Chapter 9: Excuses

Note: All statutes were retrieved from Florida Statutes Annotated. Only relevant portions thereof were placed in the text. All cases were retrieved from Westlaw. Cases were edited for relevance, clarity and readability. See original cases for complete text. Information in chapter overviews is obtained from the original text by Matthew Lippman.

Chapter Overview:

While justification provides that an individual who is responsible for their actions may have been justified in carrying them out, excuses are applied to cases in which an individual is considered to not be responsible for their actions to begin with. Excuses include things like insanity, diminished capacity, intoxication, age, duress, mistake of law or fact, entrapment, and a host of new defenses that are based on modern scientific, sociological, and cultural factors.

The claim made with the insanity defense is that a perpetrator was legally insane at the time of the crime and so was unable to know that their actions were wrong. Insanity is typically established by the use of expert witnesses who interview defendants to determine their sanity or likely sanity at the time the crime was committed. If a defendant is found not guilty by reason of insanity, they are often subject to required institutionalization by the state. There are numerous ways that defendants can be tested to determine if their plea of insanity is valid.

Intoxication is sometimes considered a valid excuse for criminal conduct. A distinction is made between voluntary and involuntary intoxication, and voluntary intoxication is often not recognized as excusing a crime. Involuntary intoxication, however, excuses a crime if the intoxication creates a state of mind in the defendant that satisfies the standards for legal insanity.

Some factors are seen to inhibit a defendant's ability to form criminal intent. These include such things as diminished capacity, age of the defendant, and a mistake of fact. Diminished capacity does not amount to legal insanity, but can include other lesser forms of mental illness. Mistake of fact can cause a defendant to believe something false about the circumstances of their crime that if it were true would make the act an innocent one, meaning that the defendant could not form a criminal intent.

When a person faces a threat of death or serious bodily harm, they are said to be acting under duress. In some cases this can be used to excuse the use of force. There is a reasonable person standard used to evaluate whether the defendant is truly under duress due to a reasonable fear of an immediate and imminent threat.

If a government or police agent induces an otherwise innocent individual to commit a crime that they would not otherwise have committed through the use of some type of fraud, the individual cannot be held criminally accountable for the commission of the crime. This is known as the defense of entrapment. There are many other new defenses

that are raised all the time with advances in science and changes in social theory. These include a variety of defenses based on psychology, biology, sociology, and other diverse fields. In this chapter of the supplement you will see Florida case law reflecting some of these new defense techniques, as well as the standard excuses discussed above. You will also read Florida statutes relevant to these issues.

I. Insanity

Section Introduction: A person who is found by the court to be legally insane may not be held criminally liable for their actions. This is an affirmative defense that places the burden of proof on the defendant. If a person is found not guilty for the reason of insanity, the court may order them to be institutionalized for treatment of their mental defect rather than imprisoned for criminal behavior. The following statute and case illustrate how Florida defines and utilizes the insanity defense.

Florida Statute, section 775.027 - Insanity defense

(1) All persons are presumed to be sane. It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. Insanity is established when:

(a) The defendant had a mental infirmity, disease, or defect; and

(b) Because of this condition, the defendant:

1. Did not know what he or she was doing or its consequences; or
2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.

Mental infirmity, disease, or defect does not constitute a defense of insanity except as provided in this subsection.

(2) The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

***Butler* v. *State*, 891 So.2d 1185 (2005)**

Procedural History: Defendant was convicted in the Circuit Court, Seventeenth Judicial Circuit, Broward County, Joel T. Lazarus, J., of attempted murder of law enforcement officer and attempt to deprive officer of weapon. He appealed.

Issue(s): Was the defendant legally insane at the time of the crimes?

Facts: The incident occurred after appellant asked a nurse in a hospital emergency room why it was taking so long for him to be seen and a police officer attempted to calm him down. After speaking with appellant, the officer walked away, and appellant tackled him from behind and attempted to get the officer's pistol which was in a holster. During the struggle appellant stated that he was going to kill the officer. After several minutes of this a nurse injected appellant with a drug commonly given to patients who are acting

uncontrollably. In his taped statement to a detective, appellant said that he had been hallucinating and that he had schizophrenia. He understood that he was being arrested for getting into a fight with the officer.

At trial appellant presented the testimony of three psychologists who all testified that appellant was insane at the time of the offense. One of them testified he was suffering from delusions, had complained in the past of hearing voices, and in this incident he was not really attempting to kill the officer, but rather attempting to kill himself. On cross-examination this witness admitted she had relied on documents provided solely by the defense and had not given appellant any formal psychological tests. She was unable to rule out anti-social personality disorder, which is not the same as legal insanity. Another defense expert testified that appellant was a paranoid schizophrenic. He had previously clinically evaluated appellant six years earlier for the purpose of obtaining disability benefits. The third expert testified that at the time of the incident appellant was under the influence of delusions and hallucinations so that he could not differentiate between right and wrong and that he was legally insane. She conceded on cross-examination that the diagnostic criteria for anti-social personality disorder would also apply to appellant. She acknowledged that a person with anti-social personality disorder can be legally sane and that a common symptom of the disorder is striking out at authority. The trial court had appointed all of these experts to determine whether appellant was competent to stand trial, and he was found to be competent to be tried.

Holding: Affirmed. The District Court of Appeal, Klein, J., held that evidence was sufficient for jury to reject defendant's insanity defense despite the state's lack of experts on insanity issue.

Opinion: KLEIN, J.

Appellant was found guilty of attempted murder on a law enforcement officer and attempt to deprive an officer of his weapon. He argues that the state failed to rebut expert evidence of his insanity, and that the court should therefore have granted his motion for judgment of acquittal. We conclude that, although the state had no expert, the trial court properly left the issue for the jury to determine.

Appellant's argument is that because the state did not put on any experts to testify that he was not insane, the trial court should have granted his motion for judgment of acquittal. He relies primarily on *Fisher v. State*, [506 So.2d 1052 (Fla. 2d DCA 1987)] and *Farrell v. State*, [101 So.2d 130 (Fla.1958)], in which the state offered no evidence to rebut insanity, and the defendant was granted a judgment of acquittal based on insanity. In *Bourriague v. State*, [820 So.2d 997 (Fla. 1st DCA 2002)], the only experts to testify were three defense witnesses who rendered opinions that the defendant was legally insane. The court, however, found that the lay testimony of a trooper, giving a detailed description of how the defendant attempted to elude arrest while driving his automobile, was sufficient for the jury to find the defendant not insane, even though the state had not put on any experts. [See also *Gryczan v. State*, 726 So.2d 345 (Fla. 4th DCA 1999);

Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981); *State v. VanHorn*, 528 So.2d 529 (Fla. 2d DCA 1988)]

In the present case the state points out that in addition to the testimony of the sergeant who was attacked, there was the testimony of five nurses who were all in the emergency room and witnessed the attack. They testified as to the defendant's actions and his statements, including the fact that after he had been subdued, he apologized for the attack. The state also notes that the experts who testified that appellant was insane were not aware of his history of committing other violent crimes. Appellant was sentenced as a habitual violent felony offender.
We agree with the state that the testimony of the witnesses, as well as the cross-examination of the defendant's experts, amounted to sufficient evidence from which the jury could have found against appellant on the issue of insanity. We accordingly affirm.

Critical Thinking Question(s): If you were on the jury, would you side with the defense or the State in this case on the issue of insanity? Do you believe the testimony of medical experts should be given more weight that that of laypersons when it comes to assessing a defendant's mental stability? Should the State have to produce at least one medical expert on the issue to overcome defendant's affirmative defense?

II. Diminished Capacity:

Section Introduction: Diminished capacity is a term used to describe the condition of a defendant who is unable, or less able to the average defendant, to appreciate the nature of their criminal behavior due to some form of mental defect that does not reach the standard for legal insanity. Such a defendant is found to have a diminished capacity to form criminal intent. This concept is addressed generally in the statute cited below in section five, entitled "Duress." The following Florida statute visits a specific case of diminished capacity and is accompanied by a case addressing the issue.

Florida Statute, section 921.137 - Imposition of the death sentence upon a mentally retarded defendant prohibited

> (1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

(3) A defendant charged with a capital felony who intends to raise mental retardation as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to death, the state must inform the defendant of such request if the defendant has notified the court of his or her intent to raise mental retardation as a bar to the death sentence. After receipt of the notice from the state, the defendant may file a motion requesting a determination by the court of whether the defendant has mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(7) The state may appeal, pursuant to s. 924.07, a determination of mental retardation made under subsection (4).

(8) This section does not apply to a defendant who was sentenced to death prior to the effective date of this act.

***State* v. *Clark*, 745 So.2d 1116 (1999)**

Procedural History: Defendant was convicted in the Circuit Court, Broward County, Susan Lebow, J., of attempted murder, aggravated child abuse, and neglect of his infant son. He appealed. The District Court of Appeal, McCarthy, Timothy P., Associate Judge, held that: (1) evidence supported finding that defendant was sane at time of crimes, and (2) evidence supported downward departure sentence.

Issue(s): Was the defendant insane at the time of the crime? Did his mental condition warrant a downward departure in sentencing?

Facts: A number of expert witnesses were called to testify. The experts were not unanimous in their opinion as to Clark's sanity at the time of the crimes. For example, one psychiatrist was unable to offer an opinion as to whether Clark was legally insane at the time the crimes occurred. However, three non-expert witnesses testified that after the incident, Clark seemed calm, rational, and coherent. Two of those witnesses related that even during the commission of the crimes, Clark appeared to be acting abnormally, but calm and in control of his actions. Clark's long time live-in girlfriend (and mother of the child victim) indicated that she did not have reason to believe that Clark was either insane or a threat to the child prior to this incident.

Clark's scoresheet resulted in a recommended range of between 127.05 to 211.75 months in prison. The trial court imposed a sentence of two years community control and twenty-eight years of probation for attempted murder and two years community control followed by thirteen years probation for the other two convictions. The trial court also imposed special conditions, including an "in custody" evaluation, a successful completion of a residential program, and a requirement to continue with any treatment, medication, and mental counseling during the lengthy probation. Clark is also prohibited from any unsupervised contact with his child or any other child under the age of six.

Holding: Affirmed.

Opinion: McCARTHY, TIMOTHY P., Associate Judge.

The appellee/cross-appellant, Freddie Clark, was convicted of attempted murder, aggravated child abuse, and neglect of his infant son. The jury rejected Clark's plea of temporary insanity. The trial court imposed a downward departure sentence, which the state challenges on appeal. We affirm.

It was the jury's prerogative to disregard the expert testimony and rely solely on the lay testimony. [See *State v. McMahon*, 485 So.2d 884, 886 (Fla. 2nd DCA 1986)] While the testimony as to Clark's sanity was conflicting, the evidence of his sanity was legally

sufficient to sustain the jury's decision, as well as the subsequent denial of Clark's post-trial motions attacking the jury's decision.

The trial court carefully articulated three mitigating reasons for downward departure of the sentence imposed. In so doing, the trial court also specifically recited its findings, rationale, and the applicable statutory provision for the downward departure. We have summarized those findings and rationale below.

First, pursuant to section 921.0026(2)(c), Florida Statutes (1997), the trial court found that Clark's capacity to appreciate the criminal nature of his conduct or to conform that conduct to the requirements of law were substantially impaired, although the impairment did not reach the level of insanity. Second, pursuant to section 921.0026(2)(d), the trial court found that Clark required a specialized treatment for a mental disorder that is unrelated to substance abuse or addiction and that Clark was amenable to the specialized treatment. Third, pursuant to section 921.0026(2)(j), the trial court found that the offense was committed in an unsophisticated manner and was an isolated incident for which Clark had shown remorse.

The evidence in the record supports the trial court's findings. Only one of the statutory factors needs to withstand appellate scrutiny for the departure to be upheld. [See *State v. Traster*, 610 So.2d 572, 574 (Fla. 4th DCA 1992)] We find that there was evidence in the record supporting the reasons for the departure. As such, the trial court did not abuse its discretion in imposing a departure sentence. [See id. at 573-74] AFFIRMED.

Critical Thinking Question(s): Do you agree that a person with apparent diminished capacity should receive a downward departure in sentencing as a result thereof? Why are courts and juries reticent to accept pleas of insanity from defendants? What is the medicalization of crime? Since we hold individuals accountable for their actions, should we not be more willing to take their particular circumstances into account on all crimes and sentencing?

III. Intoxication:

Section Introduction: A defendant who is intoxicated at the time that he or she commits a criminal act is still held criminally accountable for that act, even if the intoxication diminished the defendant’s capacity to understand the criminal nature of the act. This condition is upheld by the following Florida statute, and again in the statute cited below in section five.

Florida Statute, section 775.051 - Voluntary intoxication; not a defense; evidence not admissible for certain purposes; exception

> Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substance as described in chapter 893 is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit

an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance under chapter 893 was pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s. 893.02.

IV. Age:

Section Introduction: The young age of an offender allows criminal courts to provide some special consideration in sentencing of a defendant. What follows in this section is the Florida statute that deals with the sentencing of youthful offenders, as well as a case regarding the same.

Florida Statute, section 958.04 Judicial disposition of youthful offenders

(1) The court may sentence as a youthful offender any person:

(a) Who is at least 18 years of age or who has been transferred for prosecution to the criminal division of the circuit court pursuant to chapter 985;

(b) Who is found guilty of or who has tendered, and the court has accepted, a plea of nolo contendere or guilty to a crime which is, under the laws of this state, a felony if such crime was committed before the defendant's 21st birthday; and

(c) Who has not previously been classified as a youthful offender under the provisions of this act; however, no person who has been found guilty of a capital or life felony may be sentenced as a youthful offender under this act.

(2) In lieu of other criminal penalties authorized by law and notwithstanding any imposition of consecutive sentences, the court shall dispose of the criminal case as follows:

(a) The court may place a youthful offender under supervision on probation or in a community control program, with or without an adjudication of guilt, under such conditions as the court may lawfully impose for a period of not more than 6 years. Such period of supervision shall not exceed the maximum sentence for the offense for which the youthful offender was found guilty.

(b) The court may impose a period of incarceration as a condition of probation or community control, which period of incarceration shall be served in either a county facility, a department probation and restitution center, or a community residential facility which is owned and operated by any public or private entity providing such services. No youthful offender may be required to serve a period of incarceration in a community correctional center as defined in s. 944.026. Admission to a department facility or center shall be contingent upon the availability of bed space and

shall take into account the purpose and function of such facility or center. Placement in such a facility or center shall not exceed 364 days.

(c) The court may impose a split sentence whereby the youthful offender is to be placed on probation or community control upon completion of any specified period of incarceration; however, if the incarceration period is to be served in a department facility other than a probation and restitution center or community residential facility, such period shall be for not less than 1 year or more than 4 years. The period of probation or community control shall commence immediately upon the release of the youthful offender from incarceration. The period of incarceration imposed or served and the period of probation or community control, when added together, shall not exceed 6 years.

(d) The court may commit the youthful offender to the custody of the department for a period of not more than 6 years, provided that any such commitment shall not exceed the maximum sentence for the offense for which the youthful offender has been convicted. Successful participation in the youthful offender program by an offender who is sentenced as a youthful offender by the court pursuant to this section, or is classified as such by the department, may result in a recommendation to the court, by the department, for a modification or early termination of probation, community control, or the sentence at any time prior to the scheduled expiration of such term. When a modification of the sentence results in the reduction of a term of incarceration, the court may impose a term of probation or community control which, when added to the term of incarceration, shall not exceed the original sentence imposed.

(3) The provisions of this section shall not be used to impose a greater sentence than the permissible sentence range as established by the Criminal Punishment Code pursuant to chapter 921 unless reasons are explained in writing by the trial court judge which reasonably justify departure. A sentence imposed outside of the code is subject to appeal pursuant to s. 924.06 or s. 924.07.

(4) Due to severe prison overcrowding, the Legislature declares the construction of a basic training program facility is necessary to aid in alleviating an emergency situation.

(5) The department shall provide a special training program for staff selected for the basic training program.

***State* v. *Gilson*, 800 So.2d 727 (2001)**

Procedural History: Defendant was convicted upon no contest plea in the Circuit Court, Citrus County, Barbara Gurrola, J., of grand theft auto, driving with license

suspended/revoked, fleeing to elude, resisting arrest without violence, two counts of possession of cannabis under 20 grams, two counts of burglary of dwelling with different victims, and two counts of grand theft of .22 revolver involving same victim, and he was given downward departure sentence. State appealed. The District Court of Appeal, Sharp, W., J., held that: (1) it was not fatal that not all reasons for downward departure were written, and (2) fact that 18-year-old defendant was too young to appreciate consequences of offenses, and unsophisticated commission of offenses, were legally sufficient reasons for downward departure in sentencing for crimes.

Issue(s): Do age and other factors of mental capacity of the defendant warrant consideration in sentencing?

Facts: The facts giving rise to the criminal charges in case number 2000-00800 occurred on October 24, 2000. Gilson was intoxicated, and when he returned home late in the evening, his mother became very angry with him. In order to flee from her wrath, he went across the street to a neighbor's home. The neighbor, Nick Amos, was out of town. Gilson broke into the residence and into the garage apartment, in which Amos' daughter (Holly Van Nesse) lived. He took two firearms and threw them out of the window, or put them in the backyard. Then he climbed into a bed and went to sleep.

Van Nesse, who was also a friend of Gilson's mother, returned the next day and called the police from Gilson's house when she discovered an open door. Police found Gilson asleep in a bed in Amos' house, with cannabis in his possession. Gilson told the police he went to the Amos' house to sleep because he was not getting along with his mother. At the hearing, he told the court he regretted having had no chance to apologize to the victims, "and stuff." At the sentencing hearing, Gilson's mother testified that the Amos' home is a kids' hangout during the summer. Gilson and his friend, Van Nesse's daughter and Amos' granddaughter, spent a great deal of time there.

The facts giving rise to case number 2001-00048 occurred on January 14, 2001. Gilson, again intoxicated, took a Kia Sportage SUV which had been parked at a golf club with the doors open and the keys in it. When police officers attempted to stop him he refused to stop. He then stopped the vehicle, fled on foot, and resisted officers when they attempted to arrest him. Cannabis was also found in the vehicle. At Gilson's sentencing, his mother testified about his problems with drugs and alcohol, and Gilson himself acknowledged that he had a problem in this area. His mother also testified that he had been taking Ritalin for attention deficit hyperactivity disorder ("attention deficit"), but it had been discovered that he had been incorrectly diagnosed and medicated. The judge commented that it was hard to imagine somebody already hyperactive being given something that would speed them up.

In imposing the downward departure sentence, the trial court stated:

> The Court understands this is a departure sentence; the Court believes that the capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.

> Frankly, the Court also believes that, at that time of the offense, the defendant was too young to appreciate the consequences of the offense.

The court also said the offenses were mitigated by the factual setting in which they were performed and that Gilson did them in an unsophisticated manner. The written reasons given by the judge were twofold: 1) the capability of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired; and 2) at the time of the offense, the defendant was too young to appreciate the consequences of the offense.

Holding: Affirmed.

Opinion: SHARP, W., J.

The state appeals a downward departure sentence after Gilson entered a no contest plea to all counts in two criminal cases. In case number 2001-00048-CF, Gilson was charged by information with five counts: grand theft auto; driving with license suspended/revoked; fleeing to elude; resisting arrest without violence and possession of cannabis under 20 grams. In case number 2000-00800-CF, Gilson was charged by information with five counts: two counts of burglary of a dwelling with different victims; possession of cannabis under 20 grams; and two counts of grand theft of a .22 revolver (same victim) (3F). The sentences imposed ran concurrently on five counts and were for 50.7 months in prison suspended on condition of successful completion of two years on community control, followed by three years on probation. On the remaining counts, which were misdemeanors, the sentence was for time served. The sentences were substantially below the permissible sentencing range of 50.7 months to 49 years incarceration indicated by Gilson's scoresheet.

The state argues the record does not support the trial judge's findings on reasons given for the downward departure, or that the reasons given were legally sufficient. This is a close case. However, the facts of this case are unusual and there are mitigating factors noted by the trial judge, which support her decision to depart downwards. [See *Banks v. State*, 732 So.2d 1065, 1067-1068 (Fla.1999)]

It is not fatal to Gilson that not all of the stated reasons were set down in writing. [See *Pease v. State*, 712 So.2d 374 (Fla.1997)] However, they must be supported by substantial competent evidence, and at least one must be legally sufficient. It appears from this record that the first written reason given by the trial judge was legally insufficient because it was primarily based on Gilson's impairment due to his substance abuse or addiction, at the time the crimes were committed. The legislature has expressly determined that this is no longer a valid reason for departure, even though in fact, as in this case, intoxication played a role in both of the criminal incidents.

The other written reason, that Gilson was too young to appreciate the consequences of the offenses, and the court's stated reason that the crimes were committed in an unsophisticated manner based on the way in which they were accomplished, are both

legally sufficient reasons under the statute. Florida Statute, sections 921.0026(2)(c), (j) and (k) provide:

> (c) The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired;
> * * *
> (j) The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse;
> * * *
> (k) At the time of the offense the defendant was too young to appreciate the consequences of the offense.

The next question is whether or not these reasons have sufficient support in the record. Gilson's age being 18, alone is not sufficient. But there was testimony that Gilson had suffered from attention deficit problems, and was erroneously diagnosed as having that condition. He was prescribed Ritalin, a stimulant, which is known to aggravate symptoms of anxiety tension and agitation. [See Physicians Desk Reference (2001)] Adverse reactions include nervousness and insomnia. [Id.] This bolsters the court's conclusion that Gilson is a very emotionally immature 18 year old. Emotional immaturity coupled with chronological young age is a sufficient basis to allow a sentencing judge to depart downwards.

It is also apparent that the manner in which Gilson committed the two felony burglaries and theft of the two firearms was not only unsophisticated, but pathetic and laughable. These four offenses account for 91.2 of the 95.6 sentencing points in this case. The record establishes without dispute that Gilson broke into the residences and garage apartment primarily to find a bed to sleep in, and like Goldilocks, was asleep in his neighbor's bed when found by the police the following day. His theft of the weapons consisted only of throwing them out a window, or putting them outside, in the backyard, a place from which he never sought to retrieve them. He was also the friend of a child of the neighbor's household which he broke-into, and he had often been a guest in that home.

This scenario is such a far cry from the typical burglary of a dwelling as to have caused the trial judge to comment she did not think this was really a "burglary." Although technically it was a "burglary," the undisputed record adequately supports her conclusion that the offenses were committed in an unsophisticated manner. [See *State v. Sachs*, 526 So.2d 48 (Fla.1988); *Randall*; *State v. McCloud*, 721 So.2d 1188 (Fla. 5th DCA 1998); *State v. Merritt*, 714 So.2d 1153 (Fla. 5th DCA 1998). The trial judge in this case had the option to exercise her discretion to depart downwards, for the two reasons discussed above. Based on this record, these reasons were supported by substantial and competent evidence. AFFIRMED.

Dissent: HARRIS, J.

I respectfully dissent. I understand the court's concern for this young defendant. Its leniency, however, is not permitted by the legislature. I agree with the State that the downward departure sentence entered herein is contrary to law. It is true that Gilson's criminal conduct stems from his serious alcohol and marijuana problem. But this problem has resulted in very serious consequences which cannot be so easily ignored. In this case, Gilson was charged with grand theft auto, driving with license suspended or revoked, two separate counts of possession of cannabis, burglary of a dwelling, and grand theft of a revolver. Gilson's conduct, however sympathetic Gilson himself may be, put other people at risk.

On August 2, 2000, Gilson was involved in an accident and fled the scene. Cannabis was found in the vehicle. While on bond, Gilson came home one evening intoxicated and, because his mother was incensed, broke into a friend's apartment, threw firearms out the window into the backyard (the State urged to be retrieved later), and slept in the apartment where he was discovered the next day. A few months later, Gilson again drove intoxicated and ran his vehicle (actually his girlfriend's vehicle) into a stationary object. On the way home from this incident, Gilson saw another vehicle at a driving range with keys in the ignition and took it.

Gilson ultimately entered a straight-up plea of no contest. In asking for youthful offender treatment, defense counsel urged the court that Gilson had never committed a single offense while sober and that all of his problems stemmed from his serious substance abuse. Instead of considering youthful offender treatment, a program the judge found questionable, the court entered this downward departure sentence (prison terms suspended but with community control and probation) based on two reasons: 1. The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of the law was substantially impaired; and, separate but very similar, 2. At the time of the offense, the defendant was too young to appreciate the consequence of the offense.

The court's first reason seems akin to a voluntary intoxication defense. We need not consider whether this might be a valid defense to the crimes committed herein, because being intoxicated at the time of the offense is certainly and specifically excluded as a basis for downward departure by the legislature. [See section 921.0016(5), Fla. Stat.] Although the court's second reason has support in the law, it has no support in the record. [See *Banks v. State*, 732 So.2d 1065 (Fla.1999)] Gilson was eighteen at the time of the offenses. There was no testimony that he was immature for his age or that he suffered any mental abnormality which would affect his ability to comprehend. [See *State v. Scanlon*, 721 So.2d 392 (Fla. 2d DCA 1998)] Indeed, unless being eighteen will always justify a downward departure, this record is simply insufficient to sustain the downward departure herein.

I would reverse and remand for resentencing, urging the court to again consider whether the youthful offender program might properly apply to this case.

Critical Thinking Question(s): Age is considered a factor in charging as evidenced by the juvenile court system. Should there also be a transitional stage for 18 year olds so they have a chance to "mature" before being sentenced as adults? Do you agree with the Court's Opinion or the Dissent on the issue of downward departure in this case? Explain.

V. Duress:

Section Introduction: When a defendant has committed a crime while acting under the threat of immediate and serious infliction of harm may claim that he or she was under duress and so is entitled to special consideration in sentencing. All such claims that seek to justify a downward departure of sentence are collectively referred to as mitigating circumstances. Duress, along with other circumstances discussed in this chapter, is addressed by the following Florida statute. The criminal case in this section examines the commission of a crime by a defendant claiming to have acted under extreme duress.

Florida Statute, section 921.0026 - Mitigating circumstances. This section applies to any felony offense, except any capital felony, committed on or after October 1, 1998.

(1) A downward departure from the lowest permissible sentence, as calculated according to the total sentence points pursuant to s. 921.0024, is prohibited unless there are circumstances or factors that reasonably justify the downward departure. Mitigating factors to be considered include, but are not limited to, those listed in subsection (2). The imposition of a sentence below the lowest permissible sentence is subject to appellate review under chapter 924, but the extent of downward departure is not subject to appellate review.

(2) Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:

(a) The departure results from a legitimate, uncoerced plea bargain.
(b) The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
(c) The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
(d) The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.
(e) The need for payment of restitution to the victim outweighs the need for a prison sentence.
(f) The victim was an initiator, willing participant, aggressor, or provoker of the incident.
(g) The defendant acted under extreme duress or under the domination of another person.
(h) Before the identity of the defendant was determined, the victim was substantially compensated.

(i) The defendant cooperated with the state to resolve the current offense or any other offense.
(j) The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.
(k) At the time of the offense the defendant was too young to appreciate the consequences of the offense.
(l) The defendant is to be sentenced as a youthful offender.

(3) The defendant's substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor under subsection (2) and does not, under any circumstances, justify a downward departure from the permissible sentencing range.

***White* v. *State*, 817 So.2d 799 (2002)**

Procedural History: Following affirmance, [415 So.2d 719], of murder conviction and death sentence, defendant moved to vacate judgment and sentence. The Circuit Court, Orange County, Alice Blackwell White, J., denied motion. Defendant appealed. The Supreme Court affirmed conviction while vacating sentence and remanding case for resentencing, [729 So.2d 909]. Following new sentencing hearing before jury, the Circuit Court, Orange County, Margaret T. Waller, J., imposed death sentence. Defendant appealed. The Supreme Court held that: (1) exclusion of evidence as to the facts underlying codefendant's murder conviction in unrelated case did not improperly prevent impeachment of codefendant's testimony minimizing his involvement in defendant's offense; (2) evidence supported aggravating factor that victim was killed in order to disrupt or hinder enforcement of laws; (3) evidence supported rejection of proposed mitigating factor that defendant acted under extreme duress or under substantial domination of another; (4) death sentence was not disproportionate compared to 15-year sentence of codefendant who entered guilty plea to third-degree murder; and (5) death sentence was not disproportionate when compared to other capital murder cases in which death sentence was upheld.

Issue(s): Did the trial court err in rejecting the statutory mitigating factor that the murder was committed while White was allegedly under extreme duress or under the substantial domination of another?

Facts: The facts of the crime and procedural history of this case are detailed in *White v. State*, [729 So.2d 909 (Fla.1999)]. [White] was convicted of the first-degree murder of Gracie Mae Crawford. The facts of the crime are detailed in our opinion on direct appeal. White was a member of a Kentucky chapter of the Outlaws, a motorcycle gang, but was visiting the Orlando chapter. A group of the Outlaws, accompanied by some girl friends, visited an Orlando nightclub where they met Gracie Mae Crawford. Gracie Mae accompanied some of the Outlaws back to their Orlando clubhouse. Soon after returning to the clubhouse, White retired to a bedroom with his girlfriend. Sometime thereafter,

White was called by Richard DiMarino who stated that Crawford liked blacks and that they had to teach her a lesson.

White dressed and went into the kitchen area where he joined DiMarino and Guy Ennis Smith in severely beating Crawford. Whether DiMarino or White led the assault is unclear, but one witness testified of White's hitting Crawford with his fist and knocking her to the floor. After the beating, DiMarino and White placed Crawford in the middle of the front seat of White's girlfriend's car. White started driving but along the way stopped the car and DiMarino drove the car to the end of a deserted road. (The victim, White and DiMarino had done a lot of drinking that evening, but White's girlfriend testified that he knew what he was doing.) After they stopped the car, DiMarino and White pulled Crawford from the car, passed her over a barbed wire fence, and laid her on the ground. White then straddled her, took out his knife, stabbed her fourteen times and slit her throat. He handed the knife to DiMarino who also cut her throat. Crawford died as a result of the wounds inflicted upon her.

While leaving the area, White and DiMarino ran out of gas at the Seaworld parking lot and were later identified by Seaworld security guards who had given them gas. White and DiMarino went back and picked up the body of the deceased and thereafter discarded it at a different place. The body was discovered that afternoon. [*White v. State*, 415 So.2d 719, 719-20 (Fla.1982)] After a penalty phase proceeding in which defense counsel proffered no witnesses or evidence, the advisory jury unanimously recommended that appellant be sentenced to death. The trial court, finding that the three aggravating circumstances outweighed the sole statutory mitigating circumstance, sentenced appellant to death in accordance with the unanimous jury recommendation. The trial court found: (1) the murder was committed during the course of a kidnapping; (2) the murder was committed to disrupt or hinder enforcement of laws; and (3) the murder was heinous, wicked, and cruel. The trial court found that appellant had no prior violent felony conviction.

We affirmed the conviction and sentence. [*White v. State*, 415 So.2d 719, 719-21] The United States Supreme Court denied certiorari review on November 29, 1982. [See *White v. Florida*, 459 U.S. 1055, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982)]

Appellant filed [his] initial rule 3.850 motion in 1983. In 1987, while appellant's rule 3.850 motion was pending, the Supreme Court issued its opinion in *Hitchcock v. Dugger*, [481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)]. *Hitchcock* held that a Florida jury charge which precluded the trial court and the advisory jury from considering nonstatutory mitigation was unconstitutional. Appellant subsequently filed a petition for habeas relief based on *Hitchcock*. The trial court stayed further proceedings in this postconviction motion until final disposition of the habeas petition. We rejected appellant's claim for relief, concluding that "[t]he charge which may have limited the jury to a consideration of statutory mitigating circumstance was clearly harmless." [*White v. Dugger*, 523 So.2d 140, 141 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 184, 102 L.Ed.2d 153 (1988)] The trial court subsequently held an evidentiary hearing on most of appellant's claims and denied relief on all claims by order.... [Id. at 910-11]

In White's appeal of the denial of his 3.850 motion, this Court affirmed the trial court's order as to his conviction. [See id. at 910] However, on the basis of a *Hitchcock* error, we vacated White's death sentence and remanded for a new sentencing proceeding before a jury. [See id.]

On remand, the resentencing jury voted ten to two in favor of imposing the death sentence. In sentencing White to the death penalty, the trial court found four aggravators: (1) White was convicted of a prior violent felony; (2) the murder was committed while White was engaged in the commission of a kidnapping; (3) the murder was committed to disrupt or hinder the enforcement of laws; and (4) the murder was heinous, atrocious, or cruel (HAC). The trial court also found and assigned weight to one statutory and nine nonstatutory mitigating factors: (1) the murder was committed while White was under the influence of an extreme mental or emotional disturbance (little weight) (statutory); (2) White had a poor family background and an abusive childhood, lived in family squalor, and suffered from parental neglect (some weight); (3) White had an extensive history of alcohol and substance abuse from an early age (some weight); (4) White had organic brain damage and neurological deficiencies (some weight); (5) White had marginal intelligence or a low IQ (little weight); (6) White was intoxicated and had diminished capacity at the time he committed the crime (very little weight); (7) White was a willing worker and a good employee (some weight); (8) White lacked future dangerousness, had the potential to be rehabilitated, and had and a good prison record (some weight); (9) White had contributed to the community (very little weight); (10) White was a loving person and was generous to others (very little weight). In weighing the nature and quality of these aggravators and mitigators, the trial court found that the aggravators greatly outweighed the mitigators.

Holding: Affirmed.

Opinion: PER CURIAM.

William Melvin White appeals his sentence of death following resentencing. We have jurisdiction. [See art. V, § 3(b)(1), Fla. Const.] For the reasons expressed below, we affirm the death sentence.

On appeal to this Court, White raises five issues: (1) the trial court erred in not permitting the cross-examination of the key State witness concerning the underlying facts of the witness's subsequent murder conviction; (2) the trial court erred in finding that the murder was committed to disrupt or hinder the enforcement of laws; (3) the trial court erred in rejecting the statutory mitigating factor that the murder was committed while White was under extreme duress or under the substantial domination of another; (4) the imposition of the death penalty is disproportionate; (5) White's execution, after serving more than twenty-two years on death row, will constitute cruel and unusual punishment.

We summarily reject White's fifth claim, as it has previously been considered and rejected. [See *Rose v. State*, 787 So.2d 786, 805 (Fla.2001) (prolonged delay in imposing

death penalty does not constitute cruel and unusual punishment)] We now turn to the issues that merit discussion.

White claims that the trial court erred in preventing defense counsel's full cross-examination of Richard DiMarino, the State's key witness and the other perpetrator of the 1978 murder of Crawford, regarding the facts underlying the third-degree murder to which DiMarino pled guilty in Maryland in 1990. This Maryland crime occurred twelve years after White was convicted for the first-degree murder of Crawford. The facts underlying DiMarino's Maryland crime occurred in July 1990, when DiMarino and a codefendant were involved in an incident while riding their motorcycles. Words with two rival biker gang members escalated into a fight with the two rival bikers at an intersection. One of the two rival bikers fled, while DiMarino and a codefendant continued to fight with the remaining biker. In the fight, the remaining biker was stabbed and died from a single stab wound to the chest. DiMarino agreed to plead guilty to third-degree murder and agreed to testify against his codefendant in exchange for a reduced sentence of twenty years with ten years of the sentence suspended.

Prior to DiMarino's testimony at the resentencing proceeding, the State filed a motion in limine seeking to prohibit defense counsel from questioning DiMarino regarding the underlying facts of the 1990 Maryland murder conviction. After hearing argument from counsel, the trial court stated:

> I certainly understand the State's argument on this particular motion. However, I'm also aware that this is the penalty phase of a first degree murder conviction. And that in the penalty phase the court can step outside the bounds of the traditional rules of evidence, step out of bounds in the allowing of hearsay testimony. Therefore, my ruling is going to be as follows: the defense in order to evaluate the credibility of Mr. DiMarino and also evaluate, properly put before the jury clearly what weight should be given to mitigating circumstances, the defense may ask Mr. DiMarino whether he has since his conviction for this particular crime been convicted of a felony. The defense may also ask him what type of felony it was, but may not delve into the facts of this case, i.e., was there a stabbing, was a throat slit, et cetera. You may also ask him if he negotiated some type of lesser sentence for his testimony against a codefendant, if that in fact was the circumstance of that particular murder. The defense may also inquire as to his lifestyle.

DiMarino gave testimony, on direct and cross-examination, that in 1978, he was convicted and sentenced to fifteen years in prison for the third-degree murder of Crawford. Thereafter, DiMarino agreed to testify against his codefendants, Guy Ennis Smith and White, in exchange for concurrent time in prison on other unrelated felony charges. To protect DiMarino from retaliation from members of the Outlaws motorcycle gang, the State agreed to remove a tattoo and transfer DiMarino to an out-of-state prison facility. DiMarino further testified that he had been convicted of more than twenty-five felonies, including the 1990 Maryland third-degree murder for which he received a twenty-year sentence with ten years of the sentence suspended, in exchange for his testimony against his codefendant. Furthermore, defense counsel established that

DiMarino was on parole for the 1990 Maryland third-degree murder conviction; thus, any deviation from DiMarino's original 1978 testimony in the Crawford case could have been the basis for a perjury charge, constituting a parole violation that could have required DiMarino to serve his complete sentence for the 1990 Maryland murder conviction.

On appeal, White now claims that the trial court erred in preventing defense counsel's full cross-examination of DiMarino regarding the facts underlying his 1990 third-degree murder conviction in Maryland. White's first subclaim is that the facts underlying DiMarino's 1990 third-degree murder conviction are similar to the facts of Crawford's murder, in that in both crimes DiMarino killed a person by stabbing and then blamed a codefendant for his crime. Hence, the trial court's limitation on the cross-examination of DiMarino erroneously prevented White from using the facts underlying DiMarino's Maryland crime to impeach DiMarino's asserted minimal involvement in Crawford's murder. [See § 921.141(6)(d), Fla. Stat. (1999) ("[A] mitigating circumstance shall be ... [that the] defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.")] White's second subclaim is that the facts underlying DiMarino's 1990 Maryland third-degree murder conviction should have been admitted as reverse *Williams* rule evidence under section 90.404(2)(a), Florida Statutes (1999). White argues that the similarity between the facts underlying DiMarino's 1990 third-degree murder conviction and Crawford's murder show DiMarino's pattern of killing a person by stabbing and then blaming another for his crime. Hence, the trial court's limitation on White's cross-examination of DiMarino erroneously prevented the presentation of collateral evidence relevant to discrediting the view that DiMarino played a minimal role in Crawford's murder. [See § 921.141(6)(d), Fla. Stat.] We disagree.

We first discuss White's second subclaim. In *Zack v. State*, [753 So.2d 9 (Fla.2000), cert. denied, 531 U.S. 858, 121 S.Ct. 143, 148 L.Ed.2d 94 (2000)], we explained:

> In *Williams v. State*, [110 So.2d 654 (Fla.1959)], this Court reiterated the standard rule for admission of evidence; that is, that any evidence relevant to prove a material fact at issue is admissible unless precluded by a specific rule of exclusion. [See § 90.402, Fla. Stat. (1995)] The Court also said relevant evidence will not be excluded merely because it relates to facts that point to the commission of a separate crime, but added the caveat that "the question of the relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible." [110 So.2d at 662]

This rule concerning the admissibility of similar fact evidence has been codified by the Legislature as section 90.404(2), Florida Statutes (1995).

Later, in *Bryan v. State*, [533 So.2d 744 (Fla.1988)], we made it clear that the admissibility of other crimes evidence is not limited to crimes with similar facts. We stated that similar fact evidence may be admissible pursuant to section 90.404, and other crimes or bad acts that are not similar may be admissible under section 90.402. We reiterated the distinction between "similar fact" evidence and "dissimilar fact" evidence in *Sexton v. State*, [697 So.2d 833, 837 (Fla.1997)]. Thus, section 90.404 is a special limitation governing the admissibility of similar fact evidence. But if evidence of a

defendant's collateral bad acts bears no logical resemblance to the crime for which the defendant is being tried, then section 90.404(2)(a) does not apply and the general rule in section 90.402 controls. A trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent an abuse of discretion. [*Heath v. State*, 648 So.2d 660, 664 (Fla.1994)]

Thus, whether the evidence of other bad acts complained of ... is termed "similar fact" evidence or "dissimilar fact" evidence, its admissibility is determined by its relevancy. The trial court must utilize a balancing test to determine if the probative value of this relevant evidence is outweighed by its prejudicial effect. [See § 90.403, Fla. Stat. (1995); *Gore v. State*, 719 So.2d 1197 (Fla.1998)] "Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion." [*Ray v. State*, 755 So.2d 604, 610 (Fla.2000); see also *Chandler v. State*, 534 So.2d 701, 703 (Fla.1988)] Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. [See *Trease v. State*, 768 So.2d 1050, 1053 n. 2 (Fla.2000)]

We conclude that the trial court did not abuse its discretion in refusing to admit the facts underlying the 1990 Maryland crime but affording broad latitude concerning DiMarino's criminal background. DiMarino's 1990 Maryland murder was twelve years remote in time from the 1978 murder for which White was being resentenced. Moreover, the facts and circumstances of the Maryland murder are very different from Crawford's murder. [See *State v. Savino*, 567 So.2d 892, 894 (Fla.1990) (defendant must demonstrate "a close similarity of facts, a unique or 'fingerprint' type of information" in order to introduce evidence of another crime to show that someone other than the defendant committed the instant crime)] While both murders did involve stabbing with a knife, the 1978 murder involved activities within White's motorcycle group and the kidnapping of a young woman who was then stabbed fourteen times, and DiMarino's 1990 murder was during a fight at an intersection between rival motorcyclists while biking.

The trial court achieved the proper balance by admitting evidence regarding the circumstances of DiMarino's 1990 guilty plea to third-degree murder in Maryland, while not allowing this witness's conviction for third-degree murder to become the focus of White's penalty phase proceeding. [See *Steverson v. State*, 695 So.2d 687, 689 (Fla.1997) ("Even when evidence of a collateral crime is properly admissible in a case, we have cautioned that 'the prosecution should not go too far in introducing evidence of other crimes.)] The state should not be allowed to go so far as to make the collateral crime a feature instead of an incident.' [*Randolph v. State*, 463 So.2d 186, 189 (Fla.1984); Escobar v. State, 699 So.2d 988, 997 (Fla.1997), abrogated on other grounds by *Connor v. State*, 803 So.2d 598 (Fla.2001); *Stano v. State*, 473 So.2d 1282, 1289 (Fla.1985) ("[E]vidence of unrelated crimes, however, cannot be made a feature of the trial.")]

Therefore, in light of the limited relevance of the facts underlying DiMarino's 1990 Maryland crime and the evidence actually presented through the testimony of DiMarino,

we conclude that the trial court did not abuse its discretion in refusing to admit evidence of DiMarino's Maryland crime as reverse *Williams* rule evidence. [See *Gore v. State*, 784 So.2d 418, 432 (Fla.2001) (trial court did not abuse its discretion where defendant failed to show relevance and requisite similarities to admit evidence of collateral crime as reverse *Williams* rule evidence); *Crump v. State*, 622 So.2d 963, 969 (Fla.1993) (trial court properly excluded evidence regarding substance of a detective's interviews of other suspects because such evidence did not constitute reverse Williams rule evidence); *Jones v. State*, 580 So.2d 143, 145 (Fla.1991) (evidence regarding witnesses' convictions involving drug-related offenses and violence against police did not meet test for reverse Williams rule evidence); *Savino*, 567 So.2d at 894 (no abuse of discretion where trial court ruled inadmissible reverse *Williams* rule evidence that was not sufficiently similar to murder at issue); *Rivera v. State*, 561 So.2d 536, 540 (Fla.1990) (trial court did not abuse its discretion in excluding proffered reverse *Williams* rule evidence)]

With respect to White's first subclaim, the trial court's ruling in the present case did not prevent the effective and thorough impeachment of DiMarino. Our review of the record demonstrates that through the cross-examination of DiMarino the jury was made aware of all the pertinent details concerning DiMarino's prior felonies and his agreements to testify against his codefendants in exchange for more favorable sentences. Therefore, we find no abuse of discretion in the trial court's limiting the admission of collateral evidence concerning the factual details of the witness's unrelated 1990 Maryland crime. [See *Steverson*, 695 So.2d at 689; see also *Fotopoulos v. State*, 608 So.2d 784, 791 (Fla.1992) (credibility of any witness may be attacked by evidence of prior felony conviction, and such inquiry is generally restricted to existence of prior convictions and number of such convictions); *Jackson v. State*, 498 So.2d 906, 909 (Fla.1986)]

White further contends that even if the trial court did not err in limiting the cross-examination, the State opened the door to such examination when it elicited from DiMarino that he was "sickened" by Crawford's murder. Again, we cannot conclude that the trial court abused its discretion in holding that the facts and circumstances of the 1990 Maryland murder do not impeach DiMarino's testimony that he was "sickened" by the murder of Crawford in 1978. [See *Bryan*, 533 So.2d at 750 (trial judge has wide discretion in determining permissible scope of cross-examination)] Moreover, considering the evidence concerning DiMarino that the trial court did admit, any error in sustaining the objection to the admissibility of this evidence is harmless beyond a reasonable doubt. [See *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986)]
White's second claim is that the trial court erred in finding that the victim was killed in order to disrupt or hinder the enforcement of laws, i.e., to escape detection, prosecution, and punishment for the preceding battery committed upon the victim at the Outlaws' clubhouse. In reviewing a trial court's finding of an aggravating circumstance, this Court reviews the record to determine whether the trial court applied the correct rule of law and, if so, whether such finding is supported by competent, substantial evidence. [See *Willacy v. State*, 696 So.2d 693, 695-96 (Fla.1997)]

In order to establish this aggravating circumstance, the State must demonstrate beyond a reasonable doubt that the dominant motive for the murder was the elimination of the

witness. [See *Foster v. State*, 778 So.2d 906, 918 (Fla.2000); *Peterka v. State*, 640 So.2d 59, 71 (Fla.1994)] The witness elimination aggravating factor may be inferred from circumstantial evidence without direct evidence of the defendant's motive. [See *Foster*, 778 So.2d at 918; *Hall v. State*, 614 So.2d 473, 477 (1993); *Preston v. State*, 607 So.2d 404, 409 (1992)] In its sentencing order, the trial court found:

> The facts of this case establish that Defendant and his co-defendants kidnapped and murdered Gracie Mae Crawford to avoid discovery and prosecution for the battery committed upon her at the Outlaws clubhouse, just prior to the murder. Evidence shows that co-defendant Smith stated that "he wanted no witnesses," so they had to "take care of business." Co-defendant DiMarino knew that this meant they would kill Gracie Mae Crawford to avoid prosecution for the severe beating she received from these three co-defendants. Defendant placed Crawford in the middle of the front seat of Defendant's girlfriend's car; DiMarino then got into the front passenger seat, blocking any possible escape by Crawford. The evidence shows that the victim did not go with Defendant willingly to the place where she was passed over a barbed wire fence and brutally murdered. [*State v. White*, No. CR78-1840, order at 3 (Fla. 9th Cir. Ct. order filed Apr. 20, 2000)]

We have repeatedly affirmed the finding of the witness elimination aggravating circumstance in similar situations when the victim has been transported to another location and then killed. [See *Jones v. State*, 748 So.2d 1012, 1027 (Fla.1999) (upholding elimination of witness aggravator when defendant robbed victim and subsequently transported her to secluded location, where he killed her); *Preston*, 607 So.2d at 409 (upholding elimination of witness aggravator where defendant robbed and kidnaped victim, transported her to secluded location, and killed her)] We find that these cases support the trial court's determination that this aggravator could be found in this case, and we conclude that there is competent, substantial evidence in the record to support the aggravator that White killed the victim in order to eliminate her as a witness to his prior crime. [See *Jones*, 748 So.2d at 1027; *Preston*, 607 So.2d at 409]

White's third claim is that the trial court erred in failing to find the statutory mitigating circumstance that White acted under extreme duress or under the substantial domination of another during the murder. A trial court may reject a defendant's claim that a mitigating circumstance has been established provided that the record contains competent, substantial evidence to support the rejection. [See *Connor*, 803 So.2d at 611; *Nibert v. State*, 574 So.2d 1059, 1062 (Fla.1990)] Whether a mitigating factor has been proven by the evidence is a question of fact subject to the competent, substantial evidence standard. [See *Zack*, 753 So.2d at 19]

In rejecting the extreme duress statutory mitigator the trial court found:

> There was no evidence that Defendant acted under extreme duress. The evidence from other members of the Outlaws showed that Defendant was a follower, not a leader, and because of his alcoholism, could not be depended upon within the organization. Dr. Caddy testified that Defendant "was a man who was readily

> available to be influenced by others," due to his intoxication, alcoholism, polysubstance abuse and personality variables. The State concedes that Defendant had a need for approval from the other members of the Outlaws which influenced him to be drawn into unlawful activities of the other members. The fact that he was in the company of another Outlaw club member when he committed the murder, to some extent, may have influenced him to carry it out.

However, while Defendant may have been a follower and easily influenced, such evidence is insufficient to establish that Defendant committed this crime under the "substantial domination" of another. The evidence does not suggest such a leap. While some evidence suggested that the murder may have initially been Smith's idea, there was no evidence that Defendant was under the substantial domination of anyone at the point where he stabbed the victim. Therefore, this Court rejects the existence of this mitigating circumstance. [*State v. White*, order at 5]

The present case is similar to *Valdes v. State*, [626 So.2d 1316, 1324 (Fla.1993)], in which this Court upheld the rejection of the extreme duress or substantial domination statutory mitigator. In *Valdes*, this Court found:

> Here, the evidence offered to support Valdes' claim of substantial domination by Van Poyck was Valdes' former girlfriend's testimony that Valdes went with Van Poyck the morning of the murder to do him a favor, that they had moved to Fort Lauderdale to get away from Van Poyck, and that Van Poyck was dominant over Valdes. However, Valdes clearly participated equally in the escape attempt and murder. Valdes provided the murder weapon, and he was the one who forced Griffis from the van and took him to the back of the vehicle, where he was executed. The testimony indicated that Valdes and Van Poyck acted in concert during the entire episode. Contrary to Valdes' argument, the fact that we previously characterized Van Poyck as the major participant in this incident does not mean Valdes' participation was minor. We find substantial competent evidence to support the trial court's rejection of these proposed mitigators. [Id. at 1324]

In the present case, there was similar evidence supporting the trial court's finding that White played the dominant role in committing this murder. There is no evidence that anyone externally pressured White at the time of the stabbing murder of Crawford. There is evidence in the record, however, that White stabbed Crawford fourteen times and slit her throat before giving the knife to DiMarino to slice her throat. White told his girlfriend to forget that she had heard the beating of Crawford. After taking the keys to his girlfriend's car, White helped to carry Crawford to this car and initially drove the car when taking the victim from the Outlaws' clubhouse. White also provided the murder weapon, a knife. Accordingly, we conclude that there is competent, substantial evidence in the record supporting the trial court's rejection of the extreme duress statutory mitigator. [See also *San Martin v. State*, 705 So.2d 1337, 1348 (Fla.1997) (affirming rejection of extreme duress or substantial domination mitigator where evidence established that defendant was integral part of planning and execution of crimes); *Raleigh*

v. State, 705 So.2d 1324, 1330 (Fla.1997) (same); *Hill v. State*, 515 So.2d 176, 178 (Fla.1987) (same)]

White's fourth claim is that his death sentence is disproportionate. Specifically, White first argues that his death sentence is impermissibly disparate from the fifteen-year sentence received by his codefendant DiMarino, who White contends instigated the beating of the victim, escorted her to a deserted area, and slit her throat with the intent to kill her. White's second proportionality subclaim is that his death sentence is disproportionate to other cases in which the death penalty was not imposed. We first address the alleged disproportionate treatment of DiMarino.

"When a codefendant is equally as culpable or more culpable than the defendant, the disparate treatment of the codefendant may render the defendant's punishment disproportionate." [*Sexton v. State*, 775 So.2d 923, 935 (Fla.2000)] If the defendant, however, is the more culpable participant in the crime, disparate treatment of the codefendant is justified. [See id.] "A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." [*Puccio v. State*, 701 So.2d 858, 860 (Fla.1997)]

In its sentencing order, the trial court carefully considered and rejected White's argument that DiMarino was equally culpable for this murder: Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. Defendant argues that because there was evidence that he was not a leader and that he may have been easily influenced by others, it follows that on the night of the homicide he was following the lead of others, particularly DiMarino. Even if this were true (and the Court finds no evidence to support Defendant's argument), the Court cannot conclude those facts establish that Defendant's participation was relatively minor. In fact, quite the contrary is true. The evidence clearly establishes that Defendant delivered the fatal stab wounds to the victim's body, and handed the knife to DiMarino to slit her throat. Further, an employee from Sea World testified that he observed no blood on DiMarino, yet noticed what appeared to be a spot of blood on Defendant's forearm. Therefore, the Court rejects the existence of this mitigating circumstance.

In denying Defendant's Petition for Writ of Habeas Corpus, the Florida Supreme Court rejected the issue of disproportionate treatment of DiMarino, stating:

> White's co-perpetrator, Richard DiMarino, was convicted of only third-degree murder. In White's original appeal we noted this fact and stated: "While this is fortunate for him [DiMarino], it does not require the reduction of White's sentence." The two juries found different culpabilities. It is permissible to impose different sentences on capital co-defendants where their various degrees of participation and culpability are different from one another.

The Court finds that the lesser sentence of DiMarino is not a mitigating circumstance. Co-defendant Guy Ennis Smith was convicted of first degree murder and was sentenced

to life imprisonment. As quoted above, the Florida Supreme Court stated that capital co-defendants may receive different sentences based on their varying degrees of participation and culpability. The evidence clearly established that it was Defendant, not Smith, who repeatedly stabbed Crawford, causing her death. Therefore, the Court finds that the life sentence of Smith is not a mitigating circumstance. [State v. White, order at 5, 9]

The testimony from DiMarino, the Sea World employees, and the medical examiner constitute competent, substantial evidence to support the trial court's findings. [See *Sexton*, 775 So.2d at 935-36; *Howell v. State*, 707 So.2d 674, 682-83 (Fla.1998) (rejecting claim of disparate sentencing where codefendant pled to second-degree murder and received sentence of forty years); *Cardona v. State*, 641 So.2d 361, 365 (Fla.1994) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder and testified against defendant); *Cook v. State*, 581 So.2d 141, 143 (Fla.1991) (rejecting claim of disparate sentencing where codefendants pled guilty to second-degree murder and received sentences of twenty-three and twenty-four years); *Hayes v. State*, 581 So.2d 121, 127 (Fla.1991) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder and testified against defendant); *Brown v. State*, 473 So.2d 1260, 1268 (Fla.1985) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder)] We find no error in the trial court's ruling on this issue.

Finally, we address White's subclaim that his death sentence is disproportionate when compared to other similar capital cases where the defendant received a life sentence. The death penalty is reserved for the most aggravated and least mitigated of capital crimes. [See *Sexton*, 775 So.2d at 935] In deciding whether death is a proportionate penalty, the Court must consider the totality of the circumstances of the case and compare the case with other capital cases. [See id.]

In the present case, the trial court sentenced White to death in an eleven- page order carefully detailing its findings that the found aggravators greatly outweighed the mitigators. The circumstances of this case are similar to other cases in which we have upheld the death penalty. For instance, in *Singleton v. State*, [783 So.2d 970, 979 (Fla.2001)], the trial court found as aggravators to a stabbing murder HAC and the existence of a prior violent felony. In *Singleton*, the trial court determined that these aggravators outweighed the statutory mitigators of extreme mental disturbance, inability to appreciate the criminality of conduct, and the defendant's age of sixty-nine at the time of the offense, and the nine nonstatutory mitigators, which included that the defendant was an alcoholic and under the influence of alcohol at the time of the murder.

In *Alston v. State*, [723 So.2d 148, 153 (Fla.1998)], where the defendant was convicted for the armed robbery, kidnapping, and murder of a victim, the trial court found five aggravators (prior violent felonies, committed during the course of robbery/kidnapping and for pecuniary gain, avoid arrest, HAC, and cold, calculated, and premeditated). In *Alston*, the trial court also found five nonstatutory mitigators, including a horribly deprived and violent childhood, low intelligence, and mental age. [See *Alston*, 723 So.2d

at 153, 162] In *Alston* we found the death sentence proportional where the trial court determined that the found aggravators outweighed five nonstatutory mitigators. [See id.; see also *Spencer v. State*, 691 So.2d 1062 (Fla.1996) (affirming death sentence for stabbing murder where trial court found HAC and prior violent felony aggravators outweighed two statutory mental mitigators and numerous nonstatutory mitigators). Hence, we reject White's contention and find that the death sentence is proportionate. Accordingly, for the reasons expressed, we affirm the sentence of death.

Critical Thinking Question(s): Contemplate the death penalty. Should imposition of the death penalty be based on the crime committed without regard for a defendant's personal factors? Should it take the status of the victim into account? If the court is going to consider personal factors, does it not raise issues of equal protection under the law? In the instant case, do you think it is fair that a co-defendant received only 15 years compared to the death sentence of the appellant?

VI. Mistake of Law and Mistake of Fact:

Section Introduction: A mistake of law is typically viewed to not be a valid defense in any crime. Mistakes of fact, however, are sometimes an excuse. The following statute addresses a case in which an honest mistake of facts excuses an otherwise criminal act.

Florida Statute, section 836.08 - Correction, apology, or retraction by newspaper

(1) If it appears upon the trial that said article was published in good faith; that its falsity was due to an honest mistake of the facts; that there were reasonable grounds for believing that the statements in said article were true; and that, within the period of time specified in subsection (2), a full and fair correction, apology, and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then any criminal proceeding charging libel based on an article so retracted shall be discontinued and barred.

(2) Full and fair correction, apology, or retraction shall be made:

(a) In the case of a broadcast or a daily or weekly newspaper or periodical, within 10 days after service of notice;

(b) In the case of a newspaper or periodical published semimonthly, within 20 days after service of notice;

(c) In the case of a newspaper or periodical published monthly, within 45 days after service of notice; and

(d) In the case of a newspaper or periodical published less frequently than monthly, in the next issue, provided that notice is served no later than 45 days prior to such publication.

VII. Entrapment:

Section Introduction: If a defendant is able to show that his or her commission of a crime was compelled by the actions of a government agent and would not otherwise have taken place, then they are entitled to the excuse of entrapment. This Florida statute more specifically defines the entrapment defense and the case that follows illustrates how this defense is used.

Florida Statute, section 777.201 - Entrapment

(1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he or she induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

(2) A person prosecuted for a crime shall be acquitted if the person proves by a preponderance of the evidence that his or her criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

***State* v. *Blanco*, 896 So.2d 900 (2005)**

Procedural History: Defendant charged with a drug-related offense moved to dismiss on ground of police entrapment. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Susan Lebow, J., granted motion. State appealed. A panel of the District Court of Appeal affirmed.

Issue(s): Did the officer's actions in getting defendant ot supply drugs amount to entrapment?

Facts: Law enforcement received information that drugs were being sold at a bar without any detailed information. Undercover officers went to the bar to attempt to find the dealers. Upon arrival, one of the officers approached the bar and sat next to the defendant. A conversation ensued. The officer indicated that he liked to "party," and explained to the defendant that he meant the use of cocaine. The defendant left the bar at some point and went to the restroom. Upon his return, he told the officer no one was selling cocaine, but he found someone selling "Tina" or crystal meth for $60. The officer gave money to the defendant, who returned with the drugs. The officer bought the defendant a beer and talked for awhile. The officer exchanged numbers with the defendant and called him during the following days. The defendant was arrested two weeks later.

The defendant moved to dismiss the case on the grounds of entrapment. The court heard testimony from the defendant and the officer. They both testified to a conversation taking place and the use of the term "party." However, the defendant's interpretation of

the word, and who said what, differed from that of the officer. The trial court granted the defendant's motion to dismiss. The court explained:

> I have to kind of disagree with [the State].... [T]his particular defendant was not a target of an investigation. He had not been previously noted as someone who dealt in drugs and that they were targeting him. This officer walks into knowingly - knowing it's a gay bar - and, as he testified, he approached this man who was sitting alone. He was the one that began the conversation. If it had been a woman sitting there I think she would have felt the same way. This was a man who was interested in her or him. The manner of procedure here and the talk that resulted would certainly seem to me objectionable, denied this man of his due process rights. And I am going to grant the motion to dismiss.

It is from this ruling that the State appeals.

ON MOTION FOR REHEARING EN BANC

Holding: Reversed and remanded. After granting State's motion for rehearing en banc, the District Court of Appeal, May, J., held that undercover officer's conduct in approaching defendant in gay bar and getting him to procure drugs did not amount to entrapment in violation of due process.

Opinion: MAY, J.

We grant the State's motion for rehearing en banc, withdraw our previous opinion, and substitute the following opinion in its place. The State appeals an order dismissing charges against the defendant based upon entrapment. We reverse the order of dismissal and remand the case to the trial court for reinstatement of the charges.

Unlike subjective entrapment, which focuses on the issues of inducement and the defendant's predisposition, an objective analysis of entrapment on due process grounds focuses on the conduct of law enforcement. [*Munoz v. State*, 629 So.2d 90 (Fla.1993)] As Justice Kogan noted in his concurrence in Munoz, "[t]he due-process entrapment defense recognized in *Cruz*, *Glosson*, and *State v. Hunter* [586 So.2d 319 (Fla.1999)] essentially is the same as 'objective entrapment.' Thus, the majority appears to toss objective entrapment out the front door but then readmits essentially the same concept into Florida law via the rear entrance, with some minor tinkering as to analysis." [*Munoz*, 629 So.2d 90 at 102] The type of conduct held to violate due process is that which so offends decency or a sense of justice that judicial power may not be exercised to obtain a conviction. [See, e.g., *State v. Glosson*, 462 So.2d 1082 (Fla.1985) (law enforcement entering into a contingency contract with informants to obtain convictions); *Cruz v. State*, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985) (law enforcement officer appearing inebriated and hanging money from his pocket in high crime area); *State v. Williams*, 623 So.2d 462 (Fla.1993) (illegal manufacture of crack cocaine by law enforcement officials for use in reverse-sting operation); *Soohoo v. State*, 737 So.2d 1108 (Fla. 4th DCA 1999) (undercover agent's consignment

arrangement for sale of drugs)] When government conduct violates a defendant's due process rights, the remedy is dismissal. [See *Munoz*, 629 So.2d 90]

In this case, the defendant's version of the facts differed from that of the officer. But, even assuming the facts in the light most favorable to the defendant, law enforcement's conduct was not so outrageous that dismissal was warranted. The trial court failed to limit its consideration to the conduct of law enforcement. Rather, it focused its attention on the effect of the officer's conduct on the defendant, the defendant's subjective perception of the situation, and his apparent lack of predisposition to commit the offense. Respectfully, those factors are irrelevant to a ruling when it is objectively analyzed on due process grounds.

Law enforcement was alerted that drugs were being sold at this bar. As it does on a daily basis, it engaged undercover officers to find the dealers at the suspected location. We conclude the officer's conduct did not rise to that level of "outrageous" as required under the case law to support a finding of entrapment on due process grounds. Accordingly, we reverse the trial court's order of dismissal and remand the case for reinstatement of the charges. The factual dispute between the State and the defendant prevents the resolution of subjective entrapment on a motion to dismiss. A jury may very well find the defendant not guilty on the basis of subjective entrapment. That, however, is a decision for another day.

Dissent: FARMER, C.J.

I see no need to repeat what we said in the panel opinion affirming the decision of the trial judge dismissing this case. I write instead to make the following points. The rationale of the en banc majority's position is this. In considering dismissal under the objective test for entrapment, a trial Judge may not engage in any fact-finding that the statute requires the jury to resolve the facts underlying an entrapment defense. [See § 777.201(2), Fla. Stat. (2004) ("The issue of entrapment shall be tried by the trier of fact.")] And so, in the majority's view, a pretrial motion to dismiss on the grounds of entrapment must be decided solely on undisputed facts - i.e., only on those facts which the State will concede - because otherwise the court would be invading the function the statute gave to the jury. The majority reasons that when the underlying facts for entrapment are disputed, "law enforcement's conduct was not so outrageous that dismissal was warranted." [Op. at 902] One should carefully note that this reasoning is not followed by any citation of authority. Nor does the majority advance any explanation why its proposition might be sustainable.

Judge Lebow did not specify which test for entrapment she relied on in dismissing this case. This is significant because entrapment takes two forms in Florida. The first form is essentially an affirmative defense centered around the accused's alleged lack of any predisposition to commit the crime. The second form is not an affirmative defense. In this second form of entrapment, the conduct of the government operates as a legal bar to the entire prosecution. In this second form, predisposition is not a material consideration. The first form is called the subjective test; the second form is the objective test. [Munoz

v. State, 629 So.2d 90, 98-99 (Fla.1993); *Cruz v. State*, 465 So.2d 516, 520 (Fla.1985) ("The subjective view recognizes that innocent, unpredisposed, persons will sometimes be ensnared by otherwise permissible police behavior. However, there are times when police resort to impermissible techniques. In those cases, the subjective view allows conviction of predisposed defendants. The objective view requires that all persons so ensnared be released."); *Soohoo v. State*, 737 So.2d 1108, 1109 (Fla. 4th DCA 1999) ("Thus, as it stands today, Florida courts embrace both the subjective and objective standards of entrapment.")] Under the objective test, the contention is that as a matter of due process courts should not tolerate the conduct of the government regardless of the predisposition of the accused.

I do not think the majority's proposition banning all judicial fact-finding in objective entrapment cases is a correct statement of Florida law. Although the Legislature has reshaped the subjective test on entrapment into a specific statute under which the jury has a leading role, the supreme court made clear in *Munoz* that the entrapment statute does not bar the trial Judge from evaluating police conduct under the Due Process Clause: "Because the legislature cannot abrogate an accused's due process rights, section 777.201 is inapplicable whenever a judge determines as a matter of law that law enforcement personnel have violated an accused's due process rights." [*Munoz*, 629 So.2d at 98; see also Art. I, § 9, Fla. Const., and § 777.201(2), Fla. Stat. (2004)] Accordingly, it is now established law in this state that the trial judge is authorized to dismiss a criminal case when the conduct of the government should not be tolerated. The majority's view thus raises the question just how the trial judge is to carry out judicial authority to assess police conduct under constitutional law without engaging in some fact finding to determine precisely what that conduct is.

Before *Munoz*, the supreme court had already made clear that while the subjective test is ordinarily (but not exclusively, as I shall presently show) for the jury, the objective test is for the court alone. "The due process defense based upon governmental misconduct is an objective question of law for the trial court, as opposed to the subjective predisposition question submitted to the jury in the usual entrapment defense." [*State v. Glosson*, 462 So.2d 1082, 1084 (Fla.1985)] Munoz explained later that:

> Section 777.201 neither prohibits the judiciary from objectively reviewing the issue of entrapment to the extent such a review involves the due process clause ... of the Florida Constitution, nor prohibits the judiciary from determining under the subjective test that, in certain circumstances, entrapment has been established as a matter of law. [*Munoz*, 629 So.2d at 101]

In other words, even though the entrapment statute seems to require that all entrapment cases be submitted to a jury, actually the trial judge may take the issue from the jury when the evidence does not legally involve a true conflict. As for objective entrapment, *Munoz* held:

> [T]he legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a ... constitutional right. Accordingly, section

> 777.201 cannot overrule a decision of this Court regarding entrapment in any case decided under the due process provision of ... the Florida Constitution. [629 So.2d at 9]

There is not so much as a word here suggesting that under the objective test the judicial assessment of the police conduct may be made only when the state stipulates to defendant's pretrial testimony.

It is inconceivable that any rule of law or principle would operate in a factual void. All legal rules and principles are drawn upon a background of pertinent facts. If some government conduct passes muster under the Due Process Clause, but some does not, the only basis to differentiate the good from the bad is on the facts involved. Someone has to decide what those facts are. If the objective test is solely for the judge and not the jury (as *Glosson* and *Munoz* hold), then the only person who is qualified to ascertain what the facts are raising a Due Process question must be the Judge. And to do that, it may be necessary to ascertain or resolve some of those facts.

Indeed the essence of the objective test on entrapment is that the very prosecution of the crime itself must be stopped because it was begotten by police conduct that our society does not want to tolerate under its organic law. It takes but a moment's reflection to understand that the evidence admitted during the criminal trial is unlikely to include all the facts relevant to an objective entrapment issue. This is so because the guilt of the accused in objective entrapment is largely irrelevant. Some of the police conduct may be outside the corpus of the alleged crime. Therefore a holding that all objective entrapment cases must turn on undisputed facts would mean that only when the government has admitted the facts implicating a due process issue can the law enforcement officials be found to have acted outside the constitutional norm.

Depending on officials to admit that they have engaged in acts raising a due process bar to prosecution, in order to evaluate the propriety of such conduct, is logically indistinguishable from asking the actor to decide whether the acts should be tolerated. Human beings have a bent of failing to recognize the invidious nature of their own conduct, especially when they are imbued with a sense of "mission" in a cause they conceive to be noble - like punishing persons believed to be involved in the drug trade. A holding that government conduct deemed intolerable under the Due Process Clause may be condemned by the court only when those engaged in such conduct trouble themselves to admit it would truly be against reason and experience. And because objective entrapment is meant to be preemptive and not an affirmative defense, it should ordinarily be determined before an accused is put to the burden of the trial. If the claim of objective entrapment is valid, any outcome of the trial in favor of the government will be nugatory anyway.

Even if there are circumstances when the facts underlying an issue of objective entrapment should be submitted to the jury, in this case the state waived the requirement. At the beginning of the hearing on defendant's motion to dismiss the case on entrapment grounds, the state argued that defendant had the burden of proving the basis for dismissal

at the hearing. [See Trans. of Hearing, December 19, 2002, at 3 (STATE ATTORNEY: "Well it's his burden; it's a motion to dismiss.")] The state having thus impliedly conceded that defendant had the burden of proving facts at the hearing for any dismissal on the grounds of objective entrapment, the state has clearly waived a jury determination. On what theory should the judge be precluded from ascertaining those facts, especially since under *Munoz* the issue is solely within the province of the Judge? The en banc majority offer no such theory.

This waiver was repeated again after the presentation of evidence at the hearing during argument when the State plainly acknowledged the judge's authority to dismiss under the objective test without submitting the issue to a jury. [Id. at 29] The prosecutor recognized that the court is required to analyze the officer's conduct for due process purposes. The prosecutor conceded that Mike did not tell defendant during their encounter "who [Mike] was" but proceeded to argue that the officer's conduct here was not as outrageous as that in *Strickland v. State*, [588 So.2d 269 (Fla. 4th DCA 1991)]. By this argument, the prosecution urged the court to make factual findings as contended by defendant but then to hold them insufficient for dismissal as a matter of law. Hence the en banc majority is not only reversing on a ground that the state did not argue below but is reversing on a basis which the state invited the court to rule.

And even if the state had not waived the jury determination, when the testimony at the hearing is properly analyzed it is apparent that there is no real conflict in the testimony for purposes of objective entrapment. The majority's argument of factual conflict hinges entirely on whether Mike or defendant introduced the subject of drugs through the use of the word party. In other words, the only material thing truly disputed by Mike's testimony at that hearing is whether it was Mike who introduced the subject of drugs during the encounter between the two men at the bar. But Mike's testimony is legally ineffective to create a real conflict in the evidence for due process purposes.

According to Mike, the term party referred to illegal drugs. To recap the pertinent testimony, defendant had initially testified that it was Mike who first used the word party and that he thought Mike was referring to sex. In rebuttal, Mike testified that it was defendant who first used the word party and that Mike (but not necessarily the whole world) understood it to refer to drugs. Yet, in fact, Mike admitted to having to clarify to defendant that he was referring to drugs rather than sex in using the word party. Mike's testimony thus does not refute defendant's testimony that Mike was using both sex and drugs to induce a crime.

There is no recognized meaning attributed to the word party by any major dictionary that mentions the use of illegal drugs, but there is a recognized meaning referring to sexual conduct. [See, e.g., AMERICAN HERITAGE DICTIONARY 1321 (3rd ed.) ("party ... 7. Slang a. An act of sexual intercourse. b. An orgy." [e.s.])] I recognize that dictionaries often fail to include some specialized, idiomatic meanings, and that it is possible for segments of the population to attribute eccentric meanings to common words. But such a special meaning would be applicable in this case only if someone trained and experienced

in such usages had testified that there is a generally recognized meaning for party among drug users and dealers. No one offered such testimony. No expert testified to that effect. The purpose of such testimony would have been to show that in using the term party both men meant to impart the same thought. The substance of Mike's testimony, however, was only that to him the word party meant drugs. Mike was not qualified as an expert to testify that, among those knowledgeable about drug deals, party usually means drugs. Therefore Mike's testimony does not challenge defendant's testimony that defendant understood party to mean sex.

Giving the evidence its proper legal import, the testimony from both participants in the encounter establishes inducement by the police as a matter of law. Nothing in Mike's testimony challenges the assertion that he was using implied sex to induce a drug transaction. That means that government promoted the crime - instead of detecting a crime already in the planning or operational stages. From this testimony the trial court found that Mike, the government agent, used sex to entice defendant into a drug transaction.

In addition to improperly understanding the testimony and its absence of real conflict, the majority's holding as to the jury requirement in objective entrapment cases is mistaken for another reason. Any rule that all objective entrapment cases must be submitted to the jury unless the prosecution effectually admits its own misconduct would be in striking contrast with subjective entrapment cases where *Munoz* holds that the law allows some subjective entrapment cases to be decided before trial by the judge - even though the defendant has the burden of proving lack of predispositon. [*Munoz*, 629 So.2d at 101 ("section 777.201 neither prohibits the judiciary from ... determining under the subjective test that, in certain circumstances, entrapment has been established as a matter of law.")] The majority advance no reason why the standard for removing an objective entrapment case from a jury should be any more difficult than it now is for subjective entrapment. The *Munoz* court explained that a trial Judge may take a subjective entrapment case from the jury and decide it as a matter of law:

> Section 777.201 directs that the issue of entrapment be submitted to the trier of fact. Such direction is consistent with the subjective evaluation of entrapment because the two factual issues above ordinarily present questions of disputed facts to be submitted to the jury as the trier of fact. However, if the factual circumstances of a case are not in dispute, if the accused establishes that the government induced the accused to commit the offense charged, and if the State is unable to demonstrate sufficient evidence of predisposition prior to and independent of the government conduct at issue, then the trial judge has the authority to rule on the issue of predisposition as a matter of law. [629 So.2d at 100]

It is apparent from this statement that only three things are necessary for a judicial determination of entrapment: (1) the critical circumstances are not in dispute; (2) the accused establishes government inducement; and (3) the police are unable to present legally sufficient evidence of predisposition before, and unconnected with, the

government conduct. All three things are made here. The critical circumstances are not in dispute. Defendant was unknown to the police before Mike sat next to him at the bar. Defendant had no arrests or any record for criminal activities. Although police had received information that illegal drugs were being sold at the bar, no one mentioned or referred to defendant as being involved in any such activity. He was not a target of any police investigation. When Mike sat next to him he was but a face in the crowd.

The accused has established government inducement. As I have just shown, properly understood, the testimony is clear that it was Mike who introduced the subject of drugs, not defendant. Thus the record is uncontradicted that the conduct of the officer did in fact promote defendant into committing the crime. The unrebutted testimony of defendant was found by the trial judge to involve using sex as a lure to induce an unsuspecting man into a drug transaction promoted by the police. The dismissal on the basis of objective entrapment is therefore based on legally proper procedures and represented a decision founded on a matter of law.

But let's assume (without so holding) that all objective entrapment cases must be decided only after all the evidence is in at trial. Let's even further assume (also without so holding) that for objective test purposes the trial Judge is required to accept the jury's view of the facts. Because Judge Lebow did not expressly state that she was relying on the objective test exclusively in granting the pretrial motion, it would still be necessary to consider whether dismissal was proper under the subjective test. [See *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla.1979) (trial court's decision is presumed correct on review and burden is on appellant to demonstrate error; even when based on erroneous reasoning decision of trial court will generally be affirmed if alternative theory supports it)] Because both forms of entrapment are recognized and the trial judge did not expressly limit her decision to only one of them, it is necessary for the majority to consider whether the result could be sustained under either form.

The majority has an obligation to consider whether dismissal was correct for another reason. The police here were unable to present legally sufficient evidence of predisposition before, and unconnected with, the government conduct. To prove guilt after defendant's evidence, the state had the burden to prove predisposition. Predisposition has to be shown as "prior to and independent of the government conduct at issue." [629 So.2d at 100] As we said in *Farley v. State*, [848 So.2d 393 (Fla. 4th DCA 2003)], where we took specific notice of the common meaning of the word predisposition: "The prefix pre indicates that the disposition must exist before first contact with the government." [848 So.2d at 396]

Plainly all of the State's evidence on predisposition deals with events arising during the encounter between defendant and Mike. The State did not suggest the existence of any evidence of any predisposition on defendant's part before the encounter. As the trial judge noted, defendant was not a target of any investigation. The police had no previous basis to believe that he had been identified or named as someone dealing in drugs. The state did not even know of his existence until Mike sat down next to him in the bar. The State had no information about him, by tip or otherwise. When Mike began making

advances to defendant at the bar, it was with absolutely no reason to suspect him of anything.

In short, the state's entire evidence on predisposition relates to events involving Mike's encounter with defendant and ensuing events. This is plainly insufficient. [*Munoz*, 629 So.2d at 100; see also *Jackson v. State*, 810 So.2d 545 (Fla. 4th DCA 2002) (acknowledging trial court authority to decide whether to submit subjective entrapment issue to jury or instead determine question as matter of law)] [*Munoz*, 629 So.2d at 99; *Dial v. State*, 799 So.2d 407, 408-09 (Fla. 4th DCA 2001)] The burden of proof then returns to the state to disprove entrapment beyond a reasonable doubt. [*Munoz*, 629 So.2d at 99. The state's evidence must then be capable of showing that defendant had a predisposition to commit the crime existing before the police engaged in the conduct of inducement. [*Munoz*, 629 So.2d at 100]

Munoz requires a defendant initially to offer evidence that, if believed, would constitute inducement by the police and that he was not predisposed to commit the crime. The majority would seem to hold that defendant must do more than merely offer evidence of inducement, that instead defendant must conclusively prove inducement before any burden returns to the State to defeat entrapment beyond a reasonable doubt. Nothing in *Munoz* so states, and it would be illogical anyway. The majority's view would require bifurcation in all entrapment cases; first the court would have to submit to the jury the single question whether defendant has proved inducement, and only if the jury found inducement would the burden return to the State to prove the absence of entrapment beyond a reasonable doubt. There is nothing anywhere suggesting the supreme court had that procedural result in mind.

Defendant's pretrial testimony was sufficient to make out a prima facie case of inducement by the officer. There is no evidence that defendant was predisposed to commit the crime until his encounter with Mike had begun. A number of cases after *Munoz* have held that the trial court was authorized to dismiss the entire case then and there, without awaiting a jury determination. [See *Farley*, 848 So.2d at 396-97 ("The State presented no evidence of past deviant behavior or criminal activity on Farley's part. Therefore, entrapment rather than crime was at hand, and as a matter of law, the trial court should have granted Farley's motion to dismiss."); *State v. Rokos*, 771 So.2d 47 (Fla. 4th DCA 2000) ("although Rokos expressly denied it, there was evidence that in August of 1996 - before the police had enlisted Kleinbach's help in the investigation--Rokos offered Kleinbach's lawyer, John Garcia, money to keep Kleinbach quiet."); and *Davis v. State*, 767 So.2d 601 (Fla. 4th DCA 2000) (jury question presented as to entrapment; defendant clearly predisposed to engage in drug activity).

It needs stressing that in this case the outcome would be no different at trial. The State would still be faced with the same burden. The procedural posture of the present case is identical to *Farley*, where we explained:

> [I]nducement and lack of predisposition were clear upon the face of the facts. The State presented no evidence of past deviant behavior or criminal activity on

> Farley's part. Therefore, entrapment rather than crime was at hand, and as a matter of law, the trial court should have granted Farley's motion to dismiss. After all: 'When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene'. [*Farley*, 848 So.2d at 397 (quoting *Jacobson v. United States*, 503 U.S. 540, 548-549, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992)]

The dismissal in *Farley* is not based on any jury determination of the facts surrounding the entrapment claim but instead on evidence presented at a pretrial hearing on defendant's motion to dismiss on grounds of entrapment. Our reversal in *Farley* is based solely on evidence adduced at that pretrial hearing. There is no reasoned basis on which to distinguish *Farley*.

In this regard, the majority's decision also conflicts with decisions of other district courts on the identical issue. [See *Robichaud v. State*, 658 So.2d 166 (Fla. 2d DCA 1995) (error to submit subjective entrapment issue to jury where defendant established by testimony at pretrial hearing government's inducement and his lack of predisposition); State v. Ramos, 632 So.2d 1078 (Fla. 3d DCA 1994) (testimony at pretrial hearing on defendant's motion to dismiss established government inducement and his lack of predisposition; not necessary to submit entrapment issue to jury.); *Beattie v. State*, 636 So.2d 744 (Fla. 2d DCA 1993) (affidavit in pretrial motion to dismiss on grounds of entrapment established inducement and lack of predisposition, making it unnecessary for jury to decide issue). The majority has not even attempted to explain why the present case is not in conflict with these.

Upon consideration of either test, there is no legal basis to reverse the trial judge. Nor is there any reason to take up this case en banc to reverse the trial judge without running into conflict with the supreme court, with our own decision in *Farley*, and with the other district courts in *Robichaud* and *Ramos* and *Beattie*. I therefore dissent.

Critical Thinking Question(s): What is the significance of distinguishing between the objective test and the subjective test for entrapment? Is it possible to have a test that takes into account both the subjective and the objective tests? Formulate the combined test and explain your reasoning.

VIII. New Defenses:

Section Introduction: Various advances in science and social and psychological theory have given rise to a host of new defense techniques in criminal trials. The following Florida case is an example of a defense that seeks to excuse the defendant of responsibility but does not specifically fall under any of the excuses above.

State v. *Demeniuk*, 888 So.2d 655 (2004)

Procedural History: In capital murder prosecution, defendant filed motion to vacate order requiring *Frye* hearing with respect to certain scientific evidence she sought to present. The Circuit Court, St. Johns County, Robert K. Mathis, J., granted motion. State petitioned for writ of certiorari to quash order denying its motion for a *Frye* hearing.

Issue(s): Is the proposed testimony of the expert witness pure opinion? If it is not, is there a *Frye* exception for cases in which the death penalty is a possible outcome?

Facts: Ms. Demeniuk is charged with the first-degree murder of her 4-year old twin boys. The State is seeking the death penalty. Ms. Demeniuk has given notice that she intends to rely on the defense of insanity. It is the nature of the asserted insanity that gives rise to the present dispute. Ms. Demeniuk indicated to the trial court that her insanity was substance induced, which she asserts led to involuntary intoxication, and the eventual deaths of her children. In support of her position she retained two doctors, David Menkes and Ernest Miller, who provided reports supporting her claim of insanity. These doctors attributed Ms. Demeniuk's insanity to the prescribed use of modern anti-depressants known as selective serotonin reuptake inhibitors (SSRIs). Among the SSRIs marketed commonly are Zoloft and Paxil. According to her experts, her use of SSRIs caused "akathisia," which in turn caused Ms. Demeniuk to "self-medicate" with alcohol to an involuntary 0.27 blood-alcohol level, and resulted in her killing her children.

According to the Diagnostic and Statistical Screening Manual of Mental Disorders, 4th Ed., akathisia consists of "subjective complaints of restlessness accompanied by observed movements (e.g. fidgety movement of the legs, rocking from foot to foot, pacing, an inability to sit still or stand still) developing within a few weeks of starting or raising the dose of the neurolleptic medication." In response, the State also hired two experts, Dr. Alan Waldman and Dr. Douglas Jacobs. These doctors deny the existence of SSRI-induced akathisia with resulting homicidal actions, and both assert that the scientific principles upon which the defense relies are not generally accepted in the scientific community. The trial court, however, declined to consider their testimony. The State then filed two motions in limine regarding the assertion of SSRI-induced homicidal behavior, contending that the matters proposed to be testified to by the defense experts were subject to analysis under *Frye*.

Initially, the trial court by letter to counsel denied the motion for a *Frye* hearing, noting that pure opinion testimony of an expert is not subject to *Frye*. The State, however, persisted in its quest for *Frye* consideration of the theory espoused by Ms. Demeniuk's expert witnesses. Specifically, the State objected to the testimony of the defense experts concerning an alleged causal connection between suicide and SSRIs, and concerning the proposed testimony that taking SSRIs cause involuntary alcohol consumption. The State contended that the defense testimony on neither subject was pure opinion, that the conclusions were new and novel, and that a Frye analysis was, therefore, appropriate. The trial court eventually agreed to consider the issues raised, and set a hearing in February of 2004.

At the hearing Dr. Menkes, the only witness called, testified for about five hours. When the State cross-examined Dr. Menkes concerning studies he relied on in reaching his opinion regarding the effects of SSRIs, the witness related that he based his opinion on two studies regarding premenstrual syndrome that were undertaken in 1992 and 1993, and on a third unpublished Scottish study regarding depression suffered by some women during premenstrual time periods. He agreed that he had not personally been engaged in research trials of the drugs, but said that he used the results of that research in his clinical practice. Finally, he stated that he also relied on a healthy volunteer study conducted by Dr. Healy. The hearing was continued at the conclusion of Dr. Menkes' testimony. When the hearing reconvened a month later, the trial judge simply announced at the outset that he had decided to deny the State's motion to exclude the testimony of Dr. Menkes and "whoever else is going to testify as to SSRI's." He then went on to say, if this was a products liability case, I would not allow the testimony in. I think that the connection is too tenuous, but it's not a products liability case, it's a first-degree murder case, the State seeking the death penalty, and I will allow the jury to decide whether or not the testimony requires any credence.
...
[The judge continued], Well, basically I'm finding that there's a sufficient expert opinion, which obviates the need for a Frye hearing. The science that Dr. Menke bases his opinion on, in my opinion, is insufficient for purposes of any case other than a first-degree murder case. However, his opinion is pure opinion and I will allow it. The trial judge later reduced his order to writing, again saying that the testimony was pure opinion, even though he still agreed that in any case other than first-degree murder, "the Court would have to find the science was so tenuous that the evidence would not be admitted." He concluded that "capital cases are different; the defendant is entitled to present all reasonable defenses." From these rulings, the State seeks certiorari relief.

Holding: Petition granted. The District Court of Appeal, Monaco, J., held that testimony offered by defendant's expert, was not pure opinion testimony, and thus was not exempt from analysis under Frye.

Opinion: MONACO, J.

The State of Florida petitions for a writ of certiorari to quash the order of the circuit court denying the motion of the State for a *Frye* hearing, and granting the motion of the Respondent, Leslie Demeniuk, a/k/a Leslie Ewing, to vacate an earlier order requiring a *Frye* hearing. The purpose of the requested *Frye* hearing was to consider the admissibility of certain expert testimony proposed to be offered by Ms. Demeniuk at her trial for murder. Because the trial court's rulings in this regard departed from the essential requirements of law, which might result in irreparable harm, we grant the petition.

It goes without saying that the admissibility in Florida of testimony and other evidence based on new and novel scientific evidence is governed by *Frye*. [See *Spann v. State*, 857 So.2d 845 (Fla.2003); *Hadden v. State*, 690 So.2d 573, (Fla.1997)] Our review of the *Frye* issue presented to us by the present case is de novo, and we consider the ruling

of the trial court as a matter of law. [See *Hadden*; *Poulin v. Fleming*, 782 So.2d 452, 455 (Fla. 5th DCA), review denied, 796 So.2d 537 (Fla.2001)]

Frye requires that the judge perform the function of gatekeeper. In general terms, the gate of admissibility is not opened unless the proponent of new scientific evidence can demonstrate by the greater weight of the evidence that the scientific principle upon which the evidence is based, and the testing procedures used to apply the principle to the facts of the case, have gained general acceptance for reliability among impartial and disinterested experts within the particular scientific community to which the principle belongs. [See *Sybers v. State*, 841 So.2d 532, 542 (Fla. 1st DCA), review dismissed, 847 So.2d 979 (Fla.2003)] The gate does not swing open unless the proponent can demonstrate that the scientific evidence is reliable.

More specifically, *Frye* requires the trial judge, as gatekeeper, to draw three conclusions before allowing an expert to testify on the applicability of a new scientific principle. The judge must:

1. Determine whether the proposed expert will assist the jury in understanding the evidence or in determining a fact in issue;
2. Decide whether the expert's testimony is based on a scientific principle or discovery that has gained general acceptance in the particular field in which it belongs; and
3. Determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue.

[See *Ramirez v. State*, 651 So.2d 1164, 1166 (Fla.1995)] Once these determinations are made in the affirmative, the judge may permit the expert to give an opinion on the subject in question. The jury is then tasked with determining the credibility of the opinion. [Id.] If, however, the opinion is based solely on the knowledge and experience of the expert, it is deemed to be "pure opinion," and is admissible without being subjected to *Frye* scrutiny. [See *Sybers*, 841 So.2d at 542]

In the present case the trial judge was ambiguous in his conclusions about the admissibility of the scientific evidence proposed by Dr. Menkes. On the one hand, both orally and in writing, he found that the testimony was "too tenuous," and noted that he would not allow it into evidence if the case presented had been one involving products liability. Since the case involved the possible application of the death penalty, however, he ruled that he would allow it to be presented to the jury. On the other hand, both orally and in writing, the court concluded that the testimony of Dr. Menkes was pure opinion, and was, therefore, admissible without being subject to a Frye analysis.

The trial court's ruling thus raises two questions for our determination:

1. Is the proposed testimony of Dr. Menkes pure opinion?
2. If it is not, is there a Frye exception for cases in which the death penalty is a possible outcome?

In *Hadden*, the Florida Supreme Court indirectly defined pure opinion testimony as the testimony of an expert "based solely on the expert's training and experience," and as "testimony personally developed through clinical experience." [See *Hadden*, 690 So.2d at 579-80] The court differentiated "pure opinion testimony based on clinical experience from profile and syndrome evidence," because the latter is "based upon studies and tests." [Id.] Perhaps more importantly for purposes of the present case, profile and syndrome evidence was found not to be rendered admissible simply by combining it with pure opinion testimony, because the combination cannot by definition be pure opinion. [Id.; see also *Rickgauer v. Sarkar*, 804 So.2d 502, 504 (Fla. 5th DCA 2001)] The Fourth District Court of Appeal in *Holy Cross Hosp., Inc. v. Marrone* explained further:

> "Pure opinion" refers to expert opinion developed from inductive reasoning based on the experts' own experience, observation, or research, whereas the *Frye* test applies when an expert witness reaches a conclusion by deduction, from applying new and novel scientific principle, formula, or procedure developed by others. [816 So.2d 1113, 1117 (Fla. 4th DCA 2001), review dismissed, 832 So.2d 104 (Fla.2002)]

In the present case it is clear that the testimony offered by Dr. Menkes is not pure opinion. Ultimately, Dr. Menkes testified that his conclusions concerning the effects of SSRI's on Ms. Demeniuk were based on scientific studies and research conducted by three scientists, Dr. Healy, Dr. Teicher, and Dr. Jick. He admitted that he had not personally conducted independent research concerning whether SSRIs are linked to suicide, or violent and aggressive behavior, or into whether SSRIs caused an involuntary craving for alcohol. Dr. Menkes may indeed hold certain pure opinions that are admissible without Frye consideration. The opinions he discussed at the aborted Frye hearing, however, do not fall into that category.

Since the opinions of Dr. Menkes were not based solely on his own personal experience, observations and research, and since his opinions were based on a novel scientific theory, the trial court should have required *Frye* testing of the theory. *Frye* testing means implicitly that both sides of the issue should have an opportunity to present evidence regarding whether the theory has gained general acceptance within the relevant scientific community, and whether the expert is qualified to opine on this subject. As neither inquiry was permitted by the trial judge, we conclude that if *Frye* applies to capital cases, the court erred.

The trial court apparently felt that because the case against Ms. Demeniuk has capital implications, the defendant should be permitted to introduce virtually any scientific evidence, no matter how novel, without *Frye* screening. We reject this conclusion, even though we understand and fully appreciate the difficult and sensitive position of a trial court in dealing with issues of what evidence a defendant might be permitted to introduce in death penalty cases. We do so because we are unable to find any rule of law that excludes any particular variety of case, including capital cases, from the rigors of *Frye* testing proposed novel scientific evidence. The United States Supreme Court has pointed out in a somewhat different context:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. [*Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)]

The defendant's right to call witnesses in a criminal trial, however, is not absolute. [See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982); *Roussell v. Jeane*, 842 F.2d 1512, 1516 (5th Cir.1988)] The right, for example, is most obviously limited to presenting witnesses who are able to give relevant and material testimony. [See *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *United States v. Duggan*, 743 F.2d 59 (2d Cir.1984)] We conclude that the presentation of opinion testimony based on new or novel scientific principles is also within the limitations justifiably placed on the right to call witnesses when those principles fail *Frye* analysis.

There are, in fact, a number of capital cases found in our jurisprudence in which the State's novel scientific evidence has been required to be subjected to *Frye* testing. [See, e.g., *Armstrong v. State*, 862 So.2d 705 (Fla.2003); *Butler v. State*, 842 So.2d 817 (Fla.2003); cf., *Hudson v. State*, 820 So.2d 1070 (Fla. 5th DCA 2002)] We can discern no logical reason why the same regimen should not be required of the defense. The rules of evidence apply to all parties in a court of law.

We conclude that the trial court erred in making a determination that the testimony proposed by Ms. Demeniuk is exempt from *Frye* testing as pure opinion. Accordingly, we grant the petition, with instructions to conduct a full *Frye* hearing, at which both the defendant and the State are permitted to present evidence and to cross-examine on all issues associated with the introduction of new and novel scientific evidence.

Critical Thinking Question(s):

- Why would the Court deny the State from placing its own witnesses on the stand to rebut the defendant’s expert testimony?
- Should a defendant, particularly in a capital case, be able to espouse any theory of defense?
- What if a defendant was denied the testimony of an expert witness who proffers a novel theory and the theory is found to be sound ten years later?