IN THE SUPREME COURT OF FLORIDA

JAMES RANDALL PENN,

Petitioner,

v. CASE NO. 74,123

STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0714798
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

TABLE OF CITATIONS (cont'd)

TABLE OF CITATIONS (cont'd)

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On June 15, 1988, an Okaloosa County grand jury indicted James Randall Penn for first degree murder and robbery of his mother, Ruth Penn. (R 1888) The grand jury return an amended indictment charging the same offenses on January 26, 1989. (R 1965) Count One alleged first degree premeditated murder and first degree felony murder with the robbery as the underlying felony. (R 1965) The State entered a nolle prosequi to the first indictment on January 30, 1989. (R 1967) Penn proceeded to a jury trial which commenced on February 20, 1989. (R 2) The jury found him guilty of first degree murder and grand theft. (R 2021-2022) At the conclusion of the penalty phase of the trial, the jury recommended a death sentence. (R 2020)

Circuit Judge Erwin Fleet adjudged Penn guilty on February 26, 1989, and, on April 5, 1989, sentenced Penn to death for the murder and to five years for the grand theft. (R 2039-2047) In his written findings in support of the death sentence, Judge Fleet found two aggravating circumstances: (1) the homicide was especially heinous, atrocious or cruel; and (2) the homicide was committed in a cold, calculated and premeditated manner. (R 2046) (A 2) In mitigation, the court found that Penn had no significant history of prior criminal activity; and (2) Penn was under the influence of an extreme mental or emotional disturbance at the time of the crime. (R 2046) (A 2)

Penn filed his notice of appeal to this Court. (R 2071-2072)

Facts of the Offense and Guilt Phase

Randy Penn was addicted to crack cocaine. His wife, Angelika, was also addicted, and they separated about a week before Randy killed his mother, Ruth Penn. (R 792-293) Randy moved into his mother's house with his two-year-old son, David. (R 791-792) Randy had a good relationship with his mother. (R 792-793) Although Randy's drug usage had created difficulties, long-time family friends said Randy and his mother, Ruth, had a loving, supportive relationship. (R 783-784)

On the day of the homicide, Randy took his son to the beach. (R 784) Since they were late returning, Ruth Penn became anxious and talked to her close friend and neighbor, Mary Gutshall, around 5:30 p.m. about her concerns. (R 784-785) At 10:00 Ruth called Gutshall to tell her that she no longer needed help to locate Randy and the child. (R 785-786) The next morning at 7:00, Gutshall noticed that Ruth's newspaper was still in the yard which was unusual since Ruth arose early to read the paper. (R 786-787) David Davaux, who delivered the newspapers in the neighborhood at 5:30, had noticed that Ruth Penn was not waiting at her window for the paper as was her routine. (R 1301) He also had seen a maroon Dodge Omni parked in the street with a black male sitting in the passenger seat. (R 1299-1302) Davaux thought it was suspicious that the black male would not look at him as he passed by. (R 1301) A second individual, a white male who Davaux later identified as Randy Penn, was walking across the yard carrying a brown bag. (R 1301-1304) Two other neighbors, Kenneth and Florence Fritsch,

saw a car parked by Ruth Penn's house between 5:30 and 6:00, and Kenneth Fritsch saw Randy walking toward the house and jumping to avoid the activated lawn sprinklers. (R 1161-1168)

Mary Gutshall tried, without success, to reach Ruth Penn by telephone between 7:00 and 8:00. (R 787) Gutshall's daughter, Vickie Fields, arrived for her usual morning visit with her mother around 8:00, and the two women went inside the Penn residence using a key which Gutshall kept. (R 787-790, 794-796) Vickie found Ruth Penn's body in the bed in the master bedroom, and she and her mother immediately left and telephoned the sheriff's office. (R 795-798) Deputies Gregory Cameron and Tony Wadsden arrived, entered the house to see the body and also found David Penn still asleep in another bedroom. (R 799-816) Randy Penn was not present at the residence.

Dr. Edmund Kielman viewed the body at the scene and performed the autopsy the following day. (R 929-997) He found that Ruth Penn had been beaten with some instrument, most likely a hammer. (R 936-939) She had 31 separate lacerations to the scalp, ears and forehead. (R 936-937) Many of these wounds were cresent-shaped and one to the temple was circular. (R 937) Several produced fractures through the bone structure into the cranial cavity. (R 937) Any one of these wounds would have caused unconsciousness. (R 975) Kielman discovered some bruises and lacerations on the right arm, the back of the hands and the middle finger of the right hand. (R 940-941) One artificial fingernail Ruth Penn had glued in place had been broken away. (R 935) A film of blood was on the left leg

consistent with movement on the bloody bed sheet. (R 940, 968) Because of these defensive wounds, Keilman concluded that Ruth Penn did not lose consciousness immediately. (R 979-980) Cause of death was trauma to the brain and hemorrhaging due to the blows to the head. (R 975)

The crime scene revealed several items of evidence. Technicians found 25 latent fingerprints. (R 1108-1109) Twelve were obtained from the tile in the hall bathroom, eight came from the sink, one from the kitchen telephone, two were found on the jewelry box in the bedroom and two from a microwave tray in the kitchen. (R 1108-1109) Nine of the prints from the bathroom floor, the sink, the microwave tray and the jewelry box were of comparison quality and matched the finger and foot prints of Randy Penn. (R 1325-1327) Blood spatters were found around the bed and bedroom. (R 1488-1490) A blood spatter analyst opined that patterns showed that the victim's head was in various positions during the attack. (R 1482, 1498-1503) The analyst also believed that the victim may have been on the floor at one point due to a contact stain found there. (R 1503-1507) A hammer was recovered from underneath a carpet in the bathroom off the master bedroom where the homicide occurred. (R 846-849, 1352-1362) Blood and hair consistent with the victim's were found on the claw portion of the hammer. (R 1346-1347, 1397-1399) Investigators found that the telephones lines had been pulled from the walls and both Randy's and his mother's fingerprints were on one of the telephones. (R 824, 1323) Outside of the residence, two beer cans and a Diet Pepsi

can were found in the street. (R 830, 881) The Pepsi can had a fingerprint on it belonging to Mark Gandy. (R 1320-1323) A watch was also discovered in the driveway. (R 829)

Investigators began looking for Randy Penn. They found the maroon Omni which Ruth Penn had rented for Randy and learned that Randy was then driving a rental Buick. (R 1004, 1170-1174) A short time later, officers found Randy driving the Buick, pursued him and apprehended him after he wrecked the car. (R 1006-1007, 1021-1037) After his arrest, Randy confessed to killing his mother and stealing her property. (R 1041-1051, 1061-1103) Much of the stolen property was recovered from various places with the help of Robert Willis. (R 1004-1005, 1008) Robert Willis was also known as "Money Bunny", and Randy identified him as his crack cocaine supplier in his confessions. (R 1018, 1061-1103)

Randy Penn gave four confessions and made admissions to others. (R 1014-1016, 1040-1049, 1058-1103, 1175-1284) (State's Ex. Nos. 107, 108, 109, 110) Randy made his first confession shortly after his arrest on the day of the homicide and the others over the next several days. He said he arrived at his mother's house that night around 12:00 and put his child to bed. (R 1042, 1058) He left again, driving a red car his mother had rented for him, and went to an area of town known as "Country." (R 1043) Randy was smoking crack. (R 1043) During the night he returned to his mother's house several times to steal property to exchange for crack. (R 1043-1044, 1047-1069) His supplier, "Money Bunny", would take the

property from Randy and give him a little piece of crack. (R 1258-1259, 1267, 1273-1275) Randy said he gave "Money Bunny" a lot of property during the night. (R 1258) Since "Money Bunny" had the crack, Randy admitted that "Money Bunny" readily lead him around because of Randy's craving for crack. (R 1259) Randy took a microwave, a fur coat, a gun, four or five rings, a diamond bracelet and also purchased items with his mother's credit cards--all for "Money Bunny" and crack. (R 1065-1066, 1071-1073) Randy consumed six or seven pieces of crack, a quarter to a half of a rock at a time. (R 1267)

On one of Randy's trips back to his mother's house, he secured a hammer from the laundry room and hit his mother while she was asleep. (R 1044, 1066-1067, 1186, 1089) He remembered a brief struggle right at first, then nothing, but he does not remember how many times he hit her. (R 1067) He remembered a big blur and a frenzy. (R 1189, 1226) And, he did not know why he hit her. (R 1046, 1089) Furthermore, he did not realize that he had killed her. (R 1194, 1207-1210) When asked if he knew what he was going to do when he got the hammer, Randy said, "I guess so." (R 1087) Later he explained that he had been trying to figure out an answer to the question himself and could not. (R 1189) He said, "I just don't think I was thinking. Just acting." (R 1202) He did not have an argument with his mother, and in fact, he was glad his mother was seeking custody of his son. (R 1081-1084) Randy did not recall a lot things that transpired. (R 1210) He said his mind was "just a big mess." (R 1067)

Prior to trial, Randy wrote a letter to Robert Knutz, a local newspaper reporter who testified for the prosecution at trial. (R 1523-1524) Randy described his drug usage and how it impacted his life. (R 1526-1529) (State's Exhibit No. 94) Randy admitted that he killed his mother and stole her property for cocaine. (R 1528) He expressed concern for his son, David, and stated that he wanted his cousin to obtain custody of David so he could have a decent home. (R 1528) Randy expressed remorse for killing his mother and wrote that he wanted to receive the death penalty as punishment for his crime. (R 1528) His purpose in writing the letter was to have it published in the newspaper for any beneficial effect it might have on potential drug abusers. (R 1526) Knutz telephoned Randy in the jail to verify that he wrote the letter. (R 1525) During this conversation, Randy spoke about the events and his life. (R 1530) On cross-examination, defense counsel wanted to elicit two additional statements Randy made during the telephone interview to the effect that he did not think about what he was doing and did not realize what he had done until sometime later. (R 1532-1533) The prosecutor objected to the proffered testimony on the grounds that it was self-serving hearsay. (R 1530-1535) Defense counsel countered that the statements were directly related and a part of the interview Knutz testified about on direct. (R 1532-1534) Over defense objection, the trial judge prohibited the proposed cross-examination. (R 1534-1535)

Jury Selection

During jury selection, the trial judge denied two defense challenges for cause. (R 172, 314-315) Penn challenged Juror James Parish because of his beliefs in favor of imposing death for first degree murder which would interfere with his ability to fairly consider a life recommendation. (R 157-160, 166-172) He challenged Juror Carole Allen when she expressed an inability to fairly consider the defense of voluntary intoxication. (R 301, 304-305, 309-314) After the court denied the challenges for cause, Penn expended a peremptory challenge on each of the two prospective jurors. (R 175, 315) Counsel exhausted his peremptory challenges requested additional ones. (R 648-649) The court denied the request. (R 650)

Penalty Phase and Sentencing

The State presented no additional evidence during penalty phase. However, two witnesses testified for the the defense in mitigation. First, Dr. John Bingham, a licensed mental health counselor and specialist in the treatment of drug addiction, testified about his examination of Randy and the effect of Randy's crack cocaine use at the time of the homicide. (R 1729-1771) And, second, a family friend, Mary Gutshall, testified about Randy's childhood and his good relationship with his mother. (R 1771-1778)

Bingham examined and tested Randy for eight hours over two days. (R 1734) His purpose was to determine the impact of cocaine use on Randy's behavior at the time of the homicide. (R

1735) Randy has a long history of chemical dependency and has used various drugs since he was in the tenth grade. (R 1736) He started with marijuana and alcohol, but soon he turned to injecting cocaine as his primary drug. (R 1736-1737) At age nineteen, Randy also used LSD for a time. (R 1737) When he joined the military, Randy stopped his cocaine use but increase his alcohol and hashish use. (R 1737) While in the Army, Randy did genuinely attempt suicide. (R 1743) He also made another attempt at suicide while in jail. (R 1743) After his military service, Randy resumed his cocaine use in 1987, and soon turned to crack cocaine. (R 1737) Bingham described crack as the most addictive drug in use, even more so that herion. (R 1740) Because crack is smoked rather than injected, the impact of the cocaine is felt in the brain much quicker and with a greater intensity. (R 1738) Crack usage can lead to aggressive and violent behavior. (R 1740) The user also may experience a variety of other problems such as compulsiveness, repetitive behaviors, irrational thinking, poor judgment and loss of impulse control. (R 1745) Cocaine become the top priority, and the user will do virtually anything to obtain it. (R 1746) The user also over reacts to stimuli and is more likely to experience a startled response. (R 1741) Bingham concluded that Randy was definitely impaired since he had consumed a large amount of cocaine during the night of the murder. (R 1744-1746) He further found that Randy has poor coping skills and tends to resort to drastic action when confronted with confusing situations. (R 1748) Bingham was of the opinion that Randy

suffered from a diminished capacity at the time of the homicide. (R 1749) He also concluded that Randy was under the domination of cocaine and also his supplier, "Money Bunny." (R 1768-1770) Bingham also noted that Randy expressed genuine remorse for the offense during his interview. (R 1748)

Mary Gutshall, a neighbor and long-time friend of the Penns, testified in mitigation. (R 1771) She had known Randy for 22 years, since he was three-years-old. (R 1772) The whole time she knew the family, Randy had a good relationship with his mother. (R 1772-1773) She knew of no problems between them. (R 1772-1773) Randy did start using drugs his junior year of high school. (R 1774) Gutshall was also aware that Randy had move in with his mother with his son, but she understood this arrangement was happy with his mother taking custody of his son. (R 1775-1776)

SUMMARY OF ARGUMENT

1. The trial court improperly denied two of Penn's challenges for cause to prospective jurors. Juror James Parish expressed fixed opinions in favor of imposing death for premeditated murder which rendered him unable to recommend a life sentence if the jury returned a verdict for premeditated murder. Juror Carole Allen had strong views against the voluntary intoxication defense which she was unable to set aside in order to follow the law on the subject. Penn used peremptory challenges to excuse these jurors from service. He ultimately exhausted his peremptory challenges and made an unsuccessful motion for additional ones. Penn must now be given a new trial to correct this violation of his right to a fair and impartial jury trial.

2. Randy Penn was intoxicated on crack cocaine at the time the homicide. He was unable to form a premeditated design to kill. The trial court should have granted a motion for judgment of acquittal to the first degree murder charge.

3. Penn wrote a letter and gave an interview to a newspaper reporter prior to trial. His letter and statements were inculpatory and included admissions of guilt. On cross-examination, defense counsel sought to elicit testimony about portions of Penn's statements which the prosecutor did not introduce. These portions were also inculpatory, but they also tended to corroborate Penn's intoxication defense. The trial court improperly ruled that the statements were self-serving and inadmissible on cross.

4. The trial judge improperly found the homicide of Ruth Penn to be cold, calculated and premeditated. Randy Penn impulsively killed his mother, for no apparent reason, while he was under the influence of crack cocaine. There was no plan or prearranged plan to kill. In fact, there was no evidence of simple premeditation, much less the heightened form necessary for finding the premeditation aggravating circumstance. The inclusion of this factor in the sentencing process renders the death sentence unconstitutionally imposed.

5. Randy Penn's death sentence is disproportional and should be vacated. The homicide was a second degree murder and should not have subjected Randy to a death sentence in the first instance. Furthermore, the only valid aggravating circumstance did not outweigh the significant mitigation found, especially Randy's crack cocaine use at the time of the offense. The evidence showed the homicide to be nothing more than a spontaneous killing while Randy was suffering an extreme mental or emotional disturbance.

6. The State was improperly allowed to introduce, indirectly, evidence of a nonstatutory aggravating circumstance that Randy Penn was once investigated for an assault charge. While cross-examining a defense mitigation witness, Dr. John Bingham, the prosecutor asked if the witness was aware of Penn's military records which apparently indicated he was once investigated on an assault charge. Penn had never been charged with an offense and the question should not have been allowed on the theory of impeachment.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING DEFENSE CHALLENGES FOR CAUSE TO TWO PROSPECTIVE JURORS: ONE HAVING BELIEFS IN FAVOR OF THE DEATH PENALTY WHICH WOULD INTERFERE WITH HIS ABILITY TO FAIRLY CONSIDER A LIFE SENTENCE AND THE SECOND HAVING AN INABILITY TO FAIRLY CONSIDER THE DEFENSE OF VOLUNTARY INTOXICATION.

The trial court improperly denied two defense challenges for cause to prospective jurors. (R 172, 314-315) Juror James Parish expressed beliefs in favor of imposing death for first degree murder which would interfere with his ability to fairly consider a life recommendation. (R 157-160, 166-172) Juror Carole Allen expressed an inability to fairly consider the defense of voluntary intoxication. (R 301, 304-305, 309-314) After the court denied the challenges for cause, defense counsel expended a peremptory challenge on each of these two prospective jurors. (R 175, 315) Counsel exhausted his peremptory challenges during jury selection and requested additional ones. (R 648-649) The court denied the request. (R 650)

This Court, in Singer v. State, 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, 525 So.2d 870 (Fla 1988); 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, 525 So.2d at 873; 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 PARISH

Juror Parish should have been excused for cause because his beliefs in favor of the death penalty would interfere with his ability to fairly consider a life recommendation in the case. See, O'Connell v. State, 480 So.2d 1284 (Fla. 1986); Hill v. State, 477 So.2d 553 (Fla. 1985); Thomas v. State, 403 So.2d

371 (Fla. 1981). The applicable standard is the same one used to excuse jurors who oppose the imposition of the death penalty to the degree it would impair their ability to fairly consider a death sentence. Ross v. Oklahoma, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 80, 88 (1988); Fitzpatrick v. State, 437 So.2d 1072, 1075-1076 (Fla. 1983). In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court receded from the strict standard lower courts had applied in evaluating the excusal for cause of death scrupled jurors and reinterpreted the standard originally announced in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The prior interpretation of Witherspoon had required a showing of unmistakable clarity that the juror's beliefs would cause him to automatically vote for life without considering a death sentence. In Witt, the Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and restated the standard:

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

Witt, 469 U.S. at 424. Therefore, the question is whether Juror Parish's beliefs in favor of the imposition of the death penalty, in a case such as this one, created a reasonable doubt about whether those beliefs would prevent or substantially impair his ability to fairly consider a life recommendation. Questioning during voir dire revealed the following:[1]

> [COURT]: Are you opposed to the death penalty?
>
> No, I'm not.
>
> Would you automatically vote against imposition of the death penalty without regard to the evidence shown or the instructions of the Court in all cases?
>
> No.
>
> Would your views on the death penalty interfere with or substantially impair your ability to judge the guilt or innocence of the defendant in this case?
>
> They could, I guess. I'm a strong proponent of our system.

(R 157-158)

* * * *

> [PROSECUTOR]: And did you understand that in a first degree murder trial if, and only if, a verdict of first degree murder is reached by the trial jury, then the case would have two phases? It would move from the guilt phase into a penalty phase.
>
> Yes.

---

[1]The entire individual voir dire of Juror Parish is reproduced in the appendix to this brief.

Do you understand, Mr. Parish, that the defendant is entitled to a fair and impartial trial in each of those phases?

Yes.

Okay, and in the guilt phase, he is entitled to a fair and impartial trial on the issue of guilt or innocence of the crimes charged?

Yes.

In the penalty phase he is entitled to a fair and impartial determination as to whether the death panalty should or should not be imposed?

Yes.

Do you recall the Judge's instructions or statements concerning the jury's duty to weigh aggravating and mitigating circumstances?

Yes, I do.

Will you be willing to go through that weighing process if a verdict of first degree murder is reached by yourself and your fellow jurors?

Yes.

In other words, do you understand that even if you render a verdict of first degree murder based upon your feelings that it was premeditated murder, or a felony murder, that the death penalty will not automatically be imposed?

Yes.

As a juror, it is your duty to weigh statutory aggravating circumstances with any mitigating circumstances you find are proven, and then to determine whether the aggravating outweighs the mitigating or vice versa?

Yes.

Are you willing to do that?

Yes.

(R 159-160).

* * * *

[DEFENSE]: Do you believe that every person who is convicted of a first degree murder should get the death penalty?

No.

Do you believe that every person who is convicted of premeditated first degree murder should get the death penalty?

Yes.

Is it the premeditated part that is the reason for that belief?

Right.

Do you believe that every murder is a first degree murder?

No, sir, I don't think that I believe that. I have doubts about it sometimes, but I don't think I believe that every murder is a first degree.

Tell me what your doubts are.

I think there are extenuating circumstances. You could be in a fight, argument over something, and kill a man innocently really, and I don't think that's a first degree murder.

(R 166-167)

* * * *

[DEFENSE]: It is fair to say that you are predisposed towards the death penalty in first degree murder cases?

I think that is a fair statement.

And it is also fair to say that I, as a defense attorney, would have to show you some significant reason why you should not impose the death penalty or should not

recommend that the death penalty be imposed?

Yes, sir.

Do you understand that the law requires the State to prove aggravating circumstances and that the death penalty cannot be imposed unless at least one aggravating circumstance is proven beyond a reasonable doubt?

Yes, sir.

Do you attend church regularly?

Yes, sir.

Do you know whether or not your church has a position on the death penalty?

You know, I really don't -- as regularly as I go, I'm not sure what the church's opinion on it is.

(R 168-169)

* * * *

[PROSECUTOR]: Do you understand that not every premeditated murder is the same?

No, not really. Premeditated is premeditated.

Do you understand that there can be a difference in the time element of the premeditation is various cases?

Yes.

The premeditation, as the Judge will instruct you, there is no specific time required. It only requires time for conscious reflection in the forming of the specific intent to kill. It could be a matter of seconds. It could be planned for years. Do you understand that?

I was thinking more in terms of some time lapse in the premeditated. If you get down to seconds like you are talking about, then I'm not sure whether I could differentiate

between premeditated or not if it's that close a situation.

I understand. Now, if you were selected as a juror in this case and if the jury should find that the defendant is guilty of first degree murder, and that determination was based on a belief of the jury that it was a premeditated murder, are you saying that you will automatically vote for the death penalty?

If I was convinced by the trial that it was premeditated murder, I would recommend the death penalty.

(R 169-170)

* * * *

[COURT]: You would follow the law as the Court instructs you?

Right.

Is that what you are telling me?

Yes.

(R 172)

* * * *

[DEFENSE]: In addition, you are going to be asked to put aside some very strong personal feelings that you have about the -- what we have just talked about on the death penalty. All of that, you are saying that you can set all of that aside and be a fair and impartial juror?

I would have trouble setting aside my beliefs about how I feel the penalty should be carried out, but I think I could be fair and impartial as far as the facts as presented on each side.

The problem is, Mr. Parish, both are required, I think.

[COURT]: The main question is, Mr. Parish, can you follow the instructions on the law?

I can follow the instructions, yes, sir.

(R 174)

Parish's responses demonstrate a reasonable doubt about his ability to fairly consider a life sentence. At the beginning of questioning, Parish told the judge that his strong beliefs in favor of the death penalty could interfere with or substantially impair his ability to fairly judge guilt or innocence. (R 158) When asked if defense counsel "would have to show you some significant reason why you should not impose the death penalty," Parish responded with an unequivocal "Yes, sir." (R 168-169) After extensive questioning, Parish did finally say that he thought he could fairly judge guilt, but he still had "trouble setting aside my beliefs about how I feel the penalty should be carried out." (R 174) Although he told the judge and the prosecutor that he would follow the judge's instructions, he never abandoned his position that death is presumed appropriate if the jury convicts for premeditated murder. Parish never changed his position that he would automatically vote for death if the jury convicted for premeditated murder. Just as the juror in Hill v. State, 477 So.2d 553, Parish also had a fixed opinion concerning the imposition of the death penalty for premeditated murder. Penn was entitled to jurors who enter the trial of the case with no presumption concerning sentence. The cause challenge should have been granted.

JUROR ALLEN

A criminal defendant is entitled to jurors who will give fair consideration to his defense at trial. See, Moore v. State, 525 So.2d 870; Henninger v. State, 251 So.2d 862 (Fla. 1971). Juror Carole Allen was unable to give such consideration to Penn's defense of voluntary intoxication which was based on Penn's crack cocaine use at the time of the homicide. Voir dire examination of Juror Allen on this point was as follows:[2]

> [PROSECUTOR]: Do you have any opinion or knowledge concerning its effects, immediate effects, on a user of crack cocaine?
>
> No, only that I've heard that it's very addictive after, you know, one or two doses.
>
> Have you or any member of your family, or any close friend that you are close to, ever suffered from an alcohol or drug abuse dependency problem of some sort?
>
> My father was an alcoholic.
>
> Do you feel because of that that in a case in which the issue of intoxication or addiction to drugs may be raised, that it would cause you any problems in rendering a fair and impartial verdict in the case?
>
> I don't know.
>
> Do you feel that you would be disposed to have sympathy towards an individual who suffered from such a situation?
>
> No, I probably wouldn't have sympathy.

---

[2]The entire individual voir dire of Juror Allen is reproduced in the appendix to this brief.

Would you be disposed in the other direction?

I really don't know.

(R 301)

* * * *

[DEFENSE]: This may get a little personal and I hope you understand. Are you sympathetic with your father's position or circumstances now?

I understand why he drank. I'm a Christian and I have forgiven him, but I think he could have chosen a better way to deal with him problems.

Do you think that he chose the route that he took?

Yes.

You don't think that there were things that occurred that were out of his hands that he had no control over?

Well, I don't know. He was a professional man and he drank for enjoyment.

Do you think all alcoholics are that way?

I really don't know. I've not been around many.

Have you formed any opinion about that at all?

About alcoholism?

Yes.

In what way?

Whether or not people who become alcoholics all choose to drink or rather maybe some of the circumstances might be beyond their control?

I think people that drink are coping perhaps in the only way they know how with

their problems, but I think there are other ways to handle problems.

Granted everybody chooses that first drink, I would think, but do you think that everyone chooses to drink to excess who does drink to excess?

Well, not purposely.

The same thing with drugs. Do you think that there is a freedom of choice there or do you think there might be some things beyond these people's control?

Well, I think when a person first takes drugs, that he probably realizes that things could get out of control later. There is so much in the news now about addiction.

If the Judge were to instruct you that intoxication, either by alcohol or by drugs, goes to the extent where that person cannot form a necessary intent to commit a crime and if you find that that is true, you should find the person not guilty. Would you follow the Judge's instructions if he would tell you that?

Would you repeat that again?

If the Judge were to instruct you that a person -- either - became intoxicated either through alcohol or by drugs to such an extent that he could not form the intent to commit a particular crime, and you found in this particular case that Randy Penn was so intoxicated you didn't believe he could form the intent to commit the crime, would you then find him not guilty as the Judge instructed you you should?

No, because I believe he would be responsible for being intoxicated.

Even if the Judge instructed you that if you found the person was so intoxicated that he could not form the intent and that you should, according to the law, find him not guilty, you don't think you could follow the law?

It would depend on the circumstances. It would be hard to make a blanket statement.

(R 304-307)

* * * *

[DEFENSE]: Miss Allen, do you believe that people can get so intoxicated they could not form the intent to commit certain crimes?

I believe a person could be so intoxicated they didn't know what they were doing, if that's what you are asking.

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

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

If the Judge instructed you that it was, would you follow those instructions?

I really can't say.

[COURT]: I think the question that the attorney is trying to ask you, Miss Allen, is will you follow the Court's instructions in arriving at your verdict in the case even if those instructions may be contrary to what your personal beliefs may be? Would you still follow the law as the Court told you?

Well, if I were chosen, I would have to follow the law.

[COURT]: Okay, that's the question he was asking.

(DEFENSE]: You have told me here that you believe that if a person who is intoxicated, either by drugs or alcohol, does so at least partially by his own choice and should be held accountable, is that right?

Yes.

Could you if the Judge instructed you that that was contrary to the law, could you put that belief aside and follow the Judge's instruction?

I don't know.

(R 307-309)

* * * *

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

I think so.

Okay. Do you understand the statement of law that where a person takes alcohol or drugs and that merely releases his inhibitions or clouds his reason and judgement -- in other words, he might do some things that he wouldn't do when he wasn't on alcohol or drugs, but that's not a defense to the crime.

Right, I understand.

Do you agree with that proposition of law?

Yes, I agree that's not a defense.

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

Yes.

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

Yes.

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

Yes.

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

Yes.

(R 312-313)

* * * *

[DEFENSE]: Miss Allen, are you saying now that Mr. Elmore has gone through all of that on voluntary intoxication, that you have no problem about following the Judge's instructions?

Yes.

Even if it differs from your personal belief?

Well, I thought you were saying that intoxication would be a legal defense and, as he has described it, it would be a defense against first degree murder but not against second or third degree. Do I understand that correctly?

That is correct, and it also could be a defense against specific intent crime of robbery, which is a basis for Mr. Elmore's charge of felony murder. So you could be in a position because of the intoxication issue to find Mr. Penn not guilty of first degree murder, either felony or premeditated first degree murder because of the intoxication issue. Do you understand that?

You are saying that the intoxication -- that that would be a legal defense against the robbery also?

Yes.

I really can't say. He was responsible for being intoxicated. That's how I feel.

(R 313-314)

Juror Allen candidly and consistently expressed her inability to fairly apply a voluntary intoxication defense in this case. Throughout questioning, she maintained her view that a person's intoxication should not be a defense. When asked if she could set aside her views and follow the court's instructions on the voluntary intoxication defense, Allen's first responses were:

> No, because I believe he would be responsible for being intoxicated.
> (R 306)
>
> It would depend on the circumstances. It would he hard to make a blanket statement.
> (R 307)
>
> If that was a recognized defense. I don't know. I don't know the points of law.
> (R 308)
>
> I really can't say.
> (R 308)
>
> Well, if I were chosen, I would have to follow the law.
> (R 308)
>
> I don't know.
> (R 309)

After the prosecutor told Allen that voluntary intoxication would not be a defense to second degree murder or manslaughter, Allen said she could follow the law. (R 312-313) However, when defense counsel explained that intoxication was a defense to robbery and felony murder, Allen changed her position. Her

final response on her ability to follow the law was the following statement:

> I really can't say. He was responsible for being intoxicated. That's how I feel.

(R 314)

The trial judge should have granted Penn's challenges for cause to Jurors Parish and Allen. Penn has been deprived of his rights under the Sixth, Eighth and Fourteenth Amendments and Article I, Section 16 of the Florida Constitution. He urges this Court to reverse his case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN DENYING PENN'S MOTION FOR JUDGEMENT ACQUITTAL TO THE FIRST DEGREE MURDER CHARGE SINCE THE STATE FAILED TO PROVE THE HOMICIDE WAS PREMEDITATED.

The State failed to prove that the homicide of Ruth Penn was a first degree murder. There was no proof of premeditation, which was the only theory of first degree murder supporting the judgment. The jury acquitted Randy Penn of the robbery which could have formed the basis of a felony murder convictions. At best, the State proved nothing more than a second degree murder, and the trial court should have granted Penn's motion for judgment of acquittal on the first degree murder charge.

This Court has defined the premeditation element for first degree murder in Forehand v. State, 126 Fla. 464, 171 So. 241 (1936):

> Premeditation has been defined by this Court to mean intent before the act, but not necessarily existing any extended time theretofore. Ernest v. State, 20 Fla. 383. Lowe v. State, 90 Fla. 255, 105 South. Rep. 829, holding that the intent to kill may enter the mind of the killer a moment before the act. [citations omitted]
>
> The substance of the holding in these cases upon the subject of premeditation as an element in the offense of murder is that if the purpose or intention to kill is definitely framed in the mind of the killer and he proceeds to act in the execution of such thought or design, the element of premeditation exists. It is not a question of how long the definite design or purpose to kill has been entertained by the killer. It is only sufficient that the evidence adduced shows to the exclusion of a reasonable doubt that the purpose to kill was definitely formed and definitely acted upon

> an appreciable length of time prior to the commission of the act which resulted in the taking of human life.

126 Fla., at 468-469.

Voluntary intoxication due to use of drugs or alcohol is a defense to the premeditation element of first degree murder since it impairs the mental capacity to form a design or purpose to kill. See, e.g., Gardner v. State, 480 So.2d 91, 92 (Fla. 1985); Cirack v. State, 201 So.2d 706 (Fla. 1967); State ex rel Goepel v. Kelly, 68 So.2d 351 (Fla. 1953). Randy Penn was intoxicated on crack cocaine and unable to form a premeditated design to kill. He had consumed a considerable amount of crack during the night of the homicide. His supplier, "Money Bunny", would take the property from Randy and give him a little piece of crack. Randy said he gave "Money Bunny" a lot of property during the night. "Money Bunny" had the crack and Randy had an uncontrollable for it. Randy consumed six or seven pieces of crack, a quarter to a half of a rock at a time.

Randy candidly confessed to every act he remembered committing that night. However, his state of mind did not show a premeditated design to kill. While he remembered the homicide, he did not remember all the details and had no idea why he killed his mother. He remembered a brief struggle right at first, then nothing, but he does not remember how many times he hit her. He remembered a big blur and a frenzy. And, he did not know why he hit her. Furthermore, he did not realize that he had killed her. When asked if he knew what he was going to do when he got the hammer, Randy said, "I guess so." (R 1087)

Later he explained that he had been trying to figure out an answer to the question himself and could not. He said, "I just don't think I was thinking. Just acting." (R 1202) He did not have an argument with his mother, and in fact, he was glad his mother was seeking custody of his son. Randy did not recall a lot things that transpired. He said his mind was "just a big mess." (R 1067)

The trial court erred in denying Penn's motion for judgment of acquittal on the charge of first degree murder. He asks this Court to reverse his judgment and sentence on that offense.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE PORTIONS OF AN INCULPATORY STATEMENT PENN MADE TO A NEWSPAPER REPORTER AND THEN PROHIBITING PENN ON CROSS-EXAMINATION FROM ELICITING THE ADDITIONAL PORTIONS OF THE SAME STATEMENT ON THE GROUND THAT THOSE PORTIONS WERE SELF-SERVING.

While in jail awaiting trial, Randy wrote a letter to Robert Knutz, a local newspaper reporter who was covering the case. (R 1523-1524) The letter detailed Randy's history of drug usage and how he and his wife became addicted to crack cocaine which destroyed their lives. (R 1526-1529) (State's Exhibit No. 94) Randy admitted in the letter that he killed his mother and stole her property for crack. (R 1528) He further said he hoped his cousin won custody of his son, David, so that he could have a decent home. (R 1528) Randy expressed remorse for killing his mother and wrote that he wanted to receive the death penalty as punishment for his crime. (R 1528) He wanted the letter published in the newspaper for any beneficial effect it might have on potential drug abusers. (R 1526)

Knutz decided to write an article based on the letter and telephoned Randy in the jail to verify that he wrote the letter. (R 1525) During this conversation, Randy said,

> I know what I did by writing the letter saying what I did. I know what that's going to mean. The only way for me to pay for what I did is for me to die. I can't believe I did that but I did and I have to pay. I've thought about all of this.

(R 1530) On cross-examination, defense counsel wanted to elicit two additional statements Randy made to the effect that

he did not think about what he was doing and did not realize what he had done until sometime later. (R 1532-1533) Counsel proffered Knutz's testimony as follows:

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

(R 1533) The prosecutor objected to the proffered testimony on the grounds that it was self-serving hearsay. (R 1530-1535) Defense counsel countered that the statements were directly related and a part of the interview Knutz testified about on direct. (R 1532-1534) Over defense objection, the trial judge prohibited the proposed cross-examination. (R 1534-1535)

The trial court erred in restricting defense counsel's cross-examination of Knutz. When a prosecution witness testifies about an inculpatory statement a defendant makes, the defense is entitled to elicit on cross any portions of the statement omitted during the prosecutor's direct examination, even if that portion is favorable to the defense. Steinhorst v. State, 412 So.2d 332, 337-338 (Fla. 1982); Louette v. State, 12 So.2d 168 (Fla. 1943); Heathcoat v. State, 430 So.2d 945, 947 (Fla. 2d DCA), approved, 442 So.2d 955 (Fla. 1983). This is not the same as a defense attempt to introduce a wholly exculpatory statement, see, Fagan v. State, 425 So.2d 214 (Fla. 4th DCA 1983), nor is it an attempt to use cross-examination as a vehicle for presenting defense evidence. See, Steinhorst, 412 So.2d at 337. The rule merely allows the defense to fully present to the jury on cross the subject matter of the

witness's testimony on direct. Penn sought to do no more during his cross-examination of Knutz.

Randy Penn was denied his Sixth Amendment right to confront and cross-examine the witness presented against him at trial. See,Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Coxwell v. State, 361 So.2d 148 (Fla. 1978); Coco v. State, 62 So.2d 892 (Fla. 1953). He urges this Court to reverse his convictions and to remand the case for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The trial judge improperly found the premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes. Initially, there was no evidence of even the simple premeditation required for a first degree murder conviction. See, Issue III, supra. Since this aggravating factor requires more than that level of premeditation,see, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981), the circumstance cannot stand in this case. The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed -- one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987). Randy Penn had no such plan to kill his mother, and plan to kill cannot be inferred from a lack of evidence. LLoyd v. State, 524 So.2d 396, 403 (Fla. 1988); see, also, Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Drake v. State, 441 So.2d 1079 (Fla. 1983).

The killing was, at best, an impulsive act committed while Randy was under the influence of crack cocaine. Impulsive killings, even without the influence of drugs, do not qualify for the premeditation aggravating circumstance. See, e.g., Rogers v. State, 511 So.2d 526, (defendant shot robbery victim three times because he was "playing hero" and trying to flee); Hamblen v. State, 527 So.2d 800 (Fla. 1988) (defendant shot robbery victim in the back of the head after becoming angry with her for activating a silent alarm); Wilson v. State, 436 So.2d 913 (Fla. 1983) (defendant beat and shot his father during an altercation). The existence of multiple wounds does not render the homicide cold, calculated and premeditated. This Court has rejected the premeditation circumstance even though the victim suffered a beating death involving several wounds. See, King v. State, 436 So.2d 50 (Fla. 1983) (victim was hit in the head with a blunt object and then shot); Wilson, 436 So.2d at 912 (State conceded on appeal the beating and shooting death was not premeditated). Without more, multiple wounds do not prove the heightened premeditation required. In fact, with the added element of mental impairment, multiple wounds evidence the frenzied attacks characteristic of the mentally impaired perpetrator, not the deliberative state of mind necessary to establish the premeditation factor. See, e.g., Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979).

Including the premeditation aggravating factor in the sentencing process tainted the court's imposition of death.

James Penn has been sentenced in violation of the Eighth and Fourteenth Amendments, and he urges this Court to vacate his death sentence.

ISSUE V

THE TRIAL COURT ERRED IN SENTENCING PENN TO DEATH SINCE SUCH A SENTENCE IS DISPROPORTIONAL TO THE OFFENSE COMMITTED.

Randy Penn's death sentence is disproportionate and must be vacated. The killing of his mother was an impulsive act committed while Randy was under the influence of crack cocaine. This is not the kind of crime justifying his execution.

Initially, the homicide was not a first degree murder and should never have exposed Randy to a death sentence. At best, the homicide was a second degree murder. The insufficiency of the evidence for first degree murder is addressed in Issue II, supra. Second, the cold, calculated and premeditated aggravating circumstance was improperly found for the reasons presented in Issue IV, and the remaining aggravating circumstance -- that the homicide was especially heinous, atrocious or cruel -- carries little weight. Third, the mitigating circumstances present in this case, including the two the trial judge specifically found, outweighs this single aggravating circumstance. See, Smalley v. State, 546 So.2d 720 (Fla. 1989). The court found that Randy had no significant history of prior criminal activity and suffered from an extreme mental or emotional disturbance at the time of the homicide due to his use of crack cocaine. (R 2046) His addiction to the drug is also a nonstatutory mitigating circumstance. Songer v. State, 544 So.2d 1010 (Fla. 1989). Additionally mitigating factors are Randy's sincere remorse for his offense and his full cooperation with law enforcement after his arrest. Smalley; Songer.

The heinous, atrocious or cruel factor is technically supported because of the multiple blows and the defensive wounds to the hand. See, e.g., Lamb v. State, 532 So.2d 1051 (Fla. 1988); Heiney v. State, 447 So.2d 210 (Fla. 1984). However, that aggravating circumstance cannot support the death sentence in this case. Although the defensive wounds indicate that the victim was conscious for at least a portion of the attack, there is no evidence of how long victim remained conscious or how much, if any, pain she suffered. Moreover, when weighed against the mental mitigation, which the trial court found, the multiple wounds are consistent with the frenzied attack of a mentally impaired perpetrator who is unable to control his conduct. This court has recognized that such a mental condition mitigates the aggravating quality of a homicide found to be heinous, atrocious or cruel. Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977). Crack cocaine rendered Randy Penn mentally unable to control his behavior. The frenzied attack on Ruth Penn was the direct product of the uncontrollable, cocaine-induced aggressiveness Randy suffered. Consequently, the heinousness of the attack carries little weight in the sentencing equation.

This Court has frequently recognized that spontaneous, impulsive killings during stressful circumstances are not the aggravated murders for which the ultimate penalty is required. Domestic killings are a common situation where such impulsive killings occur. See, e.g., Smalley v. State, 546 So.2d 720

(defendant, baby-sitting for his girl friend's sick 28-monthold daughter, beat the child, dunked her head in water and banged her head on the floor); Wilson v. State, 493 So.2d 1019, (defendant beat his stepmother and father with a hammer and stabbed his five-year-old cousin with scissors); Ross v. State, 474 So.2d 1170 (Fla. 1985) (defendant, while drinking, beat his wife with a hammer during an argument); Blair v. State, 406 So.2d 1103 (Fla. 1981) (defendant shot his wife during an argument). This factor has also been addressed in the felony murder context. See, Proffitt v. State, 510 So.2d 896 (Fla. 1987)(defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.496 (Fla. 1985) (defendant shot a convenience store clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984) (defendant bludgeoned store owner during a robbery); Richardson v. State, 437 So.2d 1091 (Fla. 1983)(defendant beat victim to death during a residential burglary in order to avoid arrest). The impairment of the defendant's capacity by way of drugs or alcohol has also been an important variable in these cases. See, Holsworth v. State, 522 So.2d 349, 353 (Fla. 1988) (defendant may have been under the influence of PCP which could prompt aggressive behavior); Ross, 474 So.2d 1170 (defendant had been drinking at the time he bludgeoned his wife); Caruthers, 465 So.2d 496 (defendant "had drunk a considerable amount of beer"). The homicide here falls into that category of cases. Penn impulsively killed his mother, for no apparent reason, while he was under the influence of crack cocaine.

Just as the defendants in the above referenced cases did not deserve to die for their crimes, neither does Randy Penn.

Randy Penn's death sentence is disproportional to his crime. The mitigating circumstances present outweigh the single aggravating circumstance legally supported. This Court must reverse his sentence with directions to impose sentence of life imprisonment.

ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO USE REFERENCES TO ALLEGED CRIMINAL INVESTIGATIONS INVOLVING PENN WHILE IN THE MILITARY, WHICH DID NOT RESULTED IN CONVICTION, TO IMPEACH AN EXPERT WITNESS WHO TESTIFIED DURING PENALTY PHASE.

Under the guise of impeachment, the State effectively introduced nonstatutory aggravating circumstances into the sentencing proceeding. When cross-examining Dr. John Bingham, the prosecutor asked if he had been provided Randy's military records to which Bingham answered negatively. (R 1760) The prosecutor then asked,

> Q. You also stated that he had no history of aggressive behavior. Did you have any knowledge of the fact that he was investigated while he was in the military in Germany for an aggressive act towards a relative of his wife, that is, an attack on her brother?

(R 1760) Bingham again gave a negative answer. (R 1760) However, the jury was left with the inference that Penn had committed an assault while in the Army. A mere allegation of an assault is inadmissible evidence of a nonstatutory aggravating circumstance. No amount of judicial instruction could unring the sounding of that bell in the jury's ears. Now, this Court must reverse for a new penalty proceeding with a new jury.

Robinson v. State, 487 So.2d 1040 (Fla. 1986), is on point. There, the State used two alleged crimes for which Robinson had not yet been charged or convicted to impeach the credibility of Robinson's character witness. Defense counsel

objected on the ground that Robinson had not been convicted of the these offenses. This Court rejected the contention that such impeachment was proper in the penalty phase of a capital trial because the procedure allowed the State to introduce nonstatutory aggravating circumstances indirectly. Since there had been no conviction, the offenses were irrelevant to prove the statutory aggravating circumstance of a previous conviction for a violent felony. Sec. 921.141(5)(b) Fla. Stat. Noting the prejudicial impact, this Court said,

> Arguing that giving such information to the jury by attacking a witness's credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

487 So.2d at 1042. The prosecutor likewise went too far in this case. He used a similar impeachment method as the one used in Robinson which created a similar prejudicial impact.

The jury's receipt of this prejudicial inference of criminal conduct tainted the sentencing proceeding. Penn's death sentence based upon such a tainted jury's recommendation of death violates the Eighth and Fourteenth Amendments and cannot stand. Penn urges this Court to reverse his sentence for a new sentencing proceeding with a new jury.

CONCLUSION

For the reasons presented in Issues I and III, James Penn asks that his judgments and sentences be reversed for a new trial. Upon the arguments made in Issue II, Penn asks that his conviction for first degree murder be reduced to one for second degree murder. Alternatively, in Issues IV through VI, he asks this Court to reduce his death sentence to one for life imprisonment.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER

W. C. McLAIN #201170
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to James Randall Penn, #115770, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 20th day of November, 1989.

W. C. McLAIN