IN THE SUPREME COURT OF FLORIDA

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DAVID PENTECOST,

Appellant,

v.

CASE NO. 71,851

STATE OF FLORIDA,

Appellee.

_______________________/

INITIAL BRIEF OF APPELLANT

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

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The Appellant, David Duane Pentecost, will be referred to by name throughout this brief. References to pages in the record on appeal and the supplemental record will be preceded with the prefixes "R" and "SR."

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

An Escambia County grand jury indicted David Duane Pentecost on January 6, 1986, for first degree murder for the stabbing death of Junevis Smith and for armed burglary with an assault. (R 1031) The grand jury returned an amended indictment charging the same offenses on February 3, 1986. (R 1032) Pentecost proceeded to trial on the amended indictment, and the jury found him guilty as charged. (R 1227) After hearing additional evidence in aggravation and mitigation, the jury recommended a life sentence for the murder. (R 1228) The court ordered a presentence investigation. (R 1026, 1230)

On December 31, 1987, Circuit Judge Lacey A. Collier adjudged Pentecost guilty and sentenced him to death for the murder and life imprisonment for the burglary. (R 1230-1274, 1277-1289) In support of the death sentence, the court found three aggravating circumstances: (1) the homicide was committed during the commission of a burglary; (2) the homicide was especially heinous, atrocious or cruel; and (3) the homicide was committed in a cold, calculated and premeditated manner. (R 1285-1286) (A 1-2) The court found as a nonstatutory mitigating circumstance that Pentecost had no history of violence. (R 1288) (A 5)

Pentecost timely filed his notice of appeal to this Court. (R 1290)

Facts--Guilt Phase

Kimber Smith wanted her mother to die. (R 460, 468, 497, 636-637) She had hated her mother, Junevis Smith, for years. (R 418-419, 459-461, 468, 497, 636) Her mother had taken legal custody of Kimber's two children after having Kimber declared an unfit mother. (R 418-419, 461) Kimber believed that her mother had paid friends to fabricate some of the evidence used in the proceedings. (R 418-419) Kimber psychologically dominated her 18 year-old, younger brother, Kayle Smith. (R 496-497, 634-636) A friend said that Kayle followed Kimber around like a puppy dog. (R 635-636) Kimber called him "Kayle Baby." (R 682) Even though he did not think Kimber should have her children, Kayle shared Kimber's hatred for their mother. (R 497-498) They talked about ways to kill her. (R 463-466, 497) In spite of this long-standing hatred, Kimber and Kayle continued to live in their mother's house along with Kimber's son, Sonny, who was in Junevis Smith's custody. (R 458-459)

David Pentecost met Kimber at the construction site where they both worked. (R 678-680) They began dating and soon their relationship intensified. (R 680-681) David became closer with Kimber's family, and Kimber's mother asked David to move into the their home. (R 681) He did so at the end of September 1986. (R 681) David and Kimber married in November 1986. (R 458) A few weeks before December 15, 1986, David, Kimber and Kayle moved out together. (R 458-459, 657-658, 684) David said it was his idea to move. (R 684) Kayle told a friend, Warren Hovermale, that his mother kicked them out. (R 657)

During this time, Kayle and Kimber threatened to kill their mother. Kayle testified at trial to making two threats against his mother's life. (R 462-463, 493-496) Shannon Bush, a friend of Kimber's who had lived with the family for a brief time, heard Kimber threaten to kill her mother. (R 632, 636) Kimber said she was going to kill her mother in a way that no one would suspect her involvement. (R 636) A friend of Kayle's, Warren Hovermale, described an incident which occurred two weeks before the homicide, during which Kayle threatened to kill. (R 651-658) Kayle was depressed over the death of another friend who had died in a motorcycle accident a few weeks earlier. (R 651-652) He visited Hovermale and became intoxicated and wildly irrational. (R 652, 654-655) Kayle wrecked Hovermale's apartment--throwing furniture and breaking things. (R 652) Kayle also had a stiletto-style switchblade which he kept opening, saying that he had the knife for Robby, the person Kayle blamed for the motorcycle accident. (R 653-654) He threatened to kill Robby with the knife and take care of some others as well. (R 654) Although he did not directly threaten his mother, he expressed his anger at her for kicking him out immediately after threatening to kill Robby and others. (R 655-658) Anthony Pentecost, David's brother, also heard Kayle threaten to kill his mother. (R 664-666) David, Kimber and Kayle had stopped at Anthony's house. (R 662-664) David was helping Anthony with some work. (R 664) Kimber and Kayle were talking, but Anthony overheard them talking about stabbing or blowing up their mother. (R 664-666)

On December 15, 1986, Edward Biles, a dispatcher with the Pensacola Police Department, received a call on the emergency number. (R 506-507, 1382-1385) (State's tape recorded exhibit no. 26) The caller identified herself as Junevis Smith and said that someone was breaking into her home. (R 507) She said she was calling from her back bedroom. (R 507) Biles immediately dispatched officers to the scene and continued to talk to the caller. (R 507) Biles said the telephone conversation ended when the caller became involved in a struggle and screamed. (R 507-508) The telephone line was disconnected. (R 507-508) During the conversation, Biles heard the caller call out the name "David." (R 512-513)

Sergeant Perry Knowles heard the dispatch to Smith's residence at 11:23 p.m. (R 273) When he arrived at the address less than two minutes later, Officer McKenzie was waiting for him at the front of the house. (R 272) Officer Petroni watched the back of the house. (R 272, 283) Knowles and McKenzie entered through the front door and walked down the hallway. (R 273) The door was unlocked and the chain lock had been broken. (R 293, 312) In one bedroom, they found a 10 to 12 year-old boy asleep. (R 274) In the master bedroom, the officers found Junevis Smith on the floor between the bed and a dresser. (R 274) The cord of the fully operational telephone was wrapped around her. (R 307-308) A large amount of blood was in the area. (R 274) The officers left the house, but Knowles immediately returned with Lieutenant Stephan Banakas who had just arrived. (R 275-277) Banakas and Knowles attempted to talk to

Smith, but she could produce only grunts and a gurgling sound. (R 277, 287-288) She died during the attempted conversation. (R 277, 287-288) Dr. Birdwell, the assistant medical examiner, later concluded that the cause of death was trauma to the head, primarily a stab wound to the left side. (R 380) This wound entered in front of the ear and penetrated about three inches into the head cutting the brain, a nerve and a blood vessel. (R 378) Birdwell also found defensive wound type cuts to the hands and some other minor lacerations and abrasions. (R 375-380)

Crime scene technicians recovered several items of evidence from the house. In addition to blood samples from items in the bedroom, blood was found in the foyer and on a closet door in the hallway. (R 273, 303-304, 322) An album cover from the bedroom had a bloody fingerprint. (R 298-299) Also, a large envelope found near the body had a shoe impression in blood. (R 299-301) On the bed, technicians recovered a small hatchet which proved to have a blood on it. (R 296-298, 451) Twenty-six latent fingerprints were lifted from around the house. (R 364) Finally, in a school parking lot a few blocks from the house, officers found and searched a 1978 Honda automobile. (R 295, 532) An empty, one-half gallon, Jim Beam whiskey bottle, a knife sheath and some fingerprints were obtained. (R 365, 532-536) The car belonged to the victim's daughter, Kimber Smith. (R 295)

Leroy Jordan testified that David, Kayle and Kimber came to his house around 10:30 p.m. on December 15, 1986. (R

384-385) He lived in his mother-in-law's house with his wife, Suzanne. (R 384, 412) Kimber and Suzanne worked together at a restaurant. (R 385) Leroy had known Kimber, Kayle and David about two weeks. (R 384-385) All three of them were drunk when they arrived and still had cups and a Jim Beam bottle with them. (R 386-387) They asked Leroy if Kimber could stay there for awhile. (R 387) After telephoning his wife, who was at work, Leroy said Kimber could stay. (R 388) David and Kayle left and Kimber fell asleep on the couch. (R 388) Leroy picked up his wife at work, and when they returned, David and Kayle were still not there. (R 388-389) Kayle returned about 3:00 a.m. with blood all over the front of his shirt and a knife in his hand. (R 389, 405) He told Kimber, "It's done." (R 389) With no change in facial expression, Kimber merely asked, "Is she dead?" (R 390, 406) Kayle replied, "Yes." (R 390)

Leroy Jordan wanted Kayle and Kimber to leave, but they wanted to wait for David. (R 391) Kayle burned his shirt in the fireplace. (R 419-421) Leroy also assisted Kayle in abandoning a car Kayle had stolen, and on their return trip, Kayle threw his knife away. (R 391-393) Leroy noted the location and later lead the police to it. (R 392-393) David arrived between 7:00 and 8:00 a.m. (R 395) He was tired as if he had been running, and four fingers on his left hand were cut to the bone. (R 395)

Kayle related some details about the murder to Kimber and the Jordans. He said that he and David went to his mother's house, and he broke the chain lock to open the door. (R 396,

415) Kayle said that David wanted to back out, but Kayle told him they had to go through with the murder. (R 402-403) David had turned to leave the house when Kayle stopped him and said, "No, if we're here, we got to do it." (R 415) According to Kayle, the two of them went into the bedroom. (R 415) Kayle said his mother was stabbed twice in the head, and he could hear her screaming. (R 407, 415) Kayle said David cut his hand during the struggle with Junevis Smith over the knife. (R 406) Kayle said the blood on his shirt was from David's hand. (R 415) They became separated, and Kayle stole a car and returned to the Jordan's. (R 391) Kayle did most of the talking, but Leroy Jordan remembered David saying that he could not believe he had done it. (R 395-396, 399-400) Suzanne Jordan remembered David saying that he walked into the bedroom and stabbed the woman twice in the head. (R 416) He also said he cut his hand during a struggle for the knife after she grabbed the knife out of his hand. (R 416) Suzanne said that David and Kayle acted as if they had a close relationship. (R 421)

Before he returned to the Jordan's, Kayle Smith went to a family friend's home one street away from Junevis Smith's house. (R 543) William Elrod said that Kayle rang his front doorbell about 2:30 a.m. the morning of December 16th. (R 544) Elrod stated that Kayle wore a wind breaker and gloves. (R 544-545) Leroy Jordan said a pair of gloves he normally kept in a drawer mysteriously appeared on a table after Kayle's return. (R 409-410) Kayle also had a knife. (R 550) Kayle appeared emotionally upset and stated, "I'm in trouble; I'm in

big trouble." (R 545, 547) Elrod invited Kayle inside, they talked and Kayle left. (R 547-548) About 20 minutes later, Elrod called the police. (R 551-552)

Kayle Smith was arrested on December 16, 1986, and he gave a tape recorded statement to Detective James Enterkin. (R 361-362, 533-534, 562)(Defense Exhibit No. 5) Kayle told the detective that he, David and Kimber started drinking a half gallon of Jim Beam whiskey on the day of the murder. (R 1391) They drove to a friend's house where Kimber passed out on the couch. (R 1391) Kayle and David then went for a drive. (R 1391) They parked the car at an elementary school and walked to Junevis Smith's house. (R 1392) According to Kayle he did not know where they were going, and David said, "We're going to go visit your mother." (R 1392) Kayle used his key to unlock the door to his mother's house and used his shoulder to break the door chain. (R 1393) They went inside. David said he heard Kayle's mother talking on the telephone, and the two of them left. (R 1393) Kayle said he ran two houses down, but David went back inside. (R 1393) He said he heard screams, and then David ran out of the house. (R 1393) David's left hand was cut. (R 1393) Kayle said that David also carried Kayle's World War II military knife. (R 1393) Kayle kept the knife in the glove compartment of the car (R 1401), and he did not know David had the twelve-inch long knife. (R 1393, 1400, 1401) They ran through the residential area jumping several fences until they reached the school parking lot. (R 1394) While running, David allegedly told Kayle that he stabbed her in the

head and could not get the knife out. (R 1402-1403) David told Kayle, "I'm not going to make it, because she was yelling my name over the phone." (R 1403) Kayle said the car was being towed when they arrived. (R 1394) The two split up and Kayle said he did not see David until later that morning. (R 1394-1395) Kayle said David carried the knife, and he never saw it again. (R 1394) When confronted with information that he had been seen with the knife, Kayle said it was possible. (R 1399-1400) He told the detective that his mother kept a hatchet underneath her bed. (R 1401) Kayle admitted he had blood on his shirt, which he burned, but said the blood came from David's hand when he helped him over a fence. (R 1396-1397) Kayle denied knowledge of the stolen Thunderbird. (R 1395) Several weeks earlier, Kayle claimed that Kimber and David were talking about blowing up his mother's car. (R 1397-1398) He did not think their discussion was serious. (R 1398-1399) Kayle explained the murder as caused by a combination of alcohol consumption and the hard feelings Kimber had for her mother for taking her children. (R 1399)

Prior to David's trial, Kayle pleaded guilty to first degree murder and testified for the State at David's trial. (R 481) Although Kayle testified that he had no deal from the State and was still subject to a death sentence, the State presented nothing in aggravation at his sentencing hearing before the judge. (R 482-484) Also, Kimber was never charged and was in Mexico at the time of David's trial. (R 573)

Kayle's trial testimony differed somewhat from the statement he gave Detective Enterkin. He testified that he, Kimber and David were drinking on December 15th. (R 459-460) Their conversation turned to plans to kill Kayle's and Kimber's mother. (R 460) Kayle was sharpening his knife at the time, but he denied that he suggested stabbing his mother. (R 466) They talked about ways to blow up her car. (R 466) According to Kayle, Kimber at one point said, "I wish she were dead." (R 468) David allegedly responded, "I'd do it tonight if you wanted me to." (R 468) Kimber stood up and kissed David. (R 468) They had had such conversations in the past which were motivated by Kimber's hatred for her mother. (R 460-462) Kayle said he did not take the earlier threats seriously. (R 462-463) At Kimber's suggestion, the three of them left their place at Perido Key and drove to the Jordans' looking for marijuana. (R 464) They found none. (R 464) Kayle and David left Kimber at the Jordans' because she was drunk. (R 465) Kayle drove. (R 465) He said he knew they were going to kill his mother. (R 465)

At trial, Kayle again related the sequence of events surrounding the murder. (R 468-481, 486-494) Kayle said that he and David were drunk when they reached his mother's house. (R 471) Kayle broke the chain on the door with his shoulder. (R 468-469) They entered the house, and David walked down the hallway toward the bedroom. (R 470) David turned around, ran back and told Kayle that his mother was talking on the telephone. (R 470) Kayle told David, "We're here, it's got to be

done." (R 470) At that time, David ran back inside, and Kayle remained two houses away. (R 470) He heard his mother scream and then saw David run from the house. (R 471) David allegedly told him that he stabbed Kayle's mother twice in the head and had difficulty pulling the knife out. (R 472, 487) The two ran, jumping fences along the way. (R 471-473) David grabbed Kayle while scaling the fence and got blood on Kayle's shirt. (R 471) David also gave the knife back to Kayle. (R 473) Kayle hid from the police, watched his car being towed, went to William Elrod's house and finally stole a car to drive back to the Jordans'. (R 474-476) After reaching the Jordans', Kayle burned his shirt and disposed of the car and knife. (R 477-478) He said he wore gloves when he abandoned the car, but he denied having worn gloves at his mother's house. (R 478)

While in jail awaiting trial, Kayle wrote a letter to Kimber telling her about the murder. (R 572-574, 627-630) (Defense Exhibit No. 6) In the letter, he suggested that he and David could act like they were on mushrooms and fabricate an insanity defense. (R 572-574, 627-630) Kayle did receive mental health treatment in jail. (R 523-528) Dr. Dan Overlade also examined Kayle to determine his competency to stand trial. (R 575-576) He found Kayle to be psychologically disturbed, but not psychotic, at the time of the evaluation. (R 578-585) Overlade concluded that Kayle was competent to stand trial and legally sane at the time of the offense. (R 578-589) Although Kayle had been drinking at the time of the offense, Overlade did not think Kayle's ability to appreciate the nature and

consequences of his actions was impaired. (R 588) Overlade administered an MMPI and a Rorschach test. (R 580-588) Due to Kayle's exaggerated and false responses, the MMPI profile was not valid. (R 580) Overlade noted some borderline bizarre responses on the Rorschach. (R 586) These evidence a mental disturbance, which Overlade said could be the product of Kayle's participation in the murder of his mother. (R 586) Overlade could not determine if Kayle suffered from a psychological disturbance prior to the crime which contributed to his involvement in the murder. (R 588-589)

David Pentecost was arrested on December 17, 1986. (R 335-336) Investigator Theodore Chamberlain and Sergeant Dennis Maney tape recorded an interview with David on that date. (R 337-343, 346-356, 1350-1368) (State's Exhibit No. 23) The following day David gave a second statement to Chamberlain and Detective Enterkin. (R 342-343, 356-362, 1369-1381) (State's Exhibit No. 24) In the first, David gave a description of the homicide. On the afternoon of December 15th, David bought groceries and a half gallon of whiskey. (R 1352) He, Kimber and Kayle ate supper and drank. (R 1352) Kayle started talking about killing his mother with his knife which he was sharpening. (R 1353) They had discussed the subject several times earlier, and David thought Kayle was joking. (R 1353) David said both Kimber and Kayle hated their mother. (R 1353) Between 9:30 and 10:00, the three drove to a friend's house, Butch and Suzie Jordan's. (R 1353-1354) Kayle continued to sharpen his knife in the car during the drive. (R 1354) After

about 30 or 40 minutes at their friends', Kimber went to sleep. (R 1355) Kayle said, "Let's go" and he and David left. (R 1355) Kayle parked the car at an elementary school about three blocks from his mother's house. (R 1355) They walked the three blocks; Kayle carried his knife. (R 1355, 1357-1358) As they left the car, Kayle told David, "Let's go do it." (R 1357) David asked, "Do what?" (R 1357) Kayle just said, "Come on." (R 1357) David said he had no intention of hurting anyone. (R 1357) Kayle unlocked the front door of his mother's house with his key, he broke the chain lock and entered the residence. (R 1355) While in the doorway, David heard Kayle's mother talking on the telephone. (R 1355) David turned to leave. (R 1355) Kayle grabbed him and said, "No, you got to do it, you got to do it." (R 1355, 1358) Apparently, Kayle had planned to commit the murder. (R 1358) Kayle handed his knife to David. (R 1358) David said he had no recall of the stabbing. (R 1358-1359, 1366-1367) He did remember telling Kayle that the knife was stuck. (R 1355) As they ran away, Kayle kept asking if she was dead, and David told him that he did not know. (R 1359) David remembered washing blood off of his hand, but he did not realize that he was cut until the following morning when he awoke at a friend's house. (R 1359-1360) He borrowed a bicycle and returned to Butch and Suzie's house to find Kimber and Kayle. (R 1356, 1361) David said he had a bad hang-over and was sick. (R 1361) In his second statement, David told the investigators that he remembered Kayle and Kimber talking about $10,000 in insurance money and a car that he and Kimber would

get if their mother died. (R 1372-1373) Kimber had also made the statement that if her mother was killed, she wanted one of her mother's fingers for each child she had taken away. (R 1373-1375)

David testified at trial that Kayle was the one who actually stabbed his mother. (R 673-735) David admitted that he had not told the truth in the statements he gave the police because he was trying to protect Kayle and Kimber. (R 700-701) Because his name had been yelled over the telephone, David felt he would be prosecuted anyway. (R 699) He promised Kayle and Kimber that he would not mention their involvement. (R 700-701)

In his testimony, David said that while drinking on December 15th, Kayle talked about killing his mother. (R 688-690) Kayle wanted to kill her, stab himself and take items from the house to make it appear as if a burglar was responsible. (R 688-690) David told Kayle he was crazy. (R 689) David, Kayle and Kimber continued to drink and drove to Butch and Suzie Jordan's. (R 692-693) David said he was close to drunk when they arrived at the Jordans'. (R 692-693) When he left the Jordans' with Kayle, David went to sleep in the car. (R 693-694) He awoke when Kayle stopped the car at the school near his mother's house. (R 694) Kayle left and said he would meet David in an hour. (R 694) David saw the empty knife sheath on the car seat and realized that Kayle was going to kill his mother. (R 695) He ran after Kayle, and when he reached the house, David saw the door standing open. (R 695) Inside, he saw Kayle in the hallway. (R 695) He heard Kayle's

mother on the telephone. (R 695) He told Kayle he was crazy and grabbed his arm. (R 696) David also grabbed the knife catching the blade and blade guard; it cut his fingers to the bone. (R 696) At about the same time, Mrs. Smith appeared in the bedroom doorway and yelled, "David, what are you doing here." (R 696) David said he was frightened and did not know what to do. (R 697) The killing occurred so quickly, David did not have time to act. (R 697-698) David did not see the stabbing, but he went into the bedroom where he found Kayle leaning over his mother. (R 697) Kayle pulled the knife free using both hands and ran by David. (R 698) David turned on the bathroom light to see how badly Mrs. Smith was injured. (R 698) He touched her face and turned her head. (R 698) Then, Kayle grabbed David by his jacket and told him the police were coming. (R 698) They ran. (R 699) David wiped his left hand on the grass to remove some of the blood. (R 699) He also picked up the knife which Kayle had dropped. (R 699) Kayle patted David on the back and told him everything would be all right. (R 699)

The physical evidence revealed fingerprints and blood samples matching David's. Five of the 26 latent fingerprints found during the investigation matched his prints. (R 362-369) One print was located on the door of the Honda automobile. (R 365) Two were on a record album and a photograph from the record album found in the victim's bedroom. (R 365) Another print was developed on the door frame of the bathroom located off the victim's bedroom. (R 365) Finally, a print in blood

was found on the hall closet. (R 365) None of the latent prints matched Kayle's or Kimber's. (R 366) David has type A blood. (R 445) The victim had type O. (R 446) The victim's blood type was found on numerous items from the bedroom and on the outside of David's denim jacket. (R 447-452) Type A blood was found on the inside of David' s jacket (R 448-449), on the knife (R 451, 453, 455), and on a wall. (R 454-455)

David is an alcoholic. Dr. Benjamin Ogburn, a psychiatrist, examined David and testified about how the consumption of alcohol could have affected his behavior on the night of the murder. (R 590-623) Although David had had a significant amount to drink, he did not claim to be drunk. (R 614) Ogburn found that David could recall the significant details of the events surrounding the murder. (R 598-599) David's recall was sketchy at times (R 599), but he had not suffered an alcohol blackout. (R 602) Ogburn testified that David was completely honest during his examination and testing. (R 602-603) The examination and testing revealed that David is a socially withdrawn person who is shy and uncomfortable around people. (R 604) He suffers from insecurity and low self-esteem. (R 604) In order to mask these feelings of insecurity, David used alcohol extensively. (R 604) Ogburn concluded that David is not an aggressive individual and has no tendency to strike out at others. (R 605) In fact, Ogburn found that David's behavior is just the opposite -- he is withdrawn and concerned about people and their feelings. (R 605) He does, however, act impulsively. (R 604) David is self-defeating in many of his

actions, and on at least two occasions, he tried to hurt himself. (R 605)

Jury Selection

During jury selection, the trial court denied two challenges for cause to jurors who said they would have difficulty following the law concerning the intoxication defense. (R 198-205) Both jurors, Anne Hammond and Bertha Filmore, expressed the belief that voluntary intoxication, regardless of the degree, should not excuse criminal conduct. (R 142-143, 198-205) Defense counsel exhausted his peremptory challenges. (R 208-215) Both of these jurors served on the jury. (R 208-215)

Penalty Phase and Sentencing

The State presented only one witness during the penalty phase. (R 925-936) Dr. Thomas Birdwell, the pathologist who performed the autopsy, testified the amount of pressure necessary to push the knife through the bone of the skull. (R 925-936) The defense presented seven witnesses in addition to David's testimony. (R 936-984)

David's brother, Anthony Pentecost, testified that David was not a violent person. (R 947-948) He was generous and always shared with others. (R 948) Anthony said, in his opinion, that David would have been under some influence to commit such a violent act. (R 949)

Magaret Sloan testified that she supervised David for two years while he was on juvenile probation for a burglary in 1975 or 1976. (R 939) His probation was violated because he ran away. (R 942) She said that David was a very quiet person and had no history of violence. (R 941-943) He presented no disciplinary problems while in the detention home. (R 943)

Dr. Benjamin Ogburn testified about David's alcohol problem. (R 949-957) David began abusing alcohol when he was 14 years old. (R 954) He drank daily for several years and developed a tolerance for alcohol and a dependence upon it. (R 954) The alcohol became David's crutch for his feelings of insecurity and low self-esteem. (R 954-955) His alcohol consumption caused him to have alcoholic blackouts. (R 954) In 1986, David voluntarily admitted himself into an alcohol treatment program at Weston State Hospital in Kentucky. (R 950) David was attempting to save his second marriage. (R 952) Unfortunately, David was unable to complete the program because both of his legs were broken. (R 951, 955) While drinking, David had jumped from a cliff, breaking his legs. (R 951) As a result, the alcohol program became yet another failure in David's life. (R 955)

Shannon Bush testified that she had known the Smith family for over five years. (R 957) She does not know David Pentecost. (R 958) She and Karen Smith were friends, and Shannon lived the Smith's home for a period of time. (R 957) She also knew Kimber Smith and remembers frequent conversations with Kimber about her mother. (R 957-958) During these

conversations, Kimber expressed hatred for her mother and said she would find a way to kill her so that no one would know she was involved. (R 958)

Suzanne Jordan related a statements Kayle Smith made when he returned to her house after the killing. (R 959-960) Kayle said that David tried to back out before the killing. (R 959-960) David had turned around to leave when Kayle told him they had to do it. (R 960)

David Pentecost testified by way of the reading of a letter he sent to his lawyer. (R 977-980) (Defense Exhibit No. 11) In the letter, David stated again that he did not hurt anyone. (R 978) He said that he was just trying to help a friend stay out of trouble and became involved the situation. (R 978) He lamented the fact that he had been drinking too much that night and speculated that he might have had more control over the circumstances had he not been impaired. (R 978) David admitted that he had been in trouble in the past, but that he also had taken the blame for things he had not done in order to help a friend. (R 978) He also related how his drug and alcohol problem ruined his earlier marriage. (R 979) Even though he stopped drugs during the six days he stayed in the detox center, his alcohol dependence became more pronounced. (R 979-980, 983) He originally moved to Florida in hopes of making a new start in life. (R 980)

SUMMARY OF ARGUMENT

1. The trial court improperly denied two defense challenges for cause to prospective jurors. Pentecost raised an intoxication defense at trial. During voir dire, defense counsel asked prospective jurors about their ability to follow the law regarding the defense. Counsel challenged several jurors for cause. The court improperly denied two of them: Jurors Anne Hammond and Bertha Filmore should have been excused. Their views evidenced a reasonable doubt as to their ability to fairly judge the intoxication defense. Pentecost exhausted his peremptory challenges, and Hammond and Filmore served on the jury. Pentecost must now be afforded a new trial to cure this violation of his Sixth Amendment right to a fair and impartial jury.

2. The jury recommended a life sentence. Overriding that recommendation, the trial court violated the standards this Court announced in Tedder v. State. Several factors support the reasonableness of the jury's recommendation. First, the jury could have believed that Pentecost's accomplice, Kayle Smith, actually stabbed the victim. Second, the State treated Pentecost's equally culpable accomplices more favorably. Third, Pentecost's alcohol consumption at the time of the crime impaired his abilities. And, fourth, Pentecost's nonviolent past, which the trial judge found to a nonstatutory mitigating circumstance; his troubled personal life and his alcoholism were all factors justifying the jury's sentencing decision.

3. The trial court solicited and considered victim impact information in sentencing Pentecost to death. A presentence investigation report improperly contained a victim impact section. Included was a statement from the victim's husband, James Smith, which reflected his belief that the jury's life recommendation was too lenient. Before sentencing, the judge also acknowledged receipt of comments and letters from family members of the victim and others. Consideration of this material violated the Eighth Amendment and the mandate of Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING TWO CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO FAILED TO EXPRESS THE ABILITY TO GIVE FAIR CONSIDERATION TO THE DEFENSE OF VOLUNTARY INTOXICATION.

Pentecost raised an intoxication defense at trial, and the court instructed the jury on the defense. (R 901, 1222-1223) During voir dire, defense counsel inquired of the prospective jurors' ability to follow the law regarding the intoxication defense and the jurors' views on such a defense. (R 112-123, 142-143, 198-205) Counsel challenged several jurors for cause. (R 198-200) The court improperly denied two of them. (R 205) Jurors Anne Hammond and Bertha Filmore should have been excused for cause because their views evidenced a reasonable doubt as to their ability to fairly judge the intoxication defense. Pentecost exhausted his peremptory challenges, and Hammond and Filmore served on the jury. (R 208-215) Pentecost must now be afforded a new trial to cure this violation of his Sixth Amendment right to a fair and impartial jury.

A criminal defendant is entitled to jurors who will give fair consideration to his defense at trial. <u>See</u>, <u>Moore v. State</u>, No. 69,496 (Fla. 1988); <u>Henninger v. State</u>, 251 So.2d 862 (Fla. 1971). This Court, in <u>Singer v. State</u>, 109 So.2d 7 (Fla. 1959), set forth the standard to be applied when a prospective juror's competency to serve has been challenged:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to

> render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or the court on its own motion.

Ibid. at 23-24; accord, Moore v. State; Hill v. State, 477 So.2d 553 (Fla. 1985). A juror must unequivocally express his ability to be fair and impartial on the record. Moore v. State; Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). Merely expressing an ability to to control any bias or prejudice is insufficient. Singer v. State; Leon v. State, 396 So.2d 203, 205 (Fla. 3rd DCA 1981), rev. denied, 407 So.2d 1106 (Fla. 1981). Moreover, a juror's statement that he has the appropriate state of mind and will follow the law is not determinative of the question of his competence to serve. Singer, 109 So.2d at 24; Graham v. State, 470 So.2d 97, 98 (Fla. 1st DCA 1985); Leon, 396 So.2d at 205. Finally, when a defendant exhausts his peremptory challenges, the improper denial of a cause challenge compels a reversal for a new trial. See, Moore v. State, slip opinion at 4; Hill v. State, 477 So.2d at 556; Leon, 396 So.2d at 205; Auriemme, 501 So.2d at 43. Applying these principles here demonstrates the trial court's reversible error in denying the challenges for cause.

Juror Anne Hammond

Juror Hammond [juror number 3, (R 20)] expressed opposition to the idea that intoxication could be a defense. (R 143, 201-203) Defense counsel challenged her for cause. (R 198)

Before the court denied the challenge (R 205), further inquiry of Juror Hammond proceeded as follows:

> MR. KIMMEL [Defense counsel]: We aren't sure whether we can trust our notes in some of these particular areas. I have some specific questions that I think I had answers to before. Ms. Hammond, did I have the understanding from you, and you correct me if you did not understand the question before or you have a different answer from what I recall, that you're of the opinion that there is no level of intoxication that in your mind would give rise to any defense in a criminal case?
>
> PROSPECTIVE JUROR: Well, the level of intoxication I come to the opinion once you started drinking and two or three drinks, you're kind of already going out of your norm, but you have got to know when to stop, and if you don't, it seems to me like you are still responsible for what you're doing.
>
> MR. KIMMEL: Because of that belief, are you of the opinion that no level of intoxication can in your mind, no matter what the jury instructions say, can give rise to a defense to a criminal charge?
>
> PROSPECTIVE JUROR: Well, I've never had it put to me to that point before.
>
> MR. KIMMEL: Unfortunately, we have to put it to you today.
>
> PROSPECTIVE JUROR: What I would do, I would listen carefully and weigh all of the evidence to that effect and then use that judgment.
>
> MR. KIMMEL: Would you still have in your mind that that person, because they voluntarily took the alcohol, that makes them responsible for everything that happens after?
>
> PROSPECTIVE JUROR: No, sir.

(R 201-203)

Juror Bertha Filmore

Defense counsel also challenged Juror Filmore [juror number 16, (R 21)] for cause. (R 198-199) The exchange with her regarding her views on the intoxication defense went as follows:

> MR. KIMMEL: ... Same question of Ms. Filmore. Did you -- do you have the opinion that no amount of alcohol consumption or intoxication would give rise to a legal defense to a criminal charge?
>
> PROSPECTIVE JUROR: I said --
>
> MR. KIMMEL: Tell us what you did say.
>
> PROSPECTIVE JUROR: I'm trying to think of what I said earlier. I said I thought, you know, even if you drank quite a bit, you would still be responsible for your actions. And in a case like this, I would have to listen to all of the facts and then base my decision on that. I just couldn't say just what I -- you know.
>
> MR. KIMMEL: You couldn't say what, that because he was intoxicated -- because a person was intoxicated, whoever it is, that it's not a defense or that because a person is intoxicated --
>
> PROSPECTIVE JUROR: I think if a person is intoxicated, that they should be, you know, held responsible.
>
> MR. KIMMEL: No matter how intoxicated they are?
>
> PROSPECTIVE JUROR: Again that has to be a little bit more. I just don't know at this time.
>
> *   *   *   *
>
> MR. BERRIGAN [PROSECUTOR]: And Ms. Hammond, you and Ms. Filmore feel that you can looked at the facts and make a determination as to whether that person -- just

use your common sense, can you do that to make a determination?

PROSPECTIVE JUROR [Hammond]: Yes.

MR. BERRIGAN: Ms. Filmore, can you?

PROSPECTIVE JUROR [Filmore]: (Indicates in the affirmative.)

MR. BERRIGAN: Thank you all very much.

MR. KIMMEL: Reinquire, Your Honor, as to one more juror. Ms. Filmore, I didn't understand your answer to be that clear. I thought you said you were not sure whether or not you could follow that part of the judge's instructions about that if you get intoxicated, if you reach a certain level of intoxication, it might affect one of those elements of the crime?

PROSPECTIVE JUROR: Follow the judge's instructions.

MR. KIMMEL: Yes, ma'am, on that one question about alcohol and intoxication at a certain level affecting the intent to commit a crime, affecting premeditation?

PROSPECTIVE JUROR: I thought I said I could follow.

MR. KIMMEL: You can?

PROSPECTIVE JUROR: I can.

(R 202-203, 204-205) The court denied the cause challenge. (R 205)

Both Juror Hammond and Juror Filmore should have been excused for cause. Although both ultimately said they would follow the law (R 201-202, 205), their statements to that effect came reluctantly, after probing inquiry. (R 201-205) Such statements, alone, do not determine whether a cause challenge is appropriate. Singer; Leon; Graham. The totality

of the jurors' responses still leaves a reasonable doubt as to their ability to fairly apply the law concerning the intoxication defense. Juror Filmore expressly stated that she did not know if she could follow the law. (R 203) Her later statement, when pressured, that she could follow the law was insufficient to remove the doubt about her ability to do so. Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987); Auriemme v. State, 501 So.2d 41. At best, Hammond's and Filmore's responses were equivocal and failed to meet the requirement that a juror's ability to fairly try the case be unequivocally established on the record.

David Pentecost's Sixth Amendment right to a fair and impartial jury has been violated. He urges this Court to reverse this case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IN SENTENCING PENTECOST TO DEATH, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE SENTENCE WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

A jury's recommendation of life imprisonment must be given great weight, and

> In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). If any mitigating factors are present in the record, the trial judge must impose a life sentence in accordance with the recommendation. E.g., Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Ferry v. State, 507 So.2d 1337 (Fla. 1987). The fact that the sentencing judge disagrees with the jury's sentencing decision does not authorize an override and the imposition of a death sentence. Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). This Court's consistent application of this standard in life recommendation cases has preserved the constitutionality of Florida's death penalty sentencing procedures. Spaziano v. Florida, 468 U.S. 447 (1984). Several valid reasons justify the jury's life recommendation in this case. The trial judge's decision to override the recommendation was wrong. David Pentecost's death sentence must now be reversed for imposition of a life sentence.

The jury could have believed that Kayle Smith, not David Pentecost, actually stabbed the victim. Kayle made the prior threats to kill. (R 463-466, 497) Kayle had a motive since he hated his mother. (R 497-498) Kayle drove the car to the scene. (R 1391-1392) Kayle carried his knife, which was the murder weapon, and later disposed of it. (R 477-478) Kayle, himself, testified that he pressure David to stay involved when David try to leave the house. (R 470) The evidence about who did the actual stabbing was a "liars' contest" -- Kayle's version versus David's. David's testimony was consistent with the physical evidence. (R 673-735) Even though the trial judge rejected the theory that Kayle did the actual stabbing (R 1287) (A 4), the evidence was sufficient to support it. The jury could have reasonably reached that conclusion. Rivers. This constitutes a basis for recommending a life sentence. See, DuBoise v. State, 520 So.2d 260 (Fla. 1988); Hawkins v. State, 436 So.2d 44 (Fla. 1983). Even if the jury was merely uncertain about who actually stabbed the victim because of the conflicting testimony, a life recommendation was, nevertheless, reasonable. Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979).

Another valid reason supporting the jury's recommendation is the disparate treatment of equally culpable accomplices. This Court has frequently found disparate treatment of those equally guilty to be a reasonable basis for a life recommendation. E.g., Caillier v. State, 523 So.2d 158 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Although Kayle Smith had

not yet been sentenced at the time of Pentecost's trial, the jury knew that the State was not seeking a death sentence for him. (R 481-484) Moreover, Kimber Smith, who was the prime instigator of the crime, was not charged. The jury knew that she was in Mexico at the time of trial. (R 573) She was the one with the long-standing motive for the murder and had influence over both Kayle and David. (R 418-419, 459-461, 468, 496-497, 634-636) The jury could have believed that she psychologically dominated both Kayle and David, and they committed the crime to please her.

David's alcohol consumption prior to the time of the crime could have formed the basis for the jury's recommendation. This Court has approved alcohol or drug use at the time of the crime as sufficient to justify a life recommendation. See, e.g., Fead v. State, 512 So.2d at 178-179; Amazon v. State, 487 So.2d 8, 13 (Fla. 1986); Norris v. State, 429 So.2d 688, 690 (Fla. 1983). Even though the jury rejected the intoxication defense during the guilt phase, such impairment is a legitimate mitigator of the degree of punishment deemed appropriate. The trial judge rejected alcohol consumption as a mitigating circumstance (R 1287-1288) (A 4-5), but the jury could have reasonably concluded that David was impaired.

Nonstatutory mitigating circumstances could have also formed the basis for the life recommendation. See, Washington v. State, 432 So.2d 44, 48 (Fla. 1983); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981). The trial judge specifically found as a nonstatutory mitigating circumstance that David had

no history of violence. (R 1288) (A 5) David's criminal history "committed some years ago as a juvenile" (R 1286) (A 3) and his character and personality traits support this finding. (R 939-944, 947-949) His alcoholism and troubled personal life (R 949-957) also could have justified the jury's recommendation. *See*, *Huddleston v. State*, 475 So.2d 204 (Fla. 1985). His age of 25 years at the time of the crime was, likewise, a mitigating factor. (R 1288) (A 5) The prosecutor apparently expressed his opinion that the jury may have given such consideration to David's age. (R 1246-1247) All of these support the reasonableness of the jury's decision.

The trial judge, not the jury, made the wrong sentencing decision in this case. David Pentecost should not be executed for his crime. This Court must reverse the death sentence with directions to impose a sentence of life imprisonment.

ISSUE III

THE TRIAL COURT ERRED IN SOLICITING AND CONSIDERING STATEMENTS FROM RELATIVES OF THE VICTIM IN THE DEATH SENTENCING PROCESS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court ordered a presentence investigation prior to sentencing Pentecost to death. (R 1026) A victim impact section was included which contained a statement from the victim's husband, James Smith. (PSI, page 2) The statement reflected Smith's belief that the jury's life recommendation was too lenient:

> "Whatever I can do to make him suffer, be it paying back what he done I want it. If the judge gives him the chair then I want nothing. I just can not see him getting off with what the jury came up with. I want him to suffer. God is going to be his punishment. I am not going to be, but I want him to suffer."

(PSI, page 2) Before sentencing, the judge also acknowledged receipt of comments from family members of the victim's and two letters from Dorothy Littlepage and Teresa Ipock. (R 1230-1231) After hearing arguments of counsel, the court asked if any others wished to be heard on behalf of the victim, but nothing further was offered for the court's consideration. (R 1268) This material should not have been considered in sentencing. Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987); Grossman v. State, 525 So.2d 833 (Fla. 1988); Patterson v. State, 513 So.2d 1257 (Fla. 1987).

In Booth v. Maryland, the United States Supreme Court addressed the propriety of the sentencing authority in a

capital case receiving and considering information about the impact of the crime on the victims. Maryland's practice was to present the sentencing jury with a presentence investigation which included a victim impact statement. The statement included information about the character of the victim, the emotional impact of the crime on relatives and family members' views about the crime and the defendants. Concluding that this information was irrelevant to the capital sentencing decision and likely to improperly shift the focus of the sentencer to arbitrary considerations, the Court held that the introduction of these statements violated the Eighth Amendment. In Grossman, this Court followed Booth and condemned the practice of a sentencing judge in a capital case hearing testimony from relatives of the victim concerning the crime's impact. This Court held that Section 921.143 Florida Statutes (1985), which allows the next-of-kin of homicide victims to appear or present written statements concerning the crime's impact for consideration by the court at sentencing, is unconstitutional when applied to the capital sentencing process. 525 So.2d at 842. The trial judge erred in following that statute and in considering the improper information in this case.

Although the information in the PSI in this case was not as detailed as the information provided in the Maryland procedures, the same constitutional error has occurred. The trial court, as the sentencing authority, improperly received irrelevant sentencing material. Pentecost's death sentence has been imposed in violation of the Eighth and Fourteenth

Amendments. He asks this Court to reverse his sentence for a new sentencing proceeding.

CONCLUSION

For the reasons presented in Issue I, David Pentecost asks this Court to reverse his judgment and sentence with directions to grant him a new trial. For the reasons presented in Issues II and III, he asks that his death sentence be reversed with directions to impose a life sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida; and a copy has been mailed to appellant, David Pentecost, #751561, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 8th day of November, 1988.

W. C. MCLAIN