IN THE SUPREME COURT OF FLORIDA

DONNY L. CROOK, :

Appellant, :

vs. : Case No.SC03-455

STATE OF FLORIDA, :

Appellee. :

_______________________________:

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER O236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT 1

ARGUMENT 1

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. 1

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF CITATIONS

CASES	PAGE NO.
Almeida v. State, 748 So. 2d 922 (Fla. 1999)	2, 6
Brown v. State, 565 So. 2d 304 (Fla. 1990)	8
Cooper v. State, 739 So. 2d 8 (Fla. 1999)	2, 6
Guzman v. State, 721 So. 2d 1155 (Fla. 1988)	8
Johnston v. State, 841 So. 2d 349 (Fla. 2002)	6, 7
Lemon v. State, 456 So. 2d 885 (Fla. 1984)	8
Orme v. State, 677 So. 2d 258 (Fla. 1999)	2-4, 6
Pope v. State, 679 So. 2d 710 (Fla. 1996)	8
Schwab v. State, 636 So. 2d 3 (Fla. 1994)	9
Spencer v. State, 691 So. 2d 1062 (Fla. 1996)	7, 8
Urbin v. State, 714 So. 2d 411 (Fla. 1998)	2, 6

PRELIMINARY STATEMENT

The state's answer brief will be referred to by use of the symbol "SB". Other references are as denoted in appellant's initial brief.

This reply brief is directed to Issue I. Appellant will rely on his initial brief with respect to Issue II.

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.

The cases relied on by the state are not similar to appellant's situation at all. In seven of those eight cases (see SB23-27), the capital defendant had a history of prior violent felony convictions, and in the eighth case, the "no significant criminal history" mitigator was waived by the defense to prevent the state from introducing evidence of a prior sexual assault. Moreover, the cases cited by the state involved significantly weaker mitigation than the instant case, and most of the state's cases -- unlike the instant case -- involved preplanned homicides. Appellant's case is one of the most thoroughly

mitigated that this Court has seen and -- especially in light of the closeness of the jury's 7-5 penalty vote and its unanswered question during deliberations as to whether a life sentence would "actually and really mean" that appellant would never be released from incarceration -- it cannot be said that this crime falls within the category of both the most aggravated and the least mitigated of capital murders. See Cooper v. State, 739 So. 2d 8, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 933-34 (Fla. 1999); Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998). Therefore, appellant's death sentence is disproportionate and should be reversed for imposition of a life sentence without possibility of parole.

Looking at the state's comparison cases individually: in Orme v. State, 677 So. 2d 258 (Fla. 1999) (SB23) the mental mitigators (based primarily on Orme's cocaine abuse) were accorded "some" weight, and these were the only mitigating circumstances found in the entire case. Unlike the instant case, there was no evidence of brain damage. Orme's age (30) was rejected as a mitigating factor, and no nonstatutory mitigators were found. The defense expressly waived the "no significant prior criminal history" mitigator in order to prevent the state from introducing evidence of a prior sexual assault committed by Orme. 617 So. 2d at 261.

Thus in Orme the sum total of the mitigation consisted of the defendant's history of cocaine abuse and his impairment caused by "freebasing" on the night of the crime. In the instant case, in contrast, the evidence overwhelmingly established that appellant suffers from organic frontal lobe brain damage, which was worsened by

a nightmarish childhood of abuse, abandonment, poverty, and extreme neglect, and by his drug and alcohol abuse (including the huffing of paint thinners and other toxic chemicals) from as early as age 8. The effect of intoxication on a frontal-lobe damaged person is -- in Dr. McCraney's words -- like throwing gasoline on a fire (28/3048-49). The frontal lobe brain damage severely impairs appellant's ability to control his impulses and, as the experts explained, a relatively slight stimulus can ignite an explosive "frontal" rage. That this is what happened in the instant case is supported by the prosecutor's own theory that, in resisting appellant's robbery attempt, Betty Spurlock struck him in the head with the pool cue. The probable weapons (the cue stick, Mrs. Spurlock's scissors, appellant's hands and feet) were weapons of immediate opportunity, not preplanning. Due to his brain damage -- exacerbated by his state of intoxication -- appellant was incapable of controlling his rage until it was spent; only then, when he realized what he'd done, did he begin his half-baked efforts to cover up his actions by trying to make it look like the Mexicans had done it (see SB34). As the trial court recognized in his sentencing order, Drs. McCraney, McClane, Dolente, and McMahon all testified to their finding of frontal lobe brain damage, made more severe by the use of alcohol and drugs at the time of the crime, which significantly impaired appellant's ability to control his impulses (R1/110). Based on their testimony, the trial court found both mental mitigators and (in contrast to <u>Orme</u>) <u>accorded them significant weight</u> (R1/110, see 105-110). [Dr. McCraney, a board certified neurologist who serves as medical direc-

tor for a transitional living facility for brain-injured patients, testified that appellant's brain disorder has resulted in one of the worst cases of extreme emotional disturbance he has ever seen (28/3073)].

In the state's comparison case of Orme, the sentencing judge rejected all of the non-drug-related mitigators argued by the defense; "his age (30), his love for his family, an unstable childhood, potential for rehabilitation, and good conduct while awaiting trial." 677 So. 2d at 261.

In the instant case, appellant's age of 20 was found and given slight weight as a statutory mitigating factor, but more importantly, the trial judge also found as a nonstatutory mitigating factor entitled to moderate weight that appellant's psychological and emotional age was significantly less than his chronological age of 20 (R1/111).

Appellant's below average intelligence (moderate weight) and impaired educational experience (slight weight) were found as nonstatutory mitigating factors (R1/112-13,116), and the trial court also found that the evidence established that appellant suffers from other dysfunctions related to his brain damage, including learning disabilities, attention deficit hyperactivity disorder (ADHD), social isolation, and language confusion (R1/116). In Orme, an "unstable childhood" was properly rejected as a mitigator under the facts of that case. In the instant case, the trial court found and gave moderate weight to five nonstatutory mitigating factors which established in combination that appellant's mother and father were "abys-

mal 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 (R1/115,117). [The state dismissively refers to all of the mitigation in this case as a "laundry list of character traits and aspects of the crime which appellant urged as mitigating evidence" (SB35). First of all, appellant didn't just urge it, the trial court found it. Second, if this is a mere "laundry list", what kind of case would it take to convince the state that meaningful mitigation exists? Undersigned counsel would suggest that this Court has rarely reviewed a case with more profound and overwhelming mitigation, both at the time of the offense and throughout the entire course of the defendant's life, than this one. In any event, the recitation of the nonstatutory mitigating factors pertaining to life history -- laundry list if you will -- cannot convey the desolation of appellant's childhood half as eloquently as the testimony of his trainwreck of a mother, Aneitta Crook Bravo (28/2975-3021, see appellant's initial brief, p. 11-19)]. The totality of the evidence shows that appellant is a person who, literally from birth, never had a chance to develop mentally or emotionally, or to live even an intermittently productive or happy life. This does not excuse the murder of Betty Spurlock, but -- especially in light of appellant's spur-of-the-moment decision (in a severely impaired condition) to commit the robbery, and the probable triggering event of getting hit in the head with the cue stick which resulted in a sudden uncontrollable rage -- it certainly mitigates

it. Viewing appellant's miserable life in conjunction with his lack of a history of violent behavior (R1/117) (contrast Orme and the seven other comparison cases relied on by the state), his young age and even younger maturity level; his significant intellectual and educational deficits; and his brain damage, extreme emotional disturbance, impaired capacity, and intoxication, it is clear that this is one of the most mitigated first degree murders this Court has reviewed, and life imprisonment instead of death is the appropriate penalty. See Cooper; Almeida; Urbin.

Turning to the other cases cited by the state: Johnston v. State, 841 So. 2d 349 (Fla. 2002) (SB23-25) involved a 12-0 jury death recommendation. Johnston had been convicted of three prior violent felonies involving sexual battery, kidnapping, and/or aggravated assault. The only statutory mitigator was impaired capacity which was given moderate weight; unlike the instant case, extreme mental or emotional disturbance was not established in Johnston. Neither Johnston's age (he was in his 40s, having spent much of his adulthood in prison for the aforementioned violent felonies), nor any psychological or emotional immaturity was found as a mitigator. Nor was there evidence or findings that Johnston had an abused or neglected childhood, or low intelligence or learning disabilities, or a history of drug or alcohol abuse, or that he was intoxicated at the time of the offense. Rather, what was proffered as mitigation in Johnston is an example of what might accurately be called a laundry list. 841 So. 2d 349, 360-61 . (See SB23-25). Of the 26 nonstatutory mitigators proffered by the defense (some of which were

redundant, and which included such items as (11) the defendant could work and contribute while in prison; (12) the defendant had "extraordinary musical skills and is a gifted musician"; (13) the defendant has obtained additional education from the University of Florida; (15) the defendant refused worker's compensation despite constant headaches and seizures; (19) the defendant demonstrated appropriate courtroom behavior during trial; (21) the defendant has a special bond with children; (22) the defendant has the support of his mother and sister; (25) the defendant might be subject to Jimmy Ryce Act involuntary commitment; and (26) the defendant offered to be a kidney donor for his ex-wife), the trial judge gave 13 of them no weight at all, and the remaining 13 were given slight weight. Clearly, Johnston is in no way comparable to the instant case.

Nor are Spencer, Pope, Guzman, Brown, Lemon, or Schwab (SB25-27). In Spencer v. State, 691 So. 2d 1062, 1065 (Fla. 1996), the death sentence was held to be proportionate based largely upon the aggravating factor of Spencer's prior violent felony convictions, including an attempted second degree murder of his wife (whom he did murder two weeks later), as well as an aggravated battery and an aggravated assault on his stepson. The mental mitigators were found but were not accorded great weight based upon the other evidence present, including Spencer's ability to function in his job[1] and his

---

[1] Spencer had a good employment record and an honorable military record. 691 So. 2d at 1063. In contrast, appellant's educational deficits are well-documented; there is no indication that he has ever held a steady job (or would be capable of doing so, see 8/1436), and it is a safe assumption that prior to the time this offense occurred he would have been rejected for military service for

capacity to plan and carry out his wife's murder. 691 So. 2d at 1065. [In contrast to Spencer, all of the evidence in the instant case was consistent with an unplanned and disorganized killing, fueled by the effects of alcohol and cocaine on a brain damaged individual, and likely triggered by a blow to the head during a spur-of-the-moment robbery attempt].

Pope v. State, 679 So. 2d 710 (Fla. 1996) also involved a premeditated murder committed by a person with one or more prior violent felony convictions. In Guzman v. State, 721 So. 2d 1155, 1158, 1162 (Fla. 1988), the defendant had four aggravating factors, including prior violent felony conviction, "arrayed against no statutory mitigation and little nonstatutory mitigation." Brown v. State, 565 So. 2d 304, 308-09 (Fla. 1990) involved a cold, calculated, preplanned homicide, and the defendant had previously been convicted of a violent felony. The mitigating evidence in Brown consisted largely of severe mental strain resulting from financial and family pressures. In Lemon v. State, 456 So. 2d 885 (Fla. 1984), the defendant murdered a woman with whom he had a relationship; this occurred eight months after his release from prison after serving a sentence for assault with intent to commit first degree murder, in which he stabbed another female victim. There was only one mitigating circumstance found in Lemon -- emotional disturbance -- and there was some question as to the degree of the disturbance, i.e., whether it was extreme. 456 So. 2d at 888.

---

half a dozen different reasons.

Finally, in Schwab v. State, 636 So. 2d 3 (Fla. 1994), the defendant was released from prison a month before the capital homicide (involving the sexual battery and murder of an 11 year old boy) after serving just under half of an 8-year sentence for the sexual battery of another boy. In addition to the aggravating circumstance of previous conviction of a violent felony, the state also presented Williams Rule evidence through the testimony of three other young men whom Schwab had attacked. 636 So. 2d at 6-7. As for mitigation, the trial judge "considered the statutory mitigators and forty items of allegedly nonstatutory mitigation, but found little in the tendered material actually to be of a mitigating nature or to have been established by the record." 636 So. 2d at 7.

Thus, all of the cases cited by the state involve defendants with prior violent criminal histories, and many of the state's cases involve preplanned homicides. In the instant case, in contrast, all three of the aggravating circumstances arose during the commission of the crime itself -- which began as an impulsive robbery attempt by an intoxicated, brain-damaged twenty year old with no significant history of violence. The circumstances of the killing were, as the trial judge properly noted, appalling; but they were also consistent with four experts' unanimous[2] diagnosis of frontal lobe brain damage. As Dr. McCraney stated, "the events do appear to conform to

---

[2] The fifth expert, Dr. Kremper testifying on behalf of the state, acknowledged that he 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).

this blind animalistic rage that's described with the orbital frontal syndrome" (28/3115, see 3045-46). Therefore, all eight of the state's cases are thoroughly dissimilar to the instant case on the aggravation prong of the proportionality standard. On the mitigation prong they are even more dissimilar, since none of those cases contain anywhere near the quantity or quality of mitigating circumstances as were proven and uncontradicted in the instant case. For the reasons discussed in appellant's initial brief, p. 53-54, see 50-73, and because this case -- compared to others -- does not fall within the category of <u>both</u> (1) the most aggravated and (2) the least mitigated of first degree murders, appellant's death sentence should be reversed in favor of a sentence of life imprisonment without possibility of parole.

While this would seem to be the place to end this reply brief, one additional point needs to be made to set the record straight. The state, trying to suggest that the robbery was planned in advance, says "[T]he evidence shows that Crook went to the bar with the intent to "do a job" (TT15/663)"(SB33). This sentence is then juxtaposed with the fact that appellant closed and locked the front door immediately before the robbery attempt (SB33-34), which makes it clear that the state is implying that the "job" was to rob the bar owner.

First of all, contrary to the state's assertion, the evidence does <u>not</u> show that appellant <u>went to the bar</u> with the intent to "do a job". Rather, the overheard snippet of conversation was to the

effect that he came to Avon Park to do a job. The actual testimony pertaining to this is as follows:

Around 3:30 in the afternoon before the crime occurred, a woman named Eva Johns went to the Presto convenience store with her daughter Rhonda. Eva saw appellant, whom she knew, out front on a bicycle with a case of Old Milwaukee sitting on the handles. Appellant gave her a beer. The case was getting low; there were maybe six or eight beers left. Appellant "looked like he was partying" (15/624-27, 633, 641). Appellant had a brief conversation with Eva and then another with Rhonda. Eva said to him, "I thought you lived in Sebring," and appellant said he was just visiting and came over. Eva overheard him saying to Rhonda something to the effect that he had come to Avon Park to do a job. Eva had no idea what he meant by that (15/628-29, 633, 643-44, see 631). Rhonda, her boyfriend Terry, and appellant were acquaintances, and Eva had been told that they used drugs together (15/642).

The Bull Pen bar was not mentioned until another conversation which Eva had with appellant several hours later; and Eva was the one who brought it up. Eva was sitting in a parked car in her daughter's yard and appellant came up the hill on his bicycle. They spoke very briefly. Eva told him she was probably going to go to the Bull Pen later to shoot pool with Tammy Satkamp. Appellant went toward the house to talk with Rhonda and Terry; then came back to Eva's car door and told her he was going on. Asked if he said where he was going, Eva testified "I believe he said he was going to the Bull Pen" (15/634-36, 644-45).

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

Eva Johns said she had no idea what kind of job appellant meant, and neither do we. He may have come from Sebring to Avon Park to do some landscaping work, or help someone move his furniture, or deliver some drugs. Since there is nothing in the record to suggest that appellant had ever committed a robbery (preplanned or impulsive) before, or that he habitually talks like a character in a 1940s "B" movie, there is no reason to believe that "do a job" meant "rob the bar". Moreover, appellant and Betty Spurlock were acquainted. Unless the state wants to pile on some more baseless speculation that she was killed to eliminate a witness, why travel to another town to rob a bar owner who knows you? Especially when there is no reason to believe beforehand that there will be a significant amount of money there. And -- if you are a lame enough criminal mastermind to do that -- why not bring a weapon? To the contrary, this crime was what the evidence show it to be. The decision to rob Betty Spurlock was made when appellant, in his intoxicated condition, saw her counting money and decided he needed it for more crack cocaine. [See the trial court's sentencing order, R1/101-02]. His locking the door

immediately preceded the robbery attempt. The murder was not premeditated, but occurred in a rage consistent with appellant's frontal lobe brain damage, exacerbated by his intoxication. The triggering event, according to the prosecutor's own hypothesis, was that Mrs. Spurlock, in resisting the robbery attempt, whacked appellant across the forehead with the cue stick, "[a]nd the carnage begins" (25/2601-03).

The state's entire answer brief hinges on the proposition that the heinousness of a crime necessarily trumps all of the other circumstances of the offense and the totality of the defendant's life and mental condition (see SB21-22,27-35). That is not the law in Florida, and this Court should, under the two-pronged proportionality standard, reverse appellant's death sentence.

CONCLUSION

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

CERTIFICATE OF SERVICE

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

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

____
STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number O236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/ddj