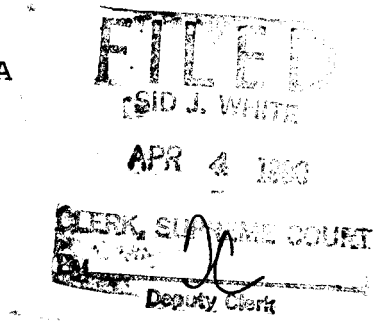
IN THE SUPREME COURT OF FLORIDA



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

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

James Randall Penn relies on his initial brief to respond to the State's answer brief except for the following additions:

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING DEFENSE CHALLENGES FOR CAUSE TO TWO PROSPECTIVE JURORS.

The State has misconstrued and misapplied several legal principles in its answer to this point. This reply will address these matters as they appear in the answer brief.

On pages 19 through 22, the State asserts an incorrect standard to be applied when determining if a juror's beliefs and predispositions in favor of a death sentence warrant an excusal for cause. Quoting Fitzpatrick v. State, 437 So.2d 1072, 1076 (Fla. 1983), the State argues that a juror should not be excused "unless he or she is irrevocably committed to

voting for the death penalty if the defendant is found guilty." State's Brief at 22. This standard was adopted from the interpretation in Fitzpatrick of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), which set the standard for excusing jurors whose beliefs in opposition to the death penalty impaired their ability to be impartial:

> Witherspoon requires that veniremen who oppose the death penalty be excused for cause only when irrevocably committed before trial to voting against the death penalty under any circumstances or where their views on capital punishment would interfere with finding the accused guilty. We find that the same standard should be applied when excusing for cause a venireman who is in favor of the death penalty. 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 of murder and is therefore unable to follow the judge's instructions to weigh the aggravating circumstances against the mitigating circumstances.

Fitzpatrick, at 1075-1076. Penn acknowledges that this Court correctly stated the then prevailing interpretation of Witherspoon in Fitzpatrick. However, the United States Supreme Court clarified Witherspoon in Wainwright v. Witt, 496 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) and restated a more relaxed interpretation of the standard for exclusion of jurors. See, Initial Brief at pages 15-16. The juror does not have to be "irrevocably committed" before the trial begins or hold beliefs "preventing" the consideration of a particular penalty option. In Witt, the Supreme Court restated the standard as follows:

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions his oath." We note that in dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, 469 U.S. at 424. The standard in Witt should be applied to jurors who favor the death penalty as well as those who oppose it. See, Ross v. Oklahoma, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 80, 88 (1988); Fitzpatrick, 437 So.2d at 1076. Consequently, the correct standard to be applied in this case is whether the juror's beliefs in favor of imposition of death created a reasonable doubt about whether those beliefs would prevent or substantially impair the juror's ability to fairly consider a life recommendation.

On page 24 of the answer brief, the State argues that the error in denying the challenges for cause is harmless. In order to reach this conclusion, the State asks this Court to recede from its long-standing precedents concerning the requirements for preserving such an error for appeal. Now, in addition to a party having to exhaust peremptory challenges and request additional ones, the State urges that the party must also show that an unqualified juror, not merely an objectionable one, actually served as the result of the erroneous denial of the cause challenge. See, Answer Brief at page 34. The

State argues that prior case law supports its position and that it merely wants this Court to recede from more recent cases which have varied from these older cases. However, this argument is without merit. The requirements for establishing reversible error outlined in recent cases, such as Hill v. State, 477 So.2d 553 (Fla. 1985), are consistent with the older cases such as McRae v. State, 62 Fla. 74, 57 So. 348 (1912); Young v. State, 85 Fla. 348, 96 So. 381 (1923); and Rollins v. State, 148 So.2d 274 (Fla. 1963).

In Young, this Court, citing McRae, discussed the applicable rule as follows:

> 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. The reason given for the rule is that the accused has a right to an impartial jury but is not entitled to any particular persons as jurors.
>
> 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 impanelled contained at least one juror objectionable to the defendant, who sought to excuse him peremptorily but the challenge was overruled. (emphasis added)

Young v. State, 85 Fla. at 354. In Hill, this Court merely restated that standard with the recognition that the exhaustion of peremptory challenges and the denial of a request for more

satisfies the test. Implicit in the request for more peremptory challenges is the existence of objectionable jurors. Moreover, the juror need only be objectionable to the defendant, not legally unqualified to serve.

> We find that such error cannot be harmless because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available [to] him. Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

Hill, 477 So.2d at 556. While not specifically reiterating th language in Young that an additional peremptory challenge must be actually attempted and denied, Hill is merely acknowledging that the party need not perform a useless act, i.e. attempt to exercise a peremptory challenge which a trial judge has ruled is not available. The rule stated in Hill is not different from the one discussed in Young.

Defense counsel met the test in this case. After the court denied the challenges for cause, counsel exhausted his peremptory challenges. He then requested additional peremptory challenges, specifically noting that most of the jurors had read or heard a great deal of the pretrial publicity about the case. The court denied the request. Although counsel did not name the objectionable jurors, implicit in the request for additional challenges is that some remained. The State argues that because the twelfth juror who was seated after the denial

of the request for more challenges had read little about the case, defense counsel had no cause to complain, and therefore, no objectionable juror was seated as the result of the denial of the cause challenge. This argument is based on speculation, at best. First, defense counsel may very well have objected to the twelfth juror but simply did not perform the useless act of trying to exercise a nonexistent peremptory challenge. The court had already denied his request for additional challenges. Furthermore, counsel stated that he had no challenge for cause which implies that he may have used a peremptory challenge if he had one. The State's argument also overlooks the fact that counsel could have exercised a peremptory challenge to back-strike one or more of the eleven jurors tentatively seated on the panel. Jackson v. State, 464 So.2d 1181, 1183 (Fla. 1985); Rivers v. State, 458 So.2d 762 (Fla. 1984). The fact that counsel had not excused jurors from the eleven did not mean there were no objectionable ones in the group. As a matter of strategy, trial counsel may have left jurors in the eleven, who were objectionable, in order to preserve a peremptory challenge for a possibly more objectionable juror who could be later called to serve. Counsel's request for ten additional peremptory challenges also indicates the existence of objectionable jurors among the eleven seated, otherwise ten challenges would seem unnecessary merely to fill one additional seat on the jury.

The cases the State relies upon are either distinguishable or support Penn's position. In McRae, Young, and Rollins there

was no indication that counsel ever asked for additional peremptory challenges or tried to use a peremptory challenge after the exhaustion of the allotted number. Additionally, in Young, the denial of the cause challenge came after the exhaustion of all peremptory challenges and, for some reason, the challenged juror never served. Therefore, the denial of the cause challenge did not force the use of a peremptory challenge. Also, counsel in Young never sought additional cause or peremptory challenges after the erroneous denial of the cause challenge. In Anderson v. State, 463 So.2d 276 (Fla. 3d DCA 1984), counsel exhausted his peremptory challenges after the denial of the cause challenge, but he never asked for more. Finally, three cases the State cites supports Penn's position. Defense counsel in those cases exhausted peremptory challenges after the erroneous denial of a cause challenge, and the appellate court reversed for a new trial. Price v. State, 538 So.2d 486 (Fla. 3d DCA 1989); Farias v. State, 540 So.2d 201 (Fla. 3d DCA 1989); Jefferson v. State, 489 So.2d 211 (Fla. 3d DCA 1989). This is precisely the situation here, and a new trial is likewise required.

Finally, the State suggests that this Court recede from the principles which have been followed in this state in light of the United States Supreme Court's decision in Ross v. Oklahoma, 101 L.Ed.2d 80. Ross does not compel any changes. While Ross holds that the erroneous denial of a cause challenge has no constitutional significance, unless an impartial juror actually serves, the opinion also recognizes that the states

are free to fashion their own procedures concerning the exercise of peremptory challenges. Ibid. at 90-91. This is not a departure from prior rulings from that Court, as the Court itself acknowledged in the opinion. Ibid. at 90.

Consequently, the State's argument that Ross somehow overruled comments in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), concerning peremptory challenges is without merit. See, State's brief at pages 30-33. Contrary to the State's position (State's brief at page 32), Swain did not hold as a matter of constitutional law that the denial of the right to peremptory challenges is reversible error without a showing of prejudice. Swain merely recognized that to be the prevailing view on the subject. Swain, at 771-772. Therefore, the mere citation of Swain in Florida cases, such as Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981), in no way requires a re-examination of those cases in light of Ross. See, State's brief at page 33. In fact, Leon cited Swain only for the proposition that the general rule is 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." 396 So.2d at 205. Ross has not created a change in the law on this point, and the soundness of this Court's decisions in this area is in no way impaired.

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

On page 51 and 52 of the answer brief, the State argues that the finding of the premeditation aggravating circumstance should be affirmed on the basis of Mason v. State, 438 So.2d 374 (Fla. 1983) and Swafford v. State, 533 So.2d 270 (Fla. 1988). However, these cases are distinguishable. In Mason, the defendant burglarized the home of a stranger and killed the victim, as she slept, with a single stab wound. This Court noted that the evidence provided no reason for the murder. Here, Penn killed his mother in a frenzied attack while he was under the influence of cocaine; the evidence provided an explanation for the murder. Furthermore, the rationale in Mason (upholding CCP because the murder was unexplained) conflicts with later cases which hold that the premeditation circumstance cannot be sustained on speculation. E.g., Hamilton v. State, 547 So.2d 630, 633-634 (Fla. 1989); Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988). In Swafford, the evidence showed that the defendant had planned, in detail, an abduction, sexual battery and murder of the victim. No such prior planning was present in this case.

The State also argues that the evidence supports the notion that Randy had a pre-arranged plan to kill his mother as required by Rogers v. State, 511 So.2d 526 (Fla. 1987).

(State's brief at pages 52-53) As the State noted in its brief, Randy did relate, during his third interview with police investigators, that he had a conversation with his estranged wife, Angelika, about a possible reconciliation. She alleged suggested that Randy should "get some money" and "get [his mother] out of the way." (R 1221) This statement does not help the State's argument when placed in context of all of the statements Randy made. Moreover, the trial judge apparently gave it little credence and did not even mention it in his sentencing order. (R 2045-2047)

Randy was genuinely remorseful for his crime and was trying to help the police as much as possible. The statement he gave about the conversation with Angelika must be placed in context of his preceding statements. Randy was searching his soul for some explanation for why he killed his mother, and the conversation with Angelika was merely a possible explanation he suggested to the investigator. In prior statements, Randy was completely baffled as to why he would kill his mother. (R 1041-1051, 1058, 1063-1103, 1180-1213) The totality of his statements clearly reflect his state of mind. His comments on the precise question are also telling. Assistant State Attorney Albert Grinsted testified to an oral, unrecorded statement Randy made in his presence to Investigator Vinson:

> ...Then Investigator Vinson asked him why he did it. He stated, "I really don't even know why I did it."
>
> He asked, "Were you mad at your mother?" And he goes, "No, sir."

(R 1046) In a second, recorded interview, Randy made the following comments:

> [Penn]: I don't know how many times I hit her.
>
> [Vinson]: Was it more than once?
>
> [Penn]: Yes ...just a big mess.
>
> [Vinson]: When you say big mess --
>
> [Penn]: What was going on in my mind, like that.

(R 1067)

> [Vinson]: ... Did, how well did you get along with your mother?
>
> [Penn]: Fairly good.
>
> [Vinson]: Fairly good? I don't understand why you did this? Do you?
>
> [Penn]: No, sir.
>
> [Vinson]: What is it that you're not telling us, Randy? Now you've [sic] been very honest and very open, but you're holding something back and I, I don't know what it is, but I want to know. What is it that you're holding back from us?
>
> [Penn]: Nothing.

(R 1084)

> [Vinson]: ... Why Randy? I asked you that yesterday. You couldn't give me a good, uh, answer. Why did you do that?
>
> [Penn]: Why did I do it?
>
> [Vinson]: Uh, huh.
>
> [Penn]: I've been trying to figure that out myself. I don't know. I haven't come up with the answer yet myself.
>
> [Vinson]: Well, you and your mother, ya'll wasn't very close were you?

[Penn]: Well, no, not as close as we should've been.

[Vinson]: And I, I know you hate it, but it's like, uh, one of your relatives had died, right? But it's, but I mean, you know, you hate what has happened, but you're not necessarily remorsed because your mother's dead. Is that correct? I mean, I mean you hate it, yes, but, its like a aunt or uncle or somebody, it --

[Penn]: No.

[Vinson]: I'm, I'm, I'm reading you wrong, then? And I could be, you know.

[Penn]: Yeah, you're reading me wrong.

(R 1189-1190)

[Penn]: ... I don't know why. I don't know why all this happened.

[Investigator Donaldson]: Yesterday you told us that when you got the hammer out the washroom, you knew right then what you were gonna do. You went there to get it for that purpose, to hit your momma with it.

[Penn]: I must have. I picked up the hammer. I can see no other reason for it.

* * * *

[Donaldson]: What were you thinking when you got that hammer? I mean, you remember going in and getting it.

[Penn]: I mena[sic], you know, I remember calling my thoughts. I don't think I was thinking. Just acting.

(R 1201-1202)

Randy was honestly trying to provide the investigators with all the details they requested. When he initiated the third interview to give them his recall of the conversation he had with Angelika, Randy was still just honestly trying to give

the investigators any details. (R 1217-1222) He did not say he killed his mother because Angelika asked him to do so. (R 1221-1222) And, he did not say this was the reason why he killed his mother. (R 1221-1222) Randy merely offered the information as a possible subconscious suggestion that may have been in his head at the time. (R 1221-1222) This statement is not proof beyond a reasonable doubt that Randy had a prearranged plan to kill.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Randy Penn asks this Court to reverse his case for a new trial, or alternatively, reduce his death sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Richard B. Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Mr. James Randall Penn, #115770, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 4th day of April, 1990.

W. C. McLAIN