IN THE SUPREME COURT
STATE OF FLORIDA

WILLIAM T. TURNER,

Petitioner,

vs.

CASE NO. 75,848

HARRY K. SINGLETARY, Secretary, Florida Dept. of Corrections, and TOM BARTON, Superintendent, Florida State Prison,

Respondents.

PETITIONER'S REPLY BRIEF TO STATE'S RESPONSE TO AMENDED PETITION FOR EXTRAORDINARY RELIEF AND FOR HABEAS CORPUS

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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.

The State argues that Campbell v. State, 571 So. 2d 415 (Fla. 1990), does not represent a "change in law." SR. 7[2]. However, whether Campbell does or does not represent a change in law is not dispositive regarding Petitioner's claim. If, as the State argues, the position advanced by Petitioner as to the necessity of clear written findings regarding all aggravating and mitigating evidence has long been the law, then Campbell simply clarified and emphasized the critical necessity of strict adherence to those rules. For this reason then, to prevent a miscarriage of justice, it is imperative that this Court **revisit** the issue of whether the trial court improperly rejected mitigating evidence and improperly applied aggravating factors in this case.

The State attempts to gloss over this issue by arguing that the trial court considered Petitioner's nonstatutory mitigation (albeit in the section on statutory mitigation and albeit in the form of rejecting statutory mitigation) and that the trial court's

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[1] As to claims not addressed in this Reply, Petitioner rests on the argument contained in his Amended Habeas Petition.

[2] References herein to the Amended Petition for Extraordinary Relief and for Writ of Habeas Corpus and to the State's Response will be designated by "AP" and "SR," respectively, followed by the appropriate page number.

failure to give any credence to this evidence "is not of constitutional significance." SR. 9. However, if ignoring nonstatutory mitigation, rejecting statutory mental mitigation in the face of unrebutted evidence, and failing to enter written findings on every mitigating factor proposed and every aggravating factor imposed "is not of constitutional significance," then the appellate review essential to the constitutionality of Florida's capital punishment scheme, see Proffit v. Florida, 428 U.S. 242 (1976), is rendered illusory.

C. THIS COURT BHOULD REVIBIT ITS DECISION UPHOLDING THE TRIAL COURT'S FINDINGS OF AGGRAVATING FACTORS.

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

Petitioner agrees that its position is "entirely contrary to this Court's precedents." SR. 10. As the State notes, however, we have a fresh admonition from the United States Supreme Court itself that "stare decisis is not an inexorable command." Payne v. Tennessee, 59 U.S.L.W. 4814, 4824 (U.S. June 27, 1991). Aside from precedent, the State has presented no argument or reason for rejecting the clear evidence of legislative intent now before this Court. At some point, this Court must at least address the evidence presented by Petitioner that this Court's application of the prior violent felony aggravating circumstance is contrary to what was intended by the Florida legislature.

Petitioner urges this Court to revisit its earlier application of the prior conviction aggravator in view of clear evidence that

the current judicial construction of this aggravator is directly contrary to the clear legislative intent as evidenced by the legislative history presented by **Petitioner.**[3] AP. 28-32. This Court should revisit this issue to remedy the fundamental injustice and denial of due process occasioned when an aggravating factor is applied contrary to the obvious legislative intent. Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986); see also Sanders v. United States, 373 U.S. 1 (1963) (courts should reconsider claims previously addressed when the "ends of justice" so require); Smith v. Murray, **477** U.S. **527 (1986);** Johnson v. Dugger, 911 F. 2d **440,** 468-69 (11th Cir. 1990) (en banc review granted) (factual innocence exception to procedural default rules on penalty issue); and Moreland v. State, 16 F.L.W. S481 (Fla. July 11, 1991) (reconsideration warranted to ensure fairness and uniformity in individual adjudications).

Most important, one must not lose sight of the fact that there is an overriding social interest in ensuring that any and every death sentence is appropriate:

> Every constitutional claim should be reviewed on the merits prior ta final disposition of a death case. If counsel was negligent in failing to raise a constitutional claim during the direct appeal or during a subsequent collateral attack, a death-sentenced defendant should not be forced to suffer the consequences.

Francis v. State, 16 F.L.W. S461, S462 (Fla. June 15, 1991)

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[3] Without question, the Florida capital punishment statute, including this aggravating circumstance, was "patterned in large part upon the Model Penal Code." Proffit v. Florida, 428 U.S. 242, **248 (1976).**

(Barkett and Kogan, JJ., specially concurring).

Also instructive regarding whether the Court should revisit this issue is the recent decision of the First District Court of Appeal (en banc), now before this Court on certification, interpreting the "prior conviction" language of the habitual offender statute as requiring sequential felonies because the statute "contemplated that an opportunity for reformation ... be given after each conviction," quoting this Court's opinion in Joyner v. State, 30 So. 2d 304, 306 (Fla. 1947). Barnes v. State, 576 So. 2d 758 (Fla. 1st DCA 1991) (en banc).[4] This Court's interpretation of the prior conviction aggravator is in direct conflict with the Barnes line of cases, and those cases were based solely on logic and public policy. In the instant case, we additionally have the clear evidence of legislative intent supporting the statutory construction advanced by Petitioner.

This evidence has never before been addressed by this Court, and the State has not in any way challenged this evidence. For this Court to simply ignore it, as has the State, would be a miscarriage of justice of the highest order.

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

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[4] The Barnes holding is consistent with other Florida district courts of appeal, see Taylor v. State, 558 So. 2d 1092 (Fla. 5th DCA 1990), Walker v. State, 567 So. 2d 546 (Fla. 2d DCA 1990), Collazo v. State, 573 So. 2d 109 (Fla. 3d DCA 1991), and Williams v. State, 573 So.2d 451 (Fla. 4th DCA 1991).

The State has misconstrued this argument as merely a challenge to the finding that the murder was "cold, calculated, and premeditated." SR. 10. However, Petitioner challenges the conclusion by the trial court and this Court that Petitioner was not acting under "any pretense of moral or legal justification" so as to negate this aggravator when the evidence that Petitioner was acting under a "pretense of moral or legal justification" is uncontradicted and when the application of this aggravator to Petitioner is inconsistent with other relevant cases.

Michael v. State, 437 So. 2d 138 (1983), and Card v. State, 453 So. 2d 17 (Fla. 1984), cited by the State (SR. 10), are totally inapposite, as they found simplythat a defendant's mental problems are relevant to mitigation and not to aggravation. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986) (SR. 10), is likewise inapposite, because it nowhere addressed the issue of "moral or legal justification" to negate the aggravator of cold, calculated and premeditated. Thus, these cases in no way addressed the question of "moral or legal justification."

Again, this Court should revisit this issue to prevent a miscarriage of justice. Kennedy v. Wainwright, 483 So. 2d 424. The overall application of a capital punishment scheme is arbitrary to the extent the same facts are not given the same mitigation treatment in all cases and to the extent unrebutted mitigation evidence is arbitrarily rejected. Smith v. Murray, 477 U.S. 527; Johnson v. Dugger, 911 F.2d 440.

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 AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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

Even though this Court has a constitutional duty to conduct an independent proportionality review in every capital case, that process is hardly infallible. Appellate counsel's failure to address this issue in the briefs, or even at oral argument when raised by the Court,[5] falls measurably below the acceptable level of practice reasonably expected of appellate counsel in a capital case.

Further, the prejudice from counsel's omission is obvious, in that death sentences in such impassioned domestic disputes are rarely upheld in the long run. *See*, e.g., Douglas v. State, 575 So. 2d 165 (Fla. 1991). The instant case is no more the "murder of an innocent third party, outside of any 'love triangle'" (SR. 14)[6] than was Douglas. Mr. Turner undisputedly believed Joyce Brown was the "other woman" who stole his wife and children and led them into

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[5] Citations by the State to the briefs on direct appeal are inappropriate. For example, in the Reply Brief, pp. 18-19, the only "proportionality" argument is not really about proportionality at all, but a comparison of disparate outcomes in the two counts in this case.

[6] Further, contrary to the State's misrepresentations that the only prior contact between Mr. Turner and Ms. Brown was when he threatened her (SR. 14), the prior contact arose when she interceded to keep him from seeing his wife and children. R. 572-73, 575, 582.

a sinful lifestyle.[7]

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.

The State is just plain wrong (SR. 15-16): nowhere did appellate counsel argue that the trial court erred in neglecting the evidence of nonstatutory mental mitigation; rather, the argument on appeal was limited to the trial court's failure to find statutory mental mitigation. (Initial Brief at **43-52**, Reply Brief at 15-18).

Roberts v. **State**, 568 So. **2d 1255, 1261** (Fla. **1990) (SR.** 16), is distinctly different. There, "the trial court considered and rejected the expert testimony concerning mental health mitigating factors." Id. On the contrary, here **the** trial court accented the opinions of the mental health experts,[8] rejected the evidence as insufficient statutory mental mitigation, and then totally neglected its relevance as nonstatutory mitigation. Order at **9-11**. Thus, the trial court found that nonstatutory mitigation was present but failed to give it any credit for sentencing purposes.

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[7] Also contrary to the State's assertion (SR. 15), the facts do not definitely resolve whether Mr. Turner's intent when he arrived at the home was to kill the women or to conduct a commando raid and rescue his child but just became crazed in the process; the only testimonial evidence **was** an opinion from the State's expert, Dr. Ernest Miller, **that** the incident actually began as a type of commando raid to rescue Mr. Turner's **daughter.** R. **1006.**

[8] The trial judge wrote: "There is ample evidence to support the conclusion that the defendant was under **the** influence of mental or emotional disturbance." Order at 10.

The Court clearly could not have just rejected outright this overwhelming evidence, but that is the result here.

Appellate counsel's failure to raise this egregious error falls demonstrably below the level of representation reasonably expected of appellate counsel. Further, prejudice under Strickland v. Washington, 466 U.S. 668 (1984), is apparent given the large number of cases in which mental mitigation has tipped the balance in favor of a life sentence. AP. 58.

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 BENTENCED TO TWO CONSECUTIVE MINIMUM TWENTY-FIVE YEAR PRISON TERM8 AND THE FAILURE TO RAISE THE TRIAL COURT'S REFUSAL TO GIVE A JURY INSTRUCTION TO THIS EFFECT CONSTITUTED INEFFECTIVE ASSISTANCE.

The State concedes that this issue is properly before this Court. SR. 18-19. However, the State omits the important fact that the error has a dual basis - not just the denial of a requested jury instruction (SR. 18) but also the prohibition of argument regarding this mitigation. AP. 80-84.

First, as to the State's contention that there was no prejudice from this omission (SR. 19-20):

(a) The State's assumption that this omission by appellate counsel was a tactical decision, as opposed to neglect or oversight, is erroneous in the absence of any record evidence on this point; at a minimum, an evidentiary hearing should be required as to this claim;

(b) The State's implication that this is one of the weaker

claims which could properly have been "winnow[ed] out" by appellate counsel (SR. 19) is undermined by the fact that this very argument prevailed in Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990);

(c) The State argues that Jones had not been decided at the time of Petitioner's direct appeal, totally overlooking the fact that Lockett v. Ohio, **438** U.S. ***586***, **604** (1978), and McCleskey v. Kemp, **481 U.S.** 279, 304 (1987), were decided **before** the **direct** appeal herein, and thus the law on this issue was clearly in Petitioner's favor at the time of his direct appeal. Further, given stringent procedural default rules which are equally applicable in capital cases, counsel has a constitutional obligation to raise any claim which is not frivolous. Put another way, an appellate strategy of "winnowing out" claims is not applicable in capital cases.

Jones v. State, **569** So. 2d **1234**, coming as it did after King v. Dugger, **555** So. 2d **355**, 359 (Fla. 1990), (SR. 19-20) is clearly controlling. First, although King did state that the testimony as to a twenty-five year minimum "is irrelevant to [the defendant's] character, prior record, or the circumstances of the crime," **555** So. 2d at 359, this Court in Jones clearly reversed that position:

> The standard for admitting evidence of mitigation was announced in Lockett v. Ohio, **438** U.S. 586, 98 S.Ct. **954**, 57 L.Ed.2d 973 (1978). The sentencer 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." Id., at 604, **98** S.Ct. at 2965. Indeed, the Court has 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." McCleskey v. Kemp, 481U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987) (emphasis in original; footnote omitted). Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

Id. at 1239-40 (emphasis added). Second, although this Court did not distinguish or even cite King, the most obvious distinction is that King did not involve a proscription on argument, whereas that was the precise error raised in Jones[9] as well as in the instant case. Finally, perhaps the most important distinction is that in King the "standard instruction on the possible sentence for first-degree murder adequately inform[ed] the jury of the minimum mandatory portion of a life sentence." King, 555 So. 2d at 359. Thus, by virtue of the standard instructions, the jury in King was already informed of the 25 year minimum sentence and it was therefore proper to exclude the proffered testimony on the point. By contrast, in Jones (and in this case), there was no jury instruction as to the possible 50 year sentence; the trial court improperly prohibited any argument as to the 50 year sentence possibility; and so the jury was in no way informed of this mitigating factor. Jones, 569 So. 2d at 1239.

As in Jones, Petitioner is entitled to a new sentencing

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[9] Another possible distinction is the difference in sentence between the twenty-five year mandatory in King and the potential fifty-year mandatory in Jones.

hearing before a new sentencing jury. Particularly, given the close jury vote, this error could not be harmless beyond a reasonable doubt. See Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987).

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 ARTICLES 1, 9, AND 17 OF THE FLORIDA CONSTITUTION.

The State wholly neglected to respond to the merits of this weighty issue, (SR. 29-30) and its summarization fails woefully to comprehend the issue. SR. 29. Further, this argument is not about an instruction on jury unanimity. SR. 30. The State is satisfied to rest on precedent that this claim is procedurally barred. SR. 30.

Petitioner urges this Court to revisit this issue to consider the reasoning of the United States Supreme Court on this matter and the proper scope of the Florida Constitution on this issue.

The United States Supreme Court has decided this issue (albeit under the Due Process Clause of the United States Constitution) against Appellant by a five-to-four vote. However, only four Justices joined in the opinion of Justice Souter for the plurality, with Justice Scalia concurring in the result only.[10] Schad v.

[10] Justice Scalia's concurrence notes that, but for the fact that this practice was the norm in 1868 and remains the norm today, "[h]e might well be with the dissenters in this case." Schad, 49 Crim. L. Rep. at 2286.

Arizona, 59 U.S.L.W. 4762, 49 Crim. L. Rep. 2279 (U.S. June 21, 1991).

Appellant would urge this Court to adopt the reasoning of the four (4) dissenting Justices set out below[11] as the constitutionally acceptable standard for imposing a death sentence under the Florida Constitution:

> Consequently, a verdict that simply pronounces a defendant "guilty of first-degree murder" provides no clues as to whether the jury agrees that the three elements of premeditated murder or the two elements of felony murder have been proven beyond a reasonable doubt. Instead, it is entirely possible that half of the jury believed the defendant was guilty of premeditated murder and not guilty of felony murder/robbery, while half believed exactly the reverse. To put the matter another way, the plurality affirms this conviction without knowing that even a single element of either of the ways for proving first-degree murder, except the fact of a killing, has been found by a majority of the jury, let alone found unanimously by the jury as required by Arizona law. ...
>
> ... The problem is that the Arizona statute, under a single heading, criminalizes several alternative patterns of conduct. While a State is free to construct a statute in this way, it violates due process for a State to invoke more than one statutory alternative, each with different specified elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt.
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> The plurality concedes that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion,

[11] This is the precise argument made in the Amended Petition at 109-119.

> or littering, for example, would suffice for conviction." Ante, at 7. But this is very close to the effect of the jury verdict in this case. Allowing the jury to return a generic verdict following a prosecution on two separate theories with specified elements has the same effect as a jury verdict of "guilty of crime" based on alternative theories of embezzlement or reckless driving....
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> * * *
>
> Regardless of what the jury actually had found in the guilt phase of the trial, the sentencing judge believed the murder was premeditated. Contrary to the plurality's suggestion, see ante, at 18, n. 9, the problem is not that a general verdict fails to provide the sentencing judge with sufficient information concerning whether to impose the death sentence. The issue is much more serious than that. If in fact the jury found that premeditation was lacking, but that petitioner had committed felony murder/robbery, then the sentencing judge's finding was in direct contravention of the jury verdict. It is clear, therefore, that the general jury verdict creates an intolerable risk that a sentencing judge may subsequently impose a death sentence based on findings that contradict those made by the jury during the guilt phase,....

49 Crim. L. Rep. at 2287-88 (White, Stevens, Blackmun and Marshall, JJ., dissenting).[12]

The Colorado Supreme Court just last week overturned the constitutionality of that state's capital punishment statute. In so doing, it emphasized the responsibility of state courts to independently evaluate state constitutional provisions and not merely to automatically adopt decisions of the federal courts

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[12] An additional reason for this Court to reconsider this issue lies in the vast difference between the Schad analysis and that of this Court in Haliburton v. State, 561 So. 2d 248 (Fla. 1990).

construing similar federal constitutional provisions.

> The existence of federal constitutional provisions essentially the same as those to be found in our state constitution does not abrogate our responsibility to engage in an independent analysis of state constitutional principles in resolving a state constitutional question. This responsibility springs from the inherently separate and independent functions of the states in a system of federalism.

Colorado v. Young, No. 90-SA-201, slip op. at 17 (Colo. July 9, 1991). See also Michigan v. Long, 463 U.S. 1032, 1037-42 (1983); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.")

Such independent state analysis of state constitutional provisions is even more critical in light of federal trends toward leaving the application of capital punishment schemes to state courts. See, e.g., Coleman v. Thompson, 59 U.S.L.W. 4789, 49 Crim. L. Rep. 2301, 2304 (U.S. June 24, 1991) ("This is a case about federalism." O'Connor, J.)

Adoption of the approach to state constitutional adjudication set out in Young and the dissenting opinion in Schad is essential to maintenance of a system wherein the ultimate social retribution of death is meted out by the strictest standards. This ensures application of the death penalty to only the most heinous of offenses where there remains no doubt that the conviction as well as a death sentence are valid and appropriate. That certainty and specificity are blatantly absent when a jury can convict a defendant of the "general crime of murder," as the Schad minority warns.

CONCLUSION

Petitioner respectfully urges this Court to reverse his conviction and death sentence based on the ineffective assistance of appellate counsel, and further, to revisit the substantial constitutional claims addressed in his Mended Petition. This Court should either vacate Petitioner's death sentence and impose a life sentence or remand for a new sentencing hearing before a new sentencing jury.

DATED this 22nd day of July, 1991.

Respectfully submitted,

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