IN THE SUPREME COURT OF FLORIDA

JAMES PATRICK BONIFAY,

Appellant,

vs. CASE NO. 78,724

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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904 - 438-3973

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STATEMENT OF CASE AND FACTS

I. Statement of Case

Appellant, James Patrick Bonifay, was indicted by an Escambia County grand jury for first degree murder, robbery with a firearm, and grand theft. The indictment charged appellant with the premeditated murder or felony murder of Billy Coker, the robbery with a firearm of Billy Coker, and grand theft of the property of Billy Coker as owner or custodian[1]. The crimes were alleged to have occurred in Escambia County, Florida, on or about January 26, 1991 (R. 534-535). Appellant was tried by jury and the jury found the Defendant guilty as charged on July 17, 1991 (R. 567-568). This verdict was viewed by the Court on July 17, 1991 and sealed until July 19, 1991 when the verdict was published in open court (R. 372-382). On July 19, 1991 the jury recommended by a vote of

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[1] Three Co-defendants were also charged in that indictment with the same offenses, to-wit: Larry Edwin Fordham, Clifford Edward Barth, and Robin Lee Archer (R. 534). The Co-defendant, Larry Edwin Fordham, was sentenced to life imprisonment, without possibility of parole for twenty-five (25) years on the charge of first degree murder, to a concurrent sentence of seventy-five (75) years in state prison on the robbery with a firearm charge, and to a concurrent sentence of five (5) years in state prison on the grand theft charge (Appendix, p. 1). The Co-defendant, Clifford Edward Barth, was sentenced to life imprisonment without possibility of parole for twenty-five (25) years on the charge of first degree murder, and to concurrent sentences of five (5) years each in state prison on the charges of robbery with a firearm and grand theft (Appendix, p. 8) The Co-defendant, Robin Lee Archer received an identical sentence to the appellant (Appendix, p. 14).

The appeal of Larry Edwin Fordham is pending before the First District Court of Appeal (Docket No. 91-3115). Clifford Edward Barth did not file an appeal. The appeal of Robin Lee Archer is pending before this Court (Case No. 78,701).

ten to two that the court impose the death penalty on appellant, James Patrick Bonifay (R. 481, 575). On July 25, 1991 the appellant filed a Motion for New Trial and that motion was denied by the court on (R. 576-577, 603-604). On September 20, 1991 Circuit Judge Lacy A. Collier adjudged appellant guilty of first degree murder and sentenced him to death (R. 615, 631, 633). Appellant was also adjudged guilty of robbery with a firearm and sentenced to a term of natural life to run consecutively to the death sentence, and additionally appellant was adjudged guilty of grand theft and sentenced to a term of five years to run consecutively to the sentence for robbery (R. 615-617, 631, 634-636).

A Notice of Appeal was filed to this Court on October 4, 1991 (R. 638) and by notice of this Court dated March 11, 1992, the appellant's brief is to be served by May 5, 1992.

II. Facts

A. "Guilt" Phase

The crimes occurred on or about January 26, 1991 in a Pensacola business, Trout Auto Parts. The witnesses who testified for the State of Florida are as follows:

(1) Carl Chapman, Escambia County Deputy Sheriff, Patrol Officer
(2) John Wilkinson, Escambia County Deputy Sheriff, Crime Scene Identification Officer
(3) Robert A. Taylor, Escambia County Deputy Sheriff, Identification Division
(4) Thomas Allen Eaton, General Manager, Trout Auto Parts
(5) Daniel Ray Wells, Trout Auto Parts Employee
(6) Jennifer Morris Tatum, Acquaintance of Appellant
(7) David Kelly Bland, Acquaintance of Appellant
(8) Thomas L. O'Neal, Escambia County Deputy Sheriff, Homicide Investigator

(9) Allen H. Cotton, Escambia County Deputy Sheriff, Homicide Investigator
(10) Clifford Edward Barth, Co-Defendant

(11) Gary Dean Cumberland, Medical Examiner's Office, Forensic Pathologist
(12) Joseph Michael Hall, Florida Department of Law Enforcement, Crime Laboratory Analyst

The pertinent facts and circumstances, as related by these witnesses, are as follows:

Carl Chapman, Escambia County Deputy Sheriff, Patrol Officer

At 12:09 a.m. on January 26, 1991 he was dispatched to Trout Auto Parts, and that he entered the building and found the victim lying behind the counter on the floor. He called for Identification, Investigations and Supervisor, and Emergency Medical Services and turned the scene over to Officer Wilkinson (R. 136-139).

John Wilkinson, Escambia County Deputy Sheriff, Crime Scene Identification

He arrived at Trout Auto Parts at approximately 12:20 a.m. on January 26, 1991 and observed the victim lying on the floor behind the counter. He took certain items into evidence and took certain photographs of the scene. Photographs of the victim and the scene were identified by the witness, published to the jury, and introduced into evidence (R. 139-156).

Robert A. Taylor, Escambia County Deputy Sheriff, Identification Division

He received four projectiles from Dr. Cumberland at the autopsy that were taken from the body of of the victim, Billy Coker. He measured and weighed the projectiles and determined that they were probably .32 caliber projectiles (R. 157-162).

Thomas Allen Eaton, General Manager, Trout Auto Parts

He said a mondey drop was made from other stores on weekends, that a security box kept petty cash until the next day, and that the cash drawers were secured by padlocks. He identified at trial a ceiling mounted camera located in the store from a photograph On the date of the murder, he retrieved a tape from the surveillance camera and gave it to Investigator Tom O'Neal. Approximately $3,500.00 was taken from the store during the robbery in question. Billy Coker, the victim, was a full-time employee of Trout Auto Parts and had worked there one year prior to his death. Robin Archer had previously been an employee at the same Trout Auto Parts store (R. 177-184).

Daniel Ray Wells, Trout Auto Parts Employee

At 11:55 p.m. on January 24, 1991, someone came to the night window box and ordered a clutch disk, pressure plate, and a throw-out bearing for a 1985 Nissan truck. He was kind of spooked and only pretended to wait on this customer. This person had on gloves although it wasn't cold outside and that he heard a sound that he thought was the cocking of a gun. He told this person to check back tomorrow and the person grabbed his right glove that was in the window and took off down the sidewalk. He didn't go to work as scheduled on January 25, 1991 due to illness. He identified the appellant, James Patrick Bonifay, as the person who came to the night window box on the night of January 24, 1991. He knew Robin Archer from going to school at Coastal Training Institute and from working with him at Trout Auto Parts. He did not know the

appellant, James Patrick Bonifay.

He had problems with Robin Archer, co-defendant of the appellant. Robin Archer indicated to him that he took care of his problems with a pistol that he was wearing at the Trout Auto Parts store. He suggested to his superior that Robin Archer be fired from his employment with Trout Auto Parts. Robin Archer didn't show up for work, had a bad attitude toward customers, wasn't cut out to sell parts or work with the public and he suspected Robin Archer of selling drugs. He worked with Robin Archer for about four or five months.

He identified a State's exhibit as being a photograph of the victim, Billy Wayne Coker (R. 184-195).

Jennifer Morris Tatum, Acquaintance of Appellant

She knew the appellant from school and also knew the co-defendant, Eddie Fordham. She had seen the appellant and Eddie Fordham together. The weekend before she learned about the murder and robbery at Trout Auto Parts and heard the appellant asking her boyfriend, Kelly Bland, where the gun was.

The appellant told her in person that he did the murder at Trout Auto Parts. The details of the offenses as related this witness were as follows: Cliff, (co-defendant, Clifford Edward Barth), and the appellant went through the window at Trout. Cliff had the gun and the appellant told Cliff to shoot him (victim, Billy Coker) because he saw the appellant's face. Cliff refused and gave appellant the gun and appellant shot him. The victim, Billy Coker, was screaming out, "please don't shoot me, I have a

wife and kids". The appellant stated that he was going to rob the store, "just to get money", and that all three of them (appellant, co-defendant, Clifford Edward Barth, and co-defendant, Larry Edwin Fordham) got some money.

She talked with appellant a few more times and that he "said he did it" and that his mom knew and that she doesn't care. She notified a police agency (R. 198-207).

Kelly Bland, Acquaintance of Appellant

Appellant came to him and asked if he could borrow a gun so that he could shoot it out at the pond at the witness's cousin's house, co-defendant, Clifford Edward Barth. The appellant knew co-defendant, Robin Lee Archer, and Bland thought that they were cousins. He gave his pistol to Robin Archer, he believed on the Thursday before the robbery and murder at Trout. Appellant gave him the gun back and that "they" gave him a box of ammunition on a Wednesday. Later on, a bag and a shirt were left in his car, and at some time he got back bolt cutters.

On the Thursday or Friday after it happened the appellant told him what happened at Trout. The facts as related by that conversation are as follows: "They" went to Trout and appellant shot a guy with the gun. Appellant first reached through the window and shot the guy through the side and then appellant crawled through the window and shot him in the chest. As they were leaving, appellant shot the victim in the head. The victim was pleading for his life, he said he had a wife and two kids, not to kill him, and appellant said, "F your wife and kids", and shot him.

He hid the pistol in the woods, put the bolt cutters in the shed, and left the bag and shirt in the car. He eventually gave the gun, the bag, the backpack, shirt, ammunition, and the bolt cutters to Officer Tom O'Neal. He first lied to Officer O'Neal because he was afraid of going to jail and that he told him the gun was thrown off a bridge.

The appellant told him to threaten to hurt the co-defendant, Larry Edwin Fordham, if he talked about what happened at Trout, and that the witness did so. At first he lied and told law enforcement that he gave the gun to appellant, when he, in fact, had delivered it to co-defendant, Robin Lee Archer (R. 208-222).

Thomas L. O'Neal, Escambia County Deputy Sheriff, Homicide Investigator

The testimony of this witness was first proffered to the Court and later in the trial the witness was recalled to give testimony. He was called to Trout Auto Parts store in the early morning hours of January 27, 1991 and he arrived and observed Mr. Coker on the floor between the parts counter and the inventory directly behind where the parts counter is near the parts window. He talked with Jennifer Morris and based on that information and some other information, he prepared a warrant affidavit, and while he was having a warrant signed by a judge, investigators Martin and Cotton took the appellant into custody.

He interviewed the appellant at the Escambia County Sheriff's Office after advising him of his rights and after the appellant signed the rights form. The appellant was not threatened nor was he promised anything.

Officer O'Neal identified the tape that he stated was a recording of the interview with the appellant taken on February 11, 1991 at 9:07 p.m. and that tape was played to the jury. A summary of the contents of that taped interview of the appellant is as follows: The appellant's cousin, Robin Archer, wanted him to do a hit on a person that worked at Trout Auto Parts because that guy had gotten Robin Archer fired. Robin Archer told him to kill the man by shooting him in the head. He and co-defendants, Clifford Edward Barth and Larry Edwin Fordham went to Trout on Friday night in Eddie Fordham's automobile. He got out of the car with the gun but he couldn't shoot the man and he came back to the car and they left. He saw Robin Archer the next morning (Saturday) and Archer bitched at the him because he didn't do it and told the appellant that the man was going to be there tonight and for the appellant to do it. There was suppose to be a lot of money in it for him if he did it.

He and Clifford Edward Barth and Larry Edwin Fordham, returned to Trout on Saturday night in Eddie Fordham's father's automobile. He was going to put on his ski mask and just point the gun at the victim, but before he could do that, the victim turned around and looked him in the face. He pointed the gun at the victim after the victim turned around and he got ready, not to kill the victim, but to shoot him and Clifford Edward Barth grabbed him and the gun went off. Clifford Edward Barth yelled that the appellant didn't kill the victim and Barth took the gun and shot the victim again. Then he and Clifford Edward Barth put the ski masks on and went through

the window. The victim was saying things such as he had kids and all and please don't shoot him. He cut the locks off while Barth held the gun and then Barth told him to kill the victim. He took the gun from Barth and stuck it to the victim's head and turned the other way as he pulled the trigger. Barth then hollered, "Patrick, he ain't dead," so he shot him again. They left Trout and got back in the truck driven by Larry Edwin Fordham, and he pulled the gun on Barth and yelled at him, why did he have to holler his name, that he didn't have to kill the man. He wasn't really worried about the victim seeing his face because it was dark outside. Robin Archer set the whole thing up, told him where to do, what to do, how to do everything. The gun used came from David Kelly Bland and he informed the officers that he gave the gun back to Bland, along with the bullets that were left in the box. He and Barth and Fordham shared the money taken from Trout. He asked the officers to make sure his family and girlfriend were protected and one of the officers stated that they had advised him they would do the best, everything they could.

After the playing of the tape, Officer O'Neal identified a gun, partial box of ammunition, and bolt cutters as being items he received from Kelly Bland. He also said that Tim Eaton handed him a tape recording from the Trout store security VCR.

Officer O'Neal stated that the appellant had been crying prior to the taping of the interview and that also prior to the taping, the appellant expressed a fear for his family from Robin Archer.

He identified State's exhibit #10 as the security tape from

Trout Auto and that tape was introduced into evidence and published to the jury. He described the operation of the security camera and, over objection of the defense counsel, interpreted for the jury some of the contents of the film (R. 257-262).

Allen H. Cotton, Escambia County Deputy Sheriff, Homicide Investigator

The appellant cooperated with him in riding around with him and showing him the location of items taken from or used during the robbery. The appellant cooperated by giving a statement regarding the events that took place. Both before and after the recorded statement given by the appellant he expressed fear that Robin Archer would harm his family, his mother and sister. Officer Cotton said that the appellant showed emotion and cried throughout the interview process (R. 253-256).

Clifford Edward Barth, Co-defendant

He testified that he was friends with the appellant and had met him through the witness's cousin, Kelly Bland, in July or August, 1990. The appellant first mentioned the robbery of Trout Auto to him on the Thursday before it took place. He, Patrick Bonifay, and Eddie Fordham went to Trout Auto on Friday night to rob the store and for Bonifay to shoot the clerk if he had to, that the clerk wasn't really supposed to be shot. Bonifay walked to the window at Trout Auto and came back to the car and told him and Eddie Fordham that he couldn't do it because the guy heard him cock the gun, and the guy hurried up and closed the window.

He saw Bonifay and the next day and they talked about going back to Trout Auto and that Bonifay and Fordham left to buy bullets

and returned to the his house around 10:30 or 11:00 p.m. The appellant, Bonifay, went up to the window and shot the man and motioned for him to come out and then the appellant shot the man again. He carried the bolt cutters in and the appellant cut the locks. The man working in the store was talking about don't kill him and he had kids and a wife and said he wouldn't say nothing to the police. The man related the fact that he had a boy and a girl and gave their ages. Bonifay told the victim to shut the fuck up and fuck his kids. The appellant shot the victim two more times and that they left and counted and divided the money taken from Trout Auto. He received $700.00, Bonifay $700.00, and Fordham in excess of $600.00.

Clifford Barth was giving testimony in hopes of avoiding the death penalty or a life sentence. Bonifay said that after Friday night that he had a conversation with Robin Archer and that Archer was upset with Bonifay because he didn't do it Friday night. Barth denied shooting the victim once (R. 265-287).

Upon recall, Barth identified the bag (State's exhibit #9) and the bolt cutters (State's exhibit #8) that had been marked for evidence. He also identified Bonifay as the person who shot Billy Wayne Coker (R. 304-306).

Gary Dean Cumberland, Medical Examiner's Office, Forensic Pathologist

Cumberland, a forensic pathologist, performed an autopsy of Billy Wayne Coker on January 27, 1991. Mr. Coker had two gunshot wounds to the left side of his head and one to the abdominal region and one to the back side of his left shoulder. He removed four

bullets and turned them over to Officer Kennedy. His opinion was that the victim died from the four gunshot wounds that he received and that the wounds to the head would have rendered the victim unconscious instantaneously and that he would have died within minutes. He identified State's exhibit #11, marked for evidence as being a photograph of the person that he performed the autopsy on and that was identified to him as Billy Wayne Coker (R. 287-294).

Joseph Michael Hall, Florida Department of Law Enforcement, Crime Laboratory Analyst

The witness, a crime laboratory analyst, testified that the pistol in question (State's exhibit #6) fired the projectiles taken from the body of the victim (State's exhibits #3-A, B, C & D). He further stated that the firearm had normal trigger pull (R. 295-302).

The defense presented no witnesses or evidence during the guilt phase.

B. Penalty Phase

The State presented no additional evidence at the penalty phase of the trial. The appellant called three witnesses to provide mitigation:

(1) Theresa Crenshaw, Mother of the Appellant
(2) James Patrick Bonifay, Appellant
(3) J.J. Crater, Forensic Counselor

Theresa Crenshaw, Mother of the Appellant

Ms. Crenshaw testified that the appellant, her son, Patrick Bonifay, the appellant, was seventeen (17) years old. His father

was very violent and hateful and beat on him a lot. She became aware of sexual abuse of Patrick by his father. She then took him to Lakeview Center for counseling and those records were introduced into evidence. Patrick had problems in school and was placed into the emotionally handicapped program, was diagnosed as being hyper, having an attention deficit disorder, and took Ritalin. She stated further that Patrick was attending night school at Escambia High School at the time of his arrest. She stated that she felt that her son could be rehabilitated and could be a productive member of society.

On cross-examination, over objection of defense counsel, Ms. Crenshaw testified that she was aware of trouble that the appellant had been in that occurred in Mississippi that involved injury to someone and trouble that the appellant had been in that occurred in Pensacola in the previous twelve (12) months (R. 406-417).

James Patrick Bonifay, Appellant

The Appelant testified that Robin Archer is his 24 to 26 year old cousin and that Archer furnished him with drugs. He was afraid of Archer and his drug dealing associates. He was suppose to kill the man at Trout Auto for money on Friday night but couldn't do it. The next day Archer was yelling at him and telling him that you don't back out and had better do it. He told Archer, no, and Archer asked if he liked his mother and girlfriend, which meant to the appellant that Archer would kill them if he didn't do it.

He smoked a joint of marijuana laced with cocaine that was furnished to him by Archer prior to going to Trout Auto. His ears

were ringing from the gun fire and all he heard the victim say was kids and he told him to be quiet.

He told the Sheriff's Department officers what happened about Robin Archer's involvement, and showed Officer Cotton where to find evidence. He testified for the State in their case against Robin Archer (transcript of that testimony R. 486-532).

His father hit him and sexually abused him, including performing oral sex on the appellant.

On cross-examination, the appellant testified, over objection of defense counsel, that he had been involved in a burglary in which someone was stabbed. The appellant testified that he was real sorry about the victim being dead.

On redirect examination, he testified that he had no problems at the jail and had gotten no disciplinary restrictions.

J.J. Crater, Forensic Counselor

Crater is a forensic counselor employed by Lakeview Center and works at the Escambia County Jail. She stated that the appellant had nightmares and a lot of trouble sleeping. She said that she saw the appellant regularly, checked his jail records, and that he had no disciplinary restrictions while in jail and that the appellant had gotten along very well with the other inmates regardless of where he was housed, regardless of race, size, or part of town that other inmates lived in. She stated that this was unusual for juvenile inmates and that there are usually a lot of conflicts between juveniles.

C. Sentencing

The Court, in imposing the death penalty, found four statutory aggravating circumstances proven beyond a reasonable doubt as follows:

(1) The capitol felony was committed while the appellant was engaged or was an accomplice in the commission of a robbery.

(2) The capitol felony was committed for financial gain.

(3) The capitol felony was especially heinous, atrocious and cruel.

(4) The capitol felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

The Court found the age of the appellant, 17 years, to be a statutory mitigating circumstance. As a non-statutory mitigating circumstance, the Court found that the appellant had an unhappy childhood. As part of that circumstance, the trial court related that appellant claimed incestuous sexual abuse and other physical punishment, and found that the appellant was shuffled from home to home, with little family stability (R. 606-615, 621-627).

SUMMARY OF ARGUMENT

This appeal presents seven issues.

1. Improper admission of appellant's recorded statement

Under the "totality of the circumstances" test, the appellant's confession was not freely and voluntarily made where:

(1) the appellant was 17 years old;

(2) he gave the statement without the advice of a parent or attorney;

(3) he was emotionally upset and in fear for his family prior to and during the giving of the statement; and

(4) the interrogating officers made a promise to appellant that induced him to give the statement.

2. Improper Finding of Especially Heinous, Atrocious, or Cruel

This killing was not especially heinous, atrocious, or cruel when the robbery-murder took a short period of time, when the victim died quickly from gun shot wounds, and there were no additional or torturous acts by the appellant.

3. Improper doubling of aggravating factors

The aggravating factors of a capital felony committed during a robbery and a separate finding of a capital felony committed for financial gain should merge under the facts of this robbery-murder case.

4. Improper rejection of non-statutory mitigating circumstances

This record clearly shows that the appellant cooperated with law enforcement and the office of the state attorney, by giving a full confession, leading law enforcement to evidence, and by testifying for the State against a co-defendant.

5. Improper rejection of non-statutory mitigating circumstance

The record clearly shows that the appellant had an excellent record for good behavior and attitude while incarcerated awaiting trial in this matter.

6. Improper admission of evidence in penalty phase

The trial court erroneously allowed the State to introduce evidence of prior criminal activity by the appellant through the guise of "impeachment of the credibility" of a witness.

7. This death sentence is disproportional

The trial court erred in sentencing to death the appellant, who was 17 years old, had an unhappy childhood including incestuous sexual abuse, who was emotionally handicapped, who was cooperative with law enforcement, and had an excellent record of good behavior and attitude during his pre-trial incarceration under the circumstances of this case, which involve a robbery-murder in which the victim died quickly from gunshot wounds, and there were no additional torturous actions by appellant.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL PRIVILEGE AGAINST SELF INCRIMINATION BY ADMITTING OVER DEFENSE OBJECTION THE APPELLANT'S TAPE RECORDED CONFESSION INTO EVIDENCE.

It is a violation of the appellant's privilege against self incrimination guaranteed under the Fifth Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment of the United States Constitution and Article I, Section 9, of the Florida Constitution and a violation of the appellant's right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution for a trial court to admit into evidence a confession that is not freely and voluntarily given. Mallory v. Hogan, 378 U.S. 1, 12 L ed 2d 653, 845 S. Ct. 1489 (1964). Under the test of "totality of the circumstances"[2] several factors or circumstances combine in this case that should have resulted in a ruling by the trial court that this statement was not freely and voluntarily made. First, the appellant was a juvenile, age 17 years. The youth of a defendant is a factor to be considered in determining the voluntariness of a statement, Gallegos v. Colorado, 370 U.S. 49, 8 L ed. 2d 325, 82 S. Ct. 1209 (1962), Haley v. Ohio, 332 U.S. 592, 92 L ed 224, 68 S. Ct. 302 (1948). The court in Gallegos, citing Haley, stated as follows:

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[2] Schneckloth v. Bustamonte, 412 U.S. 218, 36 L Ed. 2d 854, 93 S. Ct. 2041 (1973).

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. Id. at 328. He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. Id. at 329.

The District Court of Appeal of Florida, Third District, in suppressing a confession on the basis of an illegal arrest, stated as follows:

> Of foremost importance is the simple fact that B.S. was a seventeen year old juvenile. Youth has been held almost necessarily to involve a vulnerability to the wishes of adult authority figures like policemen which is the antithesis of an exercise of the child's free will.
> B.S. v. State, 548 So. 2d 838, 839 (Fla. 3d DCA 1989).

Secondly, the appellant in this case was arrested from his night high school, taken directly to the Sheriff's Office, and made this statement without the benefit of advice of counsel and without any contact with a parent (R. 176). For the purpose of the trial court's ruling on the appellant's motion to suppress this statement, it was stipulated to by the State and the defense, and accepted by the court, that the testimony of Theresa Crenshaw, appellant's mother, if called, would be that there was no attempt by law enforcement to contact her and that if she had been contacted that she would have advised appellant not to give a statement. The further stipulation was that the appellant, if called, would testify that if he had talked with his mother that he would not have given the statement.

The court, in B.S. v. State, citing a circumstance used in determining whether the juvenile voluntarily accompanied the

officers to the police station, observed that:

> ....Faced with the information that the child was home alone with her younger brother, the officers neither waited for her mother to return, nor decided to leave and come back later themselves.
> Id. at 840.

Gallegos was a case in which the juvenile defendant was advised of his right to counsel, but did not ask either for a lawyer or for his parents. However, the court in that case considered as a significant factor in determining that the defendant's confession was not freely and voluntarily given, the fact that he did not speak with an attorney or parent prior to giving the confession, and observed as follows:

> A lawyer or an adult relative or friend could have given the petitioner the protection which his own maturity could not.
> Id. at 329.

Thirdly, in this case the appellant was emotionally upset and in fear for his family when giving this statement. State witness, Thomas O'Neal, the interrogating officer, testified that at the very beginning of the interview that appellant expressed a fear for the safety of his family and was crying and emotional (R. 174-176, 249). The assisting interrogation officer, Allen H. Cotton, corroborated the testimony of Officer O'Neal in stating that the appellant expressed a fear for his family before giving the statement and showed emotion or cried during the entire time of the interview (R. 256).

Fourthly, there is the circumstance of the promise made to the

appellant by the interrogating officers prior to his giving the recorded statement. A confession cannot be obtained by any direct or implied promise, however slight, Mallory v. Hogan, supra. In this case the interrogating officers had promised the appellant, prior to appellant giving his statement, that "they would do their best, everything they could" to protect the appellant's family. This was the great concern the appellant expressed from the beginning and this promise, by law enforcement, could certainly be considered, under these circumstances, as an inducement for the appellant to give the recorded statement. These facts appear in the record from the recorded statement of the appellant at the point where Officer O'Neal asks the appellant about promises, and that sequel is related as follows:

> Q. (By Officer O'Neal) Have we promised you anything, promised to help you, promised to get you to give this statement?
>
> A. (By Appellant) I just ask you all to make sure my family is protected. That's all, and my girlfriend.
>
> Q. And we've advised you we would do the best, everything we could, is that correct?
>
> A. Yes, sir.
> (R. 244).

This promise obviously was made prior to the appellant giving the recorded statement in that it does not appear at any prior point in the text of the recording.

Although, the recent United States Supreme Court decision of Arizona v. Fulminante, 113 L Ed. 2d 302, 111 S. Ct. 1246 (1991), might subject the introduction of an involuntary confession to

harmless error analysis the recorded statement in this case was a major part of the State's case, both in the guilt and penalty phases, and also led to the recovery and introduction of other evidence harmful to the appellant.

The test as harmless error as it applies to federal constitution rights is still as stated in Chapman v. California, 386 U.S. 18, 17 L Ed. 2d 705, 710-711, 87 S. Ct. 824 (1967):

> Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Based on the totality of the above circumstances, this court should reverse the trial court's judgment and sentence and remand for further proceedings.

ISSUE II

THE COURT ERRED IN FINDING THAT APPELLANT COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER.

The trial court as part of it's sentencing decision found that the appellant committed this murder in an especially heinous, atrocious, and cruel manner and stated:

> Nothing could be more heinous, atrocious, and cruel than termination of an already severely wounded husband and father as he pled for his life. Nothing could be more torturous than to beg for mercy in the name of ones wife and children and to die with the killer cursing their existence (R. 608, 622).

The trial court committed errors in finding this murder to have been especially heinous, atrocious, and cruel based upon the rulings previously rendered by this court.

The court in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), found the definition of the aggravating circumstance to be as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

In this case Coker received four gunshot wounds, the last two of which were shots to the head. The second shot followed the first in short order and, although it is not pinned down in the

record, it appears that a very short time elapsed between the second shot and the third shot, which was to the head. The fourth shot, which was also to the head, immediately followed the third shot. Coker was rendered unconscious instantaneously from the shots to the head (R. 274-278, 290-293).

Multiple gunshot wounds do not make a murder especially heinous, atrocious, or cruel. This court has on numerous occasions found the trial court in error in determining that a murder was especially heinous, atrocious, or cruel when there were multiple gunshot wounds. Shere v. State, 579 So. 2d 86 (Fla. 1991), ten shots; Lewis v. State, 377 So. 2d 640 (Fla. 1980), several initial shots and additional shots while victim was fleeing; Amoros v. State, 531 So. 2d 1256 (Fla. 1988), three shots; McKinney v. State, 579 So. 2d 80 (Fla. 1991), several gunshot wounds and two lacerations.

The other factor that the trial court seemed to rely upon in determining this murder to be especially heinous, atrocious, or cruel was the fact that Coker was asking not to be killed and mentioned his family prior to the fatal shots. However, this does amount an additional act by the appellant that would set the murder apart from the norm of capital felonies, nor did the appellant commit any additional act that was unnecessarily torturous to Coker as required by Dixon. In Brown v. State, 526 So. 2d 903 (Fla. 1988), this court ruled that the trial court erred in finding the murder to be especially heinous, atrocious, or cruel when an officer was severely wounded in the arm, was knocked to the ground, and then the assailant stood over the victim pointing the victim's

revolver at him and shot the victim two more times after the victim pleaded for his life saying, "Please don't shoot me, please don't shoot me."

In Rivera v. State, 545 So. 2d 864 (Fla. 1989), this court made a similar ruling when an officer was shot three times and was shot while he was kneeling on the floor with his hands upraised. Likewise in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), the victim, a storekeeper, was shot twice and fatally shot when his arms were in a raised and submissive position.

The factual situation of this case reveals a "quick killing" that does not show any intent by the appellant to inflict a high degree of pain or otherwise torture the victim and thus was not especially heinous, atrocious, or cruel, as this court has ruled in Chesire v. State, 568 So. 2d 908 (Fla. 1990), and in Santos v. State, Case No.74,467 (Fla. September 26, 1991) 16 FLW S 633.

As this court stated in Lewis v. State, 398 So 2d 432, 438 (1981):

> ...a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel.

This court should, therefore, reverse the trial court's sentence and remand for a new sentencing hearing or with instructions to impose a sentence of life imprisonment without possibility of parole for twenty-five years.

ISSUE III

THE TRIAL COURT ERRED IN FINDING TWO SEPARATE AGGRAVATING CIRCUMSTANCES; THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE APPELLANT WAS ENGAGED OR WAS AN ACCOMPLICE IN THE COMMISSION OF ROBBERY AND THAT THE CAPITAL FELONY WAS COMMITTED FOR FINANCIAL GAIN.

As aggravating circumstances, pursuant to Florida Statute 921.141, the trial court found that first that the capital felony was committed while the appellant was engaged, or was an accomplice, in the commission of robbery, Florida Statute 921.141(5)(d) (R. 607, 621). As a second and separate aggravating circumstance, the trial court found that the capital felony was committed for financial gain, Florida Statute 921.141(5)(f) (R. 607, 622). However, this court in ruling in Provence v. State, 337 So. 2d 783 (Fla. 1976) that the aggravating circumstances of a capital felony being committed during a robbery and being committed for pecuniary gain constitute only one factor stated as follows:

> ...here, as in all robbery-murders, both subsections 921.141(5)(d & f), refer to the same aspect of the defendant's crime. Id. at 786.

This court has consistently followed that ruling in robbery-murder and burglary-murder cases. Maggard v. State, 399 So. 2d 973 (Fla. 1981), Mills v. State, 476 So. 2d 172 (Fla. 1985), Cherry v. State, 544 So. 2d 184 (Fla. 1989), Bruno v. State, 574 So. 2d 76 (Fla. 1991), Green v. State, 583 So. 2d 647 (Fla. 1991).

This court, based upon the above error, should remand this matter for a new sentencing hearing.

ISSUE IV

THE COURT ERRED IN FINDING THAT THE NON-STATUTORY MITIGATING CIRCUMSTANCE OF THE APPELLANT'S COOPERATION WITH LAW ENFORCEMENT HAD NOT BEEN PROVEN.

The trial court, during the sentencing procedures, rejected the claim that the appellant had been cooperative with law enforcement (R. 612-613, 625).

A mitigating circumstance does not require proof beyond a reasonable doubt. As stated by the court to the jury, "If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established", Fla. Std. Jury Instr. Crim. p. 81. This Court has found that when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved, Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

The trial court stated that the appellant offered six non-statutory mitigating circumstances, but found that, "The Court is reasonably convinced of only one" (R. 612). The one circumstance found by the trial court to exist was that the appellant has had an unhappy childhood (R. 612).

A defendant's cooperation with law enforcement has been found by this court to be a non-statutory mitigating circumstance to be considered and weighed by the trial court. Perry v. State, 522 So. 2d 817 (Fla. 1988). Washington v. State, 362 So. 2d 658 (Fla. 1978).

The evidence in both the guilt and penalty phase clearly shows that the appellant was cooperative with law enforcement (Escambia

County, Florida, Sheriff's Office), and also with the Office of the State Attorney. The appellant immediately after being arrested and advised of his Miranda rights gave a taped confession in which he admitted committing the robbery of Trout Auto and that he fired the shots that killed Billy Coker. He also told the interrogating officers the names and the involvement of the three co-defendants that were later indicted in this matter. In his statement, the appellant also told the officers where and from whom he got the gun used to commit this murder and what he did with the gun after these offenses occurred and where the gun was when he last saw it. This was recovered by Officer O'Neal from the person indicated by the appellant to be in possession of that gun. This confession was played to the jury as part of the State's evidence in the prosecution of this matter (R. 230-248).

Officer Cotton testified that on the same night that appellant gave his confession, he took Officer Cotton to a location where checks that were taken from Trout Auto were left after the robbery. The checks were recovered by law enforcement at the location pointed out by the appellant (R. 253-254). Officer Cotton gave his opinion that the appellant had been cooperative with law enforcement (R. 255).

In this case, the appellant's cooperation extended beyond the confession and location of evidence. The appellant testified at the trial of co-defendant, Robin Archer, as a witness for the State of Florida, and told the jury the details of Archer's involvement in this matter (R. 487-532).

The court, in rejecting this mitigating circumstance, stated

that, "...his stories have varied, been incomplete and, at best, self-serving". However, this is not born out by the record. The appellant's testimony at the trial of Robin Archer was consistent with the appellant's taped confession that was played at the appellant's trial. Both the confession and the appellant's testimony at the trial of Robin Archer were very detailed and the appellant did not refuse or hesitate to answer any questions (R. 230-248, 487-532).

It is difficult to determine in what respect the trial court felt the appellant's "stories" were self-serving. He admitted the robbery and firing the fatal shots. If the trial court was referring to the appellant's implication of Robin Archer as the instigator of this matter, the appellant's testimony is the very evidence that the State of Florida used to convict Robin Archer, and the same trial judge sentenced Robin Archer to death based on that evidence (Footnote One of this Brief).

It is clear that the trial court erred in finding that this mitigating circumstance of cooperation with law enforcement had not been proven, and as stated in Nibert, supra, at 1062:

> This court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law.

The court should, therefore, reverse the trial court's sentence, and remand for a new sentencing hearing.

ISSUE V

THE TRIAL COURT ERRED IN FINDING THAT THE NON-STATUTORY MITIGATING CIRCUMSTANCE OF APPELLANT'S GOOD ATTITUDE AND CONDUCT WHILE INCARCERATED HAD NOT BEEN PROVEN.

Again, the trial court found that it was reasonably convinced of only one non-statutory mitigating circumstance; that the appellant has had an unhappy childhood.

The appellant in this case was incarcerated in excess of seven months prior to his trial in this matter. It has been held by the United States Supreme Court, in a case in which the defendant was incarcerated seven and one-half months before the trial, that his good behavior while in jail was a mitigating circumstance that must be considered and weighed by the trial court. Skipper v. South Carolina, 476 U.S. 1, 90 L ed 2d 1, 106 S. Ct. 1669 (1986). This mitigating circumstance has also been recognized by this court, Delap v. State, 440 So.2d 1242 (Fla. 1983), Craig v. State, 510 So. 2d 857 (Fla. 1987), Valle v. State, 502 So. 2d 1225 (Fla.1987).

The record is very clear that appellant's attitude and behavior were exemplary during his period of incarceration awaiting trial. During the penalty phase the defense called J.J. Crater as a witness (R. 449-457). Ms. Crater, who has a master degree in psychology, was employed by a local mental health unit, and worked at the Escambia County jail as a forensic counselor. She testified that she saw the appellant regularly and had checked the appellant's jail records, and that he had not received any disciplinary restrictions during his incarceration (R. 452, 450). She testified that this was unusual for juvenile inmates and that there are usually a lot of conflicts between juveniles (R. 452).

Ms. Crater further stated that the appellant had gotten along very well with the other inmates regardless of where he was housed, regardless of race, size, or part of town that other inmates lived in (R. 452-453). This good behavior and attitude of the appellant during incarceration was not disputed through any evidence presented to the trial court.

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING THE STATE, OVER OBJECTION OF THE DEFENSE, TO INTRODUCE EVIDENCE OF PRIOR CRIMINAL ACTIVITY OF THE APPELLANT AFTER THE APPELLANT HAD WAIVED THE PRESENTATION OF ANY EVIDENCE THAT WOULD PROVE THE STATUTORY MITIGATING CIRCUMSTANCE THAT APPELLANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

The appellant waived his right to present evidence and have the jury instructed on the statutory mitigating circumstance contained in Florida Statute 921.141(6)(a), that the appellant has no significant history of prior criminal activity (R. 383, 385, 389). The jury was not, in fact, instructed as to this statutory mitigating circumstance (R. 477, 572). The trial court then allowed, over defense objection, the State to illicit testimony on cross-examination from the appellant's mother, Theresa Crenshaw, regarding appellant's prior criminal activity (R. 413-417).

The State made no request for an instruction pursuant to Florida Statute 921.141(5)(b) regarding the appellant having been previously convicted of a felony involving the use or threat of violence to the person (R. 384-385). The jury was not instructed to consider that aggravating circumstance. Evidence of past criminality, offered by the State for the purpose of aggravating the crime, is inadmissible unless it tends to establish one of the aggravating circumstances listed in the statute, Odom v. State, 403 So. 2d 936 (1981).

It is also error for the trial court, after a waiver by a defendant of a mitigating factor, and over defense objection, to allow the State to present evidence of the defendant's prior criminal activity, Maggard v. State, 399 So. 2d 973 (Fla. 1981).

This Court stated in that case that:

> Mitigating factors are for the defendant's benefit and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist.
> Id. at 978.

This court went on to state that such error was of such a magnitude as to require a new sentencing hearing before the jury and the court.

The State in this case brought out this evidence during cross-examination. This court in Robinson v. State, 487 So. 2d 1040 (1986), found this method to be inappropriate, and in rejecting the State's argument that they were attacking a witness's credibility, stated:

> Arguing that giving such information to the jury by attacking a witness's credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the State do by one method something it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial.
> Id. at 1042.

In Robinson the State's attempt to "impeach the credibility" of the witnesses came after the witnesses testified that the defendant was a good-hearted person and a good worker. The State was then allowed, on cross-examination, over defense objection, to ask the witnesses if they were aware of two other specific crimes the defendant had committed.

In this case the State's attempt to "impeach the credibility" of the witness was in response to the following inquiry:

Q. (By appellant's attorney) Okay. Mrs. Crenshaw, do you feel that your son can be rehabilitated and be a productive member of society?

A. (By Theresa Crenshaw, Appellant's mother) Yes, I do.
(R. 413).

The State then, in cross-examination, asked Mrs. Crenshaw a similar question, "But you think he can be rehabilitated?" and she responded, "Yes, I do." The following sequence of questions and answers between the prosecutor and Mrs. Crenshaw occurred:

Q. And you're aware of all the things your son has done?

A. Yes, I am.

Q. All of them?

A. All as to the things he does?

Q. The things he's done wrong.

A. I'm aware of what's going on here, yes.

Q. Are you aware of anything else?

A. Yes, I am.

Q. What are you aware of?
(R. 414).

The defense objected at this point on the grounds that the State was asking Mrs. Crenshaw to relate prior criminal activity of the appellant after the appellant had waived the issue of no significant prior record. The court overruled the defense objection and allowed the State to proceed with the following questions by the prosecutor and answers by Mrs. Crenshaw:

Q. Are you aware of other problems that he's had?

A. Yes.

Q. Are you aware of a problem he had in Mississippi very recently?

A. Yes, I am.

Q. Are you aware of the details of that?

A. Yes, I am.

Q. Was anyone injured in that?

A. Yes, there was.

Q. There was?

A. Yes.

Q. And you know about your son's involvement in that?

A. Yes, I do.

Q. Are you aware of any other things that have happened in Pensacola that involve your son recently?

A. Not recently.

Q. Well, within the last year?

A. No.

Q. No?

A. Not in the last year. Not in this year.

Q. Within the last 12 months?

A. Yes.

Q. You are.

A. Uh-huh.

Q. And you're aware of the details of those events?

A. Yes, I am.

Q. And you still think he can be rehabilitated?

A. Yes, I do.

> Q. Is there anything your son could do that would make you believe he couldn't be rehabilitated?
>
> A. No.
> (R. 415-417).

The State obviously in this case was not trying to impeach Mrs. Crenshaw in regard to her not having sufficient knowledge to render her opinion that her son could be rehabilitated. She had already answered twice that she was aware of all the things her son had done, prior to the trial court allowing the further questioning of Mrs. Crenshaw in that regard. The State's questions led to answers that the jury could easily and reasonably infer meant that the appellant had been involved in prior criminal activity, and also that activity included violence to another person.

This is the very matter and the same means of presentation that this court condemned in Robinson, supra. That the inquiry in this case might not have been as extensive as in Robinson, supra, is of no consequence; this court addressed that issue in Garron v. State, 528 So. 2d 353, 358 (Fla. 1988), and stated:

> The penalty phase, like the quilt phase of appellant's trial, contained error. During cross-examination of appellant's sister, the prosecutor was permitted to raise the point that appellant had allegedly killed somebody in Greece or Turkey. We stated in Robinson v. State, 487 So. 2d 1040 (Fla. 1986), that evidence of crimes for which the defendant has not been charged with or convicted of may not be presented to the jury in an attempt to attack the witness' credibility. The State's argument that Robinson is distinguishable on the basis of the number of times the inadmissible evidence was mentioned by the prosecutor is wholly without merit. The number of times evidence is put before the jury has not bearing on its admissibility.

This court should, based upon the above error, remand this matter for a new sentencing hearing before a jury.

ISSUE VII

THE TRIAL COURT ERRED IN IMPOSING APPELLANT DEATH SENTENCE THAT IS DISPROPORTIONAL TO OTHER DECISIONS RENDERED BY THIS COURT.

The appellant, as issue number II has urged this court to find that the trial court erred in finding this murder to be especially heinous, atrocious, and cruel.

In this case, the trial court found the statutory mitigating circumstance of age. The appellant was 17 years old when this offense occurred. The trial court also found the non-statutory mitigating circumstance of the appellant having an unhappy childhood. As part of this finding, the court noted that the appellant claims incestuous sexual abuse and other punishment (R. 612). This was the testimony of the appellant's mother, Theresa Crenshaw (R. 407-411) and of the appellant (R. 424-426). The State called no witnesses nor introduced any evidence to controvert their testimony.

Also, an aspect of the appellant's childhood based upon undisputed evidence that the trial court neglected to comment upon was the fact that as early as the third grade the appellant was diagnosed as being emotionally disturbed, attended emotionally handicapped and special education classes in school, was hyper and took Ritalin, and was also diagnosed as having an attention deficit disorder (R. 411-412). The appellant has also urged this court in issue numbers IV and V to find that the trial court erred in not finding the non-statutory mitigating circumstances; that the appellant was cooperative with law enforcement and the state attorney, and in rejecting the appellant's claim of good attitude

and conduct while incarcerated.

The appellant cannot anticipate this court's rulings in regard to the above matters, but even if this court does not rule favorably in reversing part or all of the trial court's rulings in regard to aggravating circumstances, the appellant still urges this court to find that there is substantial mitigation and to find the trial court's death sentence to be disproportional.

This court, in Nibert v. State, 574 So 2d 1059 (1990), found that although the murder was heinous, atrocious, or cruel, (defendant stabbed the victim 17 times and some of the wounds were defensive in nature), that there was substantial mitigation and reversed the trial court's death sentence. The same was the situation and result in Smalley v. State, 546 So 2d 720 (1989), (defendant struck twenty-eight month old girl repeatedly, dunked her head in water, and banged her head on the floor).

In Blakely v. State, 561 So 2d 560 (Fla. 1990), the death sentence was found to be disproportional when the aggravating circumstances of heinous, atrocious, or cruel, and cold, calculated, and premeditated were found to exist.

Murder-robbery cases in which the death sentence was found to be disproportional are Lloyd v. State, 524 So 2d 386 (Fla. 1988), Rembert v. State, 445 So 2d 337 (Fla. 1984), Caruthers v. State, 465 So 2d 49 (Fla. 1985).

This court, in a recent decision, Penn v. State, 574 So 2d 1079 (Fla. 1991), found a death sentence to be disproportional after an unanimous jury's recommendation of death. In that case, the defendant stabbed his mother 31 times and there were defensive

wounds on her hands and it could have taken her up to 45 minutes to die.

The quote from Eddings v. Oklahoma, 455 U.S. 104, 71 L Ed 2d 1, 11, 102 S. Ct. 869, seems appropriate to the proportionality review of this case:

> Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. In some cases, such evidence may be given little weight. But when the defendant was 16 years old at the time of the offense, there can be not doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance, is particularly relevant.

Here we have a young man who was still 17 years old at the time of trial, who was physically and sexually abused by his father, and who was diagnosed as emotionally handicapped, and who was shuffled from home to home, with very little family stability. To this is added the young man's cooperation with law enforcement, and his good conduct and attitude while incarcerated. The appellant asks this court to find that these factors constitute substantial mitigation and that this court, upon it's proportionality review, remand with direction that appellant be sentenced to life imprisonment with no possibility of parole for twenty-five years.