IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-582

JOHN M. BUZIA,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant,

ANSWER BRIEF OF APPELLEE/ INITIAL BRIEF OF CROSS-APPELLANT

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

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STATEMENT OF THE CASE

Appellant was indicted on the following charges for crimes which occurred March 14, 2000:

(1) First degree murder of Charles Kersch;

(2) Attempted first degree murder of Thea Kersch;

(3) Burglary of a dwelling with intent to commit assault or battery on Charles and/or Thea Kersch; possession of weapon, an axe;

(4) Robbery of Charles and/or Thea Kersch with a deadly weapon.

(R 19-21).

Multiple motions regarding the death penalty were filed. The motions were heard pre-trial and all but one denied: that the State should provide defense with a list of aggravating circumstances (R 253-245).

Appellant moved to disqualify Judge Kenneth Lester because he was "married to a career prosecutor in Orange County." (R 254-256). The State responded (R 257-259). The motion was denied (R 260).

On June 7, 2002, the Public Defender representing Appellant filed a Motion for *Nelson* Hearing (R 292). After a hearing, the trial judge found the representation of the Public Defender effective(R 294). The Public Defender filed a

certificate that trial counsel, Timothy Caudill and James Figgatt met the requirements of Florida Rule of Criminal Procedure 3.112(f) and (g) (R 303).

The case was tried by jury on March 24-28, 2003. Appellant was found guilty of both felony and premeditated murder (R 470, 1463). Additionally, he was found guilty of attempted first degree premeditated murder with a weapon, burglary of a dwelling with an assault or battery while armed with a weapon, and robbery with a deadly weapon (R 471-473, 1463). Appellant filed a Motion for Judgment of Acquittal pursuant to *Ring v. Arizona,* 536 U.S. 584 (2002) (R 512-517). The State filed a response to the motion (R 549-551).

The penalty phase began April 1, 2003. On April 4, the jury returned an 8-4 recommendation for a sentence of death (R 502, 510). The *Spencer* hearing was set for May 5, 2003 (R 511). The *Spencer* hearing was held August 18, 2003 (R 597). The parties filed sentencing memorandum.

On March 11, 2004, Appellant was sentenced to death for the murder of Charles Kersch. The trial judge made detailed findings in a twenty-five page sentencing order (R 653-678). The following aggravating circumstances were considered:

(1) Prior Violent Felony: the attempted murder of Thea Kersch - given great weight (R 656-657);

(2) During a Robbery/Burglary/Kidnapping: robbery and burglary were not considered as underlying felonies since they were used in the "pecuniary gain" aggravating circumstance. The State argued the uncharged felony of kidnapping supported this circumstance; however, the court did not find the aggravating circumstance because there was no jury verdict on kidnapping (R 658-659) - no weight;

(3) Avoid Arrest: Appellant was known to both victims, purpose of killing Charles Kersch was to eliminate witness who could identify him (R 660-661) - great weight;

(4) Pecuniary Gain: Appellant found guilty of burglary and robbery, took money and property, waited for Charles to come home to acquire more money, credit cards and vehicle; however, this circumstance merges with Robbery/Burglary (R 661-663) - no weight;

(5) Heinous, Atrocious and Cruel: attack took place in stages, elderly victim attempted to stand and struck again, after second attack, was struck twice with axe, period of time elapsed between three stages of beating, not immediately struck dead, high degree of pain and awareness of plight, when Defendant left, victim was breathing and groaning (R 664-666) - great weight;

(6) Cold, Calculated, Premeditated: murder was in three

stages and reflection at each stage, beat Thea Kersch then tried to clean up crime scene and lay in wait for Charles Kersch to come home, beat Charles with fists and when that did not succeed he struck him with axe (R 666-669)-great weight.

The following mitigating circumstances were considered:

(1) Extreme Mental or Emotional Disturbance: not proven as statutory mitigating circumstance, but given substantial weight as non-statutory mitigating circumstance (R 671);

(2) Capacity to Appreciate Criminality/Conform Conduct: actions contradict this mitigating circumstance; however, non-statutory mitigation found and given substantial weight (R 672);

(3) Additional Non-Statutory Mitigation:

(a) Gainfully employed - little weight (R 673);

(b) Appropriate courtroom behavior - little weight (R 674);

(c) Cooperation with law enforcement - little weight (R 674);

(d) Difficult childhood - somewhat contradictory - little weight (R 674-675);

(e) Remorse - little weight (R 675);

Appellant was also sentenced to life imprisonment on the attempted murder, burglary and robbery (R 677). The three

life sentences were concurrent to each other and to the sentence of death (R 677, 681-684).

STATEMENT OF THE FACTS

Charles and Thea Kersch lived in Riverwalk gated community in Oviedo (R 493, 499). They were retired and managed their real estate investments (R 493). They employed Appellant and Mr. Garcia to work on rental properties (R 494). At some point, the Kersch's asked Appellant and Garcia to do some work at their house (R 495). When they were painting the house, appellant and Garcia never came inside (R 495). After the painting was finished, Appellant continued to work for the Kersch's putting a floor in the attic over the garage (R 496). Thea Kersch had limited contact with Appellant, although she would usually serve him lunch (R 497).

Appellant was expected at the residence on March 14, 2000, but did not show (R 498). Charles Kersch would usually pick up Appellant from a bus stop (R 499). Appellant did not have a key to walk through the gates to the Kersch residence (R 500). The Kersh's waited for Appellant awhile, then decided to run errands. They left in separate cars (R 503). Thea Kersch returned to the residence between 4:00 and 4:30 p.m. (R 503). Appellant was standing in front of the house (R 504). He said his brother had been beaten up the night before and he needed to talk to Charles Kersch (R 504). Appellant seemed agitated (R 507).

Thea Kersch told Appellant he could go around the back of the house and wait on the patio. She parked her car in the garage and went inside the house to the kitchen (R 508). Appellant came to the sliding glass door between the kitchen and patio and handed her the tray from his lunch a few days prior (R 508). As Thea put the tray on a table, Appellant hit her several times on the back of the head (R 513).

When Thea regained consciousness, she was lying on the floor in the back bedroom (R 519). She could hear someone moving in the room and she thought: "Oh, no, my tormentor is back." She could feel and hear that her head was cut. The sound was a crunching noise (R 518). She blacked out again and regained consciousness (R 519). There was a puddle of blood where she was lying (R 520). She crawled through the bathroom into the office and called 911 (R 520).

Thea Kersch was able to go to the front door to let emergency personnel enter (R 470, 522). Deputy McGrath was the first officer to arrive (R 468). He could see someone's feet lying on the floor near the kitchen (R 471). Thea told Deputy McGrath that Appellant hit her (R 472, 523). She could see her husband lying on the floor behind the sofa and bloody footprints on the tile floor (R 525). McGrath walked around to make sure no one was in the house. When he returned, Thea

had collapsed on the floor (R 474). Thea was placed on a stretcher and taken to the hospital with cuts on her head, a concussion and a dislocated arm(R 525-527). Several days later, she learned her husband had died. They were both 71 years old (R 526).

Charles Kersch was found dead on the floor with papers next to his body. One of the papers was a quick-reference list which contained Appellant's name and phone number (R 477). A neighbor had seen Appellant walking rapidly in the area the day of the murder. She saw his photograph on television and called the police (R 488-489).

Officer Jaynes responded to the hospital and spoke with Thea Kersch. She told him Appellant was the one who hit her (R 641). He retrieved her clothing and placed it into evidence (R 642). Jaynes then tried to locate Appellant but could not find him (R 643-644).

Denise Lohrman worked at National Bank of Commerce in Winter Park (R 539) Appellant drove into the drive-through the morning after Charles Kersch was murdered (R 541). He handed Denise a check drawn on Charles Kersch's account for "eight hundred and some odd dollars" (R 543). Appellant did not have

a driver's license, so he gave Denise a Publix and YMCA card[1] (R 544-545). Denise called the Kersch residence to verify the check. There was no answer, so she left a message on the answering machine (R 546). Denise then talked to Harriett Fickett, who indicated she had some concerns about the transaction (R 547). Harriet had seen a news story on TV regarding a car the police were looking for (R 551). She had seen a strange car in the parking that morning that matched the description given on TV (R 551-552). She checked the tag number in the newspaper and it matched the car which had moved to the drive-through (R 554). The police had issued a BOLO to the press for Appellant and Charles Kersch's car (R 666-667). Harriet talked to Denise, then called the police (R 548, 554). The police arrived on the scene while Appellant was still in the drive-through lane (R 548-549, 556).

When Officer Jones arrived at the bank, he called in the tag number of the white Toyota (R 560). Two other officers blocked the vehicle from leaving (R 562). Jones ordered Appellant to exit the vehicle, but it was too close to the bank wall, so he had to exit out the passenger side (R

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[1] The check, the YMCA card and the Publix card Appellant gave the teller were retrieved and placed in evidence (R 603).

563). There were no problems with Appellant exiting the vehicle (R 564). Appellant seemed to understand the officers' commands (R 564). He did not have any trouble walking (R 566). Officer Barber searched Appellant and seized a ball cap, utility knife, pliers, keys, change, and a wadded up pieced of paper (R 578). Appellant did not resist (R 582). Appellant was disheveled and unkempt (R 582).

Officer Biles transported Appellant to the police station. Before they left the bank, Biles read Appellant his *Miranda* rights (R 587). Biles did not question Appellant. When they were at the police station, a trainee officer asked Appellant whether he wanted to take a seat and Appellant said something like: "I think I'm gonna have plenty of time in the future to be sitting down." (R 588). Appellant was very calm and was talking about attending Florida State University, wanting to be in hotel management and working at motels on International Drive (R 588). Appellant had no problems engaging in conversation or understanding the officers (R 589). There was no indication Appellant was "high." (R 589).

Officer Biles noticed what looked like dried-up blood on Appellant's shoes and under his fingernails (R 590). The shoes were seized and packaged as evidence (R 591, 607). A bloodstain was noted on Appellant's shoulder (R838).

Appellant was photographed and swabs collected from his hands. Fingernail scrapings and his clothes were collected (R 836). A photograph showed a bloodstain on the shoulder of Appellant's shirt (R 839).

Officer Jaynes conducted a videotaped interview of Appellant at the Winter Park Police station (R 649). Appellant was advised of his *Miranda* rights and signed the warning sheet (R 648, 689-690, State Exhibit 28). Appellant understood the questioning and did not appear to be high on alcohol or drugs (R 685). During the interview, Appellant mentioned he had been at a Mobil station in Winter Park. Jaynes viewed the video surveillance tape from the Mobil station and seized the credit card receipt for gas and beer (R 659, 664). Appellant used Charles Kersch's credit card to make the transaction (R 665). He bought gas for the car and a 12-pack of Busch (R 748).

During the videotaped interview, Appellant denied doing drugs, but said he drinks a few beers a day (R 696). Appellant admitted he "took the keys from [Charles Kersch] and took the car[2]." (R 695). The morning of the murder, Appellant

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[2] When Thea Kersch returned to the residence, she learned that approximately $200.00 cash was missing, as were her credit cards, and her husband's car and wallet (R 533).

had slept on the street then gone to McDonald's for breakfast and just "hung around there" reading the paper or went to Books-A-Million (R 764). He arrived at the Kersch residence around 2:00 to 2:30 p.m. by walking through the gate when a car entered (R 697, 732). There was no one home when he rang the doorbell (R 697). Appellant waited for someone to arrive. Thea Kersch pulled in after about twenty minutes (R 698). She let Appellant in so he could get up in the attic to work. She asked whether he wanted to wait for Charles to come home before he started work.[3] Appellant said he did (R 698). Thea directed Appellant to the back patio/pool area.

Appellant picked up the tray from lunch the day before and assaulted Thea in the family room and took her keys (R 699, 701). He was not angry, he just walked up and punched her so he could get money (R 718). He "tried to make her unconscious so I could get some money from her." (R 699). When he hit her, blood sprayed from her nose. He hit her with his fist and kicked her with his shoe. He went into her purse to get money (R 700). She had $80.00 (R 702). He also took Thea's Mastercard (R 704).

Appellant pulled Thea Kersch into the spare bedroom and

[3]Thea was aware Appellant had asked Charles for money, and Charles refused to give it to him (R 532).

covered her with a blanket (R 702). He duct-taped the door shut so Thea could not get out of the bedroom (R 726). He wandered around the house because “curiosity takes over and you look for stuff.” (R 703).

At that point, Appellant heard the garage door open and “assumed that was Charles coming home.” (R 704). Appellant’s mind was contemplating what to do. He couldn’t imagine saying “I just punched your wife.” There was blood on the floor (R 705). Appellant considered the options, then hit Charles Kersch as he entered the house through the garage door (R 706). Charles was bleeding “bad...real bad.” He did not put up a struggle because “he’s an older guy.” (R 707).

Charles Kersch’s head hit the tile floor “pretty hard.” (R 708) Appellant hit Charles a few more times when Charles got up on all fours (R 709). He knew “he’s gonna die, if [I] leave right now.” (R 708). But, Appellant was committed at that point (R 708). He wanted to keep Charles down longer so he could drive away and get more time. To accomplish that, Appellant hit him again with his hands then took the wallet from his pants to see whether he had money (R 709).

At one point, Appellant went to the garage and got an axe

"to make 'em unconscious" (R 711).[4] At first, Appellant claimed he did not hit Thea and Charles with the axe, he just "threw it on the ...in the puddle of mess." (R 711). There were actually two axes. Appellant later conceded he hit Charles with an axe (R 734). He used the flat side because "I would never use the sharp side." (R 735). He claimed he did not mean to kill Charles, his intention was "just to slow him... to put him out." (R 735). Appellant swung the axe sideways and it "glazed off" Charles' skull (R 740, 751).

Appellant also admitted he hit Thea with one of the axes after he had "taken care" of Charles (R 711-712, 738). Thea was getting up, so he hit her with the flat side of the axe (R 713).

Charles Kersch had close to $100.00 in his wallet. Appellant grabbed Charles' car keys and drove away (R 710, 714). When he left, both Thea and Charles were moving, moaning and groaning (R 750). He used Charles' credit card at a Mobil station to get gas, then spent the night in the car at Albertson's parking lot (R 715). In the morning, Appellant wrote out a check for $830.00 and tried to cash it (R 716-717).

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[4] Thea knew of two axes her husband kept in the garage (R 531).

Appellant denied drinking or taking drugs of any kind (R 723). He had a few beers the night before the murder (R 724). He did not have a drug problem (R 765). He did not appear to Investigator Jaynes to be coming down from a crack cocaine "high." (R 796) One of Appellant's family members said he might have a crack problem, but Appellant denied this (R 766). He was wearing the same clothes during the incident as when he was arrested, except for a T-shirt he left at the house (R 728). He had taken one of Charles' shirts from the laundry and was wearing it at the time of arrest (R 721, 727).

Investigator Robert Martin, who had worked hundreds of crime scenes including a "couple hundred" homicides responded to the murder scene, assessed the "security situation," and assigned crime scene unit members (R 825-827). Upon entering the residence he saw Charles Kersch located near the garage door in a pool of blood around him (R829, 830). Officers removed the victim's pants and shirt to protect bloodstain evidence from being contaminated in the body bag (R834). Investigators spent two weeks at the scene (R 834). The scene was secured the entire time (R 835).

Two axes were recovered: one in the dinette area, and a second behind the couch (R878, 883-884, 1105). The second axe was a double-bladed axe (R 994). A white Orlando Magic shirt

was found in the Kerschs' kitchen (R 861, 1124). There was diluted blood in the sink (R 1126) There was a tray on the family room floor. The foyer, family room, garage hall, kitchen and dinette were tiled. The tiles showed bloody shoe impressions (R883, 937, 925). Floor tiles were removed from the scene for processing (R925, 1210). Terrell Kingery, FDLE crime scene lab analyst compared Appellant's shoes to the shoe impressions on 23 pieces of tile and in 1,658 photographs (R 1192-1194). There were seven matches to Appellant's shoes: six to the right shoe and one to the left (R 1209). Kingery had visited the crime scene and all the treads were the same. He did not compare all the impressions (R 1210).

The carpet was also processed for footwear impressions which appeared in the library, west hall, and master bedroom (R 852-853). There were footwear impressions in front of the dresser, and the drawers were opened (R 856).

The entire residence was processed for latent fingerprints (R 843, 848). Many of the areas had impressions in which no ridge detail could be obtained (R 848). Other areas provided ridge detail. The investigators were able to obtain prints with ridge detail on the garage cabinet, family room, and west hall bathroom (R 852). There was a ladder in front of a cabinet in the garage. What appeared to be a blood

smear was on the door of the cabinet (R 844). Appellant's palm print was found on the cabinet in the garage (R 1099).

Sharon Ballou, crime scene analyst with the Seminole County Sheriff's Office, examined the victims' home for bloodstain pattern (R955). Blood spatter on the wall near the body of victim Charles Kersch indicated it was "a result of a beating" (R973, 975). There were a number of different (blood) stains around the body (R973). Assuming an axe was used and a person were lying on the floor with no blood on them; a first blow would not create cast off (R 984-985). The second blow would cause cast off (R 985). Ballou was able to determine in this case that there were at least two impacts to Charles Kersch's head. The blood patterns showed two separate blows (R 986-987). Two patterns would occur with two blows: the first causing medium velocity impact spatter and the second creating cast off (R 985). Appellant's shorts had medium velocity impact spatter from the middle to the side seam (R 1160-61). Appellant was wearing four socks. Socks #1 and #3 also had medium velocity impact spatter (R 1162). Both Appellant's left and right shoes had medium velocity impact spatter (R 1165, 1166).

Vicki Bellino, crime laboratory serology analyst with the Florida Department of Law Enforcement (FDLE), received several

items to process for DNA testing: Appellant's white T-shirt, four socks, shorts, and shoes, an axe found in the family room, an axe in the kitchen, and blood samples from a tray. Two blood stains on the white T-shirt matched Thea Kersch (R 1052). Stains on appellant's sock and shorts also matched Thea. Bellino was not able to exclude Thea Kersch or Charles Kersch as donors of the blood on the right shoe. She was able to exclude Appellant (R 1053). Blood on Appellant's shorts and on one axe[5] matched Charles Kersch (R 1053). The results on the other items were inconclusive (1059). Martin Tracey, professor at Florida International University-Miami did the frequency calculations on the DNA results (R 1079-1084).

Charles Kersch's car was processed, and three wallets found: Appellant's, Charles' and Thea's (R 899, 907). Inside Appellant's wallet was a check to Albertson's, on Kersch's account, the ID card of Charles Kersch, Charles' Sams Club card and two Mastercards (R 900-903, 907).

The medical examiner who conducted the autopsy, Dr. Thomas Parsons, found bruising to the back of Charles Kersch's right hand which appeared to be from blunt force (R 1237). Charles had lacerations in three places on the right side of

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[5] The other axe had no blood on it (R1061).

the head with “abundant hemorrhage” under the eye injury (R 1238). The injury was consistent with being hit by a fist and inconsistent with being hit with an axe (R 1239). Charles had a laceration and hemorrhage to the back of the head. There was a small skull fracture with a large amount of accumulated blood. The wound could have caused death (R 1240). Last, Charles had a large complex laceration and hemorrhage to the left side of the head which was consistent with being hit with an axe or falling hard on the floor (R 1242-1243). The object that made the wound would have to have great density and momentum (R 1247). The large wound would have caused unconsciousness immediately. Death would result within a couple minutes (R 1250). The cause of death was blunt force trauma (R 1250).

The trial judge made the following fact findings:

> Prior to March 14, 2000, the Defendant, John Michael Buzia, had a work relationship with Charles Kersch. Charles Kersch had employed the Defendant for odd jobs about the Kersch residence. From time to time, Thea Kersch would feed the Defendant by making him lunch or providing drinks. On the day of the murder, the Defendant took a bus to the victims' neighborhood and walked through a gate into their community. He passed a neighbor of the victims' on the way to their residence and then waited for one of them to arrive home. Thea Kersch arrived home first and spoke briefly with the Defendant. The Defendant advised her that he wanted to talk to her husband, at which time Thea Kersch allowed the Defendant to wait in the enclosed patio area until Charles Kersch arrived home. The Defendant took a

tray that was located on the patio and went to the door and handed it to Thea Kersch, using this helpful act as an artifice to gain access to the house. Once inside the residence, he attacked Thea Kersch with his fists, knocking her down and kicking her. He then dragged the elderly Thea Kersch to the back bedroom, covered her with a blanket, and then tried to use duct tape to keep her from getting out of the bedroom. After an unknown period of time, the Defendant returned and struck Thea Kersch in the head with an axe. The Defendant attempted to clean up the bloodshed located in the kitchen/den area of the house, but finally gave up and solved the problem by throwing a rug over the bloodiest area. The Defendant rummaged through Thea Kersch's purse and removed approximately eighty dollars ($80.00). Subsequent to that he went to the laundry room to change into a clean shirt and then he began searching the house. A period of time passed before Charles Kersch returned home. The Defendant met Charles Kersch near the entrance from the garage. He was aware that Charles Kersch was about to enter the residence due to the sound of the garage door opening. It is unclear when the Defendant obtained the axe or axes used in the murder and attempted murder. Regardless, upon Charles Kersch entering the house by the garage entrance, the Defendant began to beat him with his fists. Although in good shape, the elderly Charles Kersch was no match for the youthful Defendant and went down on the floor hitting his head on the tile. Charles Kersch tried to get up but was beaten to the floor once again. As he was helplessly lying on the floor, the Defendant struck him in the head with an axe at least twice. The evidence at trial made it unclear whether or not both axes were employed. It is unknown whether one axe was cleaned at some stage during one of the attacks and then the other axe was used, or whether one axe was used and it was cleaned subsequent to being used a second time. Regardless, both axes were brought into the house by the Defendant. The plausible explanation is that he brought one axe into the house and forgot where he placed it and found it necessary to go back into the garage and obtain the second axe. The Defendant then stole the victims' car along with personal possessions. He

> used the victims' credit card to buy beer and gas that night. He went to the bank the next day in an attempt to cash a check and at that time was arrested by the authorities. He was interrogated by the police and admitted striking the victims and taking their money and personal property. (R 654-655).

Penalty Phase.

The State called two witnesses on victim impact: Thea Kersch and Cacjek Phillips (R 1496-1509, 1509-1514). The defense called sixteen lay witnesses, two police officers, and an expert witness: psychologist William Riebsame. The State then called Officer Barber, Ann Coy, and psychiatrist Jeffrey Danziger.

Patricia Breslin married Appellant's father, John Elum Buzia, when she was 19 years old and he was 22 years old (R 1521). John E. Buzia was studying business in college (R 1521). They were married after he went into the Army in 1954(R 1523). They lived in Germany for 1 1/2 years (R 1525). Patricia returned to Illinois when she was eight months pregnant, and John E. joined her for the birth of their daughter, Kathy, in 1957 (R 1524). Kathy passed away in October, six months before the trial (R 1527).

John E. Buzia was a traveling salesman who sold anesthetic equipment (R 1528-1529). He and Patricia had a second daughter, Mary Carol, in 1959 (R 1529). Patricia did

not drink during her pregnancies (R 1531). John E. adored his children (R 1533). In 1960, Patricia gave birth to Appellant in Cincinnati. There were no problems with the pregnancy (R 1535). They had no financial problems (R 1536). They bought a four-bedroom home in an area with families with children (R 1536-1537). The Buzia children were very close (R 1538). While they were in Cincinnati, Patricia had a fourth child, Jack (R 1540).

John E. was relocated to Chicago, so the family moved to an affluent community on Lake Michigan named Ogden Dunes (R 1541, 1543). Appellant had lots of friends (R 1543). As the children grew older, it seemed John E. was favoring Jack more than Appellant (R 1545). When John E. went into management, he did not like his job and began drinking (R 1547-1548). He was angry with everyone, but his relationship with the children remained good (R 1548). The family attended church and the children all had pins for perfect attendance (R 1550-1551).

About this time, John E. went into business for himself and things started to fail (R 1562). John E. would get “quite ugly” with Patricia, sometimes physically but more often mentally (R 1562). The Buzias were divorced in 1972 (R 1564). At the time of the divorce, Patricia considered John E. to be

an alcoholic (R 1580). There was no history of mental illness in the family (R 1551).

Appellant was proficient in all sports (R 1549). He attended a private high school (R 1554). Educationally, the school was a tremendous opportunity (R 1557). Appellant received a scholarship to the school (R 1557). He played soccer, golf, baseball, and wrestled (R 1558). Appellant even traveled to England with the soccer team (R 1560). Occasionally, Appellant would drink a beer (R 1559). It was only social drinking when the kids were seniors (R 1560). When Appellant graduated, the head master told Patricia the IQ tests may have shown that Appellant was just slightly above average, but in every way – scholastically, leadership and other attributes –he "far out did what he should have been able to do." (R 1568).

Appellant attended a community college in Cape Cod for a year, then moved to Florida where John E. was living in Winter Park (1569-1570). Appellant attended Florida State University ("FSU") but did not graduate (R 1571). Patricia had no idea whether Appellant did drugs in college (R 1572). She did not expect him to take drugs because he was concerned with his health, was athletic, and did not smoke (R 1573).

Patricia moved to Orlando in 1991 after she was divorced

from her second husband (R 1573). Appellant lived in Tallahassee and worked (R 1575). Around 1994 to 1997, Appellant, Patricia, and Jack rented a condo in Orlando. Appellant worked at Universal Studios (R 1577). Patricia returned to Cape Cod and Appellant moved in with his father (R 1577). John E. passed away in 1997. Appellant found him on the floor when he got up in the morning. He was very upset (R 1578). Patricia did not think Appellant was taking drugs, but he looked as if he had been drinking too much (R 1579).

Several of Appellant's friends from the private high school testified about his activities during that period. William McKenna did not recall Appellant's academic abilities, but he remembered him in sports (R 1587). Appellant played baseball well and was a nice addition to the team (R 1588). Tom Crepeau was a friend of Appellant's in high school. The school was small, so you knew everyone (R 1594). Appellant was a very good soccer player and wrestled (R 1595). When he heard about the murder, Crepeau felt there was "some extraneous something cooking" because it did not sound like the "John we knew and loved in high school." (R 1596). Harry Zegers played soccer with Appellant in high school and lived in the same dorms (R 1601-1602). Zegers and Appellant graduated from high school in 1978 (R 1600, 1603). Jonathan

Hicks played soccer with Appellant and lived near him (R 1625). Even prior to high school, Appellant was a very strong athlete and good-natured person (R 1626). Patricia Breslin helped organize a trip to England one summer (R 1627). None of the above witnesses stayed in touch with Appellant after they graduated from high school (R 1590, 1597, 1603, 1626).

Amber Buzia, Appellant's 22-year-old niece, lived with John E. in Winter Park when she was a child (R 1631). She remembered climbing trees, going to the beach, and visiting Universal Studios with Appellant (R 1633). There are a lot of alcoholism problems in the family (R 1635). Her mother, Mary (Appellant's sister), had been in rehabilitation centers four times (R 1636). Amber had never seen Appellant drunk (R 1636). The family also used recreational drugs. Appellant changed later in life and lost weight (R 1637). Amber lost touch with Appellant when she was a teenager (R 1638).

Pastor Smart grew up in Ogden Dunes and knew the Buzia family (R 1642). Appellant was a "friend, someone I love very much, very good memories of him." (R 1642). Pastor Smart had little contact with Appellant since before high school (R 1643-1644).

Several of Appellant's college friends testified about their years in college. William Bennett described

Appellant as “outgoing”... “He was very athletic, all the guys kind of gravitated towards him as the guy to talk to.” Appellant was a “good looking guy, girls liked him.” (R 1695). Bennett and Appellant were part of a group of about ten “misfits” who hung out together (R 1697). They played racquetball, soccer, and football (R 1698). They would go to fraternity parties, and everyone drank to excess (R 16999-1700). Second semester, some of the students, including Appellant, began doing lines of cocaine (R 1702). They also used marijuana (R 237). Bennett had only seen appellant intoxicated five times during the college years (R 1720). Appellant was very even-tempered. One time a student spit in his face at a bar, but Appellant never hit him (R 1711). Bennett met John E. at a going-away party for Appellant when he was leaving Tallahassee (R 1712). John E. appeared intoxicated (R 1713). Later on, Bennett saw Appellant at a wedding in Ft. Lauderdale. Appellant wanted money to buy cocaine (R 1719). Bennett lost contact with Appellant in 1991 but saw him in court in 2000 on charges of solicitation for prostitution (R 1724-1725, 1728). Bennett learned that Appellant was a substance abuser and had become a transient because of his drug problems (R 1728). Bennett was stunned when he heard Appellant was charged with murder. It was “not

the person that I know." (R 1726).

William Behr worked with Appellant in the FSU cafeteria as a student manager (R 1653-1654). Later on, they both worked as bellmen at the Governor's Inn in Tallahassee (R 1655). Appellant was a "hard, hard worker" who took pride in his work and was very good at managing people because he made them feel at ease (R 1656). Appellant was a very good athlete in college (R 1659). Behr lost contact with Appellant after college (around 1986) except that he saw him one time at Outback Steak House where Behr's brother, P.J., was manager (R 1657-1568). Appellant never abused drugs in college, although they would drink socially after a game (R 1661).

P.J. Behr, William's brother, hired Appellant as a cook in February, 1998 (R 1663, 1669). Appellant was a "diligent, good worker" who produced at a high level for the kitchen (R 1667). Appellant was terminated from Outback in June or July of 1998 due to tardiness (R 1668, 1675). Tardiness termination required a person be at least 15 minutes late at three times (R 1675). Appellant then worked in a Subway in the same strip plaza as the Outback (R 1669).

Gary Selje met Appellant the summer of 1978 when Selje was dating Appellant's older sister, Kathy (R 1607). Selje and Kathy married in 1986 and remain married until Kathy's

death (R 1608). Selje had "little to none" contact with Appellant (R 1609). Appellant stayed with them for a month a couple of times (R 1609, 1610). Selje and Kathy would see Appellant after they moved to Orlando (R 1611). Kathy and Selje developed an alcohol problem and drank at least a 12-pack a day (R 1612). Appellant also developed a drinking problem (R 1613). He went through "negative job changes" (R 1614). He would start drinking earlier in the day (R 1614). Selje had seen Appellant inhale powder cocaine (R 1615). Selje and Kathy also participated (R 1616). Appellant developed a cocaine dependency (R 1617). Selje separated from Kathy and left Florida in 1998 (R 1617, 1622). Selje had no further contact with Appellant after he left Florida (R 1623).

Appellant's cousin, Mary Carol Lohr, appeared by video-conference (R 1732). She is approximately eight years older than Appellant (R 1736). Mary Carol remembered family visits. There did not seem to be problems in the Buzia family (R 1737). The parents would argue (R 1738). The children were a little nervous around John E. (R 1738). Mary Carol's mother was an alcoholic (R 1738-1739). Patricia Breslin ran the Buzia family. John E. was never around (R 1741-1742). Lohr never spent a lot of time with Appellant. She was mostly with his sisters (R 1742). She was not aware of any alcohol

problems with John E. When she reflected, however, she was aware there was an abusive situation in the household (R 1749).

Appearing by video, Sally Borgetti advised the jur she grew up with the Buzia family and was close to Appellant's older sister, Mary (R 1797-1798). The Buzias were a normal household, and Borgetti did not see signs of alcohol abuse even though Borgetti's mother thought there was(R 1800). She last saw Mary when she was in college. Borgetti was at Cape Cod and Patricia Breslin was smoking marijuana in the home and the household was permissive (R 1802, 1805).

Appellant worked on the grounds crew where John Raaen lived . Appellant was the best worker and was dependable(R 1813). Raaen had no reason to believe Appellant was taking drugs; however, after the murder the other workers said Appellant had a drug problem (R 1814, 1816).

Dr. Riebsame reviewed materials in the case including reports, interviews, transcripts, depositions, medical records, an MRI from 2001, records of a 1994 hospitalization, and Appellant's criminal history (R 1827-30). He talked with the family and interviewed Appellant (R 1830). He spent approximately 16-18 hours directly with Appellant (R 1866). Appellant admitted the murder (R 1833).

Appellant scored in the 86th percentile on the wide range achievement test (R 1834). On the MMPI-2, he scored in the normal range on the lie, F, and K scales (R 1838-1839). Appellant's score on the substance abuse scale was clinically significant, and he had a real possibility for addiction (R 1840-1841). In Dr. Riebsame's opinion, Appellant was in denial about substance abuse (R 1841). Appellants scale 4 showed he was outgoing, assertive, confident and a leader. His scale 7 showed anxiety and that he keeps to himself (R 1842). His IQ was 104 and he had no neurological or neuropsychological problems (R 1850-1851). Appellant was not anti-social, although he was immature (R 1852, 1853).

Appellant told Dr. Riebsame his parents, brother and sister were alcoholics. There were physical altercations between the parents (R 1845). His father would come home intoxicated. There were two incidents of physical abuse to Appellant, who said he was never able to please his father (R 1846). The father died in 1996 of a stomach aneurism. This did not cause Appellant to be depressed (R 1856). He lived on the streets or in a tent in his brother's back yard (R 1859). Appellant had several arrests for intoxication-related offenses such as DUI (R 1848). He said he started using cocaine in college and crack cocaine in 1997 (R 1848). Dr.

Riebsame believed Appellant was both alcohol and cocaine dependent (R 1849). Appellant reported he would work to get the money for crack, then not show up for work (R 1857). Charles Kersch had given him $200.00. He spent $100.00 on clothes at Target and spent the other $100.00 on crack. The next day, he returned the clothes and bought more crack[6] (R 1858).

According to Appellant's interview with Dr. Riebsame, the day of the murder, he missed work at the Kersch house because he was on crack. He took the bus to the house and used crack at two stops (R 1861). The reason for going to the house was to rob Charles Kersch (R 1866). Appellant was able to get himself into the gated community and waited at the Kersch house (R 1862). Thea Kersch arrived and invited him to sit on the back porch. Thea gave him lunch and he hit her with the tray. He felt an adrenalin rush (R 1862). Appellant hit Thea so he could get money. He punched and struck her, then dragged her to the bedroom. He went through her purse and found $60.00 to $100.00 (R 1863). He was going room to room looking for money when he heard the garage door open (R 1863).

Appellant met Charles Kersch in the garage area, punched

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[6] The receipts from Target were admitted (R 1860, 1867, Defense Exhibit 1).

him, then reached for an axe and hit him. He then heard Thea Kersch stirring. He hit Charles again then took his wallet. He went around the house looking for money. He took a 12-pack of beer from the refrigerator and left in Charles' car. Appellant immediately went to a crack apartment and bought crack cocaine (R 1864).

Dr. Reibsame believed Appellant was experiencing cocaine withdrawal which created paranoia, agitation and delirium (R 1865). Appellant was able to recall generally what he did, but he was still in the throes of cocaine withdrawal and delirium (R 1865). Appellant admitted planning to go to the Kersch's to get money. He denied planning to harm them until he was sitting on the porch and struck Thea Kersch (R 1866). In the interview with police, Appellant denied using alcohol or cocaine because he does not use alcohol and drugs to excuse his behavior (R 1866).

Officer Randall Durkee, Winter Park police, helped detain Appellant at the bank on March 15, 2000 (R 1756). When Ofc. Randall told Appellant to get out of the car or he would release the K-Nine, Appellant looked at him "with kind of like a blank stare, almost like he was impaired in some sort." (R 1757). Police cars had blocked Appellant in, Ofc. Durkee had opened the passenger side door, and the K-Nine was barking and

lunging at Appellant (R 1760). The officer said Appellant looked as if he had been wearing the same clothes for a long period (R 1758). Ofc. Durkee was never close enough to tell whether there was an odor of alcohol in the car (R 1758).

Officer McAfee blocked Appellant's car from behind (R 1765). He approached the passenger side of the vehicle with his weapon drawn. He told Appellant to turn off the car and hand him the keys (R 1765). Appellant did nothing and stared straight ahead (R 1765). He looked as though he might be considering driving away, but he didn't (R 1765-1766). Ofc. McAfee could smell alcohol on Appellant (R 1766). Appellant's movements were "lethargic, almost dazed." He looked like the classic impaired driver (R 1767). Ofc. McAfee's contact with Appellant was extremely brief (R 1768).

The two police officers who searched Appellant and the car found neither drug paraphernalia nor any incendiary device, such as a lighter or matches, to ignite crack cocaine (R 1878, 1881).

Dr. Danziger, psychiatrist, reviewed depositions reports, transcripts, and the videotape of Appellant's interview with the police at 10:30 a.m. the day after the murder (R 1890). According to the DSM-IV, there is no such thing as cocaine withdrawal delirium as Dr. Riebsame testified (R 1895). There

is such a thing as cocaine withdrawal, but it does not include delirium (R 1896). Alcoholism has withdrawal delirium and there is cocaine intoxication delirium (R 1909). In Dr. Danziger's opinion, Appellant was not suffering from delirium. He had a clear recollection of the event and remembered details. For example, the credit card he used was a Master card (R 1899). The jail medical records did not show any indication of severe withdrawal symptoms (R 1919). The police interview showed nothing to suggest delirium (R 1920). Appellant clearly stated his purpose was to rob and incapacitate the victims. His actions were very goal directed (R 1899). Appellant moved Thea so no one could see her (R 19210.

According to Dr. Danziger, Appellant met the criteria for alcohol dependence and cocaine dependence (R 1908, 1909). However, Appellant denied use of any other drugs (R 1911).

Spencer Hearing.

The *Spencer* hearing was held August 18, 2003, at which time Appellant made a statement. He also presented the testimony of Officer Samuel Peterson, Richard Dickens, and Daniel Buffington. Thea Kersch was the only State witness.

Appellant's statement to the trial judge was about his friendship with, and working for, Charles Kersch (R 2577-

2579). Mr. Kersch inspired Appellant to do his best work. Appellant did not "know how my life so suddenly could deteriorate so quickly to take this man's life like that." (R 2579). He grieved for Thea Kersch because he destroyed her life (R 2579). He could not explain what he did, but he was sorry for Mrs. Kersch and sorry for what he did (R 2580). Appellant apologized to his mother (R 2581). He asked the judge to let him live because he has a message to share through outreach programs to prevent youths from making poor decisions (R 2581).

Department of Corrections Officer Peterson had contact with Appellant while he was housed in the jail (R 2583). Ofc. Peterson recalled an incident in which Appellant helped save an inmate who tried to commit suicide (R 2584). The inmate had wrapped a sheet around his neck and was turning blue. The officer was having problems untying the sheet, and Appellant helped him remove the sheet (R 2584). Ofc. Dickens was the drill instructor for the sheriff's office in a juvenile program named Operation Right Track (R 2586). As part of the program, the children are taken inside the adult correctional facility for a tour (R 2587-2588). At the end of the tour, an inmate tells them about life in jail. Appellant participated for over a year in the 45-minute portion at the end of the

tour (R 2588).

Dr. Daniel Buffington, clinical pharmacologist at the University of South Florida, reviewed Appellant's confession, and the trial testimony of Dr. Riebsame and Dr. Danziger, Mr. Selje, Amber Buzia, and William Bennett (R 2592-2592). He evaluated Appellant on May 9, 2003 (R 2596). Dr. Buffington presented a PowerPoint presentation on the pharmacology of cocaine and crack cocaine (R 2598-2606). He explained the effects of addiction to crack cocaine (R 2606-2608, 2615-2620). During Appellant's life, he experienced the divorce of his parents, alcohol abuse at home, and exposure to drugs during parochial school (R 2609). When Appellant reached college he was introduced to cocaine. Shortly after he left college, he had some problems with the law, including a DUI (R 2510). In his early thirties, Appellant began using crack cocaine. He went from positions of authority and management to doing odd jobs (R 2611). All the experts agreed Appellant was in the high risk category for drug dependence and addiction (R 2613). Appellant's behavior pattern was that of a drug addict (R 2521). Dr. Buffington agreed that Appellant's behavior could also be explained as getting money from the easiest source, i.e., the older Kersches (R 2636).

Dr. Buffington's interview with Appellant indicated

Appellant was probably not under the influence of cocaine intoxication the day of the murder (R 2624-2625). Blood samples were taken from Appellant the day of his arrest, the day after the murder (R 2626). The test results were negative for all drugs, including cocaine metabolites (R 2627, 2628). The blood was drawn on March 15, 2000, and tested on December 5, 2001 (R 2630-2631). Cocaine is eliminated very rapidly. Some metabolites are gone shortly after use, others remain in the blood over twelve hours (R 2628). The blood test results were admitted into evidence (R 2630, Defendant Exhibits 2 and 3).

Defense counsel requested the trial judge review letters received from friends and family concerning Appellant (R 2638).

Thea Kersch testified that Appellant did not have a close relationship with her and her husband and they did not invite him into the house (R 2640). She would feed him lunch as a courtesy when he worked there, but she left it on the patio for him. He was not invited into the house to eat (R 2640). If Appellant wanted ice or a drink of water, he would knock on the kitchen door and Thea would hand it out to him (R 2640). He never came inside (R 2640). Mrs. Kersch never had a long conversation with Appellant. Charles Kersch's relationship

with Appellant was employer/employee (R 2641). Charles had never given Appellant any clothes (R 2643).

The trial judge requested closing arguments in writing (R 2646-2647).

Sentencing.

Sentencing took place March 11, 2004. Appellant was adjudicated guilty on all counts (R 2656). He was sentenced to death on Count I, and to life in prison on Counts II, III and IV (R 2656).

SUMMARY OF ARGUMENT

Claim I. A formal adjudication on a contemporaneous felony is not required after a jury verdict in order that the trial judge consider the felony as an aggravating circumstance. A "conviction" for purposes of Section 921.141 means a valid guilty plea or jury verdict. This issue was not preserved.

Claim II. The avoid-arrest aggravating circumstance was proven beyond a reasonable doubt. Thea and Charles Kersch knew Appellant because he worked at their house as a handyman. Appellant beat Thea, then covered and hid her in a bedroom while he waited for Charles to come home. He then fatally beat Charles, 72, to death so he could have more time to get away. Appellant believed he had killed both victims and went to cash a check at their bank the next morning. He was surprised to learn Thea survived.

Claim III. The heinous, atrocious, and cruel aggravating circumstance was proven beyond a reasonable doubt. Appellant struck Charles Kersch as he entered the house from the garage. Charles fell to the floor and hit his head. He tried to stand, but Appellant beat him to the ground again with his fists. Appellant then went into the garage, climbed a ladder to procure an axe, and struck Charles at least two times in

the head with the axe causing blood spatter all over the wall. Appellant left ten to fifteen minutes later at which time Charles was still moving, moaning, and groaning.

Claim IV. The cold, calculated, and premeditated aggravating circumstance was proven beyond a reasonable doubt. Appellant waited at the Kersch residence until Thea arrived. He then used a serving tray as a ruse to get her to open the door. When she did, Appellant struck her to the ground then dragged her to a bedroom where he covered her. He waited for Charles Kersch to enter the house, then beat him repeatedly with his fists. When that did not succeed in dispatching Mr. Kersch, he went to the garage to get an axe and struck the victim at least two times in the head.

Claim V. The sentence of death is proportional to other similarly situated death cases. The State proved six aggravating circumstances beyond a reasonable doubt. The non-statutory mitigation did not outweigh the aggravating circumstances.

Claim VI. There is no merit to Appellant's claim under *Ring v. Arizona*, 536 U.S. 584 (2002). Appellant was convicted of a contemporaneous violent felony, the attempted murder of Thea Kersch. He was also convicted of robbery and burglary. Florida's capital sentencing scheme is different from

Arizona's capital sentencing scheme.

Claim I on cross-appeal. The trial judge abused his discretion in failing to give weight to the aggravating circumstance that Appellant committed the murder of Charles Kersch during the kidnaping of Thea Kersch. The trial judge mistakenly believed that a jury verdict was necessary on the kidnaping in order to use that crime as an aggravating circumstance. There is no improper doubling of the aggravating circumstances of during-a-kidnaping and pecuniary gain.

Claim II on cross-appeal. The trial judge abused his discretion in failing to give weight to either pecuniary gain or during-a-robbery/burglary. The judge mistakenly believed that when two aggravating circumstances merged, he could not give weight to either aggravating circumstance.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING APPELLANT WAS CONVICTED OF A PRIOR VIOLENT FELONY; THE JURY FOUND APPELLANT GUILTY OF THE CONTEMPORANEOUS ATTEMPTED MURDER OF THEA KERSCH.

Appellant argues that, even though the jury found him guilty of the attempted murder of Thea Kersch, the judge did not pronounce that he was adjudicated of the crime before the penalty phase; thus, he was not "convicted." (Initial Brief at 27). There was no objection at the trial level, and this issue is not preserved for appeal. This issue has no merit. Section 921.0011(2), Florida Statutes, defines "conviction" as a "determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld." Appellant was convicted when the jury returned verdicts of guilty on all counts. Whether the judge adjudicated him or not at that point is a formality. Appellant was formally adjudicated guilty on all counts at sentencing(R 2656).

Appellant's argument that an "adjudication" is the same as a "conviction" raises form over substance.

The word "convicted" as used in section 921.141(5)(b) means a valid guilty plea or jury verdict of guilt for violent felony; an adjudication of guilt is not necessary for such a "conviction" to be considered in the capital sentencing character analysis. *McCrae v. State*, 395 So.2d 1145, 1154 (Fla. 1980).

Appellant also argues that a contemporaneous violent felony[7] should be given less weight because it occurred in the same episode as the murder (Initial Brief at 29). He argues that since he had no prior violent felonies, this aggravator is entitled to less weight. First, the argument about no prior criminal history is more properly presented as it relates to mitigating circumstances. Second, it is the crime itself that should be weighed. The attempted murder of Thea Kersch was extremely brutal.

The trial judge found:

> F.S. 921.141(5)(b) <u>The Defendant was previously convicted of another capital felony or of a felony</u>

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[7] The Florida Supreme Court has long recognized that a conviction for a contemporaneous violent felony can be the basis for the prior-violent-felony aggravator. *Lecroy v. State*, 533 So. 2d 750 (Fla. 1988) and *Correll v. State*, 523 So. 2d 562 (Fla. 1986).

> involving the use or threat of violence to a person.
>
> It was proven by the State of Florida during the penalty phase that the Defendant had been convicted of a prior felony conviction that involved the use or threat of violence to a person. The Defendant was convicted of the attempted first degree premeditated murder of Thea Kersch. At trial, the Court was able to consider the Defendant's statement to the authorities, the testimony of Thea Kersch and the photographs of the crime scene. There is no doubt that this felony involved violence visited upon Thea Kersch based upon the victim's own testimony and the photographic evidence received during the trial. The victim was seventy-two (72) years old at the time she was first beaten by the younger, robust Defendant. After beating her with his fists, he then struck her in the head at least twice with an axe.
>
> Although the conviction of the Defendant for attempted first degree premeditated murder of Thea Kersch is contemporaneous with the conviction of the Defendant on Count I, premeditated murder of Charles Kersch, the qualifying prior violent conviction may be considered as proof for the subject aggravating circumstance. King v. State, 390 So.2d 315 (Fla. 1980); Stein v. State, 632 So.2d 1361 (Fla. 1994); Francis v. State, 808 So.2d 110 (Fla. 2003).
>
> This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given great weight by the Court.

(R656 - 657).

The law is well settled regarding this Court's review of a trial court's finding of an aggravating factor. It is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that is the trial court's job. *Owen v.*

State, 862 So.2d 687, 698 (Fla. 2003). Rather, this Court's task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. *Way v. State,* 760 So.2d 903, 918 (Fla. 2000) (quoting *Willacy v. State,* 696 So.2d 693, 695 (Fla. 1997)). Here, the trial judge found the State had proven the prior violent felony aggravating factor beyond a reasonable doubt and applied great weight to that factor. In his sentencing order, the judge provided the proper analysis regarding this aggravator. The trial judge's determination of this issue is supported by competent and substantial evidence, and it was not error for the trial court to apply the prior violent felony aggravating factor.

The existence of the prior violent felony aggravating factor is proven by the verdict for the attempted first degree premeditated murder of Thea Kersch. This was an extremely brutal crime in which an elderly woman was attacked, beaten to unconsciousness, dragged to the bedroom, regained consciousness and beaten back into unconsciousness, hit at least twice with an axe and left for dead. If there were ever a crime to be given great weight, it is the attempted murder of Thea Kersch.

Last, Appellant tries to excuse the attempted murder conviction because he is addicted to cocaine, hadn't slept, and had heart palpitations. (Initial Brief at 30). Again, these are circumstances that may be considered in mitigation. These circumstances do not minimize the harm to Thea Kersch.

II. THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER OF CHARLES KERSCH WAS COMMITTED TO AVOID ARREST.

The State established the avoid-arrest aggravating circumstance beyond a reasonable doubt. The trial court found:

> F.S. 921.141(5)(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> a. The Defendant was well known to both Charles Kersch and his wife, Thea Kersch. He had been a handyman at the residence and had social interaction with both victims based upon an employer/employee relationship. The Defendant had been allowed inside the victims' home to perform tasks under the direction of Charles Kersch. All of the parties had the opportunity to see and speak with each other on a number of occasions.
>
> b. After attacking Thea Kersch, the Defendant placed her in the back bedroom. Thea Kersch had just been severely beaten and was barely aware of her surroundings. She was not a threat to the Defendant. She was an impediment to the Defendant being able to leave the crime scene without being discovered or detected.
>
> c. If the Defendant had left at that time, Charles Kersch would have discovered his wife within a short period of time upon arriving home. The Defendant made a conscious decision to continue his criminal episode, to rob and murder Charles Kersch and to eliminate him as a witness so that the Defendant could avoid being arrested.
>
> d. The Defendant easily dominated the elderly victims. He physically subdued them immediately after beginning his violent assaults. The Defendant could have simply restrained the victims and allowed them to work loose by themselves or be discovered by another person. The Defendant reflected upon the

> situation and determined that it was necessary to eliminate the witnesses due to their ability to identify him. This aggravating factor may be proven by circumstantial evidence from which the motive for the murder may be inferred without direct evidence of the offender's thought process. Swafford v. State, 533 So.2d 270, 276 n.6 (Fla. 1988), *cert. denied,* 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).
>
> e. The manner and method of the attacks visited upon the victims indicates that the Defendant intended to kill them. Charles Kersch and Thea Kersch had been severely injured by the Defendant and were in no condition to prevent the Defendant from leaving their residence. There was no reason to try to kill either Kersch except to eliminate them as potential witnesses.
>
> f. When the Defendant raised the axe, swung the axe, and hit his intended victims, he was trying to kill them so that they would not identify him at a later date. Charles Kersch was killed so that the Defendant could avoid arrest and so that he could not testify against the Defendant.
>
> g. This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given great weight by the Court.

(R660-661).

The trial judge findings are supported by competent substantial evidence. The Defendant greeted Charles Kersch with his fists as Mr. Kersch came into his home from the garage. He rendered him incapable of resisting the robbery, burglary kidnaping that were underway. In order to complete the burglary and robbery there was no need to go get two axes and beat Mr. and Mrs. Kersch in the head, killing Mr. Kersch.

However, both of the Kersch's knew the Defendant well and were quite capable of identifying appellant and exposing him to substantial prison time. Appellant obviously believed he killed both Thea and Charles because he calmly drove around town until the bank opened and tried to cash a check at the Kersch's bank. He remained calm when the teller said she was calling the Kersch residence. Appellant thought he had killed them both and the crime would not yet have been reported. During his statement to the police appellant never asked about the condition of the victims until Investigator Jaynes asked him if he wanted to know. (R 766) Clearly he thought he had killed them both and that there was no way the crime should have been discovered. The victims lived alone and the discovery of their deaths should have taken a day or two.

In his statement to police he admitted that Mr. Kersch went down easily - he was an old man. It is obvious he could physically dominate Charles and Thea Kersch and complete the crime. However, that was not sufficient to avoid detection and conviction for the serious crimes he had committed. To avoid being arrested he needed to kill them. He admits that Charles tried to get up after he had knocked him down with his fists and that he got the axe and beat him with it to keep him down longer:

> I guess my intention was just obviously to keep him down longer, so maybe I could drive away and get more time, I was like thinking.

(R 707)

In *Willacy v. State*, 696 So. 2d 693,696 (Fla. 1997), this Court held:

> Willacy contends that the court erred in finding that the murder was committed to avoid arrest. We disagree. When Sather surprised Willacy burglarizing her house, he bludgeoned her and tied her hands and feet. At that point, Sather posed no immediate threat to Willacy: She was incapable of thwarting his purpose or of escaping and could not summon help. There was little reason to kill her except to eliminate her as a witness since she was his next door neighbor and could identify him easily and credibly both to police and in court. *See Thompson v. State*, 648 So.2d 692, 695 (Fla.1994), *cert. denied*, 515 U.S. 1125, 115 S.Ct. 2283, 132 L.Ed.2d 286 (1995). The court applied the right rule of law to these facts, and competent substantial evidence supports its finding. We find no error.

Another case involving the same issue is *Preston v. State*, 607 So. 2d 404, 409 (Fla. 1992), wherein this Court stated:

> We have long held that in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988) *Bates v. State*, 465 So.2d 490, 492 (Fla.1985). However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes. *Swafford v. State*, 533 So.2d 270, 276 n. 6

(Fla.1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).

There can be little doubt of Appellant's intent in repeatedly striking Mr. Kersch in the head based on the Defendant's own statements. While Appellant claims that it was only to allow himself more time to escape and that he did not intend to kill him, this is an admission from his lips that he struck him in order to avoid detection. Appellant admitted he knew Charles was going to die (R 708). The jury's verdict of guilty for premeditated first degree murder as indicated in their special verdict form clearly establishes that appellant in fact killed Charles intentionally - the reason is provided from his own lips.

III. THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER OF CHARLES KERSCH HEINOUS, ATROCIOUS AND CRUEL.

Appellant argues the trial court finding on heinous, atrocious and cruel is not supported by the evidence (Initial Brief at 38). The State disagrees. The trial judge's order is supported by competent substantial evidence. In fact, Appellant concedes he committed the murder in three stages (Initial Brief at 40).

The trial court found:

> F.S. 921.141(5)(h) <u>The capital felony was especially heinous, atrocious or cruel.</u>
>
> a. The Defendant, through his confession, admitted that the attack of Charles Kersch took place in stages. When Charles Kersch first entered his residence, the Defendant attacked him by punching him in the face with his fists. The seventy-two (72) year old Charles Kersch was beaten to the floor where he struck his head on the tile. Blood was already beginning to flow, but that did not deter the Defendant from continuing to strike Charles Kersch with his fists.
>
> b. Sometime thereafter, Charles Kersch attempted to stand up but got as far as being on all fours before the Defendant struck him again. After the second attack, the Defendant used an axe on Charles Kersch.
>
> c. Dr. Parsons, the examining Assistant Medical Examiner, testified that Charles Kersch suffered:
>
> 1. prominent hemorrhaging resulting in black eyes
>
> 2. an abrasion on the top center of the head
>
> 3. a superficial laceration over the back of the

head, akin to an abrasion

4. a bruise over the right eyelid

5. an abrasion on the nose

6. a smaller laceration to the right side of the head near the parietal area

7. a gash to the left top of Charles Kersch's head above his ear, a ragged laceration with a distinct pattern with significant hemorrhage

8. bruising to the palm of his right hand.

d. Crime Scene Technician Sharon Ballou opined that Charles Kersch was not on all fours when hit with the axe. The significance of her testimony means that after Charles Kersch had been initially beaten by the Defendant and when he attempted to get up on all fours, he was not hit with an axe at that time, but was again beaten by the Defendant with his fist. The medium impact blood splatter patterns as analyzed by Sharon Ballou indicated that Charles Kersch's head was on the floor when he was struck with the axe. The cast off patterns also demonstrated that Charles Kersch's head was not raised but on the floor when struck with the axe. The blood stain patterns indicated that Charles Kersch was struck at least twice with the axe. Dr. Parsons testified that the major fractures to the skull resulted from significant force such as being hit with an axe. The fracture in the back of the skull, accompanied by a small laceration, did not result in a displacement of the skull and was consistent with striking the floor or being hit with a flat object such as a side of an axe. That injury could have caused death and could have caused loss of consciousness. The injury to Charles Kersch's right eye was consistent with being struck by a fist. The injuries associated with the right forehead and the fracture of the orbital bones behind the right eye were most likely caused by a blow to the eye. The hemorrhaging associated with the black eyes was most likely caused by the hinge fracture of the skull resulting from the axe blow to

the left side of the head and the radiating fracture. That blow caused a large displacement fracture which circumvented the head and which resulted in Charles Kersch losing consciousness almost instantly and dying within a short period thereafter.

e. A period of time elapsed between each, of the three separate stages of the beating of Charles Kersch. When the victim first entered his residence, the Defendant began beating him with his fists. That resulted in Charles Kersch being driven to the floor. Charles Kersch lost consciousness and was unable to move but then attempted to get up on all fours. At the second stage of the beating, the Defendant again used his fists to beat Charles Kersch back to the floor. The third stage of the beating took place when the Defendant retrieved the double bladed axe and began to beat Charles Kersch about the head with the axe. It is uncontroverted that Charles Kersch was conscious during the second stage of the beating.

f. Charles Kersch was not immediately struck dead by a blow from the axe, but suffered from a high degree of pain and awareness of his plight. The Defendant did not kill Charles Kersch in a frenzied spate of activity, but took a measured approach to the beating of his victim. He was in no great hurry. When the Defendant left, Charles Kersch was breathing and groaning.

g. Being beaten to death as a result of combination of blows from fists and an axe falls within the definition of a heinous, atrocious or cruel crime. In light of the beating visited upon Thea Kersch and then a similar beating being directed toward Charles Kersch, there is no doubt that the Defendant was utterly indifferent to the suffering and high degree of pain that he caused.

h. This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given great weight by the Court.

(R 663-666).

These findings are supported by competent substantial evidence Charles Kersch, a 72 year old man, entered his home on March 14, 2000, to be attacked by John M. Buzia. Buzia used his fists during this initial attack and easily knocked Mr. Kersch to the floor. Buzia himself noted that Mr. Kersch was too old to put up a fight. (R 707-708) He described how Mr. Kersch struck his head on the tile as he fell, and lay there breathing but bleeding real bad. (R 708) Buzia told police that he hit him a couple more times after he went down. (R 708, 733) He stated to police that he was thinking "he's gonna die if [I] leave right now." (R 708)

At some point, according to Buzia's confession, Mr. Kersch regained consciousness and tried to get up on all fours, so he struck him again. (R 709) Initially, appellant claimed he did not strike Mr. Kersch with the axe (R 711, 713). However, he later admitted that he used the axe on Mr. Kersch. (R 734) According to Sharon Ballou, the medium velosity impact blood stains were consistent with Charles' head being on the floor when struck (R 982, 990). This was confirmed by the cast off patterns (R 984) There were at least two, possibly three cast off patterns (R 984) The blood stain patterns and the testimony of Crime Scene Technician Ballou, establish that appellant struck Charles at least twice. (R

986-987).

The examining Assistant Medical Examiner, Dr. Parsons, noted the following injuries to the body of Charles Kersch:

> Bruising to the palm of his right hand;
>
> A gash to left top of his head above his ear, which was a ragged laceration with a distinct pattern with significant hemorrhage;
>
> A smaller laceration to the right side of the head near the parietal area;
>
> An abrasion on the nose;
>
> A bruise just over the right eyelid;
>
> A superficial laceration over the back of the head, abrasion;
>
> An abrasion on the top center of the head;
>
> Very prominent hemorrhaging causing black eyes on both eyes.

(R1237-1243)

Dr. Parsons testified that the injury just over the right eye was consistent with being caused by a fist. (R 1239) He testified that the injury on the right forehead area consistent with either an axe or a fist. (R 1245) There was a fracture of the orbital bones behind the right eye which could have been caused by the blow to the eye or by the blow to the left side of the head, but was more likely caused by the blow to the eye. (R 1245) The blackening of the left eye was caused by the hinge fracture of the head above the eyes that was

caused by the blow to the left side of the head and the radiating fracture. (R 1248-49)

The hinge fracture was consistent with being hit by the flat side of an axe (R 1245-46) It was inconsistent with hitting the head on the floor (R 1246) Dr. Parsons testified that the blow that caused this large injury required significant force consistent with the force experienced in an automobile accident. (R 1247) It was so forceful that the front of the face and the skull were turned into a hinge so it could be mobile. (R 1246) During his testimony Dr. Parsons examined the double-bladed axe that was found at the scene next to Mr. Kersch and opined that it was consistent with the wounds. (R 1250)

Dr. Parsons described the wound to the back of the skull as a small laceration with an underlying fracture, but no displacement of the skull. (R 1240) He testified the wound was consistent with the head striking some flat object such as a floor and was also consistent with a flat object such as the side of the axe striking the head. (R 1241, 1253) It could have caused death and could have caused loss of consciousness. The cause of death was blunt force injury to the head. (R 1250) The blow to the left side of the head that caused the large displacement fracture (the axe wound) which went around

the head would have caused the victim to lose consciousness instantly and death would have occurred within a couple minutes. (R 1250)

Appellant argues that the blow by the axe rendered Charles immediately unconscious. This argument is contradicted by the his own statement that Charles was moaning when he left (R 750). The final blows by the axe were the ones that killed him. Death was not instantaneous, as appellant argues, In fact, after appellant his Charles with the axe, he went back to hit Thea with the same axe. (R 751) He left the house ten to fifteen minutes later (R 752) It was dust. (R 752) The forensic evidence shows those blows were made while Charles' head was on the floor. Thus, they could have only happened after he was beaten to unconsciousness, regained consciousness and tried to stand, and was beaten down again. The only reasonable conclusion is that Appellant then went to get an axe and proceeded to beat Charles to death. If he had the axe with him at the beginning, he would have used it. Appellant then struck Thea and left ten to fifteen minutes later leaving Charles moaning and groaning on the floor. This crime meets the standard for heinous, atrocious and cruel.

The Florida Supreme Court has upheld the heinous,

atrocious or cruel factor in numerous cases involving beatings. *Heiney v. State*, 447 So. 2d 210 (Fla. 1984), *Lamb v. State*, 532 So.2d 1051 (Fla. 1988) *Penn v. State*, 574 So. 2d 1079 (Fla. 1991), *Owen v. State*, 596 So. 2d 985 (Fla. 1992) and *Colina v. State*, 634 So.2d 1077 (Fla. 1994). In *Colina* the court stated:

> In regard to Angel Diaz, the record reflects that Angel was first hit by Castro and fell to the ground. Castro testified that when Angel attempted to get to his feet, Colina stepped in and hit Angel several times in the back of the head with the tire iron. Castro also stated that, as he turned to get something to tie up the victims, one of the victims started to get up and that Colina hit them with the tire iron several more times. We find that these murders are the type of beating murders to which the heinous, atrocious, or cruel aggravating factor applies. *See, e.g., Zeigler v. State*, 580 So.2d 127 (Fla.), *cert. denied*, 502 U.S. 946, 112 S.Ct. 390, 116 L.Ed.2d 340 (1991); *Penn v. State*, 574 So.2d 1079 (Fla. 1991); *Bruno v. State*, 574 So.2d 76 (Fla.), *cert. denied*, 502 U.S. 834, 112 S.Ct. 112, 116 L.Ed.2d 81 (1991). *Id*. at p. 1081,1082.

In *Lamb v. State*, 532 So.2d 1051 (Fla. 1988) the defendant was burglarizing the victim's apartment and when he heard the victim coming up the stairs he hid with a claw hammer. When the victim came in he attacked him from behind and struck him six times in the head. The court found that the murder was HAC. On appeal, the Florida Supreme Court upheld this application of HAC and noted:

> Further, we affirm the finding that the murder was

> heinous, atrocious, and cruel. The victim had a defensive wound. He was struck six times in the head with a claw hammer. Even though Lamb delivered each blow with sufficient force to penetrate the skull, the victim did not die instantaneously. The evidence shows that he fell to his knees and then to the floor after Lamb pulled his feet out from under him. The victim moaned, rolling his head from side to side, until Lamb kicked him in the face. This evidence supports the court's finding that the murder was heinous, atrocious, and cruel.

Id. at p. 1053.

The instant case involves a beating that took place over a longer period of time. In the *Lamb* case the victim never saw his attacker until he was struck in the head with a hammer. Mr. Ebernez, the victim there, fell to the floor immediately, groaned and then was struck in the face and ceased making any noise. Unlike in *Lamb*, the victim here was knocked to the floor, but regained consciousness and tried to get up from the floor and was beaten to the floor again. Once he was helplessly lying on the floor, the Defendant struck him in the head with the axe at least two times. When the defendant left, he told police that both victims were still breathing and groaning.

Another case wherein a beating death was found to be HAC is *Heiney v. State*, 447 So.2d 210, (Fla. 1984). There the court found that seven severe hammer wounds to the victim's

head and the testimony of the medical examiner that the injuries to the victim's hands were probably defensive wounds was sufficient to prove this aggravator.

Beating someone to death by inflicting multiple blows with hands and an axe satisfies the heinous and atrocious aspect of the aggravator. The trial court findings are supported by the evidence.

Appellant also argues that he did not intend to kill Charles Kersch or cause him undue suffering. (Initial Brief at 42). In *Lynch v. State,* 841 So.2d 362, 369 (Fla. 2003), this Court reiterated that, when analyzing the heinous, atrocious aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina,* 801 So.2d 44, 53 (Fla. 2001); *see also Hitchcock v. State,* 578 So.2d 685, 692 (Fla. 1990). Further, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State,* 533 So.2d 270, 277 (Fla. 1988); *see also Chavez v. State,* 832 So.2d 730, 765-66 (Fla. 2002). The HAC aggravating factor focuses on the means and manner in which

the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. *See Barnhill v. State,* 834 So.2d 836, 849 -850 (Fla. 2002); *Brown v. State,* 721 So.2d 274, 277 (Fla. 1998).

Furthermore, the evidence does not support Appellant's conclusion that the victim was "killed quickly when struck on the left side of the head with an axe." (Initial Brief at 42). To the contrary, the axe blow could only have been the last blow. It defies common sense that Appellant would beat Mr. Kersch with his fists if he had an axe available. Further, the blood spatter shows Mr. Kersch was already on the floor when the axe blows were struck.

IV. THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER OF CHARLES KERSCH COLD CALCULATED AND PREMEDITATED.

To prove this aggravator, the law requires, that the State prove that (1) the murder was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage, (2) the defendant had a careful plan or prearranged design to commit murder before the killing, (3) the defendant exhibited heightened premeditation, and (4) the defendant had no pretense of legal or moral justification. *Nelson v. State*, 748 So. 2d 237 (Fla. 1999); *Sireci v. Moore*, 825 So. 2d 882 (Fla. 2002). There is absolutely no evidence there was any moral or legal justification for the murder of Charles Kersch.

The trial judge found:

> F.S. 921.141(5)0) <u>The capital felony was a homicide and was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification</u>.
>
> a. On March 14, 2000, Defendant, John Michael Buzia, made the decision to rob the victims and steal their money and personal property. The testimony elicited during the guilt phase shows that the Defendant had devoted an exceptional amount of time and effort in traveling to the victims' residence in order to commit his crimes.
>
> b. After arriving at the Kerschs' residence, it was necessary for the Defendant to remain there a period of time until Thea Kersch arrived home.

c. Upon being instructed to wait on the patio for the arrival of Charles Kersch, the Defendant created a diversion so as to gain access to the inside of the home at which time he began beating Thea Kersch. After the bloody beating had been completed, the Defendant removed Thea Kersch from the kitchen/den area of the house and placed her in the back bedroom. The Defendant did not leave the residence immediately, but remained therein attempting to clean the area of blood and generally looking around and searching the residence. As John Michael Buzia remained within the confines of Charles and Thea Kerschs' home prior to the murder of Charles Kersch, he had the opportunity to reflect on his decision of whether he wanted to rob the victim and then steal his vehicle without murdering him or to murder him and then steal his vehicle.

d. Rather than simply rob the victim, take his keys and then steal his car, the Defendant decided to kill Charles Kersch.

e. The murder was neither easy nor simple. It involved several stages of beating and striking Charles Kersch. At each stage, the Defendant had an opportunity to stop and reflect upon his actions. The first time the Defendant beat Charles Kersch to the floor, he could have stopped and renounced his homicidal labor. The second time the Defendant beat Charles Kersch to the floor, he could have stopped and renounced his homicidal labor. The third time the Defendant began beating Charles Kersch with an axe, he could have stopped and renounced his homicidal labor.

f. The Defendant had an exceptional amount of time to calmly and coolly reflect upon his course of action. He had an opportunity to consider his actions that had been directed toward Thea Kersch. The time lapse that occurred between the beating of Thea Kersch and the murder of Charles Kersch allowed him to reflect upon his criminal activity and to renounce any further violence. Instead the Defendant used that extended period of time to clean up the crime scene and to perfect his plan of attack toward Charles Kersch. The extensive period of time that

the Defendant used to reflect upon his actions and to consider his further actions directed toward Charles Kersch goes beyond ordinary premeditation and demonstrates a heightened level of premeditation.

g. The Defendant's cleaning of the residence after attacking Thea Kersch and changing his shirt, along with attacking Charles Kersch as soon as he entered the residence, demonstrates that he had a careful plan or prearranged design to commit murder before attacking and killing Charles Kersch.

h. The manner in which the murder was committed demonstrates that the Defendant calmly and coolly reflected upon how he was going to commit the murder and did so in a measured fashion not impacted by emotional frenzy, panic or rage.

i. Inasmuch as Charles Kersch had treated the Defendant in an appropriate manner throughout his interaction with him, the Defendant had no pretense of legal or moral justification for the attack and murder of Charles Kersch. *Nelson v. State*, 748 So.2d 237 (Fla. 1999) and *Sereci v. Moore*, 825 So.2d 882 (Fla. 2002).

j. The Defendant was not under the influence of an extreme emotional or mental disturbance. His actions were goal oriented with respect to obtaining funds and property and cashing a check drawn on the Kerschs' account. The testimony of the defense's experts, Dr. Riebsame and Dr. Buffington, do not convince the Court that the Defendant was under the influence of extreme emotional or mental disturbance.

k. Dr. Buffington attempted to explain the Defendant's actions as resulting from his addiction and withdrawal from cocaine and alcohol which in turn created agitation, paranoia and mental confusion. Dr. Buffington's extensive testimony related to the Defendant's long term addiction and how it impacted upon his ability to reflect on or form heightened premeditation.

l. The actions of the Defendant during the day of the murder and the period of time following the murder, including his confession to the police, clearly rebuts Dr. Buffington's suggestion that the Defendant suffered from some form of temporary mental state during the criminal episode that rendered him incapable of rational functioning.

m. Dr. Jeffrey Danziger who testified on behalf of the State regarding the Defendant's mental state concluded that the Defendant was not suffering from any impairment of his consciousness in the form of intoxication or withdrawal delirium at or about the time he committed his crimes. Dr. Danziger contradicted and corrected Dr. Reibsame's assessment based upon accepted professional publications. The Court agrees with Dr. Danziger's analyses of the Defendant's mental state and finds that the Defendant did riot suffer from any impairment of his consciousness in the form of intoxication or withdrawal delirium. The Court further finds that the Defendant was alert, able to experience cool and calm reflection and acted in a rational goal oriented fashion. *Sexton v. State*, 775 So.2d 923, 934(Fla. 2000).

n. This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given great weight by the Court.

(R 666-669). These findings are supported by competent substantial evidence.

This Court stated in *Alston v. State,* 723 So.2d 148 (Fla.1998):

> We have previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder. In this case, as the trial court properly pointed out, appellant had ample opportunity to release [the victim] after the

> robbery. Instead, after substantial reflection, appellant "acted out the plan [he] had conceived during the extended period in which [the] events occurred."

Id. at 162. In *Alston*, with the victims bound and rendered harmless, the robbery of the victims' valuables complete, and having uncontested access to the victims' vehicles, it was clear the defendants had "the opportunity to leave the crime scene and not commit the murder but, instead, committed the murders". In *Rodriguez v. State,* 753 So.2d 29, 46 (Fla. 2000), this Court reviewed a strikingly analogous situation and found CCP as follows:

> [The defendant] planned a ruse to enter the apartment but formulated a back-up plan to force his way into the apartment if the plan failed; [the defendant] armed himself with a loaded handgun and two pairs of latex gloves so as to not to leave any fingerprints in the apartment if the initial plan did not work; [the defendant] fired an additional shot into each victim from close range to make sure they were dead; none of the elderly victims offered any resistance; each victim was shot while seated and fully compliant....

753 So.2d at 46; *see also Willacy v. State,* 696 So.2d 693, 696 (Fla. 1997) (finding CCP where victim surprised defendant during burglary, defendant attacked and bound victim, obtained a can of gasoline from the garage and set victim on fire); *Lynch v. State*, 841 So.2d 362 (Fla. 2003) (defendant had five-to-seven-minute opportunity to withdraw from scene or seek

help for victim, but shot her instead).

Appellant's statement established that his behavior was goal oriented and coldly premeditated:

> He decided he wanted to see Mr. Kersch about getting money and took the bus to University Boulevard and Rouse Road, then walked to the Kersch home;
>
> To gain entry he had to wait until a car came in and then slip in the gate;
>
> He waited perhaps as long as two hours for one of the Kersch's to come home, (depending on the accuracy of his statement that he got there about 2 - 2:30 p.m.);
>
> He used the tray as an artifice to gain access to the house by bringing it over to the door and offering it to Mrs. Kersch;
>
> He recalls specifically striking Thea first with his fists and that blood flew from her nose;
>
> He then kicked her with his feet when she fell;
>
> He moved her into the rear bedroom, covered her with a blanket and recalls specifically that she was breathing; He went through Thea's purse and recalls removing about $80.00;
>
> He got a shirt from the laundry room to change into;
>
> He canvassed the house looking for things to take;
>
> He heard the garage door and knew Charles was coming home and there was blood on the floor - he reflected on what to do and decided to kill Charles so he could escape;
>
> He hit Charles, who was unable to put up a fight due to his age. Charles went down hard and struck his head on the tile;

> He thought that he needed more time to get away so he beat Charles again to insure he would not interfere;
>
> He got two axe’s from the top of the cabinet in the garage;
>
> He struck Charles Kersch at least twice with the axe while he lay helpless on the floor;
>
> He went into Mr. Kersch's pockets and got his keys and wallet.

After he knocked out Mrs. Kersch, the Defendant admits he wiled away the time satisfying his curiosity and looking through the Kersch home. He was apparently waiting for Mr. Kersch to come home. He then formulated his plan to attack and rob Thea, and gained entry by subterfuge. After he disabled Thea, he looked around the house for more items to take, waiting for Charles. As soon as Charles came through the door, Appellant attacked him.

Appellant admitted that his thought process was to beat both victims with the axe. Both victims were subdued and of no danger to him. Yet he procured an axe and proceeded to hit Charles at least twice in the head. This is the cold, and calculated premeditation that the law requires be proven.

Appellant argues that he did not intend to kill Mr. Kersch because he “never used the sharp side of the axe.” (Initial Brief at 48). The truth is that Appellant hit Mr.

Kersch so hard, albeit with the flat side of the axe, it caused so many skull fractures his skull was unhinged. The medical examiner's testimony was quite clear about the force of the blows – tantamount to the force in a car accident. Appellant further argues he "was not aware that he had killed Charles Kersch." (Initial Brief at 49). To the contrary, Appellant's actions of driving to the bank at which Mr. Kersch does business showed Appellant believed he had killed both victims. He simply didn't care about the victims as exemplified by the videotaped statement in which the police asked him if was interested in knowing what happened to the victims (R 766). Appellant expressed surprise that Thea was alive (R 767). He assumed he killed them both. After all, he left them both in a pool of blood with blood spatter all over the walls after repeated blows of an axe to their heads.

Appellant not only struck Charles Kersch with the axe; but also he took the axe all the way back to the bedroom where he tried to kill Mrs. Kersch. Appellant was operating with an agenda to eliminate the two of them as witnesses. After killing Mr. Kersch with the axe, he did not stop. He went on with his plan to eliminate them both as possible witnesses against him and marched on through the den, through the hall and into the bedroom where he left Thea. He found her trying

to get up, and beat her nearly to death. This is indicative of the state of mind of the defendant as it constitutes a series of rational goal-oriented acts indicating a plan to make sure that neither of them would be able to put the police on his track. He then gathered the car keys, credit cards and cash from Mr. Kersch and left.

Appellant relies on *Geralds v. State*, 601 So.2d 1157 (Fla. 1992) as "indistinguishable" from the present case. In *Geralds,* this Court noted there was evidence of a struggle prior to the killing and defendant presented a reasonable hypothesis that he tied the victim's wrists in order to interrogate her regarding the location of money which was hidden in the house. However, after she refused to reveal the location, Geralds became enraged and killed her in sudden anger. Alternatively, the victim could have struggled to escape and been killed during the struggle. The present case is completely different. Appellant had disabled both victims and had their money, car keys, and credit cards. Neither of the elderly victims could have stopped Appellant from taking whatever he wanted from the house and leaving. There was no reason to continue striking them with the axe except to kill them both. Appellant set about this task with a cold, calculated mindset. He went into the garage, climbed a ladder

and obtained an axe to kill both victims. He struck Charles as he lay in the hallway creating blood flow with the first strike and cast-off with subsequent blows. The forensic expert knew there were *at least* two blows established by the blood spatter on the wall. This was not the product of a frenzy or struggle. Charles Kersch, described by Appellant as elderly and not able to fight back. He was lying on the floor when Appellant crushed Charles's skull with *at least* two blows with the force of a car accident.

Under similar circumstances, this Court has found the evidence sufficient to prove that the murder was cold, calculated and premeditated. In *Lamb v. State,* 532 So.2d 1051 (Fla. 1988), the court considered whether a murder by claw hammer was sufficiently cold, calculated and premeditated to constitute CCP. The court noted that the defendant there waited for the victim to arrive home, that he planned the burglary and theft and brought a weapon to the scene and once there, exchanged it for one better suited for the crime, which clearly indicated he planned violence. The court noted that after searching the victim's home and committing the felony, he concealed himself and waited for the victim to return because of his pique at the frugal results of the burglary. Further, there was evidence that, after leaving the scene,

Lamb's companion suggested that they call an ambulance for the victim and Lamb rejected the idea, reasoning that their voices might be recorded and traced. Here, appellant waited on Mrs. or Mr. Kersch to arrive home, disabled both victims then obtained two axes and struck the victims multiple times. He did all of this with the objective of obtaining money or items of value and avoiding arrest.

In *Evans v. State*, 800 So. 2d 182 (Fla. 2001), the defendant argued that the court improperly found the murder was CCP because the court also found that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance and thus could not have had a "careful plan or prearranged design to kill." This mitigator was found based on the testimony of three experts that he suffered from a mental or emotional disorder. The Florida Supreme Court noted the activities of the defendant during the course of the crime and concluded that his actions in removing one of the victims from the apartment to avoid detection, placing a silencer on the gun to avoid detection, and his ability to get back to Orlando before the victim so he could await his arrival all indicated the "ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened

premeditation. *See Sexton v. State*, 775 So. 2d 923, 934 (Fla., 2000)" As in *Evans*, appellant performed many rational, goal-oriented acts to complete his crimes.

This crime did not happen quickly and is therefore not easily explained by the theory that appellant was suffering from emotional or mental disorder that caused him to act out in a rage or frenzy. There were steps taken toward the commission of this murder over a period of hours. It did not involve just the attack on Mrs. Kersch at the rear door of the house, taking her money and fleeing. It began hours before when he determined he was going to the Kersch's home to obtain money, took a bus to Rouse and University, walked to the house, waited for one of the Kersch's to come home and used the return of the tray as a device to gain entry to the home. After he rendered Thea unconscious, he moved her into the bedroom and attempted to cover her body with a comforter so no one could see her. He waited for Charles to return to the home, going through closets and drawers in virtually every room in the house. He beat Mr. Kersch to the floor with his fists and recalls hearing his head strike the tile hard. When Mr. Kersch tried to get up he struck him again with his fists, and then, at some point after that, went and got the axe that he eventually used on both victims. After striking repeated

blows to Charels' head, he gathered the keys, wallet and blank checks, took Charles' car, and left the scene. Later in the night, Appellant went to the Mobil station and purchased beer and gas with Mr. Kersch's credit card. In the morning he went to the bank to cash a check on the Kersch's account. None of those actions are consistent with appellant being under the influence of extreme emotional or mental disturbance.

In *Connor v. State*, 803 So. 2d 598 (Fla. 2001), the trial court found the murder was cold, calculated, and premeditated even though Connor suffered from a mental illness involving some paranoid ideation that caused the court to find mental health as a non-statutory mitigating factor. There the defense produced two experts to testify he in fact was suffering from extreme emotional or mental disturbance and his capacity to appreciate the criminality of his conduct was impaired. The State produced experts to disagree - a similar situation to what we have here. As in *Evans*, the court found that the facts of the crime showed the sort of rational, calm and cold behavior necessary to a finding that the murder was committed in a cold, calculated and premeditated fashion.

This aggravator has been proven beyond a reasonable doubt.

V. THE DEATH PENALTY IS PROPORTIONAL.

Appellant argues a death sentence is not appropriate because there is only one aggravating circumstance and substantial mitigation. This argument assumes Claims I through IV have merit and that neither claim in the cross-appeal[8] has merit. Appellant's argument on mitigation basically asks this court to go behind the trial judge's order and assign less weight to the aggravating circumstances and more weight to the mitigation. The trial judge found in mitigation[9]:

MITIGATING CIRCUMSTANCES

> Three statutory mitigating circumstances were presented to the jury for their consideration during the penalty phase of the trial:
>
> Section 921.141(6)(b): The felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> Section 921.141(6)(f): The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was

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[8] Appellant concedes that pecuniary gain and felony murder were established and should be considered one aggravator. (Initial Brief at 52; *See* Claim I on cross-appeal).

[9] The trial court findings on aggravating circumstances are contained within the corresponding claims, as Appellant has challenged the existence of all but the during-a-felony/pecuniary gain aggravator.

substantially impaired.

Section 921.141(6)(h): The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty

(a) Any other aspect of the Defendant's character, record or background.

(b) Any other circumstance of the offense.

1. F.S. 921.141(6)(b) The capital felony was committed while the Defendant was under extreme mental or emotional disturbance.

a. The Defendant acknowledged that he was addicted to and dependent upon cocaine. The issue of alcohol dependence has almost been subsumed by the fact that cocaine dependence overshadowed everything else in the Defendant's life. The testimony of Dr. Riebsame during the penalty phase and that of Dr. Daniel Buffington at the Spencer hearing worked hand in hand to explain the interplay between addiction and mental/emotional disturbance. Both doctors had the opportunity to personally meet with and interview the Defendant and also question him at length with respect to his history of drug and alcohol abuse and the effect it had on personal and familial relationships. The Court viewed Dr. Riebsame's testimony as a clinical approach to the explanations surrounding the Defendant's current status. Dr. Buffington's testimony revolved about the effects of long term substance abuse. Dr. Buffington's testimony was poignant in that it explicitly demanded that an overall view of the Defendant be considered rather than looking at one small segment of his addiction cycle.

b. What cannot be denied is that the Defendant suffered not only from the physical effects of substance abuse, but also from the mental and emotional symptoms as a result of his actions. The Defendant enjoyed an above average family lifestyle and had the opportunity to attend college at Florida State University. It was there that his substance abuse began. His drug and alcohol abuse began to

take its toll almost immediately in that he left the university and went from job to job suffering a decline in living standards and job responsibilities. Throughout Dr. Riebsame's and Dr. Buffington's testimony was the subtle undercurrent that all of these factors impacted upon the Defendant's mental and emotional well-being not only due to the physical impact that substance abuse had upon him, but also the psychological impact on the Defendant as he saw his lifestyle, social status and personal well-being decline.

c. It appears from the record that the experts questioned the Defendant about this and he acknowledged that even though his life was spiraling out of control, he still did not possess the innate ability to stop his substance abuse or to take steps to turn around his personal decline.

d. The State's expert witness, Dr. Danziger, also acknowledged that the Defendant suffered from long tenn cocaine and alcohol dependence. Numerous witnesses presented by the defense, including family members and long term friends, established that the Defendant's drug and alcohol abuse was ongoing and continuous. The effect this had upon the Defendant's emotional and mental state cannot be denied.

e. The Court is reasonably convinced that this mitigating circumstance has not been proven and is entitled to no weight. The Court is reasonably convinced that the facts above stated do prove a non-statutory mitigating circumstance of mental or emotional disturbance, not extreme in nature, and entitled to substantial weight.

2. F.S. 921.141(6)(f) <u>The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired</u>.

a. The testimony of the three (3) experts, Dr. Danziger, Dr. Riebsame and Dr. Buffington, confirms that the Defendant's life was out of control based upon his substance abuse and resulting addiction.

b. Their testimony, taken as a whole, is

uncontradicted, in that substance abuse impacted upon the Defendant's life in the most adverse fashion possible. The same analyses that took place for reviewing whether or not the Defendant was under the influence of extreme mental or emotional disturbance as it involved substance abuse also is appropriate in reviewing this mitigating circumstance.

c. The actions of the Defendant contradict his expert's explanation that he was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. When the Defendant approached the gated community where the Kerschs resided, he did not simply scale the wall and enter the neighborhood, he waited until another resident entered which granted him access to the controlled gate. When he approached the Kerschs' house and determined that no one was home, instead of breaking into the house at that time, he waited for someone to return home so that he would not trigger the burglar alarm. He did not immediately attack Thea Kersch, but waited until he was in the backyard away from open view and did so only once he had gained access to the residence.

d. Other than substance abuse, it did not appear as though there was any substantial testimony concerning the inability of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Certainly there is testimony that his abilities in those two areas were impaired. The veneer of substance abuse and drug addiction covered the Defendant's existence and impacted upon his overall ability to function appropriately, but it did not rise to the level to where his life was totally out of control.

e. The Court is reasonably convinced that this mitigating circumstance has not been proven and is entitled to no weight. The Court is reasonably convinced that the facts above stated do prove a non-statutory mitigating circumstance that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct

to the requirements of law was impaired but not substantially. This non-statutory mitigating circumstance is entitled to substantial weight.

3. F.S. 921.141(6)(h) <u>The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty</u>

(a) Any other aspect of the Defendant's character, record or background.

(b) Any other circumstance of the offense.

a. During the penalty phase the Defendant presented numerous witnesses that testified as to his interaction in the community and his work record. Friends of the Defendant from high school testified that he was well liked and admired by his fellow students. The Defendant was portrayed as athletic and good looking and enjoyed a certain amount of prestige as being a member of the high school soccer team.

b. In college he was well liked by his fellow students and also enjoyed a reputation much like that in high school of being good looking and athletic.

c. The Defendant worked throughout his adult life at a variety of occupations. He did not appear to be an individual that was a financial drain upon friends, family or society.

d. The Court is reasonably convinced that this mitigating circumstance has been proven and is entitled to little weight.

NON-STATUTORY MITIGATION

1. The Defendant was gainfully employed.

a. Defendant established this fact that he was employed by way of extensive testimony of witnesses during both the penalty phase and during the Spencer hearing.

b. The Court is reasonably convinced that this mitigating circumstance has been proven and is entitled to little weight.

2. The Defendant manifested appropriate courtroom behavior throughout the pendency of the guilt and penalty phases of the trial Additionally, the Defendant manifested appropriate courtroom behavior during the Spencer hearing.

a. The Court had an opportunity to view the Defendant on a consistent basis during the course of the guilt phase, penalty phase and during the *Spencer* hearing. The Court finds that the Defendant's behavior was appropriate throughout all aspects of his trial. The Defendant was cooperative with his attorneys, court officials and the court proper.

b. The Court is reasonably convinced that this mitigating circumstance has been proven and is entitled to little weight.

3. The Defendant cooperated with law enforcement.

a. The Defendant cooperated with law enforcement upon his arrest.

b. The statement made by the Defendant was reasonably accurate based upon the circumstances.

c. The Court is reasonably convinced that this mitigating circumstance has been proven and is entitled to little weight.

4. The Defendant had a difficult childhood.

a. The evidence presented by the Defendant regarding this mitigating factor is somewhat contradictory. He attended an expensive preparatory school and Florida State University. His friends and family all acknowledge that he was an attractive, well liked and athletic child. He grew up in an upper middle class neighborhood and enjoyed a privileged lifestyle.

b. The Defendant's father provided for his family, but suffered from alcoholism. The father visited psychological abuse upon the Defendant, Defendant's mother and his siblings.

c. The Defendant suffered from the direct exposure to the alcoholism of his father. The overall pattern of substance abuse in the family contributed to the Defendant, his mother, his sisters Cathy and Mary, and his brother, Jack, suffering from alcoholism. The siblings' alcoholism did not occur during the Defendant's childhood, but did develop in the later years. The Defendant's sister, Mary, also suffered from cocaine abuse, but not while the Defendant was a child.

d. The Court is reasonably convinced that the mitigating circumstance of the Defendant having a difficult childhood has been proven and is entitled to little weight.

5. The Defendant expressed remorse about his actions.

a. The Defendant expressed remorse from shortly after his arrest up to and including the Spencer hearing. The Defendant did not attempt to excuse his actions by way of his addiction or by any other mitigating circumstance.

b. The Court is reasonably convinced that thismitigating circumstance has been proven and is entitled to little weight.

> All aggravating circumstances and all mitigating circumstance have been discussed by the Court in this Order as they relate to Count I. Each of the aggravating circumstances has been proven beyond all reasonable doubt. Each of the following aggravating circumstances has been given great weight by the Court.
>
> a. F.S. 921.141(5)(b) The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person.
>
> b. F.S. 921.141(5)(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> c. F.S. 921.141(5)(h) The capital felony was specially heinous, atrocious or cruel.
>
> d. F.S. 921.141(5) The capital felony was a homicide and was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification.
>
> Each of these aggravating circumstances proven by the State is given great weight and far outweighs the mitigating circumstances. Each one of the above aggravating circumstances in Count 1, standing alone, would be sufficient to outweigh the total of the minimal amount of mitigation that exists.

(R 669-676)

The mitigation offered in this case pales by comparison to the six aggravating circumstances which have been proven by the State. (See cross-appeal) The state acknowledges this is a weighing, not a counting, process. The weight to be given the aggravators was properly determined by the trial court.

The death penalty is appropriate if one aggravator is found and outweighs (or is not outweighed by) the mitigation offered. *Foster v. State*, 369 So. 2d 928 (Fla. 1979) The jury in appellant's case recommended death by a vote of 8 to 4, and that recommendation must be given great weight by the court. *Grossman v. State*, 525 So. 2d 833 (Fla. 1988) The aggravating circumstances proven by the State clearly establish that the death penalty is appropriate and the State asks this Court affirm the sentence of death. *See Winkles v. State*, 30 Fla.L.Weekly S27 (Fla. Jan. 13, 2005); *Blackwelder v. State*, 851 So. 2d 650 (Fla. 2003); *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003); *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997); *Johnson v. State*, 660 So. 2d 637 (Fla. 1995).

VI. FLORIDA'S DEATH PENALTY IS NOT UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

There are fundamental reasons why the *Apprendi/Ring* argument fails: Buzia's death sentences are supported by aggravators that fall outside any interpretation of *Apprendi/Ring*;[10] and, the statute under which Buzia was sentenced to death provides that, upon conviction for capital murder, the maximum possible sentence is death, unlike the statute at issue in *Ring. Ring* clarified that *Apprendi* applied to capital cases, and that *Apprendi* applied to Arizona's death penalty statute. However, *Ring* has no application to Florida's death sentencing scheme because the United States Supreme Court, while misinterpreting Arizona's capital sentencing law, did not misinterpret Florida law. The basic difference between Arizona and Florida law is dispositive of Buzia's claims.

***Apprendi/Ring* does not invalidate Florida's death penalty statute.**

Buzia's claim that *Apprendi/Ring* operates to invalidate Florida's long-upheld capital sentencing statute has been

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[10] The contemporaneous attempted murder of Thea Kersh as a prior violent felony and the during-a-robbery/burglary aggravator. (See cross appeal).

repeatedly rejected by the Florida Supreme Court and by the United States Supreme Court. *See Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003); *Conahan v. State*, 844 So. 2d 629 (Fla. 2003); *Butler v. State*, 842 So. 2d 817 (Fla. 2003)(relying on *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) to a *Ring* claim in a single aggravator (HAC) case); *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); *Grim v. State*, 841 So. 2d 455 (Fla. 2003); *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla. 2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003).

Buzia's death sentences are supported by aggravators that fall outside any interpretation of *Apprendi/Ring*.

Under the plain language of *Apprendi*, a prior violent felony conviction is a fact which may be a basis to impose a sentence higher than that authorized by the jury's verdict without the need for additional jury findings. There is no constitutional violation (nor can there be) because the prior conviction constitutes a jury finding which the judge may rely upon, without additional jury findings, in imposing sentence.

See Almendarez-Torrez v. United States, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under any view of the law, and even after *Ring*, the jury is not required to make a determination of the prior violent felony aggravator, and that aggravating circumstance can be found by the judge alone.

Under any interpretation of the facts, the prior violent felony convictions obviate any possible Sixth Amendment error. Those aggravating circumstances are outside of the *Apprendi/Ring* holding,[11] and, because that is so, those decisions are of no help to Buzia. In the absence of any legal support, Buzia's claim collapses. *Apprendi* and *Ring* do not factor into the facts of this case, and no relief is justified. Additionally, this murder was committed during a felony and the jury returned verdicts of guilty on both robbery and burglary.

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[11] The *Apprendi* Court cited to *Jones v. United States,* 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000). [emphasis added]. The Court has already clearly said that death is the maximum penalty for first degree murder, so that component of the statement has no application to Florida law. In any event, Buzia's prior violent felony convictions establish an aggravator that is outside any possible (or reasonable) interpretation of *Apprendi/Ring.*

Death is the maximum penalty for first-degree murder.

"[T]he legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law." *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). The Court, long before *Apprendi*,[12] concluded that the maximum sentence to which a Florida capital defendant is subject following conviction for capital murder is death. *Apprendi* led to no change of any sort, by either the Legislature or the Florida Supreme Court.

In Florida, the determination of "death-eligibility" is made at the guilt phase of a capital trial, not at the penalty phase, as was the Arizona practice. The Florida Supreme Court has unequivocally said what Florida's law is, just as the Arizona Supreme Court did. The difference between the two states' capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree murder in Florida (and because it is not in Arizona), Buzia's *Apprendi/Ring* claim collapses because

[12] The Florida Supreme Court's interpretation of Florida law is consistent with the description of Florida's capital sentencing scheme set out in *Proffitt v. Florida,* and echoed in *Barclay v. Florida,* 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). If the defendant were not eligible for a death sentence, there would be no second proceeding.

nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State,* 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Ring did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. Under the Arizona capital sentencing statute, the "statutory maximum" for practical purposes is life until such time as a judge has found an aggravating circumstance to be present. An Arizona jury played no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. As the Arizona Supreme Court described Arizona law, the statutory maximum sentence permitted by the jury's conviction alone is life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001). Florida law is not like Arizona's. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a "sentencing factor" (*i.e.*: "selection factor," under Florida's statutory scheme) and an element is sharply made in *Apprendi,* where the Court stated: "One need only look to the kind, degree, or range of punishment to which the prosecution is entitled for a given set of facts. Each fact necessary for that entitlement is an element." *Apprendi v. New Jersey,* 530 U.S. at 501. [emphasis

added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida's scheme, is not a "sentence enhancement," nor is it an "element" of the underlying offense. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998); *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). *See, Hildwin v. Florida,* 490 U.S. 638, 640-41 (1989). [emphasis added].

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT ERRED IN FAILING TO WEIGH THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF CHARLES KERSCH WAS COMMITTED DURING THE KIDNAPPING OF THEA KERSH.

The trial court held:

F.S. 921.141(5)(d) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of or in an attempt to commit any robbery, burglary or kidnapping.

b[13]. What remains is the State's contention that the kidnapping of Thea Kersch qualifies for an aggravating circumstance under this section. During the penalty phase, the State argued that the uncharged allegation of kidnapping supported the felony murder aggravating circumstance. The elements of kidnapping were explained to the jury as follows:

1. John Buzia forcibly confined, abducted, or imprisoned Thea Kersch against her will.

2. John Buzia had no lawful authority.

3. John Buzia acted with the intent to:

(a) commit or facilitate commission of robbery or burglary.

(b) inflict bodily harm upon the victim or another person.

In order to be kidnapping, the confinement, abduction, or imprisonment

(a) must not be slight, inconsequential or merely incidental to the felony;

(b) must not be of the kind inherent in the

[13] Section “a” is included in Claim II on cross-appeal.

nature of the felony; and

(c) must have some significance independent of the felony in that it makes the felony substantially easier of commission or substantially lessens the risk of detection.

The Defendant was not charged with kidnapping. The issue arises as a result of the State's seeking to prove the aggravating circumstance while avoiding impermissible doubling.

c. The Court finds there is no doubt that the Defendant committed a kidnapping of Thea Kersch. The purpose of the kidnapping was to allow the Defendant the opportunity to attack, rob and murder Charles Kersch. The Court agrees in part with the State's alternative theories that the Defendant kidnapped Thea Kersch to inflict bodily harm or to terrorize her or another. The jury was never instructed on the "terrorization" aspect of the kidnapping charge. At the charge conference for the penalty phase instructions, both parties stipulated to deleting the phrase "to terrorize" from the jury instructions. In fact, the Defendant moved Thea Kersch from the walkway area between the dinette and den to the back bedroom to allow him to complete his criminal enterprise without the victim noticing his injured wife. The purpose of kidnapping Thea Kersch was not to permit him to commit or complete a robbery or burglary of her, but to allow him to successfully complete his criminal enterprise against her husband. This did result in harm to another; to-wit: Charles Kersch. The Court has considered Faison v. State, 426 So.2d 963 (Fla. 1983) in its analysis of the factual situation involving the victims. Thea Kersch was moved from one area of the house to another across a wide expanse and then hidden from view in the back bedroom. The Defendant at that time considered using duct tape to continue imprisoning her in the back bedroom. The abduction or imprisonment of Thea Kersch was not inconsequential. The movement and confinement of Thea Kersch did not result from the beating and robbery of Thea Kersch inasmuch as she

> was incapacitated at the time the Defendant was stealing her belongings. The Defendant reflected upon his situation and then decided to move Thea Kersch to allow him to complete his next criminal endeavor, the robbery and murder of Charles Kersch.
>
> d. **This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given no weight by the Court. The circumstances associated with the use of this aggravating circumstance as an alternative theory to avoid impermissible doubling troubles the Court.** The Court does not have the benefit of a unanimous finding by the jury on the subject of a predicate offense. The Court is not willing to constitutionally find the aggravating circumstance independent of the jury. (emphasis supplied)

(R 658-660)

The trial judge found the State proved the during-a-kidnapping aggravating circumstance. It was an abuse of discretion to fail to assign weight to an aggravating circumstance. The court's reasoning was (1) that the State was using the kidnapping because it could not use the burglary or robbery to establish the during-a-felony aggravating circumstance; and (2) the jury had not convicted Appellant of kidnapping.

As the judge found, there is no question Appellant committed the crime of kidnaping. The trial judge's conclusion that he could not give any weight to the during-a-felony aggravator is mistaken. It is not error to find both pecuniary gain and committed-during-the-course-of-a-

kidnapping. This argument has been consistently rejected by this Court. *Hartley v.* State, 686 So. 2d 1316 (Fla. 1996); *Preston v. State*, 607 So. 2d 404 (Fla. 1992), *cert. denied*, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); *Bryan*; *Routly v. State*, 440 So. 2d 1257 (Fla. 1983), *cert. denied*, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984).

The robbery/burglary felonies are doubled with the pecuniary gain aggravator (See Claim II on cross-appeal herein). Notwithstanding, there is no preclusion to finding the during-a-felony aggravator with kidnaping as the underlying felony. There is no improper doubling with the "committed during the course of a felony" aggravator if that aggravator is based upon the commission of the kidnapping. *See Doorbal v. State*, 837 So. 2d 940 (Fla. 2003); *Hartley v. State, supra.*

Generally, the consideration of two or more aggravators is improper when the aggravators are based on the same aspect of the crime. *See Rose v. State,* 787 So.2d 786, 801 (Fla.2001) (citing *Banks v. State,* 700 So.2d 363, 367 (Fla.1997)). However, the facts of a case may support multiple aggravating factors "so long as they are separate and distinct aggravators and not merely restatements of each other." *Rose,* 787 So.2d. at 801. This Court in *Banks* said:

> Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other, as in murder committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement.

700 So.2d at 367 (citation omitted). Therefore, when considering the issue of doubling, the focus is on the aggravators themselves, not on the overlapping facts. *See Spann v. State*, 857 So.2d 845 (Fla. 2003).

This Court has previously upheld the finding of the "pecuniary gain and committed during the course of a kidnaping" aggravators. *See Hartley v. State,* 686 So.2d 1316, 1323 (Fla.1996) (noting that the assertion that the pecuniary gain and in-the-course-of-a-kidnapping aggravators are improperly doubled has been consistently rejected). Where other factors indicate that the defendant did not act with the absolute, sole motive of pecuniary gain, it is not error to find the pecuniary gain and in-the-course-of-a-kidnaping aggravators. *Spann*, 857 So.2d at 857. *See also Griffin v. State* 820 So.2d 906, 915 (Fla. 2002)(murder committed during the course of a kidnapping and committed for pecuniary gain do not necessarily involve the same aspect of the crime, although

a kidnapping may be used to facilitate or make easier the commission of a robbery or other crime).

The trial judge was also mistaken that he cannot consider the kidnaping as an underlying felony for the aggravating circumstance of during-a-felony. The State is not required to charge the felony during the guilt phase in order to argue the murder was committed during the commission of a felony. *Turner v. State*, 530 So.2d 45, 50 (Fla. 1987); (Section 921.141(5)(d), Florida Statutes (1983), does not require that a defendant be charged or convicted of the enumerated felonies, it requires only that the aggravating circumstances be proven beyond a reasonable doubt).

By finding the aggravating circumstance was established but could be given no weight, the trial court eliminated the during-a-kidnapping-aggravator. His misunderstanding of the law lead to rejection of this aggravating circumstance.

II. THE TRIAL COURT ERRED IN FAILING TO WEIGH EITHER THE DURING-A-ROBBERY/BURGLARY AGGRAVATING CIRCUMSTANCE OR THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE

The trial court held:

> F.S. 921.141(5)(d) <u>The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of or in an attempt to commit any robbery, burglary or kidnapping.</u>
>
> a. The jury found the Defendant guilty of Count III,

Burglary of a Dwelling with an Assault or Battery while Armed with a Weapon and Count IV, Robbery with a Deadly Weapon. While the jury was justified in finding the Defendant guilty of Count III, Burglary of a Dwelling with an Assault or Battery while Armed with a Weapon and Count IV, Robbery with a Deadly Weapon, the State acknowledges that the use of burglary and robbery in support of the felony murder aggravating circumstance would create an improper doubling in conjunction with the pecuniary gain aggravating circumstance. The State acknowledged its factual and legal dilemma by conceding thesame in its response to the Defendant's Motion for Judgment of Acquittal. Accordingly, the Court does not consider the aforementioned Counts III and IV for purposes of this aggravating circumstance.

(R 657-658)

. . . .

F.S. 921.141(5)(f) <u>The capital felony was committed for pecuniary gain</u>.

a. The Defendant was found guilty of Count III, Burglary of a Dwelling with an Assault or Battery while Armed with a Weapon and Count IV, Robbery with a Deadly Weapon.

b. The Defendant did take money and property from both of the victims. In the Defendant's confession, he acknowledged that the basis for the attack on Thea Kersch revolved about the need for money.

c. After attacking Thea Kersch, the Defendant remained in the Kerschs' residence and rummaged about. He waited for Charles Kersch to return so that he could rob him. After beating Charles Kersch, the Defendant removed Charles Kersch's wallet and stole the cash that was inside. He also took the victims credit cards, checks and vehicle. There is no doubt that the Defendant intended to take the property and money of the victims.

d. This Court acknowledges that proving the aggravating circumstances of witness elimination or

a capital felony being committed for a pecuniary gain does not necessarily preclude the existence of the other. Howell v. State, 707 So.2d 674 (Fla. 1998), Urbin v. State, 714 So.2d 411 (Fla. 1998), Knight v. State, 721 So.2d 287 (Fla. 1998) and Griffin v. State, 820 So.2d 906 (Fla. 2002).

e. What remains is the merger of the pecuniary gain aggravator with the burglary and robbery counts. This is impermissible doubling unless the aggravator is based upon the commission of an independent felony; to-wit: the kidnapping.

f. Although this Court finds that a kidnapping of Thea Kersch did occur, it does not find that it was for the purpose of inflicting pain or to terrorize Thea Kersch. It was for the purpose of allowing the Defendant to continue with his criminal endeavor which included inflicting pain upon and murdering Charles Kersch.

g. This aggravating circumstance has been proven beyond all reasonable doubt. The aggravating circumstance is given no weight by the Court.

(R 661-663)

....

The Court found that two aggravating circumstances have been proven beyond all reasonable doubt by the State, but given no weight by the Court. They are

a. F.S. 921.141(5)(d) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of or in an attempt to commit any robbery, burglary or kidnapping.

b. F.S. 921.141(5)(f) The capital was committed for pecuniary gain.

The Court does not consider these aggravating circumstances in determining if they outweigh the mitigating circumstances. Although they were proven beyond all reasonable doubt, they are given no weight by the Court.

> This Court finds that in weighing the aggravating circumstances against the mitigating circumstances, the scales of life and death tilt to the side of death in Count I of the Indictment.

(R 669)

It is undisputed the pecuniary gain aggravator merges with the crimes of "during the course of a felony" insofar as the robbery/burglary are concerned. *Davis v. State*, 604 So.2d 794, 798 (Fla.1992); *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976).

However, in this case the trial judge then eliminated **both** aggravating circumstances because he believed they each were doubled with the other. He should have considered these two aggravating circumstances as one single aggravator. *Cherry v. State*, 544 So.2d 184, 187 (Fla. 1989); *Mills v.* State, 476 So.2d 172, 178 (Fla. 1985); Blanco *v. State*, 452 So.2d 520, 525 (Fla. 1984). Instead, the trial judge found each aggravator double with the other and found neither. This was error.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee/Cross Appellant has been furnished by U. S. Mail, to George Burden, Office of the Public Defender, 112 Orange Avenue, Daytona Beach, FL 32114 on this _____ day of February, 2005.

Attorney for Appellee/Cross-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Courier New, 12 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

Attorney for Appellee/Cross-Appellant