IN THE SUPREME COURT OF FLORIDA

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JAMES RANDALL PENN,

Appellant,

v. CASE NO. 74,123

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, but would briefly supplement the latter with the following:

As to the relationship between Appellant and the victim, his mother, while there may have been testimony to the effect that the two had "a good relationship" (Initial Brief at 2), there was also testimony as to some strains in that relationship. For instance, Appellant's cousin, David Luahan, testified that, in September of 1987, Ruth Penn cut Appellant out of her will (R 1447). Additionally, there was testimony from Daryl Fields concerning an incident in February of 1988 in which Appellant stole some jewelry from his mother; actually, some of these items of jewelry were the same pieces that Appellant again stole on the night of the murder (R 1464). Appellant admitted this theft to Fields, stating that his wife had distracted Ruth Penn while Appellant had taken the jewelry (R 1465). The pieces were recovered from a "fence" before they could be sold (R 1466). Appellant acknowledged this prior theft in his third statement to the police (R 1236).

As to the pathologist's testimony concerning the cause of death, as noted (Initial Brief at 3), Dr. Kielman testified that there were thirty-one (31) separate wounds to the victim's scalp, some lacerations apparently shaped like a crescent, such as would be consistent with a claw hammer (R 937-938). Dr. Kielman testified that some of the injuries were quite deep, noting that considerable force had been used in infliction (R 939). The

pathologist likewise noted a number of what he termed defensive wounds on the victim's forearms and hands; some lacerations to the finger were bone deep (R 940, 967, 971-972), and the doctor testified that such wounds were consistent with the victim attempting to defend herself or fend off the blows (R 967). The doctor testified that the victim could have remained alive for between thirty to forty-five minutes during the attack, as all thirty-one blows were administered (R 979). He also stated that she could have been in considerable pain during this time; the doctor hypothesized that, given the presence of the defensive wounds, it was unlikely that the victim had been immediately rendered unconscious by the first attack (R 979-980). The doctor estimated the time of death as 1:00 a.m., on May 27, 1988, but stated that such time actually could have been as late as 4:00 or 5:00 a.m. that morning (R 977); a witness saw Appellant leaving the house at 5:30 a.m., carrying a brown paper bag "stuffed with items" (R 1299, 1304).

As to Appellant's actions and demeanor on May 27, 1988, Gregory Tincher, manager of a department store near the Penn home, testified that he had come into contact with Appellant that day, when Appellant had sought to use his mother's credit card to purchase some gold chains (R 1151-1153); the store declined to accept the credit card and Appellant left (R 1154). According to Tincher, there had been no indication that Appellant had been intoxicated or under the influence of drugs at that time (R 1154). Additionally, the owners of three Panama City pawn shops testified that they had come into contact with Appellant on that

day, when he had pawned various items of his mother's jewelry; all three testified that Appellant had not seemed intoxicated in any way at that time (R 1133-1139; 1139-1144; 1145-1151). Meanwhile, Appellant was arrested that afternoon. When police first attempted to stop him in another rented car, Penn attempted to flee (R 1007, 1026, 1031). According to one of the officers, Appellant, while upset, did not appear intoxicated or under the influence of any drug (R 1037). Both of the vehicles which Appellant had rented -, i.e. the Dodge Omni which his mother had rented for him the previous day and the Buick sedan which he had rented in Panama City that day - were searched (R 1109). A number of items were found in the Omni including Ruth Penn's checkbook, keys, credit cards and a locket; all of these items were found under the driver's seat (R 1110-1111). The victim's wallet and several credit cards were found in the glove compartment (R 1111); a gold ring, a pawn ticket and several sales slips were found between the two front seats (R 1112-1113). Additionally, a plastic bag containing a white powdery substance was found in the car (R 1130); a narcotic test proved to be negative, and the analyst testified that the substance appeared to be sugar (R 1435-1436).

As Appellant notes in his brief, Penn made a number of admissions to law enforcement officers and others. Appellant's first confidante was "Ace" Grinsted, an investigator with the prosecutor's officer, who had met with Appellant at approximately 4:00 or 4:30 p.m., on May 27, 1988 (R 1040). Among Appellant's statements at that time were those to the effect that he had

"just got on crack yesterday" (R 1046) and that he had "known what he was going to do when he got the hammer" (R 1046). Appellant then gave a statement which was tape recorded (R 1063). In this statement, Penn stated that on one of his trips to the house, he had gone to the laundry room and gotten a hammer which he had then used to kill his mother, as she lay sleeping in the bedroom (R 1066-1067, 1076). When asked if he remembered using his key to unlock the laundry room door to get the hammer, Penn replied that the door was usually locked (R 1086). Penn later stated that he had had to unlock the door (R 1087, 1202).

In his second statement, given on May 28, 1988, Penn stated that when he had first returned home that night he had been "straight", and that his head was clear (R 1196). Later in the statement, Penn was asked why he had not gone back to see if his mother was still alive after he had hit her; his response was,

> No, it wasn't like that, it's just, you know, I was just all the time trying to, you know, I guess block out of my mind what I did, you know, **and I wasn't really high or anything.** I was thinking about a lot of stuff and I couldn't, it really wasn't like reality that I did it, you know. It seems hard to accept now, though.

(R 1208). (Emphasis supplied).

In his third statement, given on May 31, 1988, Penn mentioned his wife, Angelika Penn, for the first time (R 1221). Appellant contended that after he had brought his son back to the house at approximately 10:30 or 11:00 p.m., he had put the child to bed and then proceeded to a part of town known as "the lower rentals" (R 1221). There, Appellant met with his estranged wife, and, at such time, asked her if there was any chance of their

getting back together (R 1221). According to Penn, his wife stated that the victim "was in the way" (R 1221). Angelika Penn also allegedly feared that the victim would get custody of the baby, and told Appellant that it would be better if Appellant "got her out of the way" and "got some money and stuff, so that [they] could get away from there." (R 1222). It was after this conversation that Penn returned home and began systematically stealing items, and, at one point, beat his mother to death with a hammer.

Penn's final statement to the authorities occurred on June 8, 1988. At such time, Penn stated that he wanted to talk about Jeff Frearson, whom he contended was responsible for his predicament, in that Frearson had originally gotten him involved with crack cocaine (R 1248); Appellant recounted various crimes which Frearson had allegedly committed and stated that he should be arrested (R 1248-1250). Appellant related more details as to his earlier theft of the jewelry from his mother. According to Penn, his wife had participated in this offense by distracting his mother, while Appellant had taken the necklace and ring (R 1255); Frearson had allegedly agreed to "fence" these items, before also helping to recover them (R 1256). Appellant also wanted to know if anything was going to happen to his wife (R 1283).

As best as can be determined from Penn's various statements, the following is a chronology of the events at issue. Although it apparently was believed that Appellant had taken his son to the beach on the afternoon of May 26, 1988 (R 784), he had

actually taken the baby along with him to Alabama in an abortive attempt to purchase crack cocaine (R 1259-1261). The two returned to Mary Esther at around 10:30 or 11:00, and Appellant put his child to bed (R 1222). Appellant then left and went to "the country", an area where drugs were available, returning with a black man named "Money Bunny", who supplied him with cocaine. At this time, Appellant again entered the house, took a bottle of liquor, and left (R 1065). After again going to "the country", Penn returned home and, at this time, entered his mother's bedroom and took some of her jewelry while she slept (R 1065, 1096, 1235). Appellant then returned to "the country" and, apparently, was alone upon his return to the house (R 1188). At this point, Appellant let himself into the house with his key, using the door in the carport, proceeded to the laundry or utility room, unlocked the door, and took the hammer which he found inside (R 1084-1088, 1202). Penn then went to his mother's bedroom, which was dark, and beat her to death with the hammer as she slept. He then went to the hall bathroom and washed some of the blood off of himself (R 1187, 1200). Appellant subsequently entered the house a number of times after the murder and took such items as a microwave oven, a fur coat and a gun (R 1277, 1280).

SUMMARY OF ARGUMENT

Appellant raises six points on appeal, three in regard to his conviction of first degree murder, and three in regard to his sentence of death. Appellant's primary attack upon his conviction relates to the trial court's denial of his challenge for cause to two prospective jurors; following the denial of these cause challenges, Appellant utilized peremptory challenges on both veniremen, and neither served on the jury which actually convicted him. On appeal, Penn contends not only that the denial of his cause challenge was error, but that, because he utilized all of his peremptory challenges and was denied more, he is entitled to reversal of his conviction. The State disagrees. Appellee contends initially that it was within the discretion of the trial court, who personally observed the demeanor of the prospective jurors, to deny the challenges for cause. Further, Appellee argues that in this case any error **can** be harmless. While it is true that defense counsel requested further peremptory challenges, such request was a general one, simply made due to his belief that a number of prospective jurors had known about the case. Penn was never denied a peremptory challenge to utilize on a particular "objectionable" juror, and he was not forced to accept any "objectionable" juror. This court's prior precedents have consistently required that a defendant in Penn's position demonstrate prejudice, in order to merit relief. There has never been any assertion that the jury which actually convicted Penn was not, in fact, impartial, and no relief is warranted as to this claim. Appellant's other two

attacks upon his conviction are likewise without merit. Sufficient evidence of premeditation was adduced below, and reversible error has not been demonstrated in regard to the trial court's ruling during the cross examination of witness Knutz; the judge made it clear that the defense retained the option of presenting the allegedly excluded evidence during its case in chief. The instant conviction of first degree murder should be affirmed in all respects.

As to the sentence of death, Appellant raises a claim of error in regard to the trial court's questioning of a defense witness at the penalty phase; no claim of error has been preserved for review, and, in any event, no error has been demonstrated. In sentencing Appellant to death, the judge found the existence of two aggravating circumstances and two in mitigation; the State contends that the record indicates the presence of a third aggravating circumstance, that relating to pecuniary gain, which must be considered in any proportionality review of the instant sentence. Appellant offers no attack upon the finding that the instant homicide was especially heinous, atrocious or cruel, but states that it was error for the court to have concluded that the crime had been committed in a cold, calculated and premeditated manner. The State disagrees, inasmuch as there was evidence of the existence of a careful plan or premeditated design. Appellant bludgeoned his mother to death with a claw hammer, during the course of a series of systematic thefts; on the night of the murder, Appellant stole his mother's jewelry, a microwave oven, a fur coat and a number of other

items. There was evidence in the record indicating that, immediately before the murder, Appellant's estranged wife suggested to him that his mother was "in the way", that he should "get her out of the way" and "get some money and stuff", so that the two of them could leave the area. The fact that Appellant immediately bartered the stolen goods for crack cocaine or that, according to his own statements, he allegedly used crack cocaine on the night of the murder, does not mean that he is entitled to a life sentence. Both the judge and jury fully considered possible mitigation in this case, and both determined that the aggravating circumstances outweighed those in mitigation. The death sentence in this case is not disproportionate, when considered in light of this court's prior precedents, and such sentence should be affirmed in all respects.

ARGUMENT

POINT I

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN REGARD TO THE TRIAL COURT'S DENIAL OF DEFENSE COUNSEL'S CHALLENGES FOR CAUSE OF PROSPECTIVE JURORS PARISH AND ALLEN

As his primary attack upon his conviction of first degree murder, Penn contends that the trial court erred in denying defense counsel's challenges for cause of prospective jurors Parish and Allen. Appellant argues that prospective juror Parish was predisposed toward the death penalty and that prospective juror Allen expressed an inability to consider the defense of voluntary intoxication. Because Penn exhausted all of his peremptory challenges, and was denied more, he contends that he is entitled to relief. The State disagrees, and suggests that excusal of these jurors was not error. The State also suggests that, even if error did occur, reversal of either the conviction or the sentence would not be warranted, given the fact that prejudice has not been demonstrated, in that it has not been shown that any objectionable juror had to be accepted by the defense. Due to the importance of this point, the State presents rather a lengthy response, and such response is divided into three sections.

(A) Relevant Facts

As to prospective juror Parish, the record indicates that the venireman initially indicated that his views on the death penalty **could** impair his ability to determine guilt or innocence (R 158). At this point, the judge asked Parish, specifically, if

his beliefs concerning the death penalty would "lessen in [your] mind that burden of proof [involving proof of all elements beyond a reasonable doubt] on the part of the State"; the prospective juror stated, "no" (R 158). During voir dire by the prosecutor, the prospective juror stated that he understood that the death penalty would not **automatically** be imposed following a conviction of first degree murder, whether based on premeditation or felony murder (R 160); Parish likewise acknowledged that as a juror, it would be his duty to weigh aggravating and mitigating circumstances and then determine whether the aggravating outweigh the mitigating (R 160). During examination by defense counsel, Parish stated that he was strongly in favor of the death penalty, that he did **not** believe that every person convicted of first degree murder should get the death penalty, but that he felt that every person convicted of **premeditated** first degree murder should (R 166). Parish did state, however, that he understood that not all murders were first degree and that he would follow the law and consider a defense of voluntary intoxication (R 167-168). Parish did state that he regarded as a "fair statement" the proposition that he was predisposed towards the death penalty and agreed that the defense would have to show a significant reason not to recommend death (R 168); in the same breath, however, Parish stated that he understood that the law required the State to prove aggravating circumstances and that death could not be imposed unless one such circumstance had been proven beyond a reasonable doubt (R 169).

The prosecutor then proceeded to re-examine Parish (R 169). While initially maintaining his position that he would automatically vote for death, following a conviction of premeditated murder (R 170), Parish modified such statement upon questioning by the court. After the judge explained the capital sentencing structure in more detail, the prospective juror stated that he would **not** be compelled to vote for death in a situation in which the State had failed to prove that the aggravating circumstances outweighed the mitigating (R 171). Parish then affirmed that he would follow the law as instructed (R 172). On further questioning by defense counsel, Parish reiterated that he could follow the instructions on the law (R 174). Judge Fleet denied Penn's challenge for cause as to this juror, and the defense then utilized a peremptory challenge to remove him (R 172, 175).

As to prospective juror Allen, the record indicates that during her voir dire, she stated that, in her view, the death penalty should not be automatic following a conviction of first degree murder (R 294). The prosecutor, during voir dire, asked the prospective juror whether she was familiar with the term "crack cocaine" (R 300). She stated that she had read about it in the media and had heard that it was very addictive (R 301). The State Attorney then asked her whether she or any member of her family had "ever suffered from alcohol or drug abuse dependency problem of some sort" (R 301). Ms. Allen stated that her father had been an alcoholic (R 301). She then stated that she "did not know" whether her father's alcoholism would cause

any problems for her in rendering a fair and impartial verdict in this case (R 301). She stated that she probably would not have sympathy towards an individual who suffered from such a situation, but that she really did not know whether she would be disposed to go in the other direction (R 301). Defense counsel likwise questioned Allen on this matter during his voir dire, asking her if she was sympathetic with her father's position or circumstances now; Allen replied that she had forgiven him and understood why he drank, but felt that he could have chosen a better way to deal with his problems (R 305). After further questioning as to her views on alcoholics, defense counsel then asked her specific questions as to her views on drug addiction (R 306).

Prospective juror Allen initially stated that she would not be inclined to find Penn not guilty on the grounds of voluntary intoxication, because she would hold him responsible for being intoxicated in the first place (R 306). When asked if she could follow the law and find Penn not guilty, if he was so intoxicated he could not form the requisite intent, she replied that it would depend on the circumstances (R 307). When asked whether she believed that a person could be so intoxicated that he could not form the intent to commit certain crimes, Allen stated that she believed that a person could be so intoxicated that he did not know what he was doing (R 308). The following exchange then took place:

> Q: If you find that in this particular case, and you find that that was a defense by the Judge's instructions, would you follow the Judge's instructions?

> A: If that was a recognized defense. I don't know. I don't know the points of law.

(R 308).

After another question in the same vein, the court specifically asked Ms. Allen if she would follow the instructions in arriving at her verdict in the case,even if those instructions might be contrary to her personal beliefs; the prospective juror replied, "Well, if I were chosen, I would have to follow the law" (R 308). Upon further questioning by defense counsel, however, Ms. Allen stated that she "did not know" whether she could put aside her beliefs and follow the judge's instructions in this vein (R 309).

The prosecutor then questioned Ms. Allen further (R 310). He emphasized to her that a degree of alcohol or drug consumption less than intoxication was not a defense, a proposition with which she agreed (R 310). He then advised her that premeditation and specific intent were elements of the crimes of murder and robbery, respectively, and advised her that "when a mental state is an essential element of a crime and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist and, therefore, the crime could not be committed"; Ms. Allen indicated that she understood (R 311). The following then transpired:

> Q: Then he [the judge] would tell you that if you find from the evidence that the defendant was so intoxicated from the voluntary use of alcohol and/or drugs as to be incapable of forming the premeditated design to kill, or you have reasonable doubt about it, you should find the defendant not guilty of first degree premeditated murder, and that if you find from the evidence that the defendant was so intoxicated from the use of alcohol or drugs as to be incapable of

forming a specific intent to permanently deprive the victim of her property, or you have a reasonable doubt about it, you should find the defendant not guilty of robbery with a deadly weapon. He would tell you then that voluntary intoxication is not a defense to second degree murder, third degree murder, or manslaughter. Mr. Loveless, in his questions, asked you whether you would vote not guilty?

A: Yes.

Q: As you see from the instruction of law, if you find that there was not a specific intent to kill on the part of an individual but you find that he committed a homicide, you wouldn't vote not guilty. You would vote second degree murder, or manslaughter, or third degree murder. Now that I have read you the entire instruction of law, do you feel that you could follow that law despite any personal beliefs you have about a person's accountability for his actions in drinking or in taking drugs?

A: I think so.

* * * * * * * * * * *

Q: Do you agree with the proposition that a person could be so intoxicated -- so intoxicated -- that he is incapable of forming the specific intents that are a part of the instruction?

A: Yes.

Q: The specific intent to kill, the specific intent to rob or take property?

A: Yes.

Q: So you do agree with that as a statement of law -- the defense of voluntary intoxication -- and will you follow it if Judge Fleet tells you that is the law of this case?

A: Yes.

Q: Okay, and will you consider all of the facts and circumstances of this case in applying that instruction of law to this case?

A: **Yes.**

(R 311-313) (Emphasis supplied).

Defense counsel then returned for further questioning, beginning by asking,

> Q: Ms. Allen, are you saying now that Mr. Elmore has gone through all of that on voluntary intoxication, that you have no problem about following the Judge's instructions?
>
> A: Yes.

(R 313).

Ms. Allen then clarified that she understood voluntary intoxication to be a defense to first degree murder, but not to lesser degrees of homicide (R 313-314). When counsel questioned her as to the defense's applicability to the charge of robbery, Ms. Allen, however, stated that she "really could not say", in that Penn would be responsible for being intoxicated (R 314). Questioning ceased at that point, and defense counsel challenged Ms. Allen for cause (R 314). Judge Fleet denied the challenge, finding that, as to the legal questions which were posed "which correctly stated the law", the prospective juror had given answers which "would not support a challenge for cause." (R 314). Defense counsel then exercised a peremptory challenge and Ms. Allen was excused (R 315).

Voir dire then continued into the next day. After defense counsel exercised a peremptory challenge as to prospective juror Barbara Tharpe, the court announced that such was the defense's tenth challenge (R 577-578). After the examination of two more venirepersons, the State asked if the defense could be directed

to announce the existence of any potential challenge for cause first, before the State exercised a peremptory, in that the defense had used all of its peremptory challenges (R 606-607). Four more venirepersons were then examined, one being excused on a State peremptory and the remainder for cause (R 607-648); at this point, apparently, eleven of the twelve jurors were already seated. At this juncture, defense counsel then made the following motion,

> Your Honor, can I make a statement for the record? Based on upon the amount of publicity that's involved, Your Honor, I would request the Court grant me additional challenges -- peremptory challenges. As the Court is aware, I have used all I had and if, in addition, you said that the last one, two, three witnesses [sic] have been challenged for cause, most of them because of their knowledge of this particular case. I think, Your Honor, that every person we have talked to the last two days has known about the case and, in all fairness, I think that I should be granted additional challenges.

(R 648-649).

The judge then asked defense counsel how many more challenges he wanted, and counsel eventually agreed that ten would be sufficient (R 649). The State objected to this request, and it was denied (R 649-650).

Following this ruling, a new panel of twelve prospective jurors was called, and individual voir dire began (R 650). The first three venirepersons were excused for cause based upon their knowledge of the case (R 661-668). At this point, prospective juror Belarde was examined (R 668-679). In response to questions by the court, Ms. Belarde stated that, while she was not opposed to the death penalty, she thought that it "should be the last

resort we should resort to." (R 668). During examination by the prosecutor, the following exchange took place:

> Q: Do you feel you know anything about the facts or circumstances about this case?
>
> A: No. I just read it in Sunday's newspaper that there was going to be a case heard which was Monday, and I knew that was the case I was going to be on.
>
> Q: I see. Is that the only newspaper article you've read about the case?
>
> A: Yes, and I tried to avoid it.
>
> Q: Okay. That article which I think basically told what the charges were and the case was coming to trial.
>
> A: Monday.
>
> Q: Did anything about that article effect your ability to render a fair and impartial judgment in this case?
>
> A: No, sir.

(R 671-672).

During examination by defense counsel, it was brought out that Ms. Belarde accepted the possibility that a person could be so intoxicated on alcohol or drugs so as to do something that he did not intend (R 676). Further, as to publicity, Ms. Belarde reiterated that she had not read anything about the case at the time of the incident, not reading anything at all until the Sunday article described above; this article simply said that the case was coming up for trial (R 677). At the conclusion of examination, the State announced that it accepted the jury (R 679); defense counsel stated that he had no challenge for cause (R 679). At this point, the jury was sworn (R 679).

(B) Argument on the Merits

As noted, Appellant contends that it was error for the court to have denied his challenges for cause to prospective jurors Parish and Allen; neither prospective juror ended up sitting on Appellant's jury. The State respectfully suggests that it is clear that no error has been demonstrated as to venireman Parish; presumably, under this court's decision in **Hill v. State**, 477 So.2d 553 (Fla. 1985), any error in this regard would only effect the death sentence. **Hill, supra**, (wrongful denial of defense challenge for cause as to juror who was predisposed as to death penalty resulted in reversal of death sentence only; conviction of first degree murder upheld). The primary cases relied upon by Penn - **Hill, O'Connell v. State**, 480 So.2d 1284 (Fla. 1985), and **Thomas v. State**, 403 So.2d 371 (Fla. 1981) - are distinguishable; this case does, however, bear similarity to **Fitzpatrick v. State**, 437 So.2d 1072 (Fla. 1983).

This court recently reiterated the broad discretion afforded a judge in passing upon challenges for cause. Thus, in **Cook v. State**, 542 So.2d 964, 969 (Fla. 1989), this court held,

> There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors. In fact it has been said:
>
> > There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the

> empanelling of a jury (citations omitted).

Such holding, of course, is consistent with such precedents of this court as **Davis v. State**, 461 So.2d 67, 70 (Fla. 1984), in which this court observed,

> The competency of a challenged juror is a mixed question of law and fact, the determination of which is within the trial court's discretion. **Christopher v. State**, 407 So.2d 198 (Fla. 1981), **cert. denied**, 456 U.S. 910, 102 S.Ct. 1761, 72 L.Ed.2d 169 (1982). Manifest error must be shown before a trial court's ruling will be disturbed on appeal.

Id.

The **Davis** case also contains the following language:

> Prospective jurors are frequently ambivalent, and their answers, as well as the questions asked of them, are, sometimes, not models of clarity. In such instances, as here, it can be argued that the words on the cold record have several meanings and are subject to several interpretations. It is of great assistance to an appellate court if a trial court states on the record the reasons for granting or not granting a challenge for cause, and we encourage trial court's to do so.

Davis, 461 So.2d at 70.

The sentiments expressed by this court in **Davis** are, of course, consistent with those enunciated by the United States Supreme Court. In **Wainwright v. Witt**, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court reaffirmed the deference due a trial judge's rulings as to these matters, and, citing an earlier precedent, wrote,

> The manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot be spread upon

> the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.

Witt, 469 U.S. 429, n.9.

Keeping these precedents in mind, Penn has failed to demonstrate a clear abuse of discretion in regard to Judge Fleet's denial of the defense challenge for cause as to prospective juror Parish. While it is true that Parish, at times during voir dire, gave answers which, **standing alone**, can be said to evidence a predisposition toward the death penalty, following a conviction of premeditated first degree murder, the clear meaning of the above cases would seem to be that one cannot simply look to isolated excerpts of a venireman's examination. Parish's statements in this vein would seem to have resulted from an incomplete understanding of the meaning of premeditation and of the mechanics of Florida's capital sentencing structure. Once it was explained to him that a death sentence could not be recommended unless the State had proven the existence of an aggravating circumstance and that such circumstance or circumstances outweighed those in mitigation, the prospective juror stated that he could follow the law as instructed and not feel "compelled" to vote for death (R 171-172, 174). Thus, this case would seem distinguishable from **O'Connell** or **Thomas**, in which the prospective jurors at issue were adamant in their avowed intent never to recommend life imprisonment under any circumstance.

Additionally, as argued before, this case is comparable to **Fitzpatrick**, in which this court held that the trial court's

denial of the challenges for cause at issue had not been error. The venirepersons in that case had, upon initial examination, stated that the death sentence would be appropriate "for anyone who committed murder" or "any time a police officer is shot in the line of duty." This court noted, however, that:

> When the prosecuting attorney explained that under Florida law the death penalty is not automatic under any situation and asked if they would be able to follow the court's instructions and weigh the aggravating circumstances against the mitigating circumstances in making their recommendation, they all said they could.

Fitzpatrick, 437 So.2d at 1075.

This court then concluded,

> A judge need not excuse such a person unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty and is therefore unable to follow the judge's instructions to weigh the aggravating circumstances against the mitigating circumstances.

Id. at 1076.

It cannot be said that Parish met the above standard and, in contrast to the situation in **Hill**, accordingly, it cannot be said that a reasonable doubts exists as to whether Parish could render an impartial recommendation as to punishment, **see Singer v. State**, 109 So.2d 9 (Fla. 1959), **Lusk v. State**, 446 So.2d 1038 (Fla. 1984), in that an adequate basis exists in the record to support the ruling at bar. **Cf. Tibbs v. State**, 397 So.2d 1120 (Fla. 1981).

A similar result obtains as to the denial of a challenge for cause as to prospective juror Allen. Again, while it is clear that the prospective juror initially displayed some

misunderstanding of the nature and function of the defense of voluntary intoxication, when questioned by the court and prosecutor, she stated that she could put aside any personal feelings and follow the law as instructed (R 308, 310-313). The judge, in denying the cause challenge, observed that, apparently, he found some of the defense questions to be inaccurate statements of the law (R 307, 314-315). The fact that defense counsel was able to subsequently elicit a response consistent with an inability to consider such defense as to the charge of robbery should not be determinative, in that the trial court, in passing upon a challenge for cause, must consider the totality of the prospective juror's answers, and not simply the latest in time. Based upon a review of all of Ms. Allen's examination, it cannot be said that a clear abuse of discretion has been shown in regard to the denial of the defense challenge for cause. **Cf. Cook, supra; Davis, supra.** The primary cases relied upon by Appellant - **Henninger v. State**, 251 So.2d 862 (Fla. 1971), and **Moore v. State**, 525 So.2d 870 (Fla. 1988) - are distinguishable.

In **Henninger**, the issue was whether it had been error for the court to **grant** a state challenge for cause. The fact that, in such case, this court observed that it was not error for the court to have granted such challenge does not mean that any prospective juror who offers arguably similar testimony **must** be excused; such holding would obviously be totally at odds with the recognition that a trial judge enjoys wide discretion in this area. In **Moore**, this court concluded that it had been error for the court to have denied a challenge for cause as to a

prospective juror who stated that he "had problems" with the insanity defense, that he felt that it was "overused" and that his concern as to whether the defendant would be set free, if found to be insane, "would probably" prevent him from following the instructions as to the insanity defense. The State would respectfully suggest that whatever misunderstandings Ms. Allen may have harboured as to the defense of intoxication, she **never** stated or implied that she could not follow the law or instructions, and, indeed, stated affirmatively that she could; regardless of her final exchange with defense counsel, Ms. Allen had stated that she recognized that voluntary intoxication could be a defense to felony murder with robbery as the underlying offense (R 311-312, 313). Because Ms. Allen did not evince as absolute an opposition to the defense at issue, as did the prospective juror in **Moore**, **Moore** is distinguishable. **Cf. Parker v. State**, 456 So.2d 436 (Fla. 1984) (not error to deny challenge for cause to juror who stated that home had recently been burglarized and who feared crime in the community, where such juror stated that she could follow instructions). Accordingly, it cannot be said that a reasonable doubt exists as to whether Allen could render an impartial verdict as to guilt, **see Singer, supra**, **Lusk, supra**, in that an adequate basis exists in the record to support the ruling at bar. **Cf. Tibbs, supra.**

(C) <u>Argument as to Harmless Error</u>

Finally, the State would respectfully contend that if error occurred as to the denial of the cause challege as to either juror (or both), any such error would be harmless. In his brief,

Appellant contends that such a finding cannot be made, in light of this court's decision in **Hill v. State, supra**. In **Hill**, this court held that the erroneous denial of a challenge for cause could not be harmless, "provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." **Id.** at 556. This court stated that the basis for such holding was that it was reversible error "for a court to force a party to use peremptory challenges on persons who should have been excused for cause." Appellee respectfully submits that this holding should not be construed in an overly literal manner, so as to defeat its purpose. Precedent of this court, both before and after **Hill**, has dictated that, in order to mandate reversal in comparable circumstances, a defendant **still** must demonstrate some prejudice, usually evidenced by the fact that, due to the denial of a subsequent requested peremptory, an objectionable juror has actually sat upon the jury which convicted the defendant. Inasmuch as such cannot be said to have occurred **sub judice**, harmless error has not been demonstrated.

The principle that this type of prejudice is required for relief was recognized as early as 1912, when, in **McRae v. State**, 62 Fla. 74, 57 So. 348 (1912), this court noted that, "Although it does appear that the defendant exhausted his statutory number of peremptory challenges, it does not appear that any objectionable jurors were selected after the defendant's challenges were exhausted." **Id.** 57 So. at 349. Needless to say, relief was denied in **McRae**. This court expounded upon the **McRae**

holding in **Young v. State**, 85 Fla. 348, 96 So. 381, 383 (1923), and, in language pertinent to the case at bar, stated,

> The **McRae** case definitely holds that the action of the court in holding a juror to be qualified over defendant's objection works no injury to the accused if the objectionable venireman does not serve, even though the accused exhausted his statutory number of peremptory challenges, when it does not also appear that any objectionable juror was selected after the defendant's challenges were exhausted . . .
>
> In a case where an objectionable juror is challenged by the defendant for cause, and the court wrongfully overrules the challenge, and the defendant uses one of his peremptory challenges to excuse the objectionable venireman, the record should show that the jury finally empanelled contained at least one juror objectionable to the defendant, who sought to excuse him peremptorily, but the challenge was overruled.

Id. 96 So. at 383.

Applying **Young**, it is clear that Appellant Penn has failed to demonstrate sufficient prejudice to merit relief.

Both **McRae** and **Young** were relied by this court in **Rollins v. State**, 148 So.2d 274 (Fla. 1963), another precedent highly relevant to this cause. In **Rollins**, the defendant contended that it had been reversible error for the court to have denied his cause challenge to venireman Cribbs, Cribbs having stated that "he did not see how he could recommend mercy to any one of the three [defendants] who might be shown by the evidence to have committed the murder which led to the prosecution." Rollins used all of his peremptory challenges and, after such point, one further venireman, Braxton, was examined. Braxton indicated that he could recommend mercy, and no challenge for cause was made;

Braxton served on the jury. This court affirmed the conviction, and found **Singer** inapplicable as to the merits of the cause challenge, observing, "We have never held that to be qualified a juror must state that he will grant mercy to one shown to be guilty of the crime of the murder with which he is charged." **Rollins**, 148 So.2d at 276. This court also held, however, citing to **McRae** and **Young**,

> More important, even assuming that the denial of the challenge for cause was error, Appellant Rollins has wholly failed to show that he was prejudiced by being required to accept an objectionable juror because of the denial of a challenge for cause directed to Cribbs and resultant use of the sixth of his ten peremptory challenges. **This he is required to do in order to demonstrate reversible error.** (citations omitted).

Rollins, 148 So.2d at 276 (Emphasis supplied).

This court then noted that "after he exhausted his quiver of peremptory challenges", Rollins had **still** never moved to challenge Braxton, who sat on the jury. In the case at bar, after exhausting his peremptories, Penn **still** never moved to challenge any juror who sat on the jury and, despite his general request for more peremptories, due to "publicity", it is clear that no basis for challenge on that ground existed as to the twelfth juror. While **Hill** did not cite the three precedents above, inasmuch as **McRae**, **Young** and **Rollins** have never been expressly overruled, Appellee maintains that they are still good law.

In **Hill**, this court did cite to two Florida decisions - **Singer, supra**, and **Leon v. State**, 396 So.2d 203 (Fla), **cert.**

denied, 407 So.2d 1106 (Fla. 1981).[1] It should be noted immediately that **Singer** says very little as to "harmless error"; it should also be noted, however, that **Singer** was unquestionably prejudiced by the denial of his challenge to juror Shaw, **in that juror Shaw then proceeded to serve on the jury which convicted him.** In **Leon**, the Third District reversed the conviction at issue, finding that it had been error to deny the defendant's challenge for cause as to a prospective juror. Although noting that defense counsel did not subsequently utilize a peremptory challenge on this juror, thus suggesting that the juror in question served on the jury, the court predicated its reversal upon the fact that "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges." **Id.** 396 So.2d at 205. In support of this proposition, the Third District cited to **Swain v. Alabama**, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 959 (1965), and **Stroud v. United States**, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed.2d 103 (1919).

Leon, however, would seem to have been an extremely short-lived case. Thus, in **Anderson v. State**, 463 So.2d 276 (Fla. 3rd DCA 1984), **review denied**, 475 So.2d 693 (Fla. 1985), **cert. denied**, ____ U.S. ____, 108 S.Ct. 2870, 101 L.Ed.2d 905 (1988), the Third District, in essence, nullified the **Leon** holding beyond

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[1] This court also cited to a number of decisions from other state courts. In **Auriemme v. State**, 501 So.2d 41, 43 (Fla. 5th DCA 1986), the Fifth District seemed to state that such citation was inappropriate.

all recognition. The issue in **Anderson**, of course, was the wrongful denial of a defense challenge for cause. While finding that, pursuant to **Leon**, error had indeed occurred, the Third District was very explicit as to why reversal was not mandated,

> . . . No reversible error is made to appear because (1) the defendant exercised a peremptory challenge on this juror and consequently the juror did not sit on this case as did the challenged juror in **Leon, supra**, and (2) the defendant exhausted his peremptory challenges, but made no showing below, as required by **Young v. State**, 85 Fla. 348, 354, 96 So. 381, 383 (1923), "that the jury finally empanelled contained at least one juror objectionable to the defendant, who sought to excuse him [the juror] peremptorily but the challenge was overruled." Stated differently, the defendant has failed to demonstrate that "he was prejudiced by being required to accept an objectionable juror because of the denial of the challenge for cause . . . [which] he is required to do in order to show reversible error." **Rollins v. State**, 148 So.2d 274, 276 (Fla. 1963).

Anderson, 463 So.2d at 277.

Lest there be any doubt as to its holding, and the reasons therefore, the Third District then went on:

> Indeed, under circumstances identical to those in the instant case, **where the defendant exhausted his peremptory challenges but did not attempt to and was never denied a peremptory challenge on a single member of the jury who actually served on the case,** the Florida Supreme Court has held that the erroneous denial of a challenge for cause of a prospective juror who, in fact, did not serve on the jury, as here, cannot constitute reversible error. **Rollins v. State, supra; Young v. State, supra; McRae v. State**, 62 Fla. 74, 57 So. 348 (1911). **The theory behind these cases is that a defendant has in no way been harmed by such a ruling where he**

> **makes no complaint below about, and in no way seeks to strike any juror who actually served on his case.**

Anderson, 463 So.2d at 277 (Emphasis supplied).

The Third District then observed that, in light of **Hoffman v. Jones**, 280 So.2d 431 (Fla. 1973), it was constrained to follow the controlling precedent of this court. It is worth noting that the Third District has consistently adhered to the **Anderson** approach and has required a showing of prejudice in this regard. **See, e.g., Jefferson v. State**, 489 So.2d 211 (Fla. 3rd DCA 1986) (defendant "forced to accede to an objectionable juror" due to loss of peremptory entitled to relief); **Price v. State**, 538 So.2d 486 (Fla. 3rd DCA 1989) (same); **Farias v. State**, 540 So.2d 201 (Fla. 3rd DCA 1989).

Anderson, additionally, is in accord with the **present** position of the United States Supreme Court, and the State would respectfully suggest that there is a reason why **Anderson** was pending before the highest court for three years; although this court denied review in 1985, the United States Supreme Court did not deny certiorari until June 27, 1988. On June 22, 1988, the United States Supreme Court rendered its decision in **Ross v. Oklahoma**, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). The issue in **Ross** is virtually identical to that **sub judice**. In such case, the defendant had moved to challenge a prospective juror for cause, on the grounds that such juror would automatically vote for the death penalty; when such challenge was denied, the defendant then exercised a peremptory challenge on that venireman. Ross then used all of his other peremptory

challenges. On appeal to the Oklahoma Court of Criminal Appeals, Ross complained of being "forced" to use this peremptory challenge; such court found no basis for relief, given the fact that there was "nothing in the record to show that any juror who sat on the trial was objectionable." The United States Supreme Court granted review to consider the Sixth and Fourteenth Amendment implications of the trial court's refusal to remove the prospective juror for cause, and Ross' subsequent use of a peremptory.

The Court immeditately noted that had the objectionable juror actually sat on the jury, and had Ross preserved the claim of error, he would be entitled to relief. The Court then noted, however, that, of course, the prospective juror had not sat on the jury, and that any claim that the jury had not been impartial had to focus upon those jurors who had actually sat. In that none of the jurors who actually sat had been unsuccessfully challenged for cause, and in that Ross had otherwise failed to demonstrate any lack of impartiality, he was entitled to no relief. The Court then considered Ross' claim that the mere fact that he had "wrongfully" been "forced" to utilize a peremptory challenge entitled him to relief. The Court stated absolutely, however,

> We reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. **Gray, supra**, at ____, 95 L.Ed.2d 672, 107 S.Ct. 2045; **Swain v. Alabama**, 380 U.S. 202, 215, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965); **Stilson v. United States**, 250 U.S. 583, 586, 63 L.Ed.2d 1154,

> 40 S.Ct. 28 (1919). They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. (citations omitted).

Ross, 101 L.Ed.2d at 90.

Finally, the Court considered Ross' argument that his due process rights had been violated, in that, due to the trial court's erroneous ruling, he had been "arbitrarily deprived" of his full complement of peremptory challenges allowed under Oklahoma law. The Court likewise rejected this argument. While noting that in **Swain**, it had held that the denial or impairment of the right to exercise peremptory challenges was "reversible error without a showing of prejudice", the Court still concluded that the right to peremptory challenges was only "denied or impaired" if the defendant did not receive "that which state law provides." **Ross**, 101 L.Ed.2d at 91. The Court then noted that, under Oklahoma law, a defendant who disagreed with the court's ruling on a challenge for cause, was required to use a peremptory challenge on that prospective juror, in order to preserve any claim of error. Even then, a defendant would only be entitled to reversal if he had exhausted all peremptory challenges and an incompetent juror was forced upon him. The United States Supreme Court concluded that there was nothing arbitrary or irrational about these requirements and, inasmuch as Ross had failed to demonstrate that he was entitled to relief, no due process violation existed. Ross had "received all that was due under Oklahoma law."

Thus, to the extent that this court's holding in **Hill** is derived from **Leon**, or **Leon's** interpretation of **Swain**, it is clear that such holding must be re-examined. The State would further note that, even following **Hill**, this court has looked to the existence of prejudice or the seating of a partial juror, in resolving claims of this nature. Thus, in **Hamilton v. State**, 547 So.2d 630 (Fla. 1989), this court reversed the conviction at issue due to the trial court's erroneous denial of a challenge for cause, where the defendant used all of his peremptory challenges; this court noted that the defendant had requested an additional peremptory challenge to strike this prospective juror, and that such challenge had been denied, resulting in the partial juror sitting on the jury. Additionally, in **Pentecost v. State**, 545 So.2d 861 (Fla. 1989), this court recently rejected a claim of error in regard to the trial court's denial of a challenge for cause. Significantly, this court wrote,

> Pentecost has demonstrated no prejudice on this issue. When the court denied these challenges for cause, he had numerous peremptory challenges remaining, but chose not to exercise any on these two people. To show reversible error, a defendant must show that all peremptories had been exhausted **and that an objectionable juror had to be accepted. Rollins v. State**, 148 So.2d 264 (Fla. 1963). **See also Nibert v. State**, 508 So.2d 1 (Fla. 1987). Pentecost cannot meet this test.

Pentecost, 545 So.2d at 863, n.1 (Emphasis supplied).

To the extent that any conflict exists between **Pentecost** and **Hill**, **Pentecost** is obviously the most recent expression of this court, and, by virtue of its citation to **Rollins**, more in conformity with past precedent on this subject.

On the basis of all the above precedents, the State's position is basically this - in order to demonstrate reversible error in regard to the wrongful denial of a challenge for cause, a defendant must do more than simply go through the motions of asking for more peremptory challenges and suffering an adverse ruling; some showing of **actual** prejudice is required. The mere act of requesting more peremptories is, by itself, meaningless. **Cf. Fitzpatrick v. State**, 437 So.2d at 1076 ("Appellant's argument that he had an insufficient number of peremptory challenges is premised on the assumption that he unnecessarily used four of them to excuse the above-mentioned veniremen. At oral argument, appellant's counsel conceded that there is nothing in the record to show that if appellant had been given more he would have used them"). In this case, counsel's request for more peremptories was general in the extreme; he did not even know how many he wanted. Counsel's request was **not** made because he wished to strike a particular partial prospective juror. Rather, it was simply made due to counsel's perceived view that the prospective jurors examined at that time had seemed to have had a great deal of knowledge about the case (R 648-650).

Whatever merit this observation may have had, the denial of the requested peremptories had **no** effect upon the partiality of Penn's jury. At this juncture, eleven jurors had already been seated; as it was, only four more prospective jurors would be examined before the twelfth juror would be seated (R 650-679). Of these four prospective jurors, three were excused for cause (R 661-668); obviously, the fact that defense counsel's request for

additional peremptories was not granted had no effect upon these events. At this point, prospective juror Belarde, who was to become the twelfth juror, was examined; it is clear from her testimony that the defendant would have had no basis, or strategic reason, to challenge her for any reason, in that she knew nothing of the case and seemed reluctant to recommend the death sentence (R 668-672). No basis for relief exists.

This court held in **Palmes v. State**, 397 So.2d 648, 653 (Fla. 1981), that no judgment would be reversed unless any error committed therein was prejudicial to the substantial rights of the appellant. That showing has not been made here. It cannot be said that, as a direct result of the judge's ruling on Penn's challenges for cause, or upon Penn's subsequent request for additional peremptories, Penn has suffered harm. Penn was not "forced to accede to objectionable juror", **see Anderson, Rollins, Pentecost,** nor was he denied a peremptory challenge to strike a particular partial prospective juror. **See Hamilton, supra.** There has not even been an **allegation** that the jury which convicted Penn was not, in fact, completely impartial. **Cf. Ross, supra.** The State has met its burden of demonstrating harmless error. **See State v. DiGuilio**, 491 So.2d 1129 (Fla. 1986). For all of the reasons expressed, the instant conviction of first degree murder and sentence of death should be affirmed in all respects.

POINT II

DENIAL OF APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WAS NOT ERROR; SUFFICIENT EVIDENCE OF PREMEDITATION EXISTS, SUCH THAT THIS COURT SHOULD AFFIRM PENN'S CONVICTION OF FIRST DEGREE MURDER

Appellant argues on appeal that his conviction of first degree murder must be reversed, because the State failed to adduce sufficient evidence of premeditation. Appellant contends that "[a]t best, the State proved nothing more than a second degree murder", given the fact that this was an "impulsive" crime, committed while Penn was "intoxicated on crack cocaine and unable to form a premeditated designed to kill." (Initial Brief at 30-32); Appellant relies upon **Forehand v. State**, 126 Fla. 464, 171 So. 241 (1936). This State finds Appellant's reliance upon **Forehand** misplaced, and suggests that the instant conviction of first degree murder should be affirmed in all respects.

Although, as noted, Appellant contends that his murder of his mother was an "impulsive" act, Appellee respectfully suggests that the record clearly indicates otherwise. Far from being "impulsive", the murder was a deliberate act committed during a series of thefts; while, as Appellant notes, the jury did not convict Penn of robbery, as part of a felony murder prosecution, they did convict him of the lesser included offense of grand theft, as well as of first degree premeditated murder (R 1722). The victim in this case was beaten to death with a claw hammer. Thirty-one (31) separate blows were inflicted, most to the head and scalp (R 937-938). The pathologist testified that the victim could have remained alive for thirty to forty-five minutes, as the blows were administered (R 979).

This court has consistently held that evidence from which premeditation may be inferred includes such matters as the manner in which the homicide was committed, the nature of the weapon used and the nature and manner of the wounds inflicted. **See Larry v. State**, 104 So.2d 352 (Fla. 1958). This court has consistently upheld convictions of first degree murder, in capital cases, in which the victim has been killed by multiple blows, or stabbings, with a deadly weapon. **See, e.g., Sireci v. State**, 399 So.2d 964 (Fla. 1981) (victim beaten with lug wrench and stabbed fifty-five times); **Heiney v. State**, 447 So.2d 210 (Fla. 1984) (victim beaten to death with a claw hammer); **Nibert v. State**, 508 So.2d 1 (Fla. 1987) (victim stabbed seventeen times); **Roberts v. State**, 510 So.2d 885 (Fla. 1987) (victim bludgeoned to death with baseball bat). Indeed, in **Buford v. State**, 403 So.2d 943, 949 (Fla. 1981), this court went so far as to hold,

> Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. **See Rhodes v. State**, 104 Fla. 520, 140 So. 309, 310 (1932).

See also Thomas v. State, 456 So.2d 454 (Fla. 1984) (proper for jury to assume that defendant intended consequences of his actions where he attacked victim with lethal force). In light of the above pertinent precedents, it is clear that Penn's conviction should be affirmed.

Appellant seeks, however, to avoid the application of these cases by arguing, on appeal, that he was too intoxicated to have

formed the requisite intent. The problem with this argument is that it is one that should be presented to a jury, and not to an appellate court. In this case, such argument **was** presented to the jury and was rejected by them. No good cause exists for this court to reweigh the evidence in Appellant's favor, even assuming that such was this court's task on appeal. As this court has consistently recognized, whether or not the evidence shows a premeditated design to commit murder is a question of fact, which may be established by circumstantial evidence. **See Preston v. State**, 444 So.2d 939 (Fla. 1984). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is one for the jury to determine, and where there is substantial competent evidence to support the jury verdict, the verdict will not be reversed on appeal; the circumstantial evidence standard does not require the jury to believe the defendant's version of facts on which the State has produced conflicting evidence, and the State, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. **See Cochran v. State**, 547 So.2d 928 (Fla. 1989); **Bello v. State**, 547 So.2d 914 (Fla. 1989). In **Songer v. State**, 322 So.2d 481 (Fla. 1975), cited with favor in **Cochran**, this court specifically rejected the contention that a defendant's interpretation of circumstantial evidence, i.e. that the defendant was too intoxicated to form the requisite intent, had to be accepted unless specifically contradicted.

In the case at bar, while there undoubtedly are statements from Penn which support his hypothesis that he was too

intoxicated to commit the offense, that he did not know what he was doing or that it was "a blur", there was definitely contrary evidence adduced. Thus, Penn told State Investigator Grinsted that he **had** "known what he was going to do when he got the hammer." (R 1046). It is clear that Penn killed his mother in the midst of several "raiding expeditions". Prior to the murder, he had gone into her bedroom and taken some of her jewelry while she slept (R 1065, 1096, 1235); after the murder, he returned to the house and, at various intervals, took the microwave oven, a fur coat and a gun (R 1277, 1280). Penn told the police that when he returned to the house to murder his mother, he had to unlock the carport door, enter the house, unlock the door to the laundry room, enter the laundry room, take the claw hammer and then proceed to his mother's bedroom, where he bludgeoned her to death as she slept (R 1084-1088, 1202). At one point in his statements, Penn stated, when asked why he had not gone back to see if his mother was alive, that he "wasn't really high or anything." (R 1208).

Inasmuch as it is well established that premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before, **see Sireci, supra**, it should be undisputed that Penn had more than adequate time to form the intent to murder his mother. He could have formed such intent before he reached the house itself, at the time that he unlocked the carport door, at the time that he unlocked the laundry room door, at the time that he took the claw hammer or at the time that he entered his mother's bedroom, carrying the

hammer. A "decision" at any of the above times would be sufficient. **See Middleton v. State**, 426 So.2d 548, 550 (Fla. 1982) (defendant's claim that shooting was "snap decision" insufficient basis to invalidate conviction; "that the decision was made at all is sufficient to prove premeditation"). Whatever else he may have said, Penn did state that he "knew what he was going to do" when he went to get the hammer, and his later actions speak for themselves. The jury had a sufficient basis to reject his claim of drug-induced intoxication. **Cf. Jennings v. State**, 453 So.2d 1109, 1113 (Fla. 1984) (evidence showed that defendant had more than enough time to form the intent to kill the victim and there was substantial competent evidence in the record that he was not so intoxicated that he could not form the specific intent to kill). The primary case relied upon by Appellant, **Forehand v. State**, in which this court reduced a conviction of first murder to second degree, wherein the homicide occurred during a fight in which the defendant's brother was killed, is completely distinguishable.

It is likely that the jury, in rejecting Penn's contention of "intoxication", noted how self-serving and unsubstantiated such allegation was. Thus, despite the fact that the infamous "Money Bunny" was allegedly supplying Penn with crack cocaine throughout this incident, it must be noted that "Money Bunny" was never called to testify. Significantly, while there was a bag containing white powdery substance found in Appellant's vehicle, such bag proved to contain **sugar** and not cocaine (R 1435-1436). Those persons who came into contact with Appellant later on the

day of the murder - the clerk at the department store, the owners of the pawn shops and the police officers who arrested him - uniformly stated that Appellant had not seemed intoxicated or under the influence of drugs at the time (R 1154, 1133-1139, 1139-1144, 1145-1151, 1037); of course, at the time that Appellant first sighted the police officers intending to arrest him, he had the presence of mind to lead them on a high speed chase and to seek to avoid arrest. Even earlier, however, it must be noted that at the time Appellant left the house with his final "load", carrying a paper bag "stuffed with items", he had the presence of mind to jump over the sprinklers, which were on, so as not to get wet (R 1165). Appellant, of course, had previously taken the time to clean himself off in the bathroom, wiping his mother's blood off of him (R 1187, 1200); he also, apparently, recognized the necessity of hiding the murder weapon, which was subsequently found under the carpet in the other bathroom (R 1358-1359). The jury was not contrained to accept Appellant's tale of intoxication, which was at odds with some of his later statements and with his actions at the time.[2] The instant conviction should be affirmed in all respects.

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[2] The defense did not put on any evidence at the trial. Penn did, however, call an expert witness at the penalty phase, Dr. Bingham, who hypothesized about Penn's mental state at the time of the offense, assuming, for purposes of argument, that Penn had ingested ten grams of crack cocaine at the time (R 1744); the doctor testified that, of course, he had no actual basis to suppose this, aside from Appellant's statement (R 1757). Significantly, Dr. Bingham stated that Penn had never told him that he had not intended to kill his mother and, further, the defense expert stated that he was unable to make any statement as to whether Penn would have been able to form the specific intent to kill at the time (R 1766, 1770).

POINT III

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN REGARD TO THE TRIAL COURT'S SUSTAINING OF A STATE OBJECTION DURING DEFENSE CROSS EXAMINATION OF WITNESS KNUTZ

The State called a local reporter, Robert Knutz, as its last witness at trial (R 1523-1535). On direct examination, the State adduced evidence concerning a letter which Knutz had received from Appellant in July of 1988, approximately forty-five days after the murder (R 1524). After receiving the letter, Knutz called Appellant, who was then incarcerated, to confirm that he had in fact written it (R 1525); Appellant described the letter in sufficient detail to convince the reporter (R 1526). The letter was introduced into evidence, as State's Exhibit #94, and was read to the jury in its entirety (R 1526-1529). In such letter, Penn described his troubles with drugs and the murder of his mother, and stated that he hoped that his story would deter others from turning to drugs (R 1526); Penn also expressed remorse for his crime and stated that he deserved to die (R 1528).

In response to the prosecutor's questions, Knutz stated that he had asked Penn some general questions during their conversation, and that Penn had also volunteered some information (R 1529). He stated that he has asked Penn if he understood the consequences of the letter being published; Penn stated that he did (R 1529). The following exchange then took place:

> Q [by the prosecutor]: Mr. Knutz, did he in any way disclaim responsibility for the murder of his mother?

> A: No. No, I would say not.
>
> Q: Did he in any way indicate that anyone else had participated in the murder of his mother?
>
> A: He didn't indicate that anyone had participated in the crime, no.
>
> Q: Did he indicate he had any suspicion that anyone had participated in the crime or had been in the house when his mother was killed?
>
> A: No.
>
> MR. ELMORE: Thank you. Nothing further.
>
> JUDGE FLEET: Defense may cross.
>
> CROSS EXAMINATION
>
> BY MR. LOVELESS:
>
> Q: Mr. Knutz, did the rest of your conversation concern the reason why? Is that what he wanted to talk about?
>
> A: He wanted to talk --
>
> MR. ELMORE: I object to any further examination concerning the other things that James Randall Penn said at that time. They are self-serving declarations.
>
> JUDGE FLEET: Objection overruled. Both counsel approach the bench.

(R 1530-1531).

At this point, a discussion was held at the bench. The prosecutor maintained his position that he had only asked the witness "very pointed and specific questions as to specific areas." (R 1531). The jury was excused, and the defense briefly proffered the rest of Knutz' testimony; aside from certain extraneous matters, the witness stated,

> Except for the other statements that appear in the newspaper article, his determination to die, his statement -- let me think. At

> one point he said he didn't think about what he was doing, that he could have just robbed her, that he didn't have to kill her. He mentioned something about not really having realized what he had done until he was on his way to Panama City, I believe its says.

(R 1533).

Defense counsel stated that the last two matters were what he wanted to elicit (R 1533). After further argument by counsel, the judge announced his ruling,

> Let the record reflect that the proffered testimony through cross examination, the objection thereto is sustained **without prejudice of the rights of the defendant to introduce it in his own case in chief if he desires to do so.**

(R 1535) (Emphasis supplied).

There was no further examination of this witness, and the State subsequently rested after the charge conference; the defense rested without putting on any evidence (R 1573).

Appellant contends on appeal that his conviction of first degree murder must be reversed because he was denied his Sixth Amendment right to confront and cross examine witnesses against him, citing to such precedents of this court as **Coco v. State**, 62 So.2d 892 (Fla. 1953), and **Coxwell v. State**, 361 So.2d 148 (Fla. 1978). The State disagrees that such drastic remedy is called for or that the instant ruling deprived Penn of his right to elicit critical information, on a par with that in **Coco** or **Coxwell**. Appellee would initially note that there is case law supporting the prosecutor's contention that the evidence at issue was, in fact, inadmissible self-serving hearsay. **See, e.g.**, **Turner v. State**, 99 Fla. 246, 126 So. 158 (Fla. 1930) (self-

serving act subsequent to crime inadmissible); **Lowery v. State**, 402 So.2d 1287 (Fla. 5th DCA 1981) (defendant's self-serving declarations not part of **res gestae** inadmissible; not error to sustain state's objection during cross examination of witness). Further, given the fact that the State was very careful in its inquiries of Knutz, limiting such to certain areas, it certainly can be argued that Penn was seeking to expand the scope of direct examination. **See Jones v. State**, 440 So.2d 570 (Fla. 1983) (not error to preclude defendant from eliciting certain matters on cross examination of state witness, where such matters "were not opened on direct"). Additionally, while this court undoubtedly did, in **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982), recognize the importance of a defendant's right to a full and unfettered cross examination, this court also clearly held in **Steinhorst** that a defendant may not use cross examination as a vehicle for presenting defensive evidence. In **Steinhorst**, this court went on to state,

> If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own.

Steinhorst, 412 So.2d at 337.

On the basis of the above precedents, the instant conviction should be affirmed.

The State would also submit, however, that this cause greatly resembles the situation in **Correll v. State**, 523 So.2d 562 (Fla. 1988). In such case, the trial court had redacted portions of a statement made by Correll, and, on appeal, Correll contended that such was error. This court held,

> Ordinarily, a defendant's statement should be introduced into evidence in its entirety, absent totally extraneous matters. However, the trial court here concluded that the matters contained in the last portion of Correll's statement were irrelevant. We cannot say that the judge abused his discretion in so ruling, **particularly since he made it clear that Correll was at liberty to introduce the redacted portion himself.** Even Correll must not have believed that the redacted portion was of great significance because he did not seek to introduce it in his case in chief, even though he presented several witnesses in his defense.

Correll, 523 So.2d at 566 (Emphasis supplied).

While, in contrast to **Correll**, Penn did not desire to present any defense witnesses, thus gaining the advantage of two closing arguments, the fact remains that he clearly had the option of presenting this testimony, if such was truly his desire. **See also Jones v. State, supra**, (not reversible error to sustain state's relevancy objections during cross examinations; defendant could have attempted to adopt witness as his own, and thus was not **unequivocally** denied the opportunity to elicit the desired testimony from the witness). **Correll** and **Jones** dictate that the instant conviction should be affirmed.

Finally, the State would simply note that, even if any error was committed, such was surely harmless beyond a reasonable doubt. **See State v. DiGuilio, supra.** In **Palmes v. State, supra**, this court considered a claim of error in regard to the trial court's exclusion of evidence. This court found the error no basis for reversal "where substantially the same matters are presented to the jury through testimony of the same or some other witness." **Palmes**, 397 So.2d at 654. Such a conclusion is

warranted **sub judice**. While the jury did not hear from witness Knutz that Appellant "didn't think about what he was doing, that he could have just robbed her, that he didn't have to kill her", or that Penn had not realized what he had done until he was on his way to Panama City, they did hear substantially the same evidence during testimony concerning Appellant's various statements. Thus, the jury heard that, in Appellant's first statement, he had said that his mind was "a big mess" at the time that he committed the crime, and that he did not understand why he had done it (R 1067, 1084); he repeated this latter contention in his second statement (R 1203). In this statement, Penn subsequently stated that, after the crime, he apparently still did not believe that his mother was dead and further indicated that he had not been "sure", even at the point that he was arrested (R 1207); subsequently, Penn stated that "it had all hit him", **i.e.** what he had done, **after** he "got out of the house and everything." (R 1238). Reversible error has not been demonstrated. **DiGuilio, supra; Palmes, supra.** The instant conviction should be affirmed in all respects.

POINT IV

THE TRIAL COURT DID NOT ERR IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE INSTANT HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, PURSUANT TO §921.141(5)(i)

The jury in this case unanimously recommended that the death penalty be imposed (R 2020). In imposing such sentence, Judge Fleet found the existence of two (2) aggravating circumstances and two (2) mitigating circumstances (R 2045-2047). Specifically, the court found, in aggravation, that the homicide had been especially heinous, atrocious or cruel, pursuant to §921.141(5)(h), and that the homicide had been committed in a cold, calculated and premeditated manner, pursuant to §921.141(5)(i);[3] in mitigation, the court found that Penn had no significant history of prior criminal activity, pursuant to §921.141(6)(a), and that the homicide had been committed while Penn was under the influence of extreme mental or emotional disturbance, pursuant to §921.141(6)(b). On appeal, Penn attacks only the finding of the latter aggravating circumstance, contending that no evidence of premeditation was adduced at all, and that no careful plan or prearranged design existed, within the meaning of **Rogers v. State**, 511 So.2d 526 (Fla. 1987).

The State disagrees with these contentions. Penn's assertion that no premeditation exists is largely premised upon

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[3] As will be argued in Point V, **infra**, the State contends that, in fact, a third aggravating circumstance, that relating to the homicide having been committed for pecuniary gain, pursuant to §921.141(5)(f), exists in this case, and must be considered in any proportionality analysis of the instant sentence. See **Echols v. State**, 484 So.2d 568, 576-577 (Fla. 1985).

the arguments already propounded in Point II, **supra**; the State would rely upon the response already presented as to these matters. At this juncture, however, Penn specifically argues that the presence of multiple wounds does not "prove the heightened premeditation required", citing to this court's precedents, **Amazon v. State**, 487 So.2d 8 (Fla. 1986), and **Miller v. State**, 373 So.2d 882 (Fla. 1979) (Initial Brief at 37). The State maintains its position that the existence of multiple wounds is a proper matter for consideration, and that no basis exists to presuppose the existence of a mindless "frenzy" to explain their presence. This court's reversal of the death sentence in **Amazon** was not premised upon the striking of this aggravating circumstance, but rather upon a conclusion that the judge should not have overridden the jury's recommendation of life. While it is true that in **Miller**, this court observed that the defendant's mental illness could explain the heinousness of the crime, **Miller**, 373 So.2d at 886, this court subsequently held in **Michael v. State**, 437 So.2d 138 (Fla. 1983), that a defendant's mental and emotional problems do not preclude the finding of the heinous, atrocious or cruel or cold, calculated and premeditated aggravating factors; specifically, this court stated,

> A defendant's emotional and mental problems do not affect the application of these two aggravating factors, but, rather, affect the weight given the mitigating factors.

Michael, 437 So.2d at 142.

See also Card v. State, 453 So.2d 17 (Fla. 1984) (testimony of defense psychologist did not preclude finding of cold, calculated

and premeditated aggravating circumstance). Further, this case is distinguishable from **Mitchell v. State**, 527 So.2d 179 (Fla. 1988), in which this court struck the cold, calculated and premeditated aggravating circumstance, wherein the medical examiner had testified that the number of stab wounds and the force with which they were delivered was consistent with a killing consummated by one in a rage; there was no comparable testimony **sub judice**.

Further, the State continues to reject Appellant's characterization of this crime as "impulsive" or as one committed by an individual unable to form the requisite intent. It should be noted that the testimony of the defense expert, Dr. Bingham, offers no support for this hypothesis. Bingham expressly testified that Penn had never made any statement indicating that he did not intend to kill his mother (R 1766). Further, Bingham stated that he was unable to make any statement as to whether Penn had been able to form the specific intent to kill (R 1770). Of course, the only basis that Bingham had to believe Appellant was even on crack cocaine at the time of the murder was Penn's own statements to him (R 1757). This murder occurred during the course of a series of systematic thefts undertaken by Penn. There is no evidence that the victim did anything to precipitate her own murder, i.e., woke up and startled the defendant in the act of stealing her jewelry. **Cf. Blanco v. State**, 452 So.2d 520 (Fla. 1984) (aggravating circumstance stricken where evidence did not exclude possibility that victim surprised defendant and tried to grab gun from him). After Appellant succeeded in stealing the

jewelry from his mother's room, without waking her up, it should have been clear that there was no immediate necessity for him to murder her. Additionally, in bludgeoning her to death with a claw hammer, it cannot be said that Appellant simply grabbed the first thing handy and "impulsively" struck his mother. In order to get the claw hammer, it was necessary for Appellant to go to the utility room, unlock the door and secure the hammer. Also, it must be remembered that the murder in this case took place between Appellant's various thefts of certain items from the house, and that, all told, he entered and left the house at least half a dozen times, if not more; this type of behavior is difficult to square with the notion that this crime resulted from any sort of "split second frenzy". Appellant's actions would not seem to be those of a drug-crazed automaton.

The State would suggest that this case bears great similarity to **Mason v. State**, 438 So.2d 374, 379 (Fla. 1983), in which this court affirmed the aggravating circumstance at issue, holding,

> The record shows that Appellant broke into Mrs. Chapman's house, armed himself in her kitchen, and attacked her as she lay sleeping in her bed. Nothing indicates that she provoked the attack in any way or that Appellant had any reason for committing the murder.

While in this case, Appellant did not need to break in, inasmuch as he already had a key, such is a distinction without a difference; similarly, the fact that this murder was, no doubt, committed at least in part to facilitate the ongoing thefts, does not distinguish this situation from that in **Mason.** **See also**

Swafford v. State, 533 So.2d 270, 277 (Fla. 1988) ("The cold, calculated and premeditated murder, committed without pretense of legal or moral justification, can also be indicated by circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course."). **Swafford** and **Mason** dictate that the finding of this aggravating circumstance should be affirmed.

Finally, Appellant's contentions notwithstanding, there is evidence of a prearranged plan or careful design, as such terms are used in **Rogers**. In his third statement to the police, Penn stated that before he had taken any of the items from the house, he ran into his estranged wife, Angelika, "at the lower rentals" (R 1221). Appellant had asked her if there was any chance of the two getting back together, and Angelika said that the victim, Ruth Penn, "was in the way a lot" (R 1221). Angelika suggested that Appellant "get her out of the way" and that he "get some money and stuff", so that the two could get away from the area (R 1221-1222). Appellant then proceeded to do exactly what his wife had suggested to him - he got his mother out of the way, permanently, and "got some money and stuff". Regardless of whatever role the mysterious "Money Bunny" may have played in all of this, it is undisputed that Penn used his mother's stolen credit card to buy certain goods, such as gold chains, and that he pawned some of his mother's jewelry for cash; at the time that he was arrested, he still had his mother's wallet, her credit cards and a gold ring (R 1111-1113). Penn's decision to murder

his mother at this time may also have been influenced by the fact that his prior theft of her jewelry, earlier in the year, had been unsuccessful when she discovered the loss and he was forced to get the jewelry back; this time, of course, he made sure that there would be no "complaining witness". Additionally, the fact that Appellant ripped all of the telephones out of the wall, and rendered them inoperable, would certainly seem consistent with a prearranged design. **See Lightbourne v. State**, 438 So.2d 380 (Fla. 1983) (fact that telephone lines cut consistent with heightened premeditation); **Correll v. State, supra**, (same).

While it is true, as Appellant notes, that this would not seem to be a contract murder or a witness-elimination crime, this court has clearly held that this description of the scope of application of this aggravating circumstance is not all inclusive. **See Rutherford v. State**, 545 So.2d 853 (Fla. 1989). There was evidence of the existence of a prearranged plan, as well as of heightened premeditation. Finding of this aggravating circumstance was not error. Should this court disagree, the State would still contend that death remains the appropriate sentence, given the presence of two other valid aggravating circumstances. **See** Point V, **infra**. Although there were findings in mitigation, it can be said beyond a reasonable doubt that the elimination of this aggravating circumstance would not have resulted in a life sentence. **See Rogers, supra; Hamblen v. Dugger**, 546 So.2d 1039 (Fla. 1989); **Bassett v. State**, 449 So.2d 803 (Fla. 1984); **Brown v. State**, 381 So.2d 690 (Fla. 1980). The instant sentence of death should be affirmed in all respects.

POINT V

PENN'S SENTENCE OF DEATH IS NOT DISPROPORTIONATE

Appellant contends that his sentence of death is disproportionate and must be reversed. In support of this contention, Penn renews his claims that the murder was an "impulsive" act, that it was not premeditated and that the cold, calculated and premeditated aggravating circumstance was improperly found; these contentions have already been addressed. Penn also argues, however, that the heinous, atrocious and cruel aggravating circumstance, while "technically supported", "carries little weight" (Initial Brief at 39, 40). Appellant further suggests that the mitigating circumstances outweigh any in aggravation, and that this crime simply represents one of those "spontaneous, impulsive killings during stressful circumstances", which does not merit the death penalty. In support of this latter proposition, Appellant notes that this was a "domestic" crime, and represents that "Penn impulsively killed his mother, for no apparent reason, while he was under the influence of crack cocaine." (Initial Brief at 41). Appellant also cites a number of this court's precedents, in which death sentences were vacated, which he regards as comparable; before discussing such cases in detail, the State would initially suggest that those involving an override of the jury's recommendation of life, which this court deemed to be unwarranted, **see Amazon, supra, Burch v. State**, 343 So.2d 831 (Fla. 1977), **Richardson v. State**, 437 So.2d 1091 (Fla. 1983), **Holsworth v. State**, 522 So.2d 348 (Fla. 1988), are obviously distinguishable.

Turning first to Appellant's attack upon the weight of the aggravating circumstances, the State would simply note that there was nothing "technical" about the sentencer's finding that the instant homicide was especially heinous, atrocious or cruel. The victim in this case was brutally beaten to death with a claw hammer as she slept in her own bed. She sustained thirty-one (31) separate wounds to the head and scalp. It was obvious that Ruth Penn fought for her life, given the presence of defensive wounds on her hands; some lacerations to her fingers were bone deep (R 940, 967, 971-972). At one point, she apparently fell off of the bed, or otherwise ended up on the floor of the bedroom, given the presence of a blood stain in that area, perhaps in a futile attempt to escape the blows (R 1503-1504). The pathologist testified that the victim would have been in considerable pain and that it could have taken between thirty to forty-five minutes for the blows to be administered (R 979). Not only has this court approved the finding of this aggravating factor under comparable circumstances, **see e.g., Heiney, supra, Roberts, supra,** but this court has also upheld sentences of death in which the **only** aggravating circumstance has related to the fact that the homicide was committed in a cruel and pitiless manner, unnecessarily torturous to the victim. **See, e.g., Rutledge v. State**, 374 So.2d 975 (Fla. 1979) (stabbing); **Smith v. State**, 407 So.2d 984 (Fla. 1981) (same).

In addition to this aggravating circumstance, and that relating to the homicide having been committed in a cold, calculated and premeditated manner, discussed in Point IV, **supra**,

the State would respectfully suggest that the record supports the finding of a third aggravating circumstance, that the homicide was committed for pecuniary gain, pursuant to §921.141(5)(f). In **Echols v. State**, 484 So.2d 568 (Fla. 1985), this court noted the presence of an "unfound" aggravating circumstance, as part of its review process, stating,

> We cannot determine whether the trial judge overlooked this fourth aggravating factor or was uncertain as to whether convictions for crimes committed concurrently with the capital crime could be used in aggravation. However, we note its presence in accordance with our responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision. (citations omitted).

Echols, 484 So.2d at 576-577.

Inasmuch as Penn attacks the proportionality of his sentence of death, it is appropriate to note the existence of this aggravating circumstance.

It is not clear, as in **Echols**, whether the judge simply overlooked this factor in his sentencing order. Such sentencing order recites only the aggravating factors found; there is no discussion as to why any aggravating circumstance was not found (R 2045-2047). There can be little doubt that this aggravating circumstance was proven beyond a reasonable doubt, and that no subjective decision by the sentencer would play a significant part in this finding. Although the jury acquitted the Appellant of robbery, on the felony murder charge, they did convict him of the lesser included offense of grand theft, in regard to his theft of such items as the gun, the microwave, the mink stole,

the wallet, the credit card, the camera and the pair of binoculars (R 1888, 2022). The judge granted the State's request that the jury be instructed as to this aggravating circumstance, and he did so instruct them (R 1725-1727, 1782). The State argued the applicability of this aggravating factor at the sentencing hearing before the judge on April 5, 1989 (R 3003-3006). Most significantly, in the sentencing order itself, wherein the judge set forth his factual findings, he described as proven beyond a reasonable doubt such facts as -

> The defendant made one or two more visits to the house after killing his mother. On each visit, before and after the murder, the defendant stole items belonging to the victim such as her jewelry, her gun, camera, fur coat, wallet and microwave oven. Each of these items were bartered by the defendant for crack cocaine which he was smoking that evening. During the morning following the murder, the defendant and his cocaine supplier drove to Panama City, Florida, where the defendant assisted the supplier in selling or pawning some of the stolen items, and the money was turned over to the supplier.

(R 2045-2046).

The fact that Appellant may not have "profited" from his theft of these items in the traditional sense, in that they, apparently, were quickly converted for crack or cash or both, hardly renders this factor inapplicable. In **Porter v. State**, 429 So.2d 293 (Fla. 1983), the defendant argued that it could not be said that he had committed the homicide at issue for pecuniary gain, given the fact that he gave away, threw away or abandoned the items in question; this court found it immaterial that he had not profited from the murders, "in view of the proof that the stole [the

items] in the first place." **Id.** at 296. **See also Parker v. State**, 458 So.2d 750 (Fla. 1984) (aggravating factor properly found where defendant's motive in committing murders was "to establish a renumerative drug-dealing network" and "to establish his reputation as a collector of debts"). Inasmuch as there is nothing in the record to indicate that the judge rejected this aggravating factor,[4] the conclusion one must reach is that there are three valid aggravating circumstances in this case, which outweigh anything found in mitigation.

As noted, Judge Fleet found the existence of two statutory mitigating circumstances - that Penn lacked the significant history of criminal activity, §921.141(6)(a), and that the homicide had been committed while Penn was under the influence of extreme mental or emotional disturbance, §921.141(6)(b); the judge also noted, "While there was evidence tending to show other

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[4] The State would note, however, that at one point during the charge conference, prior to the jury's return of a verdict, the judge stated that he did not see any evidence that the murder was committed for financial gain; the judge did observe, however, that any robbery obviously had been committed for such purpose (R 1691). This observation was made during the course of defense counsel's argument that both robbery and pecuniary gain should not be considered by the jury, and that the State should have to elect between the two aggravating circumstances (R 1690-1692); the judge decided, however, that the jury would in fact be instructed on this factor (R 1692). After the jury returned its verdict acquitting Penn of robbery, but convicting of grand theft, defense counsel argued that, by such action, the jury had found that the murder and theft were "separate" and that this aggravating circumstance would not be applicable; Judge Fleet rejected this argument and, as noted, instructed the jury on pecuniary gain (R 1725-1727). Inasmuch as the court only instructed the jury below on aggravating circumstances for which sufficient evidence existed to justify such instruction, the judge's action in instructing the jury on pecuniary gain must be regarded as a finding on his part that this aggravating circumstance could properly be found.

mitigating circumstances, the court did not find any to exist." (R 2046). It is instructive to consider the evidentiary bases for these findings. That relating to mental or emotional disturbance was, no doubt, based upon Penn's post-arrest statements and the testimony of the defense expert, Dr. Bingham. However, just as Penn's own statements often contained inculpatory matters, the testimony of Dr. Bingham was likewise not without its weaknesses. Bingham did state that Penn had a history of chemical dependency, having used marijuana, alcohol, LSD, hashish, "ordinary" cocaine and crack cocaine (R 1736-1737). Bingham also stated that Penn was prone to drug addiction, as indicated by certain test results, although the doctor emphasized that such result did not mean, in fact, that Penn was actually addicted to anything (R 1741). The doctor did describe the symptoms or aftereffects of a condition known as cocaine psychosis, as well as of a condition which he referred to as an "altered state" (R 1745-1747); the doctor noted, however, that he had no direct evidence as to how much, if any, crack cocaine Penn had consumed on the night of the murder, inasmuch as all of his hypotheses were based upon what Penn had told him (R 1757-1758). On cross examination, the doctor stated that he had not formulated any opinion that Penn actually suffered from cocaine psychosis (R 1759-1760). The doctor also stated that he had found no evidence of organic brain damage, paranoid schizophrenia or "any major mental disorder" (R 1742, 1746, 1766); Bingham also stated that the test results revealed "no major intellectual deficits", and that Appellant functioned in the lower end of the

average intelligence range (R 1742). While the State does not contend it was error for the judge to have found this mitigating circumstance, Penn's "extreme mental or emotional disturbance" cannot be regarded as on a par with that of the defendants cited in the cases relied upon by Appellant. **Cf. Songer v. State**, 544 So.2d 1010 (Fla. 1989) ("unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs"); **Fitzpatrick v. State**, 527 So.2d 809 (Fla. 1988) (experts unanimous that defendant's capacity to conform conduct to requirements of the law was substantially impaired, and lay witnesses at scene described defendant as "psychotic"; no finding that homicide heinous, atrocious or cruel or cold, calculated and premeditated).

As to the mitigating circumstance relating to Penn's alleged lack of significant criminal history, it is interesting to note that defense counsel had so little confidence that the jury would weigh this factor that he waived instruction or argument upon it (R 1701-1702). The presentence investigation report indicates the reason. Such document reveals that Penn had two traffic convictions from 1983 and 1984, one involving leaving the scene of an accident, as well as fifteen (15) convictions for passing worthless checks, such latter convictions often involving multiple counts; Penn also has three (3) convictions for grand theft (R 2085-2088). The scoresheet prepared for Penn's sentence on the accompanying grand theft conviction includes one hundred and twenty five (125) points for prior record (R 2093). The PSI also indicates that Appellant was placed on probation for a

number of these offenses and that he was later convicted of violating one such probation (R 2088). While it is true that none of these prior offenses, apparently, involved violence, the State would still suggest that Judge Fleet gave Penn the benefit of a very large doubt in finding the existence of this mitigating circumstance. Certainly, had the judge **not** found this factor in mitigation, it could not be said that error had occurred. **Cf. Teffeteller v. State**, 439 So.2d 840 (Fla. 1983) (not error for court to have declined to find mitigating circumstance of no significant criminal history, where defendant had convictions for forgery and escape); **Mills v. State**, 462 So.2d 1075 (Fla. 1985) (prior convictions for burglary sufficient basis for rejection of this mitigating circumstance). This mitigating circumstance must be regarded as marginal at best, and Penn, in contrast to the defendants in some of the cases cited in his brief, cannot be said to have **no** prior contact with the criminal justice system. **Cf. Smalley v. State**, 546 So.2d 720 (Fla. 1989) (aside from occasional marijuana use, defendant "otherwise a law-abiding citizen"). Judge Fleet was not in error in concluding that the aggravating circumstances outweighed those in mitigation, and the instant death sentence is not disproportionate.

In support of his position that the instant death sentence should be vacated, Penn cites to two "groups" of cases for analogy. One "group" - **Proffitt v. State**, 510 So.2d 896 (Fla. 1987), **Caruthers v. State**, 465 So.2d 496 (Fla. 1985), and **Rembert v. State**, 445 So.2d 337 (Fla. 1984) - involves the disproportionality of a death sentence in cases of "marginal"

felony-murders. Such cases have nothing to do with the case at bar. The second "group" of cases cited by Penn are those in which so-called "domestic" crimes have taken place, i.e. ones in which the defendant and victim have a familial relationship. **See Blair v. State**, 406 So.2d 1103 (Fla. 1981) (husband and wife); **Ross v. State**, 474 So.2d 1170 (Fla. 1985) (same); **Wilson v. State**, 493 So.2d 1019 (Fla. 1986) (father and son). While it is undisputed that Appellant is the adopted son of the victim, the above cases do not dictate vacation of the instant death sentence. In **Blair**, this court concluded that death was not appropriate, where the sentencer had found a number of improper aggravating circumstances, and where the victim's murder had not been especially heinous, atrocious or cruel; there was a mitigating circumstance relating to Blair's lack of significant criminal history. Given the presence of valid aggravating circumstances **sub judice**, especially that in relation to the heinousness of the instant murder, **Blair** does not indicate that the instant sentence should be reduced.

In **Ross**, this court determined that death was disproportionate where the defendant had murdered his wife during a drunken rage; the trial court had found that the homicide was especially heinous, atrocious or cruel, but this court concluded that the court had erred in failing to find certain factors in mitigation, noting also that the sentencer had observed that Ross' commission of the murder was "probably upon reflection of not long duration." **Ross** is distinguishable **sub judice**, because, despite Appellant's best efforts, the instant crime was not a

"spontaneous" one or one committed during a "drunken" or "drug induced" "rage". The court below properly found this crime to have been committed in a cold, calculated and premeditated manner, and, additionally, there is, of course, the pecuniary gain motivation. Penn did not murder his mother because he was angry with her or because he was "cracked up"; rather, she was, in Angelika Penn's words, "in the way", and Appellant needed some of the luxury items in the house for his own purposes. **Wilson**, which also involves a killing which occurred during a "heated domestic confrontation", is distinguishable on similar grounds. Further, for every "domestic" case in which the death penalty is deemed inappropriate, there would seem to be at least an equal number in which the death sentence is upheld. **See, e.g., Dobbert v. State**, 328 So.2d 433 (Fla. 1976) (defendant beats and tortures daughter to death); **Zeigler v. State**, 402 So.2d 365 (Fla. 1981) (defendant murders three family members for pecuniary motive); **Hooper v. State**, 476 So.2d 1253 (Fla. 1985) (defendant murders sister-in-law and niece); **Byrd v. State**, 481 So.2d 468 (Fla. 1985) (defendant murders wife for pecuniary gain); **Huff v. State**, 495 So.2d 145 (Fla. 1986) (defendant murders parents; aggravating factors outweigh mitigating circumstance of no significant criminal history); **Correll v. State, supra**, (defendant murders entire family); **Buenoano v. State**, 527 So.2d 194 (Fla. 1988) (defendant murders husband for pecuniary gain). The instant case bears greater similarity to those above than it does to **Blair**, **Ross** or **Wilson**.

Finally, in passing upon the propriety of the instant sentence, it not inappropriate to note that such sentence follows the jury's unanimous recommendation of death. This court has previously recognized that a jury's recommendation of death, reflecting the conscience of the community, is entitled to great weight. **See LeDuc v. State**, 365 So.2d 149 (Fla. 1978); **Stone v. State**, 378 So.2d 765 (Fla. 1979); **Smith v. State**, 515 So.2d 182 (Fla. 1987); **Grossman v. State**, 525 So.2d 833 (Fla. 1988). The recommendation in this case was reasonable, and it was the jury's prerogative to weigh Appellant's proffered evidence in mitigation. **See Middleton v. State**, 426 So.2d 548, 553 (Fla. 1982) (. . . the jury's recommendation of a sentence of death is a strong indication that they did not find Appellant's emotional state particularly compelling as a mitigating circumstance."). There has been no contention that Judge Fleet failed to consider or weigh all evidence presented in mitigation, and his ultimate decision that death was appropriate did not result in a sentence which is disproportionate to this court's prior precedents. The instant murder was truly a brutal and unmitigated one. The victim was bludgeoned to death in her own bed. Far from being "spontaneous" or "senseless", the instant murder was committed for the basest of all possible motives. James Randall Penn needed his mother's valuables and wanted to make sure that he got them. The fact that he may have chosen to squander these valuables for drugs hardly entitles him to a life sentence. The instant sentence of death should be affirmed in all respects.

POINT VI

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE STATE'S CROSS EXAMINATION OF DR. BINGHAM

As noted, the defense called Dr. Bingham, a mental health counselor, to the stand during the penalty phase. Although the defense had waived the application of that mitigating circumstance relating to Appellant's lack of a history of criminal activity (R 1701-1702), the following exchange took place during defense counsel's examination of this witness:

> Q: From your evaluation, do you have an opinion as to whether aggressive behavior is typical of Randy Penn?
>
> A: As I said before, in terms of actually acting out aggressive acts, there is no history, to my knowledge, of that other than in the instant offense.
>
> Q: In your opinion, would this murder of Mrs. Penn have been atypical of Randy Penn's overall lifestyle or personality?
>
> A: As compaired (sic) to his previous behavior.

(R 1747-1748).

Prior to cross examining the doctor, the prosecutor requested a bench conference, and, at such juncture, announced:

> ELMORE: Judge, I didn't anticipate any questions of this witness as to whether he had an opinion as to whether James Randall Penn was an aggressive individual. I have evidence in the form of military records concerning an incident where he attacked a relative of his wife in Germany. I believe the door has been opened for me to question the Doctor concerning that particular attack, although it was a major incident, Judge, a simple battery, so to speak. I believe the door has been opened for me to at least question the Doctor concerning that and perhaps to admit at least those portions of

> the record which speak to that attack in evidence.

(R 1751).

Inasmuch as defense counsel offered no objection, the judge advised the prosecutor to proceed (R 1751-1752). Subsequently, during the cross examination of Dr. Bingham, the following exchange took place:

> Q: You also stated that he had no history of aggressive behavior. Did you have any knowledge of the fact that he was investigated while he was in the military in Germany for an aggressive act toward a relative of his wife, that is, an attack on her brother?
>
> A: No, sir, I did not.

(R 1760).

On appeal, Penn contends that his sentence of death must be reversed because of this last exchange, which, in his view, was the equivalent of the introduction of non-statutory aggravating circumstances; Appellant cites this court's decision, **Robinson v. State**, 487 So.2d 1040 (Fla. 1986), in support of this contention. **Robinson**, however, is distinguishable in at least one very significant respect. In **Robinson**, defense counsel interposed a contemporaneous objection and moved for a mistrial, in regard to the prosecutorial questioning which he deemed to be improper. In this case, defense counsel, despite more than adequate opportunity and notice, interposed **no** objection in this regard. Accordingly, no claim of error has been presented for review. **See, e.g., Rose v. State**, 461 So.2d 84 (Fla. 1984) (contemporaneous objection rule applicable in capital cases in regard to allegedly improper prosecutorial comment); **Davis v.**

State, supra, (same); **Steinhorst v. State, supra**. The instant sentence of death should be affirmed.

Assuming that this court should view this claim as at all cognizable, however, error has nevertheless not been demonstrated. This court rejected a virtually identical claim of error in **Parker v. State**, 476 So.2d 134 (Fla. 1985). In such case, as here, the defendant waived the application of §921.141(6)(a), relating to a lack of significant criminal history. Again, as in this case, the defense called a psychologist at the penalty phase, who testified that the defendant was "a passive, non-aggressive individual." During cross examination, this State asked the doctor whether he knew of various incidents of violence on the part of the defendant, and, on appeal, Parker had contended that such had been error. This court held,

> In the instant case, the testimony of the defense expert that he based his opinion regarding Appellant's non-violent nature on the Appellant's past, personal and social developmental history, including a prior criminal history, opened the door for this cross examination by the State. **We find that it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis.**

Parker, 476 So.2d at 139 (Emphasis supplied).

Parker obviously applies **sub judice**, and this case has nothing in common with those in which the prosecutor has sought to impeach the credibility of a lay witness with references to uncharged crimes attributed to the defendant. **See also Hildwin v. State**, 531 So.2d 124 (Fla. 1988) (rebuttal testimony as to

defendant's commission of sexual battery not improper when defendant "opened the door"); **Jackson v. State**, 530 So.2d 269 (Fla. 1988) (defendant opened the door to impeachment with prior record when he testified that he "always" was a positive influence on his children). Further, there can be no doubt that the State had a good faith basis for its questions; the section of the PSI dealing with Penn's military history includes a notation to the effect that, on one occasion, he was charged with assault (R 2090). Finally, inasmuch as the witness simply indicated no knowledge of this matter, and it was immediately dropped, it is hard to credit Appellant's contention that this one question irretrievably "tainted" the sentencing proceeding in this case. **See also Jennings v. State**, 453 So.2d 1109 (Fla. 1984) (new sentencing not required when State expert inadvertently made reference to crimes committed by defendant while in military, where defendant had waived applicable mitigating factor). The instant sentence of death should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant conviction of first degree murder and sentence of death should be affirmed in all respects.

Respectfully submitted,

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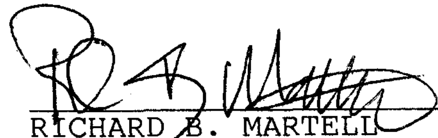
ATTORNEY GENERAL



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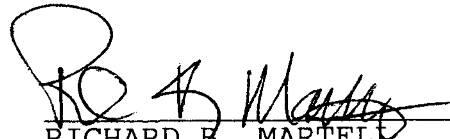
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W.C. McClain, Esq., Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 20th day of February, 1990.



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