IN THE SUPREME COURT OF FLORIDA

WILLIAM **THADDEUS TURNER,**

Petitioner,

v. **CASE NO. 75,848**

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

Respondents.

/

RESPONSE TO AMENDED PETITION FOR EXTRAORDINARY RELIEF, ETC.

COME NOW Respondents, Harry K. Singletary and Tom Barton, by and through the undersigned counsel, pursuant to Fla.R.App.P. 9.100(h), in response to Turner's Amended Petition for Extraordinary **Relief,** filed on or about October 15, 1990, and move this Honorable Court to deny all requested relief, for the reasons set forth in the instant pleading.

Preliminary Statement

On July 18, 1984, William Turner was indicted on two counts of first degree premeditated murder, in regard to the July 3, 1984, murders of Shirley Turner and Joyce Brown. Following a trial by jury in Duval County Circuit Court, Turner was faund guilty as charged on both counts; the defense presented had been one of insanity, and the defense had presented the testimony of six (6) witnesses. The penalty phase was conducted an August 23,

1985, and at such proceeding, the defense presented six (6) witnesses, including Turner's father and brother, his employer and a mental health expert. The jury subsequently returned an advisory verdict of life imprisonment, as to the murder of Shirley Turner, and an advisory verdict of death, as to the murder of Joyce Brown. On November 1, 1985, Judge Southwood formally imposed sentence in accordance with these verdicts. As to the death sentence imposed for the murder of Joyce Brown, the judge found four (4) aggravating circumstances to exist - prior conviction for a crime of violence, §921.141(5)(b); commission of the homicide during a felony, to-wit: burglary, §921.141(5)(d); that the homicide had been especially heinous, atrocious or cruel, §921.141(5)(h), and that the homicide had been committed in a cold, calculated and premeditated manner, §921.141(5)(i). In mitigation, the court .found some nonstatutory mitigation, which was adjudged to be of little weight.

Turner appealed his convictions and sentence of death to this Court. He raised ten (10) primary claims for relief: (1) alleged involuntary absence during voir dire and charge conference; (2) alleged error in the admission into evidence of certain photographs and of a tape recording of the victim's murder; (3) alleged error in the exclusion of evidence concerning the Baker Act proceedings; (4) alleged insufficiency of evidence as to Turner's sanity at the time of the offense; (5) alleged insufficiency of evidence as to premeditation; (6) alleged error in the trial court's instruction of the jury on felony murder; (7) alleged error in the denial of defense-requested jury

instructions at the penalty phase, as to the statutory mitigating circumstances of duress and age; (8) alleged error in the sentencer's findings in aggravation, as to §§921.141(5)(h) & (i), and in the sentencer's rejection of statutory and nonstatutory mitigation; (9) alleged error in sentencing, in that §§921.141(5)(h) & (i) impermissibly "doubled", and (10) alleged error in the court's acceptance of the jury's sentencing verdicts. During the course of the direct appeal, this Court relinquished jurisdiction to the circuit court for the holding of evidentiary hearings as to the first claim.

On July 7, 1988, this Court rendered its opinion, affirming Turner's convictions and sentence of death in all respects. See **Turner v. State, 530** So.2d 45 (Fla. 1988). In such opinion, this Court expressly discussed only four of the issues raised, noting in a footnote that six of them - claims (3), (4), (5), **(6), (7),** (9), (10) and a portion of claim **(8)** - were "meritless". **Turner,** 530 So.2d at **47, n.1.** As to the claim involving Turner's alleged absence, this Court concluded that any error therein had been harmless. **Turner,** 530 So.2d at **47-50.** As to the claim of error involving the admission of the tape recording, this Court concluded that Turner had failed to demonstrate that the circuit court had abused its discretion in allowing the admission of this evidence. **Turner,** 530 So.2d **at 50.** As to the claims in regard to Turner's sentence of death, this Court expressly found that the three aggravating circumstances under attack had been proven beyond a reasonable doubt. **Turner,** 530 So.2d at 50-51.

Turner subsequently sought certiorari review by the United States Supreme Court, which was denied on February 21, 1989. See **Turner v. Florida, 489** U.S. 1040, 109 S.Ct. **1175,** 103 L.Ed.2d **237** (1989). On March 29, 1990, Governor Martinez signed a death warrant for Turner, such warrant active between May 29, 1990, and June **5,** 1990. On April 6, 1990, the Office of the Capital Collateral Representative filed a request for stay of execution on behalf of Turner, in which they contended that they could not represent him. This Court granted a stay, and directed that all post conviction pleadings be filed within four months; subsequently, this Court extended such period of time.

On oK about October 15, 1990, Turner, represented by the instant counsel, filed his Amended Petition for Extraordinary Relief and for Writ of Habeas Corpus. In such pleading, comprising some one hundred and twenty (120) pages, counsel presents three (3) primary claims for relief: (1) a contention that this Court should revisit its affirmance of Turner's sentence of death based upon, inter alia, intervening caselaw; (2) a contention that Turner had been deprived of effective assistance of counsel on appeal, and (3) a contention that this Court should revisit its affirmance of Turner's conviction, due to the alleged lack of a unanimous jury verdict. The claim of ineffective assistance of appellate counsel contained a number of specific allegations, including: (a) counsel's allegedly ineffective presentation of the argument concerning the proportionality of the death sentence; (b) counsel's allegedly ineffective presentation of the issue concerning the sentencer's

failure to find nonstatutory mitigation; (c) counsel's failure to raise a claim on appeal in regard to the aggravating circumstance concerning Turner's conviction of a prior violent felony, §921.141(5)(b); (d) counsel's failure to raise on appeal a specific claim that the aggravating circumstance pertaining to the homicide having been cold, calculated and premeditated, could not be found, in light of Turner's pretense of moral justification; (e) counsel's failure to present a claim on appeal in regard to the denial of a special requested jury instruction to the effect that Turner could be sentenced to two consecutive terms of life imprisonment, with no parole eligibility for fifty years; (f) counsel's failure to raise on appeal the trial court's allegedly prejudicial rulings and exclusion of defense evidence; (g) counsel's failure to argue on appeal that the tape recording of the victim's murder had constituted "victim impact" evidence, and (h) counsel's failure to raise on appeal claims concerning the prosecutor's closing argument at the guilt and penalty phases.

Argument

THE** INSTANT PETITION FOR WRIT OF **HABEAS CORPUS** SHOULD BE DENIED IN ALL RESPECTS; **TURNER'S** PROPERLY PRESENTED CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL **ARE** WITHOUT MERIT, AND ALL OTHER CLAIMS ARE PROCEDURALLY **BARRED

This Court has consistently held that habeas corpus is not a vehicle for additional appeals of issues that could have been, should have been, or were raised on appeal or in other post conviction motions, or of matters that were not objected to at

trial. See Mills v. Dugger, 574 So.2d 63, 65 (Fla. 1990); Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990); Roberts v. State, 568 So.2d 1255, 1261 (Fla. 1990); Mills v. Dugger, 559 So.2d 578, 579 (Fla. 1990); Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990); Clark v. Dugger, 559 So.2d 192, 193 (Fla. 1990); Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989); Suarez v. Dugger, 527 So.2d 190, 192 (Fla. 1988); Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). Indeed, this Court has also gone so far as to hold that claims of ineffective assistance of counsel cannot be used to circumvent the above rule, to the effect that habeas corpus proceedings do not provide a second or substitute appeal. See Kight v. Dugger, 574 So.2d 1066, 1071 (Fla. 1990); Mills, supra; Swafford, supra; Bolender v. Dugger, 564 So.2d 1057, 1059 (Fla. 1990); Porter, supra; Clark, supra; King v. Dugger, 555 So.2d 355, 360 (Fla. 1990); Blanco, supra. Respondents respectfully suggest that the vast majority of the claims presented in the instant petition run afoul of the above principles, and, hence, are procedurally barred. To the extent, however, that any valid claim of ineffective assistance of appellate counsel is raised, Respondents suggest that the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), have not been met. Each of Turner's claims will now be addressed.

CLAIM I

TURNER'S CLAIM THAT THIS COURT SHOULD REVISIT ITS AFFIRMANCE OF HIS SENTENCE OF DEATH IS PROCEDURALLY BARRED AND OTHERWISE WITHOUT MERIT

In this claim, collateral counsel contends that this Court should revisit its affirmance of Turner's sentence of death in 1988 and reverse such, on the basis of certain more recent decisions. Specifically, collateral counsel contends that this Court's approval of certain aggravating factors found by the sentencer, as well as its affirmance of the sentencer's failure to find certain matters in mitigation, are now suspect in light of such precedents as **Campbell v. State, 571** So.2d **415** (Fla. 1990), **Cheshire** v. **State, 568 So.2d 908 (Fla. 1990), Hallman v. State, 560** So.2d 223 (Fla. 1990), **Christian** v. **State, 550 So.2d 450** (Fla. 1989), and **Banda v. State,** 536 So.2d **221** (Fla. **1988).** It must be noted, however, that this Court has never held that any of the above precedents constitutes a fundamental change in law, so as to **make** its holding entitled to retroactive application on collateral attack, and, indeed, in Gilliam v. **State, 16 F.L.W. S292 (Fla. May 2,** 1991), this **Court** expressly held that Campbell was an "evolutionary refinement" of the law, and not a "jurisprudential upheaval." Accordingly, Petitioner's claims based upon "new law", which, in any event, should have been presented on 3.850, cf. **Witt v. State,** 387 So.2d **922** (Fla. 1980), are without merit.

Respondents would respectfully suggest that what Turner is, in fact, requesting, in addition to an improper second appeal, see **Blanco,** supra, is a second proportionality review. At the

time that this Court affirmed Turner's sentence of death in 1988, this Court found it proportionate with all past capital cases, see Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), and the fact that such conclusion is not expressly stated in the opinion is of no moment. See, e.g., Messer v. State, 439 So.2d 875, 879 (Fla. 1983) (no requirement that court explicitly compare sentence under review with past cases in opinion). Turner would like this Court to now compare his death sentence to all of those in cases which this Court has subsequently decided. This Court, for obvious reasons, has vehemently rejected such course of action, holding, in Sullivan v. State, 441 So.2d 609, 614 (Fla. 1983),

> Proportionality review does not mean the reopening of every prior death case when a new one is decided to determine whether the previous decision is consistent with the later case. Rather, it means viewing the later one in light of the previous decisions to ensure consistency of the later decision with the former ones. Otherwise, it would become necessary for this Court to continuously re-review every previous sentence. Defendants whose sentences of death have been affirmed cannot challenge their sentences again and again each time the death sentence of a later convicted murderer is reduced to life imprisonment. There would then be no end to the process and no standard for comparison.

This Court has consistently adhered to this ruling. See e.g., Foster v. Wainwright, 457 So.2d 1372, 1373 (Fla. 1984) (declining to reopen proportionality issue on habeas corpus); Adams v. Wainwright, 484 So.2d 1211, 1213 (Fla. 1986) (same); Williams v. Wainwright, 503 So.2d 890, 891-892 (Fla. 1987) (reopening of proportionality on habeas corpus "would render a proportionality

analysis on direct appeal a futile endeavor", in that "evolutionary refinements in the case law would undoubtedly produce enough variant results to at least arguably present an avenue of attack on proportionality grounds."); Porter, supra, 559 So.2d at 203 (applying **Sullivan** holding). In light of all of the above, it is clear that instant claim is procedurally barred. See also **Jones v. Dugger, 533** So.2d 290, 292 (Fla. **1988)** (additional arguments against finding of aggravating circumstance, affirmed on appeal, procedurally barred on habeas corpus); **Jackson** v. Dugger, **547** So.2d **1197,** 1198, n.1 (Fla. 1989) (claim that mitigating circumstance should have been found, raised initially on habeas corpus, procedurally barred).

To the extent that any further argument is necessary, Respondents would contend that no fundamental error has been demonstrated. The sentencing order in this case clearly indicates that Judge Southwood considered the nonstatutory mitigation presented in regard to Turner's mental state, and, further, made findings that, in fact, Turner had been under the influence of mental or emotional disturbance at the time of the murder and his capacity to conform his conduct to the requirements of the law had been impaired (R 306-307). The fact that these latter findings were made in the section of the sentencing order addressing statutory mitigation, as opposed to nonstatutory mitigation, is not of constitutional significance. Similarly, as to the findings in aggravation, the fact remains, whether Petitioner chooses to recognize it or not, that there was, in fact, sufficient evidence of heightened premeditation,

such that the finding of §921.141(5)(i), was correct, in that the State adduced sufficient evidence to justify a finding that Turner had planned the homicides and carried them out with calculation, regardless of the apparent rationality of his motivation. **Cf. Provenzano v. State, 497** So.2d 1177, 1183 (Fla. 1986) (cold, calculated and premeditated aggravating circumstance upheld in case where defendant committed murders for delusional motive); **Michael v.** State, 437 **So.2d** 138, 141-142 (Fla. 1983) (defendant's mental and emotional problems did not preclude finding of cold, calculated and premeditated aggravating circumstance, but simply affected weight to be given it); **Card v. State,** 453 So.2d 17, **23** (Fla. 1984) (testimony of defense psychiatrist concerning defendant's mental problems did not preclude finding of this aggravating circumstance). Likewise, Turner's belief that a defendant's contemporaneous conviction for the murder of one victim cannot be used as a basis in aggravation for the death sentence imposed in regard to another victim, under §921.141(5)(b), is entirely contrary to this Court's precedents. See **Lucas** v. State, **376** So.2d 1149 (Fla. 1979); King **v.** State, **390** So.2d **315** (Fla. **1980); Pope v. State, 441** So.2d **1073** (Fla. 1983); **Thomas** v. **State,** 456 So.2d **454** (Fla. 1984); **Corsell v. State,** 523 So.2d 562 (Fla. 1988); **LeCroy v.** State, **533** So.2d **750** (Fla. 1988); **Cook** v. **State,** 542 So.2d 964 (Fla. 1989). No relief is warranted as to this procedurally barred claim.

CLAIM II

TO THE EXTENT THAT TURNER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ARE NOT BARRED, THEY ARE INSUFFICIENT TO MERIT RELIEF UNDER STRICKLAND v. WASHINGTON, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

In this claim, collateral counsel contends that Turner's appellate counsel, Clyde Collins, Esq., rendered ineffective assistance during the course of the direct appeal, in eight (8) respects: (a) deficient presentation on appeal of the issue of proportionality; (b) deficient Presentation on appeal of the issue regarding the sentencer's failure to find nonstatutory mitigation; *(c)* failure to raise on appeal a contention that the aggravating circumstance relating to prior conviction, §921.141(5)(b), had been erroneously found; (d) failure to raise on appeal a contention that the aggravating circumstance, as to the homicide having been cold, calculated and premeditated, §921.141(5)(i), had been erroneously found due to Turner's pretense of justification; (e) failing to raise on appeal an argument concerning the denial of a defense-requested jury instruction at the penalty phase; (f) failure to raise on appeal claims of error in regard to various rulings of the trial court; (g) deficient presentation on appeal of the issue concerning the admission of a tape recording of the murder, and (h) failure to present on appeal a claim of error in regard to prosecutorial argument. Each allegation will now be addressed.

A. The claim in regard to proportionality

Petitioner contends that attorney Collins rendered ineffective assistance on appeal in failing to convince this Court that the death sentence in this case is disproportionate, due to the fact that it is a "domestic" murder and one in which substantial mitigation is present. Collateral counsel contends that neither of these matters was adequately briefed and that, following a question during oral argument, attorney Collins merely filed a supplemental authority on this subject. In setting forth his argument, Turner looks not only to precedents which existed at the time this case was decided in 1988, but also those decided subsequently (Petition at 42-59). Respondents would initially contend that, regardless of the rubric of ineffective assistance of counsel, this claim is merely a duplicate of that addressed above, in Claim I, supra, and is yet another attempt by Turner to secure a proportionality review of his death sentence. As noted previously, this Court has consistently held that claims of ineffective assistance of counsel cannot be used to circumvent the rule that habeas corpus does not provide a second or substitute appeal, *See*, e.g., Kight, supra; Blanco, supra. Accordingly, this claim is procedurally barred.

To the extent that this Court disagrees, Respondents suggest that no viable claim of ineffective assistance of counsel has been set forth or proven. As to the performance of counsel, it should be clear that attorney Collins did in fact raise arguments of this nature on direct appeal in 1988. In the Initial Brief,

he specifically requested this Court to reverse the death sentence at issue due to the sentences's failure to find mitigation relating to, inter **alia,** Turner's background and mental state at the time of the offense (Initial Brief, **Turner** v. **State**, Florida Supreme Court **Case** No. 67,987, at 43-52; Reply Brief at 15-18). Indeed, in support of such reversal, counsel argued,

> This Court has specifically recognized mental or emotional disturbance resulting from emotional strain over a "love triangle" or divorce proceeding. *Adams v. State,* 412 So.2d *850* (Fla. 1982); *Kumpff v. State,* 371 So.2d 1007 (Fla. 1989); *Halliwell v. State, 323* So.2d *557* (Fla. 1975).

(Reply Brief at 17).

Similarly, in the Reply Brief, appellate counsel pointed out that one of this Court's responsibilities was to "ensure that the death sentence is imposed consistently under similar circumstances"; counsel argued that **the** death sentence in this case was disproportionate, given the fact that, in other cases in which the jury "split" its recommendations, this Court had ordered the imposition of a life sentence (Reply Brief at 18-19). Additionally, the supplemental authority filed by appellate counsel, in support of his claim that the death sentence in this case was disproportionate, involved this Court's opinion, Wilson **v. State, 493** So.2d 1019 (Fla. 1986), in which this Court reversed the death sentence at issue due to the fact that the murder had occurred as a result of "a heated, domestic confrontation." (Notice of Supplemental Authority, filed November 21, 1986). It should be noted that Wilson is one of the

cases presently cited by collateral counsel in their disproportionality argument (Petition at 47-48).

Respondents suggest that the above demonstrates that appellate counsel, in essence, raised the same claims which Turner now presents, and that this Court's affirmance of the sentence of death in 1988 was in no way attributable to any deficiency on counsel's part; Respondents would also respectfully maintain, that, given the fact that this Court's proportionality review is a self-imposed duty, see **Brown,** supra, **Sullivan, supra,** it is questionable whether any act or omission by appellate counsel would impact upon the reliability of an affirmance in this regard. In any event, Turner's continued dissatisfaction with the result of his appeal is no basis for relief. See, e.g., Steinhorst **v. Wainwright, 477 So.2d 537, 540** (Fla. **1985); Swafford,** supra. Further, appellate counsel could quite reasonably believe that Turner had already received the "benefit" of any "domestic" aspect of this case. William Turner is not on death row for the murder of Shirley Turner, his estranged wife, but rather for the murder of Joyce Brown, a virtual stranger to him; the only time that the two came in contact was when Turner threatened to murder her and then, subsequently, made good on his threats. The cases now cited by collateral counsel in support of their disproportionality argument do not involve situations in which the defendant has been sentenced to death for the murder of an innocent third party, outside of any "love triangle". Further, the homicide in this case did not occur during the course of a "heated domestic confrontation". Turner had been

separated from his wife for a matter of months, and he broke into the victims' home so that, totally without provocation, he could murder them in cold blood. In contrast to many of the cases cited by Turner, the death sentence in this case was not the result of a jury override, **cf. Cheshire,** supra, **Fead v.** State, 512 So.2d 176 (Fla. 1987), Irizarry v. **State, 496 So.2d 822 (Fla. 1986),** and Petitioner would seem to overstate the extent to which "domesticity" disentitles one from a sentence of death. See, **e.g., Occhicone v. State,** 570 So.2d 902 (Fla. 1990) (death sentence affirmed where defendant killed parents of former girlfriend whom he viewed as standing in the way of reconciliation; crime was "culmination of avowed threats"); Porter v. **State, 564 So.2d 1060** (Fla. 1990) (death sentence affirmed where defendant murdered former live-in lover and her new boyfriend, where murder was well planned; **Turner** cited with favor); Hudson **v.** State, 538 So.2d 829 (Fla. 1989) (death sentence affirmed where defendant broke into ex-girlfriend's apartment and killed roommate, where, inter alia, crime was well planned). No relief is warranted **as** to any avowed claim of ineffective assistance of appellate counsel, and, in any event, Respondents would contend that this claim is procedurally barred.

B. The claim in regard to nonstatutary mitigation

Petitioner contends that attorney Collins rendered ineffective assistance on appeal because he failed to persuade this Court that the sentence of death should be reversed, due to the sentencer's alleged failure to find nonstatutory mitigation present in the record, specifically, that as to Turner's mental

state, military service and the "domestic" nature of the homicide. Respondents would suggest that this claim is essentially yet another restatement of that addressed previously, and is, consequently, procedurally barred; as noted, a claim of ineffective assistance of counsel cannot be used to avoid the proper application of a procedural bar. See **Kight, supra; Blanco, supra.** It is clear from the record that attorney Collins did in fact raise on appeal all of the arguments now asserted (Initial Brief at 43-52; Reply at **15-19).** The fact that appellate counsel was not successful does not mean that he rendered ineffective assistance. **See, e.g.,** Swafford, **569** So.2d at **1266; Steinhorst, supra; Harris v. Wainwright, 473** So.2d **1246 (Fla. 1985).** Additionally, this claim would seem comparable to that rejected by this Court recently in Roberts v. **State, 568** So.2d 1255, 1261 (Fla. 1990). Finally, in regard to Turner's reliance upon Campbell v. State, Respondents would simply point out that such precedent did not exist at the time of Turner's direct appeal and that at such time, it was certainly not error for a trial court to fail to find unrebutted evidence in mitigation. Cf. Rutherford v. **State, 545** So.2d **853, 856** (Fla. 1989) (evidence that defendant had served in armed forces in Vietnam may be considered as mitigating factor, "but need not be"). No relief is warranted as to this procedurally barred claim.

C. The claim in regard to §921.141(5)(b)

In this claim, collateral counsel contends that attorney Collins rendered ineffective assistance of counsel for failing to

attack on appeal the sentencer's finding of that aggravating circumstance relating to Turner's prior conviction for a crime of violence, §921.141(5)(b). Petitioner contends that the finding of this aggravating factor was error, in that the Legislature never intended that contemporaneous convictions be so utilized. It is well established that appellate counsel cannot be deemed ineffective for failing to brief on appeal an issue which he reasonably believes is without merit or which stands little chance of success. **See Thomas v. Wainwright, 495** So.2d 172 (Fla. 1986); **Swafford, supra; Suarez, supra.** At the time that appellate counsel argued this case, the law was clear that contemporaneous convictions could be so utilized. **See Lucas,** supra; **King v. State, supra; Pope, supra; Thomas, supra; Correll, supra.** Indeed, the law remains so to this day, and even if it were to change tomorrow, such would not mean that attorney Collins was ineffective. See **Herring v. Dugger, 528** So.2d **1176** (Fla. 1988) (appellate counsel not ineffective for failing to convince court to strike aggravating circumstance on appeal, even though court later receded from holding). Neither prong of **Strickland** has been satisfied, and no relief is warranted as ta this claim.

D. The claim in regard to §921.141(5)(i)

In this claim, collateral counsel contends that attorney Collins rendered ineffective assistance, in that he failed to argue an appeal that the cold, calculated and premeditated aggravating circumstance, §921.141(5)(i), should have been stricken, because Turner had a pretense of moral justification

for the murder. Assuming that this claim is not yet another improper attempt to avoid application of the procedural bar, see Kight, supra, **Blanco, supra,** it is clearly without merit. Appellate counsel specifically attacked on appeal the finding of this aggravating circumstance in the Initial Brief (Initial Brief at 39-43); in urging this Court to strike this aggravating circumstance, appellate counsel pointed out, ". . . Dr. Miller was uniformly in agreement that the Appellant was possessed in his own mind of a belief in the moral justification of his actions." (Initial Brief at 43). The fact that this argument did not **succeed** does not mean that appellate counsel was ineffective. See **Swafford, supra; Steinhorst, supra; Harris, supra. No** relief is warranted, assuming in fact that this claim is not procedurally barred.

E. The claim in regard to the denial of a jury instruction

In this claim, collateral counsel contends that attorney Collins rendered ineffective assistance, in that he failed to raise any claim of error in regard to the denial of a **defense-**requested **jury** instruction at the penalty phase, to the effect that Turner could be sentenced to two consecutive life terms, with a minimum mandatary of fifty years, if not given the death penalty. The record indicates that trial counsel **did** indeed ask **Judge** Southwood in 1985 to give such an instruction at **the** penalty phase, to the effect that, if given life, Turner would be denied parole for fifty years (R 1259-1306); the request was denied and counsel later restated his objectian (R 1305-1306, 1364). Because it would seem that a claim could have been argued

on appeal, the questian is whether counsel was ineffective for failing to do sa.

Respondents respectfully suggest that he was not. As to performance of counsel, it is well established that, in order to be deemed effective, an appellate counsel need not raise every non-frivolous claim apparent from the record. **See** Jones v. **Barnes, 463 U.S. 745, 103** S.Ct. **3308, 77** L.Ed.2d **987 (1983).** It is equally well established that one of appellate counsel's duties is to "winnow out" weaker appellate claims, and to focus upon those most likely to prevail. See **Smith** v. **Murray, 477 U.S. 527, 106 S.Ct. 2661, 91** L.Ed.2d **454 (1986); Provenzano v. Dugger, 561** So.2d **541,** 549 (Fla. **1990); Atkins v. Dugger, 541** So.2d **1165, 1167** (Fla. **1989)** ("Most successful appellate counsel recognize that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the **effect** of diluting the impact of the stronger points."). Applying these standards, it is clear that no deficient performance of counsel has been demonstrated. Counsel presented other more compelling allegations against the death sentence in this case, and could quite well have reasonably concluded that any claim of error would stand little chance of success. See **Thomas, supra.** Although, as Petitioner points out, this Court recently held in Jones v. **State, 569** So.2d 1234, 1239-1240 (Fla. 1990), that it was error for a court to **deny** a similar jury instruction in this regard, such precedent did not exist at the time that this appeal was decided. In Ring v. **Dugger, 555** So.2d **355, 359** (Fla. 1990),

this Court expressly held that appellate counsel had not been ineffective for failing to raise on appeal a claim of error in regard to the trial court's exclusion of testimony to the effect that, if given life, the defendant would have to serve a mandatory minimum of twenty-five years. This Court expressly held that such ruling had not violated Lockett v. Ohio, **438** U.S. ***586***, 98 S.Ct. 2954, 57 L.Ed.2d **973** (1978), in that,

> [T]estimony that King would have to serve at least twenty-five years of a life sentence is irrelevant to his character, prior record, or the circumstances of the crime. ***See*** *Franklin,* 108 S.Ct. at **2327** (plurality), **108** S.Ct. at 2383 (O'Connor, J., concurring in the judgment).

King, 555 So.2d at **359.**

In light of King, it cannot be said that appellate counsel sub judice was **ineffective**, cf. Thomas **v. State, 421** So.2d **160, 165** (Fla. **1982);** Respondents respectfully state their agreement with the holding of King. Further, appellate counsel in reading the record, would have noted the portion of defense counsel's closing argument at the penalty phase, in which he advised the jury that, if given life, Turner would effectively serve the rest of his natural life behind bars, such fact obviously militating against any finding of prejudice in this regard (R 1346). No relief is warranted as to this claim.

F. The claim in regard to various rulings of the trial court

In this claim, collateral counsel contends that attorney Collins rendered ineffective assistance in failing to argue a number of claims of error on appeal, such as: (1) the judge's denial of defense counsel's motion to continue the penalty phase;

(2) the trial court's exclusion of certain defense evidence on insanity; (3) other evidentiary rulings by the trial court, and (4) the trial court's denial of a defense-requested jury instruction on manslaughter at the trial. Inasmuch as it would appear that all of these potential claims of error were preserved for review, the question is whether counsel's failure to raise them rendered him ineffective. The State suggests that it did not, and, given the many cogent points on appeal presented by attorney Collins, would further maintain that reasonable counsel could quite conclude that the raising of these points would merely serve to distract, if not annoy, this Court, see **Atkins,** supra; further, given the highly dubious nature of many of these claims, any lack of prejudice is apparent. Each claim will now be addressed.

As to the denial of the continuance, appellate counsel would no doubt have been aware that, in order to prevail on appeal, he would not only have to demonstrate error, but an abuse of discretion. **See**, e.g., Rose **v. State,** 561 So.2d **84** (Fla. **1984**); **Williams** v. **State, 438** So.2d **781** (Fla. **1983**). Appellate counsel would no doubt be aware that in **Williams,** this Court found no reversible error in the denial of a motion to continue the penalty phase therein, in that, **inter alia,** defense counsel had been on notice for several months that the case would involve the death penalty. Such observation could equally be made here, inasmuch **as** the record indicates that the trial in this cause was continued several times at the request of defense counsel, so as to allow for additional time for preparation. (R 97-99, 110,

114, 130, 133 . Further, the lack of prejudice is plain, in that trial counsel s primary motivation for a continuance was the fact that he could not secure all of Turner's military records. (R 1177-1179). The record, nevertheless, indicates that defense counsel was able to introduce at the penalty phase copies of Turner's marksmanship awards and honorable discharge, and that Turner's father was able to offer testimony concerning his son's military service in Vietnam (R 1258-1259). Neither deficient performance nor prejudice has been demonstrated under Strickland.

As to the unpresented claim of error in regard to the trial court's exclusion of evidence, Which in turn related to Turner's mental state, appellate counsel would likewise be well aware that, in order to prevail on appeal, he would not only have to demonstrate error, but an abuse of discretion. See Blanco v. State, 452 So.2d 520, 523 (Fla. 1984) (claim of error involving exclusion of defense evidence subject to abuse of discretion standard). Further, appellate counsel would no doubt be well aware of the axiomatic principle that the mere exclusion of cumulative evidence provides no basis for reversal. See Palmes v. State, 397 So.2d 648, 654 (Fla. 1981). Collateral counsel contends that reversible error occurred when Judge Southwood did not allow an FBI agent to testify that he had told one of his colleagues that Turner was a "whacko" (R 735), as well as in the court's ruling that Officer Zipperer could not, in answer to a hypothetical question, offer a guess as to what Turner's mental state had been on the day of the murder (R 749). Attorney Collins could quite reasonably conclude that any claims of error

in this regard would be frivolous, in that substantial testimony was actually adduced below, not only from the defense expert, but also from the eye witnesses who were present at the time of the murder and arrest, concerning Turner's mental state (R 763-833, 357, 359, 379, 388, 600-601, 701, 712-713, 757). No reasonable probability exists that, had any claim of error in this regard been raised, a different result on appeal would have existed. The lack of prejudice as to Zipperer's "testimony" is so obvious that no proffer was indeed required. Further, it is clear that no prejudice could exist in regard to the trial court's ruling that the defense expert could not, at the penalty phase, compare Turner's mental state to that of various contract killers whom he had examined; such testimony was of course totally irrelevant, and the doctor was otherwise able to fully describe Turner's mental state to the judge and jury (R 1226-1246). Neither deficient performance of counsel nor prejudice has been demonstrated.

As to collateral counsel's other two evidentiary claims, the record conclusively refutes one of them. Although Petitioner now contends that attorney Collins failed to argue on appeal any claim of error in regard to the trial court's refusal to allow the defense to admit evidence concerning Turner's Baker Act proceedings, this claim was in fact raised on direct appeal (Initial Brief at 21-23), and this Court found it to be without merit. Turner, 530 So.2d at 47, n.1. The fact that appellate counsel was not successful in this regard does not mean that he was deficient. See Swafford, supra; Steinhorst, supra. The

suggestion that appellate counsel should have argued on appeal that Turner was entitled to a new sentencing hearing, because Judge Southwood did not allow the defense to move into evidence a letter which had been read verbatim by a witness is ludricous; reasonable counsel could quite well conclude that the raising of this point would be counterproductive. See Correll v. Dugger, 558 So.2d 422, 424 (Fla. 1990). Neither deficient performance nor prejudice has been demonstrated.

Petitioner's final allegation in this section relates to attorney Collins' failure to raise on appeal any claim of error in regard to the denial of a defense-requested jury instruction on manslaughter during the guilt phase; a specific instruction was in fact drawn up and denied (R 169, 1033-1038, 1154). Petitioner contends that a substantial probability exists that the outcome of the appeal would have been different, had any claim of this nature been raised. Respondents cannot agree. Reasonable appellate counsel would be well aware that, without getting into the specifics of the manslaughter instruction at issue, the denial of such instruction could not, as a matter of law, serve as a basis for reversal of Turner's conviction. It is well established that harmless error at most occurs when a trial court denies a jury instruction on an offense two steps removed from that of which the defendant is ultimately convicted. See State v. Abreau, 363 So.2d 1063 (Fla. 1978); Perry v. State, 522 So.2d 817 (Fla. 1988); Bruno v. State, 574 So.2d 76, 80-81 (Fla. 1991) (deficient instruction on manslaughter harmless, given defendant's conviction of first degree murder). Further,

reasonable appellate counsel could quite well conclude that the instructions as a whole, including Turner's other special instruction on manslaughter, adequately covered all of the matters raised in defense (R 1129-1136, 1138-1141). See, e.g., Hansborough v. State, 509 So.2d 1081 (Fla. 1987) (denial of defendant's requested instruction not error, where standard instructions adequately apprised jury of the law); Bertolotti v. State, 476 So.2d 130, 132 (Fla. 1985) (denial of special instruction not error, where such "subsumed in the standard jury instruction"). Neither deficient performance of counsel nor prejudice has been demonstrated, and no relief is warranted as to this claim.

G. The claim in regard to the tape recording

In this claim, collateral counsel contends that attorney Collins was ineffective because he did not argue on direct appeal that the admission into evidence of the tape recording of the murder constituted reversible error, due to its highly graphic and emotional nature, due to the fact that it was played twice, due to the fact that a transcript could simply have sufficed and due to the fact that the tape was "essentially victim impact testimony." It is clear from the Initial Brief, however, that appellate counsel did in fact raise some of these claims on direct appeal, i.e., contentions that the tape had "aroused the emotions of the jury" and that its probative value had been outweighed by prejudice (Initial Brief at 19-21; Reply at 5-7). This Court rejected these arguments, finding that no abuse of discretion had been shown. Turner, 530 So.2d at 50. The fact

that this argument was unsuccessful does not mean that Turner's counsel was ineffective. See Swafford, **supra;** Steinhorst, **supra.**

As to those "new grounds" now alleged, it is clear that appellate counsel could not have argued on appeal that reversible error had occurred due to the fact that the tape was played twice. Trial counsel never objected to the second playing of the tape (R **1117).** It is well established that appellate counsel cannot be deemed ineffective for failing to raise an argument on appeal which has never been presented to the trial court. See Tompkins v. Dugger, 549 So.2d **1370, 1371** (Fla. **1989); Suarez,** 527 So.2d at 193; Bertolotti **v.** State, 565 **So.2d 1343** (Fla. **1990).** Further, it should be **noted** that trial counsel stated during closing argument at the guilt phase that he was pleased that the State was going to play the tape a second time, because the tape would, in fact, indicate how irrational Turner had been at the time of the murder **(R 1087-1088).**

As to the "victim impact allegation", Respondents would contend that the instant allegation of ineffective assistance of counsel is an attempt to avoid the procedural bar, given the fact that claims premised upon Booth v. **Maryland, 482 U.S. 496, 107** S.Ct. **2529, 96** L.Ed.2d **440** (1987), **are** generally not cognizable on habeas corpus. See **Jackson** v. Dugger, **547** So.2d at **1199-1200,** n.2 (Fla. **1989); Clark, supra;** Porter, **supra; Swafford,** supra. The only exceptions to such rule are when the claims have been preserved through specific contemporaneous objection at trial and where this Court's affirmance of the conviction has occurred prior to the rendition of the Booth decision. See **Jackson,**

supra; Bush v. Dugger, 16 F.L.W. S233 (Fla. March **28,** 1991). Neither circumstance exists **sub** judice. The decision in Booth was rendered on June 15, 1987, and the formal opinion in this case was not rendered until July 7, 1988. Further, it is questionable whether the objections at trial preserved any "victim impact" argument for appeal. While trial counsel did object to the playing of the tape on the grounds that such was prejudicial and would arouse the emotions of the jury (R 154-155, 613-619), he never argued that the tape contained irrelevant matters which would divert the jury from its responsibility under the Eighth Amendment. Cf. Bertolotti **v. State, supra** (trial objections, evidentiary in nature, insufficient to preserve "victim impact" argument for appeal). Obviously, the lack of contemporaneous specific objection preserving this point defeats any claim of ineffective assistance of appellate counsel. See Tompkins, **supra; Suarez, supra.** Accordingly, this claim is procedurally barred. **See Suarez,** supra; **Blanco, supra.**

To the extent that this Court disagrees with any of the above, Respondents would simply note that Booth itself provides that evidence concerning a victim is admissible, when such is relevant to the circumstances of the crime. See **Bertolotti, supra; Duest v. Dugger, 555** So.2d **849,** 852 (Fla. 1990). In this case, **the tape** recording of the murder itself was obviously relevant, not only to prove the very circumstances of the crime, but also the existence of heightened premeditation. **See Bertolotti, supra** (evidence that victim feared strangers relevant to proving whether burglary occurred); Duest, supra (admission of

photographs showing victim's family not error under **Booth** where such relevant to the case). Any prejudice would be minimal. See **Bertolotti, supra; Bush, supra; Duest, supra. No** relief **is** warranted as to this procedurally barred claim.

H. The claim in regard to closing argument

In this final allegation of ineffective assistance of appellate counsel, collateral counsel contends that attorney Collins was ineffective because he did not argue on appeal that fundamental error occurred in regard to the prosecutor's closing arguments at the guilt and penalty phases. Collateral counsel's use of the term "fundamental error" is a concession that no contemporaneous objection **was** interposed in **1985** in **regard to** any of the remarks now deemed objectionable (R 1053, **1058, 1059, 1061, 1063-1064, 1092-1093, 1096, 1111, 1113, 1114, 1115, 1320, 1325, 1326, 1327, 1332, 1341).**[1] It is, of course, axiomatic that appellate counsel cannot be deemed ineffective for failing to raise a claim which has been waived due to lack of objection. ***See*** **Roberts** v. State, 568 So.2d 1255, 1261 (Fla. 1990) (appellate counsel not ineffective for failing to raise claim of error in regard to prosecutor's closing argument, where no such claim preserved for review); **Tompkins, supra;** Suarez, **supra; Routly v.** Wainwright, 502 So.2d 901 (Fla. 1987). Petitioner has cited no

[1] Indeed, in the contemporaneously filed Motion to Vacate, etc., filed pursuant to Fla.R.Crim.P. **3.850,** collateral counsel contends that trial counsel was ineffective, for failing to object to some of these remarks (Motion to Vacate, Turner v. **State,** filed October **18, 1990,** at **page 215-218,** presently contained in the record on appeal from the summary denial of such motion, such case styled, Turner v. **State,** Florida Supreme Court Case No. 77,062, **ROA** 220-223).

precedent of this Court to the effect that any of the remarks now at issue constitutes fundamental error, and it is well established that matters which should have been preserved through contemporaneous objection at trial cannot be raised for the first time on habeas corpus. See **Blanco, supra; Swafford, supra.** The claim of ineffective assistance of appellate counsel is merely a transparent attempt to avoid application of this procedural bar. See **Kight, supra; Blanco, supra. No** relief is warranted as to this procedurally barred claim.

In conclusion, Turner is not entitled to any relief based upon his claims of ineffective assistance of appellate counsel, and, for the reasons set forth above, it is Respondents' contention that Claims II(A), (B), (D), (G) and (H) are procedurally barred.

CLAIM III

TURNER'S CLAIM INVOLVING **THE** DESIRABILITY OF SPECIAL VERDICTS IS **PROCEDURALLY BARRED**

In his final claim, Turner asks this Court to revisit its affirmance of his convictions, and to now reverse, because special verdicts were not utilized, i.e., verdicts which would have required the jury to specify whether conviction for first degree murder was based upon premeditation or felony murder. The alleged bases for this extraordinary request are counsel's belief that special verdicts are a good idea, and the fact that a case is presently pending in the Supreme Court of the United States, which would allegedly present this issue. See **Schad** v. **Arizona, 788** P.2d **1162** (Ariz. 1989), **cert. granted, ____ U.S. ____, 111**

S.Ct. 243, 112 L.Ed.2d 202 (1990). Collateral counsel also speculates, baselessly, that the jury in this case was not properly instructed that their verdict had to be unanimous.

This claim is obviously procedurally barred. Trial counsel did not request special verdicts in **1985**, and interposed **no** objection to the jury forms or the jury instructions on this basis.[2] As noted above, habeas corpus is not a vehicle for claims that, inter **alia**, should have been preserved through objection at the time of trial. See **Hills, supra; Swafford, supra; Suarez, supra; Blanco, supra.** Further, this Court has consistently denied relief in regard to claims of this nature, whether presented on direct appeal or collateral attack. **See** Buford **v. State, 492** So.2d **355, 358** (Fla. **1986)** (no requirement of special verdicts in capital trial); Martin v. **Wainwright, 497** So.2d **872, 874** (Fla. **1986)** (absence **of** special verdict not fundamental error cognizable on habeas corpus); Gorham **v. State, 521** So.2d **1067, 1070** (Fla. **1980)** (claim that standard jury instructions unconstitutional, for failing to require unanimity as to whether conviction based upon premeditation or felony murder, procedurally barred on collateral attack). No relief is warranted **as** to this procedurally barred claim.

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[2] Indeed, collateral counsel contends in the motion to vacate that trial counsel rendered ineffective assistance in this regard (Motion to Vacate, **Turner** v. State, filed October 18, 1990, at pages **186-195**, presently cantained in the record on appeal from **the** summary denial of such motion, such case styled **Turner** v. State, Florida Supreme Court Case No. **77,062**, ROA **191-200).**

Conclusion

WHEREFORE, for the aforementioned reasons, Respondents respectfully move this Honorable Court to deny the instant Petition for Writ of Habeas Corpus in all respects.

Respectfully submitted

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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. C. Graham Carothers, Esq., AUSLEY, McMULLEN, McGEHEE, CAROTHERS & PROCTOR, Post Office Box 391, Tallahassee, Florida 32302; and to Ms. Gwendolyn Spivey, 517 Beverly Street, Tallahassee, Florida 32301, this 3rd day of June, 1991.

RICHARD B. MARTELL
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