IN THE SUPREME COURT OF THE

STATE OF FLORIDA

WILLIAM T. TURNER,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 67,987
	)	
STATE OF FLORIDA	)	
	)	
Appellee.	)	

INITIAL BRIEF OF APPELLANT

Appeal from the Fourth
Judicial Circuit

Capital Case

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STATEMENT OF THE CASE

This is an appeal from a sentence of death. William T. Turner was charged by indictment with first degree murder of his estranged wife Shirley Turner and her roommate Joyce Brown, contrary to Section 782.04, Florida Statutes (1983).

William Turner proceeded to jury trial before the Honorable Southwood, Circuit Judge, on August 13, 14, 15 and 16, 1985. At the conclusion of the guilt stage of the trial, the jury returned a verdict finding William Turner guilty of murder in the first degree, count one, and guilty of murder in the first degree, count two. (R 191).

At the penalty phase of the trial, as to count one [Shirley Turner], the jury found: sufficient aggravating and sufficient mitigating circumstances. The jury, by a vote of six or more recommended a life sentence. (R 212). As to count two [Joyce Brown], the jury found: sufficient aggravating circumstances; and by a vote of seven to five, recommended a death sentence. (R 213).

The appellant was adjudicated guilty and sentenced in count one to a life term of imprisonment with no parole for 25 years (R 299) and in count two, to death by electrocution. (R 300,302). The trial judge found four aggravating circumstances, of which, the conviction of the murder of Shirley Turner in count one was "the most significant factor considered by the court in imposing sentence." (R 304). Notice of appeal was timely filed

(R 310) and undersigned counsel appointed for purpose of direct appeal. (R 318).

STATEMENT OF THE FACTS

Appellant William T. Turner, in the early morning hours on the day following his 39th birthday, walked to a Monroe Street apartment near the interstate highway exit where his estranged wife, Shirley Turner, and their daughter, Anetra, lived with Joyce Brown and her daughter Irene Hall. The appellant fired a single shot shotgun outside the building then entered the apartment. William Turner stabbed his wife some twenty-two (22) times while Anetra yelled and hit her father with her fists. (T 630). At no time did Mr. Turner say anything to Anetra or Irene Hall or react to anything the children said or did. (T 599, 635).

At this point, the record is unclear as to the circumstances leading to the appellant stabbing Joyce Brown some fifty-one (51) times in a telephone booth located on the busy street corner some three houses away from the apartment. It is not clear from the record whether the appellant left the apartment in pursuit of his daughter or Joyce Brown or encountered Joyce Brown on the street after leaving the apartment.

It is also not clear from the record whether the appellant ceased stabbing Joyce Brown when a police car passed the telephone booth located at the corner. A neighbor, Daniel

Robinson, testified that the appellant continuously stabbed Joyce Brown despite the fact that a police car passed by without stopping to render assistance.(T 377-79). Another eye witness, Russell Kimball, gave similar testimony. (T 757). In contrast, James Andrews, testified at trial that the appellant stabbed Joyce Brown a number of times until he saw a police car pass by the apartment. Andrews stated that at that point in time the appellant retreated to the side of the building, waited until the car had passed, then returned and repeated stabbing Joyce Brown. (T 354). The decedent's daughter, Irene Hall, gave similar testimony. (T 594).

Jacksonville Police Officers Venosh and Aikens arrived on the scene shortly thereafter and chased the appellant down an alley. Officer Venosh testified that he ordered the appellant to stop running. The officer stated that the appellant stopped, raised his hands - keeping a knife in his right hand - and took a step towards the officer. After a standoff for a moment, the appellant dropped the knife and surrendered. (T 642-43). Officer Venosh was reported as saying that at the time of the arrest, Turner was in a "very agitated state and was growling and gnashing his teeth." (T 712-13). Officer Aikens testified that the appellant stated "go ahead and kill me . . . it's not worth living for." (T 701).

The Chief Deputy Medical Examiner, Bonoflorio Floro, M.D., testified of the vast number of incise wounds, a conglomeration of stabbing and cutting (T 532), suffered by both victims and their cause of death due to loss of blood. Dr. Floro

stated that Shirley Turner fell after receiving a fatal wound and received additional stab wounds. (T 553). Shirley Turner received some 21 stab wounds of the neck and chest. (T541-42). Joyce Brown received in excess of 51 stab wounds. (T 537). Dr. Floro described the crime as "overkill" and defined "overkill" as when the assailant continues to stab an already dead victim. (T 550-51). Such a term and multiple stab wounds is more frequently found in so-called homosexual murders or in victims killed by homosexuals.

At the close of the state's case, appellant's motion for a judgment of acquittal was denied. (T 690).

The defense presented seven (7) witnesses. F.B.I. Special Agent Stephen Rayfield and Special Agent Ernest Killian testified that the appellant was interviewed as a potential confidential informant but rejected, in part, because of his total preoccupation with the affairs of his wife, Shirley Turner. (T 731, 741-42).

Daniel T. Stinson, M.D., was qualified as an expert in the field of psychiatry and testified to the appellant's insanity. Dr. Stinson rendered an opinion that the appellant was suffering from a brief reactive psychosis; was not able to reason accurately; and not in control of his facilities. (T 792, 825). The doctor explained that the psychosis appeared following a psychosocial stressor or a buildup of factors which included the appellant's age, in having experienced his thirty-ninth (39th) birthday and perceiving his estranged wife having sexual intercourse on the night of the appellant's 39th birthday with

another man. (T 826). no evidence to support this perception

At the conclusion of Dr. Stinson's testimony, defense counsel offered into evidence the judicial order committing the appellant for a Baker Act mental examination and its medical report. The state's objection was sustained. (T834).

The defense rested and moved for a judgment of acquittal. (T 834). The motion was denied. (T 871).

In rebuttal, the state called two psychiatrists: George Barnard, M.D., and Ernest Miller, M.D. Dr. Barnard rendered an opinion that the appellant did not have any resultant disability that would cause him to lose his ability to know the nature and quality of his acts. (T 891).

Dr. Miller testified that the apparent fury, the amount of force directed on the victims, and the inordinate number of stab wounds correlates with a highly charged emotional state and often with a psychotic state. (T 957-58). The doctor rendered an opinion that despite his emotional state the appellant knew the nature and the consequences of his acts and the wrongfulness of his acts at the time that he committed them. (T 955). Although Dr. Miller found the William Turner not insane, he also found the appellant to be lacking premeditation to kill. Dr. Miller stated that he found nothing to suggest that the appellant had gone to the house to kill his wife (T 984) or that the murders had been a premeditated act. (T 1009). Rather, Dr. Miller explained that William Turner wanted to conduct a commando raid on the house and create a diversion by shooting the shotgun, and in the resulting confusion, rescue his daughter. (T 1006). He further explained

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that the appellant perceived his wife Shirley Taylor having a lesbian affair with Joyce Brown and working as a prostitute in the house in front of her children. (T 984).

At the conclusion of Dr. Miller's testimony, defense counsel again offered into evidence the judicial order committing the appellant for a Baker Act mental examination and medical report. The state's objection was sustained again. (T 1014).

The state rested. The defense's motion for judgment of acquittal was denied. (T 1011).

In chambers, the trial court heard argument regarding jury instructions. The court granted, over objection, the state's motion for a jury instruction regarding flight. (T 1019). The Court also granted two jury instructions proposed by the defense: instruction on voluntary manslaughter # 1 (R 169); and Special Instructions on Insanity #1 (R 171).

The jury returned a verdict of guilty to both counts. The defense moved for a continuance of the sentencing phase in order to introduce into evidence requested but not received military records of William T. Turner. The motion for continuance was denied. (T 1183).

At the penalty stage of trial, the state did not call any witnesses but introduced into evidence the two jury verdict forms. (T 1187). The state did not offer evidence of any other aggravating factor.

The appellant called six witnesses to testify in mitigation, including the appellant's father, brother, and the state's expert witness, Dr. Miller. The appellant relied upon the

interrelated factors of commission of the murder while "under the influence of extreme mental or emotional disturbance," F.S. 921.141(6)(b) and the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." F.S. 921.141(6)(f). In addition, the appellant relied upon non-statutory mitigating factors, relating to his family background, upbringing, and military record. disch 1968

In support of mitigating factors, the appellant produced Ernest Miller, M.D., who had previously testified as the state's expert witness. Dr. Miller testified that the appellant, of borderline intelligence, was suffering from an extreme emotional disturbance. (T 1228). The doctor explained that the appellant did not have the mental capacity to conceive alternative plans of dealing with problems in his life. (T 1234). The doctor rendered an opinion that at the time of the crime the appellant was in a heightened emotional state which diminished his mental capabilities in terms of performing rational thought. Dr. Miller opined that the appellant justified his action as morally necessary to protect his daughter for he believed that she was being subjected to an unhealthy environment by his wife's prostitution and consumption of narcotics. (T 1232). D told this to Dr.

The defense also called the appellant's brother, Greg Turner, testified of the appellant's Catholic background and life as a family man. A co-worker at the State Department of Transportation, employee Mark Ballard, testified of William Turner receiving state recognition for rescuing a young woman

kidnapped by three men who intended to rape and possibly kill her. (T 1220).

The jury returned with an advisory sentence, and announced a vote of six to six to recommended life in Count One. (T 1367) and by a vote of seven to five recommended death in Count Two. (T 1367). The court took the sentence under advisement and announced an additional hearing to present evidence in mitigation and aggravation of sentence. This was to provide the defense with time inter alia to obtain the appellant's military records. (T 1365). Subsequently, a hearing was held, wherein the trial court announced the intention to pronounce sentence, notwithstanding his previous announcement. Defense counsel was instructed that the record could be supplemented by any written materials for purposes of sentencing. (T 1378). A Presentence Investigation, conducted by the Florida Department of Corrections, was reviewed by the trial court. (T 1382). Defense counsel presented written objections to the PSI report. (R 220-23).

The trial court adjudicated the appellant to be guilty of each of the two counts of murder in the first degree. (R 1441). The court, finding and adopting the jury's recommendation of life in count one, sentenced the appellant to a term of natural life without parole for 25 years. (T 1442). In count two, the trial court sentenced the appellant to death. (T 1432) finding four aggravating circumstances to exist and no mitigating circumstances.

Appellant objected to the imposition of sentence in

count two as not supported by the law. Counsel argued that the court previously found no deviation between counts one and two as to aggravating and mitigating circumstanes yet approved the jury recommendation of life in count one one the one hand, and on the other, rejecting the presence of any mitiating circumstances in count two. The trial court justified the differentation because of he considered the prior conviction in chronological order. (T 1452).

I.
APPELLANT WAS DENIED DUE PROCESS OF LAW BY HIS INVOLUNTARY ABSENCE FROM THE VOIRE DIRE CONFERENCE AND CHARGE CONFERENCE

In a capital case, the defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 45 L.Ed.2d 562 (1975). This right has been held by the United States Supreme Court to derive from the confrontation clause of the sixth amendment and the due process clause of the fourteenth amendment. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

The defendant's right to be present at a capital trial is nonwaivable. Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), rehearing denied, 706 F.2d 1311 and 708 F.2d 734, cert. denied, 104 S.Ct. 508,509 (1983).

On the first day of trial, after voire dire, the trial

court judge met with counsel, but without the appellant, to review potential jurors and hear preemptory challenges or challenges for cause. Although the record reflects the appellant in the courtroom, the record does not reflect Turner's voluntary exclusion from the venire conference. Appellant submits that it was his desire to be present at all stages of the trial but that he was involuntarily excluded by the trial court.

The trial record reflects the following:

> The Court: Okay.
> Now, ladies and gentlemen, it's going to be necessary that I have a brief conference with the attorneys involved in the case.
>
> * * *
>
> (The following proceedings were had in the jury room outside of prospective jurors:)
> The Court: Now, let's talk about cause first, if there's any such. Do you have any challenges on anybody for cause? (T 208-09).

Later, that same day, the trial court judge accompanied by counsel but not including the appellant, retired to the jury room for additional challenges to the venire:

> The Court: Ladies and Gentlemen, rather than keep you in like we did before and, again, it's been a long day for everyone, I think I'm going to ask counsel and the court reporter to retire to the jury room and I'll just excuse all of you until 4 o' clock. It will probably take us that long anyway. If everybody will be back here at 4 o'clock, we'll reconvene court. In the meantime, I'll be conferring with the attorneys.
>
> We'll be in brief recess except for that aspect of it, gentlemen.
>
> (The following proceedings were had in jury room outside of the presence of prospective jurors:)
>
> The Court: Let's see. Who was first last was the state

on the last bunch I had so, therefore, we're going to - - the defense is going to go first on Ms. Collins. (T 290) (emphasis supplied).

The record does not reflect the appellant's presence during the challenge of jurors held by the trial court judge with the assistant state attorney and defense counsel in the jury room adjacent to the courtroom.

In addition to the absence of the appellant from the venire conference, the appellant was involuntarily absent from the charge conference. In the trial below, after the defense rested, the trial court excused the jury for the day. The record reflects the following:

(Jury absence).
Mr. Coxe [Defense Counsel]: I'll waive his appearance at the charge conference.
(The following proceedings were had in chambers).
The Court: Mr. Coxe is waiving Mr. Turner's appearance at the charge conference. (T 838).

The Court reviewed the submitted jury instructions and announced a second charge conference to finalize the instructions. (T 866).

Later the State rested after presenting two rebuttal witnesses. The trial judge then retired to chambers with the attorneys but without the defendant and without waiver of the appellant's presence at the second charge conference.

(Jury absent).
The Court: We'll just be in recess for 5 minutes or seven minutes. We'll meet in my chambers with the reporter.
Mr. Kunz [Assistant State Attorney]: Is the defense going to waive the presence of Mr. Turner?
The Court: He'll do that in there, I think, if he cares

to.
Mr. Coxe [Defense Counsel]: Yes, sir.
(The following proceedings were had in chambers.) (T 1019)

* * *

The Court: We didn't deal with the question of waiving Mr. Turner's appearance here.
Mr. Coxe: I waive that and I retroactively waive it to the beginning of this conference. (T 1031-32).

The record does not affirmatively demonstrate the presence at the venire conference or charge conference of the appellant. The record does not demonstrate any waiver of his right by counsel of his presence and that he acquiesced in his counsel's actions as to the venire conference. Any such waiver at the charged conference if valid was not acquiesced by the appellant. The record does not show appellant's absence from either conference was at the request of the appellant or his counsel.

The importance of the defendant's presence at all stages of the capital proceedings was reviewed in Francis v. State, 413 So.2d 1175 (Fla. 1982), where this Court held that the defendant's absence from his capital trial during the selection and challenges of the venire was reversible error. Justice Alderman noted that Francis was absence during a crucial stage of his trial and that his attorney had not obtained his client's express consent to either waive his presence or to challenge the jury in his absence. Moreover, the Francis court noted that record did not reflect either the defendant's waiver or consent to be absent himself and the right to be present. See, Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Only under specific circumstances can a defendant be

absented or waive his right in a capital case to be present at trial. In Peede v. State, 474 So.2d 808 (Fla. 1985), this Court held that the defendant can waive his right to be present at any stage if he personally chooses to voluntarily absent himself from the capital trial. Peede had previously interrupted the capital proceedings and distrupted the court room, and the trial court responded to his request to be absent by conducting a hearing.

Similar to the Francis decision, in the case at bar, the record does not reflect the appellant's voluntary absence from the venire conference. The venire conference, as well as the charge conference, were situations in which the appellant's presence was important because of the aid he could have given counsel. Moreover, as a capital case, any possible waiver by counsel as to his presence at the charge conference was not binding as the defendant neither consented to the waiver nor acquiesced to it afterwards. In view of the gravity of this error, it cannot be deemed harmless beyond a reasonable doubt. The defendant's involuntary absence without waiver by consent or subsequent ratification was reversible error. The conviction must be reversed and remanded for new trial.

II

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE INTRODUCTION INTO EVIDENCE OF FOURTY-THREE GRUESOME PHOTOGRAPHS AND A TAPE RECORDING OF A CONVERSATION MADE BY A VICTIM TO THE POLICE AS SHE WAS REPEATEDLY STABBED TO DEATH

A. THE PREJUDICIAL IMPACT OF FOURTY-THREE GRUESOME PHOTOGRAPHS OUTWEIGHED ITS PROBATIVE VALUE.

Gruesome photographs are generally admitted into evidence on the same basis as other photographs if they fairly and accurately represent some material fact: are relevant, Section 90.401 Florida Statutes (1983), Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882 (1982), Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981), and not excluded under Section 90.403, Florida Statutes, (1983) Exclusion on Grounds of Prejudice or Confusion.[1] Under Section 90.403, the admission of evidence, including photographs, into evidence is precluded when their probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. Ehrhardt, Florida Evidence, Section 401.2 (2d Ed. 1984); See also, United States v. Bowers, 660 F.2d 527, 529 (5th Cir. 1981).

Although a photograph may be considered relevant under Section 90.401 Florida Statutes (1983), relevance does not insure its admissibility. Even relevant photographs must be excluded if they are unduly prejudicial. Young v. State, 234 So.2d 341 (Fla. 1970);Dyken v. State, 89 So.2d 866 (Fla. 1956); Rosa v. State; Beagles v. State, 237 So.2d 796 (Fla. 1st DCA 1976). After

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[1] Section 90.403, Florida Statutes (1983), provides:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

finding a photograph relevant, one then turns to Section 90.403 to decide "whether its value is worth what it costs." Hawthorne v. State, 470 So.2d 770, 785 (Fla. 1st DCA 1985), citing to, McCormick on Evidence (3d Ed. 1984).

Section 90.403 is directed at evidence which inflames the jury or appeals improperly to the jury's emotions. Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. See, e.g., Westley v. State, 416 So.2d 18, 19 (Fla. 1st DCA 1982). In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence. Ehrhardt, Florida Evidence, 403.1 (2d Edition 1984).

In the trial below, the state introduced into evidence a total of fourty-three (43) photographs. Nine photographs of the crime scene were introduced into evidence without objection. (T 413). Later, the state introduced into evidence, over defense objections (T438, 450, 453), seven (7) additional photographs taken of Shirley Turner inside the apartment and Joyce Brown lying on the sidewalk outside the apartment. (T 438, 450, 453). The government photographer admitted that three of the seven photographs showed the same stab wounds but from different angles. (T 438).

In addition to the crime scene photographs, the state introduced twenty-seven (27) photographs of the decendents' bodies taken by the Medical Examiner's office. The defense objected to the introduction of these photographs, based upon

their prejudical value. Moreover, the previously introduced photographs could provide the basis for the medical examiner to testify as to cause of death. (T 484-85). The prosecutor responded that "each of those photographs either shows a different injury or if the photograph has two injuries within the photograph, the next photograph may show a close-up shot of them," (T 485) or a magnification of the stab wound. (T 510, 512). The prosecutor further explained: "Your Honor, a couple of those photographs of [one victim] are of the same hand, but one photograph is the open position of the palm, in the other photograph, is the other side of the palm so that it shows the nature of that injury." (T 487). (See, Appendix p. 5 & 6).

The trial court erred in admitting into evidence gruesome photographs. Undersigned counsel regrets that it is necessary to place a portion of these photographs in the appendix of this brief. The gruesomeness of the photographs is clear: State's Exhibit 24 (Appendix at p.2) shows the body of Joyce Brown with the intestines puffing out of the body, in addition to a portion of the lung. State's Exhibit 25 (Appendix at p.3) shows in greater detail a portion of the lung. State's Exhibit 20 (Appendix at p.1) shows the bloody body of Joyce Brown exposed from the waist down. State's Exhibit 44 (Appendix at 4) shows a large breast cut almost in half.

The trial court erred in admitting gruesome photographs into evidence. The detailed photographs shocked the jury and colored their reception of the defense. The judgment and sentence should be reversed and remanded for new trial.

B. THE NUMBER OF GRUESOME PHOTOGRAPHS CONSTITUTED PREJUDICIAL ERROR.

9 w/o obj.

The trial court abused it's discretion in allowing the cumulative presentation of forty-three (43) photographs showing the victims at the scene of their death and in the laboratory of the Medical Examiner's Office. The excessive number of photographs constituted unfair prejudice.

In Young v. State, 234 So.2d 341,348 (Fla. 1970), the Supreme Court of Florida held the admission of gruesome photographs in large numbers, constituted prejudicial error requiring the capital conviction be reversed and remanded for new trial:

> The very number of photographs of the victim in evidence here, especially those taken away from the scene of the crime, cannot but have had an inflamatory influence on the normal fact-finding process of the jury. The number of inflammatory photographs and resulting effect thereof was totally unnecessary to a full and complete presentation of the state's case. The same information could have been presented to the jury by use of less offensive photographs whenever possible, and by careful selection and use of a limited number of the more gruesome ones relevant to the issues before the court.

The appellant was prejudiced by prosecutorial overkill resulting from the presentation of an excessive number of gruesome stab wound photographs. The excessive number of gruesome photographs was totally unnecessary to the full and complete presentation of the state's case. The Assistant Medical Examiner could have testified as to the cause of death from the nine (9) previously introduced photographs of the victims at the

crime scene. The appellant did not contest the issues addressed by the Medical Examiner: i.e., cause of death; the location and nature of the decedent's wounds; and the nature and extent of the force and violence to commit the crime. The appellant did not contest these issues for his sole defense was insanity.

In Jackson v. State, 359 So.2d 1190, 1192 (Fla. 1978), cert. denied, 439 U.S. 1102 (1978) three gory and gruesome photographs were determined to be relevant and admissible into evidence. In upholding the conviction and sentence of death, this Court "[C]aution[ed] the prosecutors of this state that gory and gruesome photographs admitted primarily to inflame the jury will result in a reversal of the conviction." In the case at bar, two terrible murders occurred on July 3, 1984. The horror of the crime scene and the medical examiner's examination was illustrated to the jury in an excessive number of gruesome stab wound photographs. The relevancy in seeing every stab wound from a number of angles is outweighed by its inflammatory impact.

In the case at bar, two women were killed and died from loss of blood from some 63 stab wounds. Appellant argues that the gruesome photographs were prejudicial per se and in addition, the cumulative number of photographs constituted prejudice. If the victims had been killed by an individual inflicting one hundred stab wounds, could the state introduce one photograph of each one hundred stab wounds for a total of one hundred photographs? The decedents were stabbed approximately some seventy-one and the State introduced fourty-one photographs. The photographs inflamed the jury and resulted in a advisory sentence of death for the

death of Joyce Brown. The judgment and sentence must be reversed and remanded for new trial.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE INTRODUCTION INTO EVIDENCE OF A TAPE RECORDING WHICH RECORDED A CONVERSATION MADE BY A VICTIM TO THE POLICE AS SHE WAS STABBED TO DEATH

Tape recordings are admissible into evidence if authenticated, relevant, and not excluded under Section 90.403, Florida Statutes, Exclusion on Grounds of Prejudice or Confusion. Ehrhardt, Florida Evidence 401.3 (2d Ed. 1984). In the trial below, the defense moved to exclude the introduction of the tape recording as its prejudical value outweighs its probative value and arouses the emotions. (R 47, T 613,615). The prosecution offered the tape recording into evidence to prove (1) the identity of the assailant; (2) statements of the defendant; and (3) premeditation. (T 617-18). The appellant offered to stipulate as these issues. (T 619).

The tape recording, state's exhibit # 49, is a recording of an unknown number of telephone calls made to the police dispatcher on July 3, 1984. The tape contains numerous pieces of inaudible conversation and screaming throughout the tape. One unidentified caller states that a man has been stabbing a person in a telephone booth. Another woman, presumably the decedent Joyce Brown, tells the police of a man in her house with a shotgun. The telephone conversation with the police is contained in the appendix and is in pertinent part as follows:

Dispatcher I: Ma'am, stop shouting, Tell me who he is.
Woman: His name (sic) William Turner.
Dispatcher I: William Turner?
Woman: Yes.
Dispatcher I: Black man?
Woman: Hush, Baby. Hush, hush.
Dispatcher I: Black man?
Woman: Yes.
Dispatcher I: How old is he?
Woman: William, please don't --
Dispatcher I: They're on the way, ma'am. How old is he?

- - -

(Screaming)

- - -

Man: You're the one. You're the one. You're the one. You're the one.

- - -

(Screaming)

Woman: I didn't do nothing, William.
Man: Yes, you did.
Woman: I didn't do nothing.
Man: Yes, you did.
Woman: I didn't do nothing.
Man: Yes, you did.
Woman: I didn't do nothing.
Man: Yes, you did.
Woman: I didn't do nothing.
Man: Yes, you did.
Woman: I didn't do nothing.
Man: Yes, you did.
Woman: I swear, William. William - - (inaudible).
Man: Yes, you did. You know you did it.
Woman: No, I didn't
Man: Yes, you did.
Woman: No.
Man: Yes, you did.

Dispatcher I: I need the hotline.
Woman: (inaudible screaming) William - -
(The complete transcript of the tape recording is attached to the appendix of the Appellant's Inital Brief).

The appellant did not contest the issues of identity or

premeditation because his main defense was insanity. Admitting the tape recording into evidence created mass prejudice in the jury's minds. The combination of the numerous gruesome photographs and the tape recording insured the jury's disregard of Turner's defense. The combination of the numerous gruesome photographs and the tape recording explains the jury verdict of life for the death of Shirley Turner and death for Joyce Brown. The conviction and sentence should be reversed and remanded for new trial. Subject to other theories.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING THE ADMISSION INTO EVIDENCE OF A BAKER ACT ORDER AND EXAMINATION OF THE APPELLANT FOR MENTAL ILLNESS AND DISEASE.

Prior to their deaths, Shirley Turner and Joyce Brown petitioned the circuit court for an ex parte involuntary examination of the appellant, William Turner, for mental illness and disease. Both women sworn that Turner had threatened to kill his wife and (R 226,227). As a result of this testimony, an order was issued to take William Turner into custody at his job with the Florida Department of Transportation and deliver him for an involuntary examination (R 225). The appellant was examined and discharged. (T 228).

At the trial below, the key issue was the appellant's insanity. The appellant had filed and the state was aware of the intent to on the insanity defense. Defense counsel twice attempted the introduction into evidence of the Baker Act order. The order was relevant as to the issue of insanity, prove the appellant's inability to show right from wrong, and to disprove

the element of specific intent required under felony murder. The trial court denied its admission into evidence three times. (R 834, 1014, 1198). Although the trial court did not admit the Baker Act order and record, it did permit the introduction of an order issued pursuant to dissolution proceedings restraining the appellant from harassing or harming his wife and children. (State's Exhibit 50, T 687).

All evidence relevant or pertinent to the issue of the defendant's insanity should be admitted. United States v. McRary, 616 F.2d 181 (5th Cir. 1980) (Fla.law); United States v. Milne, 487 F.2d 1232 (5th Cir. 1973) (Fla. law); United States v. Davis, 411 F.2d 570 (5th Cir. 1969) (Fla. law). During the guilt phase of the trial, testimony regarding the mental state of a defendant in a criminal case is admissible provided a not guilty plea by reasons of insanity has been entered. Leigler v. State, 402 So.2d 365 (Fla. 1981), citing to Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976).

The trial court abused its discretion in denying admission of the Baker Act order into evidence. The Baker Act Order was relevant evidence to the issue of appellant's sanity at the time of the crime and his intent. The Baker Act order had been conducted by personnel under Dr. Miller's authority, and in addition, had been reviewed by Dr. Barnard and Dr. Miller in rendering their opinion at trial. (R 881, 945).

The Baker Act order and examination was relevant to the issues of insanity and specific intent at the time of the offense. The Baker Act order and examination would have

supported the appellant's defense of insanity. The exclusion assisted the state in addressing its burden of proving the appellant sane at the time of the crime. The exclusion of this significant evidence that addressed the major issue at trial, the appellant's sanity, was error.

IV.

THE STATE FAILED TO MEET ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE APPELLANT WAS SANE AT THE TIME OF THE CRIME

This Court has established that insanity is an affirmative defense. Once the defendant presents evidence of insanity, the prosecution has the burden of disproving the defendant's claim beyond a reasonable doubt. Patten v. State, 467 So.2d 975 (Fla. 1985); Wells v. State, 98 So.2d 795 (Fla. 1957). The admission into evidence of insanity, such as a prior adjudication of not guilty by reason of insanity or committment under the Baker Act requires the state to prove competency or disprove the defendant's claim of incompetency beyond a reasonable doubt.

William T. Turner, prior to the commission of the offenses at issue in this case, had been examined pursuant to the Baker Act, for mental illness and disease. (R 225-31). After his arrest, the State filed a Motion for Order appoint Expert for the Purpose of Psychiatric Evaluation and Examination of the Appellant at the time of the offense. (R 104). The appellant, examined by Drs. Miller and Barnard, subsequently filed a notice of intent to rely on the defense of insanity. (R 96, 100, 125).

At trial, in its case in chief the State did not produce any evidence to establish the appellant's sanity at the time he committed the alleged offenses. The defense introduced evidence of appellant's insanity at the time of the crime. Daniel Stinson, M.D., qualified as an expert in the field of psychiatry, rendered an opinion that the appellant was not able to reason accurately and that he was not in control of his facilities. (T 792). He testified that the appellant suffered from a brief reactive psychosis following a psychosocial stressor: seeing his estranged wife having sexual intercourse with another man on the night of the appellant's 39th birthday. (T 826).

In rebuttal, the State called Drs. Barnard and Miller who rendered separate opinions that the appellant was legally sane at the time of the alleged offenses. (T 890, 941). Dr. Barnard rejected both Dr. Stinson's opinion of brief reactive psychosis as not immediately following the psychosocial stressor (T 893-94) and Dr. Miller's initial opinion of an isolated explosive disorder. (T 930). Stinson and Miller agreed that the appellant in a state of mind described as a "frenzy" stabbed the decedents a number of times. (T 831, 957). However, Miller disagreed with Stinson's diagnosis based his review of the evidence indicating a lack of symptoms, including, disturbances of speech, delusions, and bizzare behavior.

As evident from the testimony of the doctors which examined the appellant, there is a wealth of difference as to the issue of insanity, each difference providing doubt as to the appellant's compentence and sanity. (T 975). The tape recording

of the decendent and the appellant indicates a disturbance of speech and bizzare behavior. Miller agreed that the "aparent fury" possessed by William Turner, the amount of energy directed to the victims, and the inordinate amount of stab wounds correlates with a highly charged and psychotic individual. The differences of medical opinion and the evidence of the appellant's behavoir adduced at trial, en toto, provides reasonable doubt of the appellant's sanity.

The State failed to meet its burden of proving the appellant sane beyond a reasonable doubt. A reasonable doubt exits as the expert testimony is uniform only in its opinion that the appellant was of borderline intelligence, psychotic, and suffered emotional distress. A reasonable doubt exists as the State's Expert Witnesses could not agree on the diagnosis.

Absent such proof, particularly where a specific intent crime is involved, the defendant cannot be convicted. The state having failed to meet its burden of proof to rebut the presumption of insanity at the time of the alleged offenses, the appellant is entitled to a judgment of acquittal. Burks v. United States, 437 U.S. 1 (1978).

V.

THE TRIAL COURT ERRED IN ADJUDICATING THE APPELLANT GUILTY AS THERE WAS INSUFFICIENT PROOF OF PREMEDITATION TO SUPPORT THE VERDICT OF GUILTY OF FIRST DEGREE MURDER.

Homicide, in order to constitute murder in the first degree, must have been premeditated. Driggers v. State, 164 So.2d 200 (Fla. 1964). The duration of the premeditation is

immmaterial as long as the murder results from a premeditated design existing at a definite time to murder a human being. Songer v. State, 322 So.2d 481 (Fla. 1975).

The standard to show premeditation was established in Snipes v. State, 154 Fla. 262, 260, 17 So.2d 93, 97 (1944) (Chapman, J., concurring). To show premeditation:

> it must be proven that before the commission of the act which results in death that the accused had formed in his mind a distinct and definite purpose to take the life of another human being and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well defined purpose and intention to kill another human being.

The evidence submitted to the jury was inadequate to prove premeditation and, thus, the verdict of first degree murder should not stand. The appellant stabbed his wife and in the heat of the act stabbed Joyce Brown. The stabbing was not planned. The murder was done in a crazy way. (T 788). Certainly, William Turner had no preconceived plan to kill Joyce Brown. A preconceived plan would have entailed the appellant shooting Joyce Brown with his shotgun prior to entering the apartment. The circumstances cannot support a conclusion that he reflected upon them before commission, even for a moment.

The trial court makes note that the appellant selected his targaret (Shirley Turner) in a cold, calculated, and premeditated manner. In contrast to the court's findings, the evidence shows that the appellant was attempting to create a diversion and obtain the custody of his daughter at the time the tragic events took place. The appellant had previously taken his daughter away from the house without his wife's permission.

There is absolutely no evidence of any plan, design, or intent to kill Joyce Brown, prior to the actual event. The sentencing order does not address premeditation as to Joyce Brown. The requirement of premeditation applies to each count of first degree murder; the finding of premeditation as to Shirley Turner cannot be applied to count two and justify the sentence of death for murder in the first degree of Joyce Brown.

The testimony of Dr. Miller demonstrates that insufficient proof of premeditation exists to affirm the conviction of first degree murder. Dr. Miller described how the appellant was without a premeditated design to kill on the date of the offense. Dr. Miller rendered an opinion that this was not a premeditated act. (T 1009).

The trial court erred in adjudicating the appellant guilty of first degree murder based upon premeditation. The judgment must be reversed and remanded for new trial.

VI.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE DOCTRINE OF FELONY MURDER

The trial court erred in instructing the jury on the doctrine of felony murder as not warranted by the evidence. As there is insufficent evidence to support the charge of burglary the jury instruction should not have been given.

The critical element in a charge of burglary "is that a defendant enter or remain in the premises 'with the intent to commit an offense therein.'" State v. Hicks, 421 So.2d 510 ,512 (Fla. 1982).

In the case at bar, although there is evidence that the appellant entered the decedents' apartments without consent, there is no evidence that he entered with the intent to commit an offense therein. The state's expert witness, Dr. Miller, testified of the appellant's plan to stage a commando raid on the house and rescue his daughter. Futhermore, Dr. Miller testified that the appellant at the time of the crime did not have the intent to commit an offense. Finally, there is nothing to suggest that the defendant had gone to this particular house to kill his wife.

At trial, the state vacillated between a theory of premeditated murder and felony murder. The state did not establish and the record is silent as to the intent with which the appellant entered the apartment. Certainly, none of the traditional motives for burglary (pecuniary gain, sexual gratification, etc.) were demonstrated nor advanced by the State.

The trial court erred in instructing the jury on felony murder as the underlying felony, burglary, is not supported by the record. The conviction and sentence of the appellant should be reversed and remanded for new trial.

VII.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY PURSUANT TO APPELLANT'S REQUEST, ON TWO STATUTORY MITIGATING CIRCUMSTANCES, THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The trial judge instructed the jury as to three mitigating circumstances: (1) under extreme mental or emotional disturbance, Section 921.141(6)(b); (2) impaired capacity Section 921.141(6)(f); and (3) "any other aspect of the defendant's character, record, or circumstance of the offense." (R 209). The trial judge refused to instruct the jury on the specific mitigating circumstances of (1) extreme duress, Section 921.141(6)(e), Florida Statutes; (2) the age of the defendant at the time of the crime, Section 921.141(6)(g), Florida Statutes; and (3) other aspects of the defendant's character or record, including but not limited to the following: (a) the defendant's family history and role as parent; (b) the defendant's intelligence; (c) the defendant's military record; (d) the defendant's employment records; (e) the defendant's potential for rehabilitation; and (f) the defendant's sensitivity to problems of others and capacity of helping others during a crisis; despite the unrefuted medical and lay testimony to support these mitigating factors. The failure to instruct on these mitigating circumstances must be scrutinized for compliance with the established principle that a jury must be permitted to consider any and all possible mitigating factors. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

A. Evidence of Extreme Duress

Six witnesses, a physician plus the appellant's brother and father, testified in mitigation at the penalty phase.

Dr. Ernest C. Miller, M.D., a state expert witness at

the guilt phase of the trial, rendered an opinion that on the morning of the crime William Turner suffered from extreme emotional disturbance. (T1227-28). The doctor explained that this extreme emotional disturbance, a heightened combination of rage and fear, affected Turner's behavior. (T 1229). Dr. Miller further explained that the appellant believed that his daughter was being subjected to an unhealthy home environment by the narcotics use and prostitution of the decedent Shirley Turner. Dr. Miller opined that the appellant at the time of the crime was highly and emotionally charged and suffered from an exreme mental or emotional disturbance. (T 1238).

Dr. Miller's testimony is consistent with his earlier testimony on direct examination as the state's expert witness that the appellant under duress regressed to a psychotic state. (T 957).

The appellant's father testified to the appellant's Catholic upbringing and his concern that the children be raised as good Catholics. The appellant's brother confirmed William Turner's strong Catholic views and values prohibiting divorce and promoting the family pursuant to the Catholic religion. It was William Turner's desire that his children be raised in a Christian environment. (T 1263, 1265).

gave only to murder of wife.

B. Evidence of the Defendant's Age at the Time of the Crime.

The number of years of William Turner's life and its significance to the appellant, facing the loss of his wife and

family in a divorce, should have been presented to the jury. Daniel B. Stinson, M.D., testified for the appellant in the guilt stage of the trial. The appellant went to the decedents' house the night of his thirty-ninth birthday, observed his wife having intercourse with another man, which culminated with the appellant becoming phychotic. (T 788). Dr. Stinson explained that the defendant had a brief reactive psychosis which followed a psychosocial stressor involving a signficant symptom of stress. (T 825). Dr. Stinson rendered an opinion that the psychosocial stressor that triggered the events was the fact that on the night of the appellant's 39th birthday, having reached middle age, he perceived his life before him and behind him, his estranged wife having sexual intercourse with another man, and the ensuing loss of his family (T 826).

Clearly, evidence existed on each of the two mitigating circumstances for which instructions were denied. It was not within the judge's authority to instruct only upon those mitigating circumstances which he believed were established. Just as a defendant has a right to a theory of defense instruction which is supported by the evidence, Bryant v. State, 412 So.2d 347 (Fla. 1982), he is also entitled to an instruction on mitigating circumstances supported by the record. The constitutional safeguards in imposing the death sentence requires no less. U.S. Constitution, Amendments VIII, XIV.

C.THE FAILURE TO INSTRUCT THE JURY ON REQUESTED STATUTORY MITIGATING CIRCUMSTANCES WAS ERROR

Although the jury's role in the sentencing phase is an advisory one, it is an integral part of the death sentencing process. The trial jury and the judge are charged with the responsibility of independently weighing the evidence in aggravation and mitigation to determine whether a sentence of death is appropriate. Teffeteller v. State, 439 So.2d 840, 845 n.2 (Fla. 1983); Thomas v. State, 403 So.2d 371, 376 (Fla. 1981). As recognized by this Court in Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976):

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

In Eddings v. Oklahoma, supra, the Supreme Court affirmed the Lockett holding and reversed a death penalty imposed upon a sixteen year old on the ground that the sentencing judge had not fully considered all the potentially mitigating circumstances present in the case. Specifically, the trial court failed to consider in mitigation the circumstances of Eddings' unhappy childhood and emotional disturbance. The Eddings court concluded that evidence regarding a defendant's mental and emotional development is a relevant mitigating circumstance that the sentencer may not refuse to consider. 455 U.S. at 116.

To insure that the sentencer considers fully each

mitigating factor, clear jury instructions on each such mitigating factor is required. Gregg v. Georgia, 428 U.S. 153, 192-93 (1976), emphasized the constitutional necessity for clear jury instructions in capital cases so that

> the jury is given guidance regarding the factors about the crime and the defendant that the state . . . deems particularly relevant to the sentencing decision.
>
> * * *
>
> It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

A fundamental corollary, therefore, to Lockett's prohibition against jury instructions which precludes consideration of mitigating circumstances, is the requirement that the judge clearly instruct the jury about all relevant mitigating circumstances.

In Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), the court noted that jury instructions must "describe the nature and function of mitigating circumstances". The Spivey court went on to hold:

> [T] he eighth and fourteenth amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offenses and the individual offender. . . "Jurek v. Texas, 428 U.S. at 274, 96 S.Ct. at 2957.

661 F.2d at 471. In refusing to instruct the jury on the relevant statutory mitigating factors, the trial court below in effect denied the existence of certain facts or circumstances,

i.e., appellant's low intelligence, personality disorder, age and thereby failed to guide and focus the jury's objective consideration of the independent mitigating factors.

Although the jury here was instructed on the "catch-all" reference to non-statutory mitigating circumstances, (R 206) appellant avers that the instruction was totally inadequate to suitably guide and focus the jury's consideration on the independent mitigating weight to be given the applicable statutory mitigating circumstances. It did not meet the defendant's requested instruction. (R 199) The jury cannot be presumed to give full consideration to mitigating circumstances unless it is informed of its ability to do so. Jury instructions are an indispensable tool for ensuring that the jury understands and considers the legal effect of the evidence that it has heard. Jury instructions, not the argument of counsel, serve the function of informing the jury of the law.

In view of the gravity of this instructional error, it cannot be deemed harmless beyond a reasonable doubt. Thus, under Lockett and Eddings, appellant is entitled to a new penalty trial before a jury that is properly instructed on the applicable specific mitigating circumstances. See, e.g., Thomas v. State, 403 So.2d 371 (Fla. 1981); Maggard v. State, 399 So.2d 973 (Fla. 1981); and Perry v. State, 395 So.2d 170 (Fla. 1980).

VIII

THE TRIAL COURT ERRED IN FINDING THE MURDER OF JOYCE BROWN WAS: COLD, CALCULATED AND PREMEDITATED; HEINOUT, ATROCIOUS, AND CRUEL; AND IN REJECTING THE EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY

A. Aggravating Factors

The trial court found four (4) statutory aggravating circumstances to justify the imposition of the death penalty. (R 297). The burden is on the state in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt. Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Williams v. State, 386 So.2d 538 (Fla. 1980). Not even "logical inferences" drawn by the trial court will suffice to support a finding of a particular aggravating circumstance when the state's burden has not been met. Clark v. State, 443 So.2d 973 (Fla. 1983).

(i) The trial court found the aggravating circumstance of a previous conviction of another, albeit simultaneous, capital felony, F.S. 921.141(5)(b); Hardwick v. State, 461 So.2d 79 (Fla. 1984); King v. State, 390 So.2d 315 (Fla. 1980); Lucus v. State, 376 So.2d 1149 (Fla. 1979); c.f., Meeks v. State, 339 So.2d 186 (Fla. 1976).

(ii) The trial court erred in finding as an aggravated circumstance under F.S. 921.141(5)(d) that the homicide occurred during the commission of an attempt to commit, or flight after committing or attempting to commit, the crime of burglary. The trial court's finding is based upon the following reasoning: "[t]he defendant broke into 1053 East Monroe Street, the

residence of Joyce Brown, without her consent and with the intent to commit an offense therein." (R 304).

This aggravating factor is not supported by the record. The appellant was indicted for two counts of murder in the first degree but never charged with burglary. At trial, the state vacillated between a theory of premeditated murder and felony murder. The state did not establish and the record is silent as to the intent with which the appellant entered the apartment. Dr. Miller testified that the appellant entered the apartment in an effort to rescue his daughter from what he perceived to be an evil influence of his wife and her lesbian lover. (R 984,1006). Certainly, none of the traditional motives for burglary (pecuniary gain, sexual gratification, etc) were demonstrated nor advanced by the state.

No tortuous manipulation of the facts can result in a finding that the death of Joyce Brown occurred during the burglary nor does the trial court's finding that it occurred during the flight from the burglary comport with common sense. According to the testimony and evidence from the trial, at the time the appellant exited from the apartment, Joyce Brown was some three houses away in a telephone booth. The appellant's daughter first approached the decedent, as evident from the telephone conversation, and then the appellant. It is reasonable to assume that the appellant was not fleeing the alleged burglary but following his daughter when he came across Joyce Brown.

Furthermore, the establishment of the appellant's assault on Joyce Brown in flight from the alleged burglary contradicts

the trial court's finding of the aggravated circumstance of the killing as an "especially, cold, calculated premeditated act".

In Atkins v. State, 452 So.2d 529 (Fla. 1984) this Court held the trial court's finding of sexual battery as an aggravating circumstance under F.S. 921.141(5)(d) error due to lack of proof of the crime. Although the defendant had confessed to both oral and anal intercourse, there was no physical evidence of anal sexual battery. The trial court entered a judgment of acquittal as to the sexual battery count but, nevertheless, found the commission of a sexual battery for the oral intercourse as an aggravating circumstance, based on the defendant's confession. On appeal, this court found the aggravating circumstances to be improper as not based on sufficient evidence from the record and vacated the imposition of death.

Similarly, in the case at bar, there is a lack of proof of the crime of the felony, burglary. The trial court's finding of the aggravating circumstance, during or flight from a burglary, is not supported by the record.

(iii) The trial court erred in finding as an aggravating circumstance under F.S. 921.141(5)(i) that the murder of Joyce Brown was heinous, atrocious, or cruel. The trial court's finding is based on the following reasoning:

> The victim, Joyce Brown, was stabbed and slashed 51 times by a knife in the hand of the [appellant]. This was done on an expressway exit street in Jacksonville in the presence of numerous witnesses who were attempting to detract or stop the defendant by throwing objects at him. At the time of her death, Joyce Brown was in telephonic communication with the Jacksonville Sheriff's Office and her fear, terror, and emotional strain

> preceeding her death are clearly evidenced by the tape recording of her last moments. The [appellant] began and completed his vicious attach despite the pleadings of the victim. (R 304).

State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), sets the standard for establishing heinous, atrocious, and cruel:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. Id. at 9.

oh really!

While the stabbing of Joyce Brown was reprehensible, it was not "unnecessarily torturous" or so at variance with the "norm" of deliberate killing as to meet the Dixon standard. It was not the type of killing to be conscienceless or pitiless type of killing which warrants a finding that the capital felony was especially henious, atrocious or cruel. See, e.g., Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 103 S.Ct. 3129 (1983) (victims abducted, confined, sexually abused and killed execution style); Bolender v. State, 422 So.2d 833 (Fla. 1982) (victims held at gunpoint, stripped, beatened and tortured throughout the evening before killed), White v. State, 403 So.2d 331 (Fla. 1981) (six victims held at gunpoint, tied and gagged, separated then shot execution style).

In Miller v. State, 373 So.2d 882, 886 (Fla. 1979), the Court pointed out "a large number of the statutory and mitigating factors reflected legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially

diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse." Similarly, in Jones v. State, 332 So.2d 615 (Fla. 1976) this Court voiced concern as to the appropriateness of the death penalty for defendants suffering from mental illness. Jones was convicted for rape/murder wherein he inflicted thirty-eight (38) knife wounds which the pathologist described "as some kind of frenzied attack rather than a cold calculating stabbing, homicide, premediated." The Court noted the aggravating circumstances, that the offense was heinous, attrocious and cruel, but reversed the death penalty, stating," [t]he principles determine fact directing the judgment of this Court is that the appellant had apparent psychosis which was undenied and unrefuted, the extent of which no one fully knows." See also, Burch v. State, 343 So.2d 831 (Fla. 1977).

The trial record supports the appellant's mental illness or psychosis in his frenzied, overkill attack on his wife and her roommate but does not support the agravating circumstance of heinous,attrocious and cruel.

(iv) The evidence does not support the trial court's finding that the homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. F.S. 921.141(5)(i). The trial court stated the following in support of his finding:

> The defendant had previously threatened to kill his wife, Shirley Turner, and on the day of the crime, came to the residence armed with a single shot shotgun and knife. After repeatedly firing and reloading the shotgun and firing into the house, the defendant physically broke into the house and murdered his wife, Shirley Turner, by stabbing her 22 times. Shirley Turner was one of four occupants in the house at that time and the evidence is clear that the defendant selected his target in a cold, calculated and premeditated manner. During this attack, Joyce Brown, fled the residence and ran to a nearby telephone where she made contact with the Jacksonville Sheriff's Office. The [appellant] with sufficient time to contemplate his actions, carefully chose his second victim. He pursued Joyce Brown, confronted her and accomplished his purpose and only ceased his attack when police officers arrived on the scene. (emphasis supplied) (R 305).

The trial court's finding of a prior threat by William Turner to Shirley Turner is not supported by the record and is taken from the Presentence Investigation Report (see page 6, counting from the first page). First, the record does not reflect any direct testimony of the appellant having previously threatened to kill his wife. Futhermore, Jacksonville Sheriff Office Detective Zipper testified that he had responded to police calls for assistance at the decedent's apartment on four occasions. A reivew of his testimony indicates that Detective Zipper did not testify of any threats by William Turner or arrests of William Turner. (T 744-48). Finally, the record does not contain copies of charges or criminal convictions from which the prior threat on the wife was made by the appellant.

The trial court erred in considering this aggravating factor based upon the Presentence Investigation Report, an item not introduced into evidence. Barclay v. State, 470 So.2d 691, 695 (Fla. 1985). The State did not introduce any evidence of

previous threats as to Shirley Turner. Therefore, the trial court's finding of an aggravating factor: cold, calculated and premeditated manner, cannot be upheld. Williams v. State, 386 So.2d 538 (Fla. 1980).

Assuming, arguendo, that the record reflects the appellant made prior threats to his wife, Shirley Turner, such action cannot be considered as an aggravating factor because the threats were not made on the life of Joyce Brown. The trial court improperly considered the prior threat on Shirley Turner as an before the fact decision making on the life of Joyce Brown.

The scope of this aggravating factor: cold, calculated, premeditated, has been limited in order to prevent this statutory factor from creating a mandatory death sentence in all premeditated murder cases. Mere premeditation is not enough. Thus, Combs v. State, 403 So.2d 418 (Fla. 1981), described subsection (5)(i) as a limitation which inures the benefit of the defendant. Combs involved a plan and design to lure the victim to death in a remote area - not a spur-of-the-moment killing, as in William Turner's case.

In McCray v. State, 416 So.2d 804, 807 (Fla. 1982), the Court noted that this "aggravating circumstance ordinarily applies to those murders which are characterized as executions or contract murders, although that description is not intended to be all inclusive." McCray makes it clear that this factor requires more than actual intent to kill developed by the defendant at the scene of the crime. The defendant must make up his mind to commit the offense substantially before the event. Hill v. State, 422

So.2d 816 (Fla. 1982), cert. denied, 103 S.Ct. 1262 (1983). See also, Middleton v. State, 426 So.2d 548 (Fla. 1982), cert. denied, 463 U.S. 1230 (1983). An increased level of premeditation is required as an aggravating factor, hardly the situation as in the case at bar when the entire event takes place in a few minutes.

This was not an execution or contract murder. The cold and calculated aggravating factor "is not to be used in every premeditated murder prosectution" and is reserved primarily for those murders which are characterized as execution or contract murders or witness-elimination murders." Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984). This factor focuses more on the perpetrator's state of mind rather than on the method of killing. Hill v. State, 422 So.2d 816 (Fla. 1982), cert. denied, 103 S.Ct. 1262 (1983).

Certainly, William Turner had no preconceived plan to kill Joyce Brown. A preconceived plan would have entailed the appellant shooting Joyce Brown with his shotgun prior to entering the apartment. In contrast to the trial court's finding, the evidence shows that the appellant was attempting to create a diversion and obtain the custody of his daughter at the time the tragic events took place. There is absolutely no evidence of any plan, design, or intent to kill Joyce Brown, prior to the actual event. To the contrary, the testimony of the state's expert witness, Dr. Ernest Miller, testified during the guilt phase, in response to a question on direct examination, that in his professional opinion, the defendant was without a premeditated

design to kill on the date of the offense. Moreover, Dr. Miller was uniformly in agreement that the appellant was possessed in his own mind of a belief in the moral justification of his actions. The appellant perceived his wife as a consumer of narcotic and a prostitute. The appellant perceived his wife's roommate, Shirley Brown, as his wife's seducer and lover, and the source of the evil destroying his family.

The jury found that once at the scene, William Turner, did intend to kill. That establishes premeditation - it does not establish a cold and calculated manner. The extra element of premeditation that subsection (i) looks to is before the fact decision making. That type of decision-making was not present in this case. The factor does not apply.

B. Mitigating Factors:

Mitigation is not limited to the statutorily enumerated factors and need not be proved to any certain standard. All evidence in mitigation must be considered and weighed. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. State, 365 So.2d 698 (1978); State v. Dixon, 283 So.2d 1,9 (Fla. 1973).

Statutory Mitigating Factors

Appellant contends that four statutory mitigating factors were clearly present:

(i) The defendant has no significant history of prior criminal history. F.S. 921.141(6)(a).

(ii) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, F.S. 921.141(6)(b); and 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, F.S. 921.141(6)(f); and

(iii) The defendant acted under extreme duress or under the substantial domination of another person. F.S. 921.141(6)(x)

(iv) The age of the Defendant at the time of the Crime. F.S. 921.141(6)(g).

(i) No Significant History of Prior Violent Criminal Activity

The trial court erred in rejecting the statutory mitigating factor of no significant history of prior criminal activity based upon the appellant's "prior criminal record [as] set forth in the Presentence Investigation." (R 305). Barclay v. State, 470 So.2d 691, 695 (Fla. 1985). The information regarding the appellant's prior convictions came solely from a presentence investigation. The state did not introduce any evidence to prove the prior convictions or disprove this mitigating factor this factor beyond a reasonable doubt. The trial court's finding cannot be upheld. Williams v. State, 386 So.2d 538 (Fla. 1980). The trial court should not have considered this circumstance in the sentence based solely on information contained in the presentence investigation report.

The trial court improperly used the appellant's criminal record, as taken from the presentence investigation, to deny statutory mitigating circumstances. This means the court failed to follow the correct weighing process. Mikenas v. State, 367 So.2d 606 (Fla. 1978). Appellant calls this court's attention to the Defendant's Response to the Pre-Sentence Investigation

Report, in which the trial court was advised of nine significant errors or inaccurate statements within the Report. (R 215).

(ii) Extreme Emotional Disturbance & Substantially Impaired Capacity

The trial court erred in rejecting the mitigating factors extreme emotional disturbance, and substantially impaired capacity, F.S. 921.141(6) (b),(f). The sentencing order stated: as to extreme emotional disturbance:

> There is ample evidence to support the conclusion that the defendant was under the influence of mental or emotional disturbance. . . . The key word in evaluating this mitigating circumstance is extreme. The assertion that the defendant was under the influence of extreme mental or emotional disturbance is specifically rejected as a mitigating circumstance. (R 306) (emphasis in the original)

The sentencing order stated as to impaired capacity:

> This circumstance is obviously closely akin to that of extreme mental or emotional disturbance and the Court and jury must rely on much of the same evidence in weighing these factors. The testimony of the psychiatric experts has been given careful consideration by the Court but other fact established by the evidence are that the defendant stopped his attack on Joyce Brown when a police car passed on the street and resumed the attack after the passing and further that when confronted by Officer Venosh shortly after the murder, the defendant responded to the officer's commands at gun point. While there is ample evidence to find that the defendant was impaired, the Court specifically rejects the contention that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R 306-07) (emphasis in the original).

The trial court's finding that the two mitigating factors were present but not extreme or substantial to merit consideration as mitigating factors disregards the facts and the law. This court has repeatedly held that the evidence of a defendant's mental condition may establish more than one

mitigating circumstance. In Mines v. State, 390 So.2d 332 (Fla. 1980), the defendant was diagnosed as being schizophrenic, chronic paranoid type. This Court deemed the unrefuted medical testimony as supporting both mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of capacity toappreciate the criminality of his conduct. See also, Huckaby v. State, 343 So.2d 29 (Fla. 1977) (schizophrenia and brain malfunction constitute two mitigating circumstances which should have been weighed in determining the sentence) and Burch v. State, 343 So.2d 831 (Fla. 1977) (defendant's mental condition established two mitigating circumstances).

It is clear from the court's oral statements and written findings that the trial judge did not give independent mitigating weight to all the factors in mitigation. The trial court's treatment of each mitigating factor further demonstrates the restrictive construction the court placed on the statutory scheme.

In reviewing the mitigating circumstances in the sentencing order, the trial court acknowledged that the appellant was under the influence of mental or emotional disturbance but denied that the mental or emotional disturbance was extreme enough to constitute a mitigating factor. Such an opinion clearly ignores Dr. Miller's opinion that the appellant was suffering from an extreme emotional disturbance. (T 1228).

The trial court clearly ignored the medical evidence of the appellant's borderline intelligence and personality disorder.

The trial court also acknowledged that the circumstance

of impaired capacity was close to the previously addressed circumstance of emotional disturbance and that the same evidence was weighed in considering both circumstances. The trial court likewise acknowledged that there was evidence of impaired capacity but denied that appellant was substantially impaired to meet the factors. Judge Southwood considered the interrupted attack on Joyce Brown as well as the statements made to Officer Venosh after arrest to provide the basis for denying the factor. Whether the appellant ceased stabbing Joyce Brown is unknown. (See Inital Brief of Appellant at p.2-3). Dr. Miller did not consider it in assessing the appellant. Rather, he reviewed some but not all of the statements made to the police by the appellant at the time of arrest. (T 978).

The fatal flaw of the sentencing order is the fact that after relying on the testimony and opinion of Dr. Miller in support of his finding that the appellant was not substantially impaired, the order disregards Dr. Miller's testimony in the penalty stage where he renders an opinion that the appellant's abilities were substantially impaired.

> [T]he [appellant] was in a heightened emotional state thus his capabilities in terms of performing rational thought were proportionatedly diminished . . . to a point where the terms substantial capacity and diminution of his substantial capacity are accurate representations. (T 1230).

(iii) Extreme Duress

The trial court similarly discounted the mitigating circumstance of extreme duress under Section 921.141(6)(e), A cursory reading of the aggravating and mitigating circumstances in Section 921.141(5) and (6) reveals that the disjunctive is employed in no less than nine of the enumerated factors, indicating that these circumstances can be proved by alternative means. Hence, a defendant may act under extreme duress without being substantially dominated by another person. In Miller v. State, 373 So.2d 882 (Fla. 1979), the trial court found mitigating circumstance of extreme duress where the defendant suffered hallucinations and at the time of the murder, saw his mother's face in a yellow daze on the victim, a 56 year old female taxi driver. Similarly, in Kennedy v. State, 455 So.2d 351 (Fla. 1984), the trial court found a mitigating circumstance that the defendant was under extreme duress when, under a life sentence, he escaped from jail, broke into a house and armed himself with a revolver and shotgun. He later killed the homeowner, a Florida Highway trooper, and took a mother and her six-month-old child as hostage before surrendering to authorities. The trial court's finding of extreme duress was not overturned on appeal.

On one hand, the trial court found that the capital felony was committed while the appellant was under the influence of extreme mental or emotional disturbance. (T 1447) However, on the other hand, the trial court refused to consider appellant to be under extreme duress by his perception of criminal and immoral

activities by his wife and roommate which compelled a rescue of his daughter. The trial court's rejection of the duress factor disregards Dr. Miller's testimony that the appellant, under duress, regressed to a psychotic state. (T 957).

As the lower court did not view these mitigating circumstances as contemplating extreme duress caused by a mental disorder, it is evident that the judge attributed no weight at all to the psychiatrists' testimony. As stated in Mines, 390 So.2d 332, 337 (Fla. 1980): "these circumstances may not be controlling, but they were present and should have been addressed."

(iv) The Age of the Defendant at the time of the Crime

The trial court erred in rejecting the statutory mitigating factor of the appellant's age at the time of the crime. In denying the appellant's requested instruction on age as a mitigating factor, the lower court stated:

> I think that if you want to argue that he's on the verge of adult menopause or something at age 40, whatever, that's fine, to go to show his emotional state or emotional disturbance. . . . [B]ut to take it out as a separate, total mitigating factor, when the jury is going to weigh the number of mitigating factors against the aggravating factors, I think is highlighting it to the extent that it should not be highlighted as far as a separate mitigating factor is concerned. While there is some evidence that maybe that affects him or everybody in the world, that's something that may be subject to that argument, but I'm not going to give it back as a separate mitigating factor. (R 1295).

Although review of the caselaw indicates that the appellant's age of 39 years is, in and of itself, insufficient to merit an instruction on age as a mitigating factor, Lara v. State, 464 So.2d 1173 (Fla. 1985); Simmons v. State, 419 So.2d

316 (Fla. 1982), the testimony at trial revealed the significance of the appellant having reached the age of fourty, and specifically, on the evening of his 39th birthday, having perceived his estranged wife engaging in sexual intercourse with another man, required the mitigating circumstance. Dr. Stinson testified that the psychosocial stressor that triggered his psychosis resulted from a build up of factors which included the appellant's 40th birthday. (T 826). The appellant was entitled to an instruction on age as a mitigating factor.

Nonstatutory Mitigating Factors

The appellant presented evidence and argued four nonstatutory mitigating factors in support of a sentence of life: the appellant's military record; the appellant as a good family man and father; the appellant as a diligent and conscientious employee; and the appellant's concern for others and unselfishness. The trial court erred in either rejecting the existence of the factor or finding its existence but without significance as a mitigating factor.

The trial court found that the appellant's honorable service to his country in time of war to be without significance due to his discharge in 1968. The trial court's finding is not supported by the record. The appellant was transferred to the Reserve in 1968 and discharged in 1971. The trial record does not contain the appellant's military record. Appellant calls this Court's attention to the trial court's denial of a defense motion for continuance in order to obtain the appellant's military record and appellant augmentation of the record on appeal with

the military record.

The significance of the military record was addressed by both of the state's expert witnesses, Dr. Barnard and Dr. Miller. Dr. Barnard testified that the appellant was trained in the armed forces to kill and to kill without it affecting his emotions or feelings. (T 905). The military taught the appellant how to kill and not to feel badly about it. (T 910). Dr. Miller testified that the appellant attempted to create a diversion by shooting outside the house and in the resulting confusion take his daughter. Dr. Miller opined that such a scheme was compatible with military training. (T 1006-007).

A defendant's service to his country and his emotional and mental circumstances following such service has been found to be a mitigating factor to be addressed by the trial court. Halliwell v. State, 323 So.2d 557 (Fla. 1975); see also, Moody v. State, 418 So.2d 989,995 (Fla. 1982).

The trial court rejected the existence of the appellant as a good family man and father and rejected the assertion as a mitigating factor. The evidence at trial shows that the appellant's sense of committment to family and his love for his children were precipitating factors in his mental deterioration. The testimony detailed his concern for his children, his visits, and his attempts at reconciliation of the marriage. In Jacobs v. State, 336 So.2d 713 (Fla. 1981), this Court found a non-statutory mitigating factor to be the defendant's history as a good parent.

The trial court found that William Turner was a diligent

and conscientious employee and in addition had in the past demonstrated concern for others and unselfishness. The trial court considered the weight of such mitigating factors to be slight. The lower court's finding degrades Frank Lee and Mark Ballard's testimony of the appellant risking his life to save a woman from rape and possible death by three men. (T 1209-26).

These decisions control the facts of the instant case. This is not a case where the mental mitigation was never argued to the trial court, Hall v. State, 403 So.2d 1321 (Fla. 1981); nor where it was not proven, Daughtery v. State, 419 So.2d 1067 (Fla. 1982); nor where it was rebuted by expert testimony, Stevens v. State, 419 So.2d 1058 (Fla. 1982), nor where it was in conflict, Martin v. State, 420 So.2d 583 (Fla. 1982); nor where it was not clear, Middleton v. State, 426 So.2d 548 (Fla. 1982). Rather, this is a case where mental mitigation was undisputed and properly presented to the trial court, but, to paraphase Eddings v. Oklahoma, 455 U.S. at 115 n.10, the sentencer refused to listen.

IX

APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE IT IS FOUNDED UPON AN IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES

The trial court improperly doubled the aggravating factor of F.S. 921.141(5)(h) heinous, attrocious, and cruel, with the aggracting factor of F.S. 921.141(5)(i) cold, calculated , and premeditated manner without any pretense of moral or legal

justification.

In Providence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), this Court recognized the impropriety of relying on two aggravating circumstances both based on the same evidence and the same aspect of the defendant's crime. Providence involved a robbery-murder and consideration of two aggravating circumstances, that the murder occurred in the commission of the robbery and that the crime was committed for pecuniary gain. In disallowing the doubling of these two factors, this Court stated:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) are for two separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decisions in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

337 So.2d at 786 (emphasis in the original). Accord, Oats v, State, 446 So.2d 90 (Fla. 1984).

The principle enunciated in Providence applies to the instant case. The trial court relied upon the aspect of the crime to find the capital felony both heinous, atrocious, or cruel and cold, calculated, and premeditated. Both aggravating circumstances found in the instant case were based upon the single factor: the stabbing of Joyce Brown some 51 times. The

trial court found the aggravating factor of heinous, atrocious and cruel based upon the repeated stabbing of the decedent in a public telephone booth while reporting the crime to the police. (R 304). The trial court found the aggravating factor of cold, calculated and premeditated upon the repeated stabbing of the decedent in a public telephone booth while reporting the crime to the police. (R 305).

The trial court may consider both these aggravating circumstances together as long as the findings in support of the death sentence contain sufficient, distinct proof of each aggravating factor. In Mills v. State, 462 So.2d 1075 (Fla. 1985), this Court permitted the consideration of the factors of heinous, atrocious and cruel and committed in a cold, calculated and premeditated fashion in a situation wherein the decedent was kidnapped from his home, taunted of being killed, tied and beatened with a tire iron, later escaped temporarily before before being chased down and killed with a shotgun blast at close range. Similarly, in Squires v. State, 450 So.2d 208 (Fla. 1984), this Court permitted both factors in a situation where the robbery and kidnapping victim was shot initally in the shoulder with a shotgun then, as he lay screaming in pain, the defendant completed the task by firing the remaining shots into the victim's head with a revolver. In Hill v. State, 422 So.2d 816 (Fla. 1982), this Court permitted both factors in a situation where the defendant previously informed friends of his intention to rape and murder a twelve year old girl. In Mills, Squires, and Hill, this Court permitted both aggravating factors. However,

it should be noted that in each case the underlying crime to the victim: kidnap, rape, robbery, and torture, was committted to the victim prior to his/her death. Here, the trial court found that the appellant committed a burglary. The finding of a burglary is tenuous. Moreover, the reported burglary was not a violent crime to the body of the decedent.

The trial court's finding that the capital felony was especially heinous, atrocious and cruel and was committed in a cold, calculated and premeditated manner is an improper doubling of aggravating circumstances. Since this Court cannot determine the effect of these two circumstances, the case must be remanded for new penalty stage hearing.

X

THE TRIAL COURT ERRED IN ADOPTING THE JURY ADVISORY RECOMMENDATIONS IN BOTH COUNTS AND SENTENCING THE APPELLANT TO A TERM OF LIFE IN COUNT ONE AND DEATH IN COUNT TWO.

The trial court erred in adopting the jury advisory recommendations in both counts and sentencing the appellant to a term of life in count one and death in count two. It is legally inconsistent that the jury found and the trial court adopted mitigating factors justifying the sentence of life in count one and and in count two to find no mitigating factors justifying the sentence of death.

The third and fourth steps in Florida's statutory sentencing scheme require the reasoned experience of the trial judge to be interposed between the emotions of jurors and a death sentence. Section 921.141(3), Florida Statutes:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts.

This Court interpreted this section in State v. Dixon, 283 So.2d 1 (Fla. 1973) in the following manner:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be les than heinous, but a trial judge with experience in the fcats of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of

> jurors can no longer sentence a man to die; the sentence is viewed in light of judicial experience.
>
> The fourth step required by Fla.Stat. 921.141, F.S.A., is that the trial judge justified his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important elements added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

The actions of the sentencing judge in the instant case derogated these important safeguards.

The jury, by a vote of six or more, recommended the sentence of life in count one, based upon sufficient mitigating circumstances to outweigh any aggravating circumstances. (R 212) The trial court in count one adopted the jury recommendation and sentenced the appellant to life.(R 299). The jury, by a vote of seven to five, recommended the sentence of death in count two, based upon insufficient mitigating circumstances to outwiegh any aggravating circumstances.(R 213). The trial court in count two adopted the jury recommendation and sentenced the appellant to death. (T 1442) The trial court erred in pronouncing inconsistent sentences The actions of the sentencing judge in the instant case derogated these important safeguards.

The jury, by a vote of six or more, recommended the sentence of life in count one, based upon sufficient mitigating circumstances to outweigh any aggravating circumstances. (R 212) The trial court in count one adopted the jury recommendation and sentenced the appellant to life.(R 299). The jury, by a vote of

seven to five, recommended the sentence of death in count two, based upon insufficient mitigating circumstances to outwiegh any aggravating circumstances.(R 213). The trial court in count two adopted the jury recommendation and sentenced the appellant to death. (T 1442) The trial court erred in pronouncing inconsistent sentences as not supported by the evidence or law.

The trial court had some puzzlement at the recommendation of the jury (T 1441) and noted that their recommendation of death in count two was as to the second murder committed by William Turner. (T 1442). The jury's recommendations were adopted by the lower court in both counts.

In the written order, the trial court found four aggravating circumstances but no mitigating circumstances to justify the sentence of death. The sentencing order does not address the mitigating factors found by the jury in count one. This finding disregards the jury's advisory recommendation in count one not only of the existence of mitigating circumstances but mitigating circumstances which outweigh aggravating circumstances to justify a sentence of life imprisonment.

In Ross v. State, 386 So.2d 1191 (Fla. 1980), this Court reversed the defendant's death sentence and remanded to the trial judge because the court had given undue weight to the jury' recommendation of death. This Court found in Ross that the trial court did not make an independent judgment as to whether or not the death penalty should have been imposed; but rather felt bound by the jury's recommendation of death. Id at 1275. Because this procedure violated the clear language of Section 921.141(3) as

interpreted in State v. Dixon, supra, this Court reversed.

In the instant case, the trial judge's actions indicate a similar procedure. Although the trial judge reviewed the aggravating and mitigating factors before imposing sentence as to count two, he did not weigh such factors in light of the jury recommendation and his adoption of the jury recommendation in count one. The sentencing in count two following the jury recommendation of life in count one indicates that the jury recommendation was controlling.

The standard of review when the jury recommends death was provided by this Court in LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978):

> The primary standard for our review of death sentences is that the recommended sentence of the jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation.

There are strong reasons to believe that reasonable persons could not agree with the recommendation of death in count two: the evidence of mitigating factors as evident in the jury recommendation of life in count one. Since the trial court did not make an independent judgment whether the death sentence should be imposed in light of the jury recommendation of life in count one, the sentence should be reversed and remanded for resentencing.

CONCLUSION

For the foregoing reasons, William T. Turner, appellant, respectfully requests this Honorable Court to vacate the judgment of conviction and sentence of death in the above style cause.

Respectfully Submitted,
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by _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by United States Mail to the Attorney General's Office, Department of Legal Affairs, The Capital, Tallahassee, Florida 32301, this 15th day of March, 1986.

_____
CLYDE M. COLLINS, JR.

TURNER/cc/3