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

REPLY BRIEF OF APPELLANT JAMES CAMPBELL

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

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.

Remarkably, the state devotes not one word directed specifically to Campbell's claim that the prosecutors unfairly 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 and that this revolting evidence was irrelevant to any legitimate aggravating circumstance and only operated to profoundly inflame the jury.*

The state merely argues, generically, that "[t]he lower court's ruling, permitting both the introduction of evidence

*Apparently the Assistant Attorney General finds the offending evidence so disgusting she can not even recount it.

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 along with the instant murder." [Appellee Brief at 24] There is no question that the attempted murder of Ms. Bosler was relevant and properly admitted. The removal of her soiled tampon/kleenex after his attack at a time he thought she was dead was not material or relevant. All the offensive conduct described by the state to the jury 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. "[T]he law insulates jurors from [any] emotional distraction which might result in a verdict based on sympathy and not on the evidence presented." Jones v. State, 569 So.2d 1234 (Fla. 1990).

Moreover, this Court has clearly established that the abuse of a decedent's body after a homicide is not to be considered as an aggravating circumstance. Halliwell v. State, 323 So.2d 557 (Fla. 1975). Ipso facto, the abuse of someone else's body other than that of the homicide victim after a murder must be even more irrelevant.

The state is equally unresponsive to Campbell's claim that the prosecutors' impeachment of Doctor Toomer was improper. This case does not involve an alleged pro-defense orientation or a history of testimony offered exclusively on behalf of criminal defendants.

The issue here specifically involves the state's attack of Toomer on the spurious basis that he was somehow sympathetic to killers of police officers. Such an attack on Toomer's character, wholly unrelated to the circumstances of this case, was wrong and unfair.

Finally, the state argues that the prosecutor's twice-repeated comment, "The death penalty is a message sent to a number of members of our society who choose not to follow the law", did not solicit a death recommendation from the jury or constitute an invitation to send such a message. Of course it did. Instead, the state contends, "It is simply a comment directed to that segment of society which perpetrates murders." [Appellee Brief at 22] We hope this Court will recognize the impossibility of the state's position. Indeed, the prosecutor's comment was clearly a directive to the jury (presumably not lawbreakers) to vote for death as a societal message.

While this Court can determine whether, in light of the myriad of other improper prosecutorial comments and arguments, supra, whether this "community" argument was harmful or harmless error, there should be no legitimate question that it was improper and had no place in this lawsuit. Contrary to Crump v. State, 622 So.2d 963 (Fla. 1993), the comments here were neither unchallenged at trial, isolated, nor ineffective to taint the jury's non-unanimous recommendation of death.

James Campbell should be granted a new penalty phase hearing.

II

THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO OFFER THE OPINION TESTIMONY OF DEFENSE WITNESSES AS TO THE APPROPRIATE PENALTY TO BE IMPOSED, AND ITS FAILURE TO CONSIDER SUCH PROFFERED OPINIONS 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.

In his initial brief, Campbell cited the en banc decision of the California Supreme Court in People v. Heishman, 753 P.2d 629 (Cal. 1988) and invited this Court to follow its logic and reasoning relative to the propriety of admitting opinion testimony regarding the suitability of the death penalty for a particular capital defendant. The state nowhere addresses Heishman.

In a capital sentencing proceeding, at which the only issue to be determined is whether or not a defendant should be executed, there can be no question that the testimony of a witness to the effect that the defendant should not die is relevant. Nothing could be more relevant. The real question is whether such evidence, offered in the form of lay opinion testimony, is otherwise admissible. Perhaps better stated, the issue is whether there exists any legal reason not to allow such testimony. By the same token, the predicate established for a witnesses' opinion testimony governs its weight, not its admissibility. The state is

always free to argue, for whatever reason, that the witness's opinion testimony is entitled to little or no weight. Such evidence should not be excluded altogether, however.

The fact remains that Fla. Stat. §90.701 provides for the admission of opinion testimony by lay witnesses and §90.703 (1979) provides:

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

When these relevant portions of the Florida Evidence Code are considered in pari materia with a defendant's irrefutable right in a capital murder prosecution to present non-statutory mitigating evidence, the conclusion is compelled that there was no good reason for the trial court to exclude the defendant's vital evidence. Such is precisely the conclusion reached by the Court in People v. Heishman, supra.

This Court should reach the same conclusion here.

The state relies on Thompson v. State, 619 So.2d 261 (Fla. 1993) and King v. Dugger, 555 So.2d 355 (Fla. 1990) to refute Campbell's claims of res judicata, collateral estoppel, and law of the case relative to the prior trial judge's determination of the victim's family member's wishes as a mitigating factor.

King and its rule does irremediable violence to the sacrosanct precept that a criminal defendant can not be punished for his or her prosecution of a successful appeal. Since Blackledge v. Perry, 417 U.S. 21 (1974), and through its progeny, the United States

Supreme Court has consistently condemned prosecutorial retaliation against a defendant for the exercise of a statutory or Constitutional right. As the Court in United States v. Goodwin, 475 U.S. 368 (1982) succinctly reasoned:

> To punish a person because he has done what the law clearly allows him to do is a due process violation 'of the most basic sort'.... [citation omitted] for while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right. [footnote omitted.]

Campbell's reversal of his original death sentence should not provoke the state or the court to withdraw from him the benefit of the prior court's beneficial adjudications. To do so constitutes nothing less than a "punishment" - a punishment inflicted only because Campbell succeeded in convincing this Court his original sentencing proceedings were flawed. This, and the simple fact that Campbell's successor judge, with more conservative ideas about the application of mitigating circumstances, has operated to place Campbell in a worse, more precarious position than he has ever been in before, simply because he previously exercised his constitutional right to appeal with some degree of success. This result is abhorrent to basic notions of fairness, due process of law, and established precedent.

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.

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.

Appellant will address these two related issues together.

The state concedes that argument regarding the possibility or likelihood of the imposition of consecutive life sentences as a non-statutory mitigating factor is appropriate, but counters that the issue may not be pursued in voir dire and the court need not give the jury any instruction. This contradiction makes no sense from a logical, ethical, or moral standpoint, contributes nothing significant to judicial efficiency, and increases, rather than diminishes, the chance that a death sentence will be inappropriately carried out.

For all the reasons and under all the authorities cited in his initial brief, Campbell is entitled to a fair, impartial, and

unbiased jury. He must, therefore, be able to ascertain whether a juror is able to consider the fact that he can be sentenced to consecutive life terms of imprisonment so that he will never again pose a threat to society. A capital defendant is entitled to know whether a juror is willing to consider such a factor at all. Such a defendant is also entitled to know a prospective juror's bias against such a mitigating factor even if he or she is willing give it some consideration. A juror might, for example, feel that even lifelong imprisonment is no guarantee against premature release or escape and harbor a prejudice against any sentence short of the ultimate penalty. Such a preconception could not otherwise be known and would stimulate, if uncovered, an appropriate peremptory challenge which would not otherwise be exercised.

By the same token, it makes no sense for a judge not to tell a jury that it can consider consecutive life sentences in deciding whether or not to vote for death. All that is lost is five seconds of time and about a dozen words. What is gained is confidence that the jury will follow the law, that the jury will understand the law, that the jury will not be confused, and that no man or woman will be electrocuted in Florida by mistake.

In other words, why shouldn't our system of capital punishment do everything it reasonably can to insure its fairness and accuracy? Why not promote the selection of a fair jury? Why not require jury instructions that will avoid juror confusion and

misunderstanding? Why not tell a jury the whole truth? In an area of the law so unfamiliar to most jurors, so important, and so vulnerable to irreparable error, clear and explicit instruction of an unbiased jury is essential. Because James Campbell got neither, a new hearing is required.

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 DISPROPORTIONATE, 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.

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.

Appellant will address these two related issues together.

At the time of the homicide, James Campbell was a psychological disaster. He had been victimized by a horrendous, neglectful, and abusive childhood. [TR 883 - 887, 922, 984] He suffered from an identifiable mental disorder [TR 977], functional deficiencies [TR 893], and possible brain damage [TR 940]. This Court has already determined that:

> 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."

Campbell v. State, 571 So.2d 415 (Fla. 1990) at 418.

The state never presented any psychological testimony at all. Nevertheless, it, like the trial court, dismisses all these findings. It argues, for example, that Campbell was only abused until he was 12 years old (upon being taken from his mother by HRS), "...at least eight years before the commission of the murder herein." [Appellee brief at 47] It argues, therefore, that the trauma Campbell suffered was "remote," as if somehow, the pain and damage somehow just went away. There is no evidence, however, that the effects of Campbell's childhood-long abuse somehow dissipated or his emotional scars somehow faded. In fact, there is considerable evidence to the contrary. There is certainly no evidence he ever received psychological help of any kind. In fact, the record shows he never received any mental health treatment. [TR 891] Moreover, this Court has already found Campbell's abuse to have been "extreme" and "extensive":

> 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.

Campbell's "extreme" and "extensive" childhood abuse deserved substantial consideration by the trial court, not the mere "minimal" weight it ultimately did receive.

The state and the trial court similarly discount the strong

evidence of Campbell's drug and alcohol abuse - again a fact previously determined by this Court. Campbell, supra, at 418 ("...he suffered from chronic drug and alcohol abuse...". The trial court was simply wrong to minimize the effects of such abuse for the reason it gave:

> ...the defendant's substance abuse does not extenuate or reduce his degree of moral culpability for the crime committed...
>
> [R 489]

While Campbell's moral culpability is probably not reduced by any circumstance, including his chronic substance abuse, the propriety of the state's execution of him is, as a matter of law (not morality).

Even absent direct evidence of a defendant's intoxication at the time of a murder, "evidence concerning drugs and alcohol, in conjunction with [other testimony] [i]s sufficient for the jury to ... reasonably conclude[] that [the defendant] may have been high on [drugs] and alcohol at the time of the murder. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). Evidence that a double murder was committed by stabbing during an irrational frenzy by an immature 19-year-old with a history of drug abuse who may have been intoxicated has been held to justify a jury's life recommendation. Amazon v. State, 487 So.2d 8, 13 (Fla.); cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986).

Intoxication is unquestionably a potential mitigating factor. Parker v. State, 643 So.2d 1032 (Fla. 1994); Stevens v. State, 613 So.2d 402, 403 (Fla. 1992); Cheshire v. State, 568 So.2d 908, 911

(Fla. 1990). Jurors can also find in mitigation that a murderer had a long-term drug addiction. See, e.g., Parker v. State, supra; Scott v. State, 603 So.2d 1275, 1277 (Fla. 1992).

Here, in addition to evidence of Campbell's irrefutable chronic substance addiction, Dr. 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" and Dr. Toomer believed Campbell was under the influence [of drugs and/or alcohol] at the time of the offense. [TR 903 - 904, 994 - 995]

Evidence of Campbell's drug and alcohol abuse should have merited more than "miminal" weight by the trial court.

With regard to Campbell's intellectual shortcomings, which are irrefutable in existence if not degree ("Campbell's IQ was in the retarded range; he had poor reasoning skills; his reading abilities were on the third grade level...", Campbell v. State, supra, at 418, the state and trial court commit the ultimate perversion of the death penalty scheme by basing Campbell's death on his altruism in saving another inmate's life:

> ...the defendant demonstrated sound reasoning abilities by intervening and notifying the authorities when another inmate was contemplating suicide.
>
> [Appellee brief at 49; R 486 - 487]

Thus, the court found erroneously and the state argues ingenuously, Campbell is not really retarded at all.

Be that as it may, Campbell's mental and intellectual

shortcomings deserved more than the "mininal" weight afforded by the trial court.

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.

Evidence of Campbell's extreme mental or emotional disturbance is described in detail in his initial brief at 42. It deserved at least some weight in the trial court's decision to order Campbell's death.

Campbell's biological age of 21, coupled with evidence of his even more immature emotional and cognitive age [TR 989] entitled him to the benefit of the statutory mitigating age factor. A defendant's age of 21 can reasonably support a life recommendation. Perry v. State, 522 So.2d 817, 821 (Fla. 1988); Caruso v. State, 645 So.2d 389 (Fla. 1994).

The trial court's failure to grant the defendant's request for a jury instruction on "age" as a mitigating factor was error for all the reasons described in Point IV, supra, especially since a statutory mitigating factor was involved. The state's argument

that the trial court's nonfeasance was rendered harmless by the "any other aspect..." instruction is inapposite where the catch-all instruction relates only to non-statutory factors.

The fact that Campbell was known by family members as loving and caring was unrefuted and undeniably constituted evidence of a legitimate non-statutory mitigating factor. See, e.g., Scott, supra. at 1277; Bedford v. State, 589 So.2d 245, 253 (Fla. 1991); Holsworth, supra, at 354. It was wrong for the trial court to give this, and the other factors above, no weight at all.

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.

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.

As to Points V (D) and (E), the appellant respectfully relies on the arguments and authorities advanced in his initial brief.

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.

We cannot help observing the ironic fact that the nation of South Africa, long infamous for its lack of humanitarianism and its abominable history of civil rights violations, has recently abolished capital punishment while the State of Florida perpetuates its old, barbaric habits. We cannot help but wonder what it will take for Florida to take such enlightened action, how long it will take, and how many more capital appeals like this one will unnecessarily (pre)occupy this Court's time and attention.

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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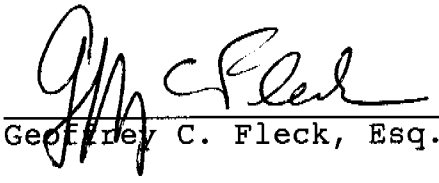
By: 
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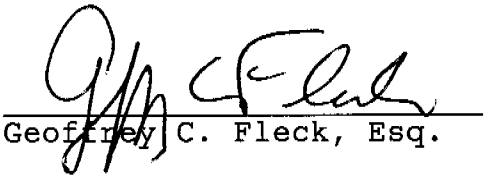
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed to Fariba N. Komeily, Esquire, the Office of the Attorney General, Post Office Box 013241, Miami, Florida, 33101, this 19 day of July, 1995.

By: 
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