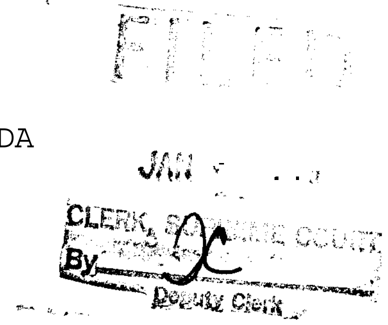

IN THE SUPREME COURT OF FLORIDA

GEORGE ALEXANDER HILL, :

Appellant, :

vs. Case No. 70,444

STATE OF FLORIDA,

Appellee. :

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

REPLY BRIEF OF APPELLANT

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RELIMINARY STATEMENT

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

This reply brief is directed to Issues I, III, and IV. As to the remaining issues, appellant will rely on his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF ERNEST DEMONBRUEN, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, TO PRESENT WITNESSES IN HIS OWN BEHALF TO ESTABLISH A DEFENSE.

Relying on United States v. McDonald, 688 F.2d 224 (4th Cir. 1982), the state argues:

> The McDonald court concluded that the declarant's statements were untrustworthy because of her pattern of admitting and denying complicity, her long-standing involvement with drugs, and her admissions that she was under the virtually continual influence of the drugs when these statements were made. The McDonald court emphasized that the risk of fabrication in this setting is significant and "[t]he requirement of corroboration should be construed in a manner [so] as to effectuate its

purpose of circumventing fabrication."

(S. 10-11) (emphasis supplied by appellant)

In the instant case, in sharp contrast to McDonald, there were no inconsistent or vacillating statements by the declarant (John Jones), nor was there any indication of drug abuse or other impairment on his part. There was, plainly and simply, an admission against interest that he murdered Mrs. Lile. As for the risk of fabrication, it is important to note that Ernest Demonbruen was developed as a witness not by appellant but by the state. It was the state which, ex parte, obtained a pre-trial order from the trial judge finding Demonbruen (who was incarcerated in the Pinellas County Jail) to be a material witness whose presence and testimony were required at trial (R 1096). Demonbruen and appellant were not on friendly terms (see T. 893, 897, 900, 1048), and Demonbruen did in fact give testimony for the state (in its rebuttal case) that was extremely harmful to appellant. Demonbruen testified that appellant had told him, outside the Availability office, that if he got the chance he might rape and beat Mrs. Lile (T. 1047). Obviously, then, Demonbruen had no motive to fabricate a third-party confession by John Jones in order to exculpate appellant.

Also important is the fact that, when Blue told Demonbruen that John Jones had admitted the murder (at a time shortly after the killing, and long before appellant became a prime suspect), Demonbruen suggested that they go to the police (T. 864-

65). Demonbruen accompanied Blue to the police station, and waited outside while Blue spoke with Detective Vargas[1] (T. *865)* The fact that Demonbruen and Blue acted **upon** the information which Blue had learned from John Jones, by bringing Jones to the attention of the police at a time when there was no conceivable motivation to fabricate on behalf of appellant, weighs heavily in favor of the admissibility of the statements against penal interest. For similar reasons, Jones' abrupt departure from the jobsite around the time of Demonbruen's and Blue's trip to the police station suggests consciousness of guilt on his part (compare the "flight instruction" cases cited at p. **31** of appellant's initial brief), and is an indication that his admissions against interest were reliable. Finally, Jones' admission against interest tends to be corroborated by the fact that he (along with Demonbruen and John Stacy; "that Ernest and those Johns") was one of the individuals that Mrs. Lile's husband gave to the police as possible suspects. **(T. 434-35)**

Under the totality of the circumstances, John Jones' admission that he murdered Mrs. Lile carried enough indicia of

[1] According to Vargas, the police interviewed John Jones, who was brought to them by Blue. (T. 817)

reliability to be heard by the jury.[2] It is ordinarily the jury's function to determine the weight and credibility of evidence, and there is no reason to believe that the jury could not have properly performed its task in this case. Appellant's conviction and death sentence should be reversed for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE LACK OF REMORSE AS AN AGGRAVATING CONSIDERATION IN THE PENALTY PHASE.

The state, in summarizing its argument, says "Where the defense counsel did not ask to approach the bench, but, instead, made a speaking objection in open court, the prosecutor cannot be faulted for responding to the objection in like fashion" (S. 1, see **S. 28).** The state misconceives the issue. The problem is not that the prosecutor made a "speaking" response to a "speaking"

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[2] Appellant acknowledges that the "double hearsay" aspect of the issue (see Fla. Stat. **§90.805)** poses a problem. If Jones' statements had been made directly to Demonbruen, appellant believes that they would clearly have been admissible as statements against penal interest. See Chambers v. Mississippi, **410 U.S. 284, 93** S.Ct. **1038, 35** L.Ed.2d **297 (1973);** Brinson v. State, **382 So.2d 322, 324** (Fla. 2d DCA **1979).** Unfortunately, most of the potential witnesses involved in this case were transients and/or migratory laborers, and John Jones, John Stacy, and Charles Hall ("Blue") all could not be located. Ernest Demonbruen was at trial only because the state secured his presence as a material witness. In view of the seriousness of the charge and the finality of the penalty, appellant submits that the applicability of **§90.805** is outweighed in this case by the constitutional principle of Chambers regarding the right to present one's defense.

objection: the problem is what he said.[3] In response to defense counsel's appropriate objection that the prosecutor was arguing matters not directed to any statutory aggravating factor, the prosecutor replied:

> One of the circumstances under this particular aggravating factor ["cold, calculated, and premeditated"] which I'm arguing is a lack of emotion, or lack of remorse in regard to the death of Mrs. Marianne Lile, and the Florida Supreme Court held that that's a Proper consideration, and my argument goes to that particular point.

(T. 1143)

The prosecutor's statement of law, heard by the jury, was completely wrong, since this Court has squarely held that lack of remorse may **not** be considered either as an aggravating factor or as an enhancement of an aggravating factor. Pope v. State, **441** So.2d 1073, 1078 (Fla. 1983); Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987); Robinson v. State, 520 So.2d 1, 6 (Fla. 1988). The trial court, by overruling defense counsel's objection, placed his stamp of approval on the prosecutor's misstatements, and conveyed to the jury that what the prosecutor said must be right. See Caldwell v. Mississippi, 472 U.S. 320, 339, 105 S.Ct. 2633, ***86*** L.Ed.2d 231, 246 (1985); Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983). Now, on appeal, the state takes the untenable position that the prosecutor's arguments concerning lack of remorse as an aggravating consideration were "fair[ ] comment on the evidence" ***(S.*** 2, see **S.** 27-28), and also appears to suggest that the prosecutor's use of lack of remorse could be construed as

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[3] And what the trial judge failed to do about it.

rebuttal of a mitigating circumstance (see **S. 27-28)** [If the state is arguing the latter theory, it can be disposed of by noting that **(1)** the defense never attempted to argue remorse as a mitigating circumstance, **(2)** the tape recorded statement to Detective Vargas was introduced by the state, not by appellant, and **(3)** the prosecutor clearly announced, in the jury's hearing, that he was arguing lack of remorse as an aasravatinq factor, or as a component of the "cold, calculated, and premeditated" aggravating factor].

The state says that the jury was properly instructed **(S. 2).** However, the jury was instructed on the "cold, calculated, and premeditated" aggravating circumstance (a circumstance which the state argued to the jury but did **not** argue in its sentencing memorandum to the trial judge). Since the prosecutor had previously - and falsely - told the jury that the Florida Supreme Court had held that lack of remorse is a proper consideration in finding that aggravating factor, and since the trial judge overruled defense counsel's objection, it is entirely likely that the jury did consider lack of remorse for that purpose. The prosecutor's blatantly improper argument, and the trial court's error of law in allowing it, could easily have misled the jury into finding a key aggravating circumstance which there was no evidence (other than appellant's supposed lack of remorse) to support. See e.g. Hansborouah v. State, **509 So.2d** 1081, **1086** (Fla. **1987)** Mitchell v. State, **527 So.2d 179, 182** (Fla. **1988)** (killing committed in rage or frenzy is inconsistent with cold calculation); Roaers **v.** State, **511** So.2d **526, 533** (Fla. **1987);** Mitchell v. State, supra, at **182** ("cold, calculated, and premeditated" aggravating

factor requires proof of a careful plan or prearranged design to kill victim). Thus, if the jurors considered lack of remorse (as the prosecutor and judge told them they could do), it may have contributed significantly to their 8-4 decision to recommend death. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See appellant's initial brief, p. 52-53. Appellant's death sentence must be reversed, and the case remanded for a new penalty trial before a newly impaneled jury.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED FOR FINANCIAL GAIN

The state mainly argues the point which appellant expressly conceded (i.e. that it was not an improper doubling to find both the "financial gain" and the "in the commission of a felony" aggravating factor, see Routley v. State, 440 So.2d 1257, 1264 (Fla. 1983)). As for the two arguments which appellant did make - (1) that the evidence failed to establish that appellant (rather than Michael Hall) was the one who took Mrs. Lile's billfold, and (2) that, even assuming arauendo that it was appellant who took the wallet, there was no evidence that there was a pecuniary motive for the killing of Mrs. Lile - the state has little to say in response. The state argues (emphasis supplied by counsel for appellant):

> In Swafford [v. State, 13 F.L.W. 595 (Fla. 1988)], this Court stated: "Evaluating the evidence and resolving factual conflicts in a

> particular case, however, are the responsibility of the trial court judge. When a trial court judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent, substantial evidence to support it. See Stano v. State, 460 So.2d 890, 894 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985)." This Court has permitted the "pecuniary gain" factor to stand where the murder is an intearal step in obtainins some souaht-after specific gain. Rouers v. State, 511 So.2d 526, 533 (Fla. 1987); Simmons v. State, 419 So.2d 316 (Fla. 1983). Here, as in Bryan v. State, 13 F.L.W. 575, Case No. 68,803, Fla. Sept. 22, 1988), the theft of the victim's wallet by Hill satisfied the "pecuniary gain" aggravating factor and does not constitute an improper doubling. [Finding that murder was committed for pecuniary gain supported by conviction for robbery based upon taking of murder victim's wallet and car, even though appellant argued that car was of little value and was soon discarded.]

(S. 32)

The state's general statements of law, including the one that aggravating factors must be proven beyond a reasonable doubt (S. 31-32), are correct. In the present case, there was no competent, substantial evidence to support the theory that the murder of Mrs. Lile was "an integral step" in obtaining "some sought-after specific gain" (i.e., the billfold). There was no showing of a pecuniary motive for the murder. See Scull v. State, ___So.2d____ (Fla. 1988) (13 F.L.W.); Simmons v. State, 419 So.2d 316 (Fla. 1982). The Bryan case, relied on by the state, does not

even remotely support its position. In Bryan, the defendant (a fugitive) borrowed tools from the elderly victim (a night watchman) in an attempt to repair his boat. When that proved unsuccessful, Bryan, using a shotgun, robbed the victim of his wallet and car keys. Then, after burglarizing the warehouse where the victim worked, Bryan drove the bound victim (in the stolen car) from Mississippi to the Florida panhandle. There, Bryan shot the victim to death, abandoned the vehicle, and continued on his travels with his female companion (who later turned him in). Clearly, in Bryan, the murder was an integral component of the robbery of the victim and the theft of his wallet and car. In the instant case, the state's evidence shows, if anything, that the motive for the attack on Mrs. Lile was sexual, fueled by alcohol and rage. The theft of the billfold (assuming it was stolen by appellant rather than Hall) could easily have been an afterthought. In any event, the state wholly failed to prove that there was a financial motive for the killing. For the reasons stated at p. 60-61 of appellant's initial brief, the error harmfully affected the weighing process, and requires reversal for resentencing. State v. DiGuilio, supra; Elledse v. State, 346 So.2d 998, 1003 (Fla. 1977).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the relief set forth at p. 72 of the initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 26 day of January, 1989.

STEVEN L. BOLOTIN

SLB/an