IN THE SUPREME COURT OF FLORIDA

FLOYD W. DAMREN,

Appellant,

v. CASE NO. 86,003

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

For the most part, the State accepts Damren's statement of the case. However, the State would offer the following supplementation and clarification.

(1) JEFF CHITTAM'S STATEMENTS: Following the May 10, 1994 indictment referred to in Damren's statement of the case, Damren was re-indicted on May 26, 1994 on the original three charges and upon a fourth count charging Damren with the murder of Jeffrey Chittam (Damren's co-defendant in the murder of Donald Miller)(R 10-11). Damren's motion for change of venue was granted as to this latter murder charge, and it was transferred to Putnam County (TR 26-29). Damren then filed two motions in limine regarding the death of Jeffrey Chittam and statements Chittam had made about the murder of Donald Miller (R 216, 219). The issue of Chittam's death was resolved by way of this stipulation:

> Neither side will elicit testimony from any witness about Floyd Damren's alleged statements concerning his plan to kill Jeff Chittam. Neither party will elicit from Nancy Waldrup any testimony about Floyd Damren asking for a gun, bullets or a hatchet when he visited her trailer late in the night on May 1 or early in the morning on May 2, 1994. Neither party will present evidence about the disappearance of Jeff Chittam, his death, the discovery of his body, or any statements by Floyd Damren about where he had taken Jeff Chittam. Neither party will argue that the absence of Jeff Chittam helps support its case. It is understood that the State will elicit

testimony that it was Floyd Damren's intention to help Jeff Chittam get out of Florida. [R 312]

As for the statements made by Chittam about the murder of Donald Miller, the parties agreed to limit the guilt-phase testimony as follows:

> The parties stipulate that at the guilt phase of the trial they will not elicit testimony about the statements made by Jeff Chittam to Wendy Hedley, Tessa Mosley and Joanne Waldrup except as follows:
> 1. Wendy Hedley will testify that she said to Floyd Damren, "Jeff told me about what happened - you hurt that man."
> 2. Tessa Mosley will testify that Jeff told her, "We done something wrong - something real bad. I won't tell you about it [un]til Floyd leaves."
> 3. Tessa Mosley will testify that she said to Floyd Damren, "Is it true what Jeff said about you all at the Mines - you hurt somebody real bad?"
> 4. Both Tessa and Wendy will say Jeff admitted he and Floyd were at the Mines inside a building. [R 372-73]

This stipulation applied only to the guilt phase. The defense understood that the State intended to "put in further hearsay statements [of Jeff Chittam] during the penalty phase" (TR 715). Following the verdict at the guilt phase, the State offered a memorandum containing a proffer of the evidence it intended to offer at the penalty phase, including the following statements of Jeff Chittam:

> Floyd and I went down to the mines tonight and Floyd hurt someone. Jeff said he was peeing on a locker when the man walked up and asked Jeff what he was doing. Floyd came up from behind the man with a metal pipe in

> his hand and at some point in time he hit the man and knocked him to the ground.
>
> The victim then started begging for them to let him go. Floyd started pacing back and forth and Jeff was telling the man to get up. Jeff heard the victim's name over the intercom and the victim said "Hey that's me." During the time the victim was on the ground the victim told them that he was going on vacation and was going to take his grandson fishing.
>
> Jeff stated that he, Jeff, begged Floyd to let the victim go. At some point in time someone else came up and Jeff told Floyd there's someone else and Floyd started chasing him. Jeff then ran out the building and across the pipe into the woods. Floyd later got the truck and picked Jeff up down the railroad tracks. [State's memorandum at R 678]

The State noted in its memorandum that Chittam's statements would be corroborated by evidence that the victim's name had been called over the intercom, that the victim had planned to begin his vacation the next day and to take his grandson fishing, and that someone else had arrived upon the scene and had been chased by Damren. The State argued that to exclude Chittam's statements from evidence at the penalty phase "would allow the defendant to profit from his criminal actions of another murder and further allow him the opportunity to benefit from his elimination of a witness to his murderous deeds" (R 679).

Following hearing and argument, the trial court ruled that the State could present these statements (TR 791).

(2) COLLATERAL-CRIME EVIDENCE: The State would note that testimony about a prior theft committed by Damren at the RCG mines (TR 394-95, 460), coupled with Damren's statement that there was more "good stuff" for which he intended to return (TR 463), was not introduced as "similar fact" evidence. Instead, it was introduced as "relevant evidence" of motive and intent, particularly in regard to Damren's claim that he was too intoxicated to have been able to form the requisite intent to commit the crimes on trial (TR 373, 376).

(2) THE JURY'S ADVISORY SENTENCE: The jury voted unanimously (12-0) for a death sentence (R 694).

(3) THE TRIAL COURT'S SENTENCING ORDER: Damren filed a sentencing memorandum containing a number of proposed nonstatutory mitigators (he did not contend that any statutory mitigators applied) (R 706-10). The trial court specifically and separately addressed each of these proposed nonstatutory mitigating circumstances in its sentencing order (R 791-95), and, in addition, addressed the proposed mitigation collectively as follows:

> The circumstances relating to the offense presented by the defense offer little, if any, mitigation. The circumstances relating to the defendant's life do not constitute mitigation. They demonstrate a life remarkably absent of good deeds, except for a few isolated, sporadic and uneventful acts of kindness that collectively do not rise to the level of mitigation. An

> empty, non-productive and vacuous existence is not an excuse for criminal behavior and cannot justify or ameliorate the act of the defendant in murdering Donald Miller. [R 795]

STATEMENT OF THE FACTS

(1) THE GUILT PHASE: The State rejects Damren's guilt-phase statement of the facts and offers its own. Because Damren's primary defense at the guilt phase was his claim of intoxication, the State will address the relevant events in more or less chronological order, beginning at noon of May 1, 1994, when Damren picked up his girlfriend Nancy Waldrup at the hospital and brought her home (TR 497). Nancy testified that he stayed with her for three hours, drinking nothing (TR 497-98). He left, and Nancy Waldrup did not see him again until after midnight (TR 498).

Jeff Chittam's girlfriend Wendy Hedley (Nancy Waldrup's stepdaughter) lived eight miles away (TR 498-99, 452, 464, 492). Sometime between 3:30 and 4:30 p.m., Damren showed up at Walt Cary's trailer, which is next door to Wendy's trailer (TR 555, 567). Roger Prout, a glass tinter and part-time mechanic, was installing a rebuilt motor in Walt's car (TR 553-555). Jeff Chittam also was there, as was Bart Greenway, who was celebrating his release from prison three days earlier (TR 566-67, 577).

Walt Cary testified that he drank five to eight beers while the engine installation proceeded. Bart Greenway testified that, over the course of that whole day, he drank at "least a case" of beer (TR 566-68). Roger Prout testified that he drank six or seven beers (TR 561).

Bart, Roger and Walt were all asked how much Damren had drunk that afternoon. Walt testified that he "didn't keep track" of what anyone had been drinking. He did not "even know how many I drank ... [and] sure don't know how many they drank." Nevertheless, he estimated that everyone had "four or five a piece, anyway" (TR 584-85). Walt testified that no one was "trashed," and that Damren did not act drunk; he was coordinated and able to communicate (TR 583-84, 585-86).

Bart acknowledged that he had not been counting how many beers Damren had drunk (TR 570). But, he testified, everyone knows that Damren "just sucks them down" (TR 574), and his experience drinking with Damren was that Damren drank at a "2 to 1" ratio (TR 570). Therefore, Bart estimated, Damren "probably" drank "a 12-pack, maybe" (TR 570). Bart was not sure if Damren was drunk that day; he had never seen him "actually staggering drunk" (TR 571).

Roger testified that it was "hard to estimate" how much Damren drank that afternoon, because he was not keeping track and "nobody

counts when you're around drinking beer," but since Damren "could out drink me ... I'd say maybe a 12-pack" (TR 557). In his opinion, however, Damren was not drunk when he left the trailer park that day (TR 558). He could walk properly and communicate well; nothing indicated that Damren was impaired in any way (TR 560).

Between 7:30 and eight p.m., Jeff Chittam called his girlfriend, Wendy Hedley, who was at her mom's house. Wendy testified that Floyd Damren was with Jeff at her trailer (TR 448-49).

At 8:30 p.m., Michael Knight was making the rounds at RGC Mineral Sands, a titanium mine in Clay County, when he heard a supervisor on the "radio" with his "operator" asking why Donald Miller had not yet shown up (TR 379-80, 382). Miller was the duty electrician that evening, and had been called in to repair a malfunction. Under union rules, Miller had one hour to punch his time clock after being called in. Because it had been more than an hour, Knight decided to check on Miller (TR 382), especially after he noticed that Miller's truck was at the plant (TR 383). Knight went to Miller's work area in the maintenance building. He heard the sound of a metal pipe hitting a concrete floor. Entering a door to his right, Knight saw a man dragging Donald Miller across

the floor by his "britches leg" (TR 384). At that moment, the man reached with his left hand and "applied a blow or motion toward [Miller's] upper trunk" (TR 385). Knight hollered, and the man turned and lunged toward Knight with what looked like a piece of pipe in one hand (State's exhibit 13) and a crescent wrench in the other (State's exhibit 17)(TR 385-86, 407, 413). Knight ran away, "screaming at the top of his lungs" (TR 386). After summoning help, Knight returned with a gun, but the assailant was gone. The victim was still on the floor, moaning faintly. Knight told him to "hold on" (TR 415). The victim had not moved since Knight had seen him last (TR 416). Behind the victim was a door. Outside that door, Knight observed a puddle of blood (TR 417). Knight also observed expensive tools and equipment that were out of place, including a battery charger sitting outside the door instead of in a bay in the mill shop where it should have been (TR 405), an open tool chest that should have been locked (TR 406), and an expensive ratchet which should have been secured in a locked locker (TR 418). None of these tools and equipment had been out of place when Knight had been there earlier that day (TR 395).

Knight described the assailant as 6'1" or 6'2", 185 pounds, reddish-blond hair, wearing a crew shirt, denim jeans and a railroad hat (TR 419). The assailant, Knight testified, had looked

Knight "dead in the eye" (TR 388). Knight immediately recognized him as Floyd Damren, whom Knight had known since childhood (TR 389-90). After identifying Damren as the assailant to several people, Knight selected Damren's photograph out of six or eight photographs in a photographic lineup conducted early in the morning of May 2 (TR 392-93). Knight saw no other assailant at the scene, but acknowledged on cross-examination that another person could have been hidden behind a "milling lade [sic]" which had blocked Knight's view of the upper part of the victim's torso during the attack (TR 414).

Donald Miller died eight minutes after midnight on May 2 (TR 441). Dr. Margarita Arruza conducted the autopsy (TR 423-24). She observed many defensive wounds on Miller's trunk and arms (TR 425-26) that had to have been inflicted while the victim was conscious (TR 442). In addition, the victim had "extensive injury to the head" (TR 432), including "linear contusions on the right cheek and the right side of the forehead," a "laceration on the upper lip[,] bruising on the lower lip, [and] three lacerations on the right ear" (TR 432). These facial injuries were not serious enough to cause unconsciousness, and were administered "from different directions," indicating that the victim was moving his head while these wounds were being inflicted (TR 435-36). Finally, Dr. Arruza

identified four wounds that would have knocked the victim unconscious, including three serious blows to the back of the head and one "chopping wound that basically goes from the base of the nose all the way across the head" (TR 432, 436). This "chopping wound" broke open the skull and exposed the "hemorrhagic lacerated" surface of the brain underneath (TR 432-33). The three blows to the back of the head fractured the victim's skull and bruised the brain underneath (TR 436). These three wounds and the "chopping wound" across the face were all deadly blows (TR 441). There were, Dr. Arruzza testified, a minimum of seven blows to the head, and at least four to the body (TR 435, 440), administered, apparently, by three different weapons, including a steel pipe, a ratchet wrench and a crescent wrench (TR 427-29, 437-38, 439, 444).[1]

Sometime before nine p.m., Wendy drove home from her mother's house (where she had been when Jeff Chittam had called). On the way, she was passed by two police cars with their lights and sirens on (TR 450). She arrived at her trailer at nine p.m. Jeff and the defendant were there (TR 451). Wendy first berated Damren for being there and then confronted Jeff inside the trailer. She

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[1] There were additional injuries, but some could have occurred when the victim fell (TR 429, 431-32), and at least some of the blows caused multiple injuries (TR 434-35).

demanded to know why he was so dirty (TR 465). Jeff was scared and nervous. He cried a lot during the evening (TR 452-53). Jeff told her that he and Damren had done something really bad, and he would tell her about it when Damren left (TR 453). Wendy went outside to confront Damren with this information (TR 473). At first he acted as if he did not know what she was talking about (TR 454). Then he claimed that he had not done "it," Jeff had, and that he had to get rid of Jeff. Damren "said he could get the electric chair" (TR 454). Wendy testified that although Damren drank "close to a 12-pack" before he left at midnight, he never appeared to be drunk and exhibited no symptoms of intoxication except that he was "loud" and "hyper" (TR 456-57, 470). Moreover, when he left (taking Jeff with him), he was able to back up and turn around on a narrow dirt road without any apparent difficulty (TR 457-58).

Tessa Mosley (Wendy's stepsister) also was at the trailer that evening. She also heard Jeff say that he and Damren had done something "real bad" at the mines, and would tell them about it after Damren left (TR 481). She also confronted Damren with this information, and, like Wendy, reported that Damren at first pretended ignorance, then blamed Jeff, saying "Jeff was the one who hurt that guy" (TR 482-83). Damren told her that just for being there with Jeff, he (Damren) could get the electric chair (TR 483-

84). He told her that he had to get rid of Jeff (TR 484).[2] She, like Wendy, saw nothing to indicate that Damren was intoxicated, and observed him drive away without apparent difficulty (TR 486-87, 494-95). She reported that she talked to him twice after he was arrested and that he told her to "try to forget some of the things that had happened that night" (TR 488).

After leaving Wendy's trailer, Damren briefly returned to the mobile home he shared with his girlfriend Nancy Waldrup (Tessa's mother), arriving at 12:30 a.m. on May 2 (TR 498). He told her that something had happened at the mines and that he would get the electric chair for it (TR 499-500). He told her that the man waiting in his truck had seen what had happened and that he would have to get rid of him because he was afraid he would tell on him (TR 500-01). Damren did not appear to be intoxicated and drank nothing during the fifteen minutes he was there (TR 500). Some time later that day, a SWAT team entered Nancy Waldrup's trailer to arrest Damren. He was not inside the trailer, but police removed some of the skirting around the base of the trailer and found

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[2] The evidence presented at trial indicated that Jeff planned to leave that night to return to his wife and children in Alabama, and that Damren was supposed to take him to the bus station (TR 467-68, 493-94). By stipulation of the parties (R 312), no evidence was presented that Damren got rid of Jeff by murdering him.

Damren hiding underneath (TR 506-07). They seized a pair of blue jeans identified by Nancy Waldrup as the ones Damren had been wearing when he stopped by her trailer just after midnight (TR 508, 518-19). Laboratory analysis of stains on those jeans revealed the presence of blood inconsistent with the defendant but consistent with that of the victim and with only 1.1% of the total population (TR 543-45).

Dr. Ernest C. Miller, a psychiatrist, testified for the defense about intoxication. The State stipulated to his qualifications (TR 589). Miller had not examined Damren; his testimony on direct examination was restricted to explaining the effects of alcohol on the brain and answering a hypothetical question about the blood alcohol level of a 43-year-old man weighing 180 pounds assuming he ate nothing all afternoon but drank twelve 12-ounce beers from four to 7:30 p.m. (TR 593). The answer was .19 grams/percent (TR 594), which would have "profound" effects on the human brain (TR 595), even if by habitual use the person had developed a tolerance for alcohol (TR 599-600). On cross-examination by the State, Dr. Miller acknowledged that slurred speech, incoordination, unsteady gait, nystagmus and flushed face were characteristics commonly associated with intoxication due to alcohol (TR 608). Dr. Miller further acknowledged that his

testimony about blood alcohol level was based entirely on defense counsel's hypothetical concerning how much the defendant had drunk (TR 600). If, instead of 12 beers, the defendant had drunk only four or five, the blood alcohol level would have been "substantially less." Because any alcohol ingested dissipates at a certain rate, a large person like the defendant would have a very low blood alcohol level if he had only drunk four or five beers over a period of three and a half hours (TR 601). The State then asked Dr. Miller to go "in the other direction" and assume that the defendant had drunk not only 12 beers between four and 7:30 p.m., as the defense hypothesized, but also another two before eight p.m., and another 12 between nine p.m. and midnight. If that had been the case, Dr. Miller testified, the defendant's blood alcohol level would have been .375 at midnight, and the defendant would have been much more impaired than he would have been at 7:30 p.m. (TR 601-603).

Dr. Miller acknowledged that chronic alcoholism can produce profound damage to the brain and to other parts of the physical anatomy of a person who consumes a substantial amount of alcohol every day, and that an actual physical medical examination could determine such damage (TR 603). Dr. Miller acknowledged that had

not examined Floyd Damren; in fact, he did not know him and could not identify him (TR 604).

Finally, Dr. Miller acknowledged that all he was saying was that the consumption of the amount of alcohol posed in the defense hypothetical might be enough to arouse passion, diminish perceptions or release inhibition (TR 606). Even assuming the defendant's blood alcohol level was in fact .19, he was not saying that the defendant's capacity to conform his conduct to the requirements of law was substantially impaired, or that the defendant was under the influence of extreme mental or emotional disturbance, or that he was incapable of forming a premeditated design to commit murder or of forming the intent to go onto someone's property for the purpose of stealing (TR 605-06).

(2) THE PENALTY PHASE: The State generally accepts Damren's statement of facts relating to the penalty phase, with the following amplification and correction.

The State does not agree that Tessa Mosley testified that Jeff said nothing about what had happened at the mines for the first ten to fifteen minutes he was at Wendy Hedley's trailer (Initial Brief of Appellant at 21-22). Mosley testified that when "they first got there, he [Jeff] had said that they had done something wrong ... Something real bad down at the mines" (TR 819).

Further, Mosley did not testify that Jeff stayed outside when Wendy Hedley first went into the trailer (TR 819). The State would note that not only Hedley, but both Mosley and Joanne Waldrup all testified that Jeff reported that the victim was begging for his life and that the victim had told them that he was going on vacation the next day. Further, both Hedley and Mosley remember Jeff telling them the victim had stated he was going to take his grandson fishing (TR 799, 816, 824).

The victim's wife and daughter corroborated the fact that the victim had planned to go on a vacation the next day and to take his grandson fishing (TR 832-34, 836).

Although the appellant's summary of the mitigation evidence presented by the defense is basically accurate, the State would note the following additional facts:

Damren's mother testified that Damren did well in school, got good grades and his attendance was "[p]erfect, just about" (TR 846). She testified that she loves her son (TR 850).

Damren's brother testified that although their mother and father never really got along, there was never any 'really heavy fighting" (TR 855). He also testified that their father liked to be the boss and be in charge, but "nobody really paid much attention to him" (TR 855). He described the family as never

having "been close . . . The whole family really hasn't" (TR 859-60).

Damren's sister testified that she was close to Damren (TR 862), and that Damren loves their mother "very, very much" (TR 864).

Damren's maternal aunt Betty Ann Mathis testified that Damren's father was "like a big kid ... who never grew up. It was always fun and games and drinking and seeing how much trouble he could get into" (TR 866). He spent little time with his family in large part because he was "a 20 year Navy man" (TR 867). Mathis described Damren's mother as "not an affectionate mother" (TR 868).

Damren's paternal aunt Alice Prescott testified that, when Damren stayed with her family one summer, he was respectful to her and her family and obeyed the rules (TR 877). The State does not agree that Prescott testified that Damren was an 'accomplished artist" (Initial Brief of Appellant at 28); however, Prescott did state that "Floyd could draw **really** nice" (TR 877).

Delores Hill was friends with Damren in the early 1970's, when he was in the army (TR 882-83). She has not seen him since (TR 885).

Damren has not worked for either Larry Wise or Steve Brown for at least three or four years (TR 902, 905). As for the shop or shed that Damren implies in his brief he built to help out a friend

(Initial Brief of Appellant at 31), it should be noted that Damren **was** paid in cash for the work (TR 907, 913-14).

Although Nancy Waldrup testified that she had loved Damren, she was not sure that she would maintain contact with him if he received a life sentence (TR 920). Further, although she testified that Damren had treated her daughter (Tessa Mosely) as a man would treat his own daughter (TR 920), it should be noted that, at the guilt phase of the trial, Nancy's stepdaughter Wendy Hedley had testified that Nancy had warned her 'not to let Floyd [Damren] be there when she [Nancy] wasn't there" (TR 473). Wendy testified that Damren "flirted" with her (TR 474).

SUMMARY OF THE ARGUMENT

There are nine issues on appeal: (1) and (2) Testimony about Damren's prior theft from RCG mines, coupled with his statement that there was more good stuff there for which he intended to return, was properly admitted as relevant evidence. Because this testimony was not admitted as Williams rule similar fact evidence, the trial court did not err by refusing to deliver the standard Willams rule instruction. (3) The prosecutor's closing argument did not misstate the law of voluntary intoxication. Moreover, the prosecutor and, in response to defense counsel's objection, the

trial judge emphasized that the law would come from the court. Any inaccuracy in the prosecutor's argument was at most harmless error, (4) Victim impact testimony was brief and confined to matters appropriate under Florida law and under decisions of the United States Supreme Court. (5) Hearsay statements by Jeff Chittam were properly admitted at the penalty phase under the relaxed rules of evidence applicable at the penalty phase. These statements were reliable and defense counsel had fair opportunity to rebut them. Alternatively, these statements were admissible as excited utterances, (6) This beating murder clearly was HAC. (7) Although Damren did not go to the mines intending to kill, under all the circumstances of this crime, he had sufficient time to reflect and to calculate. The evidence supports the trial court's CCP finding. But even if it does not, three aggravators remain to be weighed against minimal mitigation, and any CCP error would be harmless. (8) The trial judge addressed and evaluated each and every nonstatutory mitigator proposed by the defense. The fact that the judge did not find some of them was a matter within the court's discretion. Damren was not abused as a child, was normally intelligent, and did not suffer from any mental illnesses. Even if the trial judge erred in failing to find any of the proposed mitigators, any error would be harmless in light of the presence of

four statutory aggravators, no statutory mitigators, and minimal nonstatutory mitigation. (9) This Court's cases demonstrate that Damren's death sentence is proportionally warranted.

ISSUES 1 AND 2

DAMREN'S PRIOR THEFT FROM RCG MINES, COUPLED WITH HIS STATEMENT THAT THERE WAS MORE GOOD STUFF THAT HE INTENDED TO RETURN FOR, WAS RELEVANT TO HIS INTOXICATION DEFENSE; THIS TESTIMONY WAS NOT ADMITTED AS "SIMILAR FACT" EVIDENCE, AND THE TRIAL JUDGE DID NOT ERR BY REFUSING TO GIVE THE STANDARD WILLIAMS RULE INSTRUCTION

A "couple of weeks before" the night of May 1, 1994, Wendy Hedley went "for a ride" with Floyd Damren "down a dirt road behind the woods" to the RCG mines (TR 459-60). Once on the mine property, Damren parked next to a "bigger truck and got some property" (TR 460). As they left, he told Wendy that "there was some . . . more good stuff down there he'd like to get" (TR 463). Michael Knight confirmed in his testimony that property had been stolen from a Sun Electric utility truck parked on RCG mine property "quite close" to the maintenance building where Donald Miller was murdered (TR 394-95).

In his first issue, Damren contends it was error to admit this testimony because the prior theft was not sufficiently similar to the crime on trial to be admissible under the Williams rule. The

State would respond, first, that the cases cited by Damren for the proposition that the collateral crime must be strikingly similar or that the "points of similarity have some special character" or 'unique" characteristics are inapposite to this case because they are cases in which the State offered similar fact evidence to prove identity by proving a distinctive modus operandi. E.g., Drake v. State, 400 So.2d 1217 (Fla. 1981). Such cases impose the most rigid similarity requirement. As Ehrhardt says, "It is when the collateral crime evidence is offered to prove identitv that it must amount to a signature." Charles W. Ehrhardt, Florida Evidence, § 404.16, p. 175 (1996 ed.). "Similar fact evidence relevant to prove a material fact other than identitv need not meet the rigid similarity requirement applied when collateral crimes are used to prove identity." Gould v. State, 558 So.2d 481, 485 (Fla. 2d DCA 1990) (emphasis supplied). Lesser degrees of similarity might suffice in other situations. Callowav v. State, 520 So.2d 665, 668 (Fla. 1st DCA 1988). In fact, evidence of collateral crimes need not necessarily be similar at all. Factually dissimilar crimes may be admitted if relevant. Brvant v. State, 533 So.2d 744, 746 (Fla. 1988).

Damren was positively identified by Michael Knight, by Damren's own statements admitting his presence at the crime, and by

the blood stains on his jeans. Intent (as a component of the intoxication defense), not identity, was the real issue in this case.[3] Although as a matter of caution the State filed a Williams rule notice (TR 348), the State contended that earlier theft was admissible as relevant evidence, rather than as similar-fact evidence (TR 356). The State argued that in light of the intoxication defense, "the ability to form the specific intent to commit burglary, is [the] reason that the prior burglary and the announcement of his intention to go back and get other items becomes relevant ... the stated objective to go back and get more of what you stole before is totally inconsistent with the not being

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[3] (TR 370). In addition, Damren made an issue about who had struck the fatal blows (TR 369, 660). Of course, by his plea of not guilty Damren disputed every essential element of the crimes charged; in this technical sense, identity was an issue. Cf. Foster v. State, 369 So.2d 928 (Fla. 1979) (state not relieved of burden of proof beyond a reasonable doubt even by stipulation of defendant). However, under the weighing process of § 90.403, the admissibility of a collateral crime to prove an issue may depend upon the extent to which that issue is genuinely disputed or disputable. Bolden v. Statg, 543 So.2d 423 (Fla. 5th DCA 1989)(error to admit collateral crime evidence to prove identity or absence of mistake or accident, as such were not material issues at trial). Damren's trial counsel acknowledged in his closing argument that Knight's testimony, coupled with the DNA evidence, would "convince you that Floyd Damren was there at the mines on the night of May the 1st, 1994" (TR 651), and that a second-degree murder verdict "would be appropriate under the evidence that you've heard" (TR 665) . The important issues, he argued, were "What did Floyd Damren actually do at the mines and what were his mental processes" (TR 651).

able to form the intent to steal or the intent to burglarize" (TR 373).

Addressing the defendant's contention that the prior burglary was neither sufficiently similar nor "inextricably intertwined" (TR 375), the trial court stated: "Well, if it were not for the Spector [sic] of the intoxication defense, Mr. Chipperfield, I would think you were right .... But I find Mr. Shorstein's argument that it is relevant to the intoxication defense compelling and so I will deny your motion in limine and allow that testimony" (TR 376).

This ruling was correct. Damren went to the RCG mines on May 1, 1994, because he knew that there was some 'good stuff" that (he thought) would be easy to steal, having been to the same place two weeks previously and successfully having stolen some of this good stuff. The fact that he had not only been to the same site two weeks earlier, but while there had announced his intention to return for more, was properly admitted to show Damren's state of mind on May 1 and to explain his behavior on that date by showing that, at the very least, he was not too drunk to remember that he had been there previously, that there was 'more good stuff" to steal, and that he had planned to return. Even if, as the trial court thought, the prior burglary evidence would not have been independently admissible, it became relevant and admissible when

linked to the intoxication defense. Sims v. State, 21 Fla. L. Weekly S320, S321 (Fla. July 18, 1996)("While parole status evidence is not independently admissible during the guilt phase of a capital trial, it became relevant and admissible when it was linked to a motive for murdering the police officer."). The evidence concerning the previous theft from RCG mine property was offered to counter the intoxication defense by establishing "the entire context out of which the criminal action occurred." Hunter v. State, 660 So.2d 244, 251 (Fla. 1995). Such evidence is not admitted not under § 90.402(a) as similar fact evidence but under § 90.402(2) (a) because it is relevant. Ibid; Armstrong v. State, 642 So.2d 730, 737 (Fla. 1994) (testimony that, a year before murdering police officer, defendant stated that he hated police officers admissible over bad-character objection to show defendant's "state of mind to prove or explain subsequent behavior"). Especially in light of Damren's claim that on the evening of May 1 he was so intoxicated he was incapable of forming the intent to commit any crime, the collateral crime testimony was relevant to show motive and ability to premeditate. Layman v. State, 652 So.2d 373, 375 (Fla. 1995) (fact that defendant battered victim and vandalized her car two months before he murdered her "was relevant to show motive and premeditation"); Ferrell v. State,

655 So.2d 367, 369 (Fla. 1995) (testimony that one week before murder defendant said he had 'killed one bitch and he will do it again" relevant to prove premeditation) .

In his second issue, Damren contends that even if the testimony was admissible, it was admissible only under traditional Williams rule doctrine, and the trial judge should have given the limiting instruction specified in § 90.404(2), Florida Statutes for 'similar fact evidence." The trial court denied the request for such instruction, however, on the ground that this was not Williams rule testimony (TR 394, 629). This ruling was correct. In Layman v. State, supra, this Court held that evidence that the defendant had battered the victim and vandalized her car two months before he murdered her **was** properly admitted as "relevant" evidence to show motive and premeditation for the victim's murder, rather than as Williams-rule similar-fact evidence. Therefore, no limiting instruction was required. "Although a limiting instruction is required under section 90.404(2), Florida Statutes (1991), for 'similar fact evidence,' none is required under section 90.402 for 'relevant' evidence." Layman v. State, supra, 652 So.2d at 374.

Even if the trial court erred, however, in refusing to give a limiting instruction, any error is harmless. If the admission of the prior crime itself can be harmless -- and it can be, Pope v.

State, 21 Fla. Law Weekly S257, S258 (Fla., June 13, 1996) -- then the erroneous refusal to give a limiting instruction concerning the prior crime should be susceptible to harmless-error analysis, under State v. DiGuilo, 491 So.2d 1129, 1139 (Fla. 1986). See United States v. Washington, 592 F.2d. 680, 681 (2d Cir. 1978) **(applying** harmless-error analysis to failure to give limiting instruction). The limiting instruction does no more than identify the "limited purpose for which the evidence was received" and informs the jury that the defendant cannot be convicted for a charge not included in the indictment. Section 90.404(2)(b)2., Florida Statutes (1993). See Bennett v. State, 593 So.2d 1069, 1071 (Fla. 1st DCA 1992)(cautionary instructions help ensure that probative value of evidence is not outweighed by unfair prejudice). The prior-burglary evidence was minimal, and was hardly mentioned in closing argument (TR 645, 648). In light of the undisputed evidence identifying Damren as the person who was on the RCG premises dragging the victim across the floor and striking him with some object, and who, when confronted by Michael Knight, thereafter attacked Knight with a pipe and a large wrench, the prior-burglary evidence could not have contributed to the verdict in any improper way. Beyond any reasonable doubt, the lack of a limiting instruction did not affect the jury's verdict.

ISSUE III

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN OVERRULING DEFENSE OBJECTIONS TO THE PROSECUTOR'S GUILT-PHASE CLOSING ARGUMENT CONCERNING THE INTOXICATION DEFENSE

Damren contends here that the prosecutor mis-characterized the intoxication defense and that the trial court erred by overruling defense counsel's objections to the arguments. The State's position is that the prosecutor's comments, considered in toto, were fair comment on the intoxication defense. But even if by parsing these comments some inaccuracy may be discerned somewhere, any error is harmless. Any inaccuracy was de minimus; furthermore, the jury was properly instructed on the intoxication defense and both the prosecutor and the trial judge emphasized to the jury that the law would come from the court.

The prosecutor's first comment relative to the intoxication defense came in his opening argument, when he stated: "And you listen closely when Judge Foster tells you the degree of intoxication that's necessary to excuse somebody from murder" (TR 639). After discussing the evidence of intoxication, the prosecutor again cautioned the jury to "[l]isten to the law an voluntary intoxication closely . . . ." He explained: "[T]he Judge will tell you the use of alcohol to the extent that it merely

arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act. Of course, that's the law. Only if he's incapable of forming a premeditated design" (TR 648) (emphasis supplied).

Defense counsel objected neither to the admonition to "listen" to the judge for the law on intoxication, nor to the comments explaining the limitations of the intoxication defense. Following the prosecutor's opening argument, defense counsel argued the intoxication defense at length (TR 650-66). He too, referred to the judge's instructions relative to intoxication, and pointed out that the law "doesn't say that a person's got to be drunk [or] stumbling" (TR 656-57). Whether or not Damren was capable of forming the requisite mental state, not his appearance, was the important thing, he argued, and 'there is a reasonable doubt about his ability to achieve that mental state to reflect, to consciously decide to make a judgmental decision" (TR 658, 665).

In his rebuttal argument, the prosecutor responded to the defense argument. It was this response which drew an objection, viz:

> MR. SHORSTEIN: . . . On intoxication, if it's true, -- first of all, intoxication is not a defense. Mere intoxication is not a defense. No one will tell you that. It is -- it can be a defense if you cannot form a mental state; that is, if you don't know you're killing

somebody or you don't know you're burglarizing or stealing. It's hard to envision, but if you believe --

MR. CHIPPERFIELD: Your Honor, I apologize. I have to object to that characterization of the law. I think it misstates it. That would be an insanity defense.

THE COURT: Well, I hope it's been made clear to the jury that I will instruct you on the law and you are to take your instructions on the law from me and me only. And you will be allowed to take those written instructions from which I read back to the jury room when you deliberate. So there should be no question in your mind as to what law applies to this case. Thank you.

MR. SHORSTEIN: Thank you, your Honor. And I agree with counsel. Listen to the law that Judge Foster gives you. But I believe that Judge Foster will tell you -- and as I said, at any time I say that, if Judge Foster tells you something different than I tell you I think he's going to tell you, go 100 percent by what Judge Foster tells you.

But I think Judge Foster will tell you that it is a defense when a person is so intoxicated that he was incapable of forming that mental state. And that's somewhat logical. The mental state for murder we've gone over, or for a burglary. If that mental state couldn't exist, a person's not guilty. It's an element of the crime that must be proven.

And I think the Judge will tell you if he was so intoxicated to be incapable of forming an intent to steal or intent to murder, then he'd be not guilty. But I agree 100 percent with Dr. Miller's testimony because I asked Dr. Miller that question. And he said I'm not giving any opinion that he's incapable, of course not.

How drunk would you have to be not to know you've committed a murder or a burglary? I don't know. The jury has to decide that. And if you're convinced or if we have failed to convince you beyond a reasonable doubt --

> MR. CHIPPERFIELD: Your Honor, excuse me. I must object again. It's the same argument I objected to earlier, I think it takes the intoxication to a higher level than that; insanity. I would object to characterizing it that way.
>
> THE COURT: I overrule the objection.
>
> MR. SHORSTEIN: If you -- if the State has failed to prove beyond a reasonable doubt that he had the mental state necessary to commit the murder, the murder or the burglary, then so return a verdict.

(TR 666-69) .[4]

Damren contends that this portion of the prosecutor's closing argument contained misstatements of the law so egregious as to deny Damren his fundamental right to a fair trial. It is difficult to answer this claim specifically because, aside from a bare reference to the insanity defense, Damren does not explain the basis of his complaint. However, underlying Damren's objection to the prosecutor's argument seems to be some notion that there is no possible overlap between, on the one hand, the kind of mental state that would satisfy the insanity defense if the defendant were sober and, on the other, the kind of mental state produced by voluntary intoxication sufficient to excuse the commission of a specific

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[4] Defense counsel moved for a mistrial at the conclusion of argument (TR 672).

intent crime. If this is Damren's argument, the State does not agree.

The legal test for insanity in Florida is the "M'Naghten Rule." There is a reference in that rule to the defendant's ability to understand the nature of his act: "Under the M'Naghten Rule an accused is not criminally responsible if, at the time of the alleged crime, the defendant was by reason of mental infirmity, disease, or defect unable to understand the nature and quality of his act or its consequences or was incapable of distinguishing right from wrong." Hall v. State, 568 So.2d 882 (Fla. 1990) (emphasis supplied). See also Cruse v. State, 588 So.2d 983, 989 (n. 4)(Fla. 1991). There is no such direct reference in the standard formulation of the voluntary intoxication defense, which is phrased as an inability to form a specific intent. See, e.g., Garner v. State, 28 Fla. 113, 9 So. 835 (1891) ("Where a party is too drunk to entertain or be capable of forming the essential particular intent, such intent can, of course, not exist, and no offense, of which such intent is a necessary ingredient, can be perpetrated."). Nevertheless, as a factual matter, a defendant in a particular case might have been incapable of forming the essential specific intent because he was so drunk he did not understand the nature and quality of his act.

Voluntary intoxication, of course, is only a defense to a specific intent crime. Linehan v. State, 476 So.2d 1262 (Fla. 1985). First degree murder and burglary are specific intent crimes, but second degree murder and criminal trespass are not. Linehan v. State, 442 So.2d 244, 255 (Fla. 2d DCA 1983); Chestnut v. State, 538 So.2d 820, 824 (Fla. 1989). The only significant difference between the specific intent crimes of first-degree murder and burglary, which Damren contended he was to intoxicated to have been able to commit, and the lesser included offenses of second-degreee murder and criminal trespass as to which the voluntary intoxication defense does not apply, are the intent to kill and the intent to steal, respectively. Given the evidence that, after entering the RCG mine property, Damren gathered together expensive tools and, when confronted by Donald Miller, beat him to death with some of those tools and a steel pipe, it is difficult to understand in what sense Damren might have been incapable of forming the intent to kill and the intent to steal unless he was just so drunk he did not realize what he was doing (and therefore did not specifically intend to commit the crimes of murder and burglary). If that is the basis of the defense in this case, it would seem that the prosecutor was not out of line when he asked how drunk Damren would have had to be not to have realized

that he was murdering Donald Miller when he was beating him to death, or not to have realized that he was committing a burglary when he entered the RCG mine property to steal valuable tools.

This Court has stated:

> It is within the trial judge's discretion to determine when an attorney's argument is improper, and such a determination will not be upset absent an abuse of discretion by the lower court judge. Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982); see also Crump v. State, 622 So.2d 963 (Fla. 1993). Within his or her courtroom, a judge is not prohibited from granting attorneys wide latitude when making legitimate arguments to the jury. The arguments may also include any logical inferences. Id. When called to review these arguments, we consider each case within the totality of its own special circumstances.

Watson v. State, 651 So.2d 1159, 1163 (Fla. 1994). Accord Jacoby v. State, 21 Fla. Law Weekly S301, S302 (Fla. July 11, 1996). In this case, the prosecutor (and defense counsel as well) correctly quoted the standard voluntary intoxication instruction in closing argument. Moreover, the prosecutor acknowledged to the jury that the law would come from the trial judge, and warned the jury to follow the trial court's instructions in the event of any conflict between what the prosecutor said about the law and the judge's instructions. Significantly, when ruling on the defense objection, the judge explicitly reminded everyone that the law would come "from me and me only." Especially in these circumstances, the

trial court did not abuse its discretion by overruling Damren's objections to the prosecutor's argument.

Even if any portion of the prosecutor's argument was improper, there was no error in denying Damren's motion for mistrial. The only evidence relating to how much alcohol Damren had drunk prior to the crime came from three witnesses (Walt Cary, Bart Greenway, and Roger Prout) who offered no more than speculation and guesswork about the actual quantity of beer, if any, that Damren had consumed. Moreover, no witness observed Damren exhibiting any of the typical signs of intoxication that Dr. Miller described (slurred speech, incoordination, unsteady gait, nystagmus or flushed face) (TR 608), or suffering from any kind of observable impairment, either before the crime or afterwards (TR 456-57, 469, 486, 490, 494-95, 500, 558, 560, 583-86). It is arguable that Damren was not even entitled to an instruction on voluntary intoxication. Linehan v. State, supra, 476 So.2d at 1264) (alcohol consumption prior to the commission of a crime does not, by itself, establish voluntary intoxication defense; where evidence shows use of intoxicants but does not show intoxication, voluntary intoxication instruction is not required); Street v. State, 636 So.2d 1297, 1301 (Fla. 1994) (where no evidence that defendant ingested cocaine on the night of shootings, expert testimony about

intoxication properly excluded). The evidence barely supports an inference that Damren was intoxicated at all, let alone so intoxicated that he was incapable of forming the intent to commit murder and burglary. Furthermore, the facts of the crime itself are not "consistent with a person so impaired as to be unable to form the intent required for committing the crime charged." White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992). In these circumstances, the prosecutor's comments about the intoxication defense, even if improper, do not require a new trial. 'In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer v. State, 645 So.2d 377, 383 (Fla. 1994) . As in Spencer, the prosecutor's comments in this case do "not meet any of these requirements." Ibid.

The trial court committed no reversible error.

ISSUE IV

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN ADMITTING VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE

Before trial, defense counsel filed a "Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased" (R 282-301), in which he argued against the admission of victim-impact evidence on various constitutional grounds. The motion was argued just prior to the penalty phase (TR 718-36). In addition to the grounds raised in the motion attacking victim-impact evidence generally, defense counsel voiced additional objections to specific language in the State's proposed victim-impact statements (TR 729-34).[5] The trial court agreed with most of these specific objections, and ordered various deletions from the written statements, which are reflected in the transcript and in the record (TR 734-36) (R 421-22). The statements, as amended, are as set out in Damren's brief (TR 831-32, 835-36)(R 423-24).

Citing the dissenting opinion of Justice Stevens in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 155 L.Ed. 2d 720 (1991), Damren argues that victim-impact evidence 'serves no purpose other than to encourage jurors to decide in favor of death rather than

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[5] In order to ensure that victim-impact testimony was properly confined, the State planned to have the two victim-impact witnesses read from prepared statements (TR 733).

life on the basis of their emotions rather than their reason." Initial Brief of Appellant at p. 58. The State would rely on the controlling majority opinion in Payne that victim-impact evidence, properly limited, is not unconstitutional. Here the State elicited no impermissible family members' characterizations and opinions about the crime, the defendant, or the appropriate sentence. Payne, supra at 111 S.Ct. 2611, n. 2. Nor did the State elicit testimony about the effect of the crime on persons who did not even know the victim. Windom v. State, 656 So.2d 432, 438 (Fla. 1995) (testimony about effect of crime on children in elementary school, other than the victim's own children, erroneously admitted under victim-impact statute because such testimony was not limited to victim's uniqueness and the loss to the community's members by the victim's death), The evidence admitted in this case included testimony about personal characteristics of the victim, which "demonstrate[d] the victim's uniqueness as an individual human being," Windom, supra at 438, and testimony about the impact of the Donald Miller's death on members of his family, which demonstrated the "loss to the community's members by the victim's death." Ibid. This evidence was properly admitted. As this Court held very recently:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family.

Bonifay v. State, 21 Fla. L. Weekly S301, S303 (Fla. July 11, 1996). The trial court did not err admitting the proffered victim-impact testimony, after deleting certain portions. Should some small portion of this testimony have been admitted erroneously, however, any error would be harmless. Windom, supra.

ISSUE V

STATEMENTS MADE BY JEFF CHITTAM ABOUT THE CRIME WERE PROPERLY ADMITTED IN EVIDENCE AT THE PENALTY PHASE

As noted in the statement of the case, there is no issue about the admission of limited portions of Jeff Chittam's statements at the guilt phase of the trial. Damren's trial counsel did object to the admission of additional, more detailed statements made by Jeff Chittam to Wendy Hedley, Tessa Mosley and Joanne Waldrup at the penalty hearing (TR 749-69, 796). The State argued two bases for admitting this evidence: first, and primarily, on the ground that hearsay is admissible at the penalty phase (TR 743); second, and in the alternative, on the ground that it **was** admissible under the excited-utterance exception to the hearsay rule (TR 749). Defense

counsel addressed both of these grounds at trial (TR 750, 766). However, on appeal Damren argues only that these statements were not admissible under the excited utterance exception. The State would first contend that this testimony was admissible at the penalty phase under § 921.141(1) Fla. Stat. (1995) and that the trial court's decision on this issue should be affirmed regardless of the admissibility of this testimony as an excited utterance. Caso v. State, 524 So.2d 422, 424 (Fla. 1988) ("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it."). However, as it did at trial, the State would contend alternatively that Chittam's statements were admissible under the excited utterance exception to the hearsay rule.

(1) Hearsay testimony is admissible at the penalty phase. Under § 921.141(1) Fla. Stat. (1995), hearsay is admissible during the penalty phase, "regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." On appeal, Damren does not even address the admissibility of Jeff Chittam's statements under this statute, or contend that the evidence was not susceptible to the fair rebuttal contemplated by the statute. See

Drasovich v. State, 492 So.2d 350, 355 (Fla. 1986) (reputation evidence irrelevant and not susceptible of fair rebuttal). Trial counsel, however, argued that he did not have fair opportunity to rebut these statements because he could not ask the witnesses for more details about the circumstances of the crime than Chittam had provided to these witnesses (TR 766-67). Furthermore, citing Gardner v, State, 480 So.2d 91, 94 (Fla. 1985) and Engle v. State, 438 So.2d 803 (Fla. 1983), he argued that a statement or confession of a codefendant was not admissible unless he could confront and cross-examine the codefendant.

Trial counsel's inability to cross examine the testifying witnesses concerning details not provided to those witnesses by Jeff Chittam cannot be a sound basis for the exclusion of hearsay at the penalty phase. The in-court witnesses can never provide more information about events they personally did not observe than the out-of-court declarant has provided to them. If trial counsel's argument here were sound, hearsay could never be admitted at the penalty phase. However, the testifying witnesses could, and did, report what Jeff Chittam said, describe the circumstances under which he made these statements, and describe his demeanor while making them. Trial counsel had fair opportunity to examine each of these witnesses about what they had observed; in addition,

trial counsel had fair opportunity to examine witnesses who corroborated many of the facts and circumstances contained in Jeff Chittam's statements (including: that the victim planned to go on vacation the next day and to take his grandson fishing, which neither Chittam nor the testifying witnesses could have known unless the victim had told Chittam and he had then repeated this information to the testifying witnesses; that Damren had used a metal pipe, which Chittam could hardly have known except on the basis of his own observation, and which the testifying witnesses could not have known unless Chittam told them; and that someone else came on the scene and Damren had chased him, which, again, Chittam could have known only by personal observation which he then reported to the testifying witnesses). Trial counsel had fair opportunity to examine any or all of these witnesses, and the hearsay testimony was properly admitted. Spencer v. State, 645 So.2d 377, 383-84 (Fla. 1994) (proper to allow police officer to testify at penalty phase about statements made by victim regarding prior attack by defendant where defense was given opportunity to cross-examine officer); Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992)(hearsay testimony about prior felonies admissible where investigator who testified about hearsay was available for cross-examination).

Gardner and Engle, supra, which trial counsel cited, are inapposite. These cases involve an application of the rule of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), which precludes the use against one defendant of a non-testifying co-defendant's post-arrest statement or confession made to the arresting officer. Unlike the statements in Bruton, Gardner and Engle, Chittam's statements were not the product of custodial interrogation following an arrest. Instead, they were statements Chittam made to friends immediately after the commission of the crime, while he and Damren were still in the process of making their getaway. Damren was immediately confronted about these statements and acknowledged that he and Chittam were involved in the crime. Statements of an accomplice under such circumstances are admissible. Echols v. State, 484 So.2d 568, 573 (Fla. 1985) (videotape of codefendant's meeting with undercover police officer after murder had been committed, but before anyone was arrested, was properly admitted under the co-conspirator admission exception to the hearsay rule); Larzelere v. State, 21 Fla. L. Weekly S147, S151 (Fla. March 28, 1996)(codefendant's statements properly admitted under coconspirator hearsay exception where evidence independent of conspirator's statements established that plan to commit crime involved defendant and codefendant).

Moreover, even the post-arrest statements of a co-defendant are not always inadmissible. Statements not falling within a firmly rooted hearsay exception may meet Confrontation Clause reliability standards if they are supported by a showing of particularized guarantees of trustworthiness. Lee v. Illinois, 476 U.S. 530, 544, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). In Farina v. State, 21 Fla. L. Weekly S176 (Fla. April 18, 1996), this Court found sufficient indicia of reliability concerning post-arrest statements of a codefendant, where the statements were not made to police and where the defendant was present and confronting the codefendant throughout the conversations. As in Farina, Chittam's statements were not made to police, and although Damren was not present in the same room when these statements were made, he was in the area and was immediately apprised of the substance of these statements. The only matter disputed by Damren was who had actually beaten the victim. He took issue with no other portion of Chittam's statements. And, in fact, many of the facts contained in the statements were independently corroborated.

Although the jury never learned what had happened to Chittam, the fact is that Chittam was unavailable to testify as the consequence of Damren's own actions in attempting to eliminate a source of incriminating evidence whose reliability cannot seriously

be questioned. There will never be a more appropriate case in which to allow the introduction of hearsay testimony under the relaxed rules of evidence applicable at the penalty phase pursuant to § 921.141(1).

(2) Alternatively, Chittam's statements were admissible under the excited utterance exception to the hearsay rule. Should this Court disagree with any of the foregoing, however, the State alternatively would contend that Chittam's statements were admissible under the excited-utterance exception to the hearsay rule.

As an initial matter, some discussion of the time frame of these statements is warranted. Wendy Hedley testified that Jeff Chittam called her at her mother's house, from her trailer, between 7:30 and eight p.m. (TR 448-49). Michael Knight observed Damren striking and dragging the victim just after 8:30 p.m. (TR 379-80, 382, 384-85). Tessa Mosley was at Wendy's trailer when Damren and Jeff Chittam drove up in Damren's truck (TR 818). She testified that when Jeff first arrived, he told her that "they had done something wrong , . . something real bad down at the mines" (TR 819). Wendy arrived 10-15 minutes later (TR 818), at nine p.m. (TR 451, 797). Wendy argued with Damren for ten to twenty minutes (TR 806, 818). Then (presumably at 9:10 to 9:20) she and Jeff went

into the bathroom, where Jeff talked about the circumstances of the crime (TR 465, 805-07, 815). Ten minutes later (inferentially, 9:20 to 9:30), Tessa Mosley went inside (TR 818). Jeff Chittam made further statements in her presence (TR 815).

The State acknowledges that the testimony of Joanne Waldrup is somewhat inconsistent with that of Tessa Mosley and Wendy Hedley regarding the time (TR 826-28).[6] From the preponderance of the evidence, however, it may be concluded that the crime occurred at around 8:30 p.m., that Chittam made his first statements about the crime no more than fifteen minutes later, and that he soon gave more detailed statements, the first of which was delivered to Wendy between 9:10 and 9:30 p.m., or less than an hour after the murder. As he recounted the events at the mine, Chittam was nervous, scared, crying and shaking (TR 453, 465-66, 815) (R 642, 438, 446, 450, 542, 546-47, 549, 613, 615).

Hearsay statements are admissible if made "under the stress of excitement" caused by a "startling event or condition." § 90.803(2) Fla. Stat. (1989). "A person who is excited as a result of a

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[6] According to Joanne Waldrup (Wendy Hedley's mother, as opposed to Nancy Waldrup, who lived with Damren and who was Tessa Mosley's mother), she was at the trailer at nine p.m. (TR 822), or she arrived between nine and 9:30 p.m. (TR 826), or she got there at 9:30 p.m. (TR 827-28). She estimated that Wendy and Jeff stood around for an hour before entering the trailer (TR 828).

startling event does not have the reflective capacity which is essential for conscious misrepresentation; therefore statements that are made by the person who is in a state of excitement are spontaneous and have sufficient guarantees of truthfulness." Charles W. Ehrhardt, Florida Evidence, § 803.2, pp. 615-16 (1995 ed.). This Court has noted:

> A statement qualifies for admission as an excited utterance when (1) there is an event startling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event.

Rogers v. state, 660 So.2d 237, 240 (Fla. 1995).

Jeff only intended to participate in a burglary. Instead, he saw an innocent man get beaten to death. Such an event can aptly be characterized as "startling." Jeff first mentioned this startling event less than fifteen minutes later. Further elaboration followed soon thereafter. At no time during his recounting of the events did he appear relaxed or calm; on the contrary, he was crying, scared, and shaking. There is no bright-line rule regarding how much time can elapse between the startling event and the excited utterance. Ibid. The record supports a determination that Jeff Chittam observed a very startling event, that while he might conceivably had time for reflection, he did not

engage in reflection, and that he was under the stress of the excitement from having seen an innocent man being beat to death when he made the statements at issue. The statements were admissible under the excited utterance exception to the hearsay rule. Rogers, supra; Power v. State, 605 So.2d 856, 862 (Fla. 1992); Jano v. State, 524 So.2d 660 (Fla. 1988).

The trial court did not err by admitting Jeff Chittam's statements in evidence at the penalty phase.

ISSUE VI

THIS BEATING MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, AND THE TRIAL COURT DID NOT ERR BY SO FINDING

Damren contends that the murder of Donald Miller was not heinous, atrocious or cruel. He quotes the findings of the trial court to the effect that the victim "suffered at least ten blows from a pipe or other heavy object before being knocked unconscious;" that the victim sustained 'numerous" injuries to his face, head, legs, arms and chest; that many of the wounds were inflicted while the victim was conscious and "moving his head in an effort to avoid being hit;" and that clearly "the victim's death was preceded by a great deal of pain, suffering and fear, and finally by the knowledge that his death was at hand." Brief of

Appellant at 64 (citing R 789-90). Damren does not contest any of these facts; he merely contends that these facts do not establish HAC.

This Court, however, has consistently and uniformly held that beating deaths are HAC. Bogle v. State, 655 So.2d 1103, 1109 (Fla. 1995) (seven blows to the head established HAC); Whitton v. State, 649 So.2d 861, 866 (Fla. 1994)(thirty-minute beating established HAC); Colina v. State, 634 So.2d 1077, 1081-82 (Fla. 1994) (where victims did not die instantly but were beaten to death with tire irons, murders were HAC); Penn v. State, 574 So.2d 1079, 1083 (Fla. 1991) (beating victim to death with hammer was HAC); Bruno v. State, 574 So.2d 76, 82 (Fla. 1991)(beating victim to death with crowbar was HAC); Cherry v. State, 544 So.2d 184, 187-88 (Fla. 1989) (HAC where victim was beaten to death); Chandler v. State, 534 So.2d 701, 704 (Fla. 1988) (beating victims to death with baseball bat was HAC); Lamb v. State, 532 So.2d 1051, 1053 (Fla. 1988) (beating victim to death with hammer was HAC); Roberts v. State, 510 So.2d 885, 894 (Fla. 1987)(defensive wounds with blows to back of head supported HAC); Wilson v. State; 493 So.2d 1019, 1023 (Fla. 1986) (defensive wounds and brutal beating with blows to head supported HAC); Thomas v. State, 456 So.2d 454, (Fla. 1984) (bludgeoned skull supported HAC); Heiney v. State, 447 So.2d

210, 215-16 (Fla. 1984) (defensive wounds and seven claw hammer wounds to victim's head supported HAC).

The trial court's HAC finding is amply supported by the record and by this Court's case law.

ISSUE VII

THE TRIAL COURT PROPERLY FOUND THAT THIS MURDER WAS COLD, CALCULATED AND PREMEDITATED; EVEN IF THIS FINDING WAS ERROR, HOWEVER, IT WAS HARMLESS

The evidence presented at the penalty phase, primarily through the statements of Jeff Chittam, established the CCP aggravator. At Damren's suggestion, he and Jeff Chittam went to the mines to steal (TR 797). While Jeff was urinating on a locker, the victim walked up and asked him what he was doing. Damren "came up from behind" and hit the victim with a steel pipe (TR 798). The victim fell, still conscious. As Damren pace back and forth, the victim begged Damren not to hurt him. He told Damren that he planned to go on vacation the next day and to take his grandson fishing (TR 799, 816). At some point, the victim was paged over a loudspeaker; he told Damren and Chittam, "That's me" (TR 799). Jeff told Damren not to hit the victim any more, that they should just go (TR 800, 824). Damren told Jeff to shut up or he would hurt him too (TR 816). Jeff said he got scared and ran away (TR 800, 816, 824).

This testimony, coupled with that of Michael Knight, who saw Damren beating the victim after he had dragged him inside the building, and that of Dr. Arruza, who testified that the fatal wounds followed the administration of numerous nonfatal wounds which would not have caused unconsciousness, supports the trial judge's CCP finding (R 790-91).

Gamble contends the evidence does not show calm and cool reflection or heightened premeditation because the statements of Jeff Chittam were inadmissible and because there is no evidence that Damren went to the mines intending to kill someone. The State has addressed the admissibility of Jeff Chittam's statements previously, and would maintain that they were properly admitted and considered. As for when Damren formed the intent to kill, the State Attorney acknowledged in his guilt-phase closing argument that "I don't think there's any evidence they went there to kill Donald Miller" (TR 645). The State's sentencing-phase argument was that, after being confronted by the victim, Damren nevertheless had ample time to coldly and calculatedly reflect on his actions and that heightened premeditation existed (TR 934-35).

The trial judge's finding of the CCP aggravator was based on the evidence that after Damren struck the first blow, he paced and contemplated the situation, reflecting on his next course of action

while both Jeff Chittam and the victim begged Damren not to hurt the victim any further. Despite their pleadings, Damren deliberately and ruthlessly resumed his attack on the victim after a period of contemplation. These circumstances, the trial court found, supported a finding that this murder was cold, calculated and premeditated without any pretense of moral or legal justification (R 790-91).

There are four elements that must exist to establish CCP. The first is that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. Walls v. State, 641 So.2d 381, 387 (Fla. 1994). Here, the defendant did not even claim any loss of emotional control. This is not a case in which a defendant was surprised during the commission of a crime and killed the victim before he had time to think. Here, as in Walls, the "calm and deliberate nature" of Damren's actions establish this element beyond any reasonable doubt.

The second element is that the murder must be the product of a careful plan or prearranged design to commit the murder before the "fatal incident." Walls, supra at 388 (citing Jackson v. State, 648 So.2d 85 (Fla. 1994). In Walls, this element was found where the defendant left one victim, weapon in hand, and returned

to the other victim, whom he had previously bound and gagged. At the point where Walls left the first victim's body, this Court found, Walls 'obviously had formed a 'prearranged design' to kill" the second victim, a conclusion reinforced by the time it took for him to kill her. Ibid. Although Damren may originally have gone to the mines intending only to commit a burglary, the circumstances of this case show that after striking the victim, Damren listened to his pleas and those of Jeff Chittam, carefully considered his course of action, and formed a prearranged design to kill the victim. He then ruthlessly resumed his attack.

Third, CCP requires heightened premeditation. The fact that Damren killed the victim after listening to both the victim and Jeff Chittam beg Damren not to hurt the victim demonstrates the kind of "deliberate ruthlessness" that supports the element of heightened premeditation. Bonifay v. State, 21 Fla. Law Weekly S301 (Fla. July 11, 1996); Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994); Walls v. State, supra at 388. "The lengthy nature of the crime also goes to the heightened premeditation necessary to establish this aggravating factor." Fennie v. State, 648 So.2d 95, 99 (Fla. 1994). The fact that Damren had ample time to reflect on his actions and their attendant consequences "is compelling evidence of the heightened level of premeditation required to

establish the cold, calculated, and premeditated aggravator." Foster v. State, 654 So.2d 112, 115 (Fla. 1995) (the several minutes that elapsed between concealing the victim's body and inflicting mortal wound gave defendant "ample time to reflect on his actions and their attendant consequences." and was "compelling evidence" of heightened premeditation).

As for the last CCP factor, there is no contention, let alone any evidence, that Damren had even a pretense of moral or legal justification for murdering Donald Miller. Walls v. State, supra at 388.

The time Damren had to plan and to reflect on this killing, coupled with the ruthless manner in which he committed it, demonstrate that Damren murdered the victim in a cold, calculated and premeditated manner. Where there is a legal basis for finding an aggravator, this Court will not substitute its judgment for that of the trial court. Occhicone v. State, 570 So.2d 902 (Fla. 1990). Therefore, the trial court's CCP finding should be affirmed. Nevertheless, should this Court disagree with any of the foregoing, and decide that the trial court erred by finding CCP, any error would be harmless. Striking CCP would leave three valid aggravators: HAC, prior violent felony conviction and the combined burglary/pecuniary gain aggravator (the last two of which Damren

does not even contest). Damren did not even urge the existence of any statutory mitigation, and most of his proposed nonstatutory mitigation (TR 708-09) was either not supported by the evidence or was entitled to little weight. Damren is normally intelligent, has no physical or psychological problems, and was not physically or sexually abused as a child. The evidence fails to demonstrate any significant impairment from alcohol intoxication at the time of the crime. Given the presence of three strong aggravators, the lack of significant mitigation, and the jury's unanimous recommendation of death, there is no reasonable likelihood that Damren would have received a life sentence if the CCP aggravator had not been considered. Geralds v. State, 674 So.2d 96, 104-05 (Fla. 1996) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against one statutory mitigator and three nonstatutory mitigators); Barwick v. State, 660 So.2d 685, 697 (Fla. 1995) (no likelihood of different sentence when eliminating CCP left five aggravators to be weighed against minimal mitigation); Fennie v. State, 648 So.2d 95, 99 (Fla. 1994) (eliminating CCP harmless because the totality of the aggravating factors and the lack of significant mitigation conclusively demonstrate that death is the appropriate penalty); Pietri v. State, 644 So.2d 1347, 1354 (Fla. 1994) (striking CCP left

three aggravators and, even if trial court had found mitigation, there was no reasonable likelihood of a different sentence); Castro v. State, 644 So.2d 987, 991 (Fla. 1994) (error in finding CCP was harmless where three other aggravators existed, including HAC, against weak case for mitigation); Wvatt v. State, 641 So.2d 355, 360 (Fla. 1994) (striking two aggravators was harmless where three remaining aggravators "far outweigh" mitigation); Peterka v. State, 640 So.2d 59, 71-72 (Fla. 1994) (striking two aggravators was harmless where three aggravators remained to be weighed against a lack of significant criminal history); Stein v. State, 632 So.2d 1361, 1367 (Fla. 1994) (harmless error where four aggravators remained to be weighed against statutory mitigator); Watts v. State, 593 So.2d 198, 204 (Fla. 1992) (eliminating HAC harmless where three aggravators remained to be weighed against one statutory mitigator and one nonstatutory mitigator).

ISSUE VIII

THE TRIAL COURT PROPERLY CONSIDERED AND EVALUATED EACH NONSTATUTORY MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENSE

Here Damren contends that the trial court improperly rejected or improperly assigned insufficient weight to his proposed nonstatutory mitigation. Although his argument in support of this

claim is cryptic to the point of near non-existence, the State will attempt to respond. The State's position is that the trial court carefully considered and expressly evaluated each and every proposed nonstatutory mitigator,[7] as required by this Court's decisions. E.g., Campbell v. State, 571 So.2d 415 (Fla. 1990).

The court gave little weight to the claimed mitigator that this burglary did not involve a sophisticated plan, because history had shown that sophistication was not needed--Damren had burglarized RCG mines before and had not been caught (R 791). The court also gave little weight to the fact that Damren had not acted alone and the exact role of each accomplice was not clear. As the record shows, Michael Knight observed Damren deliver at least one of the blows, and no evidence other than Damren's own self-serving statements indicated that Chittam struck any blows. The trial court rejected (gave no weight to) the proposed mitigators relating to alcohol impairment on the ground that there "was no testimony from anyone that [Damren] was impaired in any way" (R 791). On the contrary, the evidence showed that Damren "was able to reflect on all his actions both before and after his visit to R.C.G. Mineral Sands" (R 792). See Garcia v. State, 644 So.2d 59, 63 (Fla.

[7] These included four proposed mitigators relating to the offense and nine proposed mitigators relating to Damren's life (R 708-09).

1994) ("the trial judge could properly find from the evidence that there was insufficient evidence of intoxication to establish that as a mitigating factor").

As for the proposed mitigation relating to Damren's life, the trial court did find that Damren had an alcoholic father and has suffered with his own alcohol problems. However, as the court explained, Damren's father may have drunk to excess, but he was generally absent on military duty. Damren drinks, but his drinking did not affect his work or his ability to function. Therefore, the court gave "little" weight to this mitigator (R 793).

The court gave "some" weight to Damren's good behavior in jail following his arrest (R 795).

The trial court gave 'no weight" to the proposed mitigators that Damren suffered emotional deprivation and little parental support as a child, has held jobs and performed well in his work, has been kind to his family, has shown patience with and affection for children, has been a generous and devoted friend, served his country in Vietnam, and has maintained a relationship with Nancy Waldrup and her daughter (R 792-94). As the court explained, Damren's father may have been absent for long periods of time, and his mother may have not been a good disciplinarian, but she did all she could to make a good home. The record shows that Damren was

well-behaved and respectful as a child, and still enjoys a good relationship with his mother and sister. As the trial court noted, his relationship with his mother "belies, in part, his claim of little parental support as a child" (R 793). As for his acts of friendship, the court explained that they were "commendable, but it is hyperbole to label them 'generous' and 'devoted'" (R 794). Damren's Vietnam experience was too remote in time, the court thought, to mitigate the offense (R 794).

After specifically addressing each of the proposed mitigators, the trial court summed up his findings:

> The circumstances relating to the offense presented by the defense offer little, if any, mitigation. The circumstances relating to the defendant's life do not constitute mitigation. They demonstrate a life remarkably absent of good deeds, except for a few isolated, sporadic and uneventful acts of kindness that collectively do not rise to the level of mitigation. An empty, non-productive and vacuous existence is not an excuse for criminal behavior and cannot justify or ameliorate the act of the defendant in murdering Donald Miller. [R 795]

As this Court has noted, there are "no hard and fast rules about what must be found in mitigation in any particular case . . . Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain with the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990). Accord, Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir.

1992) ("Acceptance of nonstatutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer consider the factors.") .[8] The trial court carefully considered all the evidence presented in mitigation, along with all of the nonstatutory mitigation proposed by the defense (R 788). The decision as to whether a mitigating circumstance has been established, and the weight to be given to it if it is established, are matters within the trial court's discretion. Bonifay v. State, 21 Fla. L. Weekly S301 (Fla. July 11, 1996). So long as the trial court considers all of the evidence, its "determination of lack of mitigation will stand absent a palpable abuse of discretion." Foster v. State, 21 Fla. L. Weekly S324, S327 (Fla. July 18, 1996). Accord, Cook v. State, 542 So.2d 964, 971 (Fla. 1984); Hudson v. State, 538 So.2d 829 (Fla. 1989); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). Damren's sentencing order was sufficient to allow adequate appellate review. Sims v. State, 21 Fla. L. Weekly S320, S323 (Fla. July 18, 1996). This Court is 'able to conduct an

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[8] See, also, Burger v. Kemp, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (quoting with approval 11th Circuit's observation that "mitigation may be in the eye of the beholder"); Tuilaepa v. California, U.S. ___, ___ S.Ct. ___, 129 L.Ed.2d 750, 767 (1994) (Souter, J. concurring) ("refusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible")

appropriate proportionality review" in this case "because the order specifies which statutory and nonstatutory mitigating circumstances the trial judge found and the weight he attributed to these circumstances in determining whether to impose a death sentence." Ibid.

The trial court's rejection of some of Damren's proposed mitigation was not an abuse of discretion. Jones v. State, 652 So.2d 346, 351 (Fla. 1995) (where defendant's mother unable to care for him but left him in care of relatives who could, "court did not abuse its discretion by refusing to find in mitigation that Jones was abandoned by an alcoholic mother"); Sochor v State, 619 So.2d 285, 293 (Fla. 1993)(trial court rejected as mitigating defendant's family history which included alcoholic, hot-tempered and violent father who was at times unable to support his family; held: "Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion."). But even if this Court were to conclude that some of the proposed mitigation rejected by the trial court should have been given some minimal amount of weight, any error was harmless beyond a reasonable doubt. The trial court's conclusion that Damren's life is "remarkably absent of good deeds, except for a few isolated, sporadic and uneventful acts of kindness" is surely supported by this record.

Damren did not even contend--much less present any evidence to show--that he suffers any mental or psychological problems, except that he drinks too much (a factor which the trial court gave some weight). And although his father could have been a better parent, Damren did not suffer any treatment remotely resembling child abuse, physical or sexual. Nothing Damren presented strongly mitigates his conduct, and adding minimal weight to the minimal mitigation found by the trial court would not affect the sentence imposed in this case. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Zeigler v. State, 580 So.2d 127, 130-31 (Fla. 1991); Rosers v. State, 511 So.2d 526 (Fla. 1987). Therefore, the trial court's judgment should be affirmed.[9]

ISSUE IX

DAMREN'S DEATH SENTENCE IS PROPORTIONATE TO THE PENALTY IMPOSED IN OTHER CASES

Damren contends, without citing any comparable cases, that his death sentence is disproportionate. The State would respond that a comparison with similar cases demonstrates that Damren's death sentence is both proportionate and appropriate. The trial court

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[9] The State would note that even if the trial court committed reversible error in its evaluation of mitigation, the remedy would be to remand for resentencing by the judge, not a remand for the imposition of a life sentence as contended by Damren at p. 74 of his brief. Foster v. State, 614 So.2d 455, 465 (Fla. 1992).

found four aggravators (CCP, HAC, prior violent felony conviction and robbery/pecuniary gain), no statutory mitigation, and minimal nonstatutory mitigation. This is the kind of case for which the death penalty is properly imposed. Geralds v. State, 674 So.2d 96 (Fla. 1996) (death sentence proportionate when two aggravators weighed against one statutory and three nonstatutory mitigators); Finney v. State, 660 So.2d 674 (Fla. 1995) (death sentence proportionate where there were three aggravators and five nonstatutory mitigators); Gamble v. State, 659 So.2d 242 (Fla. 1995) (death sentence proportionate where there were two aggravators, one statutory mitigator, and several nonstatutory mitigators); Bogle v. State, 655 So.2d 1103 (Fla. 1995) (death sentence proportionate where there were four aggravators, one statutory mitigator and several nonstatutory mitigators); Whitton v. State, 649 So.2d 861 (Fla. 1994) (death sentence proportionate with five aggravators versus nine nonstatutory mitigators) ; Fennie v. State, 648 So.2d 95 (Fla. 1994)(death sentence proportionate where there were three valid aggravators and both statutory and nonstatutory mitigators); Bruno v. State, 574 So.2d 76 (Fla. 1991)(death sentence proportionate with three aggravators and no statutory mitigators).

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the State of Florida respectfully asks this Honorable Court to affirm Damren's conviction and death sentence.

Respectfully submitted
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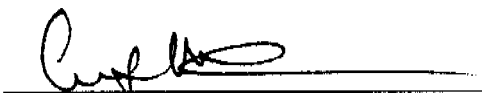

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Teresa J. Sopp, Esq. 211 N. Liberty Street, Suite Two, Jacksonville, Florida 32202-2800, this 19th day of August 1996.

CURTIS M. FRENCH
Assistant Attorney General