able to elicit that DiMarino

pleaded guilty to another murder charge, was on parole at the time of his testimony, and faced at least ten years imprisonment if he violated his parole (Vol. VIII, T. 953).

During DiMarino's direct testimony, the State asked how he felt after Gracie Mae Crawford was stabbed to death, to which he replied that he was "shocked" and "sickened." (Vol. VII, T. 971). Appellant argued that in eliciting this testimony, the prosecutor had opened the door to evidence that DiMarino participated in a subsequent stabbing death of another person (Vol. VIII, T. 974-975). The trial court disagreed, and again disallowed the testimony (Vol. VIII, T. 977).

Following deliberations, the jury returned a recommendation of death by a vote of ten to two (Vol. V, R. 327 and Vol. XII, T. 1503). The trial court held Spencer[2] hearings on January 13, 2000 and March 20, 2000 (Vol. II, R. 16-66 and Vol. IV, R. 98-154).

At a hearing on April 20, 2000, the trial court announced its decision to impose the death penalty (Vol. III, R. 67-97). In its written sentencing order the court enumerated which aggravating circumstances had been proved beyond a reasonable doubt (Vol. V, R. 484-494). Specifically, the court found the following four aggravating circumstances: 1) that Appellant was previously convicted of another felony involving the use or threat of violence to the person; 2) that the capital felony was committed while Appellant was engaged in the commission of a

---

[2] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

kidnapping; 3) that the capital felony was especially heinous, atrocious, or cruel; and 4) that the capital felony was committed to disrupt or hinder the enforcement of laws (Vol. V, R. 484-486).

The trial court also described which statutory and nonstatutory mitigating factors existed, as well as what weight it attributed to these factors (Vol. V, R. 484-494). The court found two statutory mitigating circumstances and found numerous nonstatutory mitigators (Vol. V, R. 487-493). Finally, the court rejected three proposed statutory mitigating circumstances, including that at the time of the murder Appellant was under extreme duress or under the substantial domination of another person (Vol. V, R. 487-493). After imposition of his sentence, Appellant timely filed a notice of appeal (Vol. VI, R. 526).

STATEMENT OF FACTS

A. The murder of Gracie Mae Crawford

In 1978 Appellant belonged to the Outlaws Motorcycle Club ("the Outlaws") and was a member of the Louisville, Kentucky Chapter (Vol. VIII, T. 995 and Vol. IX, T. 1105). Richard DiMarino, his brother, John DiMarino, Guy Smith, and several other men belonged to various Florida Chapters of the Outlaws (Vol. VII, T. 902, 983 and Vol. VIII, T. 1055).

Each Outlaw chapter had a distinct hierarchy. DiMarino, a drug dealer and twenty-five-time convicted felon, held a position known as the "enforcer" of the Orlando Chapter (Vol. VIII, T. 933 and 946). As the enforcer, it was his responsibility to carry out the club's rules and to "keep justice" (Vol. VIII, T. 951 and 1060). Smith was the "regional enforcer," responsible for enforcing the rules of the Outlaws throughout the State of Florida (Vol. VIII, T. 951). Appellant held no official position within the Outlaws because he was considered too unreliable due to his extensive drinking problem (Vol. IX, T. 1110 and 1126).

One of the Orlando Outlaw members owned a house on Surfside Way in Orlando, which the other members often used as a clubhouse (the Clubhouse) (Vol. VII, T. 902). On June 5, 1978, Appellant was visiting the Orlando Chapter (Vol. VII, T. 903-904 and Vol. VIII, T. 1060). After drinking for part of the day at the Clubhouse, Appellant went with his girlfriend, Renee Nestle, to the Inferno, which was a nightclub in Orlando (Vol. VII, T. 905).

Several other club members, including DiMarino, also showed up at the Inferno accompanied by their girlfriends (Vol. VII, T. 905).

While at the nightclub, DiMarino noticed a woman named Gracie Mae Crawford dancing seductively with a black man (Vol. VII, T. 906). DiMarino knew Crawford casually, and her dancing with a black man offended him (Vol. III, T. 903 and 947). He commented to his fellow Outlaw members that Crawford was a nigger lover. (Vol. III, T. 947).

Appellant was not privy to the conversation regarding Crawford (Vol. VIII, T. 984). Instead, Appellant was being thrown out of the Inferno because he was intoxicated and was causing a disturbance (Vol. V, T. 686, 689, and Vol. VIII, T. 984). Appellant was too drunk to drive, so Nestle drove him back to the Clubhouse, and shortly thereafter, the two went to bed (Vol. VIII, T. 988).

Around 2:00 a.m., DiMarino lured Gracie Mae Crawford back to the Clubhouse with him, Linda Altizer, DiMarino's brother (John), and a few of the other Orlando Outlaw members (Vol. VII, T. 857 and 909). The group returned to the Clubhouse, where Appellant was either asleep or passed-out in one of the bedrooms (Vol. VIII, T. 943 and 1057).

Soon after arriving, Crawford got into an argument with DiMarino when he again commented that she was a nigger lover. (Vol. VII, T. 863 and 910). The argument escalated to the point where DiMarino slapped Crawford so hard that her wig fell off

(Vol. VII, T. 910). Smith soon joined them in the kitchen and began beating on Crawford (Vol. VII, T. 911).

While the beating continued, DiMarino went to the bedroom where Appellant was sleeping, and told him that Crawford needed to be trained. (Vol. VII, T. 912 and Vol. VIII, T. 998). According to DiMarino, Appellant came into the kitchen, where Crawford was still being beaten, and joined the others in hitting Crawford (Vol. VII, T. 912-913). At some point Smith forcibly washed the blood off Crawford's face and then proceeded to hit her again (Vol. VII 865 and 915). The incident lasted approximately fifteen minutes, after which DiMarino put his arm around Crawford and escorted her out of the house (Vol. VII, T. 869 and 916).

Nestle, who was still in the bedroom, heard the commotion in the kitchen; when the commotion ended, Appellant came back into the bedroom and told Nestle she didn't hear anything. (Vol. VIII, T. 999-1000). She then saw him take her car keys and leave (Vol. VIII, T. 1000 and 1003). She testified that Appellant was not falling down drunk. (Vol. VIII, T. 1006-1007).

Appellant went outside and got into the driver's seat of Nestle's car; DiMarino sat in the front passenger's seat with Crawford in the middle (Vol. VII, T. 917). Before leaving the Clubhouse, Smith came out to the car and told them he wanted no witnesses, and to take care of business. (Vol. VII, T. 918). DiMarino took this to mean that Crawford was not supposed to go home, but rather, she should be killed to prevent her from

reporting the battery (Vol. VII, T. 918). According to at least one witness, both DiMarino and Appellant were known to carry knives (Vol. VII, T. 871).

Appellant, who was still too drunk to drive, pulled over at some point to allow DiMarino to drive (Vol. VII, T. 919). DiMarino then drove out to a deserted road behind Sea World, where the two men assisted Crawford out of the car and carried her over a fence (Vol. VII, T. 919 and 922). According to DiMarino, Appellant immediately began to stab Crawford as soon as she was placed over the fence (Vol. VII, T. 923-924). DiMarino testified that after stabbing her, Appellant slit her throat and directed DiMarino to do the same (Vol. VII, T. 924). DiMarino denied stabbing Crawford, but admitted he slit her throat, claiming that he was following Appellant's orders (Vol. VII, T. 924). He also testified that he was shocked and sickened by the murder (Vol. VIII, T. 971). Afterwards, DiMarino and Appellant returned to Nestle's car and left the area, only to run out of gas a short distance later in front of the Sea World parking lot (Vol. VII, T. 925).

Bryan Perley, James Birch, and Robert Granec were working at Sea World in the early morning hours of June 6, 1978 (Vol. IV, T. 585, Vol. VI, T. 795 and 810). Perley noticed a car pull up and stop, so he went to find out if the occupants needed help (Vol. VI, T. 796-796). After discovering that the two men needed gas, Perley solicited his co-workers to help them (Vol. VI, T. 796-797). The three workers testified that Appellant, who was the

vehicle's passenger, was not wearing a shirt at the time, and they did not notice that Appellant was intoxicated (Vol. IV, T. 586, Vol. VI, T. 798-802 and 811-814). However, Berch did notice alcohol on Appellant's breath (Vol. VI, T. 818).

Perley also claimed that he saw a spot of dried blood on the hair of Appellant's arm, but he did not notice any other blood anywhere on Appellant's body or clothing (Vol. VI, T. 802 and 806). Also, neither Berch nor Granec observed blood anywhere on Appellant (Vol. IV, T. 596 and Vol. VI, T. 816).

Granec had prior experience as a law enforcement officer arresting individuals for driving while intoxicated (Vol. IV, 584). He testified that during his encounter with Appellant, he did not notice a slurred speech or other indicia of intoxication, except for glassy eyes; however, he admitted that it is not uncommon for an alcoholic to be drunk, yet appear sober (Vol. IV, T. 588-592). He also admitted he only observed Appellant for approximately one minute (Vol. IV, T. 590).

DiMarino testified that after getting gas and leaving the Sea World parking lot, Appellant noticed that his wallet was missing (Vol. VII, T. 927-928). He became concerned that he dropped it at the site where Crawford's body was located (Vol. VII, T. 928). DiMarino and Appellant returned to that location and retrieved Crawford's body (Vol. VII, T. 928). They removed the spare tire from the back of Nestle's car and placed Crawford in the empty space (Vol. VII, T. 928). They then disposed of Crawford's body in some other remote area (Vol. VII, T. 928).

Crawford's body was discovered later that same day (Vol. V, T. 651). After seeing the media reports, Berch contacted the police and informed them of his encounter with Appellant and DiMarino (Vol. V, T. 680). He also provided the license plate number of the car they were driving (Vol. V, T. 681 and Vol. VI, T. 814). Authorities tracked this information back to Appellant and DiMarino (Vol. V, T. 681).

The medical examiner, Dr. Thomas Hegert, testified that Crawford died as a result of blood loss from stab wounds to her chest and neck, and also from puncture wounds to her lungs that would have prevented her ability to breath (Vol. VI, T. 745). Hegert explained that Crawford was stabbed fourteen times, and there was evidence of defensive wounds to her hands (Vol. VI, T. 751 and 755). He further testified that she would not have been rendered immediately unconscious, but that depending upon which injury she suffered first, she could have died anywhere from three to five minutes after infliction of the fatal wound (Vol. VI, T. 760-761). Also, according to Dr. Hegert, Crawford's blood-alcohol content at the time of her death was .322 (Vol. VI, T. 758).

DiMarino's brother, John, testified at Appellant's previous trial, and his former testimony was read to the jury at the new penalty phase. John DiMarino testified that he discussed the murder the next day with his brother, and his brother admitted that he stabbed Crawford (Vol. VIII, T. 1058). He told John he had taken care of business,which to John meant that his brother

had killed Crawford (Vol. VIII, T. 1064). DiMarino also told John that Appellant was not much help to him because he was drunk (Vol. VIII, T. 1065). Another witness had also heard that DiMarino said Appellant was too drunk to assist him with the murder (Vol. IX, T. 1152). Additionally, one of the Orlando Outlaw members, Joseph Watts, testified that the day after the murder, DiMarino told Watts he had killed a girl because she was a nigger lover.[3] (Vol. IV, T. 129).

B. Appellant's abusive childhood and profound alcoholism.

The evidence was undisputed that Appellant had a severe and long-standing drinking problem, to the extent that he blacked out and suffered accidents due to his level of intoxication (Vol. IX, T. 1107-1110). His drinking problem began at the tender age of eight (8) when his father took him to bars and forced him to drink (Vol. IX, T. 1085 and 1194).

Appellant's two sisters, mother, and childhood neighbor each described Appellant's abusive childhood. His neighbor, Beverly Pickren, explained how Appellant's father was frequently drunk (Vol. IX, T. 1083). She would hear Appellant's father yelling profanity as Appellant begged his father to stop beating him, and she often saw bruises on Appellant's body (Vol. IX, T. 1083 and 1101).

Appellant's sisters and mother described in more detail the physical abuse and neglect Appellant suffered at the hands of his

---

[3] Mr. Watts's testimony was not presented to the jury; rather, he testified at the January 20th Spencer hearing.

father, whom witnesses described as a violent, cruel man. (Vol. IX, T. 1187). Appellant's father was a drunk who would beat the entire family (Vol. IX, T. 1187-1189 and 1207). He would whip Appellant repeatedly with a belt or even a bullwhip (Vol. IX, T. 1201 and 1208). Appellant's ninety-one year old mother described how she would have to hide from her husband to keep from being beaten (Vol. IX, T. 1228-1229). Appellant's father also sexually molested his sister, Nadine, and he threatened to kill all three children if Appellant's mother ever left him (Vol. IX, T. 1191, 1196, and 1209). At some point, Appellant's mother finally did leave, and Appellant stayed with his father, where the abuse and the drinking continued (Vol. IX, T. 1193).

Appellant's alcoholism followed him into adulthood. Several fellow Outlaw members from Louisville testified that Appellant constantly had a drink in hand and would sometimes mix valium or barbiturates with alcohol (Vol. IX, T. 1106-1108, 1124, 1134-1135, 1168, and 1178). He would often arrive at a bar at 6:00 a.m. and wait for it to open (Vol. VIII, T. 1073-1074). According to his fellow club members, Appellant also suffered from alcoholic blackouts,which caused him to lose all memory of recent events (Vol. IX, T. 1124, 1141, and 1180).

C. Expert testimony concerning Appellant's mental and emotional infirmities.

Dr. Glenn Ross Caddy, a forensic psychologist, explained that Appellant suffered from organic brain damage resulting from his profound alcoholism, drug use, and head trauma he received

while intoxicated (Vol. X, T. 1267-1269). According to Dr. Caddy, Appellant's ability to understand and to process information was compromised because of the brain damage (Vol. X, T. 1269). Dr. Caddy testified that Appellant has an I.Q. of 88, which placed him in the low-normal range (Vol. X, T. 1276-1278).

Dr. Caddy further explained that Appellant had no recollection of the events surrounding the murder because he suffered from an alcoholic blackout at the time (Vol. X, T. 1298-1299). Dr. Caddy opined that at the time of the homicide, Appellant was under extreme mental or emotional disturbance, and it was exceptionally likely that Appellant's capacity to appreciate the criminality of his acts was substantially impaired by alcohol and substance abuse (Vol. X, T. 1264). According to Dr. Caddy, Appellant was one of the most profound alcoholics he had ever met (Vol. X, T. 1363-1364).

Dr. Caddy diagnosed Appellant with both a cognitive disorder and with antisocial personality disorder, which likely resulted from his abusive childhood (Vol. X, T. 1284-1287). He explained that as a result, Appellant could be easily dominated by others (Vol. X, T. 1264). Dr. Caddy further explained that although Appellant's mother was nurturing, her parenting was ineffective because his father's brutality overshadowed her (Vol. X, T. 1289).

D. Appellant's general character.

Appellant's sister Nadine described Appellant as a "very sweet, tender hearted" person when he was young (Vol. IX, T.

1195). His mother confirmed that he was kind, sympathetic and loving (Vol. IX, T. 1226), and his neighbor described him as a polite and outgoing teenager who hid his troubled home from others (Vol. VIII, T. 1088-1089). A previous employer stated that while Appellant had an alcohol problem, he was a very hard worker (Vol. VIII, T. 1072). Additionally, Appellant would often assist an older gentleman and his wife by getting groceries for them (Vol. IX, T. 1173).

SUMMARY OF ARGUMENT

ISSUE I: The trial court reversibly erred in refusing to permit Appellant to cross-examine Co-defendant DiMarino concerning the details of a subsequent murder for which DiMarino was convicted. The murder involved another stabbing death, which DiMarino again blamed on a co-defendant. The details of this murder were relevant to the jury's consideration of whether the death sentence in Appellant's case would be proportionate to the fifteen years DiMarino received for his relative culpability in Crawford's murder. DiMarino was the only witness who testified that Appellant stabbed Crawford, and DiMarino claimed his only participation in the actual slaying was to cut Crawford's throat because Appellant told him to do so. DiMarino's involvement in another stabbing death tended to impeach his testimony regarding his asserted minimal involvement in Crawford's murder; the details of the subsequent murder demonstrated DiMarino's pattern of stabbing one person and then casting all blame on another for the crime. The jury should have been presented with this evidence so it could properly evaluate the relative roles of each defendant in Crawford's murder.

Additionally, the State opened the door to this line of questioning. The State elicited from DiMarino that he was shocked and sickened by Crawford's stabbing death. Evidence showing he was involved in another stabbing death tended to impeach this testimony. Therefore, Appellant was entitled to question DiMarino about the details of the subsequent murder.

The failure to permit Appellant to cross-examine DiMarino on this subject matter was not harmless error, as DiMarino was the prosecution's star witness: DiMarino was the only person who was able to testify precisely how the murder occurred. As such, the ability to impeach DiMarino's credibility was vital to Appellant's cross-examination. Accordingly, Appellant is entitled to a new sentencing hearing at which he will be permitted full cross-examination concerning the facts underlying DiMarino's subsequent murder conviction.

ISSUE II: The trial court reversibly erred in finding as an aggravating factor that the murder was committed to disrupt or hinder the enforcement of laws, as there was no competent evidence to prove this aggravator. In finding this aggravator, the trial court concluded that Appellant killed Crawford to eliminate her as a witness to the prior battery. However, the State did not prove that this was Appellant's only or dominant motive for killing Crawford. The State presented the statement of co-defendant Smith, who allegedly told Appellant and DiMarino that he did not want any witnesses and to take care of business. There was no evidence to show what Smith meant by this statement, or even what Appellant understood him to mean. Smith could have meant that he did not want any witnesses to the murder. Furthermore, DiMarino's understanding of what Smith meant was irrelevant; the relevant inquiry was what Appellant understood, and more specifically, whether Appellant committed the murder to disrupt the enforcement of laws. The State presented no evidence

showing that this was Appellant's motive. Thus, this aggravating factor was not proved beyond a reasonable doubt.

ISSUE III: Appellant presented evidence to establish the mitigating circumstance of extreme duress, and the trial court reversibly erred by rejecting this as a statutory mitigator. The evidence established that Appellant was prone to domination by others because of his alcoholism, substance abuse, and personality disorders. More importantly, his two co-defendants held dominating positions, known as enforcers, within an organization that was no stranger to violence. As enforcers, they were responsible for enforcing the rules of the organization. Given these variables, it is unlikely Appellant could disobey a higher member who held such a position within the club. This is the type of external provocation contemplated by the extreme duress mitigator. Therefore, the trial court should not have rejected the mitigating circumstance that Appellant acted under extreme duress or the substantial domination of another person at the time of the murder.

ISSUE IV: The death penalty is disproportionate under the circumstances of this case. First, the death penalty is grossly disproportionate to the fifteen (15) year prison sentence imposed on DiMarino. DiMarino instigated the brutal beating of Crawford and then escorted her to a deserted area with the intention that she would be murdered. He also admitted slitting her throat. For his participation, DiMarino served eight (8) years of a fifteen (15) year sentence. When compared to the fifteen years

DiMarino received for his involvement in the murder, Appellant's death sentence cannot withstand constitutional scrutiny.

Appellant's death sentence is also disproportionate to other first-degree murder cases for which the death penalty was not imposed. Appellant's case does not involve one the least mitigated murders. To the contrary, Appellant presented expert testimony establishing that he suffered from a low I.Q., brain damage, profound alcoholism, and a personality disorder. Several witnesses described Appellant's abusive childhood and drinking problem at an early age. Based on this evidence, the trial court found several statutory and non-statutory mitigating circumstances. Despite these significant mitigators, the trial court imposed the death penalty. This Court should vacate the sentence and remand with instructions to impose a life sentence.

ISSUE V: Executing Appellant after the inordinate delay of more than twenty-two years will 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. Appellant was not at fault for the delay, and the State could not explain any reason for the delay of nearly ten years that it took to resolve Appellant's post-conviction motion. Executing Appellant at this point will not further the retributive and deterrent purposes underlying the death penalty. The decades Appellant has spent on death row awaiting his execution is sufficient retribution. Moreover, this punishment, as well as the punishment of spending the remainder of his life

in prison, is sufficient deterrence. Therefore, this Court should vacate his death sentence and remand for imposition of a life sentence.

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN REFUSING TO PERMIT APPELLANT TO CROSS-EXAMINE A KEY STATE WITNESS CONCERNING THE UNDERLYING FACTS OF THE WITNESS'S SUBSEQUENT MURDER CONVICTION, WHERE SUCH EVIDENCE WAS RELEVANT TO MITIGATION AND TO IMPEACH THE WITNESS'S TESTIMONY REGARDING EACH PARTICIPANTS' ROLE IN THE INSTANT MURDER.

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article I, Section 16 of the Florida Constitution guarantee a defendant the right to confront the witnesses against him and the right to a fair trial. The right of confrontation includes the right to cross-examine adverse witnesses. Kelly v. State, 425 So. 2d 81 (Fla. 2d DCA 1983)(citing Douglas v. Alabama, 380 U.S. 415 (1965)), rev. denied 434 So. 2d 889 (Fla. 1983)). Full and effective cross-examination presupposes the ability to question the witness on matters affecting his credibility. Davis v. Alaska, 415 U.S. 308 (1974); Kelly, 435 So. 2d at 83. Moreover, consistent with a defendant's Florida and United States constitutional rights to due process and to a fair trial, a defendant is entitled to present evidence relevant to his defense during the penalty phase of a capital trial. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, (1978).

In violation of Appellant's constitutional right of confrontation, right to a fair trial, and right to due process, the trial court prevented Appellant from effectively impeaching DiMarino and from presenting evidence relevant to mitigation.

Specifically, the trial court precluded Appellant from cross-examining DiMarino concerning the underlying facts of a similar murder DiMarino participated in years after Crawford's murder. The underlying facts were relevant to assist the jury in determining the relative roles of each participant in Crawford's murder, and the proportionality of their respective sentences. The evidence was not offered simply to prove DiMarino's bad character, but was offered to show DiMarino's pattern of stabbing one person and then blaming another for his crime. Furthermore, the State opened the door to the testimony when it elicited from DiMarino that he was shocked at Crawford's murder; evidence regarding his participation in another stabbing death impeached this testimony.

At Appellant's penalty phase, co-defendant Richard DiMarino claimed he was only a minor participant in Crawford's murder, and that Appellant actually committed the stabbing that resulted in her death. Before the State offered DiMarino's testimony, it requested a ruling from the court prohibiting Appellant from going into the details of the Maryland murder on cross-examination (Vol. VI, T. 696-724). Appellant explained to the court that DiMarino entered a guilty plea to a murder charge in Maryland (Vol. VI, T. 696-697). As in Appellant's case, the victim of the Maryland murder was stabbed to death, and DiMarino and a co-defendant were charged with first-degree murder (Vol. VI, T. 697-699). As in Appellant's case, DiMarino again claimed he did not stab the victim, but rather, the co-defendant did

(Vol. VI, T. 697-699). Appellant argued that this evidence was relevant to mitigation and to impeach DiMarino's testimony (Vol. VI, T. 699-722). Despite Appellant's arguments, the trial court ruled that it would restrict Appellant in his cross-examination by precluding him from eliciting the details of the Maryland murder (Vol. VII, T. 896-897). Appellant was only able to elicit that DiMarino was convicted of a subsequent murder for which he was on parole at the time of his testimony (Vol. VIII, T. 953). The jury was also informed that DiMarino was tried and found guilty of third-degree murder for his participation in Crawford's death, and that he received a fifteen (15) year prison sentence for the conviction (Vol. VII, T. 920).

A defendant should be afforded wide latitude in the cross-examination of a State witness, particularly when that witness is an alleged co-conspirator. E.g. Pomeranz v. State, 634 So. 2d 1145 (Fla. 4th DCA 1994)(trial court unreasonably limited cross-examination of key witness, who was also a co-conspirator, regarding a separate murder prosecution against the witness); Rivera v. State, 462 So.2d 540, 545 (Fla. 1st DCA)(noting that [t]he vital importance of cross-examination to a criminal defendant is further heightened 'when the cross-examination is of the key prosecution witness. . .')(citation omitted), rev. denied 469 So.2d 750 (Fla.1985). Appellant intended to offer evidence concerning the facts of the Maryland murder to impeach DiMarino's testimony regarding his and Appellant's alleged participation in Crawford's murder. DiMarino was the only other witness who was

at the scene of the murder, and he was the only witness who provided detailed testimony of precisely how the murder occurred. DiMarino claimed that Appellant inflicted each of the stab wounds, that DiMarino never stabbed Crawford, and that DiMarino only slit her throat once at Appellant's behest. Appellant's defense was that DiMarino actually committed the stabbing. In support of this defense, two witnesses testified that DiMarino not only admitted killing Crawford, but also stated that Appellant was too drunk to do it. The fact that DiMarino participated in another stabbing death tended to impeach his testimony regarding his involvement, or asserted lack thereof, in Crawford's murder. The similarity between the two murders tended to show that he had more involvement in Crawford's murder than he let on. Thus, the evidence was relevant to mitigation and to the jury's consideration of the proportionality of each co-defendants' sentence vis-à-vis his respective role in the murder. Cf. Downs v. State, 572 So. 2d 895 (Fla. 1990), cert. denied 502 U.S. 829 (1991).

In Downs this Court held that the trial court erred in permitting a defendant at resentencing from presenting an alibi witness to support his defense that he was not the triggerman. Downs claimed that the testifying co-defendant was the actual triggerman. This Court noted that although the evidence was connected to the issue of the defendant's guilt, it was also relevant to show mitigation in support of a life sentence. This Court reasoned that evidence showing Downs was not the triggerman

was relevant to the circumstances of his participation in the crime, and it was relevant to the evaluation of each co-defendants' sentence. Likewise in Appellant's case, had the jury known of DiMarino's involvement in another stabbing death, the jury may have doubted the minimal role he claimed in Crawford's murder; if the jury doubted his level of involvement in Crawford's murder, it may have considered the death penalty in Appellant's case disproportionate to the fifteen (15) year sentence DiMarino received. In fact, the trial court instructed the jury on the accomplice mitigator as follows:

> The defendant was an accomplice in the offense of which he is to be sentenced but the offense was committed by another person, and the defendant's participation was relatively minor.

Vol. XII, T. 1483). By excluding evidence regarding the details of the murder, the trial court hindered Appellant's ability to support this mitigator; the jury did not hear all evidence relevant to decide whether Appellant's participation was relatively minor, or whether another person, namely DiMarino, committed the offense.

Contrary to the prosecutor's assertion, the details of the Maryland murder were not offered simply to show DiMarino's bad character or propensity. Rather, the facts of the subsequent murder were offered to show DiMarino's pattern of killing another person by stabbing them to death. Evidence of other crimes or wrongs are admissible when offered to prove something other than the witness's bad character, such as motive, intent, absence of mistake, or a system or general pattern of criminality. Williams

v. State, 110 So.2d 654, 662 (Fla.), cert. denied, 361 U.S. 847 (1959)(commonly referred to as Williams Rule evidence); Section 90.404, Florida Statutes (2000). Thus, the evidence was admissible as relevant to show DiMarino's pattern of stabbing someone to death and blaming another for his crime. As mentioned above, such evidence was relevant to the propriety of a life sentence and to the proportionality of the co-defendants' sentences.

Additionally, the State opened the door to the line of questioning regarding the Maryland murder when it elicited from DiMarino that he was shocked and sickened by the stabbing death of Crawford (Vol. VIII, T. 971). When DiMarino made these statements, the jury had a right to know the whole truth- - that despite his apparent shock at the stabbing of Crawford, DiMarino was involved in another stabbing death. See Bozeman v. State, 698 So. 2d 629 (Fla. 4th DCA 1997). As the Bozeman Court stated, The 'opening the door' concept is based on considerations of fairness and the truth-seeking function of the trial, where cross-examination reveals the whole story of a transaction only partly explained in direct exam. Id. at 630-631; see also Allred v. State, 642 So. 2d 650 (Fla. 1st DCA 1994)(by testifying he lacked violent propensity and asserting that he never hit a woman, defendant opened door to rebuttal evidence that he previously physically assaulted his former wife and girlfriend). After his testimony on direct, the jury was left with a sense that the stabbing death of Crawford shocked DiMarino's conscience

and was beyond his level of comprehension. The fact that the Maryland murder also involved a stabbing death revealed the insincerity of DiMarino's shock. Therefore, it was misleading to the jury to exclude that evidence.

The trial court's refusal to permit inquiry into the details of the Maryland murder was not harmless error in this case. DiMarino was a key witness, as he was the only witness present at the murder scene other than Appellant and the victim. He was the only witness who described Appellant's alleged involvement in the actual murder. Thus, the ability to cross-examine him fully and effectively was especially crucial, and the limitation on such ability, especially harmful.

ISSUE II

THE TRIAL COURT REVERSIBLY ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO DISRUPT OR HINDER THE ENFORCEMENT OF LAWS, AS THE STATE FAILED TO PROVE THIS AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

In sentencing Appellant to death, the trial court concluded that Appellant's motive for killing Crawford was to eliminate her as a witness to the preceding battery. Based on this conclusion, the trial court found that Appellant committed the murder to disrupt or hinder the enforcement of the laws, an aggravating circumstance set out in Section 921.141(5)(g), Florida Statutes (2000). The State failed to establish that Appellant's dominant or only motive in killing Crawford was to prevent her from reporting the battery and becoming a witness against him. Thus, the trial court relied on an aggravating factor that was not supported by the evidence, thereby rendering it invalid.

To sustain the witness elimination aggravator, this Court has repeatedly held that [t]he State must clearly show that the dominant or only motive for the murder was the elimination of a witness. E.g., Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986). Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Riley v. State, 366 So.2d 19, 22 (Fla.1978)(emphasis added). Bates v. State, 465 So.2d 490 (1985).

In finding this aggravator in Appellant's case, the trial court stated:

> The facts of this case establish that Defendant

> and his co-defendants kidnapped 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.
>
> This aggravating factor has been proved beyond all reasonable doubt.

(Vol. V, R. 486). The court's findings are fundamentally flawed, as the State presented no evidence to show that Appellant killed Crawford to avoid having her report the battery to law enforcement. The only evidence conceivably pertaining to this issue was DiMarino's testimony that Co-defendant Smith leaned into the car as they were leaving the Clubhouse and said that he wanted no witnesses. . .take care of business. (Vol. VII, T. 918). However, it is unclear from this statement alone what Smith meant. Smith could just as easily have meant that he did not want any witnesses to the murder. There is nothing in the record to refute such an interpretation. Smith did not specifically state that they should kill Crawford to prevent her from reporting the battery to the police, and he did not testify as to what he meant by his statements.

DiMarino did testify that he understood Smith's statements to mean Crawford wasn't supposed to come back, wasn't supposed to go, to go home, or whatever. (Vol. VII, T. 918). However, DiMarino's opinion of what Smith meant was irrelevant; DiMarino's reason for participating in the murder was not at issue and it had no bearing on whether *Appellant* killed Crawford to hinder the enforcement of the laws. There was no evidence to show what *Appellant* understood Smith's statements to mean. Appellant's understanding was the relevant question because it was his motive at issue. The State offered no evidence to establish Appellant's motive for killing Crawford. Again, Appellant could have understood Smith to mean that he and DiMarino should ensure there were no witnesses to the murder. Under these circumstances, it would be mere speculation to assume Appellant's motive was to eliminate Crawford as a witness. Cf. Foster v. State, 436 So. 2d 56 (Fla. 1983), cert. denied, 464 U.S. 1052 (1984).

In Foster, the defendant shot two men in the back after robbing them. The evidence suggested that the defendant killed the victims to prevent them from identifying him as the robber. However, the State offered no evidence to prove this was the motive for the killing. Therefore, this Court held that the trial court erred in finding the hinder law enforcement aggravator. In doing so this Court stated, The defendant's motive cannot be assumed and the burden is on the State to prove it. Id. at 58; see also Griffin v. State, 474 So. 2d 777 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986)(although evidence

supported inference that defendant killed victim to eliminate witness, it was not the only inference; therefore, evidence did not support avoid arrest aggravator). Likewise, in Appellant's case, while the evidence may suggest the motive for the killing, it did not prove such motive beyond a reasonable doubt. The evidence was just as susceptible to the interpretation that Appellant participated in killing Crawford as part of her training, which was the motive for the beating.

Cases in which the witness elimination aggravator has been upheld are cases in which the State presented concrete evidence to show that this was the reason for the murder. For instance, in Johnson v. State, 442 So. 2d 185 (Fla. 1985), the defendant told a witness that he killed the victim because dead witnesses don't talk. Also, in Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989(1984), the defendant stated that he shot the robbery victim a second time to prevent his testifying against him. See also Trease v. State, 768 So. 2d 1050 (Fla. 2000)(defendant told witness victim had to be killed because he could identify them). Unlike Appellant's case, the State in the above cases left no reasonable doubt that the murder was committed to eliminate a witness, to avoid arrest, or to hinder the enforcement of the laws. In the instant case, the State offered only a co-defendant's interpretation of what yet another co-defendant stated before the murder. This is hardly "very strong" evidence of Appellant's motive.

When imposing the death penalty, consideration of an invalid aggravating factor is a violation of the Eighth Amendment to the United States Constitution. Sochor v. Florida, 504 U.S. 527 (1992). To cure such a violation, this Court should reverse Appellant's death sentence and remand for a new penalty phase hearing.

Consideration of such an invalid aggravating circumstance in this case was not harmless error in light of the numerous mitigating factors the trial found. Without this aggravating factor, only three would remain against several significant mitigators.

ISSUE III

THE TRIAL COURT ERRED IN REJECTING AS A STATUTORY MITIGATING FACTOR THAT APPELLANT ACTED UNDER EXTREME DURESS, WHERE COMPETENT,UNREBUTTED EVIDENCE SUPPORTED THIS MITIGATOR.

This Court has consistently held that "[w]henever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." Spencer v. State, 645 So.2d 377, 385 (Fla.1994) (citing Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990)). A trial court may only reject the proffered mitigation if the record provides competent, substantial evidence to the contrary. Spencer; Nibert; Kight v. State, 512 So.2d 922, 933 (Fla.1987). As the trial court itself acknowledged, Appellant presented unrebutted evidence showing that he was subject to the domination of other Outlaw members, particularly those who held a higher position than Appellant. The trial court, therefore, erred in rejecting the extreme duress mitigator.

Section 921.141(6)(e), Florida Statutes (2000) provides that it is a mitigating circumstance in a capital case if [t]he defendant acted under extreme duress or under the substantial domination of another person. This Court has interpreted extreme duress as referring to external, rather then internal, provocation upon the defendant. E.g., Toole v. State, 479 So.2d 731 (Fla.1985). Appellant’s case involves the precise type of external influence contemplated by this mitigator. The Outlaws Motorcycle Club was an organization centered around drugs, alcohol, and violence. The Outlaws had a hierarchy within the

organization, and Appellant was at the bottom of that hierarchy: he held no official position because of his severe drinking problem. Conversely, his two co-defendants were the enforcers, with Smith holding the highest position of the three. Enforcers were expected to keep order and justice within the club by whatever means necessary, and all Outlaw members were expected to be fiercely loyal.

Other members described Appellant as a follower, rather than a leader, and one witness explained that Appellant was a person who did what he was told (Vol. IX, T. 1116). When asked whether at the time of the homicide Appellant was under substantial domination by others, Dr. Caddy responded:

> I think it's not simply the issue of alcohol and polysubstance abuse would have set the stage for domination, I think there are important personality variables also operating. But if you combine all of those sets of events, yes, he was a man readily available to be influenced by others.

(Vol. X, T. 1264). Given Appellant's susceptibility to domination by others, and the dominating nature of the Outlaws organization, there was ample evidence suggesting that Appellant acted under external provocation from his fellow members. In rejecting extreme duress as a mitigating factor, the trial court 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, polysubsubstance 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 initially 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, this Court rejects the existence of this mitigating circumstances.

(Vol. V, R. 488). Ironically, the trial court stated that there was no evidence Appellant acted under extreme duress, yet the court continued on to describe all the evidence showing Appellant did act under extreme duress. The court also acknowledged that the State even conceded Appellant 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. Finally, the court recognized that the fact that Appellant was in the company of another Outlaw member- who happened to be an enforcer - may have influenced him to carry out the murder. Curiously, the

court still rejected the mitigator. Due to this error, this Court should reverse Appellant's death sentence and remand for a new sentencing hearing.

ISSUE IV

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY AS IT WAS DISPROPORTIONATE TO THE FIFTEEN (15) YEAR SENTENCE AN EQUALLY CULPABLE CO-DEFENDANT RECEIVED, AND DISPORTIONATE TO OTHER CASES IN WHICH THE DEATH PENALTY WAS NOT IMPOSED.

A. Appellant's sentence is disproportionate when considered in relation to DiMarino's fifteen (15) year sentence, where DiMarino drove the victim to a remote area with the intention that she would be murdered and subsequently slit her throat.

The United States and Florida Constitutions demand that the death penalty be imposed in a regular, rational, and consistent manner. Miller v. State, 415 So. 2d 1262, 1263 (Fla. 1982). When the death penalty is imposed upon a defendant whose equally culpable co-defendants received lesser sentences, the death penalty is disproportionate. Puccio v. State, 701 So. 2d 858 (Fla. 1997); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Such a disproportionate sentence is invalid. Id. A death sentence is also disproportionate when it is either one of the least aggravated or not the least mitigated. E.g. Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999).

In the instant case, Appellant received the death penalty in stark contrast to the fifteen (15) years imposed upon DiMarino, who instigated the brutal assault against Crawford, who drove her to a deserted area, who slit her throat and then left her for dead. The gross disparity in sentencing between the participants

in Crawford's murder is disproportionate. Therefore, Appellant's death sentence should be vacated and the case remanded with directions to impose a life sentence.

The evidence at the new penalty proceeding showed that the brutal beating of Crawford began because DiMarino was offended by her flirtation with a black man. He convinced her to return to the Clubhouse, where he instigated an argument by calling her a nigger lover, and then struck her so hard that her wig fell off. He thereafter recruited Appellant to participate in training Crawford, and when the beating stopped, DiMarino was the person who escorted Crawford out of the clubhouse. When Smith stated that Crawford should not return home, DiMarino understood this to mean that Crawford should be killed to prevent her from reporting the battery. It logically follows, therefore, that DiMarino drove Crawford out to the deserted road with the intent of participating in her murder. He furthered his intent by pulling Crawford from the car and passing her over a fence to the spot where she would be murdered. By DiMarino's own admission, he slit Crawford's throat with a knife.

Despite DiMarino's significant involvement-- by leading the attack on Crawford at the Clubhouse, by recruiting Appellant to participate in the attack, by driving Crawford to an isolated location with the intention of having her killed, and, finally, by slitting her throat-- DiMarino received merely fifteen years, of which he only served eight (8) (Vol. VIII, T. 953). Appellant's death sentence, when considered in relation to

DiMarino's sentence, is grossly disproportionate. See Puccio, supra (death sentence held disproportionate where co-defendants received lesser sentences; trial court's determination that defendant was more culpable not supported by competent, substantial evidence). Therefore, Appellant should receive a life sentence for his participation in the crime.

B. Appellant's sentence is also disproportionate when considered in relation to other capital cases in which the defendant received a life sentence; Appellant's case is not one of the least mitigated.

This Court has continued to hold firm to the principle that the death penalty is reserved for . . .the most aggravated and the least mitigated murders. Cooper, 739 So. 2d at 85 (Fla. 1999)(quoting Almeida v. State, 748 So.2d 922, 933 (Fla.1999)); see also Kramer v. State, 619 So. 2d 274 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla.1989). Consistent with this principle, this Court will conduct a proportionality review by comparing the instant case with other capital cases to determine whether the case under review is both one of the most aggravated and one of the least mitigated murders. Id. at 85.

Even where several aggravating factors exist, this Court will find the death sentence disproportionate if the case is not one of the least mitigated. Id. For instance, the mitigation in Cooper included evidence of a brutal childhood, brain damage, mental retardation, paranoid schizophrenia, and the defendant's age, which was eighteen (18) years old. Despite the existence of several aggravators, this Court vacated the sentence because it

could not say that the murder was one of the least mitigated it had seen.

The mitigators present in Appellant's case were nearly equivalent to those in Cooper. Dr. Caddy testified that Appellant was one of the most profound alcoholics he had ever met (Vol. X, T. 1363-1364). He also explained that Appellant suffered from organic brain damage and had an I.Q. in the low-normal range, which hindered his ability to process information (Vol. X, T. 1267-1269). He diagnosed Appellant with both a cognitive disorder and with antisocial personality disorder (Vol. X, T. 1284-1287).

Furthermore, several witnesses described the merciless abuse Appellant suffered as a child. His father beat him with a bullwhip, battered his sisters and mother, and forced Appellant to drink alcohol when he was only eight (8) years old. Appellant's fellow Outlaw members explained how Appellant was constantly drunk and would frequently suffer from alcoholic blackouts. Indeed, the evidence showed Appellant had been drinking on the night of the murder.

In light of the foregoing evidence, the trial court found that the following statutory and non-statutory mitigating circumstances existed, although giving each little to some weight: 1) Appellant suffered from extreme mental or emotional disturbance at the time of the offense; 2) he had an abusive childhood and suffered from neglect; 3) he developed alcoholism at an early age; 4) he has organic brain damage; 5) he is of

marginal intelligence; 6) he was intoxicated at the time of the offense; and 7) he has potential for rehabilitation (Vol. V, R. 487-493). Given all of these mitigators, Appellant's case does not involve one of the least mitigated murders for which the death penalty is appropriate. See also Larkins v. State, 739 So. 2d 90 (Fla. 1999); Sager v. State, 699 So. 2d 619 (Fla. 1997); Kramer, supra. This is particularly true where several of the mitigators, such as Appellant's potential for rehabilitation, organic brain damage, and abusive childhood, are significant. See, e.g., Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988)(a defendant's potential for rehabilitation is a significant factor in mitigation); Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992)(finding defendant's extensive history of substance abuse constituted strong nonstatutory mitigation). Additionally, the trial court erred in finding one of the aggravators (See Issue II above), and in failing to find one statutory mitigator (See Issue III above).

Accordingly, Appellant's death sentence should be vacated. Any other result will deprive Appellant of the due process of law to which he is entitled and subject him to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 17 of the Florida Constitution.

ISSUE V

EXECUTING APPELLANT AFTER HE HAS SERVED MORE THAN TWENTY-TWO YEARS ON DEATH ROW WILL CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Appellant has spent more than twenty-two years on death row since his conviction for Crawford's murder in 1978. By 1982 his appellate remedies were exhausted: this Court had affirmed his conviction, and the United States Supreme Court denied certiorari review.[4] In 1983 Appellant filed a post-conviction motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure (See Vol. IV, R. 212-215). While that motion was pending, the United States Supreme Court decided Hitchcock v.Dugger, 481 U.S. 393 (1987), which ultimately formed the basis for this Court's reversal of Appellant's sentence. In 1987, Appellant filed a petition for habeas corpus based on Hitchcock. When he filed this petition, the trial court stayed his 3.850 motion. Appellant's habeas petition was then denied in 1988[5], but for unknown reasons, his 3.850 motion was not decided until 1996. Appellant directly appealed the denial of his 3.850 motion, which this Court reversed in 1999.

This case history demonstrates that Appellant did not abuse the court system by filing frivolous motions that prolonged his stay on death row. Appellant exercised his constitutional right to a review of his death sentence, and at least one of his claims was valid, as evidenced by the fact that this Court found his Hitchcock claim meritorious. He also did not delay in filing the appropriate pleadings, as evidenced by the fact that he raised

---

[4] White v. State, 415 So. 2d 719 (Fla. 1982); White v. Florida, 459 U.S. 1055 (1982).
[5] White v. Dugger, 523 So. 2d 140 (Fla. 1988).

his Hitchcock claim the same year that case was decided. As Justice Breyer stated in his dissent from the denial of certiorari in Knight v. Florida, 528 U.S. 990, 994 (1999), Twenty years or more could not be necessary to provide a 'reasonable time for appeal and consideration of reprieve.' (citation omitted). Moreover, the State provided no explanation for the lengthy delay between the time Mr. White's habeas petition was denied in 1988 and the time his 3.850 motion was finally decided in 1996. Through no fault of his own, Mr. White was forced to endure death row for twenty-one years before his sentence was reversed. Spending more than twenty years under the threat of death is unusual. See generally Elledge v. Florida, 525 U.S. 944 (1998)(Breyer, J., dissenting from denial of certiorari). Under these circumstances, imposition of the death penalty 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.

In Lackey v. Texas, 514 U.S. 1045 (1997), Justice Stevens, writing on the denial of certiorari, noted that where a lengthy delay has occurred, the retributive and deterrent purposes underlying the death penalty are not served. Retribution is achieved from the decades the defendant spent under sentence of death, living with the uncertainty of his fate and awaiting execution. Id.; see also Knight, 528 U.S. at 991(Breyer, J., dissenting from denial of certiorari)(stating that [i]t is difficult to deny the suffering inherent in a prolonged wait for execution--a matter which courts and individual judges have long recognized.)(citations omitted). Additionally, as Justice Stevens pointed out,the additional deterrent effect from an

actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal. Id. at 1046. Thus, the deterrent effect of spending decades awaiting to die, and then serving the remainder of one's life in prison, cannot be understated.

Since executing Appellant at this point would not serve the State's interest in the death penalty, the sentence would merely be cruel and unusual. As Justice Stevens wrote, When the death penalty 'ceases realistically to further [its] purposes, ... its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.' Id. (quoting Furman v. Georgia, 408 U.S. 238 (1972)(White, J., concurring); see also Knight (noting that the longer the delay, the weaker the justification for the death penalty).

The delay was especially egregious in this case, as Appellant was deprived of certain witnesses. Appellant was unable to locate certain witnesses and other witnesses had died.[6] Because of this prejudice and the resultant violation of Appellant's constitutional rights, this Court should vacate Appellant's death penalty and remand with instructions to impose a life sentence.

CONCLUSION

---

[6] Defense witness Mark Merrill, a fellow Outlaw member, had passed away since Appellant's first trial (Vol. IX, T. 1104), and John DiMarino, who was a critical impeachment witness, was unable to be located.

For the above-stated reasons, the undersigned counsel respectfully requests this Court to vacate Appellant's sentence and to remand for resentencing with instructions to impose a life sentence. Alternatively, Appellant requests this Court to reverse his sentence and to remand to the trial court for a new sentencing hearing.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing has been mailed to Robert Butterworth, Attorney General, The Capitol, Tallahassee, FL 32399-1050 and to Appellant, Mr. William Melvin White, #067048, Union Correction Institution-A1, Box 221,P6203-S,Raiford, Florida 32083, this _____ day of February, 2000.

CERTIFICATE REGARDING FONT

The undersigned certifies that the font used herein is 12-point Courier New, a font that is not proportionately spaced, in accordance with this Court's Administrative Order.

Respectfully submitted,

_____
CHANDLER R. MULLER, of
LAW OFFICES OF
CHANDLER R. MULLER, P.A.
1150 Louisiana Avenue, Ste. 2
P.O. Box 2128
Winter Park, FL 32790-2128
Telephone: (407) 647-8200
Facsimile No: (407) 645-3000
Attorney for Appellant
Florida Bar No: 112381