IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,622

JAMES CAMPBELL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

MAY L. CAIN
Special Assistant Public Defender
Suite 401
11755 Biscayne Boulevard
North Miami, Florida 33181
Telephone: (305) 893-2246

for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF CITATIONS

CASES - Continued: PAGES

CASES - Continued: PAGES

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INTRODUCTION

The Appellant, James Campbell, was the defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida, In and For Dade County. The Appellee, the State of Florida, was the prosecution. In this brief, the Appellant will be referred to as the defendant and the Appellee will be referred to as the State. Both parties will also be referred to as they appear before this Court.

The symbol "R" will be used in this brief to designate the Record on Appeal. The symbol "T" will be used to refer to the court reporter's transcripts. The symbol "S" will be used to refer to the supplemental transcript of February 1, 1988 at 2:00 p.m. attached to Appellant's Notion to Supplement Record on Appeal.

STATEMENT OF THE CASE

The Appellant was charged by Indictment filed January 14, 1987 as follows:

COUNT I: First degree murder of Billy Bosler with premeditation or while engaged in a robbery (with a knife) in violation of Fla. Stat. 982.04 (1).

COUNT II: Attempted first degree murder of Sue Zann Bosler with premeditation or while engaged in a robbery (with a knife) in violation of Fla. Stat. 782.04.

COUNT III: Burglary of a dwelling (Bosler's) with intent to commit robbery armed with dangerous weapon (a knife) in violation of Fla. Stat. 810.02.

COUNT IV: Robbery with a deadly weapon (a knife) of Sue Zann Bosler of cash less than $300.00 in violation of Fla. Stat. 812.13.

COUNT V: Battery on a police officer in violation of Fla. Stat. 784.03.

COUNT VI: Unlawful display of a weapon (a knife) during commission of a felony in violation of Fla. Stat. 790.07 (R.14a).

On January 20, 1987 the defense filed written pleas. (R.5). The defense filed several pretrial motions. (R.85, 87, 89, 93, 95, 97, 99). A Motion To Suppress Physical Evidence and the Defendant's written confession were filed. (R. 95, 97).

On January 27, 1988, the Court denied Defendant's Motion To Suppress Line-Up. (T.558). The defense moved for additional peremptory challenges which was granted. (T.561-563). The defense requested that those persons who stated they could not impose the death penalty, should not be stricken for cause. (T.565). The Court denied the motion. (T.566-567). The

defense attacked the constitutionality of the death sentence which was denied. (T. 568). The defense further filed motions to suppress physical evidence, statements and the show-up. (R. 85, 95, 97, T. 570). The main thrust of the motions was an attack on the arrest and detention of Defendant who was arrested on juvenile pick-up orders while he was an adult. (T. 570). Therefore, the evidence sought to be suppressed was fruit of the poisonous tree. (T. 570). The Court denied Defendant's Motions To Suppress Evidence (S. 44-45) and the Motion To Suppress Confessions. (S.46).

A jury trial before the Honorable Alfonso Sepe commenced on February 2, 1988. (T. 873). On February 12, 1988 the jury returned its verdicts of guilty as charged on Counts **I, 11, 111, IV** and **VI.** (T. 2324-2325). The jury found the Defendant not guilty of Count **V** (battery on a police officer). (T.2325). The penalty phase began on February 19, 1988. (T.2345). The jury recommended the death sentence on Count **I** by a vote of nine to three. (T.2491). The Court imposed consecutive life sentences on Counts **II, III** and **IV** and suspended entry of sentence on Count VI (unlawful display of weapon during felony). (T.2505). The Court departed from the recommended guidelines sentence of 17-22 years on the counts based upon the first degree murder conviction. (T.416). As to Count **I,** the Court imposed the death sentence. (T.2521).

A Motion for New Trial was made and denied. (R. 416, T. 2499). The formal order adjudicating Defendant guilty and imposing sentence was entered on May 19, 1988. (R.420-428, 429-439). On June 3, 1988, counsel was appointed for appeal. (R. 448). A timely Notice of Appeal was filed on June 13, 1988. (R. 449). This appeal follows.

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[1] The jurisdiction of this Court is invoked pursuant to Article V, Section 3(b)(1) of the Constitution of the State of Florida, Section 921.141(4), Florida Statutes (1983), and Fla. R. App. P. 9.140(b)(4) and 9.030(a)(i). This Court also has jurisdiction to review the convictions for attempted first degree murder and armed burglary and possession of a weapon while engaged in a criminal offense, which arose from the same trial as did the murder conviction. See Riley v. State, 366 So.2d 19, 20 n.1 (Fla. 1978) appeal after remand 413 So.2d 1173, cert. den. 103 S. Ct. 317, 459 U.S. 981, 74 L. Ed. 2d 294, reh. den. 103 S. Ct. 773, 459 U.S. 1138, 74 L. Ed. 2d 985; Huckaby v. State, 343 So.2d 29, 30 n.1 (Fla. 1977).

STATEMENT OF THE FACTS

Count I of the Indictment alleges that the homicide in this case was committed "from a premeditated design ... or while (Defendant was) engaged in the perpetration of, or in an attempt to perpetrate a robbery." (R. 1). The defense was that the Appellant was working with his stepfather that day then went to Hearns Market, and and not commit the crimes charged. (T. 2. 161-2168). The Appellant did not testify at trial.

The main issue concerned evidence including Appellant's blood, photos, confession, among other things, which were introduced at trial over defense objections and pretrial Motions To Suppress which were denied. (S. 44, R. 95, 85, 97, T. 570-577). The defense maintained that on December 29, 1986, police stopped Appellant without cause, then used juvenile pick-up orders from May of 1983 as a basis for Appellant's subsequent detention. (T. 574). Police knew at that time that Appellant's birth date was April 7, 1966 so that Appellant was 20 years old and no longer subject to the jurisdiction of the juvenile court. (T. 574). This will be discussed in greater detail herein during the Argument portion of Appellant's brief.

The incident which gave rise to the charges in this case occurred on December 22, 1986 at approximately 2:15 P.M. at the house of Reverend Billy Bosler and his family, located at 18200 N.W. 22nd Avenue in Miami, adjacent to the church where

Reverend Bosler was the pastor. (T. 1446, 1524, 2076, 2080). On that date, Billy Bosler and his daughter, Sue Zann Bosler, went to a flea market and purchased Christmas gifts. (T.2079). They returned at approximately 2:15 P.M. according to Sue Zann. (T. 2080). Sue Zann's mother and sister, who also reside in the house, had gone to Indiana prior to that date. (T.2077-2078).

Sue Zann testified at trial that upon their return she showered and was wearing a robe and underware. (T.2081). Next, she heard the door open and heard noises. (T. 2082). She went out to investigate and saw her father being stabbed. (T.2085). A man was crouched over stabbing her father. (T.2086). The man was black, stocky- with short hair and dark clothing. (T.2087). She made a noise and the man turned and stabbed her three times. (T. 2089). She was knocked to the floor and got up again, as the man was stabbing her father in the back. (T.2091). Her father fell. (T.2091). The man followed her into the living room where he was going to stab her face and she turned her head and was struck from behind. (T.2093). She fell to the floor and held her breath pretending to be dead. (T.2094-2095). She heard the man leave and go to her room, where she heard noises as if he was throwing things around, then to her sister's room. (T.2095-2096). He went to her father's room next and she heard things being ruffled around. (T.2097). He went to the kitchen area and she heard her car keys being jingled and

later learned it was her purse. (T.2098). She had $31.00 in her purse and money in the billfold checkbook. (T.2098). She never saw that money again. (T.2099). The man walked behind her, pulled her underware down, smacked her on her rear and pulled a sanitary napkin from between her legs. (T.2099-2100). The man left through the front door. (T.2100).

She got up after he left and called 911. (T.2104). Police arrived and she was taken to Jackson Memorial Hospital. (T.2105). Later, she told Detective Geller that the man was black, dark skinned, a little taller than she, a little stocky, had short dark hair and dark clothing. (T.2106). On January 13, 1987 she viewed a photo line-up and identified a photo of Defendant. (T.2108). She identified the Appellant in Court as the attacker. (T.2110).

Officer Hank Ray, Jr., Metro Dade Police Department was the first to arrive on the scene at approximately 2:58 P.M. (T.1523-1524). He observed a blood stain on the door frame and knocked on the front door. (T.1526-1527). He met Sue Zann Bosler standing in the doorway, holding the telephone. (T.1528). She collapsed in his arms. (T.1529). He observed Bill Bosler in the other room lying face down on the floor with no vital signs. (T.1530-1531). He told other officers there was a perpetrator who cut his hand or hands. (T.1534).

Photos of the area were taken by Metro Dade Police Crime Scene Investigator Carl Barnett. (T.1441). He also collected serology evidence at the scene. (T.1499). Fingerprints were collected at the Bosler residence by Technician Susan Bowman on 23 latent cards. (T.1557-1564. She also photographed Sue Zann Bosler at Jackson Memorial Hospital. (T.1579). On December 23, 1986, Metro Dade Police Officer Agnes Duncan responded to a residence at 23rd Court and 181st Street and collected a large wad of paper towels with blood. (T.1585). Blood samples were also collected from Sue Zann Bosler. (T.1642).

On December 29, 1986, Officers Hank Ray, Jr. and Daniel Toledo had been told that the subject in the Bosler case was a male or female with an enlarged or severely cut hand. (T.1812, 1815). They heard a radio call concerning a black male with a gun behind Hearn's Market. (T.1816). Hearn's Market is a convenience type of store. (T.1537). Officer Toledo testified they were back-up for Officer Rice who took the call. (T.1816). When they arrived at Hearn's they observed Officer Rice's police vehicle, which was unoccupied. (T.1817). They observed Appellant on the outside of Officer Rice's vehicle, on the driver's side, looking in through the windshield. (T.1817). Officer Ray stated that Appellant had his hand on the driver's door and from the distance, Officer

Ray could not tell if Appellant was trying the door or not, but it aroused his suspicion enough to speak to Appellant. (T.1538). Appellant looked up and began to walk away from the squad car. (T.1538). Officer Ray got out of his vehicle and went to speak to Appellant while Officer Toledo went to speak to a Hearn's employee. (T.1818). Ray asked Appellant what he was doing in the area. (T.1539). According to Ray, Appellant told him that he ran away without one of his shoes and returned to retrieve it. (T.1539). When asked what he was doing near the police vehicle, Appellant offered no explanation, according to Ray. (T.1539). Appellant had no identification but told Ray his name was James Campbell. (T.1540). Ray asked Toledo to do a records check. (T.1819, 1540). Toledo testified he told Appellant there was no problem, if the check came back clear, he would be on his way in a few minutes. (T.1820). The check revealed two outstanding juvenile pick up orders issued on May 25, 1983. (T.1822). Toledo told Appellant to turn around so that he could handcuff him and while doing so, Toledo observed deep cuts on Appellant's hand. (T.1822). When asked about the cuts, Appellant told Toledo he had been cut in a fight, (T.1823). Toledo called Ray over to view the cuts. (T.1823, 1542). They notified Detective Geller from Homicide. (T.1542). The call was made because Ray felt he had one of the subjects involved in the homicide at this point. (T.1542).

Sue Zann Bosler had told Ray there was one black male involved but gave no physical description, and also indicated there were three black males. (T.1544). No one told police the subject had cuts; it was a possibility. (T.1546). The Appellant was frisked and no weapons were found. (T.1548). He had given police his date of birth and name. (T.1549). Police knew at the time, Appellant was 20. (T.1552, 1829). They knew he was no longer a juvenile. (T.1829). One of the pick up orders had to do with Appellant running away from a foster home. (T.1830). Aside from the cuts, at that time, there was no evidence linking Appellant to the Bosler homicide, according to Officer Ray's testimony. (T.1554).

Appellant was transported to the Warrant Section. (T.1824). Officer Ray called Detective Geller who went to the fourth floor to meet Appellant. (T.1847). Appellant was advised of Miranda warnings and complained his hand hurt. (T.1855). He told police he had been cut at a bar in Miami. (T.1856). Photos were taken of his hand. (T.1857).

Geller told Appellant he did not believe him, and that he believed Appellant murdered Bill Bosler, which Appellant denied. (T.1862). Geller accused Appellant, got up to leave and testified that Appellant hit him in the back. (T.1863). Appellant was then handcuffed to a ring in the room. (T.1866). After Detective Geller left the room, Detective Rowland Vas was asked by Geller to see Appellant. (T.1928). Vas went to

the Interview Room where Appellant was shackled with a one arm handcuff to the floor. (T.1929). He introduced himself and began to speak to Appellant. (T.1929). Appellant told Vas he was at Hearn's from 9:00 A.M. - 10:00 P.M. on December 22, 1986. (T.1930). Vas asked about the cuts on Appellant's hands. (T.1930). Appellant told him he was in a fight at the Enzone Bar and was cut. (T.1932-1933). Vas told Appellant that fingerprints taken of him earlier in the day were compared to prints taken from the scene. (T.1912-1913). Appellant told Vas he was staying at his stepfather's home. (T.1948). He signed a consent for police to search same. (T.1949-1950). On the Constitutional Rights to Search form, Vas wrote "solely on juvenile pick-up orders" as that is all Appellant was in custody for at that time. (T.1950). He was not under arrest for the homicide police were questioning Appellant about. (T.1950-1951). Several hours later, after continued police interrogation, Appellant confessed to the crime, according to Vas. (T.1956). Later his written statement was taken down by a court reporter and transcribed. (T. 1956). The statement was introduced through Officer Rickey Smith to whom Appellant asked to speak as Smith walked by the Interview Room. (T.2010, 2011, 2012, 2017).

At trial, Dr. Arthur Copeland, Medical Examiner, testified that Bill Bosler died as the result of multiple stab wounds. (T.1603). There were 24 wounds. (T.1636). Charles

Norman, IBM Security Administrator, identified the deceased as Bill Bowman (sic). (T.1639).

Blood was taken pursuant to Court Order from the Appellant. (T.1647). Fingerprints were taken as well per Court Order. (T.1659). Technician, Elsnor Brown, testified as an expert in fingerprints that of the 23 fingerprint cards submitted, five were of value. (T.1679).

Four of the five prints were identified as elimination prints and the fifth print, taken from the kitchen table cigarette package was identified as belonging to Appellant. (T.1682-1683). Also, a print from the items within Sue Zann Bosler's purse was identified as that of Appellant. (T.1693). These prints from paper goods also belonged to Appellant. (T.1689). There were no prints of value lifted from the knife. (T.1750).

Toby Wolson, expert Serologist, testified that he received 47 items to process. (T.1769). The paper towels found by Officer Agnes Duncan were consistent with Appellant's blood. (T.1771-1772). So were a bloody white T-shirt on the kitchen counter top, green cords among others. (T.1774-1777). The Serologist testified about knife slippage over defense objection. (T.1794).

The defense presented trailer driver Bobbie Clark who testified he saw Appellant on December 24, 1986 when Appellant went to his house and told him he was robbed and cut and said

it just happened. (T.2129).

The defense also called Michael Lenox, owner of All Jobs Tool Rental as a witness. (T.2156-2158). Lenox testified that on December 29, 1986 a man came into his store and told him a drug deal went bad at Hearn's, and there was a man with a gun who was going to shoot. (T.2159). The man reporting this to Lenox used Lenox's phone to call police. (T.2160). Lenox was not sure if the man who used his phone was the Appellant. (T.2160).

Milton Brown, Appellant's stepfather who is employed by the State of Florida at South Florida State Hospital, testified that Appellant was working with him on December 22, 1986 during the day, remodeling houses. (T.2161-2162). He testified they were working from 1:30 P.M. until about 3:00 P.M. and at 3:30 P.M., Appellant went to Hearn's. (T.2165-2167). Brown next saw Appellant at 8:00 P.M. that evening. (T.2168).

In rebuttal, Detective John Butchko testified that Brown was asked by Butchko during the investigation whether he knew Appellant's whereabouts on December 22, 1986 and Brown had responded that he did not. (T.2191-2193). Butchko further testified that Brown told him that Appellant called Brown on December 22, 1986 from Jackson Memorial Hospital and wanted treatment for his hand. (T.2194). While at Brown's house, Butchko testified that Robbie Clark had a telephone conversation with Brown and Brown handed Butchko the telephone.

(T.2195-2196). The person on the other end of the telephone identified himself as Robbie Clark and told Butchko that he believed it was Christmas Day, 1986 that Appellant went to Clark's house suffering from severe cuts on his hands. (T.2196). Clark told Butchko that Appellant told him his hands were cut after three men tried to rob him. (T.2197). Both sides gave closing arguments. (T.2214, 2246). The jury was instructed. (T.2280-2316).

The defense objected to the trial court repeating the felony murder instruction three times and the reasonable doubt instruction twice. (T.2316).

The jury reached its verdict. (T.2324). The jury found the Appellant guilty as to Count I (first degree murder), Count II (attempted first degree murder with a weapon), Count III (robbery with a deadly weapon), Count IV (armed burglary of a dwelling) and Count VI (unlawful possession of a weapon during the commission of a felony) and not guilty of Count V (battery of a police officer). (T.2324-2325).

The penalty phase began on February 19, 1988. (T.2345). A Motion To Preclude Death as a Penalty due to Pre-Trial Publicity was made and denied. (T.2359). The State offered into evidence pursuant to ~~Fla. Stat.~~ 90.202, a certified copy of an information, judgment and sentence for a 1984 conviction (after a no lo contendre plea) for battery on a law enforcement officer over objection by Appellant. (T.2361-2362). The

State called no witnesses.

The defense presented witnesses. (T.2363). The first witness called was the Appellant's mother, Ella Brown. (T.2363). Ella Brown testified that she was unable to take care of Appellant from the time he was born until he was six years old. (T.2364). She did raise him from the ages of six to 12. (T.2364). When Appellant was 12, problems arose and they went to Court where Appellant chose not to be with his mother any longer. (T.2365). His grandparents were given custody and he moved to Wachula with them. (T.2366). At one time she discovered drugs. (T.2366). She believes Appellant has a drug problem. (T.2367). She thinks it began at age 12. (T.2367). Appellant's natural father was never involved in Appellant's life. (T.2367).

Inez Hernandez, Clerk of the Court, Juvenile, Custodian of Records was called as the next defense witness. (T.2370). On November 20, 1978, Appellant was adjudicated a dependent child in Dade County, Florida, and placed with his grandfather. (T.2372). He and his mother were to be evaluated by the Juvenile Court Mental Health Clinic. (T.2372).

The next defense witness was Willie B. Lance, Ella Brown's sister, and aunt to the Appellant. (T.2373-2374). When Appellant was about ten years old his mother hit him with a telephone and he went running to his aunt's home bleeding. (T.2375). She took him to Jackson for treatment. (T.2375-2376). He had bruises all

over his body. (T.2376). The doctor notified the Juvenile Court and a hearing was held as a result. (T.2376). his grandparents got custody of Appellant. (T.2377).

Celia Inez Campbell, aunt of Appellant from Wachula, testified that Appellant lived with his natural father when he was a baby for six months. (T.2385).

Dr. Zaida Cruzet, M.D., Jail Psychiatrist, Dade County Jail, testified that Appellant was put on treatment for his nerves on April 6, 1987. (T.2386). He was put on Thorazine, a major tranquilizer by her, three times a day. (T.2387). He was in a single call on the fourth floor. (T.2387). Since April 6, 1987, Appellant has been taking Thorazine off and on. (T.2388).

Dr. Bruce Frumkin, Clinical Psychologist testified as an expert in psychology. (T.2393). He saw and evaluated Appellant on four different occasions beginning with a three hour session on February 5, 1987. (T.2393). Next he saw Appellant on February 19, 1987 for one-half hour. (T.2394). He also saw Appellant on December 18,1987 for one and one-half hours. (T.2395). He was last seen on January 9, 1988 for two hours so that Dr. Frumkin could Complete his evaluation. (T.2396). Dr. Frumkin gave Appellant a variety of tests. (T.2397). He did not do particularly well on the Wexler adult intelligence scale obtaining a verbal IQ score of 72, performance IQ score of 65 and a full scale IQ score of 68 which is technically in the

mentally retarded range. (T.2397). On the wide range achievement test, a word recognition test, Appellant did very poorly. (T.2398). The lowest one can score on that test is to function at approximately third grade word recognition and spelling level which is what Appellant did. (T.2399). His scores were in the lower first percentile compared to other's his age. (T.2399). In another test, Appellant's drawings were consistent with people who have severe emotional problems. (T.2400). From the Rorschach test, Dr. Frumkin determined that Appellant thinks in a very non-abstract concrete fashion. (T.2400). Appellant misses a lot of things in the environment. (T.2401). On the Minnesota multiphasic personality inventory test, Appellant's reading ability was so low that he could not complete the test. (T.2401).

Dr. Frumkin also tested Appellant as to his understanding of Miranda. (T.2402). Appellant had knowledge of the warnings but was not able to make intelligent decisions about how best to use those warnings. (T.2402). Appellant also has a chronic drug and alcohol abuse problem. (T.2402).

Dr. Frumkin's conclusions were that Appellant has had chronic emotional problems since he was very young. (T.2403). He becomes depressed and stressed, and when stressed, Appellant has a difficult time understanding what is real and what is not. (T.2403). Appellant constantly denied involvement to Dr. Frumkin, in the

crimes charged. (T.2408).

Dr. Jethro Toomer, psychologist and professor at Florida International University was the next expert witness to testify for the defense. (T.2414-2415). He saw Appellant for the first time on January 19, 1987 because Appellant had attempted suicide in Dade County Jail. (T.2416). Next, Dr. Toomer saw Appellant on February 19, 1987. (T.2416). He saw Appellant a total of four times. (T.2416-2417). He was also seen December 2, 1987 and January 6, 1988 by Dr. Toomer. (T.2417).

Dr. Toomer did a psycho-social history and clinical evaluation. (T.2420). He administered the Bendiger-Stalt design test. (T.2420). Appellant's performance indicated a number of psychological deficits. (T.2422). He also administered a Reirsea Beta examination which is an IQ test to measure intellectual strength. (T.2423). Appellant was unable to complete the examination, (which indicates deficiencies in intellectual functioning) scoring in a 65-70 range which is deficient. (T.2424). Appellant has deficits in abstract reasoning. (T.2425). The Carlson psychological survey to assess personality functioning was administered and revealed a chemical abuse percentile of 80; a thought disturbance percentile of 85; a self-depreciation percentile of 95 and showed the test to be valid. (T.2428-2429). Dr. Toomer's conclusion was that the Appellant is overall unstable across certain personality spheres in terms of fuctioning, which is often referred to as boarderline personality disorder. (T.2429). The Appellant has an emotional problem and a

drug abuse problem but is not insane. (T.2430). Dr. Toomer noted that jail records he examined showed that Appellant was prescribed psychotropic medications. (T.2430). Such medications suppress psychotic tendencies. (T.2431).

The Court and counsel went over the instructions for the penalty phase with the defense objecting to instructions as to doubling. (T.2444) and the crime being committed in a cold and calculated manner. (T.2444). The Court instructed the jury. (T.2451). Both sides rested. (T.2452). The jury recommended the death penalty by a vote of nine to three. (T.2491). A timely Motion For New Trial was made and denied. (R.416-417, T.2505).

On May 19, 1988, the Court found the following aggravating factors: (1) That Appellant was previously convicted of a felony involving the use or threat of force (for battery on a law enforcement officer and also for the contemporaneous conviction of attempted first degree murder of Sue Zann Bosler. (T.2505-2506); (2) That the capital felony was committed while Appellant was engaged in an armed robbery and armed burglary (T.2507-2508); (3) That the capital felony was committed for pecuniary gain (T.2509); (4) That the capital felony was especially heinous, atrocious and cruel (T.2509-2510); and (5) That the capital felony was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification (T.2511-2512). The only mitigating factor found

by the Court was the non-statutory mitigating factor it found from numerous letters from members of the deceased's church, and the testimony of Sue Zann Bosler seeking life for the Appellant. (T.2518-2519).

The Court sentenced Appellant to death on the first degree murder charge. (T.2521). As to the other charges, the Court imposed consecutive life sentences for the attempted first degree murder, armed robbery and armed burglary and suspended entry of sentence on the unlawful possession charge. (T.2505). On June 3, 1988 counsel was appointed for purposes of appeal. (R.448). A timely Notice of Appeal was filed. (R.449). This appeal follows.

SUMMARY OF THE ARGUMENT

The Appellant's Motion To Suppress Physical Evidence, Confessions and Identification (photo line-up) should have been granted as Appellant was unlawfully detained initially, then held on void juvenile pick up orders when he was over the jurisdictional age of the Juvenile Court (he was 20). All of the evidence used against the Appellant flowed from his unlawfully obtained confession (which was involuntary).

Next, the trial court erred by repeating the felony murder instruction and the attempt instruction and making a comment which implied the Court thought Appellant was guilty of one count or another, but did not indicate the Court believed Appellant was not guilty.

The Court erred by not requiring the State to prove the identity of the deceased when the State's identification witness testified that the deceased was "Bill Bowman" not "Bill Bosler" against whom Appellant was charged with first degree murder.

The Court erred in imposing the death penalty where the Court improperly considered certain aggravating factors and improperly did not consider statutory mitigating factors. The Court doubled in its aggravating factors.

In the very least the death sentence should be reversed. However, in light of Appellant's first issue on appeal, the judgments and all sentences should be vacated and the cause remanded for a new trial without the improper evidence.

I.

THE TRIAL COURT ERRED BY ITS DENIAL OF APPELLANT'S MOTIONS TO SUPPRESS PHYSICAL EVIDENCE, IDENTIFICATION, AND STATEMENTS, THEREBY DEPRIVING APPELLANT OF A FAIR TRIAL.

Police had no valid reason to detain James Campbell on December 29, 1986. All police had was speculation that the individual who committed the Bosler homicide (whether black or white, male or female) injured his or her hand. (T.597, 579, 1815, 1812). In responding as back-up to a radio call for Hearn's Market, Officers Toledo and Ray observed Appellant near the driver's side of an unoccupied police vehicle. (T.584, 600, 1816, 1817, 1538). Officer Ray stopped Appellant and spoke to him. (T.601). At the suppression hearing Officer Ray testified that he observed the Appellant look like he was breaking into the car, however, at trial Ray testified he could not tell if Appellant was trying the door or not (T.584, 1538) but that his suspicion was aroused enough to speak to Appellant. (T.1538). Later, when doing the records check, Officer Toledo told Appellant that if he had no outstanding warrants, he would be free to go. (T.605, 1820). When the records check was done it revealed two outstanding juvenile pick up orders: (1) Case No. 88-7447 issued on May 25, 1983 for second degree grand theft and burglary and (2) Case No. 78-10035 bearing the same date for a dependency case. (T.607).

Inez Fernandez, Supervisor from the Clerk's Office, Juvenile Division testified that the pick up orders were quashed on January 14, 1987. (T.623). She further stated that the Appellant's birth date was reflected on the files as April 7, 1966. (T.624). At the present time, she said, since the Clerk's office is short of space for files, the State Attorney is reviewing files where the child has reached the age of 19 and the cases are being nolle prossed and pick up orders are quashed. (T.625).

According to Officer Ray, Appellant told Ray his name, and that his date of birth was April 7, 1966. (T.587). After the check revealed the pick up orders, Toledo handcuffed Appellant and in doing so, noticed his hands were cut. (T.608). Toledo asked Appellant what happened and Appellant responded he had a fight and was cut. (T.608). Toledo placed Appellant in the rear of the patrol car and told Ray that he thinks they have the **Bosler** suspect. (T.609). Officer Ray looked at Appellant's hands and they transported Appellent to the Police Department. (T.591).

However, the only reason Toledo and Ray brought Appellant into the Police Station that day was because of the juvenile pick up orders. (T.593, 611). Toledo knew that Appellant's date of birth of April 7, 1966 made him 20 years old at the time of his arrest on the juvenile pick up orders. (T.612).

Sue Zann Bosler testified at the suppression hearing as to the crimes charged and that Detective Geller brought her a photo line up to see when she was a patient at Jackson Memorial Hospital and she identified the Appellant. **(T.639-642).**

Detective Jeffrey Geller testified at the suppression hearing as to Appellant's statements. **(T.663-675).** On January **13, 1987** he showed Sue Zann Bosler a photo line up and she said that the photo of Appellant "looks like him." **(T.682).**

Detective Vas testified at the suppression hearing that he interviewed Appellant per the request of Detective Geller (who had previously Mirandized him) and took a statement from Appellant. **(T.691-696).** Appellant also signed a Consent To Search (solely on juvenile pick up orders) his father's home at that time. **(T.697, 699).** Detective Vas came into contact with Appellant at approximately **4:00** P.M. **(T.691).** He spoke to Appellant approximately three and one-half hours. **(T.694).**

At the time of his confession, the Appellant was not free to go - he was in custody for the juvenile pick up orders and not the homicide at that time. **(T.715).**

Officer Rickey Smith went to Appellant's father's home on December **29, 1986** at 5:30-6:00 P.M. **(T.721).** Appellant's parents signed a Consent to Search form. **(T.723).** Police found a pair of tennis shoes on the back porch. **(T.787).** Appellant later admitted the crime to Smith as well. **(T.746).**

The Court took judicial notice of its file in the instant case with the orders it entered to have the Appellant's blood drawn and to have Appellant fingerprinted. (S.3-4).

Dr. Bruce Frumkin, Clinical Psychologist, testified that he examined Appellant to see if he had the ability to understand Miranda warnings. (S.9). Dr. Frumkin believed that Appellant probably understood the rights but that he would have difficulty understanding the nature of the rights, and therefore whether Appellant could intelligently waive his rights was another question. (S.10). Appellant has a low IQ of 68, a very poor understanding of vocabulary, knowing what words mean, poor judgment, is not good at abstract reasoning and has poor word recognition skills. (T.12). All of those things would make it very difficult for Appellant to understand complicated concepts. (S.12). Appellant's reading level was so low (lower than the third grade level) that the MMPI test could not be given to him validly. (T.23, 26). Appellant would not understand the implication of the right to remain silent. (S.37). The Motions to Suppress were denied, the Court finding Appellant made a knowing and intelligent waiver of Niranda. (S.46). As a result of the unlawful arrest of Appellant, the State obtained a confession and statements, a photo of Appellant to use in a line up, fingerprints to compare to those found at the scene, a Consent to Search Appellant's father's home where shoes and other physical evidence was retrieved, photos of

Appellant's hands, and blood to compare to blood at the scene. Without this unlawful detention and its fruits, the State did not even have probable cause to arrest Appellant much less evidence to prove up a case.

The first issue with regard to the Motions to Suppress is whether the initial detention and subsequent arrest of Appellant were lawful. In the case at bar the police admittedly had neither probable cause nor sufficient grounds for a valid stop of Appellant. This is demonstrated by the officer's testimony that absent the pick up orders, Appellant would not have been detained, and in fact that they told this to Appellant.

Initially, the officers could not tell what if anything Appellant was doing near the unoccupied police vehicle. He explained when asked, that he lost a shoe earlier and returned to retrieve it. Standing in back of a convenience store looking into the window of an unoccupied police vehicle is not a crime. Appellant's conduct did not constitute unlawful activities sufficient to give officers founded suspicion of criminal conduct to justify the stop of Appellant. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). As in Bailey v. State, 319 So.2d 22 (Fla., 1975) reh. den. 1975, the officers herein did not make an arrest of Appellant for any burglary of attempted burglary of a conveyance. In Bailey, police stopped a vehicle to inquire, made no traffic arrest,

then when questioning passengers observed marijuana near one of the passengers, and made an arrest which was held invalid by this Court. Likewise, in Coladonato v. State, 348 So.2d 326 (Fla., 1977) this Court held that where a police officer stopped a defendant on his own personal suspicion that illegal activity had been or was about to be committed; that after obtaining identification information a records check revealed a New Jersey warrant; and the officer, after placing the defendant under arrest learns that a local stereo store was burglarized and conducts an inventory search on the defendant's vehicle, the evidence seized should be suppressed as police may not arbitrarily or on a bare suspicion that someone is violating the law stop a vehicle. See also Kersey v. State, 58 So.2d 155 (Fla., 1952). This Court did not even treat the issue of the New Jersey warrant's validity in Coladonato. The initial stop was bad so the search and seizure was bad as well.

Pursuant to Section 901.151 ~~Fla. Stat.~~ (1969) police may temporarily detain an individual when they encounter such an individual "under circumstances which reasonably indicate that such person has committed, or is about to commit a violation of the criminal laws of this State...." This detention is for the purpose of ascertaining the individual's identity and the surrounding circumstances. If probable cause for arrest of the person then appears pursuant to Fla. Stat.

901.151(4) then the "person shall be arrested." If no probable cause appears the person should be released.

In the case at bar, no probable cause to believe Appellant was committing a burglary of the car arose. In fact, police testified that they told Appellant if the records check was negative they would not have detained him longer. Further, Appellant was not officially "arrested" for a crime according to police until after his confession. So that the initial stop was bad, but police, contrary to Coladonato, were permitted to use the evidence which flowed out of this initial bad detention against the Appellant at trial, in violation of Article I, Section 12 of the Florida Constitution, and the 4th and 14th Amendments of the Constitution of the United States.

The State attempted to justify the detention by the juvenile pick up orders, but this cannot stand. There were two pick up orders in the case at bar; one for a dependency case and the other for a delinquency case. Pursuant to Section 39.40(2) ~~Fla. Stat.~~ (1978) (as amended 1987) in dependency cases the Court loses jurisdiction when a child attains majority (18 years of age). In delinquency cases pursuant to Section 39.02 (4) ~~Fla. Stat.~~ (1981)the Court loses jurisdiction over the child when he or she attains 19 years of age.

This Court has held that where the juvenile court lacked the power to order a parent of a delinquent child to do an act

its contempt order against the parent was void as the Court attempted to act beyond its power. State v. S.M.G., 313 So.2d 761, 763 (Fla., 1975). Likewise, a juvenile pick up order, due to the jurisdictional mandates of Sections 39.02(4) and 39.40(2) Fla. Stat., is void when the child reaches 18 in the case of a dependency and 19 in a delinquency. The Juvenile Court does not have jurisdiction to enforce these pick up orders. The Legislature intended the powers of the Juvenile division to terminate when a child attained the age of 18 for a dependency and 19 for a delinquency. State v. A.N.F., 413 So.2d 146, 147 (Fla., 5th DCA, 1982). The Juvenile Court loses jurisdiction over a child who violated a law when under 19, once the child turns 19. State v. A.N.F., at 147-148. See also C.L.D. v. Beauchamp, 464 So.2d 1264 (Fla. 1st DCA, 1985) and Gore v. Chapman, 196 So. 2d 840, 143 Fla. 438 (Fla. 1940) where this Court held that since the Juvenile Court was created by statute its jurisdiction is limited to that mandated by the statute.

As a result of the foregoing, after the initial stop resulted in no belief by police that Appellant was committing a crime, he was then held on void pick up orders, as a pretence, since police saw cuts on his hands and at that very instance had a hunch, not more than a guess, that Appellant was involved in the Bosler homicide. Further, police knew the

pick up orders were issued in 1983 and that Appellant's birthdate was April 7, 1966 which made him 20 years of age at the time of this illegal detention and not subject to the jurisdiction of the Juvenile Court. Certainly police did not take Appellant to the juvenile detention facility, they took him to their homicide office.

The only similar cases found on the issue of a detention based upon a void warrant in Florida were at the District Court of Appeal level. In Albo v. State, 477 So.2d 1071 (Fla. 3d DCA, 1985) and Pesci v. State, 420 So.2d 380 (Fla. 3d DCA 1982). The Third District Court of Appeal held that:

> ...An arrest is invalid when the arresting officer acts upon information in criminal justice system records, which though correct when put into the records, no longer applies and which, through fault of the system, has been retained after the information should have been removed. Albo at pg. 1073.

In Albo, the defendant was stopped for a traffic infraction. A computer check revealed defendant's license was under suspension. In fact, Albo's license has been reinstated long before, but computers were not updated and did not include this fact. Albo was arrested and incident to the arrest police found a pistol concealed in his car. The Third District Court of Appeal held that the evidence must be suppressed. See also Martin v. State, 424 So.2d 994 (Fla. 2d DCA, 1983) where a warrant which was void at the time Appellant was arrested under same, could not validate an otherwise invalid arrest. The Second District Court of Appeal held:

> A void or nonexisting warrant cannot be the basis for a legal arrest and search. Eesci v. State, 420 So.2d 380 (Fla. 3d DCA, 1982). Martin v. State, at pg. 995.

In the case at bar, Appellant's detention (not even "arrest," according to officers, until after his confession), was based upon a void warrant that police should have known was void due to Appellant's age. As a result, Appellant's various Motions to Suppress should have been granted as the evidence obtained was the fruit of the poisonous tree." Wong Sun v. United States, 381 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed. 2d 441, 455 (1963), Alberty v. State, 13 F.L.W. 2635, 2636 (Fla. 3d DCA, December 6, 1988); State v. Contraras, 512 So.2d 339 (Fla. 3d DCA, 1987).

Virtually all of the State's evidence in the instant case flowed from Appellant's initial illegal detention. First, he confessed (the voluntariness of same is also objected to herein). The confession was used against him at trial. Next, he made various statements to various officers during his detention which also were admitted into evidence. He was fingerprinted as a result of this arrest and his blood was drawn by court order for comparison purposes. The comparison of his blood and blood at the scene came into evidence. His photo was taken (and his hands) and the subsequent line-up, photos, and out of court identification were introduced into evidence at trial. Finally, a Consent to Search stating it was based solely on (void) juvenile pick up orders enabled police to

gain entrance into Appellant's father's house and seize physical evidence there to be used at trial. Without all of these items, the State had no probable cause to detain Appellant for the Bosler case.

The trial court erred in permitting such police misconduct. To add to the taint of this entire episode, the trial court found that Appellant's confession was voluntary. (S.46). This was erroneous as well based upon the facts of this case. It was well established that Appellant's IQ is in the mentally retarded range, that he is incapable of thinking or reasoning abstractly and that his reading level is that of a third grader. Yet police allegedly obtained a written statement (which he supposedly read after supposedly understanding his Miranda warnings - except the right to remain silent warnings) and alleged that he read and understood (prior to signing) a Consent to Search form. It is submitted that the finding of a knowing, intelligent, voluntary waiver of Miranda in this case (particularly after several hours of detention and being handcuffed to a ring on the floor of the interview room at the age of 20) totally ignores the evidence and testimony of Dr. Bruce Frumkin, Ph.D. which was unrebutted by any State witness. This Appellant could not, due to his lack of intelligence, retardation, inability to understand anything above a third grade level when written, and the other coercive factors present in his case voluntarily waive his Miranda Rights. Therefore, the Motions to Suppress

should have been granted on this basis as well, for anything police obtained in the way of evidence came only as a result of the confession and Appellant's subsequent arrest.

To be admissible, the State must show a confession to be voluntary. DeConingh v. State, 443 So.2d 501, 503 (Fla., 1983) reh. den. 1983, cert. den. 104 S.Ct. 995, Brewer v. State, 386 So.2d 232, 235 (Fla., 1980) reh. den. 1980. This Court has held:

> If for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him. DeConingh at page 503.

A confession which is not the product of a free will renders that confession inadmissible. Townsend v. Bain, 72 U.S. 293, 308, 83 S. Ct. 745, 754, 9 L.Ed.2d 770 (1963).

The Supreme Court of the United States has also held:

> Waivers of Constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. U.S., 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed. 2d 747 (1970).

A confession can be rendered inadmissible due to mental coercion as well. Gaspard v. State, 387 So.2d 1016, 1021 (Fla. 1st DCA, 1980); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960); Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979); DeCastro v. State, 359 So. 2d 551 (Fla. 3d DCA, 1978); State v. Caballero, 396 So.2d 1210 (Fla. 3d DCA, 1981).

The Motions To Suppress should have been granted. This case should be reversed and remanded for a new trial without the improperly admitted evidence.

II.

THE TRIAL COURT ERRED BY REPEATING CERTAIN OF THE MURDER JURY INSTRUCTIONS ADDING UNDUE EMPHASIS TO THE GUILT ASPECT AND COMMENTS INADVERTENTLY IMPLYING THE COURT BELIEVED APPELLANT WAS GUILTY.

During the instructions to the jury, the Court first instructed the jury on first degree premeditated murder. (T.2282). Next the Court charged the jury with the first degree felony murder instruction. (T.2283). After instructing the jury once on first degree felony murder, the Court stated the following:

> Do you understand the distinction in first degree murder, premeditation? Premeditation you would need to prove, in first degree felony murder there is no need to prove premeditation. You must prove the commission of a felony.
>
> I'll read it again and again when I repeat the instructions. I by no means imply to you that I think there is some verdict that you find or that I'm leaning toward any particular definition or any particular count or charge. I'm only repeating because I want you clear in your mind.
>
> You are getting a bundle of law in a very brief time. That's the only reason that I'm repeating things, draw no implication whatever as to what the Court is thinking if I stress one portion of the instructions over another. It's for the purpose of your clarity.
>
> Repeating, in order to convict of first degree felony murder, it's not necessary for the State to prove that the defendant has a premeditated design or intent to kill.. .. (T.2284-2285).

Later, the Court instructed the jury on the attempted first degree murder. (T.2288). After reading the instruction,

the following occurred:

> I have just read to you the instruction on attempt to commit a crime, and this particular matter attempt to commit first degree murder. Let me read it again. (T.2288).

The Court reinstructed on attempt. (T.2289). The Court instructed the jury on the definition of a dangerous weapon. (T.2295). Immediately thereafter:

> Let me repeat the definition. A dangerous weapon is .... (T.2295).

The Court read the reasonable doubt instruction to the jury. (T.2297).

> Let me read this again. I see puzzled looks on your faces.
>
> A reasonable doubt is not a possible doubt or speculative doubt, imaginary doubt or forced doubt.
>
> That simply means the State is not required to prove someone guilty beyond any possible doubt, beyond any speculative doubt, beyond any imaginary doubt, beyond any forced doubt, beyond a shadow of a doubt. ... (T.2297-2298).

Prior to the jury retiring to deliberate the defense objected to the Court repeating the felony murder instruction and the reasonable doubt instruction. (T.2316). The Court over-ruled the objections. (T.2316).

In Beckham v. State, 209 So.2d 687, 688 (Fla. 2d DCA, 1968) a manslaughter charge was repeated. The Second District Court of Appeal held:

> We believe that this repetition, although inadvertent, was harmfully prejudicial to defendant's case and that it constitutes additional grounds for reversal. id. at 688-689.

The repetition of felony murder and attempt was harmful. However, the Court's choice of language "I by no means imply to you that I think there is some verdict that you find or that I'm leaning toward any particular definition or any particular count or charge," (T.2284), is also similar to the Court's language in Beckham where the Court instructed the jury:

> You are not to take from the Court's use of the phrase "scene of the crime" any indication on your part, nor should you derive from that statement any idea, inference or implication on the part of the Court that the Court feels that any particular crime has taken place. id. at 688.

The Court's comment above in the case at bar inadvertently did imply he believed the Appellant to be guilty but that he was not favoring any particular charge or count (as if a lesser included offense would be sufficient as well). Beckham, infra; Rawlerson v. State, 102 So.2d 281 (Fla., 1958).

This Court has held that the trial court should scrupulously avoid commenting on the evidence in a case. Whitfield v. State, 452 So.2d. 548 (Fla., 1984); Lee v. State, 324 So.2d 694 (Fla., 1st DCA, 1976).

In the case at bar the Court's comments, though inadvertent, deprived Appellant of a fair and impartial trial.

III.

THE TRIAL COURT ERRED BY PERMITTING AN EXPERT IN SEROLOGY TO TESTIFY ABOUT KNIFE SLIPPAGE OUTSIDE OF HIS AREA OF EXPERTISE OVER DEFENSE OBJECTION.

At trial Toby Wolson, testified as an expert in serology. (T.1787). He testified regarding knife slippage over defense objection. (T.1785-1794). The defense objected and moved for a mistrial on the basis of relevance, calling for speculation and that an expert in serology is not qualified to testify as to anything having to do with a knife or tool mark identification. (T.1793, 1796). Over defense objection the serologist was permitted to testify:

> A. Since there is a struggle present, it's not unusual for the person doing the stabbing to get their free hand and arm in the way of the knife being used. Again you have more blood left behind. (T.1796).

The serologist also testified that he has viewed the knife itself and the photograph of the knife. Then the following occurred:

> Q. How did that help you draw that conclusion?
>
> A. My knowledge, again as I said, how blood affects the instrument and what occurs frequently on those types of cases, from previous cases I worked.
>
> Q. And what in particular about that the knife, made you draw that conclusion?
>
> A. This is a butcher knife you find in your kitchen. This is designed for cutting food or whatever cooking object you have in mind. They don't have a hilt.
>
> Q. What do you mean a hilt?

A. A piece on the knife that goes against the blade and the handle that prevents your hands from moving forward on the blade.

Q. Okay, what about when I strike someone, would that -- could that cause an individual to cut himself?

A. Well, in situations with multiple stab wounds, the weapon tends to be covered with blood. During the process of stabbing the weapon may hit a hard surface, a breast bone or rib bone and what happens, the knife stabs abruptly because it is slippery in the hand and the hand will slide forward over the blade as I've seen in this type of case. Since the victim is struggling --

MR. CHAVIES: Object to the terminology this type of case. Once again, irrelevant to this case and calling for speculation. (T.1295-1296).

Expert testimony is permitted by Sections 90.702, 90.703 and 90.704 Fla. Stat. However, an expert in one field cannot testify in a field in which he does not have expertise, particularly after speaking to other police officers as part of the basis for his opinion (T.1791) which is inadmissible hearsay. ~~Fla.~~ ~~Stat~~. 90.801(2)(c); Bunyak v. Clyde J. Yancy, 438 So.2d 891 (Fla., 2d DCA, 1983); Everett v. State, 97 So. 2d 241 (Fla., 1987) cert. den. 355 U.S. 941 (1958). The trial court abused its discretion by permitting the testimony of the serologist on the issue of how the perpetrator may have cut himself.

IV.

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH FIRST DEGREE MURDER WHERE THE IDENTIFY OF THE DECEASED HAS NOT BEEN ESTABLISHED.

At trial, Charles Norman, IBM Security Administrator was called as a witness for purposes of identifying the deceased. (T.1639). He testified he knew the deceased for several years. (T.1639). He stated the deceased was Bill "Bowman". (T.1639). There was no objection by the defense. However, the identity of the victim is an essential element of the corpus delicti of any homicide.

The necessary elements of proof are: (1) The fact of death, (2) the criminal agency of another person as the cause thereof, and (3) the identity of the victim. Bassett v. State, 449 So.2d. 803, 807 (Fla., 1984) reh. den. 1984; Stone v. State, 378 So.2d 765 (Fla., 1979) cert. den. 449 U.S. 986 (1980). In the case at bar, Charles Norman identified the deceased as "Bill Bowman" not Bill Bosler whom the Appellant was charged with killing. Appellant's Motion for Judgment of Acquittal should have been granted as the identity of the victim was not properly established. See Terzado v. State, 232 So.2d 232 (Fla. 4th DCA, 1970) reh. den. 1970.

V.

THE TRIAL COURT ERRED BY FINDING FIVE AGGRAVATING FACTORS, NO STATUTORY MITIGATING FACTORS AND ONLY ONE NON-STATUTORY MITIGATING FACTOR, AND IMPOSING THE DEATH PENALTY.

During the penalty phase, the jury recommended imposition of the death penalty by a 9 - 3 vote. (T.2491). The trial court followed the jury's recommendation and found the following aggravating factors: (A) That Appellant was previously convicted of a felony involving the use or threat of force for a 1984 battery on a law enforcement officer and also for the contemporaneous conviction of attempted first degree murder of Sue Zann Bosler. (T.2505-2506). (B) That the capital felony was committed while Appellant was engaged in an armed robbery and armed burglary (T.2507-2508); (C) That the capital felony was committed for pecuniary gain (T.2509); (D) That the capital felony was especially heinous, atrocious and cruel (T.2509-2510); and (E) That the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (T.2511-2512).

Notwithstanding the Appellant's age and testimony of psychologists, the Court found no statutory mitigating factors and only one non-statutory mitigating factor, to wit: numerous letters from church members and testimony from the deceased's

daughter Sue Zann Bosler, asking that the death penalty not be imposed due to their religious beliefs. (T.2518-2519). The trial court erred by the findings as outlined below:

A) Findings that Appellant was previously convicted of a felony involving the use or threat of violence to the person (for a 1984 battery on a law enforcement officer and also for the conteinporaneous attempted first degree murder of Sue Zann Bosler).

In 1984, when Appellant pled no contest to battery on a law enforcement officer, he was still a minor.

While as recently as October 20, 1988 this Court has held that contemporaneous prior convictions involving another victim may be used as aggravation (See LeCroy v. State, 13 FLW 628, 630 (Fla. Oct. 20, 1988), the trial court in the case at bar erred when it also considered the 1984 battery conviction.

B) Finding that the capital felony was committed while Appellant was engaged in armed robbery and armed burglary and the finding that the capital felony was commited for pecuniary gain should have been considered as one aggravating factor rather than two. The desire for pecuniary gain should have merged with the robbery and burglary as both of those crimes by definition are for pecuniary gain. See Rogers v. State, 511 So.2d. 526 533 (Fla., 1987) reh. den. 1987, ~~cert. den.~~ 108 S. Ct. 733 where it was noted that the pecuniary gain circumstance even if applicable to Rogers would have merged with

flight circumstance. See also Riley v. State, 366 So.2d 19 (Fla., 1978). The finding of two aggravating circumstances rather than one in this situation constitutes impermissible "doubling" which this Court prohibited in Provence v. State, 337 So.2d 783 (Fla., 1976). It was the use of the "same aspect of defendant's crime" to support two different aggravating circumstances which was prohibited. The trial court erred by considering the above as two separate aggravating circumstances rather than only one.

C) The findings that the capital felony was especially heinous, atrocious or cruel and that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

At the most, these two factors should have been treated as one to avoid "doubling," however, neither of these circumstances were properly found in the case at bar.

The words "heinous," "atrocious" and "cruel" do not on their face offer sufficient guidelines to the jury and are vague, and overbroad and therefore violative of Eighth, Fifth and 14th Amendments to the Constitution of the United States and Article I, Section 17 of the Florida Constitution, and this Court has not adopted a limiting construction that cures this infirmity. In Maynard v. Cartwright, 486 U.S. , 100 S.Ct. 1853, 100 L.Ed.2d 372 (1988) the Supreme

Court of the United States held the Oklahoma death penalty statute, referring to "expecially heinous, atrocious, or cruel" murders unconstitutionally vague as applied. In Maynard, the defendant entered a couple's home, shot the wife twice with a shotgun, shot and killed the husband then slit the wife's throat and stabbed her twice. He was convicted of the first degree murder of the husband. The Supreme Court held the identical wording to the Florida statute violation of the Eighth Amendment of the Constitution of the United States. See also Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 (L. Ed. 2d 398 and Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972). See also Schafer v. State, Case No. 70,834 (Fla., January 19, 1989).

As noted in the Stetson Law Review, Spring 1986, Vol. XV, No. 2, "Review of Capital Cases," by Neil Skene:

> Despite the Supreme Court's protestations that "an ordinary man would not have to guess at what heinousness means," it would be extraordinarily difficult to determine from the last 12 years' opinions what murders are or are not heinous. ...

This factor is vague and has been applied unevenly, amounting to a denial of due process and equal protection under the Constitutions of the United States and Florida.

This aggravating factor has been held to be improperly applied where the victim suffered before dying. Teffeteller v. State, 439 So.2d 840 (Fla., 1983) cert. den. 465 U.S. 1074 (1984). The infliction of several stab wounds on a victim

who lives and is taken to three hospitals before he dies was also held by this Court not to fall within this category. Demps v. State, 395 So.2d 501 (Fla., 1981) cert. den. 454 U.S. 933 (1981). If this factor did not apply to Demps, it certainly should not be applied in the case at bar. A death accompanied by a beating has been held not to fall within this aggravating circumstance. Rembert v. State, 445 So.2d 337 (Fla., 1984). The case at bar does not rise to the level of other cases where this Court found the heinous, atrocious or cruel aggravating factor.2 It is also as a result of the uneven application of this circumstance that this aggravating factor is unconstitutionally vague.

Likewise, the "cold, calculated and premeditated" aggravating circumstance should not be applied to the facts in the case at bar. The evidence does not rise to the level of heightened premeditation exceeding a premeditated first degree murder which is necessary to support this aggravating circumstance. Smith v. State, 575 So.2d 182, 185 (Fla., 1987) reh. den. 1987, cert. den. 108 S.Ct. 1249; Hardwick v. State,

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2 See for example, Rutledge v. State, 374 So.2d 975 (Fla. 1979), cert. den. 435 U.S. 1004 (19781, mother and three children tortured and butchered while husband returned home to find them; King v. State, 390 So.2d 315 (Fla. 1980), cert. den. 450 U.S. 989 (1981), where defendant tore victim's vagina with knitting needles and caused burns, bruises, brain hemorrhage, stab wounds and broken neck during rape murder; Atkins v. State, 11 F. L. W. 567 (Fla. Oct. 30, 1986), where 6 year old child taken to wooded area, knocked unconscious and beaten again and left on seldom traveled dirt road to die, with broken jaw and teeth, 30 blows on head and neck, blood in his stomach; Scott v. State, 11 F. L. W. 505 (Fla. Sept. 25, 19861, where random victim picked up and beaten, brought him to isolated place, beaten again and ran over victim with car.

461 So.2d 79 (Fla., 1984) cert. den. 471 U.S. 1120 (1985); Rogers v. State, 511 So.2d 526 (Fla., 1987) reh. den. 1987, cert. den. 108 S. Ct. 733; Herring v. State, 446 So.2d 1049, 1057 (Fla., 1983) cert. den. 469 U.S. 989 (1984) and Schafer v. State, infra. There was no evidence of calculation or premeditation in the case at bar to satisfy this aggravating circumstance.

D) The trial court erred by failing to find statutory mitigating factors including that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

In the case at bar, there was much psychological testimony that the Appellant had mental problems. Both Dr. Frumkin and Dr. Toomer testified that Appellant has an IQ in the mentally etarded range. (T.2397), 2424); that he does not abstractly reason well. (T.2400, 2425); that he has a chronic drug and alcohol abuse problem. (T.2402, 2428); that his reading level is third grade (T.2399) and that he suffers from boarderline personality disorder. (T.2429). He also has chronic emotional problems. (T.2403). This testimony was unrefuted. Due to this the trial court should have found these two mitigating cirumstances applicable. Huckaby v. State, #$# So.2d 29, 33-34 (Fla., 1977), Jones v. State, 332 So.2d 615, 619 (Fla., 1976); Mines v. State, 390 So.2d 332 (Fla.,1980) cert. den.101 S.Ct. 1994; Holmes

v. State, 429 So.2d 297 (Fla., 1983) Burch v. State, 343 So. 2d 831 (Fla., 1977), State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. den. 416 U.S. 943 (1974).

E) The trial court failed to consider Appellant's age (coupled with his mental retardation IQ level) in mitigation. The Appellant was 20 when the crimes were committed. This Court has found the age of 19 to be properly considered in mitigation. Gafford v. State, 387 So.2d 333 (Fla., 1980). The Court in the case at bar heard evidence of Appellant's abused childhood. Additionally, the death penalty is inappropriate where the Appellant is 20 years of age but has mental problems including an IQ of mentally retarded and severe emotional problems resulting in the prescription of anti psychotic medication. Applying the death penalty in such a case is violative of the 8th and 14th Amendments to the Federal Constitution and Article I Section 17 of the Florida Constitution. See LeCroy v. State, 13 Fla. 628, 631 (Fla., October 20, 1988) dissenting opinion of Justice Barkett. While in age Appellant was not a child, his mental status should have been considered in concert with his age by the trial judge.

F) The sentence of death in the case at bar is not proportionate. Herring v. State, 501 So.2d 1279 (Fla., 1986) reh. den. 1987; Banda v. State, 13 F.L.W. 709 (Fla. December 8, 1988); Caruthers v. State, 465 So.2d 496, 499 (Fla., 1985) citing Booker v. State, 441 So.2d 148 (Fla., 1983).

Based upon the foregoing, in the very least this cause should be remanded for a resentencing to life.

VI.

THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of the United States in Gregg v. Georgia, 96 S. Ct. 2971, 428 U.S. 153, 49 L. Ed 2d. 859 (1976), held that mandatory infliction of the death penalty constitutes cruel and unusual punishment. While Appellant is not unmindful of Profitt v. Florida, 428 U.S. 242 (1976), and all of this Court's opinions on the issue, he would respectfully raise this issue once again. In the case at bar, the testimony of the psychologists agree that the Defendant suffers from boarderline personality disorder and tests out to be mentally retarded. To impose the death penalty on one in need of treatment for such a disorder is truly cruel and unusual punishment in the real sense of the words. The sentence should be vacated as the death penalty in Florida constitutes cruel and unusual punishment as applied herein.

VII.

THE DEFENDANT DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL DUE TO THE CUMULATIVE PREJUDICIAL EFFECT OF THE TOTALITY OF ERRORS COMPLAINED OF HEREIN.

Due process requires a fair hearing. Art. I, Sec. 9, Declaration of Rights, Florida Constitution; Fifth and Fourteenth Amendments to the U.S. Constitution. Driessen v. State, 431 So.2d 692 (Fla. 3d DCA, 1983); State v. Steele, 348 So. 2d 398 (Fla. 3d DCA, 1977); Crosby v. State, 97 So. 2d 181 (Fla. 1957).

In the case at bar, the Defendant was deprived of a fair trial when the State was permitted to use the fruits of an unconstitutional arrest; the jury was repeatedly instructed on felony murder, the identity of the deceased was improperly established all of these errors, any of which alone constitutes a valid reason for reversal, certainly taken together deprived the Defendant of a fair and impartial trial. The judgment and sentence should be vacated and the cause remanded for a new trial.

CONCLUSION

Based upon the foregoing reasons and authorities, the judgment and sentence should be vacated and the cause remanded for a new trial. In the very least, the sentence of death should be vacated and the cause remanded for a resentencing.

Respectfully submitted,

MAY L. CAIN
Special Assistant Public Defender
Suite 401
11755 Biscayne Boulevard
North Miami, Florida 33181
Telephone: (305) 893-2246

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial Brief of Appellant was mailed to MICHAEL NEIMAND, Esquire, Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida 33128, and to JAMES CAMPBELL, Florida State Prison, P.O. Box 747, R-2-N-2, Starke, Florida 32093, this 31st day of January, 1989.

MAY L. CAIN