IN THE SUPREME COURT OF FLORIDA

DONNY CROOK, :

Appellant, :

vs. : Case No. SC03-455

STATE OF FLORIDA, :

Appellee. :

_____:

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This is an appeal from a death sentence imposed upon resentencing. The original record on appeal (case no. SC94782), which includes transcripts of the jury trial and penalty phase, will be referred to by volume and page number. The record of the resentencing proceeding, which includes the new Spencer hearing, will be referred to by the symbol "R", followed by volume and page number. The supplemental record on appeal will be referred to as "SR".

For the sake of clarity, appellant will be referred to by his first name in the portion of the Statement of Facts summarizing his mother's testimony.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Appellant, DONNY L. CROOK, was charged by indictment on April 8, 1996 in Highlands County with the first degree murder of Betty Spurlock, robbery with a deadly weapon, and sexual battery with great force (1/37-40). After a jury trial before Circuit Judge J. David Langford on August 12-27, 1998, appellant was found guilty as charged on all counts (6/1055-57; 27/2927-28).

The penalty phase took place on September 14-15, 1998. During its deliberations the jury submitted the following question: "The jury requests information on the life without possibility of parole sentence. Does this actually and really mean that Donny Crook will never get out of jail?" (29/3316). The judge told counsel that, in accordance with Whitfield v. State, 706 So. 2d 1,5 (Fla. 1997), he would simply re-read the jury instruction that the punishment for the crime is either death of life imprisonment without the possibility of parole. Defense counsel suggested that Whitfield leaves it to the trial court's discretion, and he initially requested that the judge respond affirmatively to the jury's question, and tell them that "life means life" and there is no mechanism for parole in Florida. Defense counsel subsequently stated that the trial judge's proposal to re-read the instruction was acceptable, and the judge then did so (29/3317-24).

The jury returned an advisory verdict recommending, by a 7-5 vote, that appellant be sentenced to death (29/3326;7/1165) On November 24, 1998, the trial court sentenced appellant to death for

the murder, and imposed concurrent terms of life imprisonment on the remaining counts (11/2017-23, 2045-46, 2077).

On March 7, 2002, this Court affirmed appellant's convictions but vacated the death sentence and remanded the case to the trial court "to reconsider and reweigh all available mitigating evidence against the aggravating factors, and to determine the proper penalty in accordance with Florida law." Crook v. State, 813 So. 2d 68, 78 (Fla. 2002). The Court expressly noted that because of the remand "we do not reach the issue pertaining to the proportionality of Crook's death sentence in this case." 813 So. 2d at 78, n.8.

The new Spencer hearing took place on November 25, 2002 (R2/201-379). On February 18, 2003, Judge Langford reimposed the death penalty (R1/98-120; R3/382-417). He found the same three aggravating factors as in the original sentencing order: (1) that the capital felony occurred during the commission of a sexual battery (no specification of weight); (2) it was committed for pecuniary gain (no specification of weight); and (3) it was especially heinous, atrocious, or cruel (great weight) (R1/100-04). As in the original sentencing order, the judge found both of the statutory mental mitigating factors: (1) extreme mental or emotional disturbance and (2) impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. [In his original sentencing determination, in which he had erroneously failed to find and weigh appellant's organic brain damage, Judge Langford had given each of the mental mitigators only moderate weight (11/2035-36, see Crook v. State, 813 So. 2d at 73). However, in his revised sentenc-

ing order -- based on the testimony of Drs. McCraney, McClane and Dolente in the jury penalty phase and on the testimony of Dr. Elizabeth McMahon in the new Spencer hearing -- Judge Langford accorded both mental mitigators significant weight (R1/110, see 105-110)]. This time the trial court found that the evidence established that appellant suffers from organic brain damage:

> [Dr. McMahon found] that the test scores and clinical data presented a clear picture of cortical dysfunction, specifically frontal lobe damage, primarily in the orbitofrontal region. The defendant additionally advised her of his use before the homicide of beer, marijuana (some of which was laced with heroin) and crack cocaine. She then noted the defendant had ingested four different types of mind altering substances, all of which impacted an already impaired brain.
>
> The other experts, Dr.'s McCraney, McClane and Dolente testified to their finding of the existence of brain damage, specifically to the frontal lobe, which significantly impaired the defendant's ability to control his impulses. These experts also explained that the defendant's brain damage was made more severe by the use of both alcohol and drugs at the time of the crime.

(R1/110).

The trial court also found that the evidence established that appellant suffers from other dysfunctions related to the brain damage, including attention deficit hyperactivity disorder, learning disabilities, social isolation, language confusion, left-right dominance confusion, visual focus problems, bladder and bowel control problems, fear of abandonment, and sleep disturbance with night terrors (R1/116).

Appellant's age of 20 was found and given slight weight as a statutory mitigating factor (R1/105). However, the judge also considered as a nonstatutory mitigating factor that "[w]hile [appellant's] chronological age was 20 years, his level of maturity, i.e., his psychological and emotional age was significantly less." He found that "[t]his mitigating circumstance has been proven and the court has given moderate weight to it" (R1/111).

The trial court also found and gave moderate weight to five nonstatutory mitigating factors (considered in combination) which established that appellant's mother and father were "abysmal failures as parents" (R1/113); and that he had "a terrible home life" which included violence, instability, and periods of abandonment (R1/114-15), and physical and mental abuse and neglect which left him a virtual emotional cripple (R2/115,117).

Appellant's below average intelligence (moderate weight) and impaired educational experience (slight weight) were found as nonstatutory mitigating factors (R1/112-13,116). Also found as nonstatutory mitigators (slight weight) were his long history of substance abuse dating from age 8 (considered separately from his "drug use on the date of the offense and its effect on his mental state at that time") (R1/116-17); his lack of a history of violent behavior (R1/117); and his cooperation with the police, his true remorse for his actions (reflected in one of his taped confessions), and his good courtroom behavior despite his serious emotional and impulse control problems (R1/118-19).

STATEMENT OF THE FACTS

A. Trial

In its opinion affirming appellant's convictions, this Court set forth the following facts:

> The victim [59 year old Betty Spurlock] was the co-owner and operator of the Bull Penn Bar ("bar"). Her body was discovered lying behind the bar by the bar's other co-owner at 8:45 p.m. The bar's cash drawer we missing from the cash register. Spurlock suffered multiple stab wounds and significant head injuries. The medical examiner testified that a pool cue had been inserted into the victim's vagina, but he stated that Spurlock likely was unconscious at that time.[1]
>
> Crook was seen in the bar both in the early afternoon and in the evening of the day of the murder. In the evening, a witness saw Crook sitting on his bicycle in front of the bar with a case of beer. Crook was last seen in the bar at approximately 8:15 p.m. sitting on a bar stool in front of Spurlock.
>
> Authorities arrested Crook the next day on suspicion that he was involved in the murder. Subsequent DNA analysis determined that blood found on Crook's T-shirt was consistent with Spurlock's blood. During his time in police custody, Crook also admitted that he was present at the bar.
>
> Although Crook did not confess to killing Spurlock or taking the money from the cash register, Crook admitted that he had been drinking alcohol and using cocaine on the day of the murder and "wanted rock." Crook stated that he had "seen [Spurlock] counting money. And I turned around and everything went black." Crook informed the detectives that after seeing

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[1] Actually the medical examiner's testimony was unequivocal on this point. He testified that Spurlock was unconscious at that time and would have experienced no sensations (18/1163). The prosecutor acknowledged this fact in her closing argument (25/2573). In his sentencing order, the trial judge found that Ms. Spurlock was already mortally wounded and "undoubtedly unconscious", although still alive (R2/101).

> Spurlock lying on the floor naked with blood everywhere, he "got scared," ran out the front door of the bar, and rode his bicycle to his cousin's house where he changed his clothes. Also, a correctional officer testified he overheard Crook telling his brother, James Crook, who was visiting Crook in jail, that he "hit her in the head . . . . The money wouldn't come out. I was banging it on concrete but it wouldn't open. I got pissed off and hit her in the face."

Crook v. State, supra, 813 So. 2d at 69-70.

A detailed summary of the guilt phase evidence is contained in appellant's initial brief in the original appeal (case no. SC94782). It will not be repeated here, except for (1) the testimony tending to corroborate appellant's statements regarding his drug and alcohol consumption on the day of the crime, and (2) the testimony tending to corroborate the prosecutor's hypothesis that the murder occurred when, in the course of a robbery, Ms. Spurlock struck appellant in the head with the pool cue, sending him into a rage (25/2601-03, see R276-76,281,304-05;SR1/009,012). In his statement to Detective Murray, appellant said he was high on rock cocaine, and he was drunk. He'd had a fifth of Tequila and then he was drinking Old Milwaukee. He wanted more rock, and he saw the lady counting money (23/2193-99). He told Detective Murray that everything went black after that, though he remembered seeing her lying there and he ran out of the bar (23/2193-99).

Earlier that evening, Eva Johns (a state witness) saw appellant, whom she knew, in front of a Presto store on a bicycle with a case of Old Milwaukee sitting on the handles. Appellant gave her a

beer. The case was getting low; there were maybe six or eight beers left. Appellant "looked like he was partying" (15/624-27,633).

After the homicide, appellant showed up at the home of his cousin Melissa Lemay (a state witness). Melissa described him as "hyper loud." She thought he was high on rock or paper, because his pupils were so big you could not see his eye color (16/809-10,834).

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

The prosecutor, in responding to the defense's motion for judgment of acquittal, argued that the locking of the front door of the bar "[showed] the premeditated <u>intent to rob the lady</u> who was seen counting the money, Betty Spurlock" (24/2394-95). In her closing statement to the jury, the prosecutor again made the point that the locking of the front door went to the issue of premeditation

of the robbery (25/2580-81). The prosecutor then suggested that the homicide was committed in the following manner:

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

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

(25/2601-03)

In her sentencing memorandum in the resentencing proceeding, the prosecutor continued to assert that crime scene analysis circumstantially suggests that the brutality directed toward Ms. Spurlock was triggered by a blow to Crook's head (SR1/009), and, "The State proposed at the initial trial that a blow to Crook's head with a pool cue directed Crook's attention to Mrs. Spurlock in a very personal way. She became the focus of his violent behavior" (SR1/012).

B. Jury Penalty Phase

Aneitta Crook Bravo

Aneitta is Donny Crook's mother. She left home at age fifteen to marry Donny's daddy, James Crook. When she was growing up, she went to school "[w]henever I could", but she only got as far as the eighth grade, and she cannot read or write well. James had dropped out of school in the third grade (28/2975-76,2979).

Aneitta and James had three sons; James Jr. in 1965, Ronnie in 1968, and Donny in 1976 (28/2977-78). When James Jr. grew up, he got with the wrong people and started doing drugs and stealing (28/ 2977-78). Ronnie had a lot of physical problems as he was growing up; he was hyperactive, and had hypoglycemia and epileptic fits (28/2978).

After the two older boys were born, but several years before Donny's birth, Aneitta and James Sr. separated "because a tow motor fell on his head over at Lake Region and he was crazy" (28/2978-79). Before the injury, James was good and kind; afterwards he was awful. He hurt people, and didn't have any feelings for anybody (29/2979).

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

In 1975, Aneitta got back together with James. He had told her that he had gotten a divorce from her, but he hadn't. She got pregnant from him, and her family told her that she had to remarry him, so they remarried in Avon Park, and Donny was born in a county hospital in Birmingham, Alabama, in January of the following year (28/2978, 2981-83).

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

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

James wouldn't work, and couldn't work due to his head injury, so Aneitta got welfare and also got a job at the packinghouse. They were living in a trailer over in Mascotte, and the children were left in James' care while she worked (28/2986). James was very abusive to the children, and that included the infant, Donny (28/ 2990-91). James also abused Aneitta in front of the children; "one time he beat me with a redwood board and knocked all my teeth out" (29/2990).

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

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

(28/2988)

Donny and Ronnie were placed in foster care. In the meantime, after she got her car fixed, Aneitta went to Vero Beach to pick oranges. There she met a fellow migrant worker named Artureo Sanchez. They traveled the eastern part of the country, picking fruits and vegetables in season. They were together for almost two years before the relationship ended, and Artureo was the father of Aneitta's daughter Tonya (28/2989,2991-95,3001).

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

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

Nobody but me.

Q. And while you are working at the bar who was taking care of them?

A. I'd get baby-sitters.

Q. Do you know who?

A. No. Because I didn't have any baby-sitters. The big kids took care of the little kids.

(28/2998-99).

For the next fifteen years or so, they lived in various locations in Victoria (in south Texas) and in the Dallas/Plano area, with one other brief interval in Mascotte, Florida (28/2999-3000). "The last part of living in Texas, I would go to Dallas. I went different places because I tried to get the kids in a school where they would go to school. They didn't want to go to school. And I couldn't understand why" (28/3000).

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

Soon after she went to Texas, Aneitta met Ascuncio (Santos) Bravo. They lived together for a year, "[a]nd then I married Ascuncio because the welfare was going to take my kids again because some kids had beat up Donny with pipes" (28/3004,3001-02). The kids

in the neighborhood had beaten him in the head; he was bleeding real bad and had to go to the hospital (28/3004-05).

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

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

(28/3006)

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

Aneitta had gone back to work as a clerk in a convenience store, working various shifts. Asked who was taking care of Donny when he was at home and not in school, Aneitta replied, "I guess one of the older kids, or Sauntral" (28/3007-08). From the time Donny was four or five years old, and for years thereafter, it was often up

to his brothers Jimmy and Ronnie to look out for his physical and emotional well-being, to see that he got his medications, and to teach him what the rules were and to follow them (24/3008,3026-27).

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

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

> And I was going up when the kids weren't in school. Because we tried to get them an education but they'd skip school.
>
> He'd come on the weekend and he'd say well, did the kids go to school all week? And I'd tell him yeah. And sometimes they didn't. Because I'd send them to school and then about nine or 10:00 they'd come dragging back in the house.

(28/3011-12).

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

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

his hands and gave up, and sent Aneitta and the kids back to Victoria, while he remained in the Dallas area (28/3013).

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

By the time Donny reached the sixth grade he had attended maybe ten different schools. Asked how many classes he had been thrown out of or required to repeat, Aneitta replied, "More than I can count." Whenever he would leave one school, she would move to the other side of town to get him in another school (28/3016). She kept being required to come in and meet with teachers; she did that until she got tired of it and then she didn't bother anymore (28/ 3016-17).

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

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

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

Expert Testimony

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

Dr. David McCraney

Dr. McCraney is a board certified neurologist (an M.D. specializing in diseases of the brain and nervous system) in private practice in Tampa. He also serves as Medical Director for the Florida

Institute for Neurological Rehabilitation, a transitional living facility for patients with brain injuries of a variety of causes (28/3032-35). His work there involves the behavioral aspects of brain injuries (28/3037).

The frontal lobe is the part of the brain most susceptible to injuries and defects. It is involved in planning behavior, directing attention, and controlling impulses. Since the frontal lobe does not control movement, vision, or language to any great extent, a person with such an injury may not give the appearance of being impaired. However, frontal lobe injury affects the person's ability to function within society's norms. "The most common manifestation is that the patient basically loses control over their own behavior" (28/3041-43). There is a subset of brain-injured patients who exhibit what Dr. McCraney calls the "orbital frontal syndrome" (28/3043). [This is the specific neurological condition with which Dr. McCraney diagnosed appellant (28/3069, 3071)]. These patients are irritable and highly distractible; they appear hyper and panicky; and their emotions "may go from sorrow to rage, sometimes in the blink of an eye" (28/3043). However, the single most characteristic feature of orbital frontal lobe injury is impulsivity. This may include violent behavior, sexually inappropriate behavior, stealing, and drug abuse, and it also frequently includes self-destructive behavior; "People with brain injuries are impulsive without even regard to what it's going to do to them[selves]" (28/3044-45).

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

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

(28/3045-46).

People with frontal lobe injuries frequently lack insight into their condition, and it is extremely common for them to resort to self-medication with various street drugs, including cocaine, in order to get rid of the feeling of irritability; "[i]t's like they want to feel comfortable in their own skin" (28/3046-48). This

doesn't work, and in fact makes the original problem worse; Dr. McCraney likened it to throwing gasoline on a fire (28/3048-49).

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

> Like, for instance, my work at FINR, they always buddy up to me because I have a significant amount of influence over when they get discharged from the program. So, they all want to be my friend. This is often the nicest interview I have all day.
>
> Because the brain-injured patients are often mean, hostile, paranoid, irritable, okay. I'm . . . Sometime I feel threatened during these interviews whereas with the antisocial personality types, I never get that from them because they're always acting in their own self-interest.
>
> When we look at impulsive acts, the antisocial personality type is always going to ask "what's in it for me". That's why they're much less likely to engage [in] self-destructive activities, or at least things they perceive as being self-destructive.
>
> I think drug abuse is self-destructive. The patient doesn't see it that way.

> But the patient with brain injury will do things that even he doesn't see anything in it for him. All right. So, the person with the antisocial personality disorder may be doing things that I think are destructive but he thinks it's fine.
>
> The brain-injured patient can't take his own side in an argument.

(28/3051-52).

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

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

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

Appellant was referred to Dr. McCraney for a neurological examination, after having previously been evaluated by a psychiatrist and a psychologist, both of whom had raised the concern that something was not right with his brain (28/3055,3114). After reviewing appellant's life history and records, and after performing a series of physical and neurological examinations, Dr. McCraney concluded that appellant is paranoid and impulsive, and that his difficulty arose as a result of organic brain dysfunction rather than any character disorder (28/3071,3109). The specific neurological condition which he diagnosed is orbital frontal syndrome (28/3071). From his examination and review of the records, Dr. McCraney also concluded that appellant is of subnormal intelligence and is mildly retarded, and that he has suffered from impulsivity from a very early age (28/3057, 3069-70).

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

As to the question of causation of appellant's brain damage, Dr. McCraney noted genetic and environmental factors, and also head trauma resulting from the incident at age five when he was beaten with a pipe (28/3060-61, 3117). Most frequently, frontal lobe

injuries are congenital. In addition, appellant's problems were likely exacerbated by parental neglect during his early childhood and important formative years, and by his drug abuse from a very early age (28/3061, 3064-65). Dr. McCraney explained:

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

(28/3065).

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

> DR. McCRANEY: . . . So, in some circumstances people with frontal lobe injuries are not able to choose how they are going to act.
>
> Q. [defense counsel]: And what happens in those cases? Is that when you're talking about the sham rage?
>
> A. Exactly.
>
> Q. And is that person truly under control of himself? Can he control what he does when those things occur?

A. No.

(28/3075).

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

Dr. Thomas McClane

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

Dr. McClane described appellant as "an unusual case, an unusual person. Different from the run of the mill. More difficult to understand" (19/3142). McClane's overall impression is that of brain

damage arising from a combination of causative factors; "[d]ifficult to characterize in the sense of specifying the exact parts of the brain. Not so difficult to characterize in that the behavior patterns are perfectly consistent with diffuse brain damage" (29/3144-45).

Dr. McClane cited five factors (four of which he found to be applicable to appellant) which can cause or contribute to organic brain damage: (1) genetics; (2) pregnancy and birth process (the one which was of little importance in this case); (3) head trauma; (4) neglect and socioeconomic deprivation; and (5) substance abuse (29/3144-48). Regarding genetic factors, appellant has a low IQ which has been tested in the 60s and low 70s (29/3145). His father couldn't read or write. Both brothers are school dropouts and there is a strong family history of learning disorders. Appellant has been diagnosed by Dr. McClane and others with attention deficit hyperactivity disorder, which is largely genetic (29/3145-46). As far as head trauma, there have been several documented episodes (including the incident at age five when he was severely beaten with a pipe), and some other possible episodes (29/3146). Neglect and deprivation, especially when it occurs very early in life, can cause brain changes resulting in an organic syndrome (29/3147). Appellant, as a child, appeared to have had "a pretty disruptive time of it" in his early years with his mother's absences, inconsistent father figures, occasional troublemaking appearances by the biological father, a lot of violence in the extended family, the family's migrant life-style (29/3161-62). And as to the last factor, substance abuse, appellant

"was involved in sniffing or huffing various organic solvents" such as paint thinners and the like. This is well documented to cause brain damage in some people. According to Dr. McClane, "The larger the dose and the more frequent, the more brain damage later" (29/3147-48). Alcohol can also cause serious brain damage in some people, although it may not cause brain damage in other people. In appellant's case:

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

(29/3148).

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

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

the brain which, when it is working properly, enables people to control their urges and impulses (29/3155-57).

Dr. McClane's bottom-line opinion is that appellant has a personality disorder with antisocial traits, secondary to a combination of brain damage and severely adverse socioeconomic circumstances (29/3149,3201). His intellectual functioning is borderline, meaning "on the border between the low limits of normal and mental retardation" (29/3148-49). In addition, he has attention deficit hyperactivity disorder (29/3149). He has impulsivity and anger control problems, poor judgment, low self-esteem, difficulty in interpersonal relationships, manipulativeness (29/3149-50). Finally, appellant's brain damage "would render him hypersensitive to the usual negative effects of alcohol and other drugs" (29/3150). The substance abuse would magnify the symptoms you would normally see in a brain-injured person in two ways. First, chronic drug and alcohol abuse may literally increase the degree of brain damage. Second, the immediate effects of intoxication tend to be much greater and more severe in a person who is brain damaged (29/3150-51).

Dr. McClane testified that appellant's problems, including his brain damage, are not curable (29/3159-60). If he had received adequate treatment at an early enough age -- if he had had stability in the home, and regular school attendance, and no drug abuse -- then perhaps "the probabilities would be a little higher of his having a better shot at being a closer to normal person" (29/3160). There is "[n]ot a whole lot" that can be done for somebody like appellant; medication might help some if he stayed off street drugs and alcohol

(29/3159,3162). Dr. McClane noted that at the time of the trial appellant was on three different medications: an antidepressant, an antipsychotic, and a pain medication. This explains why he was able to sit through the trial and remain fairly calm and quiet (29/3162).

Regarding the statutory mental mitigating circumstances, Dr. McClane testified that appellant was under extreme mental or emotional distress at the time of the offense (29/3163,3201-02). The conglomeration of factors would make him highly vulnerable to any stressful situation, and he "would tend to overreact, as has been his history throughout his life" (29/3163). This would be even more so, in light of his intoxication with alcohol and cocaine (29/3163-64).

As to the second mental mitigator, defense counsel asked:

> Would those same factors substantially impair Donny's ability to appreciate the criminality of his conduct?
>
> DR. McCLANE: Yes. It wasn't my opinion that it obliterated that or there might have been an insanity defense here.
>
> Q. Sure. But this isn't insanity?
>
> A. This is not an insanity issue. But nevertheless, his ability to think clearly and appreciate these things, in my opinion, was substantially impaired not only by his intoxication but by his increased sensitivity to intoxication, and all of the factors that I mentioned earlier that have made him what he is today, namely his brain damage problem.
>
> Q. And finally, would his ability to conform his conduct to the requirements of law be substantially impaired based on all of these factors?
>
> A. If his ability to appreciate the criminality of his conduct was substantially impaired, his ability to control his impulses,

> etcetera, in other words, to conform his behavior, was much more impaired.
>
> It is in general . . . We've just gone through a long litany of discussions of his life where impulsivity and difficulty controlling impulses has been a persistent problem.
>
> As all of us know, from either having something to drink ourselves or watching friends, or enemies, who are intoxicated, we know that most people who are intoxicated have decreased control of their impulses. And somebody who is brain damaged is more sensitive than the average person to that intoxication and to that, that increased difficulty controlling impulses. So, that's even more impaired, in my opinion.
>
> Q. And those things all fit Donny Crook?
>
> A. I didn't hear you.
>
> Q. That description fits Donny Crook?
>
> A. Yes.

(29/3164-65).

Dr. Ralph Dolente

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

Dr. Dolente testified "I go into assessments open-minded not necessarily expecting to find anything" (29/3209). During the first examination, appellant "essentially blew me off"; trying to fake in an obvious and unsophisticated way (29/3209-10). Dr. Dolente told him "Take care, have a good day" (29/3210). Six months later, he

examined appellant again and got an accurate assessment (29/3210-12). After administering a series of tests, Dr. Dolente concluded that appellant is brain damaged in his frontal lobe (29/3209,3212-14). Moreover, there were clear indications in the records that he had organistic brain damage from a very early age. "Organistic" means brain impairment as a result of trauma or some embolic event such as a rupture of a vessel. When appellant was five, he sustained what appeared to be a significant brain injury from being struck on the head with a pipe (29/3208,3214,3216). In addition, Dr. Dolente gleaned from appellant's mother that he had a history of accidental head injuries and had been banged around a lot as a kid (29/3216,3229).

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

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

(29/3217).

Appellant grew up in abject poverty and neglect, with early exposure to violence and alcoholism. The family moved frequently, and there was a lot of absenteeism from school. This instability, Dr. Dolente stated, would worsen the symptoms of his brain injury, and would manifest itself in the inappropriate and out-of-control behaviors that are well documented in his background (29/3217-

18,3227). Substance abuse also made his problem worse. Appellant was huffing paint thinner and gasoline as early as age eight (29/3218-19,3229).

In school, appellant was put into the emotionally handicapped track and a learning disability track. Dr. Dolente thought that was probably not inappropriate, "[b]ut his problem was more than that. I think it was organically based" (29/3224). Brain damaged children such as appellant are not often identified or treated as such; instead they are placed in programs due to their behavioral problems, and they generally don't do well (29/3225,3228). Appellant has a record of very poor academic achievement, and he presently reads at a first-grade level (29/3230). He also has attention deficit hyperactivity disorder, but Dr. Dolente does not see this as his major problem (29/3222-23). Rather, his main diagnosis is an organic personality disorder secondary to recurrent, traumatic brain injury, with antisocial and impulsive features, along with polysubstance abuse (29/3207,3223,3238-39,3242-43). Dr. Dolente believes that the specific location of appellant's brain impairment is in the frontal lobe (29/3231).

According to Dr. Dolente, the problem with brain injury is one of being able to conform your behavior and react appropriately. Brain injured people tend to overreact; when provoked or overstimulated they can easily go into a rage and lose control (29/3230-32). Therefore, to a degree, appellant's brain injury, in combination with his socioeconomic deprivation and substance abuse, would have impaired his ability to control his impulses and conform his conduct to

the requirements of law (although his ability to appreciate the criminality of his conduct would not necessarily have been impaired) (29/3231,3233-34). Similarly, in such situations, he is "prone to being more under extreme emotional distress than we would be, or an individual, say, who has a fully functioning brain" (29/3233).

Original Spencer Hearing - Dr. William Kremper's Psychological Evaluation

At the Spencer hearing prior to sentencing, by agreement of the state and the defense, appellant's medical records (7/1247-1319; 8/1320-1514; 9/1515-1640) and school records (9/1641-1709; 10/1710-1904; 11/1905-1995) were submitted for the trial court's review (11/2001,2003,2009). Included in the medical records was a psychological evaluation prepared by Dr. Kremper -- the expert whom the state had planned to use as a rebuttal witness but ultimately chose not to call -- for a Social Security disability determination in 1994 (7/1250; 8/1432-53). Dr. Kremper's diagnostic impression included organic hallucinosis; alcohol and cocaine abuse; cannabis dependence; antisocial personality disorder; inhalant dependence, in remission; and mental retardation, mild (8/1436,1438). "Mr. Crook was not considered capable of maintaining employment within a competitive work setting due to his severe cognitive, emotional, and behavioral deficits. He was unable to tolerate routines, had severe verbal memory difficulties and was not considered able to follow simple instructions on a consistent basis. With minor frustration he was likely to become physically aggressive" (8/1436). Appellant was

rated as meeting the criteria for an organic mental disorder (8/1437-38) and/or an organic personality disorder (8/1438-39). "Is worried that others will get him. He cannot read or write, has trouble explaining things to others. Argues with everyone, poor impulse control and/or temper control. Easily confused. Marked social and personal/behavi[or]al deficits" (8/1438). The diagnosis was "Organic Mental disorder with polysubstance abuse and antisocial personality disorder. The cl[ient] has had marked social and personal deficits for many years and poor academic skills (8/1437).

C. Resentencing

Dr. Elizabeth McMahon

At the new Spencer hearing on November 25, 2002, the defense presented the testimony of Dr. Elizabeth McMahon, and introduced her psychological report (SR3/275-87; see R2/212-14,301-02,378-79). Dr. McMahon was of the opinion that -- whatever may have been the immediate trigger -- this homicide was committed in a rage, as a result of organic brain dysfunction (R2/269-72,310-11). She summarized her clinical impressions as follows:

> In March of 1996, Donny Crook was a chronologically 20 year old male who was, in fact, about four years old, psychologically. His development/maturation had been stunted at approximately that age due to cortical dysfunction, poor/inadequate parenting, domestic violence, abuse/neglect, constant relocation, etc., etc. Specifically, Donny was a young man whose thought processing was impaired, often severely confused, at times idiosyncratic and at odds with consensual reality; who experienced a high level of anxiety and depression, both of which he alleviated with whatever amounts of illegal

> substances he could get, as well as acting out behaviors; whose effective responses were very brittle and poorly controlled, especially his anger which could become rage almost instantaneously; and whose personal relationships were marked by immaturity, poor impulse control, unmet needs, and a lack of satisfaction.

(SR3/284-85).

Dr. McMahon is a forensic psychologist and neuropsychologist (R2/215-17). She reviewed the records and evidence in this case, interviewed appellant, and gave him a full battery of psychological and neuropsychological tests (R2/218,226-28, see 219-23,228-48). The validity profile showed that appellant was trying to the best of his ability, and was not malingering; in addition, Dr. McMahon stated, appellant isn't bright enough to fake a neuropsych (R2/223-26). Appellant understands spoken language at the level of an 11 year old, he reads at a second grade level, and he has the personality development and psychological maturation of a 3 or 4 years old child (R2/233,260; SR3/276,284). His verbal IQ is in the borderline range (formerly but no longer referred to as the borderline range of retardation), while his performance skills are within the average range (R2/231-32; SR3/276. Over the years (beginning at age 7), appellant's performance scores have been consistently and significantly higher than his verbal scores (20,19,11,10,17,8, and 22 point differentials); this disparity, according to Dr. McMahon raises a red flag that something is wrong with the brain; it is a strong indicator of cortical dysfunction (R2/232-33; SR3/276,280-82).

In Dr. McMahon's clinical opinion, from her perspective as a neuropsychologist with 20 years experience, appellant has frontal lobe brain damage (R2/248,250,286; SR3/282-84,286). The neuropsychological tests "are all very consistent in conveying a `test-book' example of orbitofrontal damage" (SR3/282)(emphasis in report). Moreover, appellant's records and behavioral history from as far back as age five display the symptoms of frontal lobe damage (R2/250-51). "His every day behavior exhibits those kinds of frontal signs" and, in Dr. McMahon's observation, appellant even "looks frontal" (R2/251; see 251-53,295-96). The brain damage could have resulted from any or all of a number of causes, including oxygen deprivation at birth, or other prenatal or birth process complications, or from getting "whopped on the head with a pipe" when he was five (R2/248-49,251).[2] Abuse or neglect during childhood interacts with brain damage and worsens its effect (R2/299-300). Appellant experienced this "double dose" of problems; "from birth, he was raised in a situation of physical and psychological abuse and neglect . . . in which his most basic needs were denied," resulting in a deep sense of hurt, abandonment, frustration, anger, and eventually rage, while at the same time -- due to his brain dysfunction -- he lacked the resources to modulate, suppress, or appropriately direct those emotional responses (SR3/283)(emphasis in report). In Dr. McMahon's

[2] Dr. McMahon noted in her report that appellant has at least three scars on his head -- right parietal, left temporal, and central prefrontal areas -- that he dates from this event (SR3/279).

words, "Fuel was continuously being poured on an already robust flame and, simultaneously, the damper [was] defective" (SR3/283).

School, for appellant, was "a long series of social promotions"; it is doubtful based on his record that he was ever academically promoted (SR3/280). He was classified as learning disabled and emotionally disturbed, he was often placed in special ed classes, and he simply stopped going to school in the eighth grade when he was 16 or 17 (SR3/280). From the age of 10, appellant "proceeded to flood an already non-intact brain with chemicals that did nothing but burn out more neurons and disrupt the functioning of the ones that were left" (SR3/283). He began by huffing paint and paint thinner and drinking beer; from age 13 on he was using marijuana, methamphetamine, and crack cocaine as often and in whatever quantity he could acquire (SR3/280). According to Dr. McMahon, the primary motivation underlying chronic substance abuse in such individuals is pain relief (physical, sexual, or psychological); it is a way of self-medicating the depression resulting from abuse and neglect (SR3/283). The other way of coping with that depression is "acting-out" behavior (SR3/283).

As a result of his frontal lobe disorder, exacerbated by his background, appellant has had an extreme amount of anger, hostility, and rage, along with extremely poor impulse control (R2/253,258). This is not a mere personality trait; it is brain dysfunction (R2/253). Dr. McMahon explained that the antisocial behavior which appellant displays overlaps with his brain disorder (R2/253).

When a frontal lobe damaged person perceives a threat or insult, it gives rise to a "fight or flight" reaction, and because he is unable to channel his fear and anger into a socially appropriate response, he overreacts, often in a physically aggressive way (R2/254-58). It does not take much to make appellant feel threatened, despite his "tough guy" facade, because he doesn't have the resources to deal with the world (R2/259-61). When he gets upset, he has extremely brittle impulse control, and he operates at about the maturity level of a three or four year old (R2/259-60). "[A]nger and hit is sort of all the same thing to him. He doesn't differentiate between a feeling and a behavior" (R2/261).

Appellant told Dr. McMahon that on the afternoon and early evening leading up to the homicide, he had consumed nearly twenty beers (R2/270; SR3/285). He stated that within an hour before going into the Bull Pen bar he smoked some crack cocaine; and just before entering the bar smoked four marijuana joints, one or two of which were laced with heroin (R2/270; SR3/285). These mind-altering substances impacted appellant's already impaired brain, and further reduced his capacity to control his impulses, to evaluate his actions, and to appreciate the consequences of his actions (R2/270-71; SR3/285). The effects of alcohol, Dr. McMahon explained, begin at the frontal lobes and then work their way to the back of the brain, and therefore "such things as insight, self-reflection, evaluation of actions and consequences, impulse control, and inhibition are affected considerably before balance, coordination, alertness, etc." (SR3/285; see R2/271).

Dr. McMahon's observations concerning the crime scene and the manner in which the killing occurred were consistent with her conclusion that the crime was committed in a rage which was the result of brain dysfunction (R2/307,310-11). An extraordinary amount of energy was expended -- much more than would be seen in a typical robbery/murder -- and "there had to be an incredible amount of rage fueling that energy" (R2/262, see 262-64,266). When she probed into this during one of her interviews with appellant, he told her that Mrs. Spurlock had made some disparaging comments about members of his family, particularly his mother (R2/265-66; SR3/285-86). These, according to Dr. McMahon, are "very core issues" to appellant, and (despite or perhaps because of his abused and neglected childhood) he has an unusually deep loyalty to her (SR3/285; R267; see testimony of Aneitta Crook Bravo). He had gotten up off his bar stool intending to hit Ms. Spurlock, when she made one more comment and he "just lost it" and pushed her down (R2/265; SR3/285-86). He remembered nothing after than point until he stomped once on her head, looked down, and said "Oh, my God, what have I done" (R2/285-86; SR3/286).

Dr. McMahon thought that could be the missing piece of the puzzle; something that could have aroused appellant's rage to the extent manifest in the crime scene (R2/266, see 262,264). She acknowledged that she had no way of knowing whether or not this scenario was true (R2/269-70,302). If it wasn't a comment about his family, then there had to be some other triggering event; it wasn't just "I saw money and wanted it" for more rock cocaine (R2/262,270,272; SR3/286).

On cross-examination, the prosecutor brought up the knot on appellant's forehead, which the state maintained (both in the original trial and the resentencing proceeding) was caused when Mrs. Spurlock -- in defending herself from appellant's robbery attempt -- struck him in the head with the pool cue.

> MS. HUGHES (prosecutor): Okay, You've got a victim up, a victim spunky enough to try and defend herself. She claps him once across the top of the head, makes a comment about his mama. Are we not in the rage scene?
>
> DR. McMAHON: You're saying that she . . . You're theorizing that she --
>
> Q. I wasn't there.
>
> A. -- she struck him first.
>
> Q. Struck him and said something about mama.
>
> A. I don't know that she struck him. I asked him and he denied this. Now, I don't know.
>
> Q. That's fine.
>
> A. Again, I don't know.
>
> Q. I'm just putting some importance to a knot on his head that he didn't explain in any way other this happened or that happened.
>
> A. Right. He gave three or four explanations, I think, for that as I recall. I have no idea. And when I asked him, he said he did not recall it. Didn't say it didn't happen. He said I don't recall her hitting me.
>
> Q. But if he not only got hit but a comment was made about mama, from his personality as you suggest it to be is the rage now underway?
>
> A. I don't think he needed to be hit for that to happen.

> Q. But let's say he had both had an insult towards mama and a strike across the head by Mrs. Spurlock. Is she now the focus of uncontrollable rage?
>
> A. Yeah, for him that's uncontrollable, yeah.
>
> Q. Okay. And all of this bloody mess concluding with a stomping on her head?
>
> A. Uh huh. (Affirmative response.)

(R2/275-76, see 281).

On redirect, Dr. McMahon stated that appellant, in his rage and adrenaline reaction, may not even have been consciously aware of being struck (R2/304-05). That might account for the varied explanations he gave to Sergeant Murray, because he really didn't know how he got the bang on the head (R2/305). "And, unfortunately, Donny has a hard time, I think, saying, gee, I don't know how I got that. He's more likely to give you whatever he thinks might sound right" (SR2/305).

[In its resentencing memorandum submitted after the Spencer hearing, the state continued to take the position that appellant was struck with the pool cue: "Whether the brutality directed toward Mrs. Spurlock was caused by a comment or by a blow to Crook's head as was suggested circumstantially by crime scene analysis does not change the fact that the defendant's actions toward Mrs. Spurlock were heinous, atrocious, and cruel" (SR1/009). "The State proposed at the initial trial that a blow to Crook's head with a pool cue directed Crook's attention to Mrs. Spurlock in a very personal way. She became the focus of his violent behavior" (SR1/012)].

Dr. McMahon stated that in the presence of the degree of arousal that resulted in these acts, appellant's "frontal lobes were instantly overwhelmed. It would not even occur to Donny not to act as he did at that moment -- he would evaluate neither acting nor refraining from acting" (SR3/286)(emphasis in report).

Dr. William Kremper

The state called Dr. William Kremper, a clinical psychologist who specializes in forensic evaluations (R2/312-14). Dr. Kremper made it clear that he does not have the extensive training and experience which would be necessary for someone to hold himself out as a neuropsychologist (R2/339). He does have an interest in brain behavior function, and he did his master's thesis on the effects of direct and chemical intellectual stimulation of the lateral hypothalamus of rats, but he pointed out that "there's a big difference between humans and rats" (R2/338-39). Since, as he readily acknowledged, he is not qualified to determine whether the cause of a person's problems is brain damage, he would refer someone like Donny Crook to a neurologist or a neuropsychologist like Dr. McCraney, Dr. Dolente, or Dr. McMahon (R2/340,354-56). These are the people whose opinion he would rely on (R2/356). Dr. Kremper was aware that each of those doctors had found that appellant suffers from organic frontal-lobe brain damage (R2/354-56). Accordingly, Dr. Kremper agreed that it was entirely possible that appellant has brain damage, and he was not disputing the other doctors' findings on this point (R2/353, see 353-56).

Dr. Kremper had met with appellant on three occasions; first in 1994 (several years prior to the homicide) for a disability evaluation; then in 1998 prior to the trial and penalty phase; and finally in 2002, before the new Spencer hearing, pursuant to a court order with regard to the determination of mental retardation (R2/315,318; 335, 340-41). During these three sessions, Dr. Kremper spent a total of about two hours interviewing appellant (R2/318).

Dr. Kremper now believed, based on appellant's medical and educational records which were subsequently made available to him, that his prior finding in 1994 of mild mental retardation was wrong (R2/336, see 341,348,352). The lower scores were, in Dr. Kremper's opinion, the result either of appellant's extensive use of alcohol and drugs around that time, or his agitation and poor attention span, or malingering (in the form of non-responsiveness to questions) (R2/336-37,347-48,352).[3]

Subsequent testing conducted by Dr. Kremper in 1998 yielded a verbal IQ score of 69, a performance IQ of 80, and a full scale IQ of 72 (R2/318). [Each of these scores is six or seven points higher than in 1994, while the eleven point disparity between the verbal and performance scores remain constant (R2/318,341)]. Dr. Kremper considered the eleven point differential to be significant, although far from uncommon; "discrepancies that large typically are meaningful" (R2/318-19). There are a wide variety of factors, including

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[3] In Dr. McMahon's report, she stated that appellant admitted to her that he was on that occasion trying to manipulate the evaluator for the purpose of obtaining social security benefits (SR3/281).

environmental and developmental factors, which can account for these kinds of discrepancies, but they can also be the result of brain injury or brain dysfunction (R2/321-22,324-25). [In July 2002, in testing administered by Dr. Kremper, appellant's scores were verbal - 83, performance - 91, and full scale - 86 (see R1/112; SR3/282). These results were referred to in Dr. Kremper's written report, but he did not mention them in his testimony in the Spencer hearing (see R2/312-58)].[4]

Appellant's medical and educational records reviewed by Dr. Kremper (see R2/315-17,344-47) contained information concerning birth complications and a history of head injuries which tended to corroborate what he'd earlier been told by appellant and his mother (R2/322-23,344-47). Dr. Kremper agreed that inadequate prenatal care, or oxygen deprivation at birth, or any of the incidents of head trauma could potentially have caused brain damage (R2/346-47). Dr. Kremper was also aware of certain aspects of appellant's developmental history; he was physically abused and neglected, and he was repeatedly exposed to domestic violence in which his mother was beaten (R2/324). Such emotional trauma over a period of time "typically results in severe disruption of emotional and behavior regulation for that child. And the development of verbal abilities, which typically is used to mediate emotional arousal and basically guide and control behavior" (R2/325-26).

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[4] Dr. Kremper acknowledged in his report that these scores might be slight overestimates due to recent retesting; appellant had taken an IQ test administered by Dr. McMahon six days earlier (see SR3/282).

The frontal lobes of the brain, Dr. Kremper stated, are related to the direction and control of behavior (R2/326). Therefore, if you have these kinds of emotionally traumatic experiences, "they are going to be related to the functioning of the frontal lobes" (R2/326). "The frontal lobe", Dr. Kremper explained, "is perhaps what separates us from lower organisms from the standpoint of our ability to not immediately react to our circumstances, to plan, to, in terms of guiding our behavior, to delayed gratification. Just a whole host of things that, essentially, separate us from lower organisms" (R2/329). According to Dr. Kremper, appellant's history of alcohol and drug abuse, and especially his huffing of paint and other inhalants on a daily basis for many years, would clearly have a major impact (both long-term and at specific times) on the functioning of his frontal lobes (R2/332).

Appellant, Dr. Kremper testified, has had well-documented problems with emotional and behavioral regulation and sustaining attention dating back to as early as age five (R2/326-27). When the prosecutor commented "And I notice that your diagnostic impression of Donny Crook does not include organic brain damage", Dr. Kremper replied, "Not directly" (R2/330). His diagnosis of attention deficit hyperactivity disorder "is essentially a descriptive term. It does not get into why an individual displays these characteristics" (R2/330-31). Dr. Kremper is not qualified by training or experience to determine whether the cause of a person's problems is organic brain damage; he would rely on the opinions of neurologists and

neuropsychologists like Drs. McCraney, Dolente, and McMahon (R2/338-40,353-56).

SUMMARY OF THE ARGUMENT

[ISSUE I]

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first degree murders. In view of (1) the extensive and compelling mitigation in this case, including both of the statutory mental mitigating factors; (2) the totality of the circumstances of the crime, particularly the facts that this was a "robbery gone bad" committed on the spur of the moment by a brain damaged and intoxicated twenty year old with no prior history of violent crime, and that what began as a strong-arm robbery attempt did not turn into a violent rage reaction homicide until (according to the state's own hypothesis) the victim, in defending herself against the robbery, struck appellant across the forehead with a pool cue; and (3) the fact that the most disturbing aspect of the aggravation -- the violation of the victim's body with the cue stick -- occurred (as the medical examiner unequivocally stated) when she was unconscious, near death, and would have experienced no sensations, this is not one of the most aggravated and least mitigated of first degree murders, and (especially in light of the jury's 7-5 penalty vote and its question during deliberations whether "life without possibility of parole" really meant what it said) appellant's death sentence should be reversed on proportionality grounds for imposition of a life sentence without possibility of parole.

[ISSUE II]

Florida's death penalty statute and procedure, in which the aggravating factors are determined by the trial judge rather than the jury, is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

ARGUMENT

ISSUE I

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE IN LIGHT OF THE COMPELLING MITIGATION IN HIS LIFE HISTORY AND MENTAL CONDITION, AND IN LIGHT OF THE FACT THAT THIS WAS AN UNPLANNED RAGE KILLING -- A SPUR-OF-THE-MOMENT ROBBERY ATTEMPT "GONE BAD", WHERE THE EXPLOSION OF VIOLENCE WAS CAUSALLY RELATED TO APPELLANT'S BRAIN DISORDER AND WAS TRIGGERED (ACCORDING TO THE STATE'S OWN THEORY) BY A BLOW TO HIS HEAD.

A. Introduction

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first degree murders. Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 933-34 (Fla. 1999); see also Terry v. State, 668 So. 2d 954, 965-66 (Fla. 1996); Bell v. State, 841 So. 2d 329, 337 (Fla. 2003). This Court has an independent duty to review the proportionality of each death sentence [Bell][5], and "our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggra-

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

vated, and (2) the least mitigated of murders." Cooper, 739 So. 2d at 85; Almeida, 748 So. 2d at 933 (emphasis in opinions). Thus, even in cases where there are multiple aggravating factors, the death penalty may still be disproportionate if there are compelling mitigating circumstances, especially where the mitigators include both extreme mental or emotional disturbance and impaired capacity,[6] and where the mental mitigators are shown to be causally related to the commission of the crime.[7] As recognized in Cooper v. State, supra, 739 So. 2d at 85, "[t]his Court has reversed the death penalty in cases where multiple aggravators were posed against comparable mitigation."[8] In Cooper, three aggravators (CCP, robbery and pecuni-

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[6] As recognized in Santos v. State, 629 So. 2d 839, 840 (Fla. 1994) these are "two of the weightiest mitigating factors -- those establishing mental imbalance and loss of psychological control." Evidence of mental or emotional disturbance (including brain damage) has been found to be dispositive in vacating sentences of death in such cases as Larkins v. State, 739 So. 2d 90, 92-96 (Fla. 1999); and Hawk v. State, 718 So. 2d 159, 163-64 (Fla. 1998).

[7] See Crook v. State, 813 So. 2d 68, 75 (Fla. 2002) ("the expert testimony in this case also explained the causes and origins of Crook's frontal lobe brain damage and established that there was a causal link between Crook's brain damage and the homicide"). The causal connection was further emphasized by a fourth expert, Dr. McMahon, in the resentencing proceeding.

[8] As examples the Court gave the following cases:

> See, e.g., Urbin v. State, 714 So. 2d 411 (Fla. 1998) (vacating death sentence for robbery-murder where multiple aggravators -- including prior violent felony -- were weighed against substantial mitigation including impaired capacity, deprived childhood, and youth); Curtis v. State, 685 So. 2d 1234 (Fla. 1996)(vacating death sentence for shooting death of store clerk where multiple aggravators -- including attempted murder of second

ary gain, and prior conviction of a subsequently-committed robbery-murder) were established, thus satisfying the aggravation prong of the proportionality standard. Nevertheless:

> The trial court additionally found that two statutory and several nonstatutory mitigators were established, including Cooper's low intelligence (i.e., Dr. Schwartz testified that Cooper's test results placed him in the borderline retarded category) and his abusive childhood. . . . In addition to the evidence of brutal childhood, brain damage, mental retardation, and mental illness (i.e., paranoid schizophrenia) in the present case, the defendant was eighteen years old at the time of the crime and had no criminal record prior to the present offense. We note that the jury vote was eight-to-four. On this record, we cannot conclude that the present crime is one of the least mitigated murders this Court has reviewed. In fact, the record shows just the opposite -- i.e., that this is one of the most mitigated killings we have reviewed. Accordingly, Cooper's death sentence is disproportionate.

Cooper v. State, supra, 739 So. 2d at 85-86.

[Footnote Continued On Next Page]

[Footnote Continuation]
store clerk -- were weighed against substan tial mitigation including remorse and youth), cert. denied, 521 U.S. 1124, 117 S.Ct. 2521, 138 L.Ed.2d 1022 (1997); Morgan v. State, 639 So.2d 6 (Fla. 1994)(vacating death sentence for bludgeoning death of homeowner where multiple aggravators were weighed against copious mitigation including brain damage and youth); Livingston v. State, 565 So. 2d 1288 (Fla. 1988)(vacating death sentence for shooting death of store clerk where multiple aggravators were weighed against substantial mitigation including abusive childhood, diminished intellectual functioning, and youth).

Cooper v. State, supra, 739 So. 2d at 84-85, n.10.

See also Bell v. State, supra, 841 So. 2d at 333, 337-40 (despite the presence of four valid aggravators -- HAC, CCP, kidnapping, and pecuniary gain -- this Court determined that the death sentence was inappropriate in light of the substantial mitigation); Miller v. State, 373 So. 2d 882, 886 (Fla. 1979) (". . . [A] large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse"; such mitigation "may be sufficient to outweigh the aggravating circumstances involved even in an atrocious crime").

In the instant case, the jury recommended a death sentence by the narrowest possible margin, 7-5. In view of the jury's question just prior to returning its advisory verdict, "The jury requests information on the life without possibility of parole sentence. Does this actually and really mean that Donny Crook will never get out of jail?" (29/3316), it is entirely possible that if it had been assured that life imprisonment means imprisonment for life, a majority of the jury might have been satisfied that justice could be served in this case without imposing the ultimate penalty. In any event, the closeness of the jury's penalty vote is a relevant factor for this Court to consider in its proportionality determination. See Cooper v. State, supra, 739 So. 2d at 86 (vote of 8-4); Almeida v. State, supra, 748 So. 2d at 933-34 (7-5); Jones v. State, 705 So. 2d 1364,

1366 (Fla. 1998) ("We note that the jury voted for death by the narrowest of margins, seven to five").

This is plainly not one of the "least mitigated" first degree murders this Court has reviewed. To the contrary, the mitigation here is compelling, unrebutted,[9] and causally connected to the crime. The appropriate sentence is life imprisonment without possibility of parole, in light of (1) appellant's youth and emotional immaturity; (2) his lack of any significant history of violence; (3) his traumatic childhood marked by physical and psychological abuse and neglect, as well as abject poverty; (4) his low intelligence and severe learning disabilities; (5) his frontal lobe brain damage, which resulted in extreme mental or emotional disturbance (described by Dr. McCraney as one of the worst cases of emotional disturbance he's seen), and impaired his capacity to control his conduct; (6) his long history of drug and alcohol abuse, including the "huffing" of chemicals from a very young age, which interacted with and worsened the effects of his brain damage; (7) his intoxication from alcohol and cocaine at the time of the crime; and (8) the fact that the killing was unplanned and unpremeditated, but was committed in a "frontal" rage when something (a blow to the head, according to the state) triggered it during a spur-of-the-moment robbery attempt.

B. <u>The Aggravation Prong</u>

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[9] The only aspect of the mitigating evidence which is to some degree "rebutted" by Dr. Kremper's testimony in the resentencing Spencer hearing is the fact that Kremper's most recently administered IQ test yielded a somewhat higher (but still quite low) score than appellant had ever achieved in his many previous efforts.

In reimposing the death penalty, Judge Langford found the same three aggravating factors as in the original sentencing order: (1) that the capital felony occurred during the commission of a sexual battery (no specification of weight); (2) it was committed for pecuniary gain (no specification of weight); and (3) it was especially heinous, atrocious, or cruel (great weight) (R1/100-04). There were no pre-existing (such as a history of violent crime) or long thought-out (such as CCP) aggravators. Instead, all three of the aggravators arose in a matter of a few minutes (appellant's decision to rob Mrs. Spurlock to get money for more crack cocaine when he saw her counting money) or less (HAC for the rage reaction beating death, and sexual battery for the insertion of the pool cue when the victim was unconscious and on the verge of death).[10] According to the state's own theory, the explosion of violence (though not the spur-of-the-moment decision to rob) occurred after the victim struck appellant in the head with the pool cue. Thus, in this case, at least two if not all three of the aggravators were in a very real sense the <u>product</u> of the mitigators; i.e., appellant's inability to control his impulses and actions due to his frontal lobe brain damage, exacerbated by his immediate and long-term drug and alcohol abuse, his low intelligence, his stunted emotional development, and his nightmarish life story.

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[10] Compare <u>Almeida v. State</u>, <u>supra</u>, 748 So. 2d at 933, noting that "[i]n addition to the mental health mitigation . . . the defendant was twenty years old at the time of the crime, and the present crime and the prior capital felonies <u>all arose from a single brief period of marital crisis that spanned six weeks</u>."

The trial judge described the aggravating circumstances as "appalling" (R1/119), and there can be no denying that that is true. However, the manner in which a homicide was committed is only a part of the totality of the circumstances, and is not necessarily dispositive of whether death or life imprisonment is the appropriate sentence. See, e.g., Robertson v. State, 699 So. 2d 1343, 1344-45,1347 (Fla. 1999); Miller v. State, supra, 373 So. 2d at 886. At the time Eva Johns looked into the front door of the bar and saw Betty Spurlock standing by the cash register and appellant sitting in front of her on a bar stool, none of these events had been set in motion. Within minutes, appellant saw Spurlock counting money, and got the idea of robbing her because he needed more rock. He locked the front door, and then during the robbery something happened that caused him to lose control. Maybe, as the prosecutor suggested, Spurlock resisted the robbery with scissors, or hit appellant in the head with a cue stick. Maybe, as the prosecutor also suggested, it was the frustration of not being able to get the cash drawer to open. Maybe it was a comment about his mother. Whatever was the trigger, appellant went into a rage which, once ignited, he was incapable of controlling. In this condition, he stabbed and beat Spurlock, and then -- while she was unconscious, near death, and unable to experience any sensations (18/1163) -- inserted the pool cue and ran it through her body.

In light of the closeness of the jury's vote, it is a fair assumption that the act involving the pool cue is the pivotal reason this case is here on proportionality review instead of being an

Anders brief in the Second DCA. Because Dr. Melamud believed the victim was still alive, although near death, at the time, this act constituted both the aggravating circumstance and the separate crime of sexual battery. It is not part of the HAC aggravator, because under Florida law "when the victim becomes unconscious, the circumstances of further acts contributing to [her] death cannot support a finding of heinousness." Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984).

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

C. The Mitigation Prong

Four experts in this case reached the same emphatic conclusion; appellant suffers from frontal lobe brain damage, and that -- exacerbated by the effects of drugs and alcohol -- is what led to the eruption of violent rage which resulted in his killing of Betty Spurlock.[11] Based on their testimony, the trial judge found that

[11] The fifth expert, Dr. Kremper testifying for the state, freely acknowledged that he is not qualified by training or experi-

appellant has brain damage which significantly impaired his ability to control his impulses, and that his brain damage was made more severe by the use of both alcohol and drugs at the time of the crime (R1/110). Accordingly, the trial judge found both of the statutory mitigating factors -- extreme mental or emotional disturbance and impaired capacity -- and accorded them significant weight (R1/110).

The expert testimony not only showed the existence of brain damage; as importantly, it established a powerful nexus between appellant's brain damage and his actions during the commission of the crime. Dr. McCraney is a board certified neurologist who serves as medical director of the Florida Institute for Neurological Rehabilitation, a residential facility for brain injured patients. His work there involves the behavioral aspects of brain injuries (28/3032-37). Dr. McCraney diagnosed appellant with orbital frontal syndrome (28/3043,3069,3071). The frontal lobe is the part of the brain which controls the planning of behavior, as well as directing attention and controlling impulses (28/3041). Persons with orbital frontal syndrome are irritable and highly distractible; they appear hyper and panicky; and their emotions "may go from sorrow to rage, sometimes in the blink of an eye" (28/3043). However, the single most character-

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ence to determine whether the cause of a person's problems is brain damage. He would refer someone like appellant to a neurologist or neuropsychologist like Dr. McCraney, Dr. Dolente, or Dr. McMahon, and he would rely on their opinions. Accordingly, Dr. Kremper agreed that it was entirely possible that appellant has brain damage, and he was not disputing the other doctors' findings on this point (R2/339-40,353-56).

istic feature of orbital frontal lobe injury is impulsivity. Dr. McCraney testified that people with frontal lobe damage:

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

(28/3045-46).

With brain damaged people, in contrast to those with antisocial personality disorders, you more typically see "this sham rage picture

where the intensity of violence appears to have no relationship with the inciting event" (28/3052-54).

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

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

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

(28/3075).

Dr. McCraney found that the circumstances of this homicide were consistent with his diagnosis of brain damage; "the events do appear

to conform to this blind animalistic rage that's described with the orbital frontal syndrome" (28/3115, see 28/3079-80, 3113-15).

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

Dr. McClane, a psychiatrist with a subspecialty in drug addiction, testified that appellant has diffuse brain damage, primarily affecting the frontal lobe area, from a combination of causes and made worse by his drug and alcohol abuse (29/3138-41,3144-48,3155-57,3161). Appellant's brain damage "would render him hypersensitive to the usual negative effects of alcohol and other drugs" (29/3150). The substance abuse would magnify the symptoms you would normally see in a brain-injured person in two ways. First, chronic drug and alcohol abuse may literally increase the degree of brain damage. Second, the immediate effects of intoxication tend to be much greater and more severe in a person who is brain damaged (29/3150-51). Appellant, according to Dr. McClane, would be highly vulnerable to any stressful situation and he "would tend to overreact, as has been his history throughout his life" (29/3163). This would be even more so, in light of his intoxication with alcohol and cocaine (29/3163-64).

Finally, Dr. McMahon, in the resentencing Spencer hearing, stated that her observations concerning the crime scene and the manner in which the killing occurred were consistent with her conclusion that the crime was committed in a rage which was the result of appellant's brain disorder (R2/307,310-11). An extraordinary amount of energy was expended -- much more than would be seen in a typical robbery/murder -- and "there had to be an incredible amount of rage fueling that energy" (R2/262, see 262-64,266). If it wasn't a disparaging comment about his mother, then there had to be some other triggering event; simply that he saw Mrs. Spurlock counting money and he wanted it for more rock cocaine might have explained the robbery but not the rage (see R2/262,270,272; SR3/286). The prosecutor asked Dr. McMahon about the knot on appellant's forehead; if that was caused by Mrs. Spurlock striking him across the head while resisting the robbery attempt, "[i]s she now the focus of uncontrollable rage?" Dr. McMahon answered yes; for appellant it was uncontrollable (R2/275-76, see 281).

The state's version of events was consistent with its position in the original trial (which it reasserted in its 2002 memorandum of law on resentencing, see SR1/009,012) that it was a blow to appellant's head with the pool cue which set off the violent explosion. The prosecutor argued to the jury:

> This is a case, however, that seems to be particularly consistent with an acknowledgment that <u>in the course of that Robbery this Defendant got pissed off. Perhaps it was simply the anger generated by having a cash drawer that he couldn't get open. Having in his hand money that he couldn't get to.</u> Perhaps in this case

there is another potential for - and excuse my language - but potential for being pissed off.

Let me show you what's marked as State's Exhibit Number 12. You've certainly seen it before. And it is the person of Donny Crook on the 15th day of March, 1996 when he's taken to the hospital and all of his injuries are recorded. And one of the injuries that you see in photograph 12-D. An obvious bump on his head and a laceration associated with it.

And one thing you know about that particular injury is that he explained it to Dr. Spindler and he said, I banged my head on an air compressor at the Texaco Station. Detective Murray kind of shakes his head because he had heard two other explanations for the injury. One was he had hit it on a limb and the other one was he had hit it on a door frame.

A couple things. Betty Spurlock has obvious stab wounds to her neck. She had obvious stab wounds to her abdomen. Dr. Melamud said well, the trauma from the instrument that was involved there, it had one side that was fairly blunt and one side that was fairly sharp. And it seems to come in pairs.

And what do we know about Betty Spurlock and what she had been doing that afternoon? She had been cutting hair. An object, a pair of scissors that might be in her possession. In fact, perhaps used by Betty Spurlock in an attempt to defend herself and taken from her.

Betty Spurlock beaten in this area. One of the things you notice is a pool cue wrapped with tape, a type of an object available for Betty Spurlock to whack Donny Crook right across the forehead that evening in her own defense. Sufficient, in fact, to piss off her assailant.

And the carnage begins. As she, in fact, is stomped. The jaws broken, drug and this pool cue, intact at that time, shoved from vagina to forehead. The kind of anger, kind of retaliation well beyond a simple Robbery or Sexual Battery.

(25/2601-03).

Therefore, not only does the evidence show that this was an unpremeditated murder which occurred during a "robbery gone bad", the state's own theory was that this was a robbery gone bad. Moreover, there was very little forethought even to the robbery. The evidence was that appellant, in an intoxicated state, got the idea to rob Mrs. Spurlock when he saw her counting money and he wanted more rock cocaine. It began as a strong-arm robbery; the weapons which appellant seized in his rage reaction were weapons of opportunity which Mrs. Spurlock had apparently used to resist the robbery attempt.

The relevant "robbery gone bad" proportionality decisions include Cooper v. State, 739 So. 2d 82 (Fla. 1999); Larkins v. State, 739 So. 2d 90 (Fla. 1999); Terry v. State, 668 So. 2d 954 (Fla. 1996); and Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (in each of which the death penalty was reversed on proportionality grounds); and Duest v. State, 855 So. 2d 33 (Fla. 2003); Morrison v. State, 818 So. 2d 432 (Fla. 2002); Mendoza v. State, 700 So. 2d 670 (Fla. 1997); and Carter v. State, 576 So. 2d 1291 (Fla. 1988) (in each of which the death sentence was affirmed and found to be proportionate).

Because of the very strong mitigation in this case (including but hardly limited to the findings of both statutory mental mitigators), the instant case is much closer to Cooper, Larkins, Terry, and Livingston.

Of the four reversals, Cooper has already been discussed. Larkins involved a scenario where the defendant -- armed with a rifle and his face covered with tape -- entered a convenience store and

demanded the clerk to open the register. When it did not open, he told her to step away from the register, and she did so. When the clerk ducked down, Larkins grabbed her by the arm and swung her to the side; then fired two shots at her, killing her. The trial court found two aggravating factors; (1) prior conviction of violent felonies (two 1973 convictions for manslaughter and assault with intent to kill) and (2) the murder was committed for pecuniary gain. The trial court found both mental mitigating factors, and the following eleven nonstatutory mitigators:

> (1) the defendant's previous conviction was for manslaughter, not murder; (2) the defendant is a poor reader; (3) the defendant experienced difficulty in school; (4) the defendant dropped out of school during the fifth or sixth grade; (5) the defendant functions at the lower twenty percent of the population in intelligence; (6) the defendant
> came from a barren cultural background; (7) the defendant's memory ranks in the lowest one percent of the population; (8) the defendant has chronic mental problems possibly caused by drugs and alcohol; and (9) the defendant is withdrawn and has difficulty establishing relationships; (10) the offense was the result of impulsivity and irritability; and (11) the defendant drank alcohol the night of the incident.

As can be seen, the mitigation in Larkins corresponds in many respects to the mitigation in the instant case. However, appellant has additional significant mitigating factors beyond those in Larkins; including his age of 20 (R1/105), his psychological and emotional immaturity which the trial judge found to be significantly less than his chronological age (R1/111), and the five nonstatutory mitigators (considered in combination) arising from his traumatic

childhood marked by physical and psychological abuse and neglect; a "terrible home life" which included violence, an unstable and impoverished migrant lifestyle, and "abysmal" parents (when they were around), interspersed with periods of abandonment (first in foster care, and later when his mother was dancing in bars to make additional money, or chasing halfway across Texas after the hapless Santos Bravo, leaving appellant in the "care" of his almost equally messed-up brothers) (see R1/113-17; 28/2975-3021).

Moreover, in the instant case one of the mitigating factors is appellant's lack of any significant history of violence (R1/117-18). In Larkins, in contrast, the prior violent felony aggravator was found; however, as this Court noted, it "was predicated upon two convictions [for manslaughter and assault with intent to kill] which were committed almost twenty years before the murder,... and the defendant apparently led a comparatively crime free life in the interim." 739 So. 2d at 95. In the instant case, appellant -- with about ten strikes against him from birth and early childhood, and despite his frontal lobe brain damage predisposing him to impulsivity and rage -- managed to live a relatively crime free life until the events of March 14, 1996 in the Bull Pen Bar. See Woods v. State, 733 So. 2d 980, 992 (Fla. 1999). Obviously, based on the evidence in this trial and penalty phase, his brain damage, combined with the toxic effects of the entirety of his life experience, makes him a person who needs to spend the rest of his life incarcerated and under close supervision. But just as obviously, these same factors severely diminished his ability to make rational choices and to modu-

late his impulses, so that when his half-baked robbery attempt was met with resistance and Mrs. Spurlock struck him in the head with the cue stick, he flew into a rage reaction of a type characteristic of frontal-lobe damaged individuals; a reaction which he could neither prevent nor control. See testimony of Dr. McCraney at 28/3045-46,3075; Dr. McClane at 29/3163-65; Dr. Dolente at 29/3230-33. As Dr. Elizabeth McMahon put it, due to his frontal lobe disorder "[i]t would not even occur to Donny not to act as he did at that moment -- he would evaluate neither acting nor refraining from acting" (SR3/286).

In Larkins, 739 So. 2d at 94:

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

> been under the influence of extreme mental and emotional disturbance and his ability to control his actions would have been impaired. All of this evidence was uncontroverted.

This Court, in reversing Larkins' death sentence on proportionality grounds and remanding for a sentence of life imprisonment, said that the killing appeared to have resulted:

> from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces. Indeed, the facts of this case indicate that a baby was in distress and crying during the robbery, circumstances which, according to Dr. Dee, would have affected Larkins to the point of inducing rage and making it difficult for him to control his actions. In addition, there was other extensive mitigation set out in detail in the trial court's sentencing order that cannot be ignored. When we compare the facts in this case to other cases, we cannot conclude that this case constitutes one of the most aggravated and least mitigated of first-degree murders. See Dixon. Accordingly, we hold that death would be a disproportionate penalty under the circumstances presented herein.

739 So. 2d at 95.

The Court in Larkins distinguished nine cases cited by the state on the basis that those cases "lacked significant mitigation, especially evidence of mental mitigation". 739 So. 2d at 95, n.3. For example, in Shellito v. State, 701 So. 2d 837 (Fla. 1997) the "evidence of organic brain damage was not supported by medical testimony and was contradicted"; in Mendoza v. State, 700 So. 2d 670 (Fla. 1997) there was no statutory mental mitigation, and only minimal nonstatutory mitigating evidence regarding mental health problems and drug use; and in Carter v. State, 576 So. 2d 1291 (Fla.

1989) the only evidence of organic brain damage came from testimony by the defendant's cousin.

In Terry v. State, supra, 668 So. 2d at 957-58 and 965-66, the trial court found two aggravators: (1) homicide committed during an armed robbery, merged with pecuniary gain, and (2) prior conviction of a violent felony (based on a contemporaneous offense of which Terry was convicted as a principal; the aggravated assault was done by a codefendant). In stark contrast to the instant case, the trial court found no statutory mitigators (finding, inter alia, that there was no evidence to suggest that Terry's mental or emotional age did not match his chronological age of 21), and he "rejected Terry's minimal nonstatutory mitigation". This Court reversed Terry's death sentence on proportionality grounds, stating:

> There is evidence in the record to support the theory that this was a "robbery gone bad." In the end, though, we simply cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot. Likewise, although there is not a great deal of mitigation in this case, the aggravation is also not extensive given the totality of the underlying circumstances.

668 So. 2d at 965.

In the instant case, there is admittedly more aggravation than in Terry, although -- as in Terry -- all of the aggravation arose in the moments immediately before and during the homicide; there is no prior history of violent crime and no CCP. However, looking at the other prong of the proportionality test, the mitigating evidence in Terry was minimal, while the mitigation in the instant case was at the very least extensive and, undersigned counsel would contend,

overwhelming. Based on appellant's organic brain damage, the effects of which were magnified by his drug and alcohol intoxication at the time of the offense, both the "extreme mental or emotional disturbance" and "impaired capacity" mental mitigators were found and given significant weight; and he had just turned 20 years old, with (as the judge found) a significantly lower psychological and emotional age; and he has a long history of substance abuse, including the "huffing" of paint and other chemicals from a very early age; and (while not retarded) he is of low intelligence and is severely learning disabled; and his entire childhood was disfigured by violence, neglect, and deprivation; and despite all of this he had no significant history of violent crime until the night of March 14, 1996 when -- in his impaired state -- he saw Betty Spurlock counting money and got the notion to rob her. As in Terry, it cannot conclusively be determined on the record what actually transpired during this "robbery gone bad", but considering all of the expert testimony, especially that of Dr. McCraney concerning rage attacks by frontal-lobe damaged individuals which are all out of proportion to the triggering event, and considering the prosecutor's own repeatedly asserted hypothesis that the triggering event which turned this robbery into a murder was a blow to appellant's head with the cue stick, it cannot be concluded that this is one of the most aggravated and least mitigated of first degree murders. The mitigation is comparable to that in Cooper; Larkins; and Livingston, supra, 565 So. 2d at 1292, and is actually even more extensive than the latter two of those cases. [Both the very strong mitigation, including the two mental

mitigators, and the absence of a prior history of violent crime distinguish those "robbery gone bad" cases which were affirmed on proportionality review, such as Duest, Morrison, Mendoza, and Carter].[12] As this Court recognized in Miller v. State, 373 So. 2d 882, 886 (Fla. 1979), "a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse"; such mitigation "may be sufficient to outweigh the aggravating circumstances involved even in atrocious crime."

See also Hawk v. State, 718 So. 2d 159, 160 and 162-64 (Fla. 1998) and Robertson v. State, 699 So. 2d at 1343, 1344-45 and 1347 (Fla. 1997). In Robertson, this Court said:

> Although the trial court found two valid aggravating circumstances [homicide committed during a burglary, and especially heinous, atrocious, or cruel] we find that death is not proportionately warranted in light of the substantial mitigation present in this case: 1) Robertson's age of nineteen; 2) Robertson's

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[12] In each of these four cases, the defendant had previously been convicted of one or more prior (and non-contemporaneous) violent felonies. The importance of this factor in evaluating the proportionality of the death penalty for a "robbery gone bad" homicide was especially emphasized in Mendoza, 700 So. 2d at 679. In addition, there was only minimal mitigation in Carter, 576 So. 2d at 1292-93 and Mendoza, while Morrison, 818 So. 2d at 439-40, 457 and Duest, 855 So. 2d at 38, 47 had nonstatutory mitigation but no statutory mitigating factors, and neither of the mental mitigators were established. Thus -- in contrast to the instant case -- it wasn't the effects of frontal lobe brain damage that caused the robberies in Carter, Mendoza, Morrison, and Duest to "go bad". Finally, in Duest there was evidence suggesting that the killing itself and not just the robbery was planned.

> impaired capacity at the time of the murder due to drug and alcohol use; (3) Robertson's abused and deprived childhood; 4) Robertson's history of mental illness; and 5) his borderline intelligence. When compared to other death penalty cases, death is disproportionate under the circumstances present here. Cf. Nibert v. State, 574 So. 2d 1959 (Fla. 1990) (death penalty not proportionately warranted where heinous, atrocious, or cruel aggravator was offset by substantial mitigation that included abused childhood, extreme mental and emotional disturbance and impaired capacity due to alcohol abuse). For no apparent reason, Robertson strangled a young woman who he believed had befriended him. It was an unplanned, senseless murder committed by a nineteen-year-old, with a long history of mental illness, who was under the influence of alcohol and drugs at the time. This clearly is not one of the most aggravated and least mitigated murders for which the ultimate penalty is reserved.

Neither is the instant case. What happened with the pool cue is appalling (as are the facts of the murder in Robertson, 699 So. 2d at 1344-45) but it is not dispositive in light of the copious mitigation, and in light of the totality of the circumstances of the crime, including both appellant's rage reaction induced by his mental condition and the undisputed fact that the victim was unconscious and unable to experience any sensations at the time her body was violated with the cue stick. Appellant's death sentence should be reversed and the case remanded for imposition of a sentence of life imprisonment without possibility of parole.

ISSUE II

FLORIDA'S DEATH PENALTY STATUTE, AND THE PROCEDURE BY WHICH APPELLANT WAS SENTENCED TO DEATH, ARE CONSTITUTIONALLY INVALID.

In light of the constitutional principles recognized in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed2d 556 (2002), Florida's death penalty statute and procedure are constitutionally invalid. Ring was decided during the pendency of the initial appeal in this case. Prior to the resentencing hearings, appellant moved to bar imposition of a death sentence (or, in the alternative, to empanel a new penalty jury to make the required findings) on multiple constitutional grounds based on Ring. (R1/84-90; R2/360-75). The trial court denied the motions based on this Court's decisions in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002) (R1/92; R2/374-75).

The United States Supreme Court in Ring -- overruling its prior decision in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L. Ed. 2d 511 (1990) -- held that a death sentence may not be based on findings of aggravating factors made by the trial court alone. Ring "effectively declare[d] five States' capital sentencing schemes unconstitutional" [Ring, 536 U.S. at 621 (O'Connor, J., dissenting)], and cast serious doubt on the constitutional via-bility of at least four other states' capital murder statutes. See Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003), certiorari granted in part by Schriro v. Summerlin, __S.Ct.__, 2003 WL 22327207 (Dec. 1, 2003) (No. 03-526). These are the "hybrid" capital sentenc-

ing schemes -- used in Florida, Delaware, Indiana, and Alabama -- where the trial judge and jury are "cosentencers". See Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Under Florida's statute, the jury submits a penalty recommendation which is accorded great weight by the judge, but the jury as a whole makes no specific findings as to aggravating (or mitigating) factors, nor is jury unanimity required as to the aggravating factors. It is the judge who makes the findings of the statutory aggravating circumstances.

As cogently stated by Justice Anstead, dissenting in Conde v. State, __So. 2d __ (2003) (2003 WL 22052316):

> It would be a cruel joke, indeed, if the important aggravators actually relied on by the trial court were not subject to Ring's holding that acts used to impose a death sentence cannot be determined by the trial court alone. The Ring opinion, however, focused on substance, not form, in its analysis and holding, issuing a strong message that facts used to aggravate any sentence, and especially a death sentence, must be found by a jury.

While Justice Anstead's view is not presently the prevailing view in this Court, it must be remembered that until last year Ring itself was not the law.

> Ring directly impacted the substance of approximately one-fourth of the 38 state capital murder statutes and established irreducible minimum structural requirements for all. It fundamentally altered our view of how the Sixth Amendment right to a jury trial affected the Eighth Amendment's requirement that state statutes narrow the class of individuals eligible for the penalty of death. By deciding that judges are not constitutionally permitted to decide whether defendants are eligible for death penalty, the Supreme Court altered the

> fundamental bedrock principles applicable to capital murder trials. When viewed in both theoretical and practical terms, Ring redefined the structural safeguards implicit in our concept of ordered liberty.

Summerlin v. Stewart, supra, 341 F.3d at 1120-21.

Since Florida's capital sentencing statute requires that the findings of aggravating factors -- which are the essential elements defining those cases to which a death sentence may be applicable -- are to be made by the trial judge, it is invalid under Ring, and appellant's death sentence imposed pursuant to that statutory procedure cannot constitutionally be carried out.

CONCLUSION

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

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this _____ day of January, 2004.

CERTIFICATION OF FONT SIZE

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