IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,792

JAMES CAMPBELL,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT JAMES CAMPBELL

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STATEMENT OF THE CASE

Campbell was indicted on January 14, 1987 for various offenses stemming from his attack of the Boslers on December 22, 1986. A six count indictment charged first degree murder (Count I), attempted first degree murder (Count II), robbery with a deadly weapon (Count III), armed burglary of a dwelling (Count IV), battery on a police officer (Count V), and possession of a weapon during the commission of a criminal offense (Count VI). [R. 1-5]

Campbell was convicted and sentenced to death. He appealed to this Court which, on June 14, 1990, affirmed his convictions and sentences, with the exception of the death penalty. Campbell v State, 571 So.2d 417 (Fla. 1990).

Upon remand for a new sentencing proceeding, the jury recommended the imposition of the death penalty by a vote of ten to two. [TR 1159] The trial court followed the jury's recommendation and reimposed the death penalty on May 4, 1994. [R. 472-493]

As aggravating circumstances, the trial court found that the defendant was (1) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, (2) the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or attempting to commit a robbery and/or burglary, (3) the capital felony was committed for pecuniary gain, and (4) that the capital

felony was especially heinous, atrocious or cruel. It properly counted (2) and (3) as a single aggravating factor. [R. 474-480]

The trial court explicitly rejected as mitigating factors that (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and (2) the age of the defendant at the time of the crime. [R. 483, 487-488]

It accepted, but gave "minimal" weight to the defendant's claim that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. [R. 485-487]

It grouped together the defendant's claims that he had a substance abuse problem, that he had an abusive childhood, that he was twenty years old, that he had a limited education, that he had a low IQ and learning disabilities, that he was abandoned by his parents, and that the victims d[id] not want him to receive the death penalty. [R. 488] It considered all these claims as a single mitigating circumstance and gave them "minimal" or "little weight". [R. 489-490]

This appeal follows.

STATEMENT OF THE FACTS

At about 2:15 p.m. on December 22, 1986, Sue Zann Bosler and her father, Billy, returned home from shopping. [TR 850] While in the bathroom, Sue Zann heard the doorbell ring, heard the door open, and then heard her father make grunting and groaning sounds. [TR 850] When she went to investigate, she saw her father being stabbed a number of times by an unknown attacker. [TR 854] When she made a noise, the assailant approached her and stabbed her in the back three times and knocked her to the floor. [TR 856] The assailant returned to her father, stabbing him in the back many times as he fell to the floor. [TR 857] When Sue Zann tried to help her father, the assailant backed her into another room and stabbed her in the head several times. [TR 858] She fell to the floor, pretending to be dead. [TR 860] The attacker rummaged through the house and searched Billy's pockets and Sue Zann's purse, taking an undetermined amount of money before leaving. [TR 861] Billy died; Sue Zann lived.

Campbell was later arrested and questioned concerning the Bosler homicide. He eventually confessed and gave a written statement, saying that he went to the Bosler house with a knife, that he planned to rob the occupants, and that he stabbed and robbed Billy and Sue Zann. [TR 754 -770]

The state presented no psychiatric testimony. The defense called forensic psychologist Bruce Frumkin, who had seen the defendant professionally five times. [TR 881] He described

Campbell's childhood as, "extremely traumatic, horrendous, ... [h]e was raised in an extremely abusive situation and one which was very neglectful." [TR 883] His mother hated him. As a young child he was "beaten on a regular basis with things like pool sticks, extension cords, telephones, hoses, ... stripped naked ... [and] beaten by his mother [and] stepfather." [TR 883-884] According to Frumkin, Campbell was abused emotionally as well as physically by a mother who spit in his face in public and forced him to clean toilet bowls with his bare hands. [TR 886] Campbell was exposed to a lot of violence and saw his stepfather beat his mother repeatedly and his mother stab his stepfather. [TR 886-887]

Ultimately, at approximately the age of twelve, after Campbell was treated in an emergency room after his mother beat him with a telephone, the state adjudicated Campbell dependent, took him from his mother, and returned him to live with his grandparents, with whom he had lived from birth until the age of six. [TR 887, 908, 946] A physical examination revealed bruises all over Campbell's body. [TR 947]

Frumkin found Campbell to have suffered "a chronic history" of "major emotional problems." [TR 889] He had a "history of psychotic behavior." [TR 942] At eight years of age, he attempted suicide by drinking bleach. [Tr 889-90] He repeated his suicide attempt after his arrest. His behavior was so bizarre he received the strong anti-psychotic medication, thorazine. [TR 891] He never received any mental health treatment. [TR 891]

Frumkin also found Campbell to have suffered since the age of

sixteen from a drug and alcohol abuse problem, involving crack cocaine, marijuana, and as much as twelve beers a day. [TR 893] There was a good possibility that, as a result, Campbell suffered brain damage. [TR 940]

He also found Campbell to function on "a mild mental retardation level or borderline level of intelligence" and put his IQ at 68. [TR 895] He was also "functionally illiterate", unable to read on a third grade level, and suffered from a learning disability. [TR 896]

Frumkin believed that Campbell wanted to be caught and was "crying out for help." [TR 897] He believed Campbell at the time of the offense "was in some sort of daze or he wasn't in full aware[ness] of his faculties." [TR 903 - 904]

The prior recorded sworn testimony of Willy Lance, the defendant's uncle, and Celia Campbell, the defendant's aunt, was read to the jury by stipulation. [TR 944 et seq.] Both described Campbell as loving and caring. [TR 949, 953]

Clinical and forensic psychologist Jethro Toomer diagnosed Campbell as suffering from borderline personality disorder, a condition characterized by deficits in function resulting from his history of abandonment and deprivation. [TR 977] He noted a "pattern of abuse, neglect, abandonment that occurred over time." [TR992] He found Campbell not to be sociopathic. [TR 984]

Clinical records revealed that Campbell had exhibited psychotic behavior, i.e., inappropriate screaming throughout the night and incoherence, at the time of his initial incarceration.

[TR 980] Campbell had attempted suicide, had been placed in a safety cell, and was maintained by Corrections with Thorazine, Benadryl, and Cogentin. [TR 973, 981 - 982]

Toomer found Campbell's IQ to be under 65, reflecting "defective intellectual functioning" in the retarded range. [TR 986] His functioning as to basic skills was deficient. [TR 996] Toomer described Campbell as functioning emotionally in the adolescent range. [TR 989] He noted Campbell's long-term "serious drug problem" as reported by HRS and his abuse of crack cocaine and alcohol. [TR 992, 994] Toomer believed that Campbell was under the influence [of drugs and/or alcohol] at the time of the offense. [TR 994 - 995]

Toomer concluded that Campbell's ability to appreciate the criminality of his act was substantially impaired. [TR 999] He was "most definitely" under the influence of a mental or emotional disturbance. [TR 1000] Toomer found that Campbell could sense and express remorse. [TR 1002]

SUMMARY OF THE ARGUMENT

I.

Campbell's capital sentencing hearing was infected by prosecutorial misconduct which, by design and operation, denied any semblance of due process. The prosecutor attacked Campbell's expert witness as sympathetic to killers of police officers. He argued death as a message to society and as "eye for an eye." He improperly made the attack of surviving victim Sue Zann Bosler a feature of the hearing and offered irrelevant and gratuitous testimony, argument, and unspeakably gruesome photographs for no good reason but to inflame the jury. Inexcusable, however, was the prosecutor's exploitation of irrelevant evidence that Campbell spanked his female victim, pulled down her pants, and removed her sanitary napkin/kleenex. By relying on such impermissible non-statutory aggravating factors and by so inflaming the jury, the state rendered this sentencing proceeding fundamentally unfair.

II.

If there remains any justification for the death penalty in a civilized society it is probably to allow survivors of the victim retribution and psychological closure. No such interest is served here. Sue Zann Bosler, the homicide victim's daughter and herself a victim of the attack, was called by the state to relate to the jury the gruesome details of the attack she and her father suffered. Unknown to the jury due to the trial court's

restriction of the defendant's cross-examination, neither Sue Zann nor her father wanted Campbell to be put to death by the State of Florida. This advisory jury, therefore, recommended death ignorant of the crucial fact that their vote was counter to the profound feelings of the people most effected by the crime.

III.

The trial court prohibited the defendant from conducting voir dire on the fact the defendant was already serving consecutive life sentences for the related life felonies in this case. This precluded the defendant from effectively exercising his peremptory and causal challenges and generated the defendant's death penalty recommendation from a jury whose partiality was not questioned. The defendant is entitled to a new penalty phase hearing where the guarantee of a fair and impartial jury is honored.

IV.

The trial court similarly refused to grant a defense requested jury instruction intended to inform the jury that the defendant was already serving a series of consecutive life sentences. As such, this jury recommended death not knowing that such a recommendation was not necessary to insure the defendant's lifelong incarceration. Because it denied the defendant jury instruction on a mitigating circumstance for which there was undeniable support in the evidence, the trial court erred.

VI.A.

Despite clear evidence of Campbell's low IQ, intellectual shortcomings, learning disabilities, brain damage, severe abuse suffered throughout childhood, and abandonment by his parents, the trial court refused to give more than "slight" weight to these consistent and overwhelming non-statutory mitigating factors.

B.

The trial court also refused to adequately credit Campbell with statutory mitigating factors relating to his impaired capacity despite substantial evidence of them.

C.

The trial court also erred in failing to find mitigating factors at all for extreme mental or emotional disturbance, age, the fact of Campbell's confession and remorse, or the irrefuted evidence of his capacity for love. In particular, the trial court's refusal to consider, or even instruct the jury on, the mitigating circumstance of age where the defendant was shown to function at an emotional age less than his chronological age of 21, was error. The trial court erred in its rejection of all these mitigating factors and, particularly, in failing to allow the finders of fact to determine the latter upon appropriate jury instruction.

D.

Despite the bloodiness of the crime, this crime was not heinous, atrocious or cruel when considered in light of Campbell's mental state. This Court previously found Campbell to have suffered an "impaired capacity." The trial court here, although giving the factor minimal weight, agreed that Campbell suffered "impaired capacity." As such, despite Campbell's brutal stabbing of the victim, his act did not "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." As such, as inexcusable as the crime was, it was not the most heinous, most egregious, of crimes.

E.

For all the tragic circumstances of this crime, the imposition of the death penalty on James Campbell is not proportionate to similar offenses committed by individuals as similarly and profoundly damaged as James Campbell irrefutably is.

F.

The death penalty is, and always will be, unconstitutional and wrong, especially when inflicted on the mentally incapacitated and retarded like James Campbell.

ARGUMENT

I

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT RELIEF FROM THE PROSECUTOR'S RELENTLESS APPEALS TO THE JURY'S SYMPATHY BY ATTACKING THE DEFENDANT'S EXPERT WITNESS AS SYMPATHETIC TO KILLERS OF POLICE OFFICERS, PERMITTING THE PROSECUTOR TO ADVOCATE THE DEATH PENALTY AS A MESSAGE TO SOCIETY, ENDORSING THE PROSECUTOR'S "EYE FOR AN EYE" ARGUMENT, AND IN ALLOWING THE STATE TO HIGHLIGHT AND EXPLOIT CAMPBELL'S IRRELEVANT ABUSE OF THE SURVIVING VICTIM, THEREBY DENYING THE DEFENDANT A FAIR SENTENCING HEARING AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

From opening statement to closing argument, the prosecution infected this resentencing hearing with utterly improper and gratuitously inflammatory comments and tactics. It made shameless appeals to the jury's sympathy for no apparent reason but to inflame it, contrary to the law, to vote for the defendant's death. The prosecutor's comments, sanctioned consistently by the trial court, improperly attacked the character of the defendant's expert witness, psychologist Jethro Toomer, invited the jury to send "a message to society" by recommending Campbell's death, and exploited evidence of the defendant's bad character and collateral acts of misconduct having nothing whatsoever to do with statutory aggravating circumstances. Because James Campbell's sentencing hearing was rendered fundamentally unfair, and was corrupted by the conduct of the state, he is entitled to another hearing.

The courts have long recognized the duty of a trial judge to protect an accused carefully and zealously, so that he shall receive a fair and impartial trial, free from improper or harmful statements by a prosecuting attorney. Deas v. State, 839 Fla. 139, 161 So. 729 (Fla. 1935); Tribue v. State, 106 So.2d 630 (Fla. 2d DCA 1958). It is now firmly established that a prosecuting attorney should always confine his argument to facts which are established by the record and those which may be reasonably inferred from the facts established, and when he goes beyond that range he takes the chance that he may thereby cause the necessity of reversal of a favorable judgment. Frenette v. State, 158 Fla. 675, 29 So.2d 869, 870 (1947).

In Berger v. United States, 295 U.S. 78, 88-89, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935), the Supreme Court reversed a conviction when the prosecutor through questioning and argument compromised the defendant's due process rights. The Court noted the government's unique burden of justice and heightened responsibility:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all ....

It is therefore established beyond question that remarks calculated to arouse the passions, sympathies, or prejudices of juries, especially remarks outside the evidence and without relation to the

issues are to be condemned. Wernokoff v. State, 121 Fla. 62, 163 So.225 (Fla. 1935); Clinton v. State, 53 Fla. 98, 43 So.312 (1907); Pitts v. State, 333 So.2d 109 (Fla. 1st DCA 1976).

Here, the prosecutor impeached defense expert witness Jethro Toomer, not by any lawful technique, but by portraying him as sympathetic to a specific, but completely irrelevant, class of defendants convicted of having murdered police officers. Clearly calculated to inflame the jury against the witness and obtain its wholesale rejection of his testimony, the prosecutor attacked Toomer by insinuating his unacceptable character on an entirely collateral issue having nothing to do with the facts of this case.

During his cross-examination of Toomer, the prosecutor asked:

> Q. In terms of some of the cases you have handled at penalty proceedings, you have testified at least three times for and found mitigation for three individuals who have killed police officers.
>
> [TR 1004 - 1005]

The defendant immediately objected and requested a sidebar conference at which he moved for a mistrial on the basis, including others, that the testimony sought was irrelevant, involved unrelated cases, and was only intended to "bias and prejudice the jury." [TR 1005 - 1006] The trial court denied all relief. [TR 1006]

During his closing argument, the prosecutor renewed his

improper attack:

> Dr. Toomer testified that in at least ten times or maybe more he has testified to mitigating factors solely for the defense in the case of individuals who have murdered police officers he's found --
>
> MR. LIPINSKI: Objection, Your Honor.
>
> THE COURT: Based upon the previous ground that you made?
>
> MR. LIPINSKI: Yes, Judge.
>
> THE COURT: The ruling will remain the same.
>
> MR. BAND: -- mitigation.
>
> [TR 1086 - 1087]

By its ingenuous tactic, the prosecution not only appealed to the jurors' most basic fears (of a lawless society in which the likes of James Campbell murder police officers with impunity) but abused its right to cross-examine by implying a bias or misconduct which simply did not exist.

Toomer did nothing wrong and exhibited no prejudice if his evaluations of such defendants revealed the existence of mitigating factors. The implication made by the state, that some defendants (like Campbell) do not deserve the consideration of the law and any one who says they do is not to be believed, is a perversion of the system by which the death penalty is meted out and this Court's established precedent.

In addition, during closing argument, the prosecutor enticed the jury with an uncamouflaged appeal for it to send a morbid message utterly unrelated to the process established to determine whether an accused lives or dies:

> MR. BAND: The question you have to answer is does the mitigation change the circumstances of Billy Bosler's murder. The death penalty is a message sent to a number of members of our society who choose not to follow the law.
>
> MR. LIPINSKI: Objection, Your Honor, to that.
>
> [TR 1098]

The prosecutor and his argument were, of course, irrefutably wrong. The trial court nevertheless overruled the defendant's objection but asked the prosecutor, "Please don't talk about messages to other people," whereupon the prosecutor proceeded to repeat, verbatim, his offending comment. [TR 1099]

Also over objection, the trial court allowed the prosecutor to argue during closing that:

> "The death penalty has been imposed once in this case." [TR 1101]

When the defendant immediately objected to what appeared to be the prosecutor's attempt to inform the jury that a prior jury had already resolved the issue against Campbell, the trial court admonished defense counsel:

"Let him finish, please. Go ahead." [TR 1101]

Thereupon, the prosecutor continued:

> "The defendant imposed it upon the victim, on Billy Bosler." [TR 1101]

The defendant's objection to this obvious "eye for an eye" argument was summarily overruled. [TR 1101]

Not content to limit its proof to the homicide of Mr. Bosler, the state made a feature of this sentencing proceeding the injuries sustained by Sue Zann Bosler. The prosecutor relentlessly argued (over consistent defense objection) for Campbell's death because of what he had done, not to Mr. Bosler, but to his daughter:

> We are here because this young woman was stabbed about her body and stabbed in her head. This is why we are here.
>
> ***
>
> We are here because this defendant would look at a young woman actually place his hand on Sue Zann's shoulder that close, look her in the eye and aim this [knife] directly for her face. And only at the last moment when she turned her head he would plant it in her brain twice.
>
> [TR. 674 - 675]

Moreover, over the defendant's objections and reliance on Duncan v. State, 619 So.2d 279 (Fla. 1993), the trial court permitted not only Sue Zann's detailed testimony and the

prosecutor's inflammatory arguments, but the introduction of several large photographs (blow-ups) of the extensive head wounds suffered by Sue Zann. [TR. 659, 662-663; R. 357 - 362] The unfair prejudice of such photographs far outweighed their probative value. Florida Statute §90.403. They should never have been admitted.

The state committed a far more egregious abuse, however, when it shamelessly exploited evidence that Campbell, gratuitous to the homicide of Billy Bosler or the accompanying violent crimes (necessarily limited to the charged attempted first degree murder, armed robbery, or armed burglary), against Sue Zann, pulled down Sue Zann's pants, smacked her buttocks, and removed her tampon/kleenex after his attack when he thought she was dead. This revolting evidence was irrelevant to any legitimate aggravating circumstance and only operated to profoundly inflame the jury.

The prosecutor started in opening statement:

> After he goes through all the rooms of the house, goes through Sue Zann's purse as she lay bleeding, her face warm, worn (sic) with he own blood, this defendant, this James Campbell perhaps the final indignity to this family, he removes her panties, pulls her panties down, slaps her on the butt a couple of times and then because it is the end of her period he sticks his hands between her legs and removed a Kleenex. [TR 679 - 680]

The defendant's immediate objection was overruled. [TR 680]

Once the state's intention to offer such evidence through Sue Zann became apparent, the defense moved, in limine, that the state be precluded from eliciting such irrelevant and unfairly inflaming testimony:

> And, secondly, Judge, presupposing what Your Honor's ruling may be as far as their talking about this incredible extreme indignity done to her and going over that in any way, shape or form either through her testimony or closing arguments, we submit has nothing to do with any one of eleven aggravating factors in this case and would ask for a ruling from the Court precluding the State from going into that. [TR 837]

Apparently reasoning that the testimony established "the facts of the event" and was relevant to a contemporaneous violent felony, the trial court denied all relief but noted that, "[the] [r]ecord is perfected as to your objection." [TR 838] The defendant requested a continuing objection and objected again immediately prior to Sue Zann's testimony. [TR 844, 847] Nevertheless, Sue Zann was compelled by the state and court to testify:

> Q. What did he do in the living room?
>
> A. He came over to me and ripped my underwear down.
>
> Q. And what happened after he pulled your underwear down?
>
> A. He started hitting me.
>
> Q. Where did he hit you?
>
> A. In my rear, on my rear.

Q. After he hit you on your rear, on your bottom, did he do anything else?

A. He pulled something out from between my legs.

Q. Was that some Kleenex because it was the end of your period?

A. Yes.

[TR 862]

All the conduct described occurred after the attacks on the Boslers, after the ransacking of the house, and after Sue Zann convinced Campbell that she was dead. [TR 860 - 862] It was as unquestionably irrelevant as it was unfairly prejudicial. But the prosecutor was not done.

In closing argument, clothed with the trial court's imprimitur of his conduct [TR 1073], the prosecutor argued again:

> Before he leaves, what does he do? And this more than anything speaks of the character of the conduct of James Campbell, as SueZann lays there staring off and looking at her father, this defendant comes up behind her.
>
> MR. LIPINSKI: Objection, Your Honor, outside the scope of aggravating factors.
>
> THE COURT: The ruling will remain the same.
>
> MR. BAND: Removes her panties, slaps her on her rear and takes that Kleenex or Tampon from between her legs.
>
> [TR 1085]

It is by now well established that evidence and consideration of aggravating circumstances are limited to those set out in the

statute, §921.141(5), Fla. Stat., See, e.g., Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); Elledge v.State, 346 So.2d 998 (Fla. 1976); Brown v. State, 381 So.2d 690 (Fla. 1980).

In the case at bar, the prosecutor's unsubstantiated, gratuitous, and enormously inflammatory comment contributed to the state's overzealous prosecution of the defendant, not for the crime charged, but for being a bad person in general. The trial court not only took no steps to relieve the defendant from the effects of the prosecutor's overt appeal to the jury's sympathy, but in fact denied all relief sought. Accordingly, the sentence appealed from must be reversed and a new hearing granted.

POINT II

THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO OFFER THE TESTIMONY OF DEFENSE WITNESSES INCLUDING THAT OF THE MURDER VICTIM'S DAUGHTER AND CO-VICTIM, SUE ZANN BOSLER, THAT THE APPROPRIATE PENALTY TO BE IMPOSED WAS LIFE IMPRISONMENT, AND ITS FAILURE TO CONSIDER SUCH EVIDENCE IN MITIGATION, IMPROPERLY RESTRICTED THE DEFENDANT'S ABILITY TO PRESENT EVIDENCE IN MITIGATION OF DEATH AND PROHIBITED THE JURY FROM CONSIDERING ALL NON-STATUTORY MITIGATING CIRCUMSTANCES, THEREBY RESULTING IN A DENIAL OF DUE PROCESS AND THE IMPOSITION OF A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Remarkably, and undoubtedly due to qualities of the human soul transcending those of man's laws, Sue Zann Bosler, the daughter of the deceased and herself a victim of the attack which claimed her father, opposed the taking of Campbell's life. She argued to the trial court at sentencing with extraordinary eloquence and pathos her desire that Campbell be spared the electric chair. [TR 1184-1186] The jury, however, never heard her impassioned pleas or knew how she felt because the trial court only allowed her to testify for the state but not for the defendant. If catharsis and retribution for the surviving family of murder victims is an argument for retention of the death penalty, no such interests were served here. The state exacted its own measure of flesh for its own reasons without telling the jury the most important thing it could know - that the surviving victim of the attack that killed Reverend Bosler and the living person most effected by the events

of December 22, 1986, did not want Campbell to be put to death.

Moreover, Sue Zann was not speaking for herself - she spoke for her father, himself, who had expressed his feelings earlier to her. [TR 1185-1186] ("...[I]f I were to get murdered, I would still not want that man to get the death penalty.") In its corrected opinion of June 14, 1990, this Court acknowledged that the original trial judge found, as a non-statutory factor, the "requests by Sue Zann and members of Billy's parish that his life be spared." [Campbell v State, 571 So.2d at 417 (Fla. 1990)] Nothing has since happened to change the efficacy of that mitigating circumstance.

Throughout the course of these proceedings, the defendant sought unsuccessfully to bring Sue Zann Bosler's testimony before the jury. [TR 14-19, 257-266, 648-658, 865-869] He proffered her beneficial testimony. [TR 869] The trial court initially defered ruling but ultimately precluded the defendant's offer of testimony. [TR 16, 266, 657, 865, 869]

Thus, the heartfelt sentiments of the people most effected by this crime, including the murder victim, were not only ignored by the trial court but deliberately concealed from the jury's consideration. The trial court consistently excluded any testimony from the defense witnesses that reflected their opinion that the death penalty was inappropriate for Campbell. It also

refused to consider such proffered testimony in mitigation. As such, the trial court unfairly restricted the defendant's presentation of evidence in defense and mitigation and violated the mandates of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

In Lockett v. Ohio, supra, this Court held that a death penalty is unconstitutional if imposed by a sentencer who is not free to consider all mitigating evidence, whether specifically enumerated in the death penalty statute or not:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the 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. [98 S.Ct. at 1964-1965]

This Court has recognized that the Florida death penalty statute does not limit a jury's consideration of mitigating circumstances. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). In fact, in light of Hitchcock and its progeny, juries in Florida are now directed by standard instruction to consider "any other aspect of the defendant's character or record, and any other circumstances of the offense". [Florida Standard Jury Instructions in Criminal Cases] Clearly, however, a jury cannot consider testimony it is forbidden by the trial court to hear.

This Court has recognized that it is reversible error in a sentencing proceeding in a capital murder prosecution to preclude defense counsel from presenting non-statutory mitigating circumstances. Cf., Hall v. State, 541 So.2d 1125 (Fla. 1989).

The question posed here was heard by an en banc California Supreme Court in People v. Heishman, 753 P.2d 629 (Cal. 1988), which found error in the trial court's exclusion of testimony from a capital defendant's former wife that the defendant should not receive the death penalty:

> The question should have been allowed, since the answer would have exemplified the feelings held toward defendant by a person with whom he had had a significant relationship. [Id. at 661]

The Court reasoned, however, that the error was harmless since another witness with whom the defendant had also been romantically involved was allowed to testify that the defendant should not receive the death penalty and because the former wife's testimony was so supportive of the defendant that it was unlikely any juror could have inferred that she would want to see him put to death. Here, to the contrary, all the jury heard from Sue Zann Bosler was inculpatory testimony.

In a capital sentencing proceeding, at which the only issue to be determined is whether or not a defendant will suffer execution, there can be no question that the testimony of a witness to the effect that the defendant should not be put to death is relevant.

Nothing in the Florida Evidence Code specifically excludes such testimony. Fla. Stat. Section 90.701 provides for the admission of opinion testimony by lay witnesses:

> Testimony in the form of an opinion or an inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

Whether or not James Campbell should be sentenced to death was the only issue below. Accordingly, it constituted not only an abuse of discretion for the trial court to limit the defendant's presentation of evidence in mitigation but it constituted a constitutional violation of the mandate of Lockett and its progeny.

III.

THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING VOIR DIRE EXAMINATION OF THE JURY RELATIVE TO THE SPECIFIC MITIGATING CIRCUMSTANCE THAT CAMPBELL WAS ALREADY SERVING CONSECUTIVE LIFE SENTENCES, THEREBY PRECLUDING THE DEFENDANT FROM EFFECTIVELY EXERCISING HIS CHALLENGES, BOTH FOR CAUSE AND PEREMPTORY AND DENYING THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL JURY.

The purpose of voir dire examination is to safeguard the right to jury trial which "guarantees to the criminally accused a fair trial by a panel of impartial, indifferent, jurors." The Sixth Amendment entitles a defendant to an impartial jury which will render a verdict based exclusively upon the evidence presented in court and not on outside sources. Irvin v. Dowd, 366 U.S. 717, 722 (1961). The requirement of impartiality demands that voir dire examination serve as a filter capable of screening out prospective jurors who are unable to lay aside any opinion as to guilt or innocence and render a verdict based on the evidence presented in court. United States ex rel. Bloeth v. Denno, 313 F.2d 364, 372 (2d Cir. [en banc] 1963); e.g., Pineda v. State, 571 So.2d 105 (Fla. 3d DCA 1990).

Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). Without an adequate voir dire, the trial judge cannot

fulfill his duty to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence, Id. Moreover, a careful voir dire is necessary to solicit sufficient information to permit a defendant to intelligently exercise peremptory challenges as well as his challenges for cause. Id., United States v. Cassel, 668 F.2d 969 (8th Cir. 1982); United States v. Barnes, 604 F.2d 121, 142 (2d Cir. 1979), cert. denied, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed. 260 (1980). The court's discretion in this regard must be exercised consistent with "the essential demands of fairness." E.g., Aldridge v. United States, 283 U.S. 308, 310 (1931); United States v. Delval, 600 F.2d 1098, 1102 (5th Cir. 1979).

Examination of jurors on voir dire should be so varied and elaborated as circumstances surrounding the jurors under examination in relation to the case on trial would seem to require in order to obtain fair and impartial jurors. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967).

It is established that a defendant has the right to examine jurors on the voir dire as to the existence of a disqualifying state of mind. Aldridge v. United States, supra, at 313. A defendant has the right to probe for the hidden prejudices of jurors. Lurding v. United States, 179 F.2d 419, 421 (6th Cir. 1950). A defendant is also entitled to be tried by an unprejudiced and legally qualified jury and the range of inquiry in the endeavor

to empanel such a jury should be liberal. United States v. Napoleone, 349 F.2d 350, 353 (3rd Cir. 1965).

Adequate questioning must be conducted to provide under the facts in the particular case some basis for a reasonably knowledgeable exercise of the right of challenge, whether for cause or peremptory. United States v. Jackson, 542 F.2d 403 (7th Cir. 1976). Indeed, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 171-172 (1950). As the court held in United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973):

> The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. [citation omitted]. It follows, then, that a requested question should be asked if an anticipated response would afford the basis for a challenge for cause.

The right of peremptory challenge has long been recognized as "one of the most important rights secured to the accused." Pointer v. United States, 151 U.S. 396 (1894). It has been characterized as an essential component of an impartial jury trial as long ago as by Coke and Blackstone, and more recently in Swain v. Alabama, 380 U.S. 202, 219 (1965) wherein the Court held:

> The function of the challenge is not only to

> eliminate extremes of partiality, on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise.

The Swain Court noted that while nothing in the Constitution required Congress to grant peremptory challenges, they are nevertheless one of the important rights of the accused and the impairment of that right is reversible error without the showing of prejudice. It is, therefore, clearly established that defendants, especially those on trial for their lives, must be permitted sufficient inquiry into the background and attitudes of prospective jurors to enable them to exercise intelligently their peremptory challenges. United States v. Harris, 542 F.2d 1283, 1295 (7th Cir. 1976).

Here, the trial court denied the defendant's request to voir dire the jury regarding the fact that the defendant had already been sentenced to, and was serving, consecutive life sentences of imprisonment on the three other non-capital counts of which he had been convicted. [TR 7-12] It thereby prohibited defense counsel from exploring the jurors' feelings and preconceptions relative to a crucial mitigating circumstance. See, Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990).

It is error to preclude examination regarding characteristics of an accused which might effect a juror's ability to be fair. In

Moses v. State, 535 So.2d 350 (Fla. 4th DCA 1988), for example, the court reversed due to the improper restriction of voir dire relative to the defendant's status as a convicted felon.

Florida Courts have consistently reversed convictions for restrictions of an accused's voir dire relative to anticipated defenses. In Brown v. State, 614 So.2d 12 (Fla. 1st DCA 1993), the improper restriction of voir dire relative to a defendant's anticipated voluntary intoxication defense warranted reversal of the defendant's conviction for battery on a law enforcement officer and resisting arrest with violence. Similarly, this Court in Lavado v. State, 492 So.2d 1322 (Fla. 1986), adopting Judge Pearson's dissent in Lavado v. State, 469 So.2d 917, 919 (Fla. 3rd DCA 1985) in its entirety, held that the trial court erred in refusing the defendant's request to question prospective jurors about their willingness and ability to accept the defense of voluntary intoxication in a trial for armed robbery, thus denying the defendant's right to a fair and impartial jury. See also, Nicholson v. State, 19 Fla. L. Weekly D1489 (Fla. 2d DCA July 6, 1994) (The scope of voir dire properly includes questions about and references to legal doctrines [Williams rule evidence]).

Quoting from Pinder v. State, 27 Fla. 370, 375, 8 So. 837, 838 (1891), Judge Pearson reasoned:

> [i]t is apodictic that a meaningful voir dire is critical to effectuating an accused's

> constitutional right to a fair and impartial jury. [citations omitted]
>
> What is meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. The scope of voir dire therefore "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require. . ."
>
> [Id., at 919]

The same reasoning surely applies in the context of mitigating circumstances in a capital case. Whether or not a prospective juror can accept in principle and consider with an open mind a mitigating circumstance such as the likelihood that the defendant will likely never be released from prison regardless of a death penalty recommendation is possibly the most important aspect of a defendant's voir dire in a capital case. As Judge Pearson remarked in Lavado under circumstances involving far less serious stakes:

> [i]f he knew nothing else about the prospective jurors, the single thing that defense counsel needed to know was whether the prospective jurors could fairly and impartially consider the defense of voluntary intoxication.
>
> [492 So.2d at 1323; 469 So.2d at 919]

The ability to impartially "consider" anticipated mitigating circumstances in a death case must be, at least, equally important.

IV.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE DEFENDANT HAD ALREADY BEEN SENTENCED TO CONSECUTIVE LIFE SENTENCES AND THE LIKELIHOOD OF LIFELONG IMPRISONMENT AS AN ALTERNATIVE TO DEATH.

Campbell sought a jury instruction to tell the jury that the life imprisonment alternative to death could result in a sentence structured to insure he would never be released. [TR 1064-1066] He specifically and in writing requested Defense Requested Jury Instruction #43:

> Among the mitigating circumstances you may consider are [t]hat this defendant has already been sentenced to consecutive sentences of life imprisonment.
>
> [R. 424]

Indeed, Campbell was already serving consecutive, affirmed, life sentences for the attempted first degree murder of Sue Zann Bosler, armed burglary, and armed robbery in this case. [R. 7]

The state opposed the defendant's request but agreed, as did the trial court, under Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990), that such an argument could be made to the jury. [TR. 1065] The trial court denied the request for a jury instruction. [TR 1066] This was unfair and, in light of Simmons v. South Carolina, ___U.S.___, 8 Fla. L. Weekly Fed. S277 (January 18, 1994), error.

The defendant's right to present evidence in mitigation in the

penalty phase, as well as his right to argue against imposition of the death penalty, is an essential element in Florida's capital sentencing scheme. State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1976). In fact, the right to present evidence of mitigating circumstances, without limitation, is what makes the penalty phase constitutional. Lockett v. Ohio, 438 U.S. 536, 98 S.Ct. 2954 (1978).

The United States Supreme Court has also recently recognized the problem and corrected it by reversing the defendant's death sentence in Simmons. Expanding the concept of truth in sentencing, the Court ruled that defense lawyers seeking to prevent a death penalty generally have the right to inform the jury when the alternative of life imprisonment means no possibility of parole. Specifically, the Court held that the Due Process Clause of the Fourteenth Amendment was violated by the refusal of a state trial court to instruct the jury in the penalty phase of a capital trial that under state law the defendant was ineligible for parole.

Reiterating that the Due Process Clause does not allow the execution of a person "on the basis of information which he had no opportunity to deny or explain," Gardner v. Florida, 430 U.S. 349, 362 (1977), the Court determined, as this Court should here, that "the jury reasonably may have believed that petitioner could be released on parole if he were not executed" and that "to the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to

death and sentencing him to a limited period of incarceration." Id., at S278.

As Justice Souter explained in his concurring opinion:

> The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. The Court has explained that the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case. [Citations omitted] Thus, it requires provision ,of "accurate sentencing information [as] an indispensible prerequisite to a reasoned determination of whether a defendant shall live or die, [Citations omitted] and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination. Beck v Alabama, 447 U.S. 625, 638 (1980).
>
> [Id., at S281]

In Floyd v. State, 497 So.2d 1211 (Fla. 1986), the trial court failed to give an instruction on what could have been considered a mitigating circumstance. This Court condemned the omission:

> The jury must be instructed either by applicable standard jury instruction or by special formulated instruction, that their role is to make a recommendation based on the circumstances of the case and the character and background of the defendant.
>
> Id., at 1215.

Here, the jury's recommendation was the product of ignorance rather than "accurate sentencing information" and rendered impossible the promise of its "reasoned moral judgment."

That South Carolina prohibited parole to Simmons as a matter of law while Campbell would be denied release by operation of the imposition of lengthy consecutive sentences is a distinction of no consequence and to submit to the fiction that Campbell might ever have hoped for release is intellectually dishonest. To predicate Campbell's death sentence on such a lie is constitutionally intolerable.

In light of Simmons, Campbell's death sentence should be reversed.

V.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The Trial Court Erred in Failing to Give More Weight to the Non-Statutory Mitigating Factors that the defendant had an abusive childhood, had a limited education, had a low IQ and learning disabilities, and had been abandoned by his parents.

First, the trial court improperly grouped all of these factors (along with his young age and the desire of the victims that he not receive the death penalty which the court dismissed altogether) into one mitigating circumstance under "Any other aspect of the defendant's character or record and circumstances of the offense...". [R. 488] Although this Court has invited trial courts to deal with nonstatutory mitigating circumstances as categories of related conduct rather than as individual acts, it could not have contemplated that a trial court, as here, would lump everything into one big ball of "[a]ny other aspect" and consider a number of distinct circumstances each given some small weight as "a single mitigating circumstance". Campbell, supra, at n. 3. Such creative bookkeeping could cost Campbell his life.

The state presented no psychiatric testimony. The

defense called forensic psychologist Bruce Frumkin, who had seen the defendant professionally five times. [TR 881] He described Campbell's childhood as, "extremely traumatic, horrendous, ... [h]e was raised in an extremely abusive situation and one which was very neglectful." [TR 883] His mother hated him. As a young child he was "beaten on a regular basis with things like pool sticks, extension cords, telephones, hoses, ... stripped naked ... [and] beaten by his mother [and] stepfather." [TR 883-884] According to Frumkin, Campbell was abused emotionally as well as physically by a mother who spit in his face in public and forced him to clean toilet bowls with his bare hands. [TR 886] Campbell was exposed to extraordinary violence and saw his stepfather beat his mother repeatedly and his mother stab his stepfather. [TR 886-887]

Clinical and forensic psychologist Jethro Toomer diagnosed Campbell as suffering from borderline personality disorder, a condition characterized by deficits in function resulting from his history of abandonment and deprivation. [TR 977] He noted a "pattern of abuse, neglect, abandonment that occurred over time." [TR 992] He found Campbell not to be sociopathic. [TR 984]

Ultimately, at approximately the age of twelve, after Campbell was treated in an emergency room after his mother beat him with a telephone, the state adjudicated Campbell dependent, took him from his mother, and returned him to live with his grandparents, with whom he had lived from birth until the age of six. [TR 887, 908,

946] A physical examination revealed bruises all over Campbell's body. [TR 947]

The extent of Campbell's mistreatment was reported by this Court in Campbell's initial appeal:

> We similarly conclude that the court wrongly rejected Campbell's deprived and abusive childhood as a mitigating factor. The record reveals that while in his parents' care he suffered extreme abuse, e.g., he required hospital treatment after being hit with a telephone, and was observed "covered with bruises." As a child, he was subjected to such extensive mistreatment that he was declared a dependent and removed permanently from his parents' home.
>
> [Campbell, supra, at 419]

Frumkin also found Campbell to have suffered since the age of sixteen from a drug and alcohol abuse problem, involving crack cocaine, marijuana, and as much as twelve beers a day. [TR 893] There was a good possibility that, as a result, Campbell suffered brain damage. [TR 940] Organic brain damage is a legitimate mitigating factor, in and of itself. Sireci v. State, 502 So.2d 1221 (Fla. 1987).

Frumkin also found Campbell to function on "a mild mental retardation level or borderline level of intelligence" and put his IQ at 68. [TR 895] He was also "functionally illiterate", unable to read on a third grade level, and suffered from a learning disability. [TR 896] There was no legitimate question that

Campbell was either "retarded" or close to it.

Toomer found Campbell's IQ to be under 65, reflecting "defective intellectual functioning." He is "retarded". [TR 986] His functioning as to basic skills was deficient. [TR 996] Toomer described Campbell as functioning emotionally in the adolescent range. [TR 989] He noted Campbell's long-term "serious drug problem" as reported by HRS and his abuse of crack cocaine and alcohol. [TR 992, 994]

This is clearly a valid and applicable mitigating factor. Morris v. State, 557 So.2d 27 (Fla. 1990); Mason v. State, 489 So.2d 734 (Fla. 1986); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988).

This Court, following the approach suggested by the United States Supreme Court in Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), treats low intelligence as a "significant" mitigating factor "with the lower scores indicating the greater mitigating influence." Thompson v. State, 19 Fla. L. Weekly S632, 634 (Fla. November 23, 1994). Here, the trial court failed, in an order which was extraordinarily expressive regarding aggravating factors, to discuss the defendant's intellectual shortcomings at all, except to lump them together with other non-statutory mitigating facts to which it gave "minimal weight." [R. 488-490] This was clearly error.

B.

The Trial Court Erred in Failing to Give More 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.

The defendant argued that his capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of the law was substantially impaired pursuant to Fla. Stat. §921.141(6)(e). The trial court refused to give this factor more than "minimal" weight. [R. 487]

In Campbell v. State, 571 So.2d 415 (Fla. 1990), however, this Court found evidence of [Campbell's] impaired capacity was extensive and unrefuted --"Campbell's IQ was in the retarded range; he had poor reasoning skills; his reading abilities were on the third grade level; he suffered from chronic drug and alcohol abuse; and he was subject to borderline personality disorder." Id. at 418.

In accord, Santos v. State, 591 So.2d 160 (Fla. 1991), in which this Court found the defendant was substantially impaired in his capacity to conform his conduct to the requirements of the law where the perpetrator, like Campbell, had suffered an abusive environment as a child. The trial court should have reached the same conclusion here.

Frumkin believed Campbell at the time of the offense "was in some sort of daze or he wasn't in full aware[ness] of his faculties." [TR 903 - 904]

Toomer believed that Campbell was under the influence [of drugs and/or alcohol] at the time of the offense. [TR 994 - 995]

Toomer concluded that Campbell's ability to appreciate the criminality of his act was substantially impaired. [TR 999] He was "most definitely" under the influence of a mental or emotional disturbance. [TR 1000]

Clinical records revealed that Campbell had exhibited psychotic behavior, i.e., inappropriate screaming throughout the night and incoherence at the time of his initial incarceration. [TR 980] Campbell had attempted suicide, had been placed in a safety cell, and was maintained by Corrections with Thorazine, Benadryl, and Cogentin. [TR 973, 981 - 982]

In light of the "extensive and unrefuted" evidence of Campbell's impaired capacity, it was error for the trial court to dismiss this mitigating circumstance as "minimal."

C.

The Trial Court Erred in Failing Altogether to Credit the Defendant With the Statutory Mitigating Circumstances that (1) the Capital Felony was Committed While the Defendant was Under the Influence of Extreme Mental or Emotional Disturbance and (2) the Age of the Defendant at the Time of the Crime, and Non-Statutory Mitigating Circumstances (3) the Fact of his Confession and Remorse, and (4) His Capacity for Love.

1.

Doctor Frumkin found Campbell to have suffered "a chronic history" of "major emotional problems." [TR 889] He had a "history of psychotic behavior." [TR 942] At eight years of age, he attempted suicide by drinking bleach. [tr 889-90] He repeated his suicide attempt after his arrest. His behavior (immediately after his arrest) was so bizarre he received the strong anti-psychotic medication, thorazine. [TR 891] He never received any mental health treatment. [TR 891] That the defendant was under the influence of extreme mental or emotional disturbance was established to at least some degree. To give it no weight at all was error.

2.

Campbell's chronological age was 21 at the time of the offense. [R 1174] While there is no per se rule as to when age is mitigating, Peek v. State, 395 So.2d 492 (Fla. 1981), the factor has often been considered in cases involving defendants of

Campbell's age. See, Meeks v. State, 336 So.2d 1142 (Fla. 1976) (21 years old); Randolph v. State, 463 So.2d 186 (Fla. 1984) (24 years old); Smith v. State, 492 So.2d 1063 (Fla. 1986) (20 years old); Perry v. State, 522 So.2d 817 (Fla. 1988) (21 years old); Hoy v. State, 353 So.2d 826 (Fla. 1977) (22 years old); King v. State, 390 So.2d 315 (Fla. 1980) (23 years old); Hitchcock v. State, 413 So.2d 741 (Fla. 1982) (20 years old); Adams v. State, 412 So.2d 850 (Fla. 1982) (20 years old); Lightbourne v. State, 438 So.2d 380 (Fla. 1983) (21 years old); Foster v. State, 436 So.2d 56 (Fla. 1983) (21 years old); Brown v. State, 381 So.2d 689 (Fla. 1979) (22 years old is of some minor significance).

In addition, Toomer found that Campbell's emotional and cognitive age was below his chronological age. [TR 989] See, Fitzpatrick v.State, 527 So.2d 809 (Fla. 1988) (young emotional age).

Here, the trial court not only gave no weight to Campbell's young chronological as well as emotional age, it failed to grant the defendant's request that the jury, at least, be given an appropriate jury instruction and allowed to make a determination for itself. [TR 1048 - 1049] Campbell was at least entitled to have the jury instructed on the statutory mitigating factor of age. "If evidence of an aggravating factor has been presented to a jury, an instruction on the factor is required." Bowden v. State, 588 So.2d 225, 231 (Fla. 1991), cert. denied, 112 S. Ct. 1596, 118

L.Ed.2d 311 (1992). Ipso facto, where evidence of a statutory mitigating factor has been presented to a jury, an instruction on the factor is similarly required. See, Floyd v. State, supra, at 1215.

The failure of the trial court to consider age as a mitigating factor, and particularly in precluding the jury from considering it as a mitigating factor, was error.

3.

Campbell was later arrested and questioned concerning the Bosler homicide. He eventually confessed and gave a written statement. [TR 754 -770] Frumkin believed that Campbell wanted to be caught and was "crying out for help." [TR 897] Toomer found that Campbell could sense and express remorse. [TR 1002] Campbell should have received some credit from the trial court for his confession and remorse.

4.

The prior recorded sworn testimony of Willy Lance, the defendant's uncle, and Celia Campbell, the defendant's aunt, was read to the jury by stipulation. [TR 944 et seq.] Both described Campbell as loving and caring. [TR 949, 953] The trial court gave this unrebutted testimony no weight at all.

The trial court's "out-and-out" rejection of these mental mitigators can not be squared with this Court's opinions in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); Campbell v. State, 571 So.2d 415 (Fla. 1990); and Santos v. State, 591 So.2d 160 (Fla. 1991); see, Brown v. State, 19 Fla. L. Weekly S261, 262 (Fla. May 20, 1994) (Kogan, J., concurring in part, dissenting in part).

Furthermore, because the trial court erroneously rejected, rather than weighed, these mitigating circumstances, resentencing is required. Rogers v.State, supra. This Court has made clear that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Knowles v. State, 19 Fla. L. Weekly S103, S105 (Fla. February 24, 1994), quoting Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990).

D.

The Trial Court's Determination as Justification for the Death Penalty that the Capital Felony was Especially Heinous, Atrocious or Cruel was Erroneous Where Such an Aggravating Circumstance was Neither Proved Beyond a Reasonable Doubt Nor Appropriate Under the Circumstances of this Case.

The trial court's passionate expressions of frustration and incomprehension ("It is beyond understanding. It is beyond excuse. It is beyond forgiveness") [R. 480] provide clues to its

misapplication of this aggravating factor which should be applied, if at all, objectively and dispassionately. The application of HAC does not depend on understanding, excuse, or forgiveness. It similarly does not depend on the virtue of the victim. ("The victim was a man of peace, a human being dedicated to loving his fellow man and ministering to their needs.") [R.479] The trial court's emotional tirade did not justify the application of the HAC aggravator.

The term "heinous" as used in Florida Statute §921.141(5)(h) means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. The word "cruel" describes conduct designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Alford v. State, 307 So.2d 433 (1975), cert. denied, 428 U.S. 912, 96 S.Ct 3227, 49 L.Ed.2d 1221, rehearing denied, 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155; Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598; State v. Dixon, 283 So.2d 1 (1973), cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295.

It is clear that the cruelty of the act, vis-a-vis HAC, is judged more from the perpetrator's perspective than the victim's. The depravity required to establish HAC beyond a reasonable doubt are only those "exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the

suffering of another." Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993).

Here, Campbell's impaired capacity, as previously determined by this Court [571 So.2d at 417] and the trial court [R. 486] precluded any determination to the exclusion of a reasonable doubt that the defendant had the capacity for "desire" or "indifference" or "enjoyment" of Billy Bosler's pain.

The "heinous, atrocious and cruel" aggravating factor applies only to capital crimes the actual commission of which was accompanied by such additional acts as set the crime apart from the norm of capital felonies. Its application is restricted to conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Blanco v. State, 452 So.2d 512 (Fla. 1984), cert. denied, ___U.S.___, 105 S.Ct. 940, 83 L.Ed.12d 953.

The application of this aggravating circumstance has been deemed to be appropriate to offenses "shockingly evil." Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1976) (Murder of nine year old daughter). It has been applied to murders committed in connection with abductions, confinement, sexual abuse and execution-style killings. Smith v. State, 424 So.2d 7206 (Fla. 1982), cert. denied, ___U.S.___, 103 S.Ct. 3129, 77 L.Ed.2d 1379. The aggravating circumstance has been upheld in torture murders. Thompson v. State, 389 So.2d 197 (Fla. 1980).

Similarly, the helpless anticipation by a victim of impending death may serve as a basis for the aggravating factor that a capital felony is especially heinous, atrocious or cruel. Karp v. State, 443 So.2d 973 (Fla. 1973), cert. denied, ___U.S.___, 104 S.Ct. 2400; Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (Eight year old victim screaming prior to her strangulation by defendant). Whatever Campbell's motivation, there is no evidence of intent either to execute or torture.

In Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, ___U.S.___, 104 S.Ct. 1430, 79 L.Ed.2d 754, this Court rejected especially heinous, atrocious and cruel as an aggravating factor under circumstances materially similar to the facts of the instant case except that the fatal wounds were inflicted with shotgun pellets rather than a knife. In Teffeteller, the victim sustained massive abdominal damage but remained conscious and coherent for approximately three hours until his eventual death, much longer than the victim suffered here. He underwent emergency aid both at the scene and at the hospital and ultimately died on the operating table. This Court nevertheless concluded:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies. [Id., at 846]

As previously determined by this Court in this case, Campbell suffered from an impaired capacity. Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). The facts established at his most recent sentencing hearing also demonstrate that this defendant, due to chronic mental problems and a horrible childhood, background, and history of substance abuse, was under severe emotional distress and was emotionally disturbed at the time of the offense. In view of these circumstances, established by unrefuted testimony, the defendant lacked the mental capacity to sufficiently form a "desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." See, also, Clark v. State, 609 So.2d 513 (Fla. 1992); Wickham v. State, 593 So.2d 191 (Fla. 1991); Santos v. State, 591 So.2d 160 (Fla. 1991); Cheshire v. State, 568 So.2d 908 (Fla. 1990); and Cook v. State, 542 So.2d 964 (Fla. 1989).

Accordingly, the application of the HAC aggravating factor was error.

E.

Death is a Disproportionate Penalty to Impose on James Campbell in Light of the Circumstances of this Case and Constitutes a Constitutionally Impermissible Application of Capital Punishment.

We are told by the United States Supreme Court in Furman

v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny that the Florida death penalty scheme is constitutional only because it is subject to the doctrine of proportionality.

In this case, to uphold the imposition of the sentence of death would be inconsistent with the penalties meted other defendants committing similar crimes under like circumstances. As such, the defendant's sentence of death cannot be sustained consistent with the promise of equal protection, due process, and freedom from cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Florida Statute §921.141(5) establishes an automatic review procedure in this Court to ensure against the disproportionate application of the death penalty.

Death must "serve both goals of measured, consistent application and fairness to the accused," Eddings v. Oklahoma, 455 U.S. 104, 111, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982), and must "be imposed fairly, and with reasonable consistency, or not at all." Id. Accord Hitchcock v. Dugger, ___U.S.___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Applying these tests, this is not a death case.

Murders committed during robberies and/or burglaries such as James Campbell committed are generally not death cases. Caruthers v. State, 465 So.2d 496 (Fla. 1985). In Cannady v. State, 427 So.2d 723 (Fla. 1983), the defendant was arrested for the robbery, kidnapping, and first degree murder of a night auditor at a Ramada Inn after having been arrested earlier for an unrelated robbery and kidnapping. The defendant confessed that he stole money from the Ramada Inn, kidnapped the victim, drove him to a remote wooded area, and shot him. This Court affirmed the trial court's findings that the murder was committed during the commission of a felony kidnapping and committed for pecuniary gain. Here, by comparison, no kidnapping was involved. In Cannady, this Court reversed the trial court's override of the jury's life sentence recommendation. Cannady is serving his mandatory life sentence.

Eddie Rembert entered the victim's bait and tackle shop, hit the elderly victim on the head once or twice with a club, and took forty to sixty dollars from the victim's cash drawer. Rembert v. State, 445 So.2d 337, 338 (Fla. 1984). He was convicted of first degree murder and robbery and sentenced to death pursuant to the jury's recommendation of death by a trial court which found, as here, two mitigating circumstances. This Court reversed, noting that at oral argument the state conceded that in similar circumstances many people receive a less severe sentence and held:

> Given the facts and circumstances of this case, as compared with other

> first-degree murder cases, however, we find the death penalty to be unwarranted here. [Id. at 340]

The Rembert Court vacated the death sentence and remanded for the imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years. The same result should apply here.

In the consolidated appeals of McCaskill v. State, and Williams v. State, 344 So.2d 1276 (Fla. 1977), both defendants were charged with attempted robbery, robbery, and first degree murder resulting from the robbery of a liquor store and its patrons. During their get-a-way, one of the patrons was shot twice in the neck with a handgun at close range and another patron was killed by a shotgun blast by a third, unnamed, accomplice. The trial judge overruled the jury's life recommendation and imposed the death penalty noting, among other things, that the killing was wanton and unnecessary. Id. at 1278. This Court exercised its final responsibility to review the case in light of other decisions and determine whether or not the punishment was too great:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in the light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v.

> Georgia, supra, can be controlled and channelled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in judgment at all. Dixon v. State, 283 So.2d 1 (Fla. 1973) at 10.
>
> [Id. at 1279]

It is thereby that the system insures that capital punishment is reserved only in "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1 (Fla. 1973). Recognizing that "death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation", Dixon, supra, the ultimate penalty has historically been reserved for homicides which are sadistic, physically torturous, committed execution-style, or committed under circumstances involving kidnapping and/or the prolonged anticipation of death.

As described supra, there existed strong evidence of Campbell's mental handicaps and intellectual retardation. [TR 895-896, 986, 989] There existed substantial evidence of his emotional disturbance and the impairment of his insight and judgment. [TR 903 - 904, 994 - 995, 999 - 1000] The was some evidence, at least, of organic brain damage and the existence of a personality disorder. [TR 940, 977]

The death penalty is reserved for the most heinous of crimes committed by the most depraved of criminals. Hamblen v. State, 527 So.2d 800, 807 (Fla. 1988) (Barkett, J. Dissenting). As Justice

Stewart noted:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.
>
> Furman v. Georgia, supra, at 306 (Stewart, J., concurring).

This Court has consistently reversed death penalties in cases, such as this, where, similar mitigating circumstances outweighed even significant aggravating circumstances. Livingstone v. State, 565 So.2d 1288 (Fla. 1988) (death sentence is disproproportionate when mitigating circumstances of youth, abusive childhood, inexperience, immaturity, marginal intelligence, and extensive substance abuse effectively outweigh two aggravating circumstances of previous conviction of violent felony and committed during armed robbery); Nibert v. State, 574 So.2d 1059 (Fla. 1990) (even where victim suffered multiple stab and defensive wounds and death was heinous, atrocious, or cruel, substantial mitigation, including diminished capacity, may make the death penalty inappropriate).

Even where homicides are determined to be particularly heinous, atrocious,or cruel, a factor clearly not present here, this Court has not hesitated to reverse given substantial

mitigation. Smalley v. State, 546 So.2d 720 (Fla. 1989); Morgan V. State, ___So.2d___, 19 Fla. L. Weekly S290 (Fla. June 2, 1994).

We know that "death is different" and is reserved for only the most horrible of offenses. Campbell's crime, as inexcusable as it was, was not "the most aggravated, the most indefensible of crimes." The circumstances of this case are not "so clear and convincing that virtually no reasonable person could differ" concerning the appropriate penalty. Indeed, there is nothing in this record to suggest that numerous consecutive life terms is not the appropriate, proportional sentence in this case.

Accordingly, James Campbell prays this Court to vacate his sentence of death.

F.

The Death Penalty is Unconstitutional on its Face and as Applied to James Campbell and Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the Natural Law.

The death penalty constitutes cruel and unusual punishment under any circumstances.

In Florida, the death penalty is arbitrarily applied. Its application is discriminatory on the basis of the race, sex, and economic status of the victim as well as the offender. It is particularly offensive, as here, in its application to the mentally

retarded. Woods v. State, 531 So.2d 79 (Fla. 1988) (dissenting opinion); Hall v. State, 614 So.2d 473, 479-82 (Fla. 1993)(Barkett, C.J., dissenting), and Turner v. State, 19 Fla. L. Weekly S630, 634 (Fla. November 23, 1994)(Kogan, J., concurring in part, dissenting in part).

Notwithstanding Brown v. State, 565 So.2d 304, 308 (Fla.) cert. denied, 498 U.S. 992, 111 S. Ct. 537, 112 L.Ed.2d 547 (1990), it is unconstitutional for a jury to be allowed to recommend death on a simple majority vote.

The death penalty is morally wrong. In the words of Sue Zann Bosler, "Let there be Peace on Earth and Let it Begin with [this Court]". [TR 1186]

Conclusion

Wherefore, based upon the foregoing arguments and authorities, the defendant James Campbell respectfully prays this Court for the vacation of his disproportionate and misapplied death penalty or, at least, for the grant of a new, fair, penalty preceeding before a jury correctly informed and properly instructed, and untainted by the systematic misconduct of the prosecution.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed to the Office of the Attorney General, 401 N.W. 2d Avenue, Suite 820, Miami, Florida, 33128 this 10th day of February, 1995.

By: Geoffrey C. Fleck, Esq.