IN THE SUPREME COURT
STATE OF FLORIDA

FILED
SID J. WHITE
OCT 15 1990
CLERK, SUPREME COURT

WILLIAM T. TURNER,

Prisoner # 099865
Florida State Prison
Starke, Florida

Petitioner,

vs. : CASE NO. 75,848

RICHARD DUGGER,

Secretary, Florida
Department of Corrections

and

TOM BARTON,

Superintendent,
Florida State Prison
Starke, Florida

Respondents.

AMENDED PETITION FOR EXTRAORDINARY RELIEF AND FOR WRIT OF HABEAS CORPUS

A. Procedural History

1. This case arose in the Circuit Court for the Fourth Judicial Circuit, in and for Duval County, Florida.

2. On July 18, 1984, a grand jury issued an indictment of Mr. Turner on two counts of first-degree murder for the murder of his estranged wife (Count I) and her roommate (Count 11). The incidents that were the subject of the indictment occurred on the same day (July 3, 1984), within a few minutes of each other.

3. Mr. Turner entered pleas of not guilty.

4. Mr. Turner's trial was held on August 13-16, 1985, and

the jury returned verdicts of guilty as charged.

5. The penalty phase was conducted on August 23, 1985. The jury recommended a sentence of life imprisonment on Count I for the death of Ms. Turner, and, by a vote of only seven to five, a death sentence on Count II for the death of her roommate.

6. On November 1, 1985, the trial court sentenced Mr. Turner, as recommended, to life imprisonment on Count I and death on Count 11. (R. 1451).[1]

7. On direct appeal, Mr. Turner's convictions and sentences were affirmed (after remand) by this Court on July 7, 1988. Turner v. State, 530 So. 2d 45 (Fla. 1988). Rehearing was denied on September 22, 1988.

8. The United States Supreme Court denied certiorari on February 21, 1989, 109 S. Ct. 1175 (1989), making any motion pursuant to Florida Rules of Criminal Procedure due on February 21, 1991.

9. Executive clemency was denied on August 14, 1989.

10. On March 29, 1990, Governor Bob Martinez signed a warrant for Mr. Turner's execution.

11. The execution was scheduled for May 30, 1990.

12. On April 6, 1990, the Office of Capital Collateral

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1. References to the record on appeal in this case will be denoted as follows: "MV 1" refers to page 1 of the motions volumes (I and 11) of the record; "R. 1" refers to page 1 of the record on appeal beginning with page 1 of volume III of the record; "SR 1" refers to page 1 of the supplemental record; "SRT 1" refers to page 1 of the supplemental record evidentiary transcript; "2ndSR 1" and "3rdSR 1" refer to page 1 of the second and third supplemental records respectively.

Representative ("CCR") filed with this Court a consolidated motion for stay of execution and appointment of substitute counsel on behalf of Mr. Turner.

13. On April 16, 1990, CCR also filed with this Court a limited state habeas corpus petition on behalf of Mr Turner.

14. On April 26, 1990, this Court ordered Mr. Turner's execution stayed for four months to allow time to file motions or petitions seeking post-conviction or collateral relief.

15. On May 25, 1990, CCR and the Volunteer Lawyers' Resource Center of Florida, Inc. ("VLRC") filed a notice regarding representation and a request for notice regarding when state post-conviction or collateral proceedings must be initiated. That pleading indicated that volunteer pro bono counsel had been located (the undersigned law firm) and requested four months from May 25, 1990 (the notice of appearance of said counsel) in which to file any motions or petitions seeking post-conviction or collateral relief, including the right to file an amended habeas corpus petition.

16. Also on May 25, 1990, undersigned volunteer pro bono counsel filed a notice of appearance.

17. On June 7, 1990, an order was entered by the Florida Supreme Court granting undersigned volunteer pro bono counsel the right to file any appropriate petitions for post-conviction or collateral relief, including an amended habeas corpus petition, up to and including September 25, 1990.

18. On September 21, 1990, this Court, pursuant to a motion filed by undersigned volunteer pro bono counsel and consented to

and agreed to by the State Attorney, granted undersigned counsel until and including today, October 15, 1990, in which to file for such post-conviction or collateral relief.

19. Concurrent with the filing of this amended petition, Mr. Turner is filing in the trial court his first motion for Rule 3.850 relief.

B. Jurisdiction to Grant Habeas Corpus Relief

Pursuant to subsection 3(b)(7) and (9) of Article V of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(3), this Court has jurisdiction to entertain the claims presented in this petition. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Card v. Dugger, 512 So. 2d 829 (Fla. 1987); Kennedv v. Wainwrisht, 483 So. 2d 424 (Fla. 1986); Wilson v Wainwrisht, 474 So. 2d 1162 (Fla. 1985).

This Court has never hesitated in exercising its inherent jurisdiction whenever claims are presented which undermine confidence in the fundamental fairness of capital proceedings. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1986); Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985); State v. Green, 446 So. 2d 218 (Fla. 1985); In re Agan, 466 So. 2d 217 (Fla. 1985).

Given this Court's special responsibility in monitoring the fairness of the capital review process, this is the way it should and must be. See Eledge v. State, 346 So. 2d 998, 1002 (Fla. 1977) (the absence of an objection does not preclude consideration of a claim given "the special scope of review by this Court in death cases"); Wilson, supra. This special responsibility clearly

mandates that this Court accept jurisdiction to consider the claims presented in this petition. See Wilson, supra; Card v. Dusser, 512 So. 2d 829 (Fla. 1987); Kennedv v. Wainwright, 483 So. 2d 424 (Fla. 1986); Preston v. State, 444 So. 2d 939, 942 (Fla. 1984) ("an appellate court does have the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case.").

C. Grounds for Habeas Relief

CLAIM I

IN LIGHT OF RECENT DECISIONS BY THIS COURT AND NEW EVIDENCE REGARDING LEGISLATIVE INTENT WITH RESPECT TO THE APPLICABILITY OF AGGRAVATING FACTORS, THIS COURT SHOULD REVISIT ITS EARLIER DECISION THAT THE DEATH SENTENCE IS APPROPRIATE IN THIS CASE

It is appropriate for this Court to exercise its habeas corpus jurisdiction to revisit its earlier decisions in light of changes and evolutionary developments in the law. When Petitioner asserts that new developments warrant further review of a claim that was previously considered by this Court and is record based, this Court has recognized that it is appropriate for this Court to consider the claim. See Preston v. State, 444 So. 2d 939, 942 (Fla. 1984) ("an appellate court does have the power to consider and correct erroneous rulings notwithstanding that such rulings have become the law of the case"), citing Strazulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965); Kennedv v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986) ("In the case of error that prejudicially denies fundamental constitutional rights . . . this court will revisit a matter

previously settled by the affirmance of a conviction or sentence.")
Given this Court's recent rulings in Campbell v. State, 15 F.L.W. 342 (Fla., June 14, 1990), Christian v. State, 550 So. 2d 450 (Fla. 1989), Cheshire v. State, No. 74,477 (Fla. Sept. 27, 1990), and Hallman v. State, 15 F.L.W. S207 (Fla., April 12, 1990), and new evidence concerning the legislative intent with respect to the prior violent felony aggravators, it should revisit its earlier rejection of Mr. Turner's claim on direct appeal that the evidence did not support the trial court's findings that there were sufficient aggravating factors to support a sentence of death and that the mitigating factors failed to outweigh the aggravating factors.

A. THIS COURT HAS RECENTLY RENDERED DECISIONS THAT CALL FOR REVISITING OF ITS DECISION ON DIRECT APPEAL

In Camabell v. State, 15 F.L.W. 342 (June 14, 1990), this Court recognized the continuing problems encountered by trial courts in "uniformly addressing mitigating circumstances [under the Florida statutory scheme] which requires specific written findings of fact based upon aggravating and mitigating circumstances," Id. at 343. It emphasized that because of the errors in this regard by the Campbell trial court the accused was deprived of "the uniform application of mitigating circumstances in reaching the individualized decision required by law," Id. at 344. It also implicitly noted that the trial courts' difficulties in this context could well result in the denial of an individualized sentencing determination based on a consideration

of all relevant mitigating evidence, see Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982); Id. at 343. Moreover, although not noted by the Court in Campbell, failure to set forth specific written findings concerning relevant aggravating and mitigating circumstances and the failure to give appropriate weight to same would prevent the Florida Supreme Court from performing its responsibility of providing meaningful appellate review, including proportionality review, both of which are mandated if the Florida capital punishment scheme is to withstand constitutional scrutiny, State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), Profitt v. Florida, 428 U.S. 242 (1976), Grossman v. State, 525 So. 2d 833, 850 (Fla. 1988) (Shaw, Jr., concurring).

As a result, in Campbell, this Court set out detailed requirements for sentencing courts to follow in making findings with respect to mitigating circumstances and weighing them against any aggravating circumstances:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature. ... The court must next weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Campbell, 15 F.L.W. at 5344 (emphasis supplied)(footnotes and citations omitted). As discussed in detail below, the trial court's treatment of the mitigation advanced by Petitioner is clearly inconsistent with Camsbell, supra. See also Nibert v. State, 15 F.L.W. S415 (Fla. July 26, 1990).

Since Mr. Turner's appeal was decided, this Court has also refined its application of the "without any pretense of moral or legal justification" clause of the cold, calculated and premeditated aggravating factor. In Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), cert. denied, 109 S.Ct. 1548, (1989), this Court set forth a guide for application of this aggravator:

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless, rebuts the otherwise cold and calculating nature of the homicide.

(Emphasis added.) In Christian v. State, 550 So. 2d 450 (Fla. 1989), this Court recently applied and expanded Banda to a case in which the defendant had been threatened and attacked while both were incarcerated. This Court relied on the victim's attack and threats, and on evidence that the defendant had become "withdrawn and brooding" after the victim's attack, and that the defendant was "in a daze or "out of it" during his assault on the victim, in finding that the defendant "had at least a 'pretense' of moral or legal justification." Christian, 550 So. 2d at 452.

Finally, in Hallman, supra, this Court reversed a jury override. In doing so, it noted that not only was there mitigating

evidence on which the jury may have relied in recommending the death sentence but also that the sentencing jury "may well have decided that, although four aggravating factors were proved, some were entitled to little weight." Hallman, 15 F.L.W. at S208. The Court thus recognized that in recommending or imposing sentence the capital sentencer is free to discount the weight to be given aggravating circumstances even if they are legally established. Again, like Campbell and Porter, this aspect of the Hallman decision calls for this Court to revisit its earlier decision that the trial court acted properly in identifying and weighing the relevant aggravating and mitigating circumstances.

B. THE TRIAL COURT FAILED TO MAKE EXPLICIT FINDINGS CONCERNING THE MITIGATION PROPOSED BY MR. TURNER, IN VIOLATION OF THE STANDARDS SET FORTH IN CAMPBELL

Mr. Turner introduced evidence of a large number of statutory and nonstatutory mitigating circumstances. These included overwhelming evidence that Mr. Turner was under the influence of a mental or emotional disturbance at the time of the crime and that his capacity to conform his conduct to the requirements of the law was impaired. Three psychiatrists gave largely consistent testimony with respect to Mr. Turner's emotional disturbance, and the state's expert psychiatrist at guilt/innocence testified at penalty phase for Mr. Turner that he qualified for the statutory mitigating circumstances of extreme emotional disturbance (R. 1228) and substantially impaired capacity (R. 1230). Moreover, there was also overwhelming and uncontroverted evidence that the crime was

the tragic result of a lovers' quarrel. There was also evidence that Mr. Turner had received an honorable discharge after serving in combat in Vietnam; that his training and combat experience could lessen his inhibitions with respect to killing (R. 910); that he had prevented an attempted kidnapping and rape while working for the Department of Transportation (R. 1217-24); and that his intelligence was "borderline defective," (R. 1227), with an IQ of 72. (R. 1205).

This Court has previously recognized that each of the above moral factors is a nonstatutory mitigating circumstance. See, e.g., Cheshire v. State, No. 74,477 (Fla., Sept. 27, 1990) (emotional disturbance, impaired capacity, lovers' quarrel); Fead v. State, 512 So. 2d 176, 179 (Fla. 1987) (lovers' quarrel); Perry v. State, 522 So. 2d 817 (Fla. 1988) (emotional strain); Pope v. State, 441 So. 2d 1073 (Fla. 1983) (military service); Halliwell v. State, 323 So. 2d 557 (Fla. 1975) (military service and emotional strain); Fuente v. State, 549 So. 2d 652, 654 (Fla. 1989) (saving woman from drowning); Harvey v. State, 529 So. 2d 1083 (below average intelligence); Remeta v. State, 522 So. 2d 825 (Fla. 1988) (same). See also Camabell, supra, 15 F.L.W. at S344 n.6, setting forth a partial list of categories of valid nonstatutory mitigating circumstances. The trial court failed to discuss or make findings with respect to most of this uncontroverted mitigating evidence. With respect to Mr. Turner's honorable military record, including combat duty, the court found it as a mitigating factor but assigned it no weight. The court's failure to consider,

make findings on and weigh these mitigating circumstances was error under Campbell and Nibert.

1. The Trial Court Failed to Consider the Non-statutory Mitigating Circumstances of Emotional or Mental Disturbance and Impaired Capacity

With respect to the related statutory mental mitigating circumstances that the defendant was under the influence of extreme mental or emotional disturbance, § 921.141(6)(b), Florida Statutes, and that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, § 921.141 (6)(f), the Court made the following findings:

> 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.
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> . . . . 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 the law was substantially impaired.

(MV. 306-07) (Emphasis in original).

The trial court thus found that there was "ample evidence@@that Mr. Turner was both emotionally disturbed at the time of the offense, and that his capacity was impaired. The court nevertheless rejected the application of the statutory mental mitigating circumstances on the basis that the defendant's

disturbance was not "extreme" and that his impairment was not "substantial." At that point, the court inexplicably dropped the issue of Mr. Turner's mental condition, without considering, discussing or weighing the nonstatutory mental mitigating circumstances that Mr. Turner suffered from a mental or emotional disturbance that was less than "extreme" and that his capacity was less than "substantially" impaired.

A less than extreme emotional disturbance or a less than substantially impaired capacity are clearly valid nonstatutory mitigating circumstances. Under Lockett v. Ohio, 438 U.S. 586, 604 (1978), the sentencing court may not be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis original). It is self-evident that any degree of emotional disturbance or impaired capacity, regardless of whether it rises to the level required for the statutory mental mitigating circumstances, qualifies as an "aspect of the defendant's character or record" that must be considered as a nonstatutory mitigating circumstance under Lockett.

This Court recently explicitly reached this conclusion in Cheshire v. State, No. 74,477 (Fla., Sept. 27, 1990). In Cheshire, as in the instant case, the trial court found that the evidence did not "support the statutory mitigating factor of 'extreme' mental disturbance, because the disturbance here was not extreme." Id., slip op. at 7. The trial court failed to consider

whether the evidence supported any nonstatutory mental mitigating circumstances. This Court found that this failure was reversible error:

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Lockett; Rogers. Any other rule would render Florida's death penalty statute unconstitutional. Lockett.
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> . . . . [T]he trial court clearly erred in confining its written order solely to the statutory mitigating factor of "extreme" emotional disturbance. Other nonstatutory mitigating factorswerepresentand shouldhave been considered.

Id. at 7-8.

The trial court clearly committed the same error in sentencing Mr. Turner to death as was committed by the Court in Cheshire. Indeed, Mr. Turner's case is virtually identical to Cheshire. Moreover, it also committed error under Campbell and Nibert in failing to find and weigh the nonstatutory mitigating circumstances of emotional disturbance and impaired capacity although those circumstances were supported by a reasonable, and in fact overwhelming, amount of uncontroverted evidence. As the trial court itself found in its sentencing order, there was "ample evidence" that Mr. Turner was emotionally disturbed and that his capacity was impaired at the time of the crime. Indeed, the

evidence was so compelling that it is by no means an exaggeration to state that no reasonable fact-finder could have failed to find that Mr. Turner was emotionally disturbed and that his capacity was impaired at the time of the crime. Cf. Jackson v. Virginia, 443 U.S. 307 (1979). A small portion of this evidence is discussed below:

a. Testimony of Dr. Ernest Miller. Dr. Miller testified as a rebuttal witness for the state on the issue of Mr. Turner's sanity and as a defense witness at penalty phase with respect to mental mitigating circumstances. Given Dr. Miller's unique posture as both a state and defense witness, there could be no question as to his objectivity and credibility. In fact, Dr. Miller's guilt phase testimony provided powerful mitigating evidence at the same time that Dr. Miller rebutted the insanity defense. Thus, Dr. Miller stated repeatedly that Mr. Turner was in a "highly charged emotional state" at the time of the crime, (R. 954, 957, 958, 965) and refers to the "incredible amount of emotional content that was reverberating through the mind of [Mr. Turner] at the time of the crime." (R. 983). Dr. Miller took pains to distinguish the emotional disturbance he found from legal insanity. But he acknowledged there was some evidence supporting legal insanity, especially Mr. Turner's "apparent fury," (R. 957), simply concluding that the evidence did not establish that Mr. Turner was ''unequivocally and clearly . . . insane." (R. 955).

Dr. Miller testified at length concerning the source and nature of Mr. Turner's emotional disturbance. He testified that

Mr. Turner believed that Joyce Brown had induced his wife to take his kids and leave him and that this situation "had been tormenting him for a long time." (R. 959). In addition to the fact that he was upset over his separation from his wife and children, Mr. Turner was also convinced that his wife was both in a lesbian relationship with Joyce Brown and that she was working as a prostitute.[2] (R. 984). Moreover, Mr. Turner believed that his children were in a position to witness his wife's behavior, and that this was damaging to them. (R. 959). Mr. Turner was also subjected to "accumulated stresses" (R. 991) from the fact that he had to rebuild his house after it burned down; the failure of a day care business that he had set up for his wife; a heart attack; and the fact that he had to bail out his wife on bad check charges. (R. 990). Mr. Turner's efforts to get help in dealing with his overwhelming situation were rebuffed, and his father called him a "wimp" for failing to take any action to deal with his wife's situation. (R. 996-97). As a result, Mr. Turner felt abandoned, insecure, inadequate as a man, and helpless. (R. 996). Finally, Mr. Turner was subjected to the "acute stressor" (R. 969) of seeing his wife have sex with another man on his own 39th birthday, the night before the killings.

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2. It is significant that although Dr. Miller was unable to determine whether Mr. Turner's beliefs that his wife was a lesbian and a prostitute were accurate, he was convinced that they were sincere. (R. 977). If she was a lesbian and a prostitute, that fact would affect Mr. Turner's emotional state. If she was not, then Mr. Turner was delusional, further demonstrating his emotional disturbance. (R. 985).

Dr. Miller concluded that Mr. Turner had acted under the control of the intense emotions caused by all these stressors. (R. 994). The fact that Mr. Turner was "at the very least" in a "highly charged emotional state," and possibly psychotic, was supported by the "inordinate" number of stab wounds, (R. 958), his silence and loss of memory after his arrest, (R. 965), the "obvious overkill" in the manner in which the victims were killed (R. 982), and the fact that psychological testing showed that Mr. Turner had a characterologic disorder and was a man who might "under stress regress to a psychotic state." (R. 957).

Based on these same facts, and the fact that Mr. Turner had an IQ of 72, (R. 1227), Dr. Miller testified at penalty phase that, at the time of the killings, Mr. Turner was experiencing extreme emotional disturbances (R. 1228); that his emotions at the time were a combination of rage and fear (R. 1229); that his "extremely heightened emotional state" at the time of the crime substantially impaired his capacity (R. 1230); that his emotional state was if anything more disturbed at the time of the killing of Joyce Brown (R. 1231); and that Mr. Turner's low intelligence and failure to get help from others supported Dr. Miller's conclusions with respect to emotional disturbance and impaired capacity.

b. Testimony of Dr. George Barnard. Like Dr. Miller, Dr. Barnard testified as a rebuttal witness for the state on the issue of insanity. Dr. Barnard's testimony, although less detailed than Dr. Miller's, also provides substantial support for both statutory and nonstatutory mental mitigating circumstances. Dr.

Barnard testified that Mr. Turner told him that Mr. Turner's wife was a lesbian and a prostitute "engaging with other men and with a woman in the same household in which his kids live." (R. 917). Mr. Turner also believed he had seen his wife having sex with another man the night before the killings. Like Dr. Miller, Dr. Barnard was convinced that these beliefs were genuine, whether or not they were accurate. (R. 929). Mr. Turner was greatly distressed over the situation of his wife and children, (R. 887), which he saw as inconsistent with his Catholic religious beliefs. (R. 904). Furthermore, the issue of his wife's homosexuality was very disturbing to Mr. Turner. (R. 914). Mr. Turner was angry and depressed over this situation at the time of the crime (R. 888), and felt helpless in the face of what his wife was doing to him and his family. (R. 931).

c. Testimony of Dr. Daniel Stinson. Dr. Stinson testified as a defense witness on the issue of insanity. Although the jury and the court evidently rejected his conclusion that Mr. Turner was psychotic at the time of the crime, his testimony with respect to Mr. Turner's emotional disturbance at the time of the crime was consistent with that of Drs. Barnard and Miller. Mr. Turner told Dr. Stinson that after his wife moved in with what he termed "her lesbian friend and pimp, Sammy Couch," his daughter began to tell him about sexual behavior at the house. Mr. Turner went by the house several times and heard what he "presumed to be times of sexual orgy." (R. 784). Dr. Stinson also testified concerning Mr. Turner's obsession with homosexuality, noting that

immediately after discussing his wife's supposed homosexual relationship with Joyce Brawn Mr. Turner began discussing his homicidal thoughts towards homosexuals. (R. 787). Furthermore, Dr. Stinson believed that Mr. Turner's seeing Shirley Turner have sex with another man on Mr. Turner's 39th birthday was either a stressor severe enough to throw Mr. Turner into a psychosis or a delusion consistent with psychosis. (R. 826). Finally, Dr. Stinson testified that the number of wounds and the fact that they were "done in a frenzy" supported his diagnosis that Mr. Turner was psychotic. (R. 831).

d. Lay testimony that Mr. Turner was emotionally disturbed over his family situation. Besides the largely consistent testimony of the three psychiatrists concerning Mr. Turner's emotional disturbance, lay witnesses also testified that he was preoccupied over his family situation. FBI Agents Rayfield and Kilian interviewed Mr. Turner barely three weeks before the killing as part of an investigation. Agent Rayfield testified that Mr. Turner was "totally preoccupied with . . . the relationship with his wife," (R. 730-1) and that Mr. Turner was "rational to a point" but "very uptight." (R. 733). Agent Kilian testified that Mr. Turner "seemed to have an emotional preoccupation with his family situation" (R. 741), which was one reason why they decided he would not be a useful source of information. (R. 741). Joyce Brown's daughter, Cynthia Dawson, confirmed that on two occasions Mr. Turner had accused Shirley Turner and Joyce Brown of having a lesbian relationship. (R. 583).

e. Testimony concerning Mr. Turner's behavior during and after the crime. Numerous lay witnesses testified to Mr. Turner's strange behavior during and after the crime. James Andrews testified that Daniel Robinson was cursing Mr. Turner and throwing rocks and bottles at him during the stabbing of Joyce Brown but that Mr. Turner never responded. (R. 357, 359). Daniel Robinson confirmed this testimony and added that he could tell Mr. Turner was mad because he was "slobbering all out the mouth." (R. 379, 388). Mr. Turner's daughter Anetra testified that she was hitting him and yelling at him the whole time he was stabbing his wife but that he never looked at Anetra and never acted like he knew she was there. (R. 634). Russell Kimball testified that, after Mr. Turner was arrested, he looked "as if nothing had happened, wondered what the heck was going on," and was devoid of emotion. (R. 760).[3]

f. Testimony concerning the manner of the killing. The medical examiner, Dr. Floro, testified that there were 51 stab and slash wounds to the body of Joyce Brown that he could count, in addition to several wounds to the abdomen which he was unable to count. (R. 531, 552). Of these wounds, eight of those to the chest and two of those to the back were fatal wounds. (R. 531, 535-6). Defining overkill as continued stabbing after the victim is dead or dying, Dr. Floro testified that the stabbing of Joyce

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3. As noted above, Dr. Miller testified that this absence of emotion and memory loss was consistent with a person who has been involved "in a highly charged emotional environment or circumstance," (R. 965).

Brown was definitely overkill. (R. 550-1). This was confirmed by James Andrews, who testified that Mr. Turner was "stabbing and slashing and cutting constantly" (R. 361), and that it looked as though he stabbed Joyce Brown 40 to 45 times after she appeared to be dead. (R. 364).

The consistent testimony of the three psychiatrists and the lay witnesses makes it clear that Mr. Turner was distraught over his separation from his wife and children and over what he believed was the fact that his children were being exposed to sexual conduct on his wife's part that he believed was immoral and harmful to his children. His situation was exacerbated by his low intelligence, his failures to get help from others, and his father's criticism. The night of July 2, his 39th birthday, he believed he witnessed his wife having sex with another man. After a nearly sleepless night, his emotions, as Dr. Miller testified, took control over him. (R. 994). He went to his wife's house and, in a frenzy of rage and fear, killed his wife and the woman he believed had taken his wife away from him and destroyed his family. These uncontroverted facts establish beyond any doubt that at the time of the crime Mr. Turner was emotionally disturbed and his capacity to conform his conduct to the law was impaired. The trial court's failure to find and weigh those mitigating circumstances was error under Campbell, supra, and Nibert, supra.

2. Failure to Evaluate the Mitigating Circumstance That the Murders Were the Result of a Lovers' Quarrel Between Mr. Turner and His Estranged Wife

The fact that a murder resulted from a lovers' quarrel is unquestionably a valid nonstatutory mitigating circumstance under Florida law. In Cheshire, supra, the Florida Supreme Court recently found equivocal evidence of this factor, among others, sufficient to sustain a jury recommendation of life, stating:

> [B]ased upon the state's case and the physical evidence, the murders at issue in this case reasonably could be characterized as the tragic result of a longstanding lovers' quarrel between Cheshire and his estranged wife. It is well established under Florida law that this type of situation constitutes valid mitigation. Fend v. State, 512 So. 2d 176, 179 (Fla. 1987), receded from on other srounds, Pentecost v. State. 545 So. 2d 861 (Fla. 1989); Irizarry v. State, 496 So. 2d 822, 825 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Kampff v. State, 371 So. 2d 1007 (Fla. 1979); Chambers v. State, 339 So. 2d 204 (Fla. 1976).

Cheshire, supra, slip op. at 5. See also Farinas v. State, No. 70,361, slip op. (Fla. Oct. 11, 1990).

In the instant case, there was overwhelming, direct and uncontroverted evidence of this nonstatutory mitigating circumstance. In its sentencing order, this Court failed to evaluate the applicability of the mitigating circumstance, apparently rejecting it without discussing it. This Court's failure to consider, find and weigh the mitigating circumstance, in the face of the massive and uncontroverted evidence set forth in part below, violates the standards set forth in Campbell, supra, and Nibert, supra.

Much of the evidence set forth regarding the presence of mental mitigation also supports the mitigating circumstance that

the killings were the tragic result of a lovers' quarrel. Additional evidence from people who saw Mr. Turner before, during and after the killings conclusively proves that to be the case. This record evidence is briefly summarized below.

a. James Andrews and Daniel Robinson both heard Mr. Turner threaten the victims prior to the day of the killings. In each instance, the reason for the threats was explicit: he threatened Joyce Brown "for separating my family" (R. 355); when he met Robinson he accused him of going out with Shirley Turner and then threatened Robinson and both the victims. (R. 374). As noted above, Cynthia Dawson heard Mr. Turner accuse the victims of being lesbians at the same time he used threatening language towards them. (R. 578).

b. Two state witnesses who were present at the attack on the victims agree that Mr. Turner made repeated references to his family situation during the actual attacks. Irene Hall testified that while stabbing Shirley Turner, he was saying, "I hate you, I am tired of you, I'm sick and tired of you and you won't let me see my kids." (R. 591)(Emphasis added). Anetra Turner testified that, when Joyce Brown asked Mr. Turner not to kill her, he said, "No, you're the one who kept my family away from me." (R. 631).

c. Finally, arresting officer John Venosh testified that, after Mr. Turner was arrested, Mr. Turner said "she was fucking up my family, she was fucking up my life." (R. 644).

The state's own witnesses proved beyond any reasonable

doubt that the crime was the result of Mr. Turner's reaction to the break up of his family and his separation from his wife and children. The trial court's failure even to discuss this proven and well established mitigating factor renders Mr. Turner's death sentence unreliable and in violation of ~~Camabell~~ and ~~Nibert~~.

3. Failure to Consider Other Nonstatutory Mitigating Circumstances

In its sentencing order, the trial court failed to consider and find other nonstatutory mitigating circumstances that were proposed by Mr. Turner. Mr. Turner presented a considerable amount of evidence concerning the effects on him of his training while in the military and his exposure to combat in Vietnam. While the trial court found that the fact that Mr. Turner "served his country honorably in time of war" (R. 307), was a mitigating factor (but erroneously attached no significance to this mitigating factor, see infra), it failed to consider the effects of his training and combat experience.

Drs. Barnard and Miller both testified concerning Mr. Turner's experiences in the military. Dr, Barnard testified that while Mr. Turner was in the military he was trained to kill, including training in how to kill in close combat with knives. The training included being taught to chant, "I want to be an air force ranger so every day I can kill." (R. 907). Mr. Turner was in combat involving fire fights to defend air base perimeters. (R. 1003). He had friends killed (R. 907), fired at the enemy, and was among those who found patches of blood from the bodies of

enemy soldiers that had been cleared away from the battlefield. **(R. 1004).** He dealt with the situation by staying drunk as much of the time as possible. **(R. 907).** When he returned from Vietnam, his wife could not touch him without provoking a defensive reaction. Id.

A state witness, Dr. Barnard, concluded that Mr. Turner's training and experiences could lessen Mr. Turner's inhibitions with respect to killing. **(R. 910).** Accordingly, this uncontroverted evidence was certainly an aspect of Mr. Turner's character or record relevant to the issue of whether or not he deserved to be executed. As such, under Campbell, the Court was required to expressly evaluate that evidence to determine whether the proposed mitigating factor had been proven and, if so, whether it constituted valid mitigation. Campbell, supra, slip op. at *8*.

Deeds of heroism demonstrating a willingness to put one's own life in danger to help others are well recognized as a mitigating factor. Fuente v. State, 549 **So. 2d** *652*, 654 (Fla. 1989) (saving woman from drowning). It was uncontroverted that Mr. Turner, while working for the Department of Transportation, prevented an attempted rape and as a result received a letter of commendation and a medal for heroism. **(R. 1217-24).** Dr. Miller testified that Mr. Turner's actions showed a "very positive moral approach toward other human beings." (R. **989).** The court apparently failed to consider or find these actions of Mr. Turner as a mitigating circumstance.

Finally, the court failed to evaluate Mr. Turner's low

intelligence as a mitigating factor. It is undisputed that Mr. Turner has an IQ of 72. (R. 1205). Dr. Miller described his level of intellectual functioning as "borderline defective." (R. 1227). In addition, Dr. Miller testified that Mr. Turner's low intelligence made it more difficult for him to cope with the emotionally disturbing dispute between Mr. Turner and his wife. (R. 1234). It is well established that mental retardation and below average intelligence are valid nonstatutory mitigating factors. Harvev v. State, 529 So. 2d 1083 (Fla. 1988); Remeta v. State, 522 So. 2d 825 (Fla. 1988). The trial court's failure to consider Mr. Turner's borderline defective intelligence either alone or in conjunction with the emotional disturbance and stress caused by Mr. Turner's family situation violates Camsbell, supra.

The trial court made no findings whatsoever in response to any of this evidence. This totally fails to meet the requirements set forth in Campbell. There is no way to tell whether the court found 1) that the proposed mitigating factors were not "reasonably established by the evidence," Campbell, susra, slip op. at 9; or 2) that the proposed mitigating factors were not mitigating in nature, id.; or 3) simply ignored the evidence altogether. The lack of any discussion regarding this proposed mitigation falls far short of the requirements set forth in Camsbell that the trial court make specific findings concerning each proposed mitigating circumstance, including the weight to be accorded to each mitigating factor. Camsbell, supra, slip op. at 9-10. The trial court's non-findings made the constitutionally

required meaningful appellate review impossible.

4. The Trial Court Assigned No Weight to the Mitigating Factor That Mr. Turner Served His Country Honorably in Time of War, Although it Found that Factor to be Present

In the sentencing order, the trial court made the following finding with respect to the mitigating factor of honorable service in the military during wartime:

> 1. The defendant served his country honorably in time of war. The Court finds this factor to exist but must consider the fact that the defendant was discharged in 1968. The Court attaches no significance to this factor.

(R. 307) (Emphasis added).

There is no question that an exemplary military record, as indicated by honorable service in the military during wartime, is a valid nonstatutory mitigating factor. Camsbell, supra at **344** n.6. There is also no question that, as the trial court found, Mr. Turner served in the military in a time of war and was honorably discharged. (R. 1258-59). Once the trial court found the mitigating factor to be present, it was required to include it in the weighing process. As the Florida Supreme Court stated in Camsbell, "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed **as** having no weight." Camsbell, supra, at **344** (Emphasis added).

Moreover, the court apparently relied, improperly, on the passage of time since Mr. Turner's military service in discounting it as **a** mitigating factor. Obviously, if the passage

of time erases service in Vietnam as a mitigating factor, then by this time no defendant who had served in Vietnam could claim that as a mitigating factor. See Nibert, supra, slip op. at 7-8 (reversing decision finding history of child abuse was not a mitigating factor because of passage of time). The passage of time cannot be used as a basis for per se rejection of a mitigating factor.

5. The Trial Court Failed to Weigh All the Mitigating Factors Established by the Evidence Against the Aggravating Factors

As set forth above, the trial court's treatment of the mitigating evidence presented in this case failed to comply with the dictates of Campbell and Nibert in numerous respects. The court found mental mitigating factors to be present, but, because it did not find them to rise to the level required for the statutory mental mitigating factors, it failed to include them in the weighing process. The court ignored, and therefore failed to weigh, evidence of other nonstatutory mitigating factors, including the obvious fact that the killings were the tragic result of a lovers' quarrel, the effects of Mr. Turner's military training and service in Vietnam, his heroism in preventing an attempted rape, and his borderline defective intelligence. The court found, but erroneously attached no weight to, the mitigating factor that Mr. Turner had served his country honorably during wartime.

As a result of these errors, the trial court did not include any of these numerous and significant mitigating factors in the weighing process by which it determined whether Mr. Turner

would live or die. The trial court's failure to do so violated the requirements set forth by this Court in Campbell and Nibert. Moreover, the failure to evaluate and weigh these mitigating factors also violated Mr. Turner's rights to a sentence arrived at in a reliable fashion and subject to meaningful appellate review, consistent with **due** process and the eighth amendment. Mr. Turner is entitled to a new sentencing hearing or to a life sentence. **See** Nibert.

C. THIS COURT SHOULD REVISIT ITS DECISION UPHOLDING THE TRIAL COURT'S FINDINGS OF AGGRAVATING FACTORS

1. This Court Should Revisit the Findins of the Prior Conviction of a Violent Felony Aggravating Factor

In the Initial Brief of Appellant, counsel conceded the applicability of the prior violent felony conviction aggravating circumstance. Initial Brief at 35. Relying on that concession, this Court upheld the trial court's finding of the aggravating circumstance. Turner V. State, 530 So.2d **45**, 50n.3 (Fla. 1988). New evidence concerning legislative intent and new law make it clear that applying the prior violent felony aggravator to Mr. Turner, where the **"prior"** violent felony conviction was for the first of two contemporaneous killings, would be fundamentally unjust. Accordingly, this Court should revisit its earlier decision concerning the applicability of the prior violent felony aggravator.

Chapter 72-72, Laws of Florida, in its initial form as Senate Bill No. **465**, listed the following **two** relevant aggravating cir-

cumstances:

> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) At the time the capital felony was committed the defendant also committed another capital felony.

(Emphasis added.) This language was derived directly from the Model Penal Code, § 210.6(3)(b)**(c).**

The Commentary to the Model Penal Code, from which the language of the Florida statute was drawn, explains very clearly that the first aggravator quoted above was intended to be limited to offenses committed prior to the instant offense:

> Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggests two inferences supporting escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some further occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

By comparison, the second aggravator quoted above, which was eliminated from Senate Bill 465, was directed at contemporaneous killings:

> Paragraphs (c) and (d) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons. In both instances, the defendant's contemporane-

> ous behavior is not unlike the prior conduct specified as an aggravating factor in Paragraph (b).

The Legislature's subsequent elimination of paragraph (c) from Senate Bill No. 465, quoted above, clearly expressed its intention that the aggravator at issue here only be applicable where the prior conviction was obtained in a previous case and was not a part of the case giving rise to the capital conviction on which the defendant is being sentenced. This intent, of course, was quite reasonably focused (a) on the issue of rehabilitation and propensity for future dangerousness. The Legislature evidently believed that a capital defendant who has in the past committed one or more violent crimes apart from the one with which he is charged is likely both to be beyond rehabilitation and to be more dangerous than other capital defendants. These themes have historically been quite prominent in death penalty legislation. Interpreting this aggravator to apply to cases involving more than one homicide ignores this historical concern and, in effect, converts it from a failed rehabilitation/future dangerousness aggravator to a multiple offense aggravator. This Court's conclusion to the contrary in Kinq v. State, 390 So. 2d 315, 320 (Fla. 1980), for which the court gave no authority, is clearly contradicted by this evidence of legislative intent.

Second, in Scull v. State, 533 So. 2d 1137 (Fla. 1988), this Court defined the term "prior" (in the context of the mitigating circumstance that a defendant has no significant history of prior criminal activity) as meaning prior to the offense in the case

under review. There is no logical, practical distinction between that definition and application and the Court's contrary construction of the term "previous" (in the context of the aggravating circumstance that a defendant has previously been convicted of another capital felony or a felony involving the use of violence) as previous to the sentencing in the case at issue. See also Bello v. State, 547 So. 2d 914, 918 (Fla. 1989) (error to reject the mitigating circumstance based solely on evidence of contemporaneous crimes).

It is no small matter that the arbitrary construction of this aggravator is detrimental to defendants, contrary to the clear mandate of Section 775.021(1), Florida Statutes, which provides the following rule of construction for criminal statutes:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

As this Court wrote in Ex parte *Amos*, 93 Fla. 5, 112 So. 289 (1927):

> The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms, and where there is such an ambiguity as to leave reasonable doubt of its meanins, where it admits of two constructions that which oserates in favor of liberty is to be taken.

(Emphasis added.) Strictly construed, especially in light of the

new evidence of legislative intent addressed here, the aggravator of "previous conviction" must be redefined to mean "previous to the offense in the instant case."

Mr. Turner urges this Court to revisit this critical issue. Pursuant to its jurisdiction to correct fundamental errors that took place on direct appeal, Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986), this Court should revisit its earlier implicit decision concerning this aggravating circumstance. It would be arbitrary and capricious, and a denial of Mr. Turner's rights to due process and equal protection of the law, not to revisit is earlier decision based on current law. Certainly, a death sentence based on a now discredited application of capital sentencing law is inherently unreliable and, therefore, violates Article I, Section 17 of the Florida Constitution, as well as the eighth and fourteenth amendments to the United States Constitution.

Accordingly, since the trial court indicated this factor was the primary justification for the death sentence, this Court should strike this aggravator and vacate the death sentence herein. Alternatively, Mr. Turner should receive a new sentencing hearing.

2. This Court Should Revisit Its Finding That the Homicide Was Cold, Calculated and Premeditated. Without Any Pretense of Moral Or Legal Justification

In order for this aggravating factor to apply, there must not only be a heightened degree of premeditation, the defendant must also have no pretense of moral or legal justification. This Court upheld the trial court's finding of this aggravating factor,

despite Mr. Turner's presentation of extensive and unrebutted evidence that he had a "pretense of moral . . . justification" for his actions. This evidence showed that Mr. Turner had a sincere and deeply held belief that the victim Joyce Brown had entered into a lesbian relationship with his wife, induced her to leave Mr. Turner, to take their children away from him, and to become a prostitute, thus exposing his children to an unhealthy environment.

First, Dr. Daniel Stinson, Chief of Psychiatry at St. Vincent's Medical Center in Jacksonville (R. 763-64), testified that Mr. Turner was insane at the time of the offense. Pertinent to this issue, he testified:

> I believe that from the data [Mr. Turner] may well have thought that he was doing, that he did not believe that he was wrong.
>
> . . .
>
> I feel that he believed that he was justified, ...
>
> . . .
>
> Well, as I said, if he believed that he was doing the right thing, getting rid of this person who had done the bad things, it becomes a morality play, ...
>
> [H]e didn't know what he was doing was wrong, is probably the major issue here.

(R. 793, 821, 830, 832).

Second, Dr. George Barnard, forensic psychiatrist associated with Shands Teaching Hospital in Gainesville (R. 872-74), testified for the State:

> I think that [Mr. Turner] certainly had a lot

> of anger and rage toward her. How justified it was I don't know, but as he perceived it, it was certainly justified.

(R. 930) (emphasis added).

Finally, the most compelling testimony came from State witness Dr. Ernest Miller, Chief of Psychiatry at University Hospital in Jacksonville (R. 935-36):

> Q. Did you conclude, Dr. Miller, that Mr. Turner honestly believed that his wife was having a lesbian affair and a prostitute in that house in the presence of his children?
>
> A. Yes.

(R. 984) (emphasis added). Dr. Miller also testified that Mr. Turner had tried to prevail upon his wife to see a priest for counseling but that she had refused (R. 987) and that his intent when he went to the house that morning was to rescue his children. (R. 1006).

At the penalty phase, Dr. Miller testified further:

> Q. Dr. Miller, were you able to form an opinion or conclude if Mr. Turner at the time Shirley Turner and Joyce Brown died felt any pretense of legal or moral justification.
>
> [Prosecutorial objection overruled.]
>
> A. the patient, from my discussions with him and from my reading of the various other materials furnished, was rightly or wrongly convinced and believed that his daughter was being subjected to unorthodox and potentially damaging sexual exhibitions. He otherwise viewed the environment as unwholesome and I think from the standpoint of the question posed, he felt a level, some level of moral reasoning or explanation or purpose in the acts which he executed that day, so in general the answer to your question is yes.

(R. 1231-2)[4] (emphasis added).

On direct appeal, this Court dismissed the argument that Mr. Turner had a pretense of moral justification as follows:

> We emphasize that these beliefs, as recounted to his examining psychiatrist and subsequently testified to by this doctor, are not supported by record evidence.

530 So. 2d at 51, n.4. Although the precise meaning of this footnoted explanation is unclear, it appears that this Court was applying an objective standard for determination, and judicial approval, of this element, i.e., if the defendant does not present proof of a basis for his beliefs of legal or moral justification, the aggravator will be applied. Subsequent case law establishes, however, that such proof is not required in order for a defendant to show a "pretense . . . of moral justification."

In Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), cert. denied, 109 S.Ct. 1548 (1989), this Court set forth a guide for application of this aggravator:

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless, rebuts the otherwise cold and calculating nature of the homicide.

(Emphasis added.) Mr. Turner's evidence obviously constitutes "any claim of justification or excuse." Again, in Christian v. State, 550 So. 2d 450 (Fla. 1989), this Court found that a defendant who

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4. This Court's opinion, Turner, 530 So.2d at 51 n.4, reflects an inaccurate perception that the evidence was based on the testimony of only one doctor.

had been attacked and threatened by another inmate had a "pretense of legal or moral justification" for killing the inmate. In making this finding, this court considered the facts that the defendant had suffered a psychological change after the victim's attack, becoming "withdrawn and brooding," and that during the commission of the murder the defendant was "in a daze" and "out of it." Id. at 452.

This Court's treatment of the "without pretense of . . . moral justification" issue in Turner is fundamentally at odds with its treatment of the same issue in Banda and Christian. Banda establishes that the cold, calculated and premeditated aggravating factor can be rebutted by any claim of justification that negates the cold and calculating nature of the crime. Thus, it is clear that under Banda it is not necessary for the defendant to prove that his claimed justification is objectively correct. Rather, it is sufficient if the defendant subjectively believes that he has some form of justification for his actions that negates the subjective heightened premeditation. Christian further establishes that the mental state of the defendant is relevant to this calculus. The fact that a defendant has become "withdrawn and brooding" and acts as if "in a daze" at the time of the offense must be considered in determining whether the aggravating factor applies.

Here, the uncontroverted evidence shows that the defendant sincerely believed that he had been grievously injured by the actions of both the victims, and that his children had also been

placed in an unsuitable environment--indeed, a "morally" unsuitable one--as a result. He also sincerely believed that he was justified in taking action against the victims. Furthermore, the consistent and uncontroverted evidence with respect to Mr. Turner's mental state showed that he was deeply emotionally disturbed over his family situation, and that at the time of the offense he was oblivious to everything going on around him.

This Court's treatment of the "without pretense of . . . moral justification" issue is fundamentally inconsistent with Banda and Christian. This Court should revisit this fundamental error in order to prevent the arbitrary imposition of the death penalty on Mr. Turner.

D. THIS COURT SHOULD REVISIT THE TRIAL COURT'S FAILURE TO MAKE FINDINGS CONCERNING THE WEIGHT OF THE AGGRAVATING CIRCUMSTANCES WHICH IT FOUND, IN VIOLATION OF CAMPBELL AND HALLMAN V. STATE

This Court's decision in Campbell also has clear implications regarding trial court findings with respect to aggravating factors. Under Campbell, the trial court must weigh the aggravating circumstances against the mitigating circumstances, after making explicit findings concerning each proposed mitigating circumstance. (The trial court must "expressly consider in its written order each established mitigating circumstance," and its final decision weighing the aggravating and mitigating circumstances "must be supported by 'sufficient competent evidence in the record.'" Campbell, supra, slip op. at 10, quoting Brown V. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

If the procedures set forth in Campbell are to serve their purpose of promoting the uniform, reliable and consistent imposition of the death sentence and the facilitation of meaningful appellate review, then it is self evident that they also must require the trial court to specify what weight he is giving to the aggravating circumstances and why. This is the case because the weighing process

> is not a mere counting process of X number of aggravating circumstances against Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.

Dixon v. State, 283 So. 2d 1, 10 (1973) (emphasis added). If the weighing process requires a "reasoned judgment" concerning the weight of the aggravating and mitigating circumstances, one that will be subject to review by this Court to insure the proportionality of death sentences, then surely the trial court must specify the weight he is affording the aggravating circumstances and why.

This Court recently implicitly recognized this fact in Hallman v, State, 15 F.L.W. S207 (Fla., April 12, 1990). In Hallman, this Court held that a jury may properly recommend life based on its belief that "although four aggravating factors were proved, some were entitled to little weight." Id., 15 F.L.W. at S208. As examples of aggravating factors entitled to little weight, this

Court mentioned the fact that Hallman's role in a prior armed robbery of which he had been convicted was relatively minor, and the fact that, although on parole at the time of the murder, "he had done very well with his parole until his DUI." Id. Thus, this Court recognized that in the weighing process, some aggravating factors, like some mitigating factors, are entitled to more weight than others. Under Camabell, therefore, trial courts must explicitly state how much weight they accord to each aggravating factor, as well as to each mitigating factor and the reasons for same.

In the instant case, with the exception of the prior violent felony aggravator, the trial court said nothing about the weight accorded to any of the aggravating factors it found. Instead, the court simply set forth its findings that those aggravating factors were present. (R. 303-05). Moreover, it is clear that at least one of the aggravating factors found by the court was entitled to little weight. Specifically, the court found that

> The evidence is clear that the defendant committed the murder while engaging in the commission of, an attempt to commit, or flight after committing or attempting to commit, the crime of Burglary. The evidence at trial was uncontroverted that the defendant broke into 1053 W. Monroe Street, the residence of Joyce Brown, without her consent and with the intent to commit an offense therein.

(R. 304).

The trial court did not specify what offense Mr. Turner

intended to commit when he broke into the house.[5] The trial court, and this Court on direct appeal, see Turner, 530 So. 2d at 51, apparently believed that Mr. Turner broke into the house with the intent to commit murder. The lack of specificity introduces an element of vagueness that is unconscionable in a capital case. Surely it is not too much to ask the courts to specify what underlying offense the defendant intended, beyond any reasonable doubt, to commit. More fundamentally, the application of the aggravating factor in this circumstance is hypertechnical and requires circular logic. The murder is aggravated because a) the defendant broke into a house, b) with the intent to commit a murder. There is no evidence that the defendant had the intent to commit any other crime. This amounts to a new automatic aggravating factor that applies any time a defendant breaks into a house to commit a murder.

If the Legislature had intended to create an aggravating factor for all break-in murders, it is reasonable to expect that it would have done so explicitly. The evident intent of the felony murder aggravating factor is to treat more harshly a murder committed "as part of another dangerous and felony," Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973), such as kidnapping or rape. Where the "other felony" is actually part of the murder itself, as here, it does not seem likely that the aggravating factor was

5. The trial court's statement that the evidence of Mr. Turner's intent to commit an offense was uncontroverted is inaccurate. There was evidence that Mr. Turner went to the house to "save his children." (R. 1005).

intended to apply at all. Certainly, under such circumstances the aggravating factor is entitled to little weight.

The trial court's failure to specify the weight it accorded to the various aggravating circumstances that it found and why it did so, like its failure to make specific findings concerning the mitigating circumstances proposed by Mr. Turner, deprived Mr. Turner of his rights to a sentence arrived at by reliable and consistent procedures and precluded the constitutionally requisite meaningful appellate review to which he was entitled.

Recent decisions of this Court, specifically, Campbell Christian, and Cheshire, as set forth above, call into question the validity of this Court's affirmance of the trial court's findings that there were four aggravating circumstances and no mitigating circumstances of any weight, and that death was the appropriate sentence. The trial court's findings with regard to mitigating circumstances do not meet the requirements of Campbell. Given the legislative history, the prior violent felony aggravator was improperly found, and the cold, calculated and premeditated aggravator was inapplicable in light of Banda and Christian. Finally, under Campbell and Hallman at least one of the aggravating circumstances was entitled to little weight. These facts demand that this Court revisit its findings regarding aggravating and mitigating circumstances and the appropriateness of a death sentence made on direct appeal and at a minimum require a remand to the trial court for further consideration in light of Campbell,

Christian, Cheshire and Hallman.

CLAIM II

MR. TURNER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN VIOLATION OF ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A habeas corpus petition is the appropriate vehicle for raising claims of ineffective assistance of appellate counsel in a capital case. Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986). In order to prevail, Petitioner must identify a specific act or omission by appellate counsel which constituted a serious and substantial deficiency and which prejudiced the Petitioner by undermining the essential fairness and reliability of the appeal. Id. at 940. In this case, appellate counsel's performance was deficient in a number of respects, and that deficiency undermines confidence in the outcome of Petitioner's appeal, thus depriving Petitioner of his constitutional right to the effective assistance of appellate counsel.

A. APPELLATE COUNSEL'S PRESENTATION OF THE ISSUE THAT THE DEATH PENALTY WAS DISPROPORTIONATE FOR THE OFFENSE COMMITTED WAS INEFFECTIVE

1. Appellate Counsel's Conduct

In every death penalty case, this Court "engage[s] in a proportionality review . . . to ensure rationality and consistency in the imposition of the death penalty."[6] Sullivan v. State, 441

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6. This is obviously an exhaustive responsibility, given the fact that there is currently legislative authorization for 399 circuit court judges, all of whom are authorized to decide whether or not to impose the death penalty in a capital case. Fla. Const.,

So. 2d 609, 613 (Fla. 1983). In conducting its proportionality review, this Court has repeatedly struck down the death penalty where, as here, the killing was the result of a domestic dispute. This has been especially true where, again as here, the defendant had no previous convictions for unrelated violent felonies.[7]

Despite the inevitability of proportionality review and the high rate of success in overturning the death penalty in cases factually similar to Petitioner's, his appellate counsel not only failed to raise the proportionality issue in his brief and in oral argument, but, when the Court raised the issue sua ssonte at oral argument, it was painfully clear that counsel neither recognized nor understood the issue.

During oral argument, counsel argued that there was no reasonable basis upon which the jury could have recommended and upon which the trial court could have sentenced Petitioner to life imprisonment as to Count I and the death penalty as to Count 11. Counsel erroneously referred to this as a **"proportionality"** argument. The word **"proportionality"** prompted the following comment from the Court:

> On proportionality, I kind of wondered, I didn't see really where you argued proportionality in your brief. I wondered whether you would equate it to a domestic situation and say that proportionately, it was done in the heat of passion and, of course, we have been sort of reluctant to affirm death sentences in domestic situations, but you didn't

art. 5, § 20; Fla. Stat. §§ 26.012, 26.301.

7. See discussion infra at subpoint 2.

argue that, but you seem to be arguing it now.

Justice Shaw, oral argument on direct appeal, Turner v. State, 530 So. 2d 45 (Fla. 1987) (hereinafter "oral argument").

Unfortunately, counsel still did not grasp the issue. Instead, he returned to his argument regarding the different sentences imposed as to Counts I and 11, which he continued to refer to erroneously as a **"proportionality" issue.** Mr. Collins, Oral Argument. On January 23, **1987,** appellate counsel filed a Notice of Supplemental Authority, citing one case under the heading "Issue **X",** with the brief notation, "Death Penalty not proportionately warranted." A cross reference to "Issue **X"** in the brief on direct appeal reveals that appellate counsel continued in his Notice of Supplemental Authority to confuse the two issues. Initial Brief **at 56-59.**

2. Proportionality Review--"Domestic" Cases

> "[T]his Court [has] stated that when the murder is the result of a heated domestic confrontation, the death **penalty** is not proportionally warranted." **Garron** v. State, 528 **So.** 2d **353,** 361 (Fla. **1988.)** We have expressly applied this proportionality review to reverse the death penalty in a number of domestic cases.

Blakely v. State, **561** So. 2d **560,** 561 (Fla. **1990).** Reversal on proportionality grounds in domestic cases is almost universal where the defendant has no previous unrelated conviction for a violent felony. Id.

Petitioner grew up in a large, closely knit, devoutly Catholic family which regularly attended Sunday Mass and performed the daily

rituals of Catholicism at home. (R. 777-78, 1208, 1252-54). His religion was important to him, as were his religious obligations to his daughters. (R. 986, 1194-95). He was described as a loving, tender and gentle father who was concerned that his daughters be raised in the Catholic Church. (R. 1194, 1265).

Petitioner completed high school and, despite an I.Q. of 72 and borderline intelligence, managed to complete two years of junior college before enlisting in the Air Force. (R. 905, 1227-28). After volunteering to serve in Vietnam, he was honorably discharged in 1968 and shortly thereafter met and married his wife, Shirley. (R. 905, 1194). He had a stable job history and was, at the time of the crime, employed as a Bridge Maintenance Technician with the Florida Department of Transportation (R. 886, 1212-14). He had received a commendation from DOT for his bravery in stopping the abduction and sexual battery of a woman by three men. (R. 1217-25).

Unfortunately, over time, the marriage between Petitioner and Shirley began to deteriorate. Petitioner believed that he had done everything for his wife, but she not only failed to show any appreciation, in his mind, she also tried to shame him. (R. 780). He had established at some point a day nursery for Shirley to run, only to have, in his view, her mismanagement cause it to fail. (R. 990). When she had incurred bad check charges, he covered them for her. (R. 990).

The family was under the added stress of financial problems. The family home had been lost in a fire, which was complicated by

the fact that insurance covered only a portion of the loss, prompting Petitioner to rebuild the home himself while holding down his full-time DOT job. **(R. 989-90, 1264).** Additional conflict arose from the fact that Shirley was not Catholic and placed less importance on the institution of marriage. (R. 780-81). Petitioner tried to get her to go with him to a priest for counseling; she refused, but he nevertheless went alone. (R. 987, 1264).

Petitioner and Shirley separated in 1982. **(R. 781).** She returned for a while but left him for good in February of 1984. **(R. 782).** The relationship between Petitioner and his wife continued to deteriorate after the final separation, although he still wanted her to return to him. (R. 990). She "called the police on him" a number of times when he felt he had done nothing wrong. (R. 780). In March of 1984, Shirley precipitated Baker Act proceedings against Petitioner. He was picked up under court order while riding in his car with one of his daughters and taken to University Hospital in Jacksonville for evaluation, then released. **(R. 783-84, 881, 891, 915-16, 946-47, 975-76).**

After separating from Petitioner, Shirley and one of Petitioner's two daughters, Anetra, moved in with Joyce Brown. Shirley kept him from seeing his children when he wanted to. (R. 591, 599, 604-05). Petitioner continued to brood over the impending divorce and to experience the conflict between his devout belief and parental pressure that divorce was not an option he could exercise and the fact that his marriage was indeed headed in that direction. His outrage at this set of circumstances focused on Joyce, whom he

saw as a moving force in the destruction of his family. He believed that Joyce and his wife were lesbian lovers and that they were prostituting in their shared house, exposing his daughters to unorthodox and potentially damaging sexual exhibitions--conduct which was again very much in conflict with his religious upbringing. (R. 780-87, 887, 904, 917-18, 959, 984, 990, 1231-32). He began to threaten his wife and Joyce, accusing Joyce of separating his family. (R. 355-56, 578). He began intense surveillance of their house. (R. 354-55, 365-68, 375, 385-87, 581-82).

All three mental health experts who testified at trial[8] agreed that Petitioner felt a great deal of anger and rage at Shirley and Joyce over his ever-deteriorating domestic situation, rage that was fully supported in his mind. (R. 795, 930-31, 959, 991). This rage took Petitioner over the brink to the evening before the morning he killed Shirley and Joyce, the evening of his 39th birthday, when Petitioner, on another "surveillance" visit, perceived that his wife was having sexual intercourse with another man. (R. 788, 825-26, 887, 929-30, 969).

A review of cases factually similar to Petitioner's demonstrates the disproportionality of his death sentence and underscores the egregiousness of counsel's literally fatal error in failing to present argument on this issue on direct appeal.

Two cases particularly require comparison. In Wilson v.

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8. Dr. Daniel Terrell Stinson, witness for the defense; Dr. George A. Barnard and Dr. Ernest Carl Miller, witnesses for the state.

State, 493 So. 2d 1019 (Fla. 1986), a double murder, the defendant became enraged when his stepmother ordered him to keep out of the refrigerator. He began striking her with a hammer. His father came to his stepmother's aid, and he, too, was beaten with the hammer. During the struggle, the defendant stabbed to death his five-year-old cousin with a pair of scissors. The defendant then grabbed a pistol and shot his father in the forehead, killing him. Following that, he pursued his stepmother and emptied his pistol into the closet where she was hiding. Even though the Court affirmed two aggravating factors, that the murder was especially heinous, atrocious and cruel, and that at the time of the crime, the defendant had been previously convicted of a felony involving the use of violence, and found no mitigating circumstances, the Court "[found] it significant that the record also reflects that the murder [of defendant's father] was the result of a heated, domestic confrontation" and reversed the sentence of death on proportionality grounds. Id. at 1023. Thus, the lack of proportionality to the instant case is blatant. Even though Wilson had no mitigating circumstances and the aggravator of prior violent felony, the death sentence was vacated. Here, Petitioner had a great deal of mitigation, and the trial court had indicated that the simultaneous murder (construed as a prior violent felony) was the most "compelling" reason for a death sentence. Nevertheless, this Court affirmed the death sentence, obviously failing to fulfill its duty of proportionality review.

Likewise, in Garron v. State, 528 So. 2d 353 (Fla. 1988),

another double murder, defendant and his wife had an argument regarding defendant's advances to his stepdaughter. After shooting his wife to death, the stepdaughter ran to the telephone to call the police. Similarly to here, the defendant followed his stepdaughter to the phone, leveled the gun at her and fired, killing her. Defendant's death sentence was reversed on several grounds, one of which was proportionality:

> In Wilson v. State, 493 So. 2d 1019 (Fla. 1986), this Court stated that when the murder is the result of a heated domestic confrontation, the penalty of death is not proportionality warranted . . . The record shows that this is clearly a case of aroused emotions occurring during a domestic dispute. While this does not excuse appellant's actions, it significantly mitigates them.

Id. at 361.

Again, like Wilson, the affirmance of Petitioner's death sentence was obviously disproportionate and not rationally consistent with Garron.

In a very recent case, Farinas v. State, No. 70,361, slip op. (Fla. Oct. 11, 1990), the defendant "was obsessed with the idea of having the victim [his former live-in lover] return to live with him and was extremely jealous." Id. at 13. This Court vacated the sentence of death for the defendant's murder of his lover, "find[ing] it significant ... that the murder was the result of a heated, domestic confrontation." Id.[9]

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9. Petitioner realizes that appellate counsel did not have the benefit of cases decided since his direct appeal. However, the more recent cases simply reflect a continuation of the case law as it stood at the time of his appeal and serve to demonstrate the consistency with which the Court has accepted the propor-

In another recent case, Blakely v. State, 561 So. 2d 560 (Fla. 1990), the defendant and his wife had a long-standing domestic dispute over finances and over the wife's treatment of the children. He bludgeoned her to death with a hammer. This Court overturned the death sentence, finding it disproportional.

In Ross v. State, 474 So. 2d 1170 (Fla. 1985), the defendant argued with his wife and then bludgeoned her to death with a hammer. The medical evidence showed that the wife had tried to defend herself for some period of time and that she endured torturous knowledge of her impending death with excruciating pain. Nevertheless, this Court found that the death penalty was not proportionally warranted.

Likewise, in Fead v. State, 512 So. 2d 176 (Fla. 1987), the defendant killed his girlfriend during a "lovers' quarrel." This Court found the death penalty not proportionate.

Again, in Herzog v. State, 439 So. 2d 1372 (Fla. 1983), the defendant believed his girlfriend had taken some of his drugs or money. He induced her to take quaaludes, watched as his roommate gagged her, assisted another roommate in attempting to smother her, dragged her into another room, and strangled her to death, after which the defendant and an accomplice wrapped her in a garbage bag, drenched her corpse with gasoline and set it afire. This Court stated that it had "compared this case with cases involving similar facts and find that a life sentence is consistent with these

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tionality argument in domestic cases.

decisions." Id. at 1381.

In Blair v. State, 406 So. 2d 1103 (Fla. 1981), the defendant murdered his wife after she complained that the defendant and the wife's daughter were spending too much time together and the wife threatened to go to the police about this. Again, this Court reversed: "comparing this case with others, we remand it for imposition of a life sentence." Id. at 1109. See also Cheshire v. State, No. 74,477 (Fla. Sept. 27, 1990) (double murder of estranged wife and her live-in lover); Irizarry v. State, 496 So. 2d 822 (Fla. 1986) (double murder of former wife and former wife's lover); Phippen v. State, 389 So. 2d 991 (Fla. 1980) (double murder of mother and stepfather); Kamsff v. State, 371 So. 2d 1007 (Fla. 1979) (murder of ex-wife); Chambers v. State, 339 So. 2d 204 (Fla. 1976) (murder of live-in lover); Halliwell v. State, 323 So. 2d 557 (Fla. 1975) (murder of lover's husband); Tedder v. State, 322 So. 2d 908 (Fla. 1975) (murder of mother-in-law).[10]

Conversely, in those domestic dispute cases in which the Court found the death penalty not disproportional, the defendants had prior, unrelated convictions of violent felonies. Lemon v. State,

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10. In these last cases, the Court did not base its decision directly on proportionality. However, in citing these same cases (except for Cheshire, a later case) in her dissent in Porter v. State, 564 So. 2d 1060 (Fla. 1990), Justice Barkett noted that "this Court consistently has accepted as substantial mitigation the inflamed passions and intense emotions of such situations. In almost every other case where a death sentence arose from a lovers' quarrel or domestic dispute, this Court has found cause to reverse the death sentence, regardless of the number of aggravating circumstances found, the brutality involved, the level of premeditation, or the jury recommendation." Id. at 1065.

456 So. 2d 885 (Fla. 1984); Williams v. State, 437 So. 2d 133 (Fla. 1983); King v. State, 436 So. 2d 50 (Fla. 1983); Harvard v. State, 414 So. 2d 1032 (Fla. 1982). Here, Petitioner has no such convictions. See also Hudson v. State, 538 So. 2d 829 (Fla. 1989) (Wilson, supra, and Ross, supra, distinguished on ground that they were "domestic setting" cases).

3. Application of the Ineffective Assistance of Counsel Standard

> The criteria for proving ineffective assistance of appellate counsel parallel the Strickland [v. Washinston, 466 U.S. 668, (1984)] standard for ineffective trial counsel: Petitioner must show (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Johnson v. Wainwrisht, 463 So. 2d 207 (Fla. 1985).

Wilson v. Wainwrisht, 474 So. 2d 1162, 1163 (Fla. 1985) (Wilson 11). See also Fitzpatrick v. Wainwrisht, 490 So. 2d 938 (Fla. 1986).

Again, Wilson is on "all fours" with this case and requires a new appeal. Defendant, Sam Wilson, was convicted of two counts of first-degree murder and one count of attempted murder. He was sentenced to death for the two murder convictions and to thirty years for the attempted murder. His conviction and sentences were affirmed on direct appeal, the Court specifically finding that "[s]ince for both victims there was at least one aggravating factor and there were no mitigating factors at all, the sentence of death

is proper for each crime." Wilson v. State, 436 So. 2d 908, 912 (Fla. 1983) (Wilson I).

Defendant sought post-conviction relief alleging, inter alia, ineffective assistance of appellate counsel. Finding meritorious Petitioner's allegations regarding the adequacy of research and briefing and "the gross ineffectiveness of oral argument," the Court granted the writ of habeas corpus and ordered appointment of counsel to afford the Petitioner a new direct appeal. Wilson II, 474 So. 2d at 1163.

Despite its conclusion on direct appeal that the death penalty was a proper punishment, this Court was willing to allow new argument on proportionality, as appellate counsel had:

> failed to address the propriety of the death penalty as applied in either his initial brief or his reply brief, even though the state raised the issue in its answer brief. After oral argument, this court ordered [appellate counsel] to file a supplemental brief addressing the death penalty. The result was a descriptive listing of cases in which this court had discussed the two aggravating factors in dispute and a passing reference to one possible statutory mitigating circumstance. The application of case law to the facts before the court was cursory and totally lacking in persuasive advocacy.

Id. at 1164.

Counsel's omissions in this case are at least as egregious as those in Wilson I. Here, too, counsel wholly "failed to address the propriety of the death penalty as applied" in his brief, demonstrated a total lack of understanding of the proportionality issue at oral argument, and followed up with "a passing reference" to one

case. Wilson II, 474 So. 2d at 1164.

The Court's own review of the proportionality issue does not render counsel's omissions harmless. In Wilson II, the state argued that any deficiency of counsel was cured by the Court's independent review of the record and that the Court's disapproval of two aggravating factors and the dissents of two justices addressing those issues not raised by appellate counsel obviated the need for a new appeal. This Court eloquently rejected that argument:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation.

Wilson II at 1165.

The most compelling argument for a new appeal is Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (Wilson 111), the Court's opinion following its granting of a new direct appeal. On the strength of effective appellate argument alone, this Court found the death sentence not proportionately warranted as to the first-

degree murder." Wilson III, 493 So. 2d at 1023. The reduction to life imprisonment was based in part on the Court's conclusion that the murder "was the result of a heated, domestic confrontation," even though the trial court had properly found two aggravating circumstances (that the crime was especially heinous, atrocious and cruel, and that, at the time of the crime, the defendant had been previously convicted of a violent felony) and no mitigating circumstances. Id. at 1023.[12]

Petitioner here has pointed to "specific errors or omissions"--counsel's failure to raise or effectively argue the proportionality issue. Proportionality is automatically an issue in every death appeal. Thus, competent appellate counsel in any death penalty case would always, at a minimum, research the issue and be prepared to answer the Court's questions. In the case of a domestic killing, however, where this Court has regularly reversed the death penalty on proportionality grounds, there would never be any reason, strategic or otherwise, for competent appellate counsel not to thoroughly research and vigorously argue the proportionality issue both in the brief and at oral argument. Thus, counsel's failure to argue the proportionality issue "fell outside the range

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11. The other of this double murder was reduced to murder in the second degree because of lack of sufficient evidence of premeditation. Wilson III, 493 So. 2d at 1023.

12. In support of its conclusions, the court cited Ross v. State, 474 So. 2d 1170 (Fla. 1985) and Blair v. State, 406 So. 2d 1103 (Fla. 1981), two "domestic confrontation" cases discussed in Subpoint 2 above.

of professionally acceptable performance" with tragic results. Wilson 11, 474 So. 2d at 1163. Because the Court cannot "in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims," Id. at 1165, the Court cannot be confident in the "fairness and correctness of the appellate result." Id. at 1163. Petitioner has met the standard for demonstrating ineffective assistance of appellate counsel and should be granted a new appeal.

4. Proportionality Review--Mitigating Circumstance

As noted above, this Court engages in proportionality review in every case, whether "domestic dispute" or not, "to ensure rationality and consistency in the imposition of the death penalty." Sullivan v. State, 441 So. 2d 609, 613 (Fla. 1983). "Review by this court guarantees that the reasons present in our case will reach a similar result to that reached under similar circumstances in another case." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

As demonstrated elsewhere in this Petition, there were a large number of mitigating circumstances present in the record but ignored by the trial court. Appellate counsel's failure to point out the trial court's error in ignoring these factors constituted ineffective assistance of counsel. Id. As also demonstrated in another portion of this petition, appellate counsel's failure to argue not just the weakness but *the* nonexistence of the aggravating factors found by the trial court also constituted ineffective assistance of counsel on direct appeal.

When the properly considered mitigating and aggravating circumstances of this case are compared as a whole to those of other capital cases, the death penalty is disproportionate and must be vacated.

This Court has generally accepted two categories of mitigating circumstances as especially compelling in finding the death penalty inappropriate, even though they are framed in various ways and can consist of both statutory and nonstatutory mitigating factors.

The first consists of those cases where the defendant, as is true of Petitioner here, has led a fairly peaceful, productive life, with no convictions for prior, unrelated violent crimes, even in those cases where the aggravating factors described in Section 921.141 (5)(d), (h) or (i), Florida Statutes, or a combination of them, have been present. Nibert V. State, No. 71,980 (Fla. July 26, 1990); Blakely v. State, 561 So. 2d 560 (Fla. 1990); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Proffitt V. State, 510 So. 2d 896 (Fla. 1987); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Ross V. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981).

The second type of mitigating circumstance this Court has found especially compelling in overturning the death penalty is "emotional or mental disturbance," even where it does not rise to the level of "extreme." Fla. Stat. § 921.141(6)(b) (1989). Here, again, the Court has considered this type of mitigation compelling

even where the aggravating factors set forth in Section 921.141(5)(d), (h) or (i), Florida Statutes (1989), have been present, either alone or in some combination. Blakely v. State, 561 So. 2d 560 (Fla. 1990); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Chambers v. State, 339 So. 2d 204 (Fla. 1976).

Petitioner presents the classic case of the type of mitigation this Court has time and again found compelling in overturning the death penalty--a good citizen, a veteran, a capable worker, a family man, a churchgoer--someone who reaches, in the face of circumstances that would try the most patient of men, an emotional flashpoint during which he murders his estranged wife and the woman he believes to be his wife's lesbian lover, the destroyer of his family. Despite this, it apparently did not occur to appellate counsel to argue that Petitioner's death sentence was disproportional when viewed in the light of the many mitigating circumstances in the record, even though that issue will always be visited by the Court in death cases.

Thus, Petitioner has demonstrated a substantial omission by appellate counsel. Because "[t]his court's review of the propriety of death sentences and the proceedings in which they are imposed 'is no substitute for the careful, partisan scrutiny of a zealous advocate,'" Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986), quoting, Wilson v. Wainwright, 474 So. 2d 1162, 1164

(Fla. 1985), the Court cannot know what the outcome would have been had appellate counsel properly raised and argued this issue. Petitioner has, therefore, met the Strickland test and should be granted a new direct appeal. Wilson v. Wainwright, 474 So. 2d at 116. Alternatively, this Court should vacate Mr. Turner's death sentence.

B. APPELLATE COUNSEL'S ARGUMENT CONCERNING THE TRIAL COURT'S FAILURE TO FIND NONSTATUTORY MITIGATING FACTORS WAS SO DEFICIENT AND PREJUDICIAL TO MR. TURNER THAT IT DEPRIVED MR. TURNER OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In its sentencing order, the trial court a) found that the evidence did not support the statutory mitigating factors of extreme mental or emotional disturbance and substantially impaired capacity, but totally ignored the issue whether the nonstatutory mitigating circumstances of lesser levels of emotional disturbance and impaired capacity were present; b) failed to make any findings with respect to the nonstatutory mitigating circumstance that the killings were the result of a lovers' quarrel; and c) found that Mr. Turner had an honorable record of military service in wartime, but accorded that mitigating circumstance no weight. The failure to consider and weigh nonstatutory mental mitigating circumstances was clear error under Lockett v. Ohio, 438 U.S. 586 (1978); see Cheshire v. State, No. 74,477 (Fla. Sept. 27, 1990). The fact that a murder is the result of a lovers' quarrel was well recognized as a nonstatutory mitigating circumstance at the time Mr. Turner's appellate briefs were prepared, in 1986. See, e.g., Ross v. State,

474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Kampff v. State, 371 So. 2d 1007 (Fla. 1979).

Appellate counsel failed to bring these and other egregious errors in the trial court's sentencing order to this Court's attention on direct review. Counsel's failure in this respect constituted deficient performance, and Mr. Turner was prejudiced as a result.

1. Appellate Counsel Failed to Raise the Trial Court's Clear Error in Failing to Find Any Nonstatutory Mental Mitigating Circumstances.

With respect to the related statutory mental mitigating circumstances that the defendant was under the influence of extreme mental or emotional disturbance, Fla. Stat. § 921.141(6)(b), and that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, Fla. Stat. § 921.141(6)(f), the trial court made the following findings:

> 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.
>
> . . . .
>
> . . . . 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 the law was substantially impaired.

(R. 306-07) (emphasis original).

The trial court thus found that there was "ample evidence" that Mr. Turner was both emotionally disturbed at the time of the offense, and that his capacity was impaired. The court nevertheless rejected the application of the statutory mental mitigating circumstances on the basis that the Defendant's disturbance was not "extreme" and that his impairment was not "substantial." At that point, the court inexplicably dropped the issue of Mr. Turner's mental condition, without considering, discussing or weighing the nonstatutory mental mitigating circumstances that Mr. Turner suffered from a mental or emotional disturbance that was less than "extreme" and that his capacity was impaired but not substantially impaired.

A less than extreme emotional disturbance or a less than substantially impaired capacity are clearly valid nonstatutory mitigating circumstances. Under Lockett v. Ohio, 438 U.S. 586, 604 (1978), the sentencing court may not be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis original). It is self-evident that any degree of emotional disturbance or impaired capacity, regardless of whether it rises to the level required for the statutory mental mitigating circumstances, qualifies as an "aspect of the defendant's character or record" that just be considered as a nonstatutory mitigating circumstance under Lockett. The trial court committed clear error

in confining its analysis to the statutory mental mitigating circumstances. **See Cheshire**, supra, slip op. at 8 ("the trial court clearly erred in confining its written order solely to the statutory mental mitigating factor of 'extreme' emotional disturbance.").

Appellate counsel committed the same clear, and where an appellate advocate is concerned, particularly egregious error in briefing the issue on direct appeal. Counsel argued only that the trial court should have found the statutory mental mitigating circumstances of extreme mental or emotional disturbance and substantially impaired capacity. Initial Brief at 43-45. Nowhere does appellate counsel mention the nonstatutory mental mitigating circumstances, although the trial court itself noted that there was "ample evidence" of mental or emotional disturbance and impaired capacity. (R. 306-07). In a capital case, failure to notice and bring to this Court's attention clear Lockett error surely constitutes deficient performance. This deficient performance just as clearly prejudiced Mr. Turner, since such Lockett error is grounds for reversal. **See Cheshire**, supra, slip op. at 8.

2. Appellate Counsel Failed to Raise the Trial Court's Failure to Find that the Killings Were the Result of a Lovers' Quarrel.

The fact that a murder resulted from a lovers' quarrel is unquestionably a valid nonstatutory mitigating circumstance under Florida law. This nonstatutory mitigating circumstance was well established at the time counsel prepared and filed the appellate

briefs. See, e.g., Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Kampff v. State, 371 So. 2d 1007 (Fla. 1979); Chambers v. State, 339 So. 2d 204 (Fla. 1976).

In the instant case, there was overwhelming, direct and uncontroverted evidence of this nonstatutory mitigating circumstance, as set forth in Claim I above. Yet, in the trial court sentencing order, the court failed to even mention the applicability of this mitigating circumstance, apparently rejecting it without any serious consideration. The failure of the trial court to consider, find and weigh this mitigating circumstance, in the face of the massive and uncontroverted evidence set forth in part below, was also Lockett error.

Once again, appellate counsel failed even to mention this error in briefs or oral argument. Failure to raise such a significant and obvious error on direct appeal is deficient performance. The existence of this factor has been found significant in cases where this Court has found the death sentence disproportionate. See, e.g., Blair v. State, 406 So. 2d 1003; Halliwell v. State, 323 So. 2d 557 (Fla. 1975). There is a reasonable probability that had this issue been raised, the outcome of the appeal would have been different.

3. Appellate Counsel Failed to Raise the Trial Court's Error in According No Weight to the Mitigating Factor that Mr. Turner Served His Country Honorably in Time of War.

In its sentencing order, the trial court made the following

finding with respect to the mitigating factor of honorable service in the military during wartime:

> 1. The defendant served his country honorably in time of war. The Court finds this factor to exist but must consider the fact that the defendant was discharged in 1968. The Court attaches no significance to this factor.

(R. 307) (emphasis added).

There is no question that an exemplary military record, as indicated by honorable service in the military during wartime, is a valid nonstatutory mitigating factor. Halliwell, supra; see Camsbell, supra, 15 F.L.W. at 5344 n. 6. There is also no question that, as the trial court found, Mr. Turner served i n Vietnam and was honorably discharged. (R. 1258-59). Once this Court found the mitigating factor to be present, it was required to include it in the weighing process. As this Court recently stated in Camsbell, "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. Campbell, supra, 15 F.L.W. at 5344. Once again, while this principle was emphatically stated in Camsbell, it is implicit in Lockett, supra, and Eddings v. Oklahoma, 455 U.S. 104 (1982). There would be no point in requiring the sentencer to consider nonstatutory mitigation, if the sentencer, once having found valid nonstatutory mitigation to be present, could simply dismiss it as having no weight.

Appellate counsel failed to raise this clear Lockett/Eddings

error. Instead, counsel simply argued that the trial court should have found this mitigating circumstance. Initial Brief at 50-51. That was not, however, the error made by the trial court. The court found the mitigating circumstance, but accorded it no weight. Appellate counsel's failure to recognize and raise the error actually made by the trial court was ineffective.

The errors outlined above unavoidably skewed the trial court's entire weighing process with respect to the aggravating and mitigating factors. The trial court did not include in its weighing process the extremely significant mitigating factors of emotional or mental disturbance, impaired capacity, lovers' quarrel, and honorable combat military service. Therefore, it failed to afford Mr. Turner the individualized sentencing determination required by the eighth and fourteenth amendments.

Appellate counsel failed to bring any of these errors to this Court's attention.1 The most significant and damaging errors committed by the trial court in its sentencing determination went unaddressed on Mr. Turner's direct appeal.

Appellate counsel's performance was far below that expected of appellate counsel in capital cases, and Mr. Turner was prejudiced because, individually and especially together, the errors were serious enough as to undermine all confidence that the direct appeal was correctly decided. Mr. Turner should be granted a new appeal and the case should be remanded for resentencing.

C. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE AND IN FINDING AND WEIGHING SAME

In his Initial Brief on Appeal, appellate counsel conceded the applicability of the aggravating circumstance under Section 921.141(4)(A), Florida Statutes, that:

> The defendant has been previously convicted of another capital offense or a felony involving the use of violence.

Initial Brief at 35.

Appellate counsel's concession constituted ineffective assistance. Counsel failed to investigate the easily accessible legislative history of this aggravating circumstance. Had he taken this simple and obvious step, he would have found that in passing the 1972 Florida death penalty legislation, the Legislature very clearly rejected aggravation of a capital offence based on a simultaneous conviction for a second homicide.

Chapter 72-72, Laws of Florida, in its initial form as Senate Bill No. 465, listed the following <u>two</u> relevant aggravating circumstance:

> (b) The defendant was <u>previously</u> convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) <u>At the time</u> the capital felony was committed the defendant also committed another capital felony.

(Emphasis added.) This language was derived directly from the Model Penal Code, § 210.6(3)(b)(c).

The Commentary to the Model Penal Code, from which the language of the Florida Statute was drawn, explains very clearly

that the first aggravator quoted above was intended to be limited to offenses committed prior to the instant offense:

> Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggest two inferences supporting the escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some further occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

By comparison, the second aggravator quoted above, which was eliminated from Senate Bill 465, was directed at contemporaneous killings:

> Paragraphs (c) and (d) (knowing creation of homicidal risk to many persons) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons.

When the Legislature subsequently eliminated paragraph (c) quoted above, it very clearly expressed its intention that the aggravator at issue here only be applicable where the prior conviction was obtained in a prior case and was not a part of the case giving rise to the capital conviction on which the defendant is being sentenced. This is eminently sensible since the legislature quite reasonably was focusing (a) on the issue of failed rehabilitation, i.e., the defendant was already given a second

chance, and (b) the issue of propensity or future dangerousness, themes that have historically been quite prominent in death penalty legislation. The interpretation then of this aggravator which has allowed its application to cases involving more than one homicide does not address this historical concern and, in effect, becomes a multiple-offense aggravator rather than a failed rehabilitation/propensity aggravator. Had appellate counsel been effective in pursuing this claim, he would have uncovered this legislative history which in turn would have precluded any finding of the prior violent felony aggravator. In this regard, this court's conclusion in King v. State, 390 So. 2d 315, 320 (Fla. 1980), that:

> The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance

for which the court gave no authority, is clearly contradicted by the facts recited above.

Further, because this aggravator was inapplicable as a matter of law, appellate counsel was also ineffective for failing to argue that the jury should not have been instructed on this aggravator.

The error which appellate counsel failed to advance can not be considered harmless beyond a reasonable doubt for a variety of reasons. First the trial judge indicated that this aggravator was the preeminent reason for imposition of a death sentence (even though it was equally applicable to the simultaneous life sentence) (R. 1321-23; MV 304). Second, the jury vote for seven-to-five in favor of death indicated that the decision to impose death was

reached by the narrowest of margins. Third, given the evidence of mitigation presented, the error can not legally be treated as harmless, see Elledse v. State, 345 So. 2d 998 (Fla. 1977), cert. denied, 459 U.S. 981 (1982). Petitioner is entitled to a new sentencing hearing before the jury, Jones v. State, ___ So. 2d ___, 15 F.L.W. S469 (FSC Case No. 72,461, September 13, 1990), or in the alternative, a life sentence should be imposed because without the aggravator the sentence is disproportionate.

D. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT ERRED IN FINDING THE HOMICIDE WAS COLD, CALCULATED, AND PREMEDITATED BECAUSE OF UNCONTROVERTED EVIDENCE OF PRETENSE OF MORAL JUSTIFICATION

The aggravating circumstance at issue here reads as follows:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla. Stat. § 921.141(5)(i). Thus, application of this aggravator requires proof beyond a reasonable doubt of three elements:

(a) The capital felony was a homicide;

(b) The capital felony was committed in a cold, calculated and premeditated manner;

(c) The capital felony was committed without any pretense of moral or legal justification.

(Emphasis added.)

In the instant case, the defense presented extensive and unrebutted evidence that Mr. Turner was clearly possessed of a "pretense of moral ... justification" for his actions. Yet appellate counsel ineffectively failed to argue this on appeal.

First, Dr. Daniel Stinson, Chief of Psychiatry at St. Vincent's Medical Center in Jacksonville (R. 763-64), testified that Mr. Turner was insane at the time of the offense. Pertinent to this issue, he testified:

> I believe that from the data [Mr. Turner] may well have thought that he was doing, that he did not believe that he was wrong.
>
> * * *
>
> I feel that he believed that he was justified,... .
>
> * * *
>
> Well, as I said, if he believed that he was doing the right thing, getting rid of this person who had done the bad things, it becomes a morality play, ...
>
> * * *
>
> [H]e didn't know what he was doing was wrong, is probably the major issue here.

(R. 793, 821, 830, 832) (emphasis added).

Second, Dr. George Barnard, forensic psychiatrist associated with Shands Teaching Hospital in Gainesville (R. 872-74), testified for the state:

> I think that [Mr. Turner] certainly had a lot of anger and rage toward her. How justified it was I don't know, but as he perceived it, it was certainly justified.

(R. 930) (emphasis added).

Finally, the most compelling testimony regarding this aggravator came from state witness Dr. Ernest Miller, **Chief** of Psychiatry at University Hospital in Jacksonville (R. 935-36):

> Q. Did you conclude, Dr. Miller, that Mr. Turner honestly believed that his wife was

having a lesbian affair and a prostitute in that house in the presence of his children?

A. Yes.

(R. 984) (emphasis added).

Dr. Miller also testified that Mr. Turner had tried to prevail upon his wife to see a priest for counseling but that she had refused (R. 987) and that his intent when he went to the house that morning was to rescue his children. (R. 1006).

At the penalty phase, Dr. Miller testified further:

> Q. Dr. Miller, were you able to form an opinion or conclude if Mr. Turner at the time Shirley Turner and Joyce Brown died felt any pretense of legal or moral justification.
>
> [Prosecutorial objection overruled.]
>
> A. The patient, from my discussions with him and from my reading of the various other materials furnished, was rightly or wrongly convinced and believed that his daughter was being subjected to unorthodox and potentially damaging sexual exhibitions. He otherwise viewed the environment as unwholesome and I think from the standpoint of the question posed, he felt a level, some level of moral reasoning or explanation or purpose in the acts which he executed that day, so in general the answer to your question is yes.

(R. 1231-2)[13] (emphasis added).

The state in no way rebutted or even disputed this testimony. Thus, the state failed to prove beyond a reasonable doubt that Mr. Turner had no "pretense of moral or legal justification" for the killing of his wife and Joyce Brown, As such, this aggravator was

[13]This Court's opinion at 51, n.4, reflects an inaccurate perception that the evidence was based on testimony of only one doctor.

improperly applied. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988). Nevertheless, the trial court did not even consider the evidence on this point. (R. 305).

The opinion of this Court on direct appeal states:

> We are satisfied that the judge did not err in finding heightened premeditation without any pretense of moral or legal justification.

Turner v. State, 530 So. 2d 45, 51 (Fla. 1988). By way of footnote, the Court explained:

> We emphasize that these beliefs, as recounted to his examining psychiatrist and subsequently testified to by this doctor, are not supported by record evidence.

N. 4, at 51.

The precise meaning of this footnoted explanation is unclear. If the Court was rejecting this evidence because the defendant did not testify, that would clearly run counter to the Fifth Amendment to the United States Constitution and Article 1, Section 9 of the Florida Constitution. On the other hand, if the Court was setting out a new heightened standard of evidence that a defendant must present when challenging this aggravator, that would run afoul not only of constitutional limitations and basic evidence law but also of this Court's prior decisions in this area.

Rather, it appears that the court was applying an objective standard for determination, and judicial approval, of this element, i.e., if the defendant does not present proof of a basis for his beliefs, the aggravator will be applied. This standard is clearly contrary to the legislative history of this provision, the clear

meaning of the statutory language, statutory rules of construction, and prior case law, and appellate counsel was ineffective for failing to adequately present these frailties.

First, appellate counsel was clearly ineffective in the citation and argument of relevant case law. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). In Cannadv v. State, 427 So. 2d 723 (Fla. 1983), this Court struck the imposition of this aggravator where the only evidence of a moral or legal justification was the defendant's self-serving and after-the-fact assertions in his confession that the victim jumped at him. Nevertheless, this Court wrote:

> Though these factors [victim was quiet minister shot five times] may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In the instant case, the evidence established that Mr. Turner held his beliefs of moral justification prior to the deaths. Three psychiatrists testified, two for the state, that he in fact sincerely believed his actions were morally justified. Thus, there was no question or danger here (unlike in Cannadv) that the allegation of moral justification was manufactured after the fact. Failure of this court to grant Mr. Turner the same consideration of this factor as Cannady was error, and failure of appellate counsel to cite and argue this supporting case law was clearly ineffective.

Second, appellate counsel was ineffective for failing to adequately present the factual evidence supporting this argument. The Initial Brief of Appellant in this Court contained only four sentences subsumed in the challenge to the finding that the murder was cold, calculated, and premeditated (at 42-43).

Yet, as quoted hereinabove, there was much expert testimony that Mr. Turner sincerely possessed these beliefs of moral justification. This court's footnoted reference to "one" doctor is an error of fact directly attributable to the Initial Brief of Appellant, at 43. The evidence at trial reflected that Mr. Turner's wife left him and moved in with Ms. Brown, moving his daughter from a good neighborhood to an inner-city slum where drugs and prostitution were rampant; Ms. Brown interceded to tell Mr. Turner he couldn't see his wife and kids when he came; Ms. Brown signed the Baker act papers along with his wife; and there was a stream of men, to whom the women sold drinks by the glass, in and out of the house.

In Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1548, 103 L.Ed. 2d 852 (1989), this Court set forth a guide for application of this aggravator:

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless, rebuts the otherwise cold and calculating nature of the homicide.

(Emphasis added.) Petitioner's evidence cited above obviously constitutes "any claim" of justification.

Third, appellate counsel was ineffective for failing to adequately distinguish prior case law on this issue. Most cases which have dealt with this issue have involved claims that the homicide was committed in self-defense. See, e.g., Cannady v. State, supra; Williamson v. State, 511 So. 2d 289 (Fla. 1987), cert. denied, 485 U.S. 929 (1988); Banda V. State, supra; Christian v. State, 550 So. 2d 450 (Fla. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1475, ___ L.Ed. 2d ___ (19__).

The historical presentation of this issue in the context of claims of self-defense has clouded the fact that that factual scenario is not the only one to which this circumstance is applicable. A helpful analogy can be made -- and seems to be apparent -- from this Court's analysis in Banda v. State, supra, quoted above. The element of malice aforethought in a murder case can be rebutted by a showing of justification or excuse, such as self-defense; while that showing may not negate quilt entirely, it can refute the element of malice aforethought and reduce the level of culpability. Likewise, in a capital sentencing proceeding, the question of whether there was that "heightened premeditation" necessary to impose the aggravator of cold, calculated and premeditated can be rebutted or reduced by a showing that there was some evidence of self-defense. However, just as a claim of self-defense cannot be the only factual basis sufficient to negate malice aforethought, it cannot be the only basis sufficient to constitute "moral or legal justification" and thereby rebut an allegation of "heightened premeditation." As the element of malice

aforethought can be negated by proof that the killing occurred "in the heat of passion," so may the charge that a homicide was "cold, calculated and premeditated" be negated by a showing that the homicide was a crime of passion. Here, among much other evidence on this point, the state's expert witness, Dr. Ernest Miller, testified that Mr. Turner's actions were clearly the product of "hot blood" and were not cold-blooded, deliberate, and calculated as in contract or execution-style murders. (R. 982-3, 991).

Fourth, in this same vein, appellate counsel was ineffective for failing to argue the distinction between moral and legal justification. Just because prior presentations of this issue have focused the Court's attention on "legal" justification, i.e., self-defense, the statute clearly provides equal footing to "moral" justification. Mr. Turner presented substantial proof of moral justification.

Fifth, appellate counsel was ineffective in failing to argue to this Court the statutory construction relevant to the application of this factor as well as the clear meaning of the statutory language. The Court's concern with the lack of <u>proof</u> of Mr. Turner's belief that he was morally justified was evident at oral argument and certainly in its decision. Yet, at neither point did appellate counsel address these concerns.

The statute clearly provides that a defendant may rely on a <u>moral</u> justification. The statute does not say "<u>proof</u> of a moral justification"; it does not say "moral ... justification acceptable to the trial judge or a majority of the Florida Supreme Court";

rather, it says "any pretense of moral justification." (Emphasis added.)

The Model Penal Code, from which the Florida statute was derived, couched this consideration as a mitigator:

> The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. (Emphasis added.)

Model Penal Code, § 210.6(4)(d). Thus, it was clearly grounded on a subjective belief and focused only on moral -- as opposed to legal -- justification. The Commentary to the Model Penal Code reflects that this factor was intended to extend to even an "idiosyncratic" belief in justification.

The thorniest question of judicial interpretation here is the language "without any pretense of" a moral or legal justification. The various dictionaries give diverse definitions of "pretense":

> 1: a claim made or implied esp: a claim indicated outwardly but not supported by fact 2 a: mere ostentation: Pretentiousness b: a pretentious act or assertion 3: an attempt to attain a certain condition or quality 4 a: obs: Intention, purpose b: professed rather than real intention or purpose: cover, pretext, excuse 5 a: something alleged or believed on slight grounds: an unwarranted assumption b: make-believe, fiction 6: the act of offering something false or feigned: presentation of what is deceptive or hypocritical: deception by showing what is unreal or concealing what is real: false show: simulation

Webster's Third New International Dictionary (1981), at 1797.

> 1: a claim made or implied; esp: one not supported by fact 2 a: mere ostentation; Pretentiousness b: a pretentious act or assertion 3: an inadequate or insincere attempt to attain a certain condition or quality 4:

> professed rather than real intention or purpose: 5: make-believe, fiction 6: false show :simulation

Webster's Ninth New Collegiate Dictionary (1988), at 932. Webster's Collegiate Thesaurus (1976), at 625, offers the following:

> 2 the offering of something false as real or true
> syn charade, disguise, make-believe, pageant, pretentious, pretentiousness
> rel deceit, deception, fake, fraud, humbug, imposture, sham; affection, air, mannerism, pose
> con sincereness; reality, soundness, substantiality, validity; fairness, honesty
> ant sincerity
> 3 syn mask 2, cloak, color, coloring, cover, facade, face, false front, guise, masquerade

The Court's choice of definition quoted in Banda, supra, at 225, n. 2, is curiously the narrowest definition given by virtue of the implication from the phrase "slight grounds"[14] that a defendant must present some "support" for the claim. Given the definitions of "pretense" and the clear legislative intent to focus this aggravator on execution-style or contract murders, it logically follows that the choice of the word "pretense" was to apply this aggravator to, e.g., a contract killer who coldly admits guilt and does not even pretend to have (i.e., without any pretense of) any excuse or justification; the killing was simply a matter of money or some perverse notion of fun. In this light, it appears clear the use of the phrase "without any pretense of" (emphasis

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14. "Webster's Third New International Dictionary 1797 (1981) defines [pretense] as 'something alleged or believed on slight grounds: an unwarranted assumption. ...'" Id.

added) was intended to prohibit application of this aggravator where a defendant -- as here -- sincerely believes he was justified or even, as in Cannady, does offer some justification or excuse, regardless whether it is real or imagined, subjective or objective, sympathetic or unsympathetic. Thus, the legislature allowed that, if there was any evidence -- or even any pretense -- the defendant possessed a moral or legal justification, this aggravator would not be applicable.

The court's construction of this element of the aggravator is thus contrary to established statutory rules of construction. Rules of statutory construction mandate that this language be construed in the light most favorable to the defendant. Fla. Stat. § 775.021(1). Ex parte Amos, 93 Fla. 5, 112 So. 289 (1927). With all due respect, just the opposite has been done, and appellate counsel was deficient for failing to argue (a) that rules of statutory construction prevented application of this aggravator to him, and (b) the evidence showing that there were, at the minimum, "slight grounds" for Mr. Turner's beliefs. See Banda v. State, supra.

In sum, appellate counsel was ineffective for failing to adequately prepare, research, brief, and argue that the aggravator of cold, calculated, and premeditated did not apply because Mr. Turner was clearly possessed of a "pretense of moral ... justification" for the offense. These failures of appellate counsel constitute a serious and substantial deficiency on the part of Mr. Turner's appellate counsel. If this issue had been properly raised

on direct appeal, there is a reasonable probability, in light of the mitigating evidence, Elledge V. State, 346 So. 2d 998 (Fla. 1977), and close seven to five vote of the jury, see Way v. State, 15 F.L.W. S456, No. 73,649 (Fla. Sept. 6, 1990), that this Court would have found that the sentencing error improperly contributed to Mr. Turner's death sentence, requiring resentencing or, the alternative, the death sentence was disproportionate given the crimes committed. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988).

E. THE FAILURE OF APPELLATE COUNSEL TO RAISE THAT THE TRIAL COURT IMPROPERLY PRECLUDED DEFENSE COUNSEL FROM ARGUING AS MITIGATION THAT MR. TURNER COULD BE SENTENCED TO TWO CONSECUTIVE MINIMUM TWENTY-FIVE YEAR PRISON TERMS AND THE FAILURE TO RAISE THE TRAIL COURT'S REFUSAL TO GIVE A JURY INSTRUCTION TO THIS EFFECT CONSTITUTED INEFFECTIVE ASSISTANCE

Lockett v. Ohio, 483 U.S. 586 (1978), stands for the proposition that "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," may not be precluded from the sentencers' consideration. Id. at 604. As this Court has noted, "The potential sentence is a relevant consideration of 'the circumstances of the offense' which the jury may not be prevented from considering." Jones v. State, No. 72,461 slip op. at 12 (Fla. Sept. 13, 1990). Jones, in turn relied on McCleskey v. Kemp, 481 U.S. 279, 304 (1987), decided before Petitioner's direct appeal. McCleskey recognized that the state may not narrow a sentencer's discretion to consider relevant

evidence "that might cause it to decline to impose the death sentence." Id. (emphasis added).

Here, inconsistent with McCleskey and just as was the case in Jones, defense counsel was precluded from arguing to the jury that Mr. Turner faced a potential sentence for at least fifty years before parole eligibility, rather than a twenty-five year sentence, should he receive life sentences on each of the two homicides. Further, during the penalty phase charge conference, defense counsel specifically requested such a jury instruction and also further requested that he be permitted to argue this to the jury: "I think they're entitled to know that this Court, absolutely, this Court can sentence him to a minimum of 50 years." (R. 1299). Both the state and the trial court concededly recognized defense counsel wanted to argue this as mitigation. (R. 1300, 1303).

The trial court denied defense counsel's request. (R. 1305). After the penalty phase closing argument during which defense counsel did not mention or argue the fifty-year minimum mandatory question, defense counsel again objected to the court's improper preclusion of his argument:

> MR. COXE: . . . . I also object to the Court not including language as requested at the earlier charge conference that the defendant may be sentenced to consecutive sentences with a minimum possibility of 50 years without parole and the Court's instruction, as I understood it myself, that I could not argue that to the jury.
>
> THE COURT: . . . . Those objections all were previously noted during the charge conference and are a matter of record. I've ruled on them previously and I will affirm those rulings and overrule those objections at this

time.

(R. 1364) (emphasis added).

It is apparent that the trial court prevented defense counsel from arguing the appropriateness of a life sentence based on the fact that if not executed Mr. Turner could be sentenced to two consecutive life sentences for a minimum of fifty mandatory years, at which date of parole eligibility, he would be ninety years old. Further, the Court refused to give a jury instruction to that effect.

It is undisputed that the right to due process and effective representation of counsel demands that a defendant, through his counsel, be afforded an adequate opportunity to address the appropriateness of any death sentence. Here, the trial court's restriction of defense counsel's argument interfered with counsel's ability to adequately represent his client under the Florida and United States Constitutions. A jury recommendation in Florida is afforded great weight by the sentencer. In restricting defense counsel's ability to argue the appropriateness of a life sentence due to the fact that Mr. Turner would have been removed from society for a period of at least fifty years, the judge prevented defense counsel from addressing an extremely relevant consideration to the jury is assessment of whether death should be their recommendation.

Further, precluding the presentation of accurate information to the sentencing jury denied Petitioner his right to a reliable sentencing determination. Here, the difference between twenty-five

and fifty years meant the difference between real natural life in prison and a real possibility of parole someday. "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976). The defendant is entitled to be sentenced by a jury with accurate facts. Without accurate information, the Petitioner was deprived of a sentencing phase that comports with both the Florida and United States Constitutions.

The refusal to give the aforementioned instruction or to permit defense counsel to inform the jury of the possibility of a fifty-year minimum mandatory term was highly prejudicial especially considering the narrow seven-to-five jury vote on death. In an analogous capital case involving the preclusion of jury consideration of mitigating character and circumstance evidence, and a seven-to-five death recommendation, the Florida Supreme Court recently held it could "not be certain . . . one additional juror would not have voted for life" absent the failure to consider the mitigating material. Way v. State, slip op. at 6-7 (Fla. Sept. 6, 1990). Only one person voting differently would have meant life for William Turner.

Here, the state exacerbated the prejudice resulting from the trial court error by twice referring to "twenty-five years" (R. 1337) and implying in their penalty phase closing argument that twenty-five years was not a long time:

> Now, it's not unusual, ladies and gentlemen, for some people to argue that with an

> individual convicted of first degree murder if you recommend life in prison he has to spend 25 years, that's a lons time, and that's a fate as bad or worse than death. Well, ladies and gentlemen, a lawyer would not argue for somethins worse for his client. The worst thing that can happen to William Thaddeus Turner, the thing that this murderer fears most is death.

(R. 1337) (emphasis added).

Appellate counsel was ineffective for failing to adequately raise the aforementioned issue. The issue was amply preserved at trial and appellate counsel's omission was unexplainable.

This failing was not harmless. If this issue had been properly raised on direct appeal, there is a reasonable probability in light of the mitigating evidence, see Elledge v. State, 346 So. 2d 998 (1977), and close jury vote, see Way v. State, 15 F.L.W. S456, No. 73,649 (Fla. Sept. 6, 1990), that this Court would have found that the sentencing error improperly contributed to Mr. Turner's death sentence, requiring resentencing or, in the alternative, that the death sentence was disproportionate given the crimes committed. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988).

F. APPELLATE COUNSEL'S FAILURE TO RAISE THE TRIAL COURT'S PREJUDICIAL RULINGS AND EXCLUSION OF DEFENSE EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE

Trial court rulings as to the admissibility of evidence and denial of a continuance severely handicapped the presentation of a complete defense. These actions and rulings denied Mr. Turner an opportunity to fairly and fully present his defense to the jury. Yet, unexplainably appellate counsel failed to raise these errors

on direct appeal. The failure to raise these meritorious claims constitutes a serious and substantial deficiency on the part of Mr. Turner's appellate counsel.

1. Denial of Continuance

It is abundantly evident in the trial record that counsel needed more time to prepare for the penalty phase. Indeed, with little warning, the date of Mr. Turner's penalty phase proceeding was abruptly changed from September 6, 1985 to August 23, 1985. Counsel were thus deprived of two weeks they believed they had available for conducting crucial preparation for this life and death proceeding.

At the commencement of the penalty phase, counsel for Mr. Turner moved for a continuance, citing the inadequate preparation that had been accomplished at that point:

> [MR. COXE:] . . . . To begin with, this Court, as I understood it on last Friday, had intended to schedule these proceedings for September 6th. We had discussed prior to the return of the verdict that if these proceedings were necessary that I on behalf of Mr. Turner, Mr. Smith on behalf of Mr. Turner, needed additional time within which to prepare for these proceedings and that was for purposes of obtaining the various documents . . . in locating witnesses . . . people who he was familiar with in school, in high school, . . . who could attest to his character and other persons who have known Mr. Turner throughout his life, has put us in the posture of being unable to obtain . . . so what we have to do today is present only what we have been able to obtain in the last five days.

(R. 1177-78). All these things that counsel "needed" to do in order to provide effective representation were thus not done, to

the manifest prejudice of Mr. Turner.[15]

Counsel could hardly have been clearer about the dire need for further preparation. He continued his appeal to the court for a continuance:

> We feel, given the fact that Mr. Turner is in a proceeding that is by all practical purposes the most critical proceeding in his lifetime and in these judicial proceedings, that **we** should be accorded the ability to fully investigate all the circumstances and matters in his backsround that we have not had time ad would not be able to do.

(R. 1179).

When the court denied defense's motion for a continuance, counsel repeated that he simply was not ready to do what had to be done that day:

> [**MR. COXE:**] . . . on Monday of this week I had represented that my primary concern was sufficient time to prepare and that this Friday [today] did not afford me that time.

(R. 1183).

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15. The reason for the trial court's unexpected decision to move the date of the penalty phase from September 6 to August 23, effectively wiping out two weeks of crucial trial preparation, **was** that one juror's Naval responsibilities required his presence at sea on the latter date. The state was unwilling to stipulate to the use of an alternate juror, although both alternates had sat for the entire guilt-innocence phase without being informed whether they were alternates or regular jurors (**see** R. 221-23, 307, 309). The court was unwilling to employ either of two alternative solutions it has proposed to the scheduling problem, using an alternate juror or proceeding with only eleven jurors, without the agreement of the state. Because the state refused to agree, the court opted for advancing the date of the proceeding two weeks to accommodate the juror who would be going to sea on August **24**, the day after the penalty proceeding. In denying the motion, the court told the parties to save their arguments "for the appellate court. . . I've already denied it. I'm not going to worry about why." (R. 1183).

Counsel thus proceeded to the penalty phase despite admitted inability and failure to conduct the necessary investigation and preparation. It was reversible error for the trial court to render counsel ineffective by the denial of continuance. See Note, A Capital Defendant's Right to a Continuance Between the Two Phases of a Death Penalty Trial, 64 N.Y.U. Law Rev. 579 (1989). Yet, appellate counsel ineffectively failed to raise this claim.

2. Exclusion of Defense Testimony on Insanity

The trial court erred in disallowing defense testimony from lay witnesses as to Mr. Turner's mental state. The defense was prohibited from presenting testimony from FBI Agent Rayfield that he had previously expressed an opinion that Mr. Turner was "wacko" (R. 735) and testimony from Detective Zipperer as to Mr. Turner's state of mind on the date of the offense. (R. 749). It is a well-established principle of Florida law that a witness who is not an expert may testify about a person's mental condition, provided the testimony is based upon personal knowledge or observation. Garron v. State, 528 So. 2d 353, 356 (Fla. 1988), quoting Rivers v. State, 458 So. 2d 762, 765 (Fla. 1984); see also Hixon v. State, 165 So. 2d 436 (Fla. 2d DCA 1964). It is true that in Garron, this testimony was limited to observations made in close time proximity to those events upon which appellant's sanity is in question. Id. at 357. However, at the time of Mr. Turner's trial, the test in Rivers was controlling. In Rivers, non-expert testimony was held to be admissible, provided the testimony was based upon personal knowledge or observation; no specific time period for these

observations was required. 458 So. 2d at 765. Therefore, all lay testimony regarding Mr. Turner's mental state should have been admitted.

The trial court further excluded lay testimony offered to prove Mr. Turner's state of mind on the basis that it was hearsay, even though the defense correctly and forcefully argued that it was not hearsay because it was not offered to show the truth of the matters asserted. (R. 716-29). Fla. Stat. § 90.801(2)(c) (1985).

Finally, the trial court also excluded testimony from Dr. Ernest Miller at penalty phase distinguishing Mr. Turner's mental state from that of contract murderers whom Dr. Miller had previously examined. (R. 1233). All of the rulings were error. Yet, counsel failed to raise them on direct appeal.

3. Denial of Proffer

Appellate counsel was ineffective for failing to raise the refusal to allow defense counsel an opportunity to make a proffer of excluded evidence. (R. 750). Piccirrillo v. State, 329 So. 2d 46 (Fla. 1st DCA 1976); Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982).

4. Improper Rulings on Evidence

Trial judge rulings on the admissibility of evidence were on occasion an abuse of discretion.

(1) First, the trial court prohibited the defense from introducing evidence that the victims had tried to have Mr. Turner committed under the Baker Act shortly before the murders (R. 695, 834, 1085-86), but then allowed the state to introduce a temporary

restraining order issued against Mr. Turner in a divorce action to show a prior threat against the victim. (R. 656, 688). Upon exclusion of the Baker Act evidence, the state argued at the guilt and penalty phases that Mr. Turner had no history of mental health problems! (R. 1097, 1334).

(2) The court allowed the state to play for the jury two times the tape of one victim's final pleas twice. (R. 681, 1117), but then prohibited the defense from introducing a letter from Mr. Turner's brother on the basis that it would "serve no purpose but to rehash his testimony." (R. 1198). Appellate counsel failed to raise these trial court errors.

5. Denial of Manslaughter Instruction

The trial court erred in denying the Defendant's Requested Instruction on Voluntary Manslaughter # 1 (R. 169, 841-42, 1037-38), which read:

> An intentional, unlawful killing committed while defendant was in the heat of passion brought on by a sudden provocation sufficient to produce in the mind of an ordinary person the highest degree of anger, rage or resentment that is so intense as to overcome the use of ordinary judgement, thereby rendering a normal person incapable of reflection, is manslaughter. Authority: Olds v. State, 33 So. 295 (Fla. 1902); Disney v. State, 73 So. 598 (Fla. 1916) and Taylor v. State, 444 So. 2d 931 (Fla. 1983).

The Standard Jury Instruction which was given reads:

> Before you find the defendant guilty of manslaughter, the state must prove the following two elements beyond a reasonable doubt:
>
> 1. Victim is dead.

2. The death was caused by the intentional act of the defendant to take life,

   A. Where the intentional act of the defendant was not premeditated, and
   B. Where the act of the defendant did not evince a depraved mind regardless of human life, and
   C. Where the act of the defendant was not justifiable or excusable homicide,

It is axiomatic that a defendant is entitled to an instruction which adequately covers the theory of his defense. Palmes v. State, 397 So. 2d 648, 642 (Fla. 1981). Here, the Standard Jury Instruction failed to do that. Yet appellate counsel failed to raise this meritorious issue.

If counsel had raised the aforementioned errors, there is a substantial probability that the outcome would have been different. Relief is warranted.

G. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ARGUE THAT THE ADMISSION IN EVIDENCE OF A TAPE RECORDING OF THE VICTIM BEING STABBED WAS **ESSENTIALLY** A HIGHLY PREJUDICIAL, **PROHIBITED** VICTIM IMPACT STATEMENT, ESPECIALLY WHEN PLAYED A SECOND TIME JUST BEFORE THE JURY **RETIRED, ALL IN VIOLATION OF** THE SIXTH, EIGHTH AND **FOURTEENTH** AMENDMENTS AND THEIR FLORIDA COUNTERPARTS

The trial court admitted into evidence **a** taped telephone conversation of the victim, Joyce Brown, made from the telephone booth where Mr. Turner stabbed her. This Court described the tape on direct appeal:

> Turner states repeatedly on the tape, "[y]ou're the one," to which Brown responds, "I didn't do nothing William." This exchange is followed by a **series** of accusations and

denials amid Brown's screams.

Turner V. State, 530 So. 2d 45, 50 (Fla. 1988) (following remand), cert. denied, 109 S. Ct. 1175 (1989).

On direct appeal, Mr. Turner's appellate counsel argued that the trial court abused its discretion by allowing into evidence this tape recording. Id. The claim, in essence, was that the tape was not relevant to any material issue and was therefore inadmissible. Id. See also Initial Brief at 19-21 and Reply Brief at 5-7. However, this Court found that the tape was relevant to premeditation and refused to disturb the trial court's "wide discretion concerning the admission of evidence,... unless an abuse is shown.*@ Turner at 50. The Court indicated that "Turner has shown no abuse." Id.

Appellate counsel failed to sufficiently show abuse because he failed to adequately point out to this Court: (1) the damning description by the trial judge himself as to the "very graphic" and "highly emotional" nature of the tape which "could have an emotional effect on anybody that's present"; (2) that the tape was played twice, the second time at the climax of the state's guilt phase closing argument just before the jury retired for their deliberations; and (3) that a transcript of the tape, as opposed to the playing of the tape itself, would have been more than adequate on the only real issue to which the tape was possibly relevant to, i.e., premeditation; (4) that playing the tape was tantamount to line victim impact testimony; and (5) any case law whatsoever illustrating that the probative value, if any, of the

tape was greatly outweighed by its extreme prejudice.

Mr. Turner's appellate counsel, therefore, did not render effective assistance because he failed to bring to this Court's attention all relevant arguments which show the trial court's ruling to be error.

1. The Highly Graphic and Emotional Nature of the Tape

The description of the tape recording by this Court (quoted below) does not adequately describe the nature of the tape, or the prejudicial effect it must have had on the jury. It must, unfortunately, be heard to appreciate the true prejudicial effect. The trial judge himself understood this; out of the presence of the jury, he stated to the audience in the courtroom:

> ... It's my understanding that we're going to listen to some tapes which may be very graphic, which may be highly emotional to those people who are present, ..."

(R. 612) (emphasis added). Later, the judge, outside of the presence of the jury, tells the audience:

> I have had the opportunity to hear [the tape], it is very graphic, could have an emotional effect on anybody that's present.

(R. 670) (emphasis added). The trial court made these statements out of concern that there could be an emotional display from the audience upon hearing the tape.

2. The Tape Was Played Twice

The trial court thus acknowledged the highly emotional effect of the tape. Assuming arguendo that it was proper to play the tape to the jury the first time, the second playing of the tape during

closing arguments was purely inflammatory and prejudicial to the Petitioner.

The tape was played twice in front of the jury (R. 681, 1117) and was allowed to be taken back to the jury room (though apparently without a tape player). (R. 1154, 1326). This was done over the stern objections of defense counsel. (R. 607-12, 613-18). The second playing occurred at the pinnacle of the state's guilt phase closing argument just before the jury retired for their deliberations. (R. 1117). This was also inconsistent with the trial judge's refusal to admit a letter of mitigation from Petitioner's brother into the jury room. That letter, read during the penalty phase of trial, set out various mitigating evidence and background with regard to the Petitioner and requested mercy. (R. 1190-96). Nevertheless, the trial judge refused to let the letter into the jury room.

> I'll sustain the objection to C [Greg Turner's letter] since the contents are before the jury and they would serve no purpose but to rehash his testimony.

(R. 1198) (Emphasis added). It is impossible to reconcile the trial judge's denial of defense evidence with the duplicate playing of the tape. The tape, just like the letter, should not have been "rehashed" to the jury, especially given its highly graphic and emotional nature.

3. A Transcript of the Tape Was All That Was Needed

Especially, the second playing of the tape during the climax of the state's guilt phase closing argument and just before the

jury retired for their deliberations was clearly so inflammatory as to create an undue prejudice in the minds of the jury. The trial court abused its discretion in allowing a tape recording of victim Joyce Brown being stabbed to be played to the jury, purportedly to show premeditation, when a transcript would have provided the jury with the same evidence. The state contends the words "you're the one" and "yes you did" directed at the victim show that Petitioner chose his victim and performed his acts from a premeditated state. (R. 617-18). Clearly, a transcript of the tape recording would have provided the same, if not better, presentation of that evidence:

> Dispatcher I: Ma'am, stop shouting, Tell me who he is.
> Ms. Brown: His name William Turner.
> Dispatcher: William Turner?
> Ms. Brown: yes.
> Dispatcher I: Black man?
> Ms. Brown: Hush, Baby. Hush, hush.
> Dispatcher I: Black man?
> Ms. Brown: yes.
> Dispatcher I: How old is he?
> Ms. Brown: 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)
>
> Ms. Brown: I didn't do nothing, William.
> Man: Yes, you did.
> Ms. Brown: I didn't do nothing.
> Man: Yes, you did.

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

Dispatcher I: I need the hotline.
Ms. Brown: (inaudible screaming) William --

The identity of the Petitioner was stipulated to by defense counsel.[16] (R. 617). The manner of death and particular wounds suffered were more than sufficiently developed by 43 photographs. State Exhibits 1-9, 15-48. The state's premeditation argument could have been made at least as well from a transcript of the recording. Therefore, the playing of the tape served no purpose but to inflame the jury and appeal to their emotions, in violation of Section 90.403, Florida Statutes (1989), and the trial court should have exercised its discretion to eliminate this prejudice when no harm would have done to the State as a result. Comsare Rutledge v. State, 374 So. 2d 975 (Fla. 1979) (tape recording of brutal stabbing of mother and three sons inadmissible to guilt portion of trial); Aetna v. Cooser, 485 So. 2d 1364, 1365 (Fla. 2nd DCA 1986) (videotape at stabbing victim's deathbed which recorded

16. How appellate counsel could have read the Record herein and argued as he did, that the defense also stipulated to premeditation is unfathomable. Initial Brief at 19.

anguished sounds of victim in last moments of life inadmissible, even though portions relevant).

4. The tape was essentially victim impact testimony

This case presents the ultimate victim statement. It is a well-established rule that the testimony of a victim's family is prohibited in a homicide prosecution when the proof can be made by alternate means because the danger of jury prejudice is so great. Weltv v. State. 402 So. 2d 1159, 1162 (Fla. 1981); see also Lewis v. State. 377 So. 2d 640 (Fla. 1979); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore V. State, 214 So. 2d 67 (Fla. 1st DCA 1968); Hathaway v. State, 100 So. 2d 662 (Fla. 3rd DCA 1958).

If the testimony of a victim's family is too prejudicial, how can live testimony of a victim herself actually experiencing the horror of murder be acceptable? There is no logical, rational basis to such a distinction.

This rule was recently discussed and extended in Jones v. State, No. 72,461 (Fla. Sept. 13, 1990), and the analysis there is equally forceful here. Relying on Booth v. Maryland, 482 U. S. 496 (1987), and Weltv v. State, supra, this Court wrote:

> [W]e conclude that the guilt phase identification of the victims by Brock's sister and brother and Perry's sister, in violation of Weltv, created an equal risk of an arbitrary capital-sentencing decision.
>
> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict

> based on sympathy and not on the evidence presented.
>
> Here, none of the relatives' testimony was necessary to establish the identity of the victims. It is apparent that such testimony was impermissibly designed to evoke the sympathy of the jury. We find that the trial court abused its discretion by denying Jones's objections to this testimony.

Jones V. State, supra, at 12-13 (emphasis added).

This argument is totally applicable to the instant case. How could jurors possibly remain unmoved by the tape of a woman screaming for her life and being stabbed 51 times? The jurors would inevitably have put themselves in her shoes. When the transcript could have been used, there was no excuse for the crushing prejudice of this emotional replay.

Appellate counsel was clearly ineffective for failing to argue the Welty line of cases.

5. Ineffectiveness of appellate Counsel and Reauested Relief

Counsel's omissions in this case are egregious and prejudicial. Counsel wholly failed to raise the fact and address the impropriety of allowing the tape to be replayed to the jury after the state's closing argument and just before the jury's deliberations. Appellate counsel never adequately addressed that a transcript rather than a tape would have equally served the evidentiary purpose. Nor did counsel point out the trial judge's own damning description of the "very graphic" and "highly emotional" tape and concern for emotional reactions by the audience. Nor did appellate counsel, in arguing that the prejudice

of the tape outweighed its probative value, cite any of the decisions referenced above. His only cite was to § 90.403, Fla. Stat., and the relevant discussion in Ehrhardt, Florida Evidence, § 401.3 (2d Ed. 1984). The argument in the Initial Brief covered a scant two and one-half pages, three-fourths of which was a discussion of and quotation from the tape itself. The same short treatment is given in the Reply Brief with no citations of authority whatsoever. Reply Brief at 5-7.

Appellate counsel's failure to forcefully bring these arguments to this Court's attention was a serious and substantial omission and the omission of these arguments was extremely prejudicial. Even if this Court determines that appellate counsel was not ineffective with regard to the guilt-innocence determination, he was nevertheless clearly ineffective for failing to raise this claim with regard to the penalty determination because of the constitutionally required heightened degree of reliability mandated before a death sentence may be upheld. See, e.g., Booth v. Maryland, supra, and Beck v. Alabama, 440 U.S. 625 (1980); see also Gardner v. Florida, 430 U.S. 349, 358 (1977)(any decision to impose death penalty must be based on reason, not emotion).

Because "[t]his Court's review of the propriety of death sentences and the proceedings in which they are imposed 'is no substitute for the careful, partisan scrutiny of a zealous advocate,'" Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986), quoting, Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla.

1985), the Court cannot know what the outcome would have been had appellate counsel properly raised and argued this issue. Petitioner has, therefore, met the Strickland test and should be granted a new direct appeal. Wilson v. Wainwright, 474 So. 2d at 1165.

H. IMPROPER AND FUNDAMENTALLY UNFAIR COMMENTS BY THE PROSECUTOR DURING CLOSING ARGUMENT IN BOTH GUILT AND PENALTY PHASE VIOLATED MR. TURNER'S RIGHT TO A FAIR TRIAL AND CONSTITUTIONAL CAPITAL SENTENCING DETERMINATION IN VIOLATION OF ARTICLE I, SECTIONS 9, 17, AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THESE FUNDAMENTAL ERRORS ON DIRECT APPEAL.

The prosecutor committed fundamental error in closing argument of both phases of petitioner's trial. Fundamental error that may be urged on appeal, though not properly preserved in the trial court, is error that amounts to a denial of due process. Steele v. State, 561 So. 2d 638 (Fla. 1st DCA 1990), citing Castor v. State, 365 So. 2d 701, 704 fn. 7 (Fla. 1978). In the instant case, each improper comment was deliberately calculated to shift the focus away from proper guilt/innocence and capital sentencing considerations thus denying petitioner both a verdict and sentence based on due process principles.

1. Guilt Phase Arsument

In the guilt/innocence phase the prosecutor improperly commented on Mr. Turner's right to remain silent; intentionally misled or tried to confuse the jury with an erroneous statement of the law; launched a personal attack on defense counsel; improperly

injected his personal beliefs concerning the strength of his case and the weakness of the defense case; appealed to the emotions of the jury, and invaded the province of the jury by insisting they had a "duty" to find petitioner guilty of two counts of first degree murder.

These comments taken individually as well as collectively violated petitioner's right to due process; undermined the confidence in the correctness of the verdicts, and utterly destroyed the reliability required by the eighth amendment in capital cases. As such, the comments complained of herein constituted fundamental error. Castor v. State, supra. Although there were no objections made at trial to the improper comments and arguments, appellate counsel was ineffective for failing to bring these fundamental errors to the attention of this Court on direct appeal.

2. Guilt Phase

It is axiomatic that "any comment which is 'fairly susceptible' of being interpreted as a comment on silence will be treated as such." State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). See also, State v. Murray, 443 So. 2d 955 (Fla. 1984); David v. State, 369 So. 2d 943 (Fla. 1979). Furthermore, the right to stand mute at trial is protected by both our state and federal constitutions. Commenting on a defendant's failure to testify is a serious error. State v. Kinchen, 490 So. 2d 21 (Fla. 1985). Comment on a defendant's post-arrest silence or the exercising of his right to not testify is subject to the harmless error analysis.

DiGuilio, supra. and Kinchen, supra.

In closing argument at guilt phase, the prosecutor commented to the jury, "There's no dispute with those threats, at least from Mr. Coxe. I haven't heard about him disputing those threats existed." (R. 1111). These purported threats were central to the state's contention that Mr. Turner planned to commit the offenses for which he stands convicted. Mr. Turner did not testify at trial.

Appellate counsel was ineffective for failing to bring the obviously improper comments to the Court's attention on direct appeal. Had he done so there is a reasonable probability that the outcome of petitioner's direct appeal would have been different.

Next, the prosecutor misstated the law and deliberately misled the jury concerning the propriety of a psychiatrist's determination that petitioner did not have the requisite intent to commit first degree murder. The prosecutor argued:

> Now, ladies and gentlemen, Dr. Miller was appointed by the court to examine the defendant in this case for one issue, and one issue only and that's sanity. He found the defendant, in his expertise as a forensic psychiatrist, sane. His expertise is solely to that psychiatric opinion of sanity or insanity, not to the intent of the defendant at the time of the offense. That determination is exclusively your province. The defendant (sic) is not qualified, in fact, no doctor is qualified to take that away from you. ...
>
> Dr. Miller is no more qualified in this area to ascertain the intent of a defendant, a defendant at a specific time, than you.

(R. 1092-1093).

Section 90.703, Florida Statutes (1985), reads:

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

Certainly, as a forensic psychiatrist, Dr. Miller was within his area of expertise to testify that Mr. Turner did not form the intent to kill required for a premeditated murder conviction. See also, Glendening v. State, 536 So. 2d 212 (Fla. 1988) where a qualified expert was permitted to testify to the ultimate question in issue.

The prosecutor, by telling the jury that his own expert mental health witness was not qualified to testify to mental mitigating factors, misstatedthe law, misled the jury and deprived petitioner of his right to a verdict and sentence based on due process of law. Appellate counsel was ineffective for failing to raise this point on direct appeal. Had he done so, there is a reasonable probability that petitioner would have prevailed on appeal.

Third, the prosecutor went outside the boundaries of proper closing argument when he made personal attacks on the integrity of defense counsel. Resorting to personal attacks on opposing counsel is an improper trial tactic which can poison the minds of the jury. Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984), citing Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979), cert. denied, 386 So. 2d 642 (Fla. 1980). As this Court noted in Adams v. State, 192 So. 2d 762 (Fla. 1966), prejudicial comments aimed at the defense attorney "would not constitute fatal error were their effects

limited solely to the person toward whom they were formally addressed -- the defense attorney. We are concerned, however, that the remarks might have attitudinized the jurors against the appellant, and as such be prejudicial to his cause." Id. at 764.

Below, the prosecutor implied defense counsel was deceitful when he told the jury, "Is that enough time for reflection, to know what he's doing? An intent to kill, premeditation. It exists here. Mr. Coxe just doesn't want to tell you about it." (R. 1113). Shortly thereafter, the prosecutor again attacked the integrity of defense counsel by arguing, "Remember now, ladies and gentlemen, again, Mr. Coxe (defense counsel) [is] trying to twist things around on you in his closing argument about the state switching from their opening statement on premeditation, talking about premeditated intent to kill and felony murder.... " (R. 1114). As his last shot at defense counsel, the prosecutor told the jury, "One other factor that Mr. Coxe didn't talk to you about that the court will instruct you is there's an instruction included therein concerning flight...." (R. 1115).

Each of the comments set out above constitutes an improper attempt to influence the jury to return verdicts of guilty based not on the evidence but on the prosecutor's personal opinions as to defense counsel's integrity, derogation almost necessarily imputed to the defendant. Either a verdict or a sentence based even in part on such considerations would violate petitioner's right to due process. Appellate counsel was ineffective for failing to bring these wholly impermissible comments to this

Court's attention on direct appeal.

Next, the prosecutor advised the jury what his personal opinion was regarding the evidence adduced at trial. He opined:

> "I think that indicates to You the defendant was purposeful" [when he committed the offenses] because he was calm when he was arrested. (R. 1058).
>
> "Another thins that I thought was significant was that Officer Burton testified that the lock on the residence had been broken ... he forced himself through the door, burglary." (R. 1059).
>
> "I think it's significant to note that [the FBI agents who testified] stated the defendant was preoccupied with his marital situation, he was emotional, but then they interviewed him.. . two and a half weeks before the murder, the defendant was normal...." (R. 1063).
>
> "...the defendant was normal, in touch with reality, responsive, understood who they were, the situation, the situation at hand, responsive to their questions, didn't have any problems with his reality contact at that point, and I think that's significant and that's some evidence that we'll ask you to consider." (R. 1063-1064).
>
> "Well, I think as the psychiatrist, Dr. Barnard and Dr. Miller both indicated, *** the defendant realized the authority of the police ... and succumbed to it and based on Officer Vehosh's directions, responded thereto." (R. 1096).

Each instance where the prosecutor expressed his personal opinion was improper. Expressions by the prosecutor of personal statements, opinions and beliefs unfairly exploit the prosecutor's standing, prestige and experience with the jury and impair the objective detachment that should separate the attorney from the cause for which he argues. Furthermore, by personally expressing

his opinions and beliefs, the prosecutor becomes an unsworn witness whose credibility is virtually unrefutable. Additionally, implicit in the right to trial by jury is the right to have that jury decide all relevant issues of fact and to weight the credibility of witnesses. United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969). Accordingly, the Second Circuit Court of Appeals ruled in United States v. Modica. 663 F.2d 1173, 1179-1180 (2d Cir. 1981), the comment in closing argument that "I'm here to tell you that Mr. Amato's testimony when it relates to the evidence in this case is truthful," was improper. The court reasoned , "The jury knew that (the prosecutor) has prepared and presented the case and that he has complete access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be." See also, United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972).

In the instant case, the prosecutor's repeated expressions of opinion concerning what he felt was significant evidence were improper. The opinion testimony given by the prosecutor deprived petitioner of his rights guaranteed by the state and federal constitutions as set out above in the heading of this issue.

The prosecutor did not stop with simply giving his opinion about the evidence. He also attempted to secure guilty and death verdicts by appealing to the emotions of the jurors when he argued, "I'm sure you recall the testimony of little Anetra, little Anetra

Turner who in a moment of just unimaginable terror saw the brutal murder of her mother...." (R. 1061).

The law is well settled that the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. United States v. Mordica, 663 F.2d 1173, 1181 (3d Cir. 1981), cert. denied, 450 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982). Put another way, "the only purpose of closing argument is to help the jury in evaluating the evidence." United States v. Rodriguez, 765 F.2d 1546, at 1559 (11th Cir. 1985). See also, ABA Standards for Criminal Justice 3-5.8(c) (2d ed. 1980) (The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.) When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberation, a prosecutor has ventured far outside the scope of proper argument. Garron v. State, 528 So. 2d 353, at 359 (Fla. 1988).

By urging the jury to "recall the testimony of little Anetra... who in a moment of just unimaginable terror saw the brutal murder of her mother" (R. 1061), the prosecutor ventured far outside the scope of proper argument. Garron, supra. Given the expert testimony that petitioner did not have the requisite intent to commit first degree murder along with the other problems in the

state's case, there is a reasonable probability that, but for the state's improper and grossly inflammatory closing argument, the outcome of the case might have been different.

The last improper argument in the guilt phase occurred when the prosecutor advised the jury they had a "sworn duty to convict the defendant of the charges that you are convinced of." (R. 1053). This comment improperly invaded the province of the jury and ignored their inherent power to render a jury pardon. Furthermore, it understated the correct legal standard of proof necessary to obtain a conviction, i.e., that the jury must be convinced of the accused's guilt beyond a reasonable doubt before returning a guilty verdict.

All the improper comments and arguments set out above both individually and collectively violated petitioner's constitutional rights as delineated in the heading of this issue. But for the improper arguments, there is a reasonable probability that the outcome of the trial would have been different.

3. Penalty Phase Argument

In closing argument of penalty phase, the prosecutor repeatedly made grossly inflammatory and prejudicial comments which in turn destroyed the reliability of the sentencing procedure.

The prosecutor prefaced his closing argument in penalty phase by telling the jury that the state would rely on the evidence and exhibits previously introduced at trial. He then proceeded to recount the evidence in a manner that clearly left the jury with the impression that non-statutory aggravating circumstances could

be considered in deliberating Mr. Turner's fate. He began his tirade by repeatedly referring to Mr. Turner as "this murderer." (R. 1320), and went on as follows:

> Now, this defendant -- excuse me -- ladies and gentlemen, this murderer, because he is not a defendant anymore....
>
> He's a murderer. ... We're talking about William Thaddeus Turner, murderer. ... What do we do in society with murderers?

(R. 1320).

> Now, Dr. Miller's opinion, frankly, rests almost totally on the statements of the murderer seated right over there at the table.

(R. 1332).

Comments such as these are totally inappropriate. The jury was fully aware that Mr. Turner committed the offenses. The prosecutor's repeated efforts to rile the jury by referring to Mr. Turner as a murderer and insinuate that he should be considered as something less than human were improper. There was no conceivable reason relevant to any valid sentencing criteria to stress this point. See, Section 921.141, Florida Statutes (1984). The sole purpose for the prosecutor's argument was to attempt to make the jury despise and fear Mr. Turner. This was improper and wholly unrelated to any legitimate sentencing criteria. Furthermore, this argument resulted in the strong likelihood that Mr. Turner's sentence was based on unconstitutional sentencing considerations.

Next, the prosecutor proceeded to use criteria and language purposefully designed to leave such a shocking picture in the minds of the jurors that the sentence recommended by them was actually

based on non-statutory aggravating circumstances. He described the offenses as "vile, brutal, despicable (and) awful" (R. 1325); he instructed the jury that "The anguish, the sheer horror that Joyce Ann Brown experienced and the length of this brutal attack... are facts you can consider" (R. 1326); and that petitioner "show[ed] her no mercy [and] cut her literally to pieces" (R. 1326); that "the size of that defendant compared to the victim's, the helplessness against someone like that" was a relevant sentencing consideration (R. 1327); and that one murder was committed in front of two children (R. 1341).

Sentencing criteria are restricted to enumerated circumstances surrounding the offense, the accused's background and his prior record. None of the above-mentioned criteria argued by the prosecutor were legally proper considerations for sentencing purposes and as such violated Mr. Turner's right to due process of law. Improperly implanting these highly inflammatory matters in the minds of the jurors immediately prior to their sentencing deliberations could clearly prejudice Mr. Turner. But for appellate counsel's failure to raise this issue concerning the improper closing argument, there is a reasonable probability that the outcome at sentencing would have been different.

CLAIM III

THIS COURT SHOULD REVISIT THE CONSTITUTIONAL PROPRIETY OF PETITIONER'S CONVICTION AND SENTENCE BECAUSE THE FAILURE TO REQUIRE A SPECIAL VERDICT VIOLATED MR. TURNER'S RIGHT TO A UNANIMOUS JURY VERDICT AS GUARANTEED BY ARTICLE 1, 9, 17 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE

UNITED STATES CONSTITUTION AND BECAUSE THE UNITED STATES SUPREME COURT HAS GRANTED CERTIORARI ON THIS CLAIM IN SCHAD V. ARIZONA

Mr. Turner was charged by Indictment with two counts of first-degree murder, each count alleging solely that he did "unlawfully and from a premeditated design" kill the victims. (MV 11). The Indictment omitted any specification as to whether felony-murder and/or premeditated murder was charged. However, both crimes were pursued by the State. Thus, each murder "count" included both felony-murder and premeditated murder.

1. Guilt Phase Verdict

The jury was given the standard jury instruction defining the two counts of first-degree murder with the instruction specifically referencing felony-murder and premeditated murder as to each count.

> William T. Turner, the defendant in this case, has been accused of two counts of murder in the first degree.
>
> * * *
>
> There are two ways in which a defendant may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.

(MV 176-77).

The instruction, then, revolved around two "counts" of first-degree murder which could be proven in one or both of two ways, not a separate "count" of premeditated murder and a separate "count" of felony-murder for each homicide.

This becomes critical in light of the fact that, as is set forth below, the jury instructions as to the constitutionally

requisite unanimity focused on "counts" and not the separate crimes of premeditated murder and felony-murder with their separate and distinct elements:

> Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict.
>
> * * *
>
> As I have previously indicated to you, the Defendant in the case is charged with two (2) separate offenses of Murder in the First Degree. There are three (3) lesser included offenses under the definition of Murder in the First Degree. In this particular case there are six (6) verdicts available to you. Only one (1) verdict may be returned by you as to each count. This verdict must be unanimous, that is, all of you must agree to the same verdict. The verdict must be in writing, and for your convenience, the necessary form of verdict has been prepared for you. While both counts are charged in the same indictment, there is a separate verdict form for each count.

(MV 184, 186) (emphasis added).

Nowhere was the jury told that it must be unanimous as to either the charse of felony-murder or premeditated murder. Rather, it was instructed only that it must return a unanimous verdict as to the count generally charging first-degree murder. As a result, it is certainly conceivable that the jury returned a verdict of guilt because certain members believed that the state had established felony-murder while the balance believed that premeditated murder had been proven. The result was that Petitioner was denied his right to a unanimous jury verdict. In fact, it is conceivable that the jury may have returned a verdict

of guilt without even being convinced that either state theory had been established beyond a reasonable doubt. Rather, given the jury instruction, it might have returned its verdict because there was some evidence of felony-murder and some evidence of premeditated murder. Such a result cannot be squared with the heightened degree of reliability mandated in a capital prosecution.

In the instant case, the fears and concerns that the jury may have not unanimously reached a verdict as to either felony-murder or premeditated murder is highlighted by the question the jury posed. After 90 minutes of deliberation (R. 1153, 1155), the jury came back with the following question:

> Is it required that the jury distinguish between premeditated murder and felony murder?

After discussion with counsel, the Court instructed the jury that he could not answer the question but that the answer was contained in the written instructions already given. (R. 1157).

After another 37 minutes, the jury returned verdicts of guilty as charged. (R. 1157).

There is no reasonable explanation of the jury's question other than that they did not understand whether they had to choose between felony-murder and premeditated murder and be unanimous as to one or whether they could just agree on guilt as to first-degree murder based on the state's presentation of evidence as to each.

Not only is the specific danger that the jury was unanimous as to the required verdict present here, but the failure to differentiate between premeditated and felony murder also impacted

upon sentencing findings of the trial judge. At sentencing, the judge stated that:

> I don't know whether they determined it was premeditated or felony murder ... .

(R. 1275). But he then found as aggravating circumstances, that the murder was committed during the course of a felony and that it was cold, calculated, and premeditated, findings that would surely be undermined had the jury rejected the evidence as to one or both theories as insufficient.

Here, it is not just possible, but the evidence indicates a strong likelihood that the jurors did not unanimously agree on either felony-murder or premeditated murder; and in fact they may not have agreed that the evidence as to either theory was established beyond a reasonable doubt. As such, Petitioner has been severely prejudiced by the commingling of offenses.

The obvious and simple answer to the problem presented at Petitioner's trial is to require special verdicts in capital prosecution when both premeditated and felony-murder are argued. This Court has implicitly suggested this procedure, see In the Matter of The Use BY The Trial Courts Of The Standard Jury Instructions In Criminal Cases, 431 So. 2d 594 at 597-98 (Fla. 1981), but apparently no further action was taken. However, a special verdict form has been employed by trial judges. This Court has recently reviewed two cases where special verdict forms were employed, LeCroy v. State, 533 So. 2d 750 (Fla. 1988), where a Palm Beach County jury found one murder premeditated and a second not,

and Lamb v. State, 532 So. 2d 1051 (Fla. 1988), where a jury specifically found a murder to be both premeditated and felony-murder. Further, it is clear that this Court would have liked special verdicts to be available in other cases. See, e.g., Spivey v. State, 529 So. 2d 1088, at 1094 (Fla. 1988), where this Court was required to analyze the jury's general verdict. See also Haliburton V. State, 561 So. 2d 248 (Fla. 1989 where Justice Barkett wrote:

> I concede that this Court has previously held that a special verdict delineating whether a first-degree murder conviction is based on felony murder or premeditated murder is not required. However, I believe it would be a much better practice. Moreover, I cannot see any logical reason not to require one. Surely a trial judge would benefit from such a verdict when considering the jury's recommendation and deciding whether to impose the death penalty. Likewise, death penalty review would be easier and more complete with the information contained in such a special verdict. I would require such a special verdict in all future cases.

Id. at 252, Barkett, J., concurring specially.

Special verdicts are commonplace in civil cases. Even though there is no rule of procedure which requires them, this Court has encouraged them in two-issue cases, saying:

> We believe that the "two issue" rule represents the better view. At first thought, it may seem that injustice might result in some cases from adoption of this rule. It should be remembered, however, that the remedy is always in the hands of counsel. Counsel may simply request a special verdict as to each count in the case. See Harper v. Henry, supra. Then, there will be no question with respect to the jury's conclusion as to each. If the trial court fails to submit such verdicts to the jury, counsel may raise an

appropriate objection.

Colonial Stores, Inc. v. Scarbrough, 355 So. 2d 1181, 1186 (Fla. 1978). Special verdict forms have been held mandatory in comparative negligence cases. Lawrence v. Florida East Coast R.R. Co., 346 So. 2d 1012, 1017 (Fla. 1977). Their absence in Petitioner's capital prosecution deprived Petitioner of his constitutional rights.

Federal courts have consistently held that the jury must reach unanimity on the facts at issue in order to convict a defendant, see United States V. Gipson, 553 F. 2d 453 (5th Cir. 1977).[17] Relying on the Supreme Court opinion in In re Winship, 397 U.S. 358 (1970), the Gisson court reasoned that "[t]he unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Gisson, 553 F. 2d at 457, quoting In re Winship, 397 U.S. at 364. The court went on to say that "[r]equiring the vote of twelve jurors to convict a defendant does little to ensure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F. 2d at 458.

Other courts, both federal and state, have found the reasoning in Gipson persuasive. See, e.g., United States V. Beros, 833 F. 2d 455 (3rd Cir. 1987) ("persuaded by the analysis and rationale"

17. See also, Case Comment, Right To Jury Unanimity On Material Fact Issue: United States v. Gisson, 91 Harv. L. Rev. 499 (1977).

of Gipson, the court held that "[w]hen the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury." emphasis added); United States v. Pavseno, 782 F. 2d 832 (9th Cir. 1986) (general unanimity instruction is not sufficient when different theories of guilt are presented to jury, citing Gipson); State V. Boots, 308 Or. 371, 780 P. 2d 725 (1989) (citing Gipson for authority in reversing defendant's capital murder conviction); Probst v. State, 547 A. 2d 114 (Del. 1988) (holding "[t]he Sixth Amendment to the United States Constitution requires that there be a conviction by a jury that is unanimous as to the defendant's specific illegal action," citing Beros, supra); State v. Flynn, 14 Conn. App. 10, 539 A. 2d 1005, cert. denied, 109 S.Ct. 226 (1988) (Connecticut has adopted "holding and rationale" of Gipson); State v. Johnson, 46 Ohio St. 3rd 96, 545 N.E.2d 636 (1989), cert. denied, 110 S.Ct. 1504 (1990) (quoting Gipson approvingly); and People v. Olsson, 56 Mich. App. 500, 224 N.W.2d 691 (1974) (defendant could not be convicted of first-degree murder when alternative theories of premeditated murder and felony-murder were presented to the jury and it was unclear whether jury agreed unanimously to either theory).

Recently, in Sheppard V. Rees, 909 F. 2d 1234, 1237-38 (9th Cir. 1990), the Ninth Circuit reversed a first-degree murder conviction, stating:

> Where two theories of culpability are submitted to the jury, . . . it is impossible to tell which theory of culpability the jury followed in reaching a general verdict. See

Mills v. United States, 164 U.S. 644, 646 (1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986).

Requiring juror unanimity on a single theory of first-degree murder is necessary to effectuate the reasonable doubt standard enunciated by the Supreme Court in In re Winship, supra, and is essential to meeting the constitutional requirements of heightened reliability in a capital case. It begs the question to say that premeditated and felony-murder are merely different methods of performing the same act. There are significant differences between a premeditated murder and a murder that occurs during the commission of another felony. Indeed, the only common element of the two crimes is that someone died. Without juror agreement as to what specific acts a defendant performed, the reasonable doubt standard is emasculated. Further, it is conceivable that each member of the jury may not have been convinced beyond a reasonable doubt of either state theory, but may have returned a verdict of guilt because of some evidence of guilt as to each theory.

It is true that in noncapital cases, the Supreme Court has held that, although the sixth amendment requires a unanimous verdict in federal criminal trials, it does not in state criminal prosecutions. Johnson v. Louisiana, 406 U.S. 356 (1972), and Asodaca v. Oregon, 406 U.S. 404 (1972). However, in reaching this conclusion, the court specifically pointed out that, in both Louisiana and Oregon, a defendant in a capital case would be entitled to a unanimous verdict. Johnson, 406 U.S. at 357, n. 1, and Asodaca, 406 U.S. at 406, n. 1.

The Supreme Court has never held that a less-than-unanimous verdict is constitutional in a capital case. Rather, it has held that capital cases require a heightened degree of reliability in the verdict. See, e.g., Beck v. Alabama, 447 U.S. 625, 638 (1980). Jury unanimity is essential to the heightened degree of reliability required in capital cases.

Moreover, unlike the state law on which the Supreme Court based its decisions in Johnson and Apodaca, Florida law requires a unanimous jury verdict in all criminal cases. Florida Rule of Criminal Procedure 3.440 (1988). Because Florida has chosen to make jury unanimity a right under state law, it must administer that right consistent with due process of law. Evitts v. Lucey, 469 U.S. 387 (1985) (when a state provides a right, it must administer that right in accordance with due process). Florida has failed to do so here. By allowing a less-than-unanimous jury verdict in a first-degree murder case charging alternatively premeditated murder and felony-murder, Florida provides less protection for the potential capital defendant that is afforded a defendant charged with the far less serious crime of negligent homicide.

2. The Penalty Phase Verdict

As noted earlier, the failure of the Petitioner's jury to make any findings as to whether the state had established either of its theories beyond a reasonable doubt clearly prejudiced Petitioner regarding the trial court findings as to the aggravating circumstances of felony-murder and whether the killing was done in

a cold, calculated manner. Because of this, even if Petitioner's conviction should not be vacated his sentence should be.

CONCLUSION

The United States Supreme Court has recently granted certiorari to consider this precise issue, Schad v. Arizona, 48 Cr. L. 3033 (Oct. 10, 1990) (see Appendix A for the questions presented on certiorari). At a minimum, this Court should take no action on this claim until Schad is resolved.

Fundamental fairness requires this Court to revisit Petitioner's guilty verdict and sentence of death, Preston, supra, Kennedy, supra. The above-described failing at Petitioner's capital trial precluded a reliable determination of his guilt or innocence on the appropriate penalty, Relief is warranted.

DATED this 15th day of October, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Mr. Royal P. Terry, Assistant Attorney General, Room 1501, The Capitol, Tallahassee, Florida 32399-1507 this 15th day of October, 1990.

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