IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,622

JAMES CAMPBELL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

CORRECTED
BRIEF OF APPELLEE

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INTRODUCTION

The Appellant, JAMES **CAMPBELL,** was the Defendant in the trial court. The Appellee, the State of Florida, was the prosecution below. The parties will be referred to as they stood below. The symbol "R" will designate the Record and the symbol "SR" will designate the Supplemental Record on Appeal. The witnesses who testified at the motion to suppress also testified at trial. Since the testimony was substantially similar, it will only be presented once. The record cites between 500 and 700 will refer to the motion to suppress, while the record numbers between 1400 and 2100 will refer to trial testimony. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by indictment with the first degree murder of Billy Bosler; the attempted first degree murder of Sue Zann Bosler; robbery with a deadly weapon; armed burglary of a dwelling; battery on a police officer; and possession of a weapon during the commission of a criminal offense. (R. 1-4a). The Defendant filed a written plea of not guilty and requested a jury trial. (R. 5).

Prior to trial the State, pursuant to discovery, moved to have Defendant provide both a blood sample (R. 76-77) and fingerprints. (R. 79-80). After a hearing thereon, the motions were granted. (R. 81, 82, 485-87).

Prior to trial the Defendant sought to suppress identification (R. **85-86)** and evidence **(R. 95-96)** on the ground that they were obtained as a result of an illegal arrest. The arrest was illegal, it was alleged, since it was based on outstanding juvenile pick-up orders, when the Defendant was no longer a juvenile. (R. **570-76).** He moved to suppress his statement on the ground that it was not freely and voluntarily given. **(R. 97-98).** Pursuant thereto, a hearing was held on all motions to suppress. (R. **558).**

Henry Ray, Jr., a police sergeant for Metro Dade Police Department, was working in the Northwest District Uniform Division on December 22, **1986.** On that day, he responded to a parsonage located at **18200** N. W. 22nd Avenue reference an emergency call concerning a robbery. (R. **577-78, 1523-25).** At the scene, he discovered the body of Reverend Bosler and the injured victim Sue Bosler. (R. **578, 1527-28).** At the scene, Ray learned that the suspect sustained cuts on his hands during the commission of the crime. The cuts came from when his hand slipped, because of blood, onto the knife blade while he was stabbing the victims. (R. **579-80).** This information was relayed to his squad, including Officer Toledo. (R. **580, 1534).**

December **29, 1986,** at approximately **2:00** p.m. Ray and Toledo responded to Joe Robbie Stadium regarding a minor disturbance. While there, they received a call regarding an incident at Hearns Market. (R. **581, 1535).** Both Ray and Toledo,

who were in uniform and driving separate marked police cars, responded to Hearns Market. (R. **583, 1535).** As Ray approached the scene, he observed the Defendant next to an unoccupied police car. It appeared to Ray that the Defendant was attempting to break into the car, (R. **584)** since he was on the driver's side with his hands on the window, looking into the vehicle. (R. **585).** Shortly after Ray exited his vehicle, the Defendant spotted him and started to walk away from the police car. Ray intercepted Defendant to ascertain what he was doing in the area. Once stopped, the Defendant acted nervously and kept looking past Ray for a direct path of flight. (R. **586, 1538-39).** In response to questioning, Defendant told Ray that he was James Campbell and his date of birth was April **7, 1966.** (R. **587, 1540).** He was in the area because he lost a shoe when he ran when the other police arrived, so he came back to look for it. The Defendant was trying to walk away from Ray and at that time Ray brought the Defendant over to Officer Toledo, for him to run a records check on Defendant. (R. **588, 1539-1547).** Within five minutes, Ray received a call from Toledo, requesting that he return. (R. **589).** When Ray returned to Toledo, the Defendant was in Toledo's vehicle since the records check revealed outstanding juvenile pick-up orders. Toledo then showed Ray some cuts on Defendant's palms and fingers of both hands. Ray immediately notified Detective Geller, the lead investigator, that he had a probable suspect in the Bosler murder. Toledo then transported the Defendant to the identification section, at which time, Defendant's identity and the outstanding warrants were verified. (R. **590-92, 1542).**

Daniel F. Toledo, a police officer with the Metro Dade Police Department, was assigned to Sergeant Ray's squad whereat he was advised, regarding the Bosler murder, to be on the look out for a subject who either suffered cuts on his hands or had bandaged hands as a result of knife slippage. (R. **596-98, 1812-16).** Toledo confirmed Ray's testimony concerning the incident at Hearns Market and the initial stop of Defendant. (R. **598-601).** Toledo eventually approached Ray who advised him who the Defendant was and asked him to run a records check. (R. **1819).** The Defendant was looking around, acting nervous, while seeking an escape route. (R. **603).** While the records check was being processed, he advised Defendant that if the check was clean Defendant was free to leave. At no time did Defendant present verification of his identity or date of birth. (R. **605).** The records check revealed two outstanding juvenile pick-up orders. (R. **606-07, 1820-21).** The Defendant was then advised of the outstanding pick-up orders and that he would have to be taken downtown in order to verify the validity of the warrants. Defendant advised that these pick-up orders had already been taken care of and in response Toledo told him that if they had been cleared, Defendant would be brought back to Hearns Market. (R. **608).** Pursuant to standard policy, Defendant was handcuffed and placed in the police car. While handcuffing the Defendant, Toledo noticed that Defendant's hands had recently sustained severe cuts. Pursuant to questioning, Defendant stated that some guy cut him with a bottle and that Jackson Memorial Hospital

refused to treat him. (R. **608, 1822-23).** Toledo summoned Ray and advised him of the cuts and that Defendant was a possible suspect in the Bosler Murder. After Ray viewed Defendant's hands, Toledo transported the Defendant to the identification section to verify the warrants and his identification. (R. **609, 1824).** At the station, it was ascertained that Defendant's prints were already on file and they also secured a new set for Defendant's fingerprints. (R. **610).** At all times Defendant appeared rational and coherent (R. **610).** It was determined that the pick-up orders were still outstanding and Defendant was then turned over to Detective Geller. (R. **1824-25).**

Inez Fernandez, a supervisor in the Clerk's office for Juvenile Court, testified as custodian of records. (R. **621-22).** She testified that two pick-up orders were issued by Judge Ferguson on May **25, 1983;** that on December **29, 1986,** the warrants were still in effect; and that the warrants were quashed on January **14, 1987.** (R. **623).**

Sue Bosler, is the deceased victim's daughter, and she lived with her father at the parsonage. (R. **628, 2076-77).** On December **22, 1986,** at about **2:00** p.m., Ms. Bosler and her father, returned home after a morning of shopping. They had in excess of **$200.00** in their possession. At that time, everything was normal at the house and since it was early afternoon, the house was well lit. (R. **631, 2080).** Ms. Bosler proceeded to shower and while she was dressing, she heard the doorbell. After her father

opened the door she heard her father make terrible groaning noises. She immediately came out of the bathroom and observed her father being stabbed. At this time the Defendant's back was toward Ms. Bosler. (R. 629-31, 2081-84). Ms. Bosler went to help her father, when the Defendant turned and looked directly at Ms. Bosler. She looked right in his face and saw it clearly. Defendant's face was not masked or disguised. Defendant then came after Ms. Bosler with a knife. At all times she was looking directly at Defendant's face. (R. 632, 2085-88). When Defendant reached her, she turned, and Defendant stabbed her in the back. (R. 2089) Ms. Bosler fell to the ground and Defendant returned to her father and started stabbing him in the back. During this time, Ms. Bosler was looking at Defendant's side. (R. 633, 2090). She got back up and went to help. Once again the Defendant turned, faced her and went after her. All during this time, Ms. Bosler had an excellent view of Defendant's face. (R. 634). As she backed up, he pursued her for about 30 seconds until he caught her. The Defendant put his left hand on her right shoulder and held the knife in her face. The Defendant was about two feet away from her. (R. 635). While face to face, Defendant went to stab her and Ms. Bosler turned her head. She was stabbed a couple of more times and fell to the ground. (R. 636, 2091-95). After she fell, the Defendant started to rummage through the house. When the Defendant was leaving, Ms. Bosler once again observed Defendant's face. After the Defendant left, Ms. Bosler phoned for help. (R. 637, 2096-2100).

On route to the hospital, Ms. Bosler gave Detective Geller a description of Defendant. She described him as a black male, 5' 2" tall, stocky with short hair. (R. 645, 650 . She also gave this description to Detective Ricky Smith. (R. 2106).

After three weeks in the hospital, Geller came by with a photographic lineup. Pursuant to police instructions, Ms. Bosler avoided all media coverage of the incident. (R. 630, 2106-09). Detective Geller, without any suggestiveness, showed her the lineup and asked her if she could select her assailant. (R. 639-640). Within three minutes, Ms. Bosler began smiling since she was able to identify her assailant. (R. 640). She identified the Defendant as the assailant since Defendant's face stayed in her mind. (R. 641, 2109). Ms. Bosler gave an in court identification based on memory and not the photograph. (R. 642, 2110).

On December 22, 1986, Jeffrey Geller, was a homicide detective with the Metro Dade Police Department and was the lead investigator in this case. (R. 651-652, 1834). After the incident, Geller responded to the scene and based on the physical evidence determined that the perpetrator's hands had been cut. (R. 653). Geller relayed this information to the Northwest District Uniform Division and told them to be on the lookout for someone with injuries on their hands and to forward any information, whether it be an interview card, a field information card, or the individual himself to the homicide officer for

follow up. (R. **659, 1840-41).** On any information received, Geller would have conducted a background investigation to determine if that person had previously been arrested so that fingerprint cards and photographs could have been obtained. Defendant's investigation revealed that he had been arrested previously, both in Dade County and in other Florida counties. Geller would have obtained the print cards and photograph and would have attempted to locate the Defendant. He would have then used the photograph in a lineup for Ms. Bosler's viewing. These steps would have occurred if, a field card was written on Defendant and he was not arrested on the pick-up orders. (R. **659-660).**

Detective Geller's initial contact with Defendant occurred at the identification section at about 3:30 p.m. Geller identified himself and asked if Defendant would come to homicide to talk after the identification was complete. Defendant agreed and that concluded the initial contact. (R. **662, 1847-48).**

Shortly thereafter, the Defendant was brought down to the homicide office and placed, without handcuffs, in an interview room. Geller entered with a Miranda form and advised Defendant of his rights. Prior thereto he secured educational background and ascertained that Defendant could read and write. (R. **664, 1849).** The Defendant was then advised of his rights, stated he understood them, and agreed to speak with Geller. (R. **665-667, 1850-55).** The Defendant did not appear to be under the influence

of any drugs, alcohol or medication. The Defendant's hand was hurting but it did not effect his ability to understand. He did not ask for medical treatment. (R. **668).** No threats or promises were made to secure the waiver of rights. (R. **669).**

After the waiver, Geller asked how Defendant injured his hand. The Defendant stated that he was in a bar fight and someone pulled a knife on him and cut him. (R. **670).** He did not immediately have the hand attended to but a day or *so* later he had gone to Jackson Memorial Hospital for stitches. Treatment was denied since the wound had already started to heal and stitches would not have helped. Defendant consented to having pictures of his hand taken. **(R. 671, 1856-57).** During this interview, Defendant did not have trouble understanding the questions. Geller then confronted Defendant and told him that he did not believe his version on how his hand was injured. (R. **672).** In an authoritative tone of voice, Geller then accused Defendant of the murder and attempted murder. Defendant denied any knowledge of the crime. (R. **673-74).** Geller kept questioning Defendant about the crime and Defendant kept denying any involvement. Geller, after approximately five minutes of accusatory questioning, started to leave the room so that he could get other officers to investigate Defendant's story. After passing Defendant, the Defendant struck Geller in the back. After Defendant punched Geller, both he and Lieutenant Harper had to restrain the Defendant, and Defendant was eventually handcuffed to a ring on the floor. At no time did either officer

strike Defendant in order to subdue him. (R. 675-76). Geller did not have any further contact with Defendant. (R. 677, 1861-67).

After Geller left the interview room, he spoke with Technician Elsnor Brown. Brown advised that Defendant's standard prints matched latents found at the scene. (R. 1867-68).

Three weeks later, Geller conducted a photographic lineup for Ms. Bosler. Geller secured Defendant's photograph from police records and compiled a lineup. (R. 678). At no time did he tell Ms. Bosler that her assailant was in the lineup. (R. 679). After reviewing the lineup, Ms. Bosler picked out the Defendant. (R. 681, 1869-75).

Roland J. Vas, a homicide detective with Metro Dade County Police, was involved in the instant investigation. (R. 1921). His first contact with Defendant was on December 29, 1986 at about 4:00 p.m. when Geller asked him to interview Defendant. (R. 689-90, 1928). Prior to speaking with Defendant, Geller informed Vas that Defendant waived his Miranda rights. Vas introduced himself and asked Defendant to explain what he did on December 22, 1986. The Defendant was coherent, he asked for and received water. (R. 692, 1929). Defendant explained that on the day in question he spent the entire day at Hearns and provided names of people who would vouch for him. This information was given to Geller. The Defendant then reiterated that his hands were cut in a bar fight. (R. 693-94, 1930-33). At no time

during this conversation did Defendant ever request an attorney nor did he ever express a desire to stop talking. At all times, Defendant understood the questions and did not complain of physical pain. (R. **695).** Defendant was advised that his fingerprints were going to be compared with latent prints found on the scene. Defendant became anxious and denied that his prints would be there since he was never there. Defendant repeatedly inquired as to whether his prints had matched. The interview which lasted three hours, then concluded. (R. **696, 1942-43).** During this three hour interview, Defendant was permitted to go to the restroom, and was given food and drink. (R. **697).**

At approximately **9:00** p.m., Vas reentered the interview room. The Defendant, who was sleeping since **7:00** p.m. was awakened and his initial concern was whether his prints matched those at the scene. (R. **702).** Vas truthfully told Defendant that his prints were identified with those on the scene. (T. **703).** Defendant still denied knowledge of the crime. However after being informed that his alibis were conflicting, the Defendant began confessing. **(R. 703, 1954-50, 1970). No** threats or promises were made to secure the confession and he never requested an attorney. (R. **705).** Defendant then confessed in detail. He stated that he went to the church just before lunch to obtain money. He knocked on the door and when the minister opened it, he demanded money and a fight ensued. Defendant then produced a butcher knife that he brought from his house and

stabbed the minister. He then was confronted by Ms. Bosler and he stabbed her. (R. **706).** After the oral statement, a formal statement was given. (R. **707).**

Ricky Smith, a homicide detective with the Metro Dade Police Department was involved in the instant investigation. He spoke with Ms. Bosler on the day of the incident. She described her assailant as a black male, between **5'6"-5'10"** tall, medium build, dark clothing, between **20-30** years old, with no facial fair. **(R. 2002).**

On December **29, 1986** at about **7:30** p.m. Smith was told, by Geller, that Defendant's prints matched the latents. (R. **2009).** As Smith walked by the homicide office the Defendant asked to speak with him. The Defendant was hyper because he felt he was being unjustly accused of murder. (R. **728-30, 2010-11).** Smith then spoke with Geller and was advised of the previous altercation. Smith, pursuant to Geller's request and after being advised that Defendant waived his rights, went to interview Defendant. (R. **730).** When Smith reentered the interview room he reread Defendant his rights and once again secured a waiver. (R. **731-33, 2012-15).** Thereafter, they spoke about sports before speaking about the investigation. (R. **733).** At all times, Defendant was rational and coherent. (R. **733).** Defendant reiterated that he did not have any knowledge of the murder. Smith then confronted Defendant with the fact that he was the main suspect of the murder because his prints matched those on

the scene. (R. **2016).** The Defendant then broke down and confessed. (R. **734).** Smith then told Geller, who instructed Vas to go back in with Smith. Upon their return, the Defendant once again confessed. (R. **748).** After the formal statement was transcribed, Defendant read it, initialed each page (R. **752)** and signed it. (R. **753, 2018-50).**

The Defendant presented testimony of Dr. Bruce Frumkin, a clinical psychologist. (S.R. **14).** Based on his interview and tests of Defendant, it was his opinion that, although he understood his rights, he could not intelligently waive them. (SR. **19).**

The trial court then denied in total, the motions to suppress. (S.R. **53-55).**

Thereafter, on February **2, 1988,** trial commenced. After an uneventful voir dire, a jury was selected and sworn to try the case. (R. **764-1405).** The State, on February **9, 1988,** began its case. (R. **1414).** The following testimony, in addition to the testimony from the motion to suppress, was presented to the jury.

Carl Bennett, a Metro Dade Police Department crime scene technician, was the lead technician in this investigation. (R. **1441-1446).** He arrived on the scene at approximately 3:30 p.m. He was joined by Technician Stoker and Bowman. Bennett wrote the reports and collected physical evidence, while Bowman did the latent processing of fingerprints. (R. **1447).**

Upon arrival Bennett walked around the exterior of the house. There was no sign of forced entry, but blood was on the front door and there was a bloody face cloth in the carport. (R. **1454-55, 1461).** The inside of the residence was strewn with blood covered clothing, towels and tissue paper. (R. **1462-64).** A knife was found next to the victim. (R. **1404).** Blood was also located on the outside door knob of the door to the utility room. Both the main door and utility door were open. (R. **1465).** The victims pockets were turned inside out **(R. 1484)** and his wallet was in disarray. (R. **1495).** Bennett collected blood samples on physical evidence, including a knife, tissues, paper and clothing. (R. **1497, 1507).** All samples were placed in plastic bags and sent to serology for analysis. (R. **1516).** Shoe impressions on the victim's bedroom floor were taken and were sent to the lab for analysis. (R. **1517).**

Susan Bowman, a crime scene technician for the Metro Dade Police Department, was responsible for processing the scene for latent prints. She lifted twenty-three prints from the scene and sent them to the lab for identification. (R. **1557-66).** She returned to the scene a week later and lifted three more prints and sent them over for identification. (R. **1575-79).**

On December **23, 1986,** Agnes Duncan, a crime scene technician with the Metro Dade Police Department, was requested by Detective Geller to go to the scene. Once there, she secured bloody paper towels from behind the residence and sent them to serology. (R. **1583-89).**

Arthur Copeland, an associate medical examiner for Dade County, responded to the scene on the day in question. (R. **1594, 1599).** Copeland performed the autopsy on the victim. Externally the victim had multiple stab wounds. (R. **1605).** Internally there were no contributing natural causes which led to the death. (R. **1636).** The cause of death was multiple stab wounds, with evidence of defensive wounds. (R. **1609, 1636).**

Charles Norman, a member of the victims congregation and a personal friend, when asked if he knew Bill Bosler, answered affirmatively. (R. **1639).** When identifying the victim from a picture, the transcript has him referring to the victim as Bill Bowman. No objection appears in the record concerning the wrong identification. (R. **1640).**

Thomas George Fudal Jr., a fingerprint technician with Metro Dade Police Department, pursuant to a court order, on August **21, 1987** took Defendant's standard prints. He turned the standard over to the latent print section. (R. **1656-62).**

Elsnor Brown, a fingerprint technician with Metro Dade Police Department compared Defendant's standards with latents found at the scene. (R. **1666, 1677).** The comparison of the latents with Defendant's standards, established that six latent prints were identified with Defendant's standard prints. (R. **1682, 1689, 1693, 1697).**

Toby Wolson is a criminologist with the Metro Dade Police Department, assigned to the serology section. He compared the blood samples with standards of the victim, Ms. Bosler and Defendant. Defendant's blood was obtained through court order. (R. **82, 1758).** After analyzing the samples with the standards, Wolson testified that blood samples on some of the paper towels, clothing and other evidence was consistent with Defendant's blood. (R. **1771-82).** After viewing the knife used in the stabbing, in conjunction with his expertise in components of blood and experience with crime scenes which had large amounts of blood on the scene, it was Wolson's opinion that Defend nt received cuts on his hands due to knife slippage. (R. **1794-96).** This was permitted over defense objection. (R. **1794).**

The State rested. (R. **2123).** Defendant moved for judgment of acquittal on the generic ground that the State failed to prove a prima facie case. The motion was denied. (R. **2126).**

The Defendant then presented his witnesses Robbie Clark, who works for Defendant's father, and knows Defendant. (R. **2128, 31).** He saw Defendant on December **24, 1986** and Defendant's hand was bleeding badly. Defendant said three guys jumped him and tried to rob him. Clark bandaged the Defendant's hand. (R. 2129).

Milton Brown is Defendant's stepfather. (R. **2162).** Defendant was working with him from **1:30** p.m. to **3:30** p.m on the

day in question. Then Defendant went to Hearns. Defendant returned home at 8:00 p.m. (R. 2163-68).

On rebuttal Detective Butchko testified that Brown previously told him he had not seen Defendant at all on the day the murder occurred. (R. 2193).

The State then rested and the Defendant renewed his generic motion for judgment of acquittal. This was denied. (R. 2210). Closing arguments were then given (R. 2214-2279) and the jury was instructed. (R. 2280-2318). The jury then retired to deliberate. The jury's verdict found the Defendant guilty of first degree murder, attempted first degree murder, robbery with a deadly weapon, burglary of a dwelling and possession of a weapon during the commission of a felony. He was acquitted of battery on a police officer. (R. 2324-25, 322-27, 353).

On February 17, 1988, the Court reconvened for the penalty phase. (R. 2345). Opening statements were not made by either party. The trial court instructed jury as to their role prior to the presentation of evidence. (R. 2361).

The State presented certified copies of a judgment of conviction against Defendant for battery on a law enforcement officer. (R. 2302). The State then rested.

The Defendant's mother, Ella Brown, testified on behalf of her son. (R. 2363). Defendant did not live with his mother from

birth to age six. He lived with her from age six to age twelve. During that time he was a good boy, who went to Church every Sunday. (R. **2364).** At age twelve, Defendant was taken from his mother by the family court. He visited her on weekends. One time, Mrs. Brown found drugs on Defendant and after that they did not get along. (R. **2366).** When he was on drugs, he behaved differently. She felt at age twelve he was a drug addict. Defendant's natural father was never involved in his life. (R. **2367).**

Inez Fernandez, a clerk of the Juvenile Court testified, as custodian of the records, that Defendant on November **20, 1978,** was adjudicated dependent. He was placed with his grandfather, under Health and Rehabilitative Services. (R. **2370-72).**

Willy Bell Lance is Defendant's aunt. She lived in Miami when Defendant was living with his mother. When Defendant was ten, he ran away from home and came to her house. At that time he was bleeding from his ear. She took him to the doctor, and the examination revealed bruises all over his body. As a result of this incident, Defendant was adjudicated dependent and was sent to his grandfather at Wachula. When he was in Miami, he was a good boy, although at times he appeared high. (R. **2374-2380).**

Inez Campbell, Defendant's aunt testified that he was a good boy when he lived in Wachula. (R. **2383).**

Zaida Cruzet, the psychiatrist for the Dade County Jail, testified that while in jail Defendant was periodically given Thorazine to calm his nerves. She never examined Defendant. (R. 2385-89).

Dr. Bruce Frumkin, a clinical psychologist examined Defendant four times. (R. 2391-93). His examination included a complete client interview for background information and psychological testing. Defendant was tested for intelligence with the Wexler adult intelligence test and his IQ is 68, which is behaviorally in the mentally retarded range. However, Defendant was functioning better than his score indicated. (R. 2397-97). On the wide range achievement test he performed at the third grade level. The House Tree Person Personality test results were consistent with a person with chronic emotional problems. The Rorshach Ink Blot test results were consistent with an individual who thought in a concrete fashion. The results of the Minnesota Multiphasic Personality Inventory were invalid due to low scores. (R. 2398-2401). Based on the clinical interview, Defendant has a chronic drug and alcohol abuse problem. (R. 2402).

It was Dr. Frumkin's opinion that Defendant has a long term chronic emotional problem. He was a physically abused child and was living in foster homes from a young age. As a result, Defendant had a poor self image, poor interpersonal relationships, and was very depressed at times. To alleviate the

depression, Defendant turned to drugs and alcohol. Defendant has few friends. During his periods of depression, Defendant gets very angry since he tries to keep his feelings to himself. Eventually, the anxiety builds up until he can no longer control it and he becomes very angry and excitable and lets it all out. At this time he is not able to use good judgment. He can not handle stress very well. (R. 2403).

On cross-examination, Dr. Frumkin admitted that Defendant knew that stabbing someone was wrong. (R. 2407). Defendant met the criteria to be responsible for his criminal acts. (R. 2409).

Dr. Jethro Toomer, a clinical psychologist also examined Defendant four times. (R. 2314-17). He interviewed and tested Defendant to determine his mental status functioning. Mental status functioning is the Defendant's action based on his past life experiences. (R. 2418). Defendant's performance on the Bendiger-Stalt design test indicated some psychological deficiencies, which included poor impulse control, poor self-image, poor ability is reality testing, a tendency to be withdrawn and a tendency to engage in behavior without reason. (R. 2422). The Revised Beta examination is an IQ test, which established the Defendant had a IQ between 65 and 70, which is labeled as deficient. (T. 2423-24). It further showed a deficiency in abstract reasoning. (R. 2425). The Carlson psychological survey, a test administered to individuals who have been previously incarcerated, was administered and was the

results were consistent with drug abuse and emotional disturbance. (R. 2427-28). It was Dr. Toomer's opinion that Defendant was suffering from a borderline personality disturbance. (R. 2429).

After both sides rested, closing arguments were given. (R. 2453-84). Thereafter the jury received its penalty phase instructions. (R. 2484-89). In due course, the jury returned its verdict and recommended death by a 9 to 3 vote. (R. 2491).

The trial court imposed sentence on Defendant on May 19, 1988. (R. 2499). Initially, the Defendant was given consecutive life sentences for attempted first degree murder, armed robbery, and burglary with an assault, and sentence was suspended for the weapons conviction. (R. 2502-03, 420-28A). The trial court then sentenced Defendant to death for first degree murder. In so doing, the court found the following aggravating circumstances; the Defendant was previously convicted of another capital felony or of felony involving the use or threat of violence to the person (R. 430, 2505); the capital felony was committed while the Defendant was engaged in the commission of a armed robbery and armed burglary (R. 431, 2508); the capital felony was committed for pecuniary gain (R. 431, 2509); the capital felony was especially heinous, atrocious or cruel (R. 432, 2509-11); and the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 433, 2511-13). After considering the

evidence offered in mitigation, the trial court found that it did not rise to the level of statutory mitigating circumstances. (R. 431-36, 2513-18). The trial court did find one non-statutory mitigating factor in that the surviving family, and church organizations, wanted Defendant's life spared. (R. 437, 2518–19).

This appeal then followed.

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTIONS TO SUPPRESS PHYSICAL EVIDENCE, IDENTIFICATION AND STATEMENTS WHERE THE EVIDENCE WAS NOT OBTAINED AS A RESULT OF AN UNLAWFUL ARREST AND WHERE THE CONFESSION WAS FREELY AND VOLUNTARILY GIVEN.

II

WHETHER THE TRIAL COURT ERRED BY REPEATING CERTAIN OF THE MURDER JURY INSTRUCTIONS WHERE THE JURY INSTRUCTIONS THAT WERE REPEATED WERE CORRECT STATEMENTS OF THE LAW AND WERE REPEATED IN RESPONSE TO JUROR CONFUSION.

III

WHETHER THE TRIAL COURT ERRED BY PERMITTING AN EXPERT IN SEROLOGY TO TESTIFY ABOUT KNIFE SLIPPAGE, WHERE THE EVIDENCE ESTABLISHED EXPERTISE IN THE AREA.

IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE FIRST DEGREE MURDER CHARGE WHERE THE MOTION DID NOT STATE SPECIFICALLY THE GROUNDS THEREFORE.

V

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY WHERE IT FOUND FIVE AGGRAVATING CIRCUMSTANCES AND ONE NON-STATUTORY MITIGATING CIRCUMSTANCE.

POINTS INVOLVED ON APPEAL
CONTINUED

VI

WHETHER THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 17 OF THE CONSTITUTION OF FLORIDA.

VII

WHETHER THE DEFENDANT RECEIVED A FAIR AND IMPARTIAL TRIAL.

SUMMARY OF THE ARGUMENT

Defendant contends the trial court should have granted his motions to suppress on the ground that he was illegally arrested and all evidence seized was tainted by the illegal arrest. This position is meritless since Defendant was arrested on valid outstanding juvenile pick-up orders. The fact that he was no longer a juvenile does not invalidate the pickup orders, since jurisdiction had previously been vested with the juvenile court. Only the juvenile court could quash the pickup orders. Since the arrest was valid, the evidence was admissible. Even if the arrest was illegal, suppression is not required since, pursuant to the inevitable discovery rule, the police in their routine investigation would have been able to obtain Defendant's picture and prints and thereby secure his arrest. Finally, since Defendant himself is not suppressible, all evidence secured after indictment, pursuant to Court order, is also not suppressible. Defendant's confession, as the evidence established, was not coerced and was properly admitted.

The Defendant contends the trial court's repeating of certain jury instruction was also error. The instructions repeated were correct statements of the law and was done to cure juror puzzlement on the issues. Since the repeated instructions were correct no error occurred.

The fact that the serologist testified about knife slippage is clearly not error since it was in his area of practical expertise. If it was error, it was harmless.

Defendant's contention that the identity of the murder victim was not established and therefore the evidence was insufficient to prove first degree murder, was not properly preserved for review. All of Defendant's motions for judgment of acquittal were boilerplate motions. Not once did he advise the court of this specific ground because if he did, the error could have been cured.

The trial court properly imposed the death penalty when it found five aggravating circumstances, no statutory mitigating circumstances and one non-statutory mitigating circumstances. The evidence supports the aggravating circumstances and the trial court's decision not to find certain statutory mitigating circumstances. Since the trial court properly weighed the evidence and properly weighed the aggravating and mitigating circumstances, the death penalty should be affirmed.

ARGUMENT
I

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTIONS TO SUPPRESS PHYSICAL EVIDENCE, IDENTIFICATION, AND STATEMENTS WHERE THE EVIDENCE WAS NOT OBTAINED AS A RESULT OF *AN* UNLAWFUL ARREST AND WHERE THE CONFESSION WAS FREELY AND VOLUNTARILY GIVEN.

Defendant contends that his arrest was illegal since the juvenile pick up orders were invalid because the police officers who arrested him knew or should have known the Defendant was no longer a juvenile. Defendant further contends that since his arrest was illegal, his fingerprint standards, identification and blood samples must be suppressed, as tainted from the illegal arrest.

The State submits that the trial court was eminently correct in denying the foregoing motions. The trial court's ruling can be affirmed on one of three grounds: (1) the arrest was lawful since the pick-up orders were still active and valid since they were issued when the juvenile court had jurisdiction over the Defendent; (2) based on the doctrine of inevitable discovery, the Defendant's identity would have been ascertained even if Defendant was not arrested since the arresting officers would have done a field card on Defendant and submitted it to homicide, and a homicide investigation would have uncovered Defendant since his prints and photograph were already on file; and (3) even if Defendant's

arrest is illegal, suppression of the Defendant himself is not required and since the fingerprint standards, blood samples and courtroom identifications were all obtained after the Defendant had been indicted, they are also not suppressible.

When the police officers learned that there were outstanding juvenile pick-up orders they had no discretion to do anything but arrest Defendant to ascertain the validity of the pick-up orders. McCray v. State, 496 So.2d 919 (Fla. 2d DCA 1986). After ascertaining that the outstanding pick-up orders were still valid, Defendant's arrest was valid. It was valid since the pick-up orders were issued when Defendant was under the jurisdiction of the juvenile court. The subsequent quashing of the pick-up orders by the juvenile court in no way affected the lawfulness of the arrest. See State v. A.N.F., 413 So.2d 146 (Fla. 5th DCA 1982)(Jurisdiction of juvenile court vests when Defendant is prosecuted as a juvenile).

Defendant's reliance of Albo v. State, 477 So.2d 1071 (Fla. 3d DCA 1985); Pesci v. State, 420 So.2d 380 (Fla. 3d DCA 1982) and Martin v. State, 424 So.2d 994 (Fla. 2d DCA 1983) is misplaced. In each of those cases, the defendant was arrested based on a warrant that was void at the time of arrest and therefore all evidence secured was considered tainted by the arrest. In those cases, the defendant was

arrested on a warrant that had previously been satisfied but the computer did not reflect the same. Therefore the arrest was illegal and the evidence suppressible. Here the pick-up orders were valid and without a Court order quashing the pick-up orders, they would have remained valid ad infinitum. The police computer would always reflect the pick-up orders were outstanding and therefore the police would always be under a obligation to arrest Defendant. Since the juvenile court had to quash the pick-up orders, they were not void at the time of arrest. Rather they became void at the time they were quashed.

Assuming arguendo that the arrest was illegal, Defendant's fingerprints and photograph would have been inevitably discovered and therefore admissible under Nix v. Williams, 467 U.S.431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The inevitable discovery rule permits introduction of evidence, which otherwise would have been suppressed if the police can establish that they would have discovered the evidence eventually. The evidence is admitted regardless of the taint from the illegal arrest and therefore is different from the independent source rule which requires a source independent from the illegality to admit the evidence.

In the instant case, the testimony revealed that had the officers not had valid pick-up orders on which to effectuate the arrest, they would have completed a field

card, based on Defendant's cut hand, and turned it over to homicide. Detective Geller would then have run the Defendant's name through the computer, and since he was previously arrested, Geller would have obtained his prints and photograph. Geller would then have had the Defendant's standards compared with the latents on the scene and thereafter have probable cause to arrest Defendant. Further he would have used the file photograph in a lineup for Ms. Bosler. (R. 659-60). Finally, since he would have been lawfully arrested his blood sample would then be admissible as well. See; People v. Horton, 49 Ill.App. 3d 531, 364 N.E. 2d 551 (1st Dist. 1977)(Defendant's fingerprints admissible even though arrest was invalid since police investigation would have uncovered Defendant's prints which were obtained as a result of a previous arrest one year before the illegal arrest). People v. Shaver, 77 Ill.App. 3d 709, 396 N.E. 2d 643 (2d Dist. 1979)(In-court identification admissible because police investigation would have inevitably led to defendant's arrest and therefore in-court identification would have occurred without illegal detention). People v. Hogan, 703 P.2d 634 (Colo.App. 1985)(Out-of-court identification admissible since police investigation would have uncovered defendant's photograph).

Further, the law is clear that an illegal arrest, without more, has never been a bar to a subsequent prosecution on a valid charge. The Defendant himself is not

considered as suppressible fruit and the illegality of his initial stop and detention does not deprive the State of an opportunity to prove his guilt through evidence which is not tainted by police misconduct. United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980). Therefore, information which is in official hands prior to any illegality is not subject to the exclusionary rule. State v. Tillman, 402 So.2d 19 (Fla. 3d DCA 1981); State v. Torres, 412 So.2d 941 (Fla. 3d DCA 1982); State v. Eicher, 431 So.2d 1009 (Fla. 3d DCA 1983)(en banc).

In this case, the police had in their possession, from a prior legal arrest, Defendant's fingerprint standards and a photograph. Both of these prints could have been used to identify the Defendant. Further, the fingerprint standards and the blood sample, procured pursuant to Court order are not suppressible and their comparison to prints and blood left at the scene also is not suppressible. Finally, since Ms. Bosler in-court identification came from a picture in her mind, it was not tainted by any photographic lineup containing pictures obtained through an illegality. Thomas v. State, 494 So.2d 248 (Fla. 4th DCA 1986).

The Defendant's last contention is that his confession should be suppressed since it was coerced. He relies as the fact that his IQ is in the mentally retarded range and he has difficulty thinking in the abstract. Defendant does not rely

on the fact that he functions higher than his IQ score indicates. Since there was no evidence that Defendant was mentally incapacitated it is clear the confession was not coerced. Ross v. State, 386 So.2d 1191 (Fla. 1980); Kight v. State, 512 So.2d 922 (Fla. 1987)(Defendant IQ of 69 did not render confession involuntary.) Rather, the evidence established that the confession was only given after he was told that his prints were found at the scene. This confession in the face of guilt, clearly showed that it was not coerced.

II

THE TRIAL COURT DID NOT ERR BY REPEATING CERTAIN OF THE MURDER JURY INSTRUCTIONS WHERE THE JURY INSTRUCTIONS THAT WERE REPEATED WERE CORRECT STATEMENTS OF THE LAW AND WERE REPEATED IN RESPONSE TO JUROR CONFUSION.

Defendant contends reversible error occurred when the trial court, during the initial jury charge, repeated the felony murder instruction and the reasonable doubt instruction. Further, he contends that a comment made prior to repeating the instruction implicitly told the jury the trial court's view of the case, thereby affecting the court's neutrality.

The State submits that reversible error did not occur in repeating the instructions since the instructions were a proper statement of the law and were given in response to juror puzzlement. Mirabel v. State, 182 So.2d 289 (Fla. 2d DCA 1966)(Not reversible error for trial court to repeat instructions given during period when one juror appeared to be sleeping). Gebhard v. United States, 442 F.2d 281 (9th Cir. 1970)(Repetition of instruction about quantum of proof to jury was not improper where the instruction was correct). Defendant's reliance on Beckham v. State, 209 So.2d 687 (Fla. 2d DCA 1968) is misplaced since there the repeated instruction was an incorrect statement of the law and that is why it was harmful.

Defendant's contention that the trial court's comment during the reinstruction implied that he believed Defendant guilty is likewise not reversible error. The comment when taken in context did not have the effect of implying guilt. Rather the comment merely explained why the trial court was repeating instructions and therefore the comments did not deprive Defendant of his right to an impartial tribunal. Pope v. Wainwright, 496 So.2d 798 (Fla. 1980).

III

THE TRIAL COURT DID NOT ERR BY PERMITTING AN EXPERT IN SEROLOGY TO TESTIFY ABOUT KNIFE SLIPPAGE WHERE THE EVIDENCE ESTABLISHED EXPERTISE IN THE AREA.

Defendant contends that it was error to allow the serologist to testify about knife slippage, since it was outside his expertise. This point is meritless since the expert had a working knowledge of knife slippage and therefore it was in his area of expertise.

The law is clear that a trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify, and, unless there is a clear showing of error, its decision will not be disturbed. Johnson v. State, 393 So.2d 1069 (Fla. 1980). The State submits that, based on the evidence, the trial court did not err in permitting the testimony.

Toby Wolson, the serologist was qualified as a expert in forensic serology. (R. 1755). He testified that as a serologist and based on his experiences with stabbings, he has gained working experience on the effect of blood on knife slippage. Since Wolson has hands on experience in this area of serology, he was qualified to testify about knife slippage. Johnston v. State, 497 So.2d 863 (Fla. 1986) (Testimony of officer concerning Luminol test he performed on

defendant's clothes was not inadmissible on ground that officer was never qualified as an expert on detection of blood where officer demonstrated that he possessed sufficient working knowledge of Luminol testing).

Assuming arguendo that this evidence was improperly admitted, it was harmless. The reason it was harmless since Defendant confessed to stabbing the victims. Carvajal v. Adams, 405 So.2d 763 (Fla. 3d DCA 1981).

IV

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE FIRST DEGREE MURDER CHARGE, WHERE THE MOTION DID NOT STATE SPECIFICALLY THE GROUNDS THEREFORE.

The Defendant contends that his judgment of acquittal should have been granted on the grounds that the identity of the victim was not properly established. In particular, when asked to identify the victim the witness, as transcribed by the court reporter, called him Bill Bowman instead of Bill Bosler. (R. 1639). The State submits that this issue is not preserved for appeal and therefore this court should not consider it.

A motion for judgment of acquittal must comply with Fla.R.Crim.P. 3.380(b), which requires that the motion "must fully set forth the grounds upon which it is based." A motion for judgment of acquittal based on the ground the evidence was insufficient *so* as to constitute a prima facie case is insufficient since it did not specifically state the ground upon which the motion was based. The necessity for a particular ground for the motion is to bring the exact error to the trial court in order for it to be cured, if possible, by allowing the State to reopen its case to supply the missing element. Johnson v. State, 478 So.2d 885 (Fla. 3d DCA 1985) cause dismissed, 488 So.2d 830 (Fla. 1986).

In the instant case, the motion for judgment of acquittal at the close of the State's case, at the close of the evidence, and in the motion for new trial, simply stated that the State failed to prove a prima facie case. **(R.** 2126, 2210, **416-17).** At no time did Defendant claim that identity had not been established on the ground now asserted or any other ground. If he had asserted this ground, then the technical error now complained of could have been cured. G.W.B. v. State, **340** So.2d **969** (Fla. 1st DCA **1976),** cert. denied, **348** So.2d **948** (Fla. **1977).**

V

THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH PENALTY WHERE IT FOUND FIVE AGGRAVATING CIRCUMSTANCES AND ONE NONSTATUTORY MITIGATING CIRCUMSTANCE.

The Defendant contends that there is a problem with each of the aggravating circumstances. This coupled with the allegation that the trial court did not give proper weight to the mitigating evidence, Defendant asserts requires either a life sentence or a remand for resentencing. This position cannot withstand close scrutiny and therefore the death penalty requires affirmance.

Defendant challenges the aggravating circumstance that he was previously convicted of a felony involving the use or threat of violence to the person. The trial court found support for this circumstance with Defendant's contemporaneous conviction for attempted the first degree murder of Sue Bosler. He also supported this with a conviction, based on a nolo plea, for battery on a law enforcement officer. (R. **430).**

Defendant concedes that the contemporaneous conviction on a different victim for attempted first degree murder supports this circumstance. LeCroy v. State, **533** So.2d 750, **755** (Fla. **1988).** However, he contends this entire factor must fall since the trial court erroneously considered the

conviction based on nolo plea, for battery on a law enforcement officer. (R. 2362). This position is meritless.

Initially, it is clear that battery on a law enforcement officer is a felony involving the use of violence to the person. See **784.03** and **784.07,** Florida Statutes. Since this is a crime encompassed by the aggravating circumstance, the only question is whether a nolo plea with an adjudication of guilt is a prior conviction under this section. The State is aware of Garron v. State, **528** So.2d **353** (Fla. **1988)** which held that a nolo plea without an adjudication of guilt was not a prior conviction for this aggravating circumstance. In so holding, this Court distinguished McCrea v. State, **395** So.2d **1145** (Fla. **1980),** cert. denied, 102 S.Ct. **583 (1981)** which held that a guilty plea, without an adjudication of guilt, is a conviction since the guilty plea was a confession and the adjudication or lack thereof was a mere formality. In Garron, this Court found that a nolo plea was not a confession and therefore the failure to adjudicate prohibited the use of the offense as a prior conviction. The State submits that in the instant case since the nolo plea was followed by an adjudication of guilt, the conviction for battery on a law enforcement officer was a conviction for purposes of this section. Even if this Court does not find the conviction proper, this factor is still supported by the contemporaneous prior conviction on the surviving victim.

Defendant contends that the trial court erred by using the armed robbery and armed burglary to support the aggravating circumstances that the capital felony was committed while engaged in the commission of the robbery and burglary and that it was committed for pecuniary gain. He contends that this was an impermissible doubling up since the same aspect, the unlawful taking of property, was used to support two different aggravating Circumstances.

This position also lacks merit since burglary and robbery were charged as two separate offenses and the victims were different. The evidence showed that Defendant unlawfully entered the residence to commit a robbery and that both the victims were robbed. The robbery charge alleged only that Ms. Bosler was robbed and this was also proven. Since these two crimes had different victims, both crimes can be used to support the aggravating circumstances under challenge. See, e.g., Palmer v. State, 438 So.2d 1 (Fla. 1983)(One action of robbing sixteen individuals sufficient to support sixteen robbery convictions).

Defendant next contends th t since the evidence used to support heinous, atrocious or cruel and cold, calculated and premeditated was the same, the evidence can only support one of the circumstances and not both. This Court has held that the same circumstances can support both factors since the mind set or mental anguish of the victim is the important

factor for heinous, atrocious or cruel, while the mind set of the Defendant is the important factor to uphold the heightened premeditation for imposition of the cold calculated and premeditated circumstance. Phillips v. State, 476 So.2d 194 (Fla. 1985).

The evidence established that Defendant first attacked Reverend Bosler and starting stabbing him numerous times. When Ms. Bosler entered the scene, Defendant stopped stabbing Reverend Bosler and went after Ms. Bosler. After Ms. Bosler was stabbed and was on the ground, Defendant returned to Reverend Bosler and while he was on the ground continued to stab him. The evidence also established that some of the 23 wounds to Reverend Bosler were defensive wounds. (R. 1609, 2070-2100).

Based on the foregoing evidence, the aggravating circumstance of heinous, atrocious, or cruel was established beyond a reasonable doubt. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987)(Evidence that some of the victim's 30 or more stab wounds were defensive wounds, indicating she was aware of what was happening to her and that she did not necessarily loss consciousness instantly, supported findings on aggravating circumstance that murder was heinous, atrocious or cruel). Nibert v. State, 508 So.2d 1 (Fla. 1987)(Finding that murder was heinous, atrocious or cruel was sufficiently supported by evidence that victim was stabbed 17

times, that some of the victims wounds were defensive wounds, and that victim remained conscious throughout stabbing.)

The aggravating circumstance of cold, calculated, and premeditated is also supported by the evidence. Defendant stabbed Reverend Bosler, then went after Ms. Bosler, and then returned and continued to stab Reverend Bosler. The fact that the Defendant came back and continued stabbing Reverend Bosler shows heightened premeditation since returning and continuing to stab demonstrates more time for reflection and therefore heightened premeditation. Swafford v. State, 533 So.2d 270 (Fla. 1988)(Defendant shot victim nine times and had to stop to reload the gun to finish carrying out the shooting). Phillips v. State, supra, (same).

Defendant also claims that, pursuant to Maynard v. Cartwright, 486 U.S.___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the aggravating circumstance of heinous, atrocious or cruel is an constitutionally vague and overbroad since the term is not defined for the jury. The State submits that Maynard v. Cartwright, is inapplicable herein. This is so since Florida Courts have a specific limiting definition of the terms which are used to review the finding of the aggravating circumstance and this is done in every case heinous, atrocious or cruel is found by the trial court. See State v. Dixon, 283 So.2d 1 (Fla. 1973) and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 915 (1976).

Defendant contends that the trial court failed to find two statutory mitigating factors: (1) that the capital felony was committed while under the influence of extreme mental or emotional disturbance and (2) that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The record reflects that the trial court considered the mitigating evidence concerning Defendant's mental health, but found that it did not rise to the level of statutory mitigating factors. (R. 434-35). This Court has long held that in determining whether mitigating circumstances exist, it is the trial court's duty to resolve conflicts in the evidence and that court's determination is final, if supported by competent substantial evidence. Furthermore, finding or not finding that any certain mitigating circumstance has been established and any weight given to it is within the trial court's domain and reversal is not warranted because a defendant draws a different conclusion. Lopez v. State, 536 So.2d 226 (Fla. 1988) Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied 105 S.Ct. 2347 (1985); Daugherty v. State, 419 So.2d 1067 Fla. 1982), cert. denied, 103 S.Ct. 1236 (1983).

Dr. Frumkin testified that Defendant was functioning at the borderline level, even though that IQ score was in the mental retardation range. (R. 2396-97). Although he found that Defendant suffered from a chronic emotional disturbance

(R. 2403), Dr. Frumkin also found the Defendant knew that stabbing someone was wrong (R. 2407) and that the Defendant met the criteria to be responsible for his criminal acts. (R. 2409). Dr. Toomer found Defendant to be functioning at the borderline level (R. 2423-24) and was suffering from a borderline personality disturbance. (R. 2429).

The evidence did not establish an extreme mental or emotional disturbance and it did establish that Defendant could appreciate the criminality of his conduct. Therefore, trial court's determination that these factors were not established must be upheld. Stano v. State, supra. This determination was made not only in the mental health expert's opinions, but also on all of the trial testimony as well as Defendant's demeanor during trial. (R. 435). Therefore, the trial court's rejection of these two mitigating circumstances is supported by the record and must be upheld. Middleton v. State, 426 So.2d 553 (Fla. 1982), cert.denied, 103 S.Ct. 3573 (1983).

Defendant also contends that it was error not to find Defendant's age as a mitigating factor. The trial court, recognizing that age itself is the controlling factor, rejecting the circumstance after it considered the psychological evidence which established that Defendant was not mentally retarded or suffering from a severe emotional disturbance which would have made his mental age lower than

his actual age. (R. 436). Based on this finding, age was properly rejected. Garcia v. State, 492 So.2d 360 (Fla. 1986), cert. denied, 107 S.Ct. 680 (1986).

As evidenced by the foregoing, the trial court properly found five aggravating circumstances, no statutory mitigating circumstances, and on one marginal non-statutory mitigating circumstance. See Jackson v. State, 498 So.2d 406 (Fla. 1987)(testimony that victims family did not want Defendant to receive death penalty is of marginal value since it sheds no light on defendant's character or record, or on the offense itself). A proper weighing of this factors, mandates the affirmance of the sentence of death.

VI

THE DEATH PENALTY IS NOT CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 17 OF THE CONSTITUTION OF FLORIDA.

As Defendant acknowledges he raises this point only for preservation reasons. Florida's death penalty statute has long been held not to violate the Constitution of the United States and the State of Florida. Proffitt v. Florida, supra; Copeland v. State, 457 So.2d 1012 (Fla. 1984), cert. denied, 105 S.Ct. 2051 (1985).

VII

THE DEFENDANT RECEIVED A FAIR AND IMPARTIAL TRIAL.

The Defendant contends, in this catchall point, that the total effect of all the alleged errors deprived him of a fair trial. Since, as established in points one through six, Defendant's allegation of error are unfounded, he was not denied a fair and impartial trial. Although some of the complaints might be viewed as errors, they are harmless. A defendant is only entitled to a fundamentally fair trial, not a perfect one. Corn v. Zant, 708 F.2d 549, 560 (11th Cir. 1983), cert. denied, 104 S.Ct. 2670 (1984).

CONCLUSION

Based on the foregoing points and authorities the State respectfully urges this Court to affirm Defendant's convictions and sentence of death.

Respectfully submitted,

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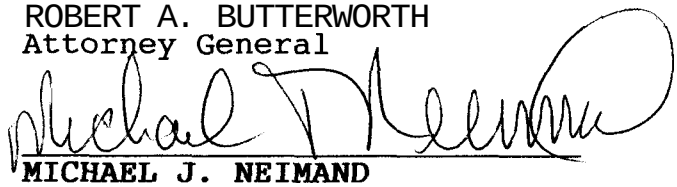

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF** OF **APPELLEE** was furnished **by** mail to MAY L. **CAIN,** Attorney for Appellant, Suite 401, 11755 Biscayne Boulevard, North Miami, Florida 33181 on this 29 day of March, 1989.

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