IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,792

JAMES BERNARD CAMPBELL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The defendant, James Campbell, was convicted of first-degree murder, attempted first-degree murder, burglary, robbery and displaying a weapon. Campbell v. State, 571 So. 2d 415, 416 (Fla. 1990). He was sentenced to death and consecutive life terms of imprisonment. Id. This Court affirmed the convictions and sentences, with the exception of the death penalty. This Court remanded for resentencing, "before the judge so that he can evaluate and reweigh the aggravating and mitigating circumstances". 571 So. 2d at 420. Due to the unavailability of the trial judge after remand, the defendant received a new sentencing hearing before a different judge and jury. At this hearing, the state presented testimony from the following four (4) witnesses:

Technician Barnett testified that on December 22, 1986, he was dispatched to the crime scene, a residence attached to a church. (T. 693, 697). The photographs of the crime scene were admitted into evidence. (T. 697). They depicted a home which had been ransacked throughout. (T. 720). The deceased victim, Reverend Billy Bosler, had been stabbed multiple times. His pockets had been pulled out. (T. 710). A wallet was on the floor, and, a purse had been "dumped" in the kitchen. (T. 724, 706). Bloodied clothing and undershorts were found on a bed in the bedroom; there were bloody shoe impressions around the bed and the clothing. (T. 702, 713). The dresser drawers, some open, some closed, also had blood on them. (T. 721-22). There was also

blood in the bathroom sink and bloody towels in various parts of the house. (T. 702, 725). The technician collected, inter alia, the clothing, towels, blood samples, and fingerprints. (T. 726). The victim's daughter, Su Zann Bosler, who was also injured, had been removed to the hospital.

Detective Rickey Smith testified that he was dispatched to the hospital, and spoke to the surviving victim on the same date. (T. 739). She stated there was one assailant and gave a brief description. (T. 740). A week later, further investigation revealed that the defendant's fingerprints had been matched to those at the crime scene.

Detective Smith then saw the defendant at the homicide office. (T. 744). The defendant told the detective that he had been arrested for stabbing someone, but he "didn't do it" and wished to talk. Id. The defendant had previously executed a Rights Waiver form. The detective re-advised him of his constitutional rights, which he again waived, prior to speaking with him. (T. 245-6). The detective then talked to the defendant about background information, where he grew up, sports, what he liked to do, etc., for one half to one hour. (T. 748). The defendant answered questions in a logical, coherent, rational manner. Id.

The defendant then again stated that, "I didn't do what they said I did. I didn't stab anybody." Id. The detective then

confronted him with the fingerprint evidence, whereupon the defendant agreed to tell the truth. (T. 749).

After an oral confession, the defendant gave a more detailed, recorded statement. (T. 749-50). The recorded statement reflects that the defendant was more than twenty years old, had completed the ninth grade, had gotten "B's and C's" in high school, could read and write English, and knew of no reason why he could not answer questions intelligently. (T. 755-6).

The defendant stated that he went to a house beside the church. He explained, "I was going to hold the people up and get some money." (T. 760). He added that he was going to carry out the holdup with a knife, which he had obtained from the kitchen at his father's home. (T. 761). He carried the knife in his waist band with his shirt over it. (T. 762).

At approximately "Eleven or Twelve" he went to the front door of the crime scene. (T. 761, 763). He knocked on the door.[1] When the victim came to the door, the defendant "pushed him in". (T. 763). Defendant asked the victim for some money, they started fighting, and defendant took out his knife and began stabbing the victim. Id. Then, "the girl came out and she got stabbed." Id. The deceased victim then fell on the ground. Id. The defendant searched his pockets and took two hundred dollars out. (T. 763,

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[1] The defendant had stated that he rang the doorbell in his prior unrecorded confession to the detective. (T. 749).

768). He also searched a purse and took out approximately one hundred dollars. Id.

Defendant then changed out of his clothes and into clothes from the victim's house. Id. The defendant took some half dollar coins from a dresser, and then took a bus away from the scene. Id.

The defendant stated that he did not remember how many times he had stabbed the deceased, but that it was more then once. (T. 765). The defendant also identified pictures of the bloody pants and shirts, taken at the crime scene, as those that he had changed out of. (T. 771-3).

The next state witness was Dr. Barnhart, a medical examiner and forensic pathologist for Dade County. (T. 805). The victim was 53 years old, five feet and eight inches in height, and had weighed approximately 164 pounds. (T. 810). He had sustained injuries from both blunt force, and sharp force. (T. 811).

There were four (4) blunt force injuries to the back of the head, left knee, left cheek and forearm. These injuries were caused by impact with a hard surface. The bruises all ranged from 1 to 2 inches in diameter. (T. 812).

There were 24 sharp force injuries, caused by a knife, consisting of 15 wounds and 9 cuts. (T. 813). Four cuts and

stabs to the hand and elbow area were defensive wounds, sustained as the victim was trying to counter a frontal attack. (T. 816-18). There was another cut to the front of the abdomen. (T. 819). There were 3 stab wounds in the shoulder area, two of which were approximately 3 inches deep. (T. 818-824, 826). There were 11 stabs and cuts to the head and neck area, ranging from 1 1/2 to 3 1/2 inch depths. (T. 821-24). There were 5 stab wounds to the back and chest area, each of which had penetrated approximately 5-5 1/2 inches. (T. 819-20, 825-37). The latter stab wounds penetrated the liver, and both lungs. Penetration of the lungs causes their collapse, which in turn impairs the ability to breathe; a type of asphyxia. (T. 825-6).

None of the injuries were instantaneously disabling wounds. (T. 830). All the wounds were painful. (T. 834-5). There was no indication of unconsciousness during the administration of these wounds. (T. 828).

The victim's daughter, Su Zann Bosler, was the next witness. She stated that her father, Reverend Billy Bosler, was the pastor of the Church of Brethren. (T. 849). She lived with him at the parsonage at the time of the crime. (T. 849). On the day of the crime, she and her father had been Christmas shopping and returned home at approximately 2:30 p.m. (T. 850). They brought in their presents, and Ms. Bosler went to her bathroom to prepare for additional shopping. (T. 852). She heard the door bell ring. She opened the bathroom door to listen, and heard her father

making "strange noises", "gasps and grunts and groans". (T. 852-3).

She ran out and saw her father standing in the kitchen doorway, being stabbed by the defendant in the chest area. (T. 854). The Reverend was holding on to the kitchen doorway, because the thrust of the knife was knocking him backwards. (T. 855). Ms. Bosler walked towards him to help, as the latter was now collapsing to the floor; she screamed. Id. The defendant turned around and attempted to stab her in the front. Ms. Bosler turned, and the defendant stabbed her three times in the back. (T. 856). She was knocked down to the floor; her father was trying to get up on his knees to try to help her. Id. As the Reverend was crawling towards her, the defendant started stabbing him in the back, many times. (T. 857).

Ms. Bosler attempted to get up and try to help her father again. (T., 858). The defendant turned around, looked at her, led her with his hand on her shoulder towards the living room, and stabbed her twice in the skull. Id. Her father had been crawling towards the door, making noises like he could not breathe. (T. 839). Ms. Bosler fell down, and held her breath to pretend she was dead. (T. 860). The defendant watched over her to see if she was dead; he then moved through the bedrooms. He was making a lot of noise, opening drawers, going through things etc. (T. 861). The defendant then went to the kitchen where her purse was, and Ms. Bosler heard the purse, which contained money, fall to the floor.

The defendant then came back to the living room, ripped her underwear and started to hit her. (T. 862). He then went back to one of the bedrooms, came out and went through her father's pockets, before eventually leaving. (T. 861-2).

The defendant also presented evidence from four witnesses. The parties stipulated that the testimony of two of these witnesses (defendant's family members) from the transcripts of the prior proceedings, would be read to the jury.

Dr. Bruce Frumkin, a forensic psychologist, testified that he had met with the defendant five times during his evaluation process. (T. 876, 881). He stated that the first category of defendant's problems was that he was raised in an extremely abusive situation and had a traumatic childhood.

Dr. Frumkin testified that, according to a maternal aunt, Ms. Lance, the defendant's mother didn't want to have anything to do with him, and shortly after birth she sent him to live with grandparents. (T. 883). At the age of six, the defendant went to live with his mother. Id.

Frumkin stated that defendant was abused after his return to his mother. Based partly upon information provided by Ms. Lance, Frumkin stated that the defendant was beaten with sticks, extension cords, telephones, etc. by his mother and sometimes by

his stepfather. (T. 884, 886). Again, according to Ms. Lance, there was a lot of emotional abuse as well, such as the defendant's mother spitting in his face, forcing him to clean out the toilets with hands, "those sorts of things". (T. 886). According to other doctors' reports, the defendant had told those doctors that he was also exposed to violence, as he saw his mother and step father beating up on each other. (T. 886).

On one occasion, Ms. Lance took the defendant to the emergency room, because he had been hit with a telephone and was bleeding. (T. 887). The state commenced an abuse investigation and removed the defendant from his mother's home at the age of twelve. (T. 887-8). The defendant went back to living with his grandparents. (T. 889).

Dr. Frumkin also testified that the defendant had a chronic history of major emotional problems. (T. 889). The example given was that the defendant allegedly attempted suicide once, by drinking bleach, which necessitated medical treatment, when he was eight years old. (T. 889-90). Dr. Frumkin also stated that the defendant has mood shifts, "from feeling okay to crying in short periods of time." (T. 890). When the defendant is very "stressed", he thinks that life is hopeless, and his ability to see things in a realistic fashion is impaired. Id. For example after his arrest on the instant crimes, while in jail, he tried to slash his wrist and was observed yelling nonsense. (T. 891). He was medicated with Thorazine at the jail.

Dr. Frumkin added that at age sixteen, the defendant began to abuse drugs and alcohol. (T. 893).

Dr. Frumkin thus concluded, "I really believe that even though at the time of the crime he knew what he was doing and he knew it was wrong, I believe that the alcohol and the drugs and/or the psychotic behavior he may have experienced if he was under stress, really substantially impacted his ability to control his actions and use good judgment." Id.

Dr. Frumkin also tested the defendant's IQ and obtained a score of 68. (T. 896). He stated, "I have to clarify that I believe when he [defendant] is not stressed, he would score a little higher. I don't think he's mentally retarded." Id. Another problem, according to this expert was that, the defendant is "functionally illiterate", which means he is able to read a "little bit" but not very much. Id. The defendant also has "a hard time learning". Id.

Finally, Dr. Frumkin concluded that at the time of the offense, the defendant was in "some sort of daze or he wasn't in full aware (sic) of his faculties." (T. 903-904). The expert acknowledged that the defendant, subsequent to his confession, has denied committing the offenses herein. His opinion as to the "daze" and lack of awareness, was, however, based upon "inconsistencies" in the defendant's confessions. The

inconsistencies were that: 1) the defendant had stated he had knocked on the victim's door, whereas Ms. Bosler stated she had heard the door bell ring; 2) the defendant had stated the crime occurred at approximately 11 a.m. to 12 p.m., whereas Ms. Bosler placed the time at approximately 2:30 p.m.; and 3) the defendant underreported and minimized the number of stab wounds he had actually inflicted upon the victims. Id.

On cross examination, Dr. Frumkin stated that during the critical period between birth and age six, the defendant was raised by his grand parents. There was no evidence or allegation of abuse at said time. (T. 908-9). The defendant's mother gave him to her parents to raise, as defendant's father was not around. (T. 908). The first mention of abuse was between the ages of six and twelve, when Ms. Lance took the twelve year old defendant to the hospital because he had been hit on the head with a telephone. Id.

Dr. Frumkin acknowledged that, during her in-court testimony, Ms. Lance had stated that she was aware of only this one incident of abuse. (T. 909-10). Dr. Frumkin, however, relied upon "a number of other reports that I reviewed which quoted Ms. Lance talking about other sorts of incidents as well." (T. 910)

With respect to the defendant's level of intelligence and "functional illiteracy", Frumkin acknowledged that the defendant had been tested by another examiner who had rated his scores

higher, at 85. (T. 920). That expert had concluded defendant was of low average intelligence. (Id.). Dr. Frumkin was also shown school records and letters written by the Defendant when he was in custody. (T. 911-13). The defendant had passing grades in school. (T. 912). With respect to a letter signed by the defendant, Dr. Frumkin acknowledged that, "Assuming this is from Mr. Campbell it appears that he would be literate." (T. 919). From the "sophisticated" words utilized in said letters, Dr. Frumkin added, "[T]his does not sound like the Mr. Campbell I spent over seven hours with...". (T. 920). "The letter you just read to me is not a letter composed [by] somebody of low average intelligence." (T. 921).

Dr. Frumkin testified that intelligence measures one's ability to manipulate or answer certain items through certain tasks. Someone may do well on a test on a particular day and do poorly on another day. (T. 922).

Dr. Frumkin also acknowledged that alleged inconsistencies which formed the basis of his opinion that defendant wasn't aware of his actions, were "possibly" due to the desire to minimize his culpability. (T. 925).

As to drug and alcohol abuse, Dr. Frumkin also acknowledged that defendant had in fact been placed in treatment programs. (T. 927). Towards his later years he was incarcerated due to various crimes. Id. The defendant was released from custody

approximately a month and a half prior to the crimes herein. (T. 928). Dr. Frumkin's opinion of drug and alcohol abuse after defendant's release from custody was based upon the latter's statements and non-specific reports which related a prior history of substance abuse. (T. 929-31). Dr. Frumkin stated that he had no information, from anyone, suggesting that defendant had used any drugs on the day of the crimes herein. (T. 932).

Finally, Dr. Frumkin admitted: "I really don't know what was going on with him. It would have been so useful if he would have told me his version of what was going on. Told me what was going on with him... He keeps on saying he didn't do it. So he didn't provide anything to be able to help us understand what was really taking place, what was really going on with him." (T. 941).

The prior testimony of the defendant's maternal aunt, Ms. Lance was then read to the jury. (T. 944-5). Ms. Lance confirmed that from birth to age six, the defendant grew up in North Florida with his grandparents. (T. 945). He then returned to live with his mother in Miami. Id. Around the age of eleven or twelve, she took the defendant to the hospital as a result of the telephone incident. (T. 946-7). He was also bruised. Id. Based upon said incident, the juvenile court took the defendant away from his mother. (T. 947). He was placed back with his grandparents. (T. 948). Prior to the above incident, Ms. Lance did not know of any problems between the defendant and his mother. (T. 948--9). She

was not aware of any other incidents of his mother or anybody else striking defendant. (T. 951).

Another maternal aunt, Ms. Campbell, confirmed that the juvenile court had given custody of the defendant to his grandparents. (T. 953-4).

The final witness for the defense was Dr. Jethro Toomer, a clinical, forensic psychologist. (T. 971). Dr. Toomer opined that defendant suffers from "borderline personality disorder", which "is not a major mental disorder". (T. 977-8). Dr. Toomer also stated that defendant had an abusive childhood. (T. 978).

Toomer stated that defendant's behavior in jail, after the crimes, was "psychotic", because defendant was aggressive towards other inmates, and yelling inapropriately. He was thus placed in a safety cell and prescribed medication. (T. 981-2). Defendant was not psychotic when Toomer met with him. Id.

Toomer's testing of defendant, reflected an IQ of below 65. (T. 986). However, this score "was derived because Mr. Campbell was unable to complete the protocol". (T. 987). In Dr. Toomer's opinion, defendant had "impaired intellectual functioning". (Id.).

Toomer also testified that defendant started abusing drugs in his teenage years. (T. 992). Toomer believed that at the time

of the crimes herein, defendant was under the influence of alcohol and drugs, based upon the "history and information" that he had gathered. (T. 994-95). Dr. Toomer also stated that defendant's capacity to appreciate the criminality of his incident was substantially impaired, by virtue of his history of abuse, drug abuse, and maladaptive behavior reflected in the borderline personality disorder. (T. 999). Toomer added, that defendant was "under the influence of a mental or emotional disturbance" at the time of the crimes, as he had suffered from the personality disorder for "sometime". (T. 1000).

On cross-examination, Toomer stated that in his opinion everyone who is abused and receives no intervention will grow up to manifest maladaptive behavior. (T. 1009). Dr. Toomer admitted that he had previously testified that he did not know what was going on in the defendant's mind at the time of the crimes, because he never took the circumstances of the offense and what had actually occurred, into consideration. (T. 1017-18). Toomer also acknowledged that, despite the personality disorder, the defendant understands the nature and consequences of his actions. (T. 1019-20). Toomer did not know whether this personality disorder affected defendant's reasoning abilities to avoid detection. (T. 1021).

The jury recommended a sentence of death by a vote of ten to two. (T. 1159). The trial court subsequently heard testimony from the victim's daughter, Ms. Bosler, that she and her father

did not believe in the death penalty. (T. 1183-6). The testimony of the victim's mother was also presented to demonstrate that Ms. Bosler's opinion was not the representative viewpoint of other family members. (T. 1187-90).

Subsequently, on May 4, 1994, the trial court imposed a sentence of death, having found the following aggravators: 1) the defendant was previously convicted of a violent felony, (battery on a law enforcement officer, and contemporaneous conviction of attempted first degree murder of Su Zann Bosler); 2) the defendant was engaged in the commission of or attempting to commit a robbery and/or burglary; 3) the murder was committed for precunary gain (merged with the second factor and treated as a single aggravator); and 4) the capital felony was especially heinous, atrocious or cruel. (R. 472-80). The trial court, taking defendant's intellectual deficits into account, found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R. 485-87). The judge gave this factor minimal weight. Id. The trial court also found and gave minimal weight to non-statutory mitigating evidence regarding: (a) the defendant's prior drug and alcohol abuse; and (b) the defendant's abusive childhood. (R. 487-90). The trial court concluded that, "[T]he court strongly feels that considering the findings made above, the results are overwhelmingly aggravating." (R. 490).

SUMMARY OF THE ARGUMENT

I. Brief questioning of a defense expert about his testimony on behalf of other accused murderers properly focused on the witness' bias as a defense oriented expert. Furthermore, defense counsel opened the door to such testimony by specifically questioning the defense expert about comparisons between the Appellant and Ted Bundy. Other alleged improper prosecutorial comments do not rise to any level of impropriety, let alone to a level of reversible error. The testimony of Su Zann Bosler and comments thereon were proper, as same related to the underlying facts, and the proof of the prior violent felony aggravator. The evidence and comments thereon were limited, and thus did not become a feature of this case.

II. The testimony of the victim's daughter, that she did not favor the imposition of the death penalty, was properly excluded, as it shed no light on the defendant's character or record, or on the offense itself.

III. The lower court did not err in failing to instruct, at voir dire, and limiting questions regarding the defendant's other consecutive life sentences for noncapital offenses, as those sentences were not mitigating factors, and those sentences were not within the province of the jury's consideration. Such questioning would not have revealed any bias or prejudice against the defendant either.

IV. The trial court did not err in failing to give defense requested instructions as to specific proposed non-statutory mitigation, where the standard instructions were given and the defense was not precluded from presenting evidence and arguing the alleged mitigation to the jury.

V. (A) The lower court acted within its discretion in finding that various nonstatutory mitigating factors existed, but had minimal weight. That conclusion is supported by the record. There was no evidence of substance abuse on the day of the murder. Evidence regarding the defendant's abusive childhood essentially consisted of references to one incident which occurred when he was 12 years old, with no other incidents in the eight years prior to the murder, and no abuse during the first six years of his life. Evidence regarding the defendant's intelligence revealed disputes regarding his IQ level. Defendant displayed sound reasoning abilities in his efforts to cover up his involvement in the murder, and he authored letters which contradicted his claim of low intelligence.

V. (B) The lower court acted within its discretion in according minimal weight to the mitigating factor that the capacity of the defendant to appreciate the criminality of his act or to conform his conduct to the requirements of law was substantially impaired. As this factor was based upon allegations of substance abuse and a low level of intelligence, for the same reasons advanced in the preceding paragraph, the court acted within its discretion in giving this factor minimal weight.

V. (C) Various mitigating factors asserted by the Appellant herein were properly rejected as they were not established by the evidence.

V. (D) This Court, in its prior opinion in this case, upheld the aggravating factor that the murder was heinous, atrocious or cruel, based upon the same evidence below. In the context of a multiple stabbing case, with defensive wounds and prolonged consciousness of the victim, that conclusion is clearly in accordance with prior precedents.

V. (E) The death sentence imposed herein is consistent with that imposed and upheld in other cases from this Court.

V. (F) The Appellant's arguments regarding the unconstitutionality of the death penalty have been previously rejected by this Court.

ARGUMENT

I.

THE LOWER COURT DID NOT ERR IN FAILING TO GRANT RELIEF FROM ALLEGED INCIDENTS OF PROSECUTORIAL MISCONDUCT.

The Appellant asserts that the prosecutor engaged in several acts of misconduct and that the trial court should have granted appropriate relief. A review of the alleged incidents compels the conclusion that neither individually nor cumulatively did they amount to reversible error.

The initial focus of the Appellant's argument is on the prosecutor's cross-examination of one of the defense experts, Dr. Toomer. During cross-examination, the prosecutor was permitted to establish that Dr. Toomer had always testified on behalf of defendants, and at least three individuals who had killed police officers. (T. 1004-1007). During closing argument, the prosecutor made a similar comment. (T. 1086-87). Such questioning is a permissible manner of establishing the prejudice or bias of the expert witness. In Henry v. State, 574 So. 2d 66, 71 (Fla. 1991), this Court, in rejecting a similar argument, stated:

> . . . Second, the prosecution was properly allowed to elicit from defense expert, Dr. Robert Berland, that ninety-eight percent of his clientele consisted of criminal defendants and that forty percent of his practice consisted of first-degree murder defendants represented by the Hillsborough County Public Defender's office. These questions were relevant to show bias, prejudice, or interest.

See also, Ehrhardt, Florida Evidence (1995 ed.), §702.4, pp. 528-30 ("In addition, each of the methods of attacking the credibility of a lay witness specified in section 90.608 may be used to attack the credibility of an expert. For example, . . . the expert's past pattern of testifying for one side in litigation [is] admissible to show a possible bias or prejudice on the part of the witness."); Gideon v. Johns-Manville Sales Corp., 761 F. 2d 1129, 1135 (5th Cir. 1985) (proper to impeach expert medical witness on grounds that he had seen 678 asbestos exposure patients, almost all of whom had been referred by plaintiffs' attorneys).

Furthermore, the prosecution's reference to Toomer's evaluations of other capital defendants was no different than the tactic which defense counsel had previously used, on direct examination. On direct examination, defense counsel, in seeking to establish that this defendant was not a sociopath, chose to elicit from Dr. Toomer that Ted Bundy was a person whom Toomer met professionally and deemed a sociopath. (T. 983). Defense counsel subsequently had Toomer reemphasize the differences between Campbell and Bundy. (T. 1001-02). Having had the defense expert engage in a comparison of Campbell with a prior capital defendant whom Toomer had evaluated, the defense effectively opened the door to brief prosecutorial questioning about Toomer's opinions in other capital cases. Just as a defense expert, who bases an opinion on a defendant's past personal and social developmental history opens the door to prosecutorial inquiries regarding

details of that prior history, see, Parker v. State, 476 So. 2d 134, 139 (Fla. 1985), so too, a defense expert who interjects comparisons between the instant defendant and prior capital defendants examined by the same expert, opens the door to similar methodological comparisons by the prosecution. See also, Valle v. State, 581 So. 2d 40, 45 (Fla. 1991) (by eliciting testimony that defendant was a model prisoner, defense opened the door to testimony about the defendant's misconduct on death row); Atlantic Coast Line R. Co. v. Watkins, 97 Fla. 350, 121 So. 91, 99 (1929) (scope of cross-examination rests within discretion of trial court). Alternatively, any error as to Dr. Toomer's cross-examination must be deemed harmless. As noted by the Appellant, this case does not involve the killing of a police officer. Questioning regarding Toomer's opinion in other cases was extremely brief, the facts of those cases were not presented to the jury, and the prosecutor did not focus on those cases in his closing argument, just having one brief reference to said opinions.

The Appellant next focuses on the prosecutor's comment, during closing argument, that "[t]he death penalty is a message sent to a number of members of our society who choose not to follow the law." (T. 1098). After an objection interrupted the prosecutor's argument, a defense objection was overruled and the prosecutor was permitted to conclude the argument: "The death penalty is a message sent to certain members of our society who choose not to follow the rules. It's only for one crime, the

crime of first degree murder. It is for those who violate the sacredness and sanctity of human life." (T. 1099-1100). The Appellant asserts that these comments constitute improper prosecutorial requests to send messages to the community.

Most significantly, the prosecutor's comment is not asking to send a message to the community at large; it is not asking the community to send a message. It is simply a comment directed to that segment of society which perpetrates murders. In Crump v. State, 622 So. 2d 963, 971-72 (Fla. 1993), this Court considered the propriety of several prosecutorial comments, including, inter alia, two comments in which the prosecutor asked the jury "to return a death sentence in order to send a message to the community." After concluding that the comments at issue were not preserved for appellate review and did not constitute fundamental error, the Court alternatively concluded that "[e]ven if we considered these issues preserved for appeal, we find that the prosecutor's comments are not so outrageous as to taint the jury's finding of guilt or recommendation of death." 622 So. 2d at 972. While this Court has disapproved "message to the community" comments, Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), this was not such a comment. The prosecutor was simply stating that the death penalty is a message to murderers - i.e., those who choose not to follow the law. Such a comment not only states the obvious, but it does not pressure the jurors to send a message to the community.

The next focus of the Appellant's argument is on the prosecutor's comment that "[t]he death penalty has been imposed once in this case." (T. 1101). The Appellant has implied that the prosecutor was referring to the prior jury's recommendation and judicial imposition of death, prior to this Court's reversal of the first death sentence. After defense counsel interrupted the prosecution and an objection was overruled, the prosecutor resumed the argument and asserted that "[t]he defendant imposed it upon the victim, on Billy Bosler." (T. 1101). These comments did nothing more than state the obvious, the unrefuted - i.e., that the defendant killed the victim in this case. Cf., Jones v. State, 20 Fla. L. Weekly S29, 31 (Fla. Jan. 12, 1995) (characterization of defendant as assassin was not unreasonable).

The final assertion of prosecutorial misconduct involves the admission of testimony and photographs of Su Zann Bosler and comments thereon during argument. The Appellant has argued that said testimony and photographs became features of the sentencing proceedings. The Appellant also contends that the prosecutor erroneously argued for a death sentence not because of what the defendant had done to the murder victim, but because of what had happened to his daughter. The Appellant's contentions are not supported by the record and are without merit.

During opening argument, the prosecutor first stated: "This is why we are here. This is Reverend Billy Bosler..." (T. 673). After showing photographs of the crime scene, the Bosler house,

the prosecutor added: "We are also here, Ladies and Gentlemen, because in addition to the Reverend Billy Bosler being attacked that day, his daughter was likewise attacked." (T. 674). The prosecutor then described the knife attack on both the Reverend Bosler and his daughter. (T. 674-675). Defense counsel sought a continuing objection "for purposes stated earlier." (T. 675). The "purposes stated earlier" referred to a prior ruling on a motion in limine. The defense was seeking to prevent the prosecution from presenting the testimony of Sue Zann Bosler, the daughter of the deceased, who was herself attacked and stabbed by the defendant. During the guilt phase of the original trial proceedings, the defendant had been convicted, not only for the murder of Billy Bosler, but for the attempted murder of Ms. Bosler. The prosecution argued, and the trial court agreed, that the facts regarding the attack on Ms. Bosler were relevant to at least one aggravating factor that the State was seeking to establish - i.e., that the defendant was previously convicted of a prior violent felony. (T. 658-59).

The lower court's ruling, permitting both the introduction of evidence regarding the attempted murder of Ms. Bosler and comment on that offense was proper. The aggravating factor of prior violent felonies includes other violent offenses which resulted in contemporaneous convictions along with the instant murder. See, e.g., Cook v. State, 542 So. 2d 964, 970 (Fla. 1989); Lucas v. State, 376 So. 2d 1149 (Fla. 1979). Not only was the attempted murder of Ms. Bosler relevant to the aggravating factor

which the prosecution was permitted to establish, but, evidence of that offense was admissible in conjunction with the proof of the prior conviction; the prosecution was not limited to merely establishing the fact of the conviction. See, e.g., Delap v. State, 440 So. 2d 1242, 1255 (Fla. 1983); Elledge v. State, 346 So. 2d 998 (Fla. 1977); Dufour v. State, 495 So. 2d 154, 163 (Fla. 1986) (rejecting argument that the prosecution "went too far" with the evidence of the prior conviction for a violent felony).

Aggravating and mitigating factors are not mere numbers which are totalled when they are weighed. The substance of each factor must be evaluated in determining the weight to be accorded to it. Therefore, when the jury is asked to weigh an aggravating factor based upon convictions for prior violent felonies, it is reasonable that the jury be given the pertinent facts of that other offense. See Lockhart v. State, 20 Fla. L. Weekly S131 (March 16, 1998)("Details of prior violent felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial. Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla.), cert. denied, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992). Such testimony helps determine whether 'the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the judge and jury.' Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977).").

Furthermore, in the typical situation, the same jury would have heard the guilt phase evidence of both the murder and attempted murder herein, before making its recommendation of life or death on the murder. What this resentencing jury heard was therefore no different than what any original sentencing jury would necessarily have heard as to the attempted murder of Ms. Bosler. Cf., Valle v. State, 581 So. 2d 40, 45 (Fla. 1991) (no error in permitting prosecution to represent guilt phase evidence for sentencing jury in resentencing proceedings); Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1987) (". . . it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital proceedings to make wise and reasonable decisions in a vacuum."). Lucas v. State, 568 So. 2d 18, 21 (Fla. 1990)(testimony from two surviving victims was proper, as resentencing jurors must be made aware of the underlying facts).

The trial court thus did not err in allowing Ms. Bosler's testimony and comments thereon. Moreover, contrary to the Appellant's argument, evidence of Ms. Bosler's injuries was clearly not a "feature" of the instant proceedings either. Ms. Bosler gave an eyewitness account of the events from when defendant started the attack on her father until he finished ransacking the house for valuables. This testimony was relevant

to all of the aggravators established in the instant case. The Appellee would note that the complained of portion of Ms. Bosler's testimony consists of five brief questions and answers, constituting one-half page of transcript, and describing defendant's actions before he finished ransacking the house. T. 862, Appellant's brief at pp. 18-19. As such, said testimony can hardly be said to have been a "feature" of the instant proceedings. See, Lucas, 568 So. 2d at 21 (testimony from two surviving victims, which in part described their own physical and mental suffering, held not a "feature"); Stano v. State, 473 So. 2d 1282 (Fla. 1985)(evidence of eight other murder convictions in sentencing proceedings); Wilson v. State, 330 So. 2d 457 (Fla. 1976)(extensive similar fact evidence that spanned over 600 pages approached, but did not reach, outer boundary where prejudice begins to outweigh probative value); Rogers v. State, 511 So. 2d 526 (Fla. 1987)(evidence of two other robberies did not become feature of case); Burr v. State, 466 So. 2d 1051 (Fla. 1985)(evidence of three other incidents did not become feature).

Likewise, Appellant's argument of "unfair prejudice" due to "several" photographs of Ms. Bosler's injuries, is without merit. The state would first note that only two photographs, from the larger four photo composite admitted at the prior trial, were entered into evidence at the instant resentencing. (T. 865, R. 357-62). The photos accurately depicted Ms. Bosler's injuries and supported her testimony which had not been detailed. (T. 865). The trial court noted that said photos were not "gruesome" and

determined that the probative value thereof outweighed any prejudice. (T. 864). There was thus no impropriety in the admission of said photos. See, Lockhart, 20 Fla. L. Weekly S132 ("there was no error in admitting the eight photographs from the Indiana crime. The admissibility of photos is within the trial court's discretion and will not be disturbed on appeal absent a showing of clear error. [citation omitted].").

In the same vein, the prosecutor's comments, as noted on pages 23-4 herein, clearly reflect that, contrary to Appellant's argument, he was not seeking the death penalty solely based on what the defendant did to Ms. Bosler. Rather, the prosecutor first described the manner of the attack upon the deceased, which was clearly relevant to the HAC[2] aggravator, and then described the attack upon the deceased's daughter, which was, as noted previously, relevant to the prior conviction of a violent felony aggravator. See, Lockhart, supra. The comments complained of herein were based upon relevant evidence and thus were not improper. See, Lucas, 568 So. 2d at 21 (comments on evidence are not improper).

Thus, as the evidence and comments at issue all related to a prior conviction which formed the basis for an aggravating factor, and as the evidence and comments were all matters which any original sentencing jury would have heard as it would have heard

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[2] Heinous, atrocious or cruel.

the entire guilt phase proceedings, there was no error in permitting the introduction of such evidence or comments.

Assuming, arguendo, that there was any error in the admission of the above evidence or comments thereon, the state respectfully submits that any such error was harmless beyond a reasonable doubt. The sentencing judge specifically instructed the jurors herein that sympathy for Su Zann Bosler was not a consideration:

> Although the evidence that you have heard in this trial included testimony of SuZann Bosler and about Suzanne Bosler, I instruct you that sympathy for Suzanne Bosler is not a legal aggravating circumstance.
>
> You're prohibited from giving this matter any weight towards the decision to recommend a death sentence.

(T. 1126). Jurors are presumed to follow the trial court's instructions. Greer v. Miller, 483 U.S. 756, 766, n. 8, 107 S.Ct. 3102, 97 L.Ed. 2d 618 (1987).

In view of the foregoing, the allegations of prosecutorial misconduct do not constitute reversible error, either individually or cumulatively. See Bertolotti v. State, supra at, (prosecutorial misconduct during penalty phase must be "egregious before reversal is warranted.).

II.

THE LOWER COURT DID NOT ERR IN PRECLUDING THE VICTIM'S DAUGHTER FROM TESTIFYING THAT THE DEFENDANT SHOULD NOT RECEIVE THE DEATH SENTENCE.

The victim's daughter, Ms. Bosler, did not wish that the defendant receive the death penalty. (T. 1184-86). Her viewpoint was not, however, representative of that of other members of the victim's family. (T. 1188-90). The court below precluded the defendant from presenting testimony as to the victim's family members' opinion of the appropriate penalty before the sentencing jury. Although the jury was not allowed to hear the opinions, the testimony of both the victim's daughter and the victim's mother were presented to the judge, prior to the latter's imposition of sentence. (T. 1184-90). The sentencing judge did not find the victim's daughter's opinion to be mitigating. (R. 489).

The Appellant contends that the trial court thus unfairly restricted the defendant's presentation of mitigating evidence to the jury in violation of Lockhett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978) and its progeny. The Appellant also argues that the sentencing judge should have found the victim's daughter's opinion to be mitigating, as the original trial judge had accepted this as a nonstatutory mitigating factor.

The Appellant's arguments are without merit, as the victim's daughter's personal opinion as to the propriety of the death penalty was irrelevant, because it shed no light on the

defendant's character or record, or on the offense itself. See, Jackson v. State, 498 So. 2d 406, 413 (Fla. 1987) ("We note again that this evidence [victim's brother's testimony that victim's family did not wish appellant to receive the death penalty] sheds no light on appellant's character or record, or on the offense itself. We agree with the state that allowing the jury to hear this testimony would have opened the door for the state to show, through testimony of other members of the victim's family, that Reverend Bevel's viewpoint was not necessarily representative. We see no error."); Floyd v. State, 497 So. 2d 1211, 1213 (Fla. 1986) (no error in failure to find as mitigation the testimony of victim's daughter that both she and victim opposed capital punishment); Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993) (trial court's refusal to allow defense witnesses to express their personal opinions concerning the appropriateness of the death penalty in defendant's case did not improperly restrict his ability to present a defense); Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994) (no error in that court's refusal to admit a statement by the defendant's children's guardian that a life sentence would be in the children's best interest. "The guardian ad litem's opinion in this regard shed no light on Cardona's character, record, or the circumstances of the offense.").

The above decisions of this Court are in full accordance with the United States Supreme Court's jurisprudence in capital cases. That Court, in Lockett, 438 U.S. at 604, n. 12, expressly held that, "[n]othing in this opinion limits the traditional

authority of a court to exclude as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." See also, Franklin v. Lynaugh, 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.Ed. 2d 155 (1988) (the edict that, in a capital case, the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, or any of the circumstances of the offense, does not mandate consideration of matters not relevant to defendant's "character," "record," or "a circumstance of the offense," such as evidence of "residual doubt."). Indeed, the Court in Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. ___, 115 L.Ed.2d 720, 739, n. 2, (1991) has held that, while victim-impact evidence is admissible, consideration of a victim's family members' opinion as to the appropriate sentence for a capital murder defendant is still prohibited.

Likewise, the Appellant's reliance upon the prior trial judge's finding that the victim's family members' wishes were nonstatutory mitigation, is misplaced. The resentencing in the instant case was a completely new proceeding, before a different judge and jury. The new sentencing judge was not obligated to find the same mitigating circumstances credited by the prior judge, in such a situation. Thompson, 619 So. 2d at 266. "Furthermore, 'a mitigating circumstance in one proceeding is not an ultimate fact that collateral estoppel or the law of the case would preclude being rejected on resentencing.'" Id., quoting King v. Dugger, 555 So. 2d 355, 358-59 (Fla. 1990).

As seen above, there was no error in precluding the presentation of the victim's family members' opinions and wishes concerning the appropriate penalty, to the jury. There was no abuse of discretion in the lower court's failure to find a mitigating circumstance on this basis, either. Jackson, supra; Floyd, supra; Thompson, supra.

III.

THE LOWER COURT DID NOT ERR IN PROHIBITING VOIR DIRE QUESTIONING REGARDING THE DEFENDANT'S PREVIOUSLY IMPOSED CONSECUTIVE LIFE SENTENCES FOR HIS NONCAPITAL OFFENSES.

At voir dire, the defense requested that the judge instruct and inform the venire that the defendant had been sentenced to life imprisonment terms on the noncapital offenses, consecutive to the sentence which the jury was to recommend, and to allow questioning on this matter. (T. 7-12). The defense relied upon Jones v. State, 569 So. 2d 1234 (Fla. 1990) (T. 265-66). The trial court determined that the requested instruction as to the noncapital crimes and questioning thereon were not appropriate at the voir dire stage. (T. 266-67). The trial court ruled that the defense could introduce evidence and argue the noncapital sentences after jury selection. Id. The defense did so. The Appellant now contends that his voir dire of the potential jurors was prejudicially limited.

The trial court's ruling was in accordance with this Court's prior precedents, and the record herein reflects there was no prejudicial limitation of voir dire. In Jones, the defendant was convicted of two counts of first degree murder. The defense thus requested that it be allowed to argue that he could be sentenced to two consecutive minimum twenty-five year prison terms on the murder charges, should the jury recommend life sentences. This Court held that defense counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years

should he receive life sentences on each of the two murders. Jones, 569 So. 2d at 1239-40. Jones thus clearly involved capital sentencing minimum mandatory options, which are within the province of the jury's consideration. Moreover, the Court, in allowing "argument" in Jones, did not mention, let alone require, specific instructions in this regard by the trial judge, nor that the matter should be addressed at the voir dire stage. Indeed, where, as here, sentences for noncapital offenses, which are not within the province of the jury to decide, are involved, this Court has expressly held that sentences on such collateral offenses are not mitigation and no instructions thereon are required:

> Nixon maintains that the fact that he was convicted of three other offenses which carried lengthy maximum penalties was a circumstance on which the jury should have been instructed under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978). Florida Rule of Criminal Procedure 3.390(a) provides that "[e]xcept in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial." This rule has been construed to mean that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties. Coleman v. State, 484 So. 2d 624, 628 (Fla. 1st DCA 1986).
>
> As we recently noted in King v. Dugger, 555 So. 2d 355, 359 (Fla. 1990), "Lockett requires that a sentencer 'not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" The fact that Nixon was convicted of three other offenses

> each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime. Therefore, the trial court did not err in refusing to give the instruction.

Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990); see also, Gorby v. State, 630 So. 2d 544, 548 (Fla. 1994) (" We [have] held that, during the penalty phase, there is no need to instruct the jury on the penalties for noncapital crimes a defendant has been convicted of. Gorby has not convinced us of any need to reconsider that [Nixon] holding".). The trial court thus did not commit any error in the instant case.

Assuming, arguendo, that lengthy penalties on offenses in which the jury plays no role in sentencing, are deemed to be nonstatutory mitigation, again there was no error. In light of the standard "catchall" jury instruction on mitigation, there is no requirement that the trial judge give specific instructions as to each proposed nonstatutory mitigating factor. Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Waterhouse v. State, 596 So. 2d 1009, 1017 (Fla. 1992); Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991). As noted previously, the court below in the instant case did allow presentation of evidence of the judgments of conviction and sentences as to defendant's noncapital offenses, and the defense fully argued same to the jury in its closing argument, as a reason for a recommendation of life. There was thus no error in the trial court's failure to specifically instruct and inform the potential jurors at voir dire on the sentences for the noncapital crimes.

Moreover, "[T]he scope of voir dire questioning rests in the sound discretion of the court and will not be interfered with unless that discretion is clearly abused." Vining v. State, 637 So. 2d 921, 926 (Fla. 1994). As noted by the Appellant, the defense must be given latitude to examine jurors on voir dire as to the existence of bias or prejudice against the defendant. Lavado v. State, 492 So. 2d 1322 (Fla. 1986), adopting Judge Pearson's dissent in Lavado v. State, 469 So. 2d 917, 191 (Fla. 3d DCA 1985). The Appellant, however, neither in the court below nor herein, has explained how instructions and questioning of potential jurors on voir dire, with respect to the noncapital sentences, would have revealed any bias or prejudice against the defendant. At the start of voir dire herein, the trial court informed the venire that they were to decide between a sentence of death, or, life imprisonment without the possibility of parole for 25 years. (T. 26). The venire was then extensively examined as to any predispositions or biases for or against both the death penalty and a sentence of life imprisonment. (T. 153-83, 251-57). All those who favored the death penalty or were biased against a sentence of life, at least nine potential jurors in all,[3] were excused for cause, upon the stipulation of both parties. (T. 426-27, 432, 435, 436, 622). The State fails to see how informing and questioning the potential jurors as to other consecutive life sentences would have revealed any more "bias against the defendant," where the venire was examined and revealed their

[3] See T. 153-83, 251-57.

biases against one sentence of life, without the possibility of parole for twenty-five years.

Furthermore, the Appellee notes that the potential jurors were extensively examined as to their ability to be fair and impartial, and to follow the law. (T. 58-144). Additionally, both defense counsel and the trial judge informed the potential jurors that: (a) mitigating factors were "unlimited", "literally anything"; whereas aggravating factors were limited to those set forth in the capital sentencing statute, and, (b) aggravating factors had to be proven beyond a reasonable doubt, whereas the standard of proof for establishing mitigation was lesser, "we have to reasonably satisfy." (T. 380-86, 584-90). The defense was allowed to fully explore the jurors' opinions as to this "bias in our law favoring life." (T. 380-91, 584-90). The potential jurors' ability to accept traditional defenses, such as psychological expert testimony, were also extensively delved into. (T. 392-419). The defense was thus given wide latitude to explore the potential jurors' understanding of the procedures, their ability to be fair and impartial, and their ability to follow the court's instructions.

As seen above, the record herein reflects that there was no prejudicial limitation of voir dire. See, Vining, 637 So. 2d at 926 ("Based upon our review of the record in this case, we do not find that the judge abused his discretion in limiting the scope of questioning during voir dire. Although the judge did not permit

questioning about the prospective jurors' personal views of what constitutes a mitigating circumstance, defense counsel was able to explore the potential jurors' understanding of the two-part procedure involved and their ability to follow the law as instructed by the judge in the penalty phase. In fact, the questioning was comprehensive enough to permit defense counsel to strike several prospective jurors for cause."); Ragsdale v. State, 609 So. 2d 10, 13 (Fla. 1992) (no error in limitation of voir dire questioning, as to willingness to accept specific instances of nonstatutory mitigation, where the record reflects that defense counsel had "sufficient latitude" so as to obtain fair and impartial jurors.).

IV.

THE LOWER COURT DID NOT ERR IN DENYING A DEFENSE REQUESTED INSTRUCTION REGARDING PRIOR CONSECUTIVE LIFE SENTENCES AS A MITIGATING FACTOR.

The defense also requested that the trial court's final instructions to the jury include the following as to the defendant's noncapital convictions:

> Among the mitigating circumstances you may consider are that this defendant has already been sentenced to consecutive sentences of life imprisonment.

(R. 424). As noted in the argument as to Point III herein, pp. 35-6, a defendant's sentences on noncapital crimes, which are not within the province of the jury to consider, are not relevant and do not constitute mitigation. Nixon, supra; Gorby, supra. No instructions to the jury on such sentences are necessary. Id. As previously noted, even assuming, arguendo, that such sentences may constitute nonstatutory mitigation, specific instruction as to every proposed nonstatutory mitigator is not required under Florida law. Walls, supra; Waterhouse, supra; Robinson, supra. This is because the standard Florida jury instructions on nonstatutory mitigating factors amply allow for consideration of all such proposed factors. Id. The State would note that in the instant case, in addition to the standard instructions given after closing arguments (T. 1120), the trial court, at the outset (during voir dire), also informed the jurors that mitigating factors are "unlimited." (T. 382). No error has thus been demonstrated.

The Appellant, however, contends that the failure to give the requested instruction herein, is in violation of Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed. 2d 133 (1994). This argument is without merit as the trial court's actions herein are in full compliance with Simmons.

A majority of the United States Supreme Court, in Simmons, agreed that in the penalty phase of a state capital trial, due process requires that the defendant be allowed, in rebuttal, to inform the capital sentencing jury "by way of argument by defense counsel or an instruction from the court" of his ineligibility for parole under state law, where future dangerousness is at issue. Simmons, 129 L.Ed. 2d at 146 (plurality opinion of Justice Blackmun; joined by Justices Stevens, Souter and Ginsburg) (emphasis added); see also, 129 L.Ed. 2d at 149 (Justice Ginsburg concurring) ("As a subsidiary matter, Justice O'Connor's opinion clarifies that the due process requirement is met if the relevant information is intelligently conveyed to the jury; due process does not dictate that the judge herself rather than defense counsel provide the instruction. See post, at ___, 129 L.Ed. 2d at 151. I do not read Justice Blackmun's opinion to say otherwise."); 129 L.Ed. 2d at 151 (Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, concurring) ("I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention by way of argument by defense counsel or an instruction from the Court -

as a means of responding to the State's showing of future dangerousness.").

In Simmons, the majority noted that the due process clause does not permit the execution of a person on the basis of information which he had no opportunity to deny or explain. Simmons had established that the jury in his case may have reasonably believed that he could be released on parole if he were not executed. The prosecution further encouraged this misperception by arguing for a verdict of death as Simmons posed a "threat" to society if he were not executed. Yet, Simmons' defense counsel, despite repeated requests, was prohibited from any mention of the true meaning of the non-death sentencing alternative before the jury, under state law - i.e., life without parole. The Court further acknowledged that, "[I]n a state in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second guess a decision whether or not to inform a jury of information regarding parole." 129 L.Ed. 2d at 145.

Unlike Simmons, the defense in the instant case was not precluded from arguing any alternatives to the jury. Indeed, defense counsel herein specifically argued that the defendant had been sentenced to consecutive life sentences:

> Defense counsel: The sad thing is what happens if you do vote for life?

> Well, you can take back State Exhibit 25. This is a judgment, it's a sentence. Look at it. Count I is this murder charge. Count I, is what you're going to decide whether its life with a minimum mandatory 25 years without eligibility for parole.
>
> Count II is a life sentence consecutive to Count I. Count III is a life sentence consecutive to Count II.
>
> Count IV is a life sentence consecutive to Count III.
>
> What's the bottom line here? We've heard for the past hour about leniency.
>
> That's really lenient, isn't it? Somebody who's giong to spend most if not all of his life in prison, that's quite lenient?

(T. 1110); See also T. 685-6 where the same statements were made during the defense opening argument. Moreover, the trial judge also provided the jury with accurate information, under Florida law, with respect to the non-death alternative which was within the jury's province to decide. The jury was instructed that the alternative punishment for the murder conviction before them, "is either death or life in prison without the possibility of parole for 25 years." (T. 630). There was thus no violation of Simmons in the instant case.

V.

A. THE LOWER COURT DID NOT ERR IN FAILING TO GIVE GREATER WEIGHT TO NONSTATUTORY MITIGATING EVIDENCE.

Initially, the Appellant argues that the lower court's sentencing order is inadequate, claiming that it improperly lumps all nonstatutory mitigating factors into one category and disposes of them jointly, as opposed to individually. The Appellant's argument clearly misstates the approach utilized in the sentencing order. Campbell, supra, states that "proposed nonstatutory circumstances should generally be dealt with as categories of related conduct rather than as individual acts." 571 So. 2d at 419. That is precisely what the lower court did in the sentencing order.

Subsection (h) of the sentencing order deals with nonstatutory mitigation, under the heading of "any other aspect of the defendant's character or record and circumstances of the offense which warrant mitigation." (R. 488). The first paragraph of that subsection lists several categories of alleged nonstatutory mitigation advanced by the defense. (R. 488). The next three paragraphs of the subsection then proceed to deal, individually, with the various categories of alleged nonstatutory mitigation. Thus, one paragraph specifically deals with the age of the defendant and the surviving victim's plea for mercy, and finds that they are not mitigating factors. (R. 489). The next paragraph then deals with evidence of substance abuse and, after

evaluating it, finds that it "is given minimal weight by this Court." (R. 489). The next two paragraphs deal with evidence of abandonment and child abuse, and, once again, after evaluating that evidence, the court finds that those factors are to given "little weight." (R. 489-90). Thus, contrary to the Appellant's initial argument, the lower court did precisely what this Court asked sentencing courts to do - i.e., evaluate nonstatutory mitigation in reasonable, general categories. See also Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994)(no error in grouping several proffered mitigating factors).

The Appellant next argues that the trial court improperly failed to give sufficient weight to several alleged nonstatutory mitigating factors, including the defendant's abusive childhood, his limited education, his low level of intelligence, and his abandonment by his family. A review of the record reflects that the lower court carefully considered all of these alleged factors and properly concluded that they were entitled to minimal weight.

First, insofar as the Appellant, with respect to both the foregoing matter and other aspects of mitigation, is suggesting that some of these matters involved "unrebutted" testimony from experts, some recently enunciated general principles should be borne in mind. Opinion testimony is not subject to the general rule that "uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory." Walls v. State, 641 So. 2d 381,

390 (Fla. 1994). Opinions, even if uncontroverted, are not necessarily binding. Id. Thus,

> . . . Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for a judge and jury to resolve.

Id. at 390-91. See also, Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994) ("even uncontroverted opinion testimony can be rejected, and especially where it is hard to square with the other evidence at hand, as was the case here.").

Second, this Court has routinely held that "the relative weight given each mitigating factor is within the province of the sentencing court. . . ." See, Campbell, supra, 571 So. 2d at 420. See also, Swafford v. State, 533 So. 2d 270, 278 (Fla. 1988); Jones v. State, 648 So. 2d 669 (Fla. 1994); Ferrell v. State, 20 Fla. L. Weekly S74, S75 (Fla. Feb. 16, 1995).

The trial court addressed and accepted the defendant's abusive treatment during childhood as follows:

> Testimony regarding the defendant being abandoned by his parents was inconsistent. Although the defendant did not live with his mother, he lived with his grandparents for the first six years of his life. Thereafter, he lived with his mother until he was declared dependent and placed in Health and

> Rehabilitative Services (HRS) custody. While the evidence established that his mother did abuse him, there is insufficient evidence to establish that he was abandoned. With respect to the history of abuse, it was not contradicted, but the extent of abuse and its weight in mitigation are factors this court has taken into account. The Court gives these factors little weight. The court feels that these factors played little if any part in the savage murder of William Bosler. While they may be a reason for the brutality shown to this murder victim, they do not and cannot be considered as an excuse for his action.

(R. 489-90). Of particular significance in evaluating the weight given to this factor, several things should be considered. First, insofar as the defendant was removed from his mother, by HRS, when he was 12 years old, any abuse occurred prior to that time, and the abuse therefore terminated at least eight years before the commission of the murder herein. There was no evidence of any form of abuse subsequent to the age of 12. The remoteness of time, between the termination of any abuse and the commission of the murder, is a factor which this Court has observed that a trial judge can properly rely upon in determining that a traumatic childhood is a factor entitled to minimal weight. See, e.g., Jones v. State, 648 So. 2d 669 (Fla. 1994).

The second significant fact is that the testimony regarding physical abuse of the defendant as a child established only the existence of one actual incident - the occasion on which the defendant, at age 12, was struck with a telephone and taken to the emergency room. No other incidents are established, and the defendant's aunt specifically stated that that incident was the only one of which she was aware. (T. 951).

The third significant fact is that the first six years of the defendant's life were spent with his grandparents, in an atmosphere that appears to have been devoid of any form of abuse. Furthermore, as far as the "abandonment" at age 12, the defendant was taken from his mother by government authorities, for the purpose of improving his environment; for terminating any abuse. It was at that time that the defendant commenced a series of rehabilitative and treatment programs. Thus, in Jones v. State, 20 Fla. L. Weekly S29, 31 (Fla. Jan. 12, 1995), this Court observed that a trial judge properly rejected abandonment as a mitigating factor where the defendant, as a child, was taken away from the abusive parent, to place him in a superior environment and end any abuse.

The Appellant next complains about the weight given to the defendant's low level of intelligence. Although this factor is not discussed in the portion of the order dealing with nonstatutory mitigating factors, from the judge's prior disposition of the statutory factor dealing with the capacity of the defendant to appreciate the criminality of his conduct, etc., it is readily apparent that the judge considered the defendant's low intelligence in conjunction with the statutory mitigating factor and gave it minimal weight:

> The evidence supporting this mitigating factor was contradicted. Although evidence was presented that the defendant's IQ was determined to be in the borderline retarded

> range (i.e., 68-80), the defendant's school records indicated that the defendant was considered to be intelligent. While the defendant was described as having poor reasoning skills, his actions immediately after the murder refute this conclusion. After killing William Bosler, the defendant cleaned the blood off of himself, took clothing from the victim's house, and changed into it prior to boarding a bus to flee the scene of the crime. Additionally, the defendant demonstrated sound reasoning abilities during his incarceration by intervening and notifying the authorities when another inmate was contemplating suicide.
>
> . . .
>
> This court feels that although the evidence was not overwhelming as to this mitigating factor, that it was established to the minimal standard necessary. The court, therefore, considers it as a mitigating circumstance but gives it the weight it deserves which is minimal.

(R. 486-87). As the defendant's level of intelligence was already addressed, and given minimal weight, in conjunction with the statutory mitigating factor, it was not necessary for the judge to reiterate the same matters in a separate reevaluation for a virtually identical nonstatutory mitigating factor. In Jones v. State, 648 So. 2d 669 (Fla. 1994), the appellant argued that the trial court had failed to give adequate consideration to evidence of the defendant's traumatic childhood and intoxication. Since the trial court had already considered and given some weight to this evidence, in its evaluation of the statutory mitigating factor regarding the defendant's ability to conform his conduct to the requirements of the law, this Court concluded that the factor was adequately weighed and considered. So, too, in the instant

case, since the court accepted the evidence in conjunction with the statutory mitigating factor, it was not necessary to reconsider it and give it additional weight in conjunction with a repetitious nonstatutory mitigating factor.

Furthermore, as noted above, it was within the court's discretion, having found this factor to exist, to accord it the level of weight that it was accorded. The court's conclusion is supported by the record. As detailed in both the Statement of Case and Facts herein, and the trial court's order, the defendant's actions after the murder reflect the existence of sound reasoning abilities, as did the defendant's actions in reporting suicidal conduct of one of his co-inmates. Additionally, the defense experts acknowledged that other experts had also tested the defendant and found his level of intelligence to be considerably higher than the IQ of 68 referred to by Dr. Frumkin. (T. 895-96, 920). Frumkin specifically acknowledged that the defendant was not mentally retarded. (T. 896). Frumkin was also shown a letter signed by the defendant. He acknowledged, upon reviewing said letter, that its author was literate and not of low intelligence. (T. 912-20). See Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993)(no error in failing to find mitigation of low intelligence notwithstanding evidence of brain damage and low IQ).

The State would also note that the Appellant has wrongfully implied that organic brain damage is a mitigating factor in this

case. See, Brief of Appellant, p. 38. No expert ever testified that this defendant suffered from any form of organic brain damage. Dr. Frumkin testified, in general, that there is a possibility that substance abusers - not Campbell in particular - "could have had some sort of brain damage." (T. 939-40). Toomer never stated that Campbell had any form of brain damage, organic or otherwise. (T. 1024).

Finally, the Defendant's substance abuse problems were also properly addressed by the trial court:

> Evidence of defendant's substance abuse problem was refuted by evidence that he has been in alcohol/drug rehabilitation programs. Moreover, the defendant's substance abuse does not extenuate or reduce his degree of moral culpability for the crime committed and is given minimal weight by this Court.

(R. 489). The sentencing order had also previously addressed the significance of substance abuse in the evaluation of statutory mitigation (capacity to appreciate criminality of conduct, etc.), while giving it minimal weight as to that factor:

> There was evidence presented that the defendant suffered from chronic drug and alcohol abuse; however, there was no credible evidence presented at the sentencing that the defendant was acting under the effects of drugs and/or alcohol at the time of the homicide....

(R. 486).

One of the defense experts testified that he had not been furnished with any information, either from the defendant directly, or from other sources, indicating that there had been any substance abuse on the day of the murder. (T. 931-32). Dr. Frumkin referred to the defendant's drug use during his mid-teens. However, the defendant had subsequently attended substance abuse treatment programs. Although Dr. Toomer expressed the opinion that the defendant was under the influence on the day of the murder, there was absolutely no evidence adduced to support that conclusion. (T. 993-94, 1017). There was no evidence that the defendant had ingested any drugs or alcohol at or about the time of the murder. (T. 931-2). The defendant never testified that he had used drugs or alcohol on the day of the murder, either. There was also no indication that the defendant was under the influence of drugs or alcohol on the day of the murder. Indeed, the evidence clearly suggests that the contrary is true, as the defendant, at the time of the murder, engaged in a series of highly rational acts, in an effort to cover up his involvement in the murder, such as changing out of his bloody clothing before leaving the scene of the murder. In view of the foregoing, as there was no evidence to connect any former substance abuse problem to the commission of the murder, the trial court correctly gave this factor minimal weight.

This Court's opinion in Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991), is highly significant here, especially with respect to Dr. Toomer's unexplained assertion that he believed the

defendant to be under the influence of alcohol. In Robinson, an expert was not permitted to testify that the defendant told him that he had been intoxicated during the incident. This Court held that such a hearsay statement to the doctor, even though during the course of a medical interview, would have been insufficient to establish the existence of this mitigating factor at trial, in the absence of any evidence of impairment at trial. Likewise, there was no evidence adduced at trial of the defendant's impairment at the time of the murder. See, also, Pittman v. State, 646 So. 2d 167, 170 (Fla. 1994)(trial court properly rejected influence of alcohol when, other than an expert's opinion, the record did not reflect it to have been a factor in the commission of the crimes); Holsworth v. State, 522 So. 2d 348, 352 (Fla. 1988) (expert testimony as to effect of intoxicants inadmissible absent proof of ingestion other than defendant's hearsay to expert; testimony of a witness who thought she smelled beer on defendant's breath insufficient to warrant admission of expert testimony). From the foregoing cases, it appears that the judge gave the defendant the benefit of every doubt by permitting the introduction of the experts' opinions, even in the absence of a sufficient predicate of drug/alcohol ingestion, and in giving this factor some minimal weight, when this Court's recent cases suggest that a judge could justifiably have found that this factor was not even established at all.

B. THE LOWER COURT DID NOT ERR IN FAILING TO GIVE MORE WEIGHT TO THE STATUTORY MITIGATING FACTOR THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS ACT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

The lower court gave minimal weight to the statutory mitigating factor that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R. 485-87). The sentencing order addressed this as follows:

> The evidence supporting this mitigating factor was contradicted. Although evidence was presented that the defendant's IQ was determined to be in the borderline retarded range (i.e., 68-80), the defendant's school records indicated that the defendant was considered to be intelligent. While the defendant was described as having poor reasoning skills, his actions immediately after the murder refute this conclusion. After killing William Bosler, the defendant cleaned the blood off of himself, took clothing from the victim's house, and changed into it prior to boarding a bus to flee the scene of the crime. Additionally, the defendant demonstrated sound reasoning abilities during his incarceration by intervening and notifying the authorities when another inmate was contemplating suicide.
>
> There was evidence presented that the defendant suffered from chronic drug and alcohol abuse; however, there was no credible evidence presented at the sentencing that the defendant was acting under the effects of drugs and/or alcohol at the time of the homicide. Reports of Dr. Bruce Frumkin indicate that the effects of drug and/or alcohol have dissipated since the first sentencing trial.
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> This court feels that although the evidence was not overwhelming as to this mitigating factor, that it was established to the minimal standard necessary. This court, therefore, considers it as a mitigating circumstance but gives it the weight it deserves which is minimal.

(R. 485-87). As noted in the preceding section herein, the relative weight given each mitigating factor is within the province of the sentencing court. . . ." Campbell, supra, 571 So. 2d at 420; Swafford, supra; Ferrell, supra. Furthermore, as previously noted, expert opinions are not binding, even when they are not contradicted - especially when they are undermined by the salient facts. Walls, supra. As noted therein, notwithstanding uncontradicted experts' opinions regarding the existence of mental-state statutory mitigating factors, "[r]easonable persons could conclude that the facts of the murder are inconsistent with the presence of the two mental mitigators." Id. at 391, n. 8.

The foregoing principles are strongly applicable here. The defendant's actions in covering up the murder and effecting his escape were indicative of sound reasoning abilities - i.e., cleaning the blood off of himself, and changing out of his bloody clothing prior to leaving the scene. Although this Court previously noted that the defendant's IQ was in the "retarded" range, the defense expert herein testified, "I don't think he is mentally retarded". (T. 896). The defense expert explained that the low score he had initially obtained, 68, was in part attributable to the fact that the defendant was "stressed" at the time. Id. It was "lower than it should be". (T. 922). He opined that defendant was border line low average intelligence. (T. 921). Dr. Frumkin acknowledged that other doctors felt defendant was of "low average intelligence," and other tests had

rated his IQ higher, at 85. (T. 920). Significantly, this expert, who had partially based his assessment of defendant's intellectual functioning based on the inability to read and spell, was shown letters written by the defendant. (T. 911-12, 918-21). He acknowledged that the "sophisticated" use of words in the letters, "does not sound like the Mr. Campbell I spent over seven hours with" (T. 919-20). The letter was not "composed by somebody of lower average intelligence". (T. 921).

The Appellant's reliance on Frumkin's testimony that the defendant was in "some sort of daze" or wasn't fully "aware" at the time of the crimes, is also misplaced. Dr. Frumkin stated, "I really don't know what was going on with him [at the time of the murder]. It would have been so useful if he would have told me his version of what was going on. Told me what was going on with him.... He keeps on saying he didn't do it. So he didn't provide anything to be able to help us understand what was really taking place, what was really going on with him." (T. 941). Dr. Frumkin's opinion that defendant wasn't fully "aware of his faculties", and something "strange" was going on, was based on his perceived inconsistencies in the defendant's confession. (T. 903-4). The inconsistencies were that, a) in his written statement the defendant had stated he "knocked" on the victim's door, as opposed to Ms. Bosler's testimony that he rang the door bell;[4] b) the defendant had stated the time of the crime to be 11 a.m. to 12 p.m., as opposed to the early afternoon hour which Ms. Bosler

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[4] In his prior statement to the police, the defendant stated that he rang the door bell. (T. 782).

stated it occurred; and, c) the defendant's statement to the police underreported the number of stab wounds which he actually afflicted upon the victim. (T. 903, 924-5). It is clear that the trial court did not abuse its discretion in resolving his "debatable link between fact and opinion" against the defendant. Walls, 641 so. 2d at 391.

Likewise, the substance abuse evidence has been addressed at length in the preceding section herein, pp. 51-3, supra; the same arguments are applicable here. To briefly reiterate, there was no evidence from which it could be concluded that there was any substance abuse on the day of the murder or at any time even remotely connected to the murder. Thus, by giving the experts' opinions regarding substance abuse even minimal weight, the judge was giving those opinions more weight than was required by law, as it could reasonably be concluded that this factor was not even established through testimony about substance abuse. Robinson, supra; Jones, 648 So. 2d 669 (Fla. 1994); Holsworth, supra.

The Appellant's reliance on Santos v. State, 591 So. 2d 160 (Fla. 1991), is completely misplaced. This Court, in Santos, in the context of factual evidence regarding the defendant's abusive childhood environment, condemned the trial court's rejection of the mitigating evidence without any explanation: "Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence."

591 So. 2d at 164. The instant case does not involve "unrefuted factual evidence" which was rejected by a trial judge. Indeed, both the factual and opinion evidence were accepted, but were given minimal weight. Furthermore, as is obvious from the foregoing, the lower court did not reject anything without explanation; the judge accepted the testimony, but explained the reasons for the minimal weight accorded to it.

C. THE LOWER COURT DID NOT ERR IN FAILING TO FIND THE EXISTENCE OF VARIOUS MITIGATING FACTORS.

The Appellant first argues that the trial court erred in failing to find that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. The court, in addressing this factor, stated:

> It is the Court's belief that he [sic] evidence presented did not support the finding of this mitigating factor. Dr. Frumkins' testimony that the defendant "wasn't all there" and was "in some sort of a daze" did not support the finding of this factor since neither Dr. Frumkin nor Dr. Toomer ever testified about the circumstances of the murder. The testimony of Doctor Toomer that the defendant is always under the influence of an extreme mental or emotional disturbance is not grounded in evidence in this record and is insufficient for this court to find this factor be a mitigating circumstance.

(R. 483). The criterion for finding this factor have been addressed by this Court in Duncan v. State, 619 So. 2d 279, 283 (Fla. 1993):

> In State v. Dixon . . . we explained that extreme mental or emotional disturbance as used in section 921.141(6)(b), is interpreted as "less than insanity but more than the emotions of an average man, however inflamed."

There was no factual evidence in this case to even suggest that the defendant was suffering from extreme mental or emotional disturbance at the time of this offense. The testimony about the defendant's emotional problems stemmed from his childhood, prior to the age of 12, and that testimony focused on just one incident of abuse, when the 12-year old was stricken with a telephone. Dr. Toomer, in referring to the defendant, concluded that he had a "borderline personality disorder." (T. 977). Even Toomer acknowledged that "it is not a major mental disorder." (T. 978).

With respect to references to the defendant's behavior as psychotic, Dr. Toomer's use of that terminology referred to the defendant's behavior at jail, after the murder; Toomer never described the defendant's conduct during the murder, or leading up to the murder, as psychotic. (T. 980). Similarly, Dr. Frumkin's reference to a "history of psychotic behavior" (T. 942), had no relation to the murder. Dr. Frumkin never spoke about the murder itself, because, as previously noted, the defendant was denying having committed same. The only "history" he ever addressed was the "history" of child abuse at age 12, and the defendant having drank bleach when he was age eight. (T. 889-90).

Furthermore, insofar as the Appellant is making references to his antipsychotic medication, Dr. Toomer alluded to this in direct examination and, when cross-examined, he acknowledged that he had no personal knowledge why prison officials were administering those drugs to the Appellant. (T. 1013-14). He acknowledged that it was possible that the drugs were being administered on Campbell's own request because of sleeping troubles, and due to his disciplinary problems with other inmates. (T. 1014).

Just as Robinson, supra, requires independent evidence of intoxication before intoxication can be treated as a mitigating circumstance for a murder, so too, there must be some factual predicate for finding that the defendant was under extreme mental

or emotional disturbance at the time of the murder. Neither expert testified, in any capacity, about the events surrounding the murder. The only concrete incidents discussed, which would in any way contribute to any emotional problems, were childhood abuse incidents occurring over eight years earlier, and, as far as that was concerned, the only actual incidents discussed were the telephone incident and the drinking of bleach at age eight. Neither expert opined that there was any "extreme" mental or emotional disturbance, and Dr. Toomer explicitly minimized the nature of the defendant's personality disorder. Under the foregoing circumstances, the trial court acted properly in rejecting this factor. Duncan, supra. Alternatively, any error in rejecting this factor must be deemed harmless as, for the foregoing reasons, it is something which, at best, consistent with the lower court's reasoning, would be entitled to minimal weight and would clearly not affect the trial court's ultimate conclusion that the aggravators herein overwhelmingly outweighed the mitigation.

The Appellant's next argument is that the trial court erred in failing to treat the defendant's age at the time of the murder, 21, as a statutory mitigating factor. This factor was explicitly rejected by the sentencing judge. (R. 487-88). That conclusion is consistent with this Court's decisions. The finding of age as a mitigating factor is a decision which rests within the discretion of the trial court, and numerous decisions have upheld the refusal to treat ages of 20 or more as mitigating. See, e.g., Cooper v.

State, 492 So. 2d 1059, 1063 (Fla. 1986) (trial judge acted within discretion in rejecting age of 18 as a mitigating factor); Kokal v. State, 492 So. 2d 1317, 1319 (Fla. 1986) (no abuse of discretion in not finding age of 20 as mitigating); Garcia v. State, 492 So. 2d 360 (Fla. 1986) ("The fact that a murderer is twenty years of age, without more, is not significant, and the trial court did not err in not finding it as mitigating."); Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988) ("This Court has frequently held that a sentencing court may decline to find age as a mitigating factor in cases in which the defendants were twenty to twenty-five years old at the time their offenses were committed."); Mills v. State, 476 So. 2d 172, 179 (Fla. 1985) (defendant 22 at time of offense).

Furthermore, as noted previously, any expert opinions are not binding, especially when they are not based on an identifiable factual predicate. Walls, supra. Additionally, as the judge observed in other contexts, the defendant's actions at the time of the murder were indicative of sound reasoning abilities, and letters which the defendant had written corroborated same.

Moreover, even though the trial court did not instruct the jury on age as a statutory mitigating factor, the court did instruct that the jury could consider "any other aspect of the defendant's character or record in [sic] any other circumstance of the offense." (T. 1120). Assuming that there was any error in not instructing the jury on age, any such error must be deemed

harmless in light of the following: (a) the catchall instruction permitting the jury to consider the factor; (b) the defense was not prevented from arguing age to the jury or presenting evidence regarding age; (c) the additional instruction advising the jury that it could give any mitigating evidence "such weight as you feel it should receive"; (d) the strength of the aggravating factors herein; and (e) the de minimis nature of the mitigating evidence, as set forth herein. See, Cave v. State, 476 So. 2d 180, 187-88 (Fla. 1985) (no error in failing to instruct on age as mitigation, where the jury was instructed that among the mitigation it might consider were any aspects of the defendant's character and any other circumstances of the offense, and, the defendant was not precluded from arguing his age as mitigating).

The Appellant next argues that trial court erred in failing to treat the fact that he confessed as a mitigating factor. There is nothing mitigating about the fact that there was a confession. It should be noted that the defendant herein was denying that he had committed the crime when he was arrested. He did not confess until after being confronted with evidence of his fingerprints at the crime scene. Furthermore, subsequent to the confession, he "keeps on saying he didn't do it." (T. 941). Mitigating factors are "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). Insofar as a confession may arise out of nothing more than mere self-interest,

as a desire or hope to avoid the ultimate sentence of death, there is nothing about an after-the-fact confession which extenuates or reduces the moral culpability for the crime.

The Appellant also refers to Dr. Toomer's testimony, where Toomer stated that "I sensed that he does have a consideration in terms of being able to express or to sense remorse." (T. 1002). Dr. Toomer did not even predicate this on any statement that Campbell actually did express any remorse. Dr. Toomer's sensations are hardly the form of opinion evidence which any court can be obligated to accept. Walls, supra. Even more significantly, the Appellant never argued in the trial court that remorse was a nonstatutory mitigating factor. The defense submitted a lengthy written sentencing memorandum which itemized 22 distinct items which were being argued as mitigating factors - remorse was nowhere to be found among them. (R. 453-55). Similarly, the defense never argued remorse in either the closing argument before the jury (T. 1108-17), or in the subsequent, additional closing argument before the judge. (T. 1191-92, 1198-1203). A defendant cannot complain about the failure of a sentencing court to analyze an alleged mitigating factor which was never proffered in the lower court. Ferrell v. State, 20 Fla. L. Weekly S74, S75 (Fla. Feb. 16, 1995); Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993); Campbell, supra, 571 So. 2d at 419.

Similarly, with respect to the contention that the defendant was described as a "loving and caring" relative, this too, was

never advanced as an alleged mitigating factor in the trial court, and it was therefore not erroneous for the trial court not to analyze same. Ferrell, supra; Ellis, supra; Campbell, supra. Furthermore, this is something which once again deals with opinion testimony, and is not grounded in any factual predicate. While the relatives refer to the defendant as loving and caring, there was no reference to any concrete indicia as to how the defendant ever, in any capacity, manifested this quality of loving and caring.

D. THE LOWER COURT DID NOT ERR IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The Appellant claims that the instant murder was not heinous, atrocious or cruel. This argument is without merit. This Court, during its prior consideration of the evidence herein, concluded:

> . . .The finding that the killing was particularly heinous, atrocious, or cruel was proper. Billy was stabbed twenty-three times over the course of several minutes and had defensive wounds. See Hansborough v. State, 509 So. 2d 1081 (Fla. 1987) (thirty stab wounds, including defensive wounds, is sufficient to establish that the killing was particularly heinous, atrocious, or cruel).

571 So. 2d at 418. The same evidence of multiple, brutal stab wounds upon a conscious victim, who was attempting to ward off the defendant, was presented at the resentencing below. See, Statement of the Facts at pp. 4-6 herein. The lower court's findings on resentencing make this even clearer. First, the court reiterated the extensive number of stab wounds - 24. (R. 477). Second, the court emphasized that the victim "remained conscious while continuing to fight for his life." (R. 478). Indeed, when his daughter walked upon the scene and was attacked, Billy Bosler, who had already been severely stabbed, was attempting to save his daughter, before the defendant's attack on Billy resumed. (R. 478).

The finding of this factor is in accordance with the well established precedents from this Court. See, Lusk v. State, 446 So. 2d 1038 (Fla. 1984) (victim received three stab wounds and

bled to death); Duest v. State, 462 So. 2d 446, 449 (Fla. 1985) (victim was stabbed eleven times, and the "medical examiner's testimony revealed that the victim lived some few minutes before dying".); Floyd v. State, 497 So. 2d 1211 (Fla. 1986) (victim sustained 12 stab wounds, including a defensive one to the hand, and died within two to four minutes of the attack); Hansborough v. State, 509 So. 2d 1081 (Fla. 1982) (several defensive stab wounds, indicating victim was aware of what was happening to her; testimony indicated that she did not die, or necessarily lose consciousness instantly); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) (victim stabbed seven times and conscious); Davis v. State, 620 So. 2d 152 (Fla. 1993) (multiple stab wounds, and although victim was intoxicated, he "was alive and conscious when each injury was inflicted"); Hannon v. State, 19 Fla. L. Weekly S447 (Fla. 1994) (victim brutally stabbed and screaming for help); Garcia v. State, 644 So. 2d 59 (Fla. 1994) (multiple stab wounds, including defensive wounds).

The Appellant's primary reliance appears to be on the case of Teffeteller v. State, 439 So. 2d 840 (Fla. 1983). In relating the facts of that case, the Appellant neglects to mention that Teffeteller involved a murder committed by a single, sudden shotgun blast. That is in no way comparable to multiple stabbings, where the torture repeats itself, and repeats itself and repeats itself.

Lastly, the Appellant appears to be suggesting that the existence of various emotional/mental mitigating factors negates his capacity to inflict the high degree of pain required for the HAC factor. Said alleged mitigators and the trial court's analysis thereof, have been set forth at pp. 48-61, and relied upon herein. The Appellee would note that the defendant's own expert admitted that, at the time when the defendant pulled out his knife and began to stab the victim, "he knew what he was doing and knew it was wrong." (T. 934). He understood the "nature and the consequences of his actions." (T. 1019-20). Although one expert added that the defendant had difficulty in "controlling" himself (T. 935-36), this opinion was amply refuted by the underlying facts of the instant case. The defendant's confession reflects that he wanted to rob someone and obtain money. He took a knife from his own home and set out in search of a victim. Upon choosing the victim's house and gaining entry, he started to stab the victim when the latter did not give him the money he demanded. When interrupted by the victim's daughter, he stabbed her as well, resumed his stabbing of the victim, and then waited to make sure they were dead. He then ransacked the house, and took the valuables he had set out to gain. Finally, the defendant cleaned himself in the bathroom, and changed his bloody clothing, prior to leaving the scene. Any claim of impulsiveness or lack of control is clearly without merit in the instant case. See, Preston v. State, 607 So. 2d 404, 407-408 (Fla. 1992) (upholding HAC finding, based upon stabbing of victim who suffered great fear and pain, notwithstanding defendant's claim that murder was during a PCP-induced frenzy).

E. THE SENTENCE OF DEATH IMPOSED IN THIS CASE IS NOT DISPROPORTIONATE WITH OTHER DEATH SENTENCES IMPOSED IN OTHER CASES.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1024, 112 L.Ed. 2d 106 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." State v. Henry, 456 So. 2d 466, 469 (Fla. 1984). The applicable factors herein are: (1) prior convictions for felonies involving violence, an attempted murder and battery upon a law enforcement officer; (2) murder committed during the course of a robbery; (3) murder committed for a pecuniary gain (merged with prior factor and treated as one); and (4) murder committed was heinous, atrocious or cruel. As to statutory mitigating factors, the court found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, but gave minimal weight to this factor. (R. 485-87). That factor took into consideration the defendant's low intelligence. The court also gave minimal weight to nonstatutory mitigating evidence regarding: (a) the defendant's prior drug and alcohol abuse; and (b) the defendant's abusive childhood. (R. 488-90).

Numerous cases involving comparable aggravating and mitigating factors have resulted in the affirmance of death sentences. Jones v. State, 648 So. 2d 669 (Fla. 1994), presents a virtually identical comparison of aggravating and mitigating factors. The defendant committed the murder, during the course of a robbery, by drowning the victim; numerous defensive wounds were observed. The court found the same three aggravating factors which exist in the instant case. The trial court also found virtually identical mitigation: capacity to conform conduct to requirements of law was substantially impaired; traumatic and difficult childhood; defendant's love of his family. This Court upheld the imposition of the death sentence. See also, Watts v. State, 593 So. 2d 198 (Fla. 1992) (multiple stabbing homicide; aggravators: prior violent felonies; murder during course of sexual battery; murder committed for pecuniary gain; mitigation: low IQ, reduced judgmental abilities; defendant 22 at time of offense. This Court held: "We conclude that the imposition of the death penalty upon the jury's recommendation was clearly consistent with this Court's prior decisions. E.g., Freeman v. State, 563 So. 2d 73 (Fla. 1990)(death penalty not disproportional when two aggravating circumstances were weighed against mitigating evidence of low intelligence and abused childhood), cert. denied, ___ U.S. ___, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); Knight v. State, 512 So. 2d 922 (Fla. 1987)(death penalty proportionally imposed with two aggravating circumstances despite evidence of mental retardation and a deprived childhood), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988)".)

Similarly, in Heath v. State, 648 So. 2d 660 (Fla. 1994), the two aggravating factors were HAC and a conviction for a prior violent felony. Substantial mitigating factors were accepted by the trial court, including that the defendant was under the influence of extreme mental or emotional disturbance, based upon his drug use. This Court upheld the death sentence. In Bowden v. State, 588 So. 2d 225 (Fla. 1991), the defendant beat the victim with a steel bar, inflicting numerous wounds. The two aggravating factors were the prior conviction for a violent felony and HAC. Nonstatutory mitigating evidence accepted by the court consisted of evidence of a terrible childhood and adolescence. The imposition of the death sentence was affirmed. By contrast, the aggravating evidence in the instant case is considerably greater, as it also involves a murder committed during a robbery.

Other comparable cases include the following: Pittman v. State, 646 So. 2d 167 (Fla. 1994) (HAC and previous conviction of another violent felony; mitigation: defendant may have suffered physical and sexual abuse as a child; defendant impulsive, with impaired social judgment - factors apparently given minimal weight); Taylor v. State, 630 So. 2d 1038 (Fla. 1993) (aggravating factors: HAC; pecuniary gain; during course of sexual battery or burglary; mitigating factors: mild retardation).

The Appellant's principal contention is that the sentence of death is generally inappropriate for murders committed during

armed robberies. The Appellant's principal support for this proposition derives from a series of jury override cases, in which this Court found that the trial court improperly rejected the juries' life recommendations. See, e.g., Cannady v. State, 427 So. 2d 723 (Fla. 1983); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); Williams v. State, 344 So. 2d 1276 (Fla. 1977). Jury override cases, however, are irrelevant in the proportionality review herein, a case which does not involve a jury override. See, Hudson v. State, 538 So 2d 829, 831-32 (Fla. 1989); Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984).

Numerous cases have affirmed death sentences while the murder was committed during the course of a robbery. See, e.g., Smith v. State, 641 So. 2d 1319 (Fla. 1994); Heath, supra; Carter v. State, 576 So. 2d 1291 (Fla. 1989); Cook v. State, 581 So. 2d 141 (Fla. 1991); Lowe v. State, 19 Fla. L. Weekly S621 (Fla. Nov. 23, 1994); Freeman v. State, 563 So. 2d 73 (Fla. 1990); Wickham v. State, 593 So. 2d 191 (Fla. 1992). Thus, far from constituting an inappropriate circumstance for the imposition of a death sentence, the fact that a murder was committed during the course of a robbery has indeed been a common situation in which the sentence of death has been upheld by this Court.

In view of the foregoing, the imposition of the death sentence is clearly proportionate with death sentences approved in other cases. As previously noted, several of the cases relied upon by the Appellant are jury override cases and, as such, are

irrelevant to proportionality review. The few remaining cases upon which the Appellant relies are equally inapplicable. See, Carruthers v. State, 465 So. 2d 496 (Fla. 1985) (single aggravating factor case - murder committed during robbery - with one statutory mitigating factor and several nonstatutory mitigating factors); Livingston v. State, 565 So. 2d 1288 (two aggravating factors, not including the HAC factor of the instant case, offset by extensive mitigation, including defendant's age (17) and unfortunate home life and rearing, with severe beatings and neglect, as well as marginal nature of intellectual functioning); Smalley v. State, 546 So. 2d 720 (Fla. 1989) (single aggravating factor (HAC) offset by four statutory mitigating circumstances); Rembert v. State, 445 So. 2d 337 (Fla. 1984) (single aggravating factor of murder during course of felony); Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (single aggravating factor with extensive mitigation); Morgan v. State, 639 So. 2d 6 (Fla. 1994) (truly extensive mitigation, both statutory and nonstatutory: extreme mental or emotional disturbance, impaired ability to appreciate criminality of conduct, age 16 at time of murder, brain damage, and several other factors).

In view of the foregoing, it must be concluded that the sentence of death in the instant case is proportionate to other death sentences which have been upheld by this Court.

F. FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL.

The Appellant claims that the death penalty is unconstitutional on its face and as applied. The Appellant's arguments were not raised in the Court below and are thus procedurally barred. Moreover, said claims have been previously rejected by this Court. Thompson v. State, 648 So. 2d 692, (Fla. 1994); Thompson, 619 So. 2d at 267, and cases cited therein; Patten v. State, 598 So. 2d 60, (Fla. 1992).

CONCLUSION

Based on the foregoing, the sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by mail to **GEOFFREY FLECK, ESQ.**, 5115 N.W. 53rd Street, Gainesville, Florida 32653, on this 23 day of May, 1995.

FARIBA N. KOMEILY
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