IN THE SUPREME COURT OF FLORIDA

ERIC DUANE TURNER, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 79,895

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0300179

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts, subject to the following additions and clarifications:

As to the competency issue, the record indicates that the trial court initially granted a defense motion for appointment of a confidential expert, pursuant to Fla.R.Crim.P. 3.216, and appointed Dr. Blau (R 1863-5). Later, on July 24, 1990, the court granted defense counsel's motion, filed pursuant to Fla.R. Crim.P. 3.210, and appointed two experts, Drs. Walker and McClaren, to determine Turner's competence to stand trial (R 2399). On March 25, 1991, the trial court, on the basis of the reports of Drs. Blau, Walker and McClaren, found that Turner was not competent to proceed, and order him committed (2648-2650).

Turner was admitted to Florida State Hospital, and, on April 24, 1991, the administrator advised the court that Appellant was now competent to proceed (R 2661). A formal competency hearing was held on July 31, 1991, at which three witnesses, Drs. Blau, McClaren and D'Errico, a psychiatrist at the state hospital, testified (R 345-471); the written reports of Drs. McClaren and D'Errico were formally admitted into evidence at this time (R 3029-3032, 3033-7). Ruling was deferred, and, on August 6, 1991, the court appointed Dr. Annis, as an additional expert, to determine Turner's competence to stand trial (2721). The competency hearing was reconvened on October 23, 1991, and Dr. Annis testified (R 509-539); additionally, his written report was introduced into evidence (R 3068-3072). On November 1, 1991,

the court rendered an order specifically finding Turner competent to stand trial (R 2735).

As to the sentences of death imposed, the sentencing judge rendered a detailed sentencing order on April 10, 1992 (R 2945-2966). In regard to the sentence of death imposed for the murder of Teresa Clements, the judge found that five (5) aggravating circumstances applied - that the homicide had been committed during a course of a robbery and kidnapping, under §921.141(5)(d) Fla.Stat. (1989), that the homicide had been committed to avoid arrest, under §921.141(5)(e) Fla. Stat. (1989), that the homicide had been committed for pecuniary gain, under §921.141(5)(f) Fla.Stat. (1989), that the homicide had been especially heinous, atrocious or cruel, under §921.141(5)(h) Fla.Stat. (1989) and that the homicide had been committed in a cold, calculated and premeditated manner, under §921.141(5)(i) Fla.Stat. (1989).[1] As to the sentence of death imposed for the murder of Lola Toombs, the judge found only that two (2) aggravating circumstances applied, those in regard to commission of a felony and pecuniary gain; it is the State's position that the judge did not find the heinous, atrocious or cruel or cold, calculated and premeditated aggravating circumstances as to this murder. The sentencing judge found that, as to both sentences, one statutory mitigating circumstance had been established - that Turner had no significant history of prior criminal activity, under

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[1] As will be argued infra, it is the State's position that the record also supports a finding that Turner had a prior conviction for crimes of violence, under §921.141(5)(b) Fla.Stat. (1989), due to his contemporaneous conviction of murder in regard to each of the two victims.

§921.141(6)(a) Fla.Stat. (1989). The sentencing judge in his order set forth his reasons for rejecting those statutory mitigating circumstances relating to mental state, §§921.141(6)(b) & (f) Fla.Stat. (1989), and age, §921.141(6)(g) Fla. Stat. (1989), and additionally discussed a number of the non-statutory mitigating circumstances presented (R 2954-2966).

As to the facts of the case, Appellee would note that, in the Initial Brief, opposing counsel relies almost exclusively, and uncritically, upon Turner's statement to the authorities for the circumstances of the offenses (Initial Brief of 2-3). While the statement was undoubtedly probative evidence, it was not the only evidence presented against Turner, nor is it uncontradicted in all respects. Accordingly, the State would set forth the following recitation.

On the evening of November 29, 1989, Annie Bennett and Julie Grimes left their place of employment, a consignment shop in Panama City called Lola's Second Chance, at around 5:40 p.m. (R 1164); they left through the front door of the building, and, by this time, the lights had already been turned off (R 1162). Lola Toombs, the owner, and Teresa Clements, a young girl who had recently been hired, were, however, still in Toombs' office in the back (R 1163). Bennett stated that although she had the receipts for that day, Toombs had not made a deposit for the last several days and that she could have had between $900 and $1500 on her (R 1173, 1176-7); the witness testified that Toombs carried a yellowish or gold money bag from Commercial Bank (R 1172). Ms. Bennett stated that Lola Toombs had a tan and blue van which she usually parked in back of the store and that Teresa

Clements drove a sports car, which was likewise parked in the back (R 1163).

The next morning, when Bennett returned to work, she found that Teresa Clements' car was still parked in the back and that her keys were lying on the ground where Ms. Toombs van was usually parked (R 1159). When the police arrived at the scene, they found a newspaper lying on the ground in the woods behind the store and some broken foliage in the area "that had been broken down to enable someone to get more of an unobstructed view to the building" (R 1185-6). Turner's fingerprints were later found on the newspaper (R 1458).

Meanwhile, earlier that morning, the bodies of Lola Toombs and Teresa Clements had been discovered in a claypit, approximately five and three quarter (5 3/4) miles away from the store (R 1375). Lola Toombs was found, fully clothed except for shoes, lying face up, whereas Teresa Clements was found alongside of her, completely nude, lying face down with a puddle of dried blood around her head. Several footprints were found near the bodies, and a shell casing was found in one footprint near Lola Toombs' head (R 1245); these footprints were later determined to have been made by a pair of sneakers owned by Turner (R 1481-3). Additionally, there were tire tracks near the bodies, as if a vehicle had "pull[ed] up by where the bodies were, back[ed] up and drive[n] back out" (R 1236). Broken glass was also found around the bodies of both victims (R 1246).

Autopsies revealed that both victims suffered gunshot wounds to the head (R 1420-1428). The pathologist specifically testified that each victim had been shot at close range or

"contact range", given the presence of powder burns (R 1420, 1428). Dr. Steiner stated that Lola Toombs had been shot while she had been sitting upright in the driver seat of the van; he stated that the gun had been held up against her forehead tightly, and had then discharged, sending the bullet through her brain (R 1420). The witness stated that he had also observed recent bruises on Ms. Toombs' face, forehead and left cheek (R 1426). From the existence of smeared blood on the victim's clothes, Dr. Steiner stated she had been dragged from the van and deposited on the ground after being shot (R 1423-4). As to Teresa Clements, Dr. Steiner testified that she had been shot once in the back of the head and that the bullet was still lodged in her brain (R 1435). The pathologist again expressly testified that the gunshot had been inflicted "at contact range", and stated that the wound was consistent with having been inflicted while the victim was lying face-down on the ground, as she was found (R 1428-1431). Dr. Steiner noted a faint bruise on the victim's left arm, which he stated would be consistent with her having been grabbed and led (R 1431-2). The doctor also noted a number of small scratches on Ms. Clement's left ankle, right lower leg and left buttock, which he suggested might have come from the broken glass (R 1431). The witness further testified that there were bloodstains on the soles of her feet, and that he did not believe that this blood had been that of Ms. Clements (R 1431).

Lola Toombs' van was subsequently located in Dothan, Alabama. Teresa Clements' clothes were found strewn throughout the passenger and cargo area (R 1192-3). Bloodstains were

detected on the driver's seat, the armrest and on the side of the driver's door; the driver's window was broken and glass was found both inside the van and on the running board (R 1203-7). Turner's fingerprints were found on the CB radio in the van, on the exterior of the driver's door and on a plastic cup from a Tom Thumb Convenience Store (R 1464-6); both Turner's and Teresa Clements' fingerprints were found on a plastic gift bag inside the van (R 1465). Additionally, an expert testified that the tire tracks found in the claypit were consistent with the van's tires (R 1473-5).

Turner was arrested in Georgia on December 13, 1989. At such time, he made a tape-recorded statement to the authorities (State's Exhibit #54). In his statement, Turner stated he had walked from a park near the marina to the back of the victim's store, where he had waited for it to close; he specifically stated that, at such time, he had lain upon a U.S.A. Today newspaper. Turner initially claimed that while he planned to rob the place, he did not want to hurt anyone. He stated that he had not known that Lola Toombs was the owner when she came out, but that he had gone up to her with a gun and pushed her into the van; the younger woman had heard Ms. Toombs call out, and had come over, and Turner had forced her into the van as well. He said that Lola Toombs was driving and that he told her to go to Dothan, although he soon realized that they were going the wrong way. Turner stated that they turned off the road a couple of times, and that he wanted to put the two women out. He said that the first time that they had turned off had been near the jail, and that they had gotten back onto the road; they later turned

off by the claypits. Turner stated that he had not consumed any alcohol or drugs at this time.

Turner claimed that Lola Toombs had offered him money and that he had shot her as she was sitting in the driver's seat of the van; he stated that the bullet had broken the window. He also said that he had found some jewelry and the gold bank bag in her purse. Turner stated that he opened the door to the van and that the victim's body fell out. Turner claimed that he had not ordered Teresa Clements to remove her clothes and that she had been shot while outside of the van; at one point, he claimed that he had closed his eyes when he shot her. After shooting the victims, Turner had driven the van to Dothan, stopping for gas on the way and getting a cup of water which he used to wash the blood off of the outside of the van. He stated that he had proceeded to Dothan and had parked the van near the projects, staying the night in a motel, under the name of Eric Young. The next morning he had gone back to the van to retrieve any spent cartridge shells, and then had simply abandoned it, throwing the keys into a trash barrel. He then proceeded to Montgomery, where he had stayed at another motel and given away the black sneakers which he had been wearing on the night of the murder; he also stated that he had thrown away the gold bank bag and Lola Toombs' jewelry because he "felt like a murderer." Turner claimed that the gun which he had used was "hot" and that he had bought it from "a guy in a white car" in Enterprise, Alabama, about a month prior to the incident; he also said that he had gotten the bullets by trading them at a pawn shop for some which he had for his .38.

Following the taped statement, Turner made additional statements to the authorities. Thus, Turner again reiterated that he had not originally planned to murder the victims, instead wanting only to steal the van and any valuables that they had (R 1314). Appellant stated that, when they had pulled into the claypits, Ms. Toombs had given him $300. He said that he had the gun in his hand and that it went off and a shot went into the roof; according to Turner, "everything just went crazy at that point", and he shot Lola Toombs (R 1315). At this time, Turner stated that he had, in fact, told Ms. Clements to remove her clothes, because he thought that, after he put her out of the van, it would take longer for her to summon help (1316). He had originally intended for Lola Toombs to strip as well, but the gun had gone off and she had started screaming (R 1316); Turner then stated that "he knew he couldn't leave the other one" (1316). Appellant stated that he "walked her" outside of the van, "laid her face down, and shot her in the back of the head" (R 1316). Additionally, when Turner returned to Panama City, he showed the authorities the precise route which he had taken on the night of the murder, pointing out where he had "staked out" the store and where they had originally turned off of the highway (R 1373-4).

At the time that Turner was taken into custody, he was found in possession of a .45 automatic; indeed, when the Georgia officers had told Appellant that they needed to speak with him, Turner had put the gun up to his head (R 1268-1275). A ballistics expert testified that this gun was the murder weapon (R 1496). The expert also testified that the gun did not have a "hair trigger", and that five and one quarter (5 1/4) pounds of

pressure were required to pull the trigger (R 1499-1500). The witness stated that the firearm was a single action, meaning that, in order to fire it, one had to manually cock the hammer and then pull the trigger; in a double action firearm, one would be able to cock the hammer and pull the trigger simultaneously (R 1498-9). Additionally, the Georgia authorities found a Cross pen in Appellant's possession, which was identified as belonging to Lola Toombs (R 1275, 1278, 1167, 1281).

At the penalty phase, the defense called fourteen (14) witnesses including Turner's mother and brother, and a mental health expert, Dr. Walker (R 1611-1761). Turner's mother testified that she had been an alcoholic and a drug addict when Appellant was growing up and that she had stolen to support her drug habit; she stated that she had recently found out that she was HIV positive (R 1612). She testified that Appellant was hurt by her behavior and that he had been rejected by his father; she also testified that Appellant had been conceived as a result of a rape (R 1611-13). Patricia Turner stated that there was a history of mental illness in her family, that both her mother and herself had been diagnosed as paranoid schizophrenic, and that her mother and sister had been institutionalized (R 1615). Mrs. Turner testified that Appellant had finished high school in Albany, New York, and had received a basketball scholarship to a community college in Texas (R 1615, 1628). She stated that Appellant, at age seventeen, had fathered a child and had accepted responsibility for the child and had become a good father (R 1617-18). She testified that Appellant had a number of jobs and also worked with troubled youths (1619-1620). Mrs.

Turner testified that Appellant's girlfriend in Texas also had a baby, but that Appellant stated that it was not his child (R 1626). She said that Appellant had left school in Texas without graduating, and had gone to stay with her sister in Alabama (R 1623). Mrs. Turner testified that she had visited Appellant the previous night and that something had happened to him, in that he no longer "looked like her son" (R 1624).

Appellant's brother, Troy, testified that when Appellant was six or seven years old, he had been hit on the head with a baseball bat (R 1632). Troy Turner stated that while they had had a tough life growing up, moving between New York and Alabama, overall they had had a "happy childhood", and that it had been clear that their grandmother, with whom they lived for several years, cared about them (R 1640). Appellant's brother testified that Eric Turner was very good at sports and that he had used sports as a chance to get out of the projects (R 1638). Troy Turner likewise testified that he had visited Appellant in the jail the night before his testimony, and seen him for the first time in several years; he stated that Appellant had not seemed like the same person (R 1643). Troy's wife, Francis Turner, and other family members offered comparable testimony as to the change in Eric Turner (R 1719, 1657, 1665); Appellant's cousin, Tracy Turner, testified that Appellant had called the family after his arrest and had been concerned as to whether family members thought he had committed the crimes of which he had been accused (R 1664). The defense also called one of Turner's former teachers, his basketball coach and a former teammate (R 1665-1678). Jessie Ingram testified that she had been Turner's tenth

grade English teacher, and that he had been very slow academically, although he had graduated on time (R 1667). Paul Lyons testified that Appellant had been exceptional basketball player and had taken direction well (R 1675-8).

Appellant's uncle, James Taylor, testified that he had visited Appellant in Texas and that Turner's girlfriend had flirted with him, and that he had then left, returning to Enterprise, Alabama (R 1685-1690). A friend of Turner's, Gerald Sanders, testified that Appellant had stayed with him for several months in 1988 in Texas. He claimed that Appellant had gone through a major personality change and that Appellant had told him that his uncle had had sex with his girlfriend during his visit (R 1697-1700). Appellant eventually came to Enterprise, Alabama and stayed with his aunt. James Taylor testified that at this time Appellant had seemed paranoid and had purchased a gun because he thought that he was being hassled by someone in Texas (R 1690-3). Appellant's aunt, Cynthia Anderson, testified that Turner had lived with her in Enterprise. She stated that he had been very upset because he had a blotchy rash on his abdomen and chest and was afraid he was losing his hair (R 1706, 1714). She stated that Turner became very withdrawn and quiet and quit his job as a waiter, because he was afraid that he was contagious (R 1705-1710, 1713-14). She stated Appellant was afraid that he had AIDS, although it was not clear whether he was aware that his mother was HIV positive (R 1712-13). Ms. Anderson, a nurse, testified that she had read that skin blotches of this type could be a symptom of AIDS but that Turner did not have any other symptoms; she claimed that he had seen a doctor who had told him

that he had nothing to worry about and to simply stay out of the sun (R 1712-14). Ms. Anderson testified that Appellant remained depressed and that she had become concerned when he left, eventually reporting him missing (1711). She stated that Turner later called her and told her that he would be home for Thanksgiving (R 1711).

Dr. Ralph Walker, a psychiatrist, testified that he had originally been appointed to determine Turner's competence to stand trial (R 1732). He stated, however, that he had also examined Appellant the previous night and that Turner, in contrast to his prior demeanor, had been willing to talk to him (R 1732-5). Dr. Walker felt that the medication which Appellant had been taking had helped him to the point where he was able to communicate with him (R 1760-1). The defense expert stated that Appellant had told him that he hears voices which tell him to do things which he knows are wrong (R 1735). Dr. Walker testified that Turner had two fixed delusions - that people were plotting against him and that his skin condition reflected a dread disease, such as AIDS or leprosy (R 1735-6). He stated that Appellant was extremely paranoid, delusional and psychotic, although not as psychotic as he had been earlier (R 1736-7). Dr. Walker opined that three statutory mitigating circumstances existed (R 1738-1740). The witness stated that, in his opinion, due to psychosis, Turner had been under the influence of extreme mental distress at the time of the murder, §921.141(6)(b) Fla. Stat. (1989), that due to the voices which he heard, Appellant had been under extreme duress, §921.141(6)(e) Fla. Stat. (1989), and that, due to the deterioration in Turner's condition, he had

been unable to conform his conduct with the requirements of the law, §921.141(6)(f) Fla. Stat. (1989), (R 1738-1741, 1752). Dr. Walker stated that, although Turner had known that what he was doing was wrong, he could not help himself (R 1740).

On cross-examination, Dr. Walker stated that his mental status examination had indicated that Turner was oriented in time, place and person and that he had good memory of the events in question (R 1740-1). The expert stated that Turner does know right from wrong and does know what he did was wrong (R 1742). The witness stated that it had been necessary to "break down" Turner's defenses in order to get him to talk to him at all (R 1744-5). Dr. Walker stated that he had spoken with Turner's mother and brother, but not to his aunt or any of the arresting officers (R 1753-7). Dr. Walker also stated that he had not reviewed Dr. McClaren's report (R 1758). The defense also called an investigator from New York, who verified that Turner's grandmother had been committed to a psychiatric center (R 1725). The investigator also testified that he had spoken with Turner by telephone four or five times prior to the trial (R 1727).

SUMMARY OF ARGUMENT

Turner raises ten (10) points on appeal, three (3) in regard to his convictions, and the remainder as to his sentences of death, which follow a jury override. The primary guilt phase issue is Appellant's contention that he was not competent to stand trial. Appellee contends that the trial court did not abuse its discretion in resolving conflicting expert testimony, and, in finding Turner competent to stand trial; likewise, the court did not error in denying Appellant's renewed requests for evaluation, which were primarily based upon the same grounds as those presented at the prior hearing. Turner's confession, as well as certain physical evidence, was properly admitted, in that the authorities in Georgia were justified in entering Turner's motel room, after he opened the door to them, and preventing Turner from killing himself in their presence; the physical evidence was seized as part of a search incident to a lawful arrest, after Appellant himself pointed his gun at the officers, as well. Denial of Appellant's belated cause challenge to seven jurors, whom he had previously had every opportunity to excuse, was not error, and the state did not exercise a peremptory challenge for racially discriminatory reasons.

As to the sentencing points, several - including the excusal of one juror and the propriety of two penalty phase jury instructions - were rendered moot by the jury's recommendation of life. Appellant's challenge to three of the aggravating circumstances found is without merit, and the trial court did not abuse its discretion in rejecting the evidence proffered as to the statutory mitigating circumstances relating to mental state.

The judge's override of the jury's recommendation of life was not error.

ARGUMENT

POINT I

THE JUDGE'S OVERRIDING OF THE JURY'S RECOMMENDATION OF LIFE WAS NOT ERROR.

Appellant opens this appeal by contending that the trial court's overriding of the jury's recommendation of life, as to both murders, was error under Tedder v. State, 322 So.2d 908 (Fla. 1975), in that the jury's recommendations were reasonable; as Appellant notes, the prosecutor below, in his sentencing memorandum, represented to the trial court, based upon his extremely pessimistic view of the law, that an override in this case "cannot survive" (R 2052) (Initial Brief at 6). Although Judge Foster did proceed to override both jury recommendations in this case, he made it clear that his focus was upon the sentence imposed for the murder of Teresa Clements; his order includes the statement, "If the Defendant had not killed Teresa Diane Clements, it is doubtful that the record would be sufficient to sustain an override of the jury's recommendation of a life sentence for the murder of Lola Mae Toombs." (R 2965).

The sentencer concluded, however, that because Turner's account as to how the murders took place, which included a pretext of accident or panic as to the murder of Mrs. Toombs, had been so conclusively discredited, he felt that death was appropriate for both murders (R 2965). In imposing death, the judge found two aggravating circumstances as to the murder of Lola Toombs; as will be argued infra, it is the State's position

that the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances were not found as part of this sentence. As to the sentence imposed for the murder of Teresa Clements, Judge Foster unquestionably found five (5) aggravating circumstances, and the record supports an additional aggravating circumstance, pertaining to both sentences, due to Turner's contemporaneous conviction of two murders, under §921.141(5)(b), Fla.Stat. (1989); this court should take this additional aggravating circumstance into account in its proportionality analysis. See, Echols v. State, 484 So.2d 568, 578 (Fla. 1985); Cannady v. State, 18 F.L.W. S67, S69 (Fla. January 14, 1993).

As to both sentences, Judge Foster concluded that one statutory mitigating circumstance applied, Turner's lack of significant criminal history under §921.141(6)(a), and found, but gave little weight to, several non-statutory factors, such as the "downward spiral" in Turner's life, Turner's cooperation with the authorities, Turner's remorse and willingness to suffer punishment, and Turner's potential for rehabilitation (R 2964). It would appear that the sentencer also found, but accorded little weight, to Turner's support for his family, the fact that Turner grew up in a fatherless and dysfunctional home, and the fact that Turner had previously been highly motivated (R 2962-2964). It is, of course, well established that the presence of valid mitigation does not absolutely preclude a jury override. See, Pentecost v. State, 545 So.2d 861, 863, n.3 (Fla. 1989); Burch v. State, 522 So.2d 810, 318 (Fla. 1988). This court has recently affirmed jury overrides, in cases in which the

mitigation presented has been adjudged to be "insignificant", when weighed against the extensive aggravation. See, e.g., Marshall v. State, 604 So.2d 799 (Fla. 1992); Coleman v. State, 610 So.2d 1283 (Fla. 1992); Robinson v. State, 610 So.2d 1288 (Fla. 1992). The evidence presented in mitigation, discussed in detail in the preceding section, involved expert testimony as to Turner's mental state (which, as noted in Point VIII, infra, the sentencer found to be refuted by other evidence, including Turner's own account of the murders and the report of another expert, the latter matter not available to the jury), as well as lay testimony from Turner's family and friends, regarding his life, accomplishments and hardships. In the circumstances of another case, this evidence could present a reasonable basis for a jury's recommendation of life, but the state would contend that in this case it did not.

As Judge Foster correctly found, the suggestion by Turner in one of his statements, to the effect that he had shot Mrs. Toombs in a "panic" (R 1315), is refuted by the fact that the gun was held to the victim's temple and discharged "at contact range"; the firearms expert testified as to the steps necessary in order to fire the gun, eliminating the possibility of any accidental or unintentional discharge (R 1499-1500). Further, Turner has never offered any exculpatory version of the murder of Teresa Clements. If the crime had occurred during a panic, one would expect that Clements would have been shot in the van, as well; instead, of course, she made to strip, walk outside the van, lie down, and was then shot in the back of the head. Even if one could say that the jury might have "pardoned" Turner for the murder of Mrs.

Toombs, based upon his less than credible account of accident and panic, no such basis could explain, or make reasonable, the recommendation as to the murder of Teresa Clements.

In Thomas v. State, 456 So.2d 454 (Fla. 1984), this court affirmed the jury override, where, in a double homicide, the judge had imposed death for the murder of the second victim; as here, the judge had found that this second murder was more aggravated, due to the fact that this victim had been eliminated for having witnessed the prior murder. In Thomas, there were two statutory mitigating circumstances found, a lack of significant criminal history and age (20), whereas here, only the former was found. Other death sentences have been affirmed, in non-override contexts, in which one victim was murdered because he or she witnessed a prior murder, see, LeCroy v. State, 533 So.2d 750 (Fla. 1988), and the circumstances of this case are comparable to Jones v. State, 18 FLW S11 (Fla. December 17, 1992), in which the defendant committed a double murder, so that he could obtain a truck which he needed for transportation.

The State does not denigrate the evidence presented by the defense below, which suggests that Turner had overcome hardships in his life, before he began, what the judge accurately described, as his "downward spiral." Further, despite the court's rejection of the statutory mitigating circumstances relating to mental state, cf. Thompson v. State, 553 So.2d 153 (Fla. 1989), it must still be remembered that even the state expert found that Appellant suffers from a personality disorder and depression (R 3072). Nevertheless, the trial judge, given the superior advantage point of his experience, cf. State v.

Dixon, 283 So.2d 1, 8 (Fla. 1973), concluded that this evidence did not provide a reasonable basis for a life recommendation, under all of the facts and circumstances of the case. His conclusion was correct and should be affirmed.

POINT II

THE TRIAL COURT'S DETERMINATION THAT APPELLANT WAS COMPETENT TO STAND TRIAL WAS NOT ERROR.

As his first attack upon his convictions, Turner contends that he was not in fact competent to stand trial. Although Appellant acknowledges that a trial court has the authority to resolve conflicts in evidence in this regard (Initial Brief at 14), Turner nevertheless maintains that Judge Foster abused his discretion, in that there was no competent and substantial evidence that demonstrated that Turner had the sufficient and present ability to assist and consult with his attorney about the facts of the case (Initial Brief at 18). The State disagrees, and would contend that reversible error has not been demonstrated.

In resolving this point on appeal, it is necessary to review in some detail the events which occurred below. Eric Turner was taken into custody in regard to the instant offenses in December of 1989, and the Office of the Public Defender was appointed to represent him. In February of 1990, defense counsel filed a Motion for Authorization of Mental Status Consultation pursuant to Fla.R.Crim.P. 3.216(a); in such pleading, counsel represented that he had good reason to believe that Turner had not been sane at the time of the offense and that he was presently not competent to stand trial (R 1863-4). The motion was granted and

Dr. Theodore Blau was appointed (R 1865-6). On June 25, 1990, Eric Turner filed a pro se motion to relieve counsel, on the grounds that a conflict of interest existed, due to the fact, inter alia, that Attorney Stone refused to handle the case "in line with Defendant's wishes" (R 2305). On July 12, 1990, defense counsel filed a motion for a competency evaluation under Fla.R. Crim.P. 3.210(b), in which he asserted that he believed that Turner was not competent to stand trial (R 2330-2). At a hearing on the same date, defense counsel, Michael Stone, stated that he was experiencing "communication problems with Mr. Turner" (R 47); counsel also stated that the defense expert had not been able to complete his examination for the same reason (R 49). The court agreed to appoint two experts to determine Turner's competence to stand trial, Drs. Walker and McClaren. During the hearing, Turner announced that he refused to go to court with present counsel (R 72).

The competency hearing was continued several times, and, on September 4, 1990, a letter by the defense expert, Dr. Blau, was filed (R 2537). In such letter, the expert stated that he had re-examined Turner on August 24, 1990, in the presence of his attorney. Dr. Blau noted that Turner had told his counsel that he wanted nothing to do with him and refused to go to trial with him; the defense expert stated that this hostility was "inappropriate" (R 2537). Dr. Blau stated that, in his opinion, Turner had appreciated the charges against him and their possible penalties (R 2537). The expert opined, however, that it was questionable whether Turner really understood the adversary nature of the legal process and that his ability to manifest

appropriate courtroom behavior was unacceptable; Dr. Blau also stated that Turner was unable to disclose relevant facts to his attorney and could not testify relevantly (R 2538). At a hearing on October 2, 1990, Turner advised the court that he wished to go forward with his pro se motion to dismiss counsel (R 213); it was agreed, however, that the matter would be deferred, pending resolution of the competency motion (R 231-3). On October 31, 1990, the public defender certified a conflict of interest between Turner and other clients, and moved to withdraw; such motion was granted on November 5, 1990, and Attorney Richmond was appointed to represent Turner (R 2628-2631).

At a hearing on February 8, 1991, counsel advised the court that he had experienced significant problems communicating with Turner, since his appointment (R 284). Counsel noted that two of the experts had concluded, in their reports, that Turner was not competent to stand trial, whereas one felt that he was malingering; Attorney Richmond asked that Turner be sent to "an environment where he can be examined on a twenty-four hour a day basis" (R 285). The state did not oppose this request, and, on March 25, 1991, Judge Foster rendered an order, holding that, on the basis of the written reports of Drs. Walker, Blau and McClaren, he found Turner to be incompetent to proceed with the trial and order him committed to a mental health treatment facility (R 2648-2650).

The July 24, 1990 report of Dr. Blau, a clinical psychiatrist, indicated that he had administered a number of psychological tests including the Reitan-Indiana Aphasia, Lezak-Rey 15 Item Test and others, and had examined Turner on April 13,

and July 19, 1990 (3027-3029). At this time, Turner had evinced distrust of his attorney and had only participated in the testing reluctantly. Dr. Blau opined that Turner was not competent to stand trial and that his capacity to disclose relevant facts to his attorney and his capacity to testify relevantly appeared to be unacceptable; the expert stated that Appellant's appreciation of the charges facing him and the potential penalties seemed acceptable, whereas his understanding of the adversary nature of the legal process was between acceptable and questionable; Blau felt that Turner's ability to manifest appropriate courtroom behavior ranged from questionable to unacceptable (R 3027). The August 28, 1990 report of Dr. Walker, a psychiatrist, indicated that he had examined Turner on July 24 and August 19, 1990; Dr. Walker indicated that he had also spoken with Turner's mother by telephone (R 3030-3033). Turner struck Dr. Walker as being paranoid and psychotic, and the doctor diagnosed him as suffering from a delusional disorder and paranoid personality disorder. Dr. Walker stated that Turner appeared to understand the charges facing him, the potential penalties and the adversary nature of the legal process; he concluded, however, that due to his paranoid delusions, it appeared that Turner was not able to disclose relevant facts to his attorney and that the doctor had severe doubt concerning Turner's ability to testify relevantly or to manifest appropriate courtroom behavior.

The September 19, 1990 report of Dr. McClaren, a clinical psychiatrist, indicated that he had examined Turner on September 10 and 11, 1990 (R 3033-7). The doctor administered a number of psychological tests, including MMPI, WAIS-R intelligence test and

the Bender-Gestalt; additionally, Dr. McClaren stated that he had spoken with Turner's mother and read Turner's jail records and materials from the State Attorney's Office, as well as Turner's school records from New York. The doctor stated that Turner had initially refused to attend the interview or cooperate at all; after Turner had read the reports of the prior experts, he had indicated some willingness to participate. The mental status examination had indicated no evidence of hallucinations or delusions , and Turner claimed no amnesia for any period in his life. As had the prior experts, Dr. McClaren concluded that Turner understood the charges facing him and their potential penalties. The expert also concluded that Turner understood the role and responsibilities of court personnel and that he could testify relevantly and manifest appropriate courtroom behavior. Dr. McClaren stated, however, that it had been difficult to access Turner's capacity to disclose relevant facts to his attorney, given the fact that Turner refused "to disclose his memories in this regard"; McClaren stated that Turner had indicated to him that "he felt that he would be able to disclose such matters to another attorney, other than his present attorney, whom he distrusted" (R 3035). Turner stated that he had heard that a number of Attorney Stone's prior clients had ended up on death row, and that he heard good things about another attorney, named John Daniels. Dr. McClaren stated that, all things considered, Turner "certainly appears now able to work with an attorney in his own defense should he choose to do so." (R 3036); accordingly, the doctor recommended that Turner be found competent to proceed (3037).

On or about April 24, 1991, the administrator of Florida State Hospital advised Judge Foster that the staff felt that Turner was now competent to stand trial, and that he was ready to return to Bay County (R 3027). Several days later, the administrator forwarded a report by Dr. D'Errico, a psychiatrist at the hospital, who set forth his conclusions as to Turner's competency; Dr. D'Errico felt that Turner was in fact competent to stand trial (R 3029-3032). At a hearing on May 7, 1991, defense counsel Richmond stated that he had briefly met Turner and Appellant had been glad to meet him "for the first time" and that it was "much better than last" (R 293). At a subsequent hearing on July 10, 1991, however, counsel stated that Turner still had not talked to him (R 312). When the competency hearing formally convened on July 31, 1991, Attorney Richmond reported that Turner had not spoken one word to him about the case and did not wish him to proceed as his counsel (R 331). The state then proceeded to call two witnesses, Drs. D'Errico and McClaren, and also introduced their written reports (R 346-420; 3028-3037); the defense called Dr. Blau (R 420-456).

Dr. D'Errico testified that he had seen Turner frequently during the month that he had been at Florida State Hospital, and that he had also reviewed the reports of the prior experts (R 360, 362-3). The doctor stated that he had attempted to have Turner take another MMPI test, but that Appellant had not cooperated (R 365). Going through the six criteria for competence set forth in Fla.R.Crim.P. 3.211, Dr. D'Errico testified that Turner did appreciate the nature of the charges against him, as well as the range and nature of possible

penalties (R 360). Likewise, the doctor testified that Turner understood the adversary nature of the legal process and had the ability to testify relevantly and to manifest appropriate courtroom behavior (R 360-2). As to Turner's capacity to disclose pertinent facts to his attorney, D'Errico testified that, while Appellant had not proffered a description of the offense to him, Turner had told him "that he could produce such a description to his attorney" (R 361); the doctor reaffirmed that, in his opinion, Turner had the ability to communicate and the cognitive ability to think and to reason (R 361). In his written report, Dr. D'Errico had indicated that Turner appeared to have no problems with either recent or remote memory and that his functioning appeared within the low average range of general intelligence (R 3030). The doctor also noted that Turner had been taking psychotropic medication during his stay at the Florida State Hospital and had not been a management problem (R 3032). In his report, the doctor stated that Turner had specifically advised him that "he would enlist the advice of his attorney in making various decisions during the legal process." (R 3031).

Dr. McClaren testified that he had examined Turner on September 10 and 11, 1990, as well as on July 10, 1991 and the day of the hearing itself (R 385, 388, 394). The expert testified that he had been aware that Turner had not cooperated very much with the other experts, and that, as a result, he had set out to "motivate" Turner into cooperating by showing him the reports of the other doctors (R 381-2, 404). Dr. McClaren stated that he had wanted Turner to agree to the psychological testing,

so that the expert could have an objective measure of Turner's mental and emotional functioning; he also stated that Turner's then-counsel, Attorney Stone, had told him that he really wanted to get to the bottom of it and understand what was wrong with Appellant (R 410, 404). At their first meeting, Turner completed the MMPI and WAIS-R tests; Dr. McClaren stated that the results were valid, and showed depression, but not psychosis (R 383). He also stated that Appellant's IQ seemed to be 81, placing him in the low average or borderline retarded range (R 384). McClaren stated that he had met with Appellant on July 10, 1991, in a futile attempt to encourage Turner to talk with Attorney Richmond, and that he had administered a second MMPI at that time; Dr. McClaren testified that the results of this test were markedly different from the first, in that, at this time, Turner seemed to be exaggerating his mental problems (R 392).

The expert testified that he had had a "very coherent conversation" with Turner, shortly before testifying (R 394). McClaren stated that there was no doubt that Turner understood the legal system, what he was charged with, and the potential penalties (R 395). He testified that Appellant still refused to discuss the murders with him which was not uncommon among defendants in his position (R 395). Dr. McClaren stated that in his opinion Turner was competent to stand trial (R 396). He stated that Appellant had told him that he had been accused of murdering two women and could get the death penalty if convicted (R 398). The doctor said that Turner was aware of the workings of the legal process and had the ability to manifest appropriate courtroom behavior (R 399). He did state, however, that Turner's

ability to testify relevantly was questionable, given the fact that he would not discuss the incident, and that his ability to consult with his attorney was likewise questionable, because Turner did not trust his attorney and felt that he was against him (R 399-400). On cross-examination, Dr. McClaren stated that Turner seems suspicious of lawyers in general (R 402). The expert testified that he was aware that mental illness ran in Turner's family, and that his grandmother had been institutionalized; he stated that not all members of a family inherit mental illness (R 411-412). At the conclusion of his testimony, the judge asked Dr. McClaren to clarify his views as to two of the competency criteria. McClaren stated, while Turner was not schizophrenic, he was suspicious of lawyers, and that the expert could not say for sure whether Appellant had the ability, as opposed to the willingness, to consult with his attorney (R 415-16); McClaren stated that if Turner lacked the ability to consult with his attorney or to testify relevantly, he would be incompetent, whereas, if it were simply a matter of choice, such would not be the case (R 415-17).

The defense then called Dr. Blau, a clinical psychiatrist and neuropsychiatrist. Dr. Blau stated that he had examined Turner in 1990, and, like Dr. McClaren, he had also seen Appellant on the day of the hearing itself (423). Dr. Blau stated that, in his opinion, Turner was not competent to stand trial (R 423). He testified that Turner met three of criteria for competence and that he understood the charges against him, the potential penalties and the adversary nature of the judicial process (R 423). Dr. Blau stated that, however, Turner's

capacity to disclose pertinent facts to his attorney and capacity to manifest appropriate courtroom behavior were both unacceptable, and that his ability to testify relevantly was between unacceptable and questionable (R 424). The defense expert stated that Turner suffered from serious memory deficits, which had gotten worse since his first examination, despite the fact that he had been taking medication (R 424). Dr. Blau stated that there was evidence of brain damage, although such was moderate, and not severe (R 425, 440). The expert described Turner as "a fragmented paranoid schizophrenic", who was plagued by hallucinations and delusions (R 426, 441); he said that Turner harbored a firmly held paranoid schizophrenic belief that everyone connected with the judicial system was against him, although such belief "drifted in and out" and, at times, Turner was apparently able to understand what was going on around him (R 427, 442-3). Dr. Blau testified that, due to his mental condition, Turner was simply unable to cooperate with his attorney (R 448). The expert stated that Turner understood the charges against him, their penalties and the operation of the legal system, because he was processing "old information"; he said that he could not predict what Turner's behavior might be during a jury trial (R 454-6).

The court reserved ruling on Turner's competence, and, on October 6, 1991, appointed Dr. Lawrence Annis as an additional expert to determine Appellant's competence (R 2721). The competency hearing was resumed on October 23, 1991, and Dr. Annis testified (R 509-539); additionally, Dr. Annis' report was introduced into evidence (R 3068-3072). Dr. Annis, a clinical

psychologist, testified that he had examined Turner twice in August of 1991 (R 516). Although the doctor did not conduct any psychological testing, he had reviewed certain portions of the court file, including Turner's statement, as well as Turner's records from Florida State Hospital; he had also talked with the staff there, the jail staff, and Turner's mother in New York and aunt in Alabama (R 522-3). He stated that, although Appellant's mother had told him that schizophrenia ran in the family, he did not believe that Appellant suffered from it (R 537); he also testified that, while the jail personnel had indicated that Turner had been a management problem two months ago, his problems had not included hallucinations, and Appellant appeared calmer now (R 525-7). Dr. Annis testified that Turner was competent to stand trial, meeting all the criteria set forth in rule (R 517). The witness expressly stated that Turner had stated that he was accused of killing two persons and could face the electric chair if convicted; he said that Turner had described the roles of the judge, prosecutor and defense attorney (R 518-521). As with the other experts, Turner had declined to discuss the murders, indicating that he did not wish to incriminate himself (R 518); Dr. Annis noted that Turner had given a statement to the authorities, and concluded that Turner had the ability to impart this information to his attorney, if he chose to do so (R 519-521). Dr. Annis testified that he detected no signs of memory deficit or organicity (R 521, 538). Dr. Annis also expressly testified that Turner had the ability to manifest appropriate courtroom behavior and the capacity to testify relevantly (R 522). In his written report, Dr. Annis specifically stated that

he had seen no overt signs of hallucinations during his meeting with Turner, and that the staff at both the jail and state hospital had not described Turner as hallucinating (R 3071). Likewise, in his report, Dr. Annis stated that while Turner "may not care for attorneys", he had the "intelligence, erudition and motivation to carefully track courtroom proceedings." (R 3071).

On November 1, 1991, Judge Foster rendered an order finding Turner competent to stand trial (R 2735). Trial was set for January 27, 1992, but, on January 16, 1992, defense counsel filed a motion to determine Turner's competence to stand trial, pursuant to Fla.R.Crim.P. 3.210; in such motion, counsel represented that Appellant had still not communicated with him, that such silence was allegedly the result of his paranoia and that Turner had allegedly been violent in the jail at some unspecified time (R 2754-9). When jury selection commenced on January 27, 1992, defense counsel, without great elaboration, contended that the motion was made due to Turner's "different behavior somewhat" (R 630); Judge Foster found such to be an insufficient basis, and denied the motion (R 630). The matter was not raised until the conclusion of proceedings (R 1122) on the next day, and as trial was set to commence on January 29, 1992, defense counsel orally renewed his motion, on the grounds that Turner was still not talking to him; Judge Foster stated that, in the absence of anything new, he would stand by his prior ruling (R 1134-5).

The next morning, defense counsel renewed the motion again, contending that, as he had observed Turner in his cell, "he appeared to be having a minor hallucination." (R 1351). Judge

Foster denied the motion, noting that he had been observing Turner carefully in all of the proceedings to date, and specifically finding:

> And I have observed his [Turner's] eyes, I observed his facial expressions and I have observed his demeanor. I have observed him to the extent that I think that he is fully cognizant of what is going on. He searches the courtroom with his eyes, when a witness is called he glances around, glances at the witness, he looks in the direction of questions being answered. He has elected not to communicate with his lawyer as I understand and he has the right not to do so. And notwithstanding the blank stare that the video television stations showed last night, I find Mr. Turner has a piercing, a penetrating, an inquiring, a searching look in his eye and he knows what's going on. And he is capable of cooperating with his attorneys if he elects to do so (R 1352).

The next morning, January 31, 1992, defense counsel again renewed his motion, on the grounds that Turner still had not communicated with him, and the motion was denied. (R 1515-17); at counsel's request, the judge specifically advised Turner of his right to testify and to call witnesses in his defense, and encouraged him to speak with his attorney (R 1519-20). Following the return of the jury's verdict of guilt, defense counsel renewed his motion, stating that Turner was still not communicating with him; Judge Foster denied the motion, specifically noting that he had seen Appellant talking to the bailiff, and, thus, evincing an ability to communicate (R 1604-5). The penalty proceeding was conducted on February 3, 1992, and, interesting, defense counsel did not renew his motion on such date, even though he called as a witness Dr. Walker, who had examined Turner the previous night and who testified extensively

as to Appellant's mental state. In his post-trial motion for new trial, defense counsel renewed his motion for a final time, and specifically alleged, for the first time, that Turner had been "hearing voices throughout the trial" (R 2881); the motion was denied (R 1814).

As noted, Turner contends on appeal that Judge Foster abused his discretion in finding him competent, in that, allegedly, no competent and substantial evidence demonstrated that Turner had the present ability to assist and consult with his attorney about the facts of the case. Appellant contends that only one expert, Dr. D'Errico, unequivocally found Turner competent to stand trial (Initial Brief at 17). Appellee disagrees with Appellant's arguments, both in the general and the specific; both Drs. D'Errico and Annis unequivocally found Turner competent to stand trial and Dr. McClaren, despite some uncertainty as to one of the factors, never retreated from his position that Turner was in fact competent to stand trial (R 354, 517, 396). There are essentially two issues presented, one in regard to the correctness of Judge Foster's initial finding of competency, rendered on November 1, 1991, and another in regard to the judge's denial of subsequent request for evaluation. The state would contend that Judge Foster did not abuse his discretion in any respect, and that the instant conviction should be affirmed in all respects.

As to the first issue, Appellant concedes that, under such precedents of this court as Ponticelli v. State, 593 So.2d 483, 487 (Fla. 1991), it is a trial court's responsibility to resolve conflicting testimony, including that of experts, on the issue of

competency, and that, absent abuse of discretion, the decision of the trial court in such regard will be upheld. (Initial Brief at 14). This is, indeed, the law. See, also, Watts v. State, 593 So.2d 198, 202 (Fla. 1992); Carter v. State, 576 So.2d 1291, 1292, (Fla. 1989); King v. State, 387 So.2d 463, 464 (Fla. 1st DCA 1980); Fowler v. State, 255 So.2d 513, 514 (Fla. 1971). While Dr. Blau testified that, in his opinion, Turner was not competent to stand trial, a view also expressed by Dr. Walker in his report, such expert testimony was not binding upon the court, especially when contradicted by the views of Drs. Annis, McClaren and D'Errico. See, e.g., Muhammad v. State, 494 So.2d 969, 973 (Fla. 1986) (reports of experts "merely advisory to court", which retains responsibility of determining defendant's competence); Gilliams v. State, 514 So.2d 1098, 1100 (Fla. 1987).

In this case, all of the experts were in agreement that Turner understood the charges against him, their potential penalties and the adversary nature of the judicial system. Although Dr. Blau, the defense expert, found Turner's capacity to manifest appropriate courtroom behavior to be unacceptable, the doctor's opinion was primarily based upon speculation (R 424, 455-6). Aside from expressing a desire to dismiss his counsel, Turner did nothing out of the ordinary in any of his prior court appearances, and the other experts evinced no concern in this regard. As to Turner's ability to testify relevantly, there was, obviously, no direct evidence as to this factor as Turner never testified. While Drs. Blau and Walker expressed concern in this regard, given the fact that Turner had never disclosed to them the events of the murder (R 399, 3066), Drs. Annis and D'Errico

both found that Turner possessed this ability, and, in his report, Dr. D'Errico specifically stated that Turner had assured him that "he recalled enough of the incident in question to be able to relate it to the court." (R 3031).

As to Turner's capacity to disclose relevant facts to his attorney, this factor provoked the most debate. Again, Turner's refusal to discuss the events in question with any of the experts, as well as his distrust of lawyers, led to a difference of opinion. Drs. Blau and Walker stated that Turner lacked the ability to disclose relevant facts to his attorney because of problems with memory and paranoid delusions (R 424, 426, 434, 3060), whereas Drs. Annis and D'Errico reached different conclusions. Dr. D'Errico, who had had the opportunity to observe Turner for an entire month at the state hospital, specifically stated that Turner had told him that he could provide a description of the events to his attorney (R 361); in his report, Dr. D'Errico stated that Turner had told him "that he would enlist the advice of his attorney in making various decisions during the legal process" (R 3031). Dr. Annis, who had examined Turner closest in time to the trial, testified that Turner evinced no signs of any memory deficits, and stated that Turner had declined to discuss the incident with him, because he "felt that this would be risking incriminating himself." (R 521, 518). Dr. Annis stated that he knew that Turner had given a statement to the authorities concerning the offense, and concluded that Turner had the ability to provide an account of the murder to his attorney, should he choose to do so (R 519-521). In his report, Dr. Annis noted, while Turner did not "care

for attorneys", he had the intelligence, erudition and motivation to track courtroom proceedings (R 3071). There was, in fact, competent and substantial evidence presented in regard to all of he criteria for competence under Fla.R.Crim.P. 3.111, and Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) and Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Judge Foster did not abuse his discretion in finding Turner competent to stand trial in November of 1991.

In Drope itself, the United States Supreme Court specifically admonished that even when a defendant has been previously determined to be competent to stand trial, trial courts must nevertheless always be alert "to circumstances suggesting a change that would render the accused unable to meet these standards of competence to stand trial." Id. at 420 U.S. 180-1. Indeed, this court has, on occasion, reversed convictions when the trial court, despite entirely proper initial findings of competency, has failed to order subsequent examination when required. See, e.g., Nowitzke v. State, 572 So.2d 1346 (Fla. 1990) (trial court should have ordered second competency hearing where, on eve of trial, defendant rejected plea bargain based upon information that came to him in a dream, laughed at possibility of death penalty and stated that he could not be executed due to numbers of letters in name); Pridgen v. State, 531 So.2d 951 (Fla. 1988) (trial court erred in not ordering second competency evaluation prior to sentencing proceeding, where defendant refused to allow witnesses to be called, demanded the judge kill him and gave a rambling statement to jury protesting innocence but asking for death); Scott v. State, 420

So.2d 595 (Fla. 1982) (trial court erred in not ordering competency hearing, where defendant rejected favorable plea bargain, failed to communicate with attorney due to perceived racism, even though defendant and attorney of same race, and where trial court erred in believing that prior finding of competency had been made); Lane v. State, 388 So.2d 1022 (Fla. 1980) (trial court erred in continuing with trial, where, on eve of trial, three experts were unable to state that the defendant was in fact competent to proceed).

These cases, however, are distinguishable from the situation sub judice, in that there was no "change in circumstance". While defense counsel did renew his motion for evaluation of Turner several times during the trial, the grounds for the motions would seem to be simply repetition of matters already presented during the original competency hearing. Defense counsel's primary complaint was, understandably, that Turner refused to communicate with him. While such a stance on the part of a defendant undoubtedly was not beneficial to the defense, the criteria for trial competency involves a defendant's ability to disclose pertinent facts to his attorney, not his willingness to do so. Both Drs. D'Errico and Annis had testified earlier that Turner had the ability to disclose information to his attorney, should he choose to do so, and Turner's continued recalcitrance in this regard did not mandate a second competency hearing. In LaPuma v. State, 456 So.2d 933, 934 (Fla. 3rd DCA 1984), cert. denied, 464 So.2d 555 (Fla. 1985), the Third District expressly held that a defendant's failure to communicate with his attorney, "a matter of his own choosing," did not constitute a change in

circumstances sufficient to require a second competency hearing. Asimilar is result in warranted in the case at bar.[2]

While defense counsel did also make some generalized references to Turner, in his cell, allegedly "appearing to be having a minor hallucination," and also made an additional reference to an undated violent outburst in jail (R 2754-9, 1351), these, or comparable, matters were already presented at the original competency hearing. Dr. Annis was aware of Turner's prior outburst at the jail, which had apparently occurred two weeks prior to his report (R 3071); Dr. Annis still found Turner competent. Drs. Annis and D'Errico specifically noted the absence of hallucinations in their evaluations of Appellant (R 3031, 3071), and Dr. Annis reviewed all the jail records, noting that none of the correctional personnel had ever observed Turner suffering from a hallucination (R 3071). Judge Foster continually pressed defense counsel to be more specific as to the basis for his renewed motions, and it is clear that defense counsel, despite numerous opportunities, failed to clarify whether or not he was arguing something new. Judge Foster likewise indicated that he was well aware of his responsibility to continuously monitor Turner's competency throughout the trial, and placed on the record his observations of Appellant, including the fact that he had seen him conversing with the bailiffs and that he had personally observed Turner paying close attention to

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[2] From the testimony presented at the penalty phase, it would appear that Turner was able, and willing, to communicate with the defense investigator in New York, who was in charge of investigating his background, in that Appellant talked with him by telephone a number of times (R 1727).

the testimony of witnesses (R 1352, 1604-5). While defense counsel did include a final allegation of incompetency in his motion for new trial, stating, without elaboration or clarification, that Turner had been "hearing voices throughout the trial" (R 2881), counsel's lack of specification deprived the court of a meaningful opportunity to evaluate this claim.

In contrast to the cases cited above, Turner did not display any dramatic or unbalanced behavior in the courtroom, and there has been no showing of any meaningful "change in circumstance", since the original determination of competency. Accordingly, Judge Foster's denial of Turners' renewed motions for evaluation was not error. See, Hodges v. State, 595 So.2d 929 (Fla. 1992) (defendant's suicide attempt near conclusion of penalty phase insufficient basis for suspension of proceeding and competency evaluation); Gilliam, supra (second competency evaluation not required where, on eve of trial, defendant indicated desire to dismiss counsel, after successfully dismissing prior counsel, where court had carefully observed defendant and "any behavioral changes which may have occurred subsequent to the initial competency evaluation"); Muhammad, supra ("one need not be mentally healthy to be competent to stand trial", and defendant, who indisputably suffered mental problems, failed to demonstrate error in court's finding of competency); Trawick v. State, 473 So.2d 1235 (Fla. 1985) (defendant's state of despondency and contemplation of suicide insufficient to trigger need for second competency evaluation); Thompson v. State, 389 So.2d 197, 199 (Fla. 1980) (denial of second competency evaluation not error, where defense counsel failed to "identify any particular

circumstance which had caused the mental condition of the defendant to change since [the] prior examinations"). As in Pericola v. State, 499 So.2d 864, 867 (Fla. 1st DCA 1986), cert. denied, 509 So.2d 1118 (Fla. 1987), Turner failed to raise a "bona fide and reasonable doubt" as to his competency, so as to necessitate a second evaluation. The instant convictions should be affirmed in all respects.

POINT III

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN RECORD TO HIS MULTI-FACETED ATTACK UPON JURY SELECTION.

As his next point on appeal, Tuner presents three (3) separate claims in regard to the jury selection sub judice. Initially, he contends the trial court violated Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), in granting the state's challenge for cause as to one prospective juror; as will be argued below, the state questions the preservation of this point, as well as Turner's standing to bring it, given the fact that the jury in this case returned an advisory sentence of life. Turner also argues, as to his convictions, that the trial erred in allowing the state to utilize a peremptory challenge against one prospective juror, allegedly in violation of State v. Neil, 457 So.2d 481 (Fla. 1984), and in denying defense challenges for cause as to seven prospective jurors, who, allegedly, due to pretrial publicity, could not be impartial. Neither contention has merit, and Appellee further questions the harmfulness of any error as to the last point. Each of Turner's arguments will now be consider.

A. No Claim for Review under Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), Has Been Preserved for Review; Any Error Was Rendered Moot by the Jury's Recommendation of Life.

As his first claim in this point, Turner contends that Judge Foster erred in granting the state's cause challenge of prospective juror Lillian Roche. The record indicates that Lillian Roche was called as a member of the sixth panel of prospective jurors to be examined; she was the mother of Hugh Roche, another prospective juror, who was excused based upon a defense cause challenge, given the fact that he was general manager of a local television station (R 1066, 1111). During voir dire, Ms. Roche testified that she had seen television accounts concerning the case in 1989, and also on the night prior to voir dire (R 1097); she likewise stated that she had been to the victim's store, and had recognized the victim's photograph at the time the murder was publicized (R 1080-1). In regard to the death penalty, Ms. Roche stated that she found it "shocking", and was not sure if she believed in it or not (R 1078-9). She did state, however, that she believed that she could apply it in the appropriate circumstance, but when asked to clarify her response, stated, "I just don't know." (R 2079). The prosecutor subsequently announced that he wished to exercise a cause challenge upon Mrs. Roche, which was granted (R 1112). Defense counsel did not object, but stated for the record, "I don't believe she indicated that she has a fixed opinion as to whether she could give it or not. She would have to take it on a case by case situation." (R 1112).

On appeal, Turner contends that the trial court erred in excusing Mrs. Roche for cause, in that she did not meet the requirements for excusal set forth in Wainwright v. Witt or Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); it is apparently opposing counsel's view that her excusal resulted in a jury composed only of people "who were uncommonly willing to condemn a man to die" (Initial Brief at 25). There are a number of problems with this argument. Initially, the State would contend that this claim is not preserved for review. While defense counsel below offered his opinion that Mrs. Roche did not, in fact, have a fixed opinion, he never objected to the state's cause challenge or the court's granting of it; had he done so, the court might have ruled differently. Accordingly, under this Court's precedents, no claim of error has been preserved. See, e.g., Cannady v. State, 18 FLW S67, 69 (Fla. January 14, 1993); Gunsby v. State, 574 So.2d 1085, 1088 (Fla. 1991); Hoffman v. State, 474 So.2d 1178, 1181 (Fla. 1985) (defendant's contention that trial court erred in excusing certain veniremen not preserved for review, where, although defendant's counsel did object to excusal at trial, he did so on different basis than that presented on appeal); Maxwell v. State, 443 So.2d 967, 970 (Fla. 1983); Rose v. State, 425 So.2d 521, 524 (Fla. 1982) ("... an objection to excusing a juror on the basis of Witherspoon must be made to the trial court before the juror is excused.")

In Maggard v. State, 399 So.2d 973, 975 (Fla. 1981), this court set forth its rationale for requiring a contemporaneous objection in this regard,

> If a defendant does not want a prospective juror to be excused on the basis of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct 1770, 20 L.Ed.2d 776 (1968), he should make his objection known before the juror is excused. This is not an unreasonable requirement in view of the fact it is certainly possible that the defendant himself does not want the particular juror to serve and is perfectly content to have the juror excused for cause by the court so that he will not have to use one of his peremptory challenges.

Indeed, that is exactly what the State would contend occurred sub judice. As will be demonstrated in Part C, infra, Turner's trial counsel took the absolutist, and incorrect, position that any juror who knew anything about the case, including simply the fact that a murder had occurred, was subject to a cause challenge; in accordance with this belief, defense counsel moved to strike virtually every panel of prospective jurors, including that upon which Mrs. Roche sat, due to the fact that any juror thereon knew something about the case (R 776). Defense counsel challenged for cause a number of prospective jurors whose knowledge of the case was comparable to that of Mrs. Roche (R 1050, 1052, 1054, 1056, 1057, 1108, 1109, 1110, 1113, 1114, 1119, 1121). Accordingly, it is more than likely that, despite his observation for the record, defense counsel was quite content with the excusal of Mrs. Roche, and his failure to formally object to her excusal was no accident. No claim of error has been preserved for review.

To the extent that this Court disagrees, Appellee would contend that any error in this regard was rendered moot by virtue of the jury's recommendation of life. As this Court noted in Randolph v. State, 562 So.2d 331, 335 (Fla. 1990), quoting from Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d

622 (1987), the wrongful excusal of a juror in this regard "stacks the deck" against the defendant, and no death sentence resulting from such jury can stand. It is difficult to see how Turner's jury can be said to have been "stacked against him", given the fact that they recommended life for his crimes. Cf. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Further, it is difficult to see what remedy could be imposed in this instance, inasmuch as simply remanding this case so that another jury could have an opportunity to recommend life would hardly seem to be an efficient use of court resources. No viable claim of error has been presented, and the instant convictions should be affirmed in all respects.

B. Appellant's Claim of Error, under State v. Neil, 457 So.2d 481 (Fla. 1984), is Without Merit.

As his next claim, Turner contends that Judge Foster erred in allowing the state to exercise a peremptory challenge against prospective juror Lanshana Booker, a black male. Appellant contends that the prosecutor did not provide racially-neutral reasons for this challenge, in that, allegedly, jurors with similar backgrounds were allowed to serve on the jury. The state disagrees, and would suggest that, under such precedents as Files v. State, 17 FLW S742 (Fla. December 10, 1992), and Reed v. State, 560 So.2d 203 (Fla. 1990), there has been no abuse of discretion demonstrated in this case.

Initially, in reviewing the events below, it must be noted that a total of one hundred and four (104) veniremen were examined during voir dire, and not one hundred and forty (140) as represented by Turner's counsel, both at trial and on appeal (R

931; Initial Brief at 28); the court minutes indicate that one hundred and four prospective jurors were examined (R 2782-2792). The State exercised three (3) peremptory challenges, including one upon prospective juror Stanley, after the defense indicated that it wished to strike the juror, but lacked a challenge to do so (R 1117-1119). The trial court initially examined the venire in panels of six, and Lanshana Booker was a member of the second panel (R 668). At this time, Booker stated in regard to questions involving knowledge of the case, that he had seen something about the case in Sunday's newspaper, and that he had heard about it at the time that the incident occurred (R 669-670). Booker stated, however, that he had no opinion at this time and could base his verdict solely upon the evidence presented in court (R 670-671).

On January 28, 1992, general voir dire was conducted, and the prospective jurors were examined in groups of twenty-one. In answer to the court's questions, Booker stated that he had lived in Panama City for the last five years, that he was an electrical engineer and that his wife was a graduate student in psychology (R 955). During the state's voir dire, the prosecutor asked Booker if he was "bothered" by the fact that premeditation, an element of first-degree murder, could be formed in the snap of a finger; Booker replied, "I'm not quite sure" (R 970). When the prosecutor advised Mr. Booker that the judge would later be instructing the jury that the law did not fix an exact time for the formation of premeditation, the prospective juror responded that he understood the definition, but he was questioning "exactly how I feel about that definition itself" (R 971). When

the prosecutor asked the prospective juror whether he had a problem with the law, Booker stated that the problem was "exactly knowing my convictions on it", adding that "it might have something to do with a discussion I had with my wife, who is a psychologist." (R 972). Booker then stated,

> . . . And it's hard to believe anyone could kill without the intent somewhere along the way, unless accidentally, but whether it's First Degree, Second Degree, somewhere along the way the intent has to happen. Whether it, whether it happened two weeks in advance or a second in advance or in the process, you know, it still happens. And I have a problem with, I guess it's the definition of First Degree. (R 972-973) (emphasis supplied).

Mr. Booker then stated that his real problem was with the distinction between first and second degree murder, adding, ". . . I hate the fine line. I, I guess that's something inside." (R 973). Although Mr. Booker asserted that he could follow the law as instructed, he interrupted the prosecutor's examination of the next prospective juror, requesting clarification as to the definition of felony murder (R 973-6). Booker stated later that he owned a shotgun and that his sister had been raped and that his car had been stolen (R 1004, 1029); during defense voir dire, Booker stated, as to any knowledge of the case, that he had seen accounts of the murder when it first occurred, "the specifics about what had happened", and that he had seen Sunday's headline (R 1023). Mr. Booker also advised the court, when asked if there was anything that might keep him from being a fair and impartial juror, that a co-worker had come up to him the previous day and had discussed the case with him (1009). Outside of the presence of the rest of the venire, Booker stated that the co-

worker had told him about Turner not cooperating with his attorney, and that such comment had "stuck" and raised a number of questions in his own mind (1038-39). While claiming that he could set all this aside, Booker stated that he had speculated to himself as to the cause for Turner's position, wondering if Appellant were a black Muslim who distrusted all white people or whether he had adopted this stance for another reason (R 1039).

The state then announced it wished to exercise a peremptory challenge on Booker, and defense counsel responded, "Immediate objection." (1040) Defense counsel then stated that because the state's first challenge was exercised upon a black individual, this evidenced "a clear-cut passion to keep blacks from determining this case"; counsel stated that there were "four black people on the venire" (1040). The prosecutor then set forth his reasons for the challenge:

> MR. APPLEMAN: Essentially, what bothers me about Mr. Booker is, number one, he is an engineer, who is a person who feels that everything should be fine tuned to a certain situation. But then he turns around and says that he cannot understand the fine line that you place between First Degree Murder and Second Degree Murder, which makes me leery of his perceptions and his understanding of how to handle this particular case. The other problem that deals with is from the standpoint of his wife and he discussing psychological aspects involving premeditation and intent, things of this nature (R 1040-1).

Judge Foster stated he would reserve ruling, but also said that he was "concerned with the dialogue between Mr. Booker and Mr. Appleman" concerning the definitions of first and second Degree Murder, adding that Booker "appeared not to accept" the definitions (1042). Defense counsel insisted, however, that the

entire panel had to be stricken, and the judge stated that he would deny the challenge, because Mr. Booker's answers were as confusing as those of Mrs. Chase [another black prospective juror who was not stricken] (R 1044). The state then presented further arguments of law, and the court announced that it struck the prospective juror peremptorily (R 1044-7). Defense counsel asked that his objection be noted, and the state observed that there were two black prospective jurors on the panel which had been tendered (R 1047-8).

On appeal, Turner contends that he is entitled to a new trial, because the state's racially-neutral reasons do not meet the criteria set forth by this court in State v. Slappy, 522 So.2d 18 (Fla. 1988); Appellant specifically points out that other engineers were allowed to serve on the jury (Initial Brief at 35). The state disagrees, and would contend that Appellant is misconstruing the prosecutor's remarks; further, defense counsel below never offered this argument, thus waiving the point. See, e.g., Fotopoulos v. State, 608 So.2d 784, 788-9 (Fla. 1992); Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990). It is clear in any event, that the state was not challenging Mr. Booker due to his occupation, but rather due to the fact that, of all the prospective jurors (engineers included), he was the only one who argued with the prosecutor concerning the definition of first degree murder.

Mr. Booker specifically stated, that, even though he understood the distinction between first and second degree murder, he "hated it", and still "had a problem" with the definition of first degree murder (R 972-3). It is entirely

proper, and race-neutral, for a prosecutor to use a peremptory challenge upon a juror who has indicated an inability, or unwillingness, to follow the law as instructed. See. e.g., Green v. State, 583 So.2d 647, 650-1 (Fla. 1991) (prospective juror's doubts about death penalty, and its lack of deterrence, proper basis for peremptory challenge; Neil objection unfounded); McNair v. State, 579 So.2d 264 (Fla. 2nd DCA 1991) (prospective juror's inability to understand presumption of innocence valid race neutral ground for challenge); Foster v. State, 557 So.2d 634 (Fla. 3rd DCA 1990) (prospective juror's statement that he would follow the law "only if compelled to do so", racially-neutral and valid basis for peremptory challenge). The fact that, at one point, Booker claimed that he could follow the law is not dispositive, in that the state does not have to establish grounds which rise to the level of a cause challenge in this regard. See, Happ v. State, 596 So.2d 991, 996 (Fla. 1992).

The cases relied upon by Turner are distinguishable, and, in any event, did not involve a prospective juror as outspoken and argumentative as Mr. Booker. Regardless of the number of other engineers on the jury panel in this case, none had also indicated a complete, a palpable, distaste for the law which they would be called upon to apply. Cf. Richardson v. State, 575 So.2d 294 (Fla. 4th DCA 1991) (state's challenge to prospective juror, who had indicated a disagreement with law, not racially neutral, where other prospective jurors who espoused similar view not challenged); Williams v. State, 574 So.2d 136 (Fla. 1991) (state could not peremptorily challenge prospective juror due to the fact that he did not understand felony murder doctrine, wherein veniremen never questioned on felony murder).

The prosecutor's racially-neutral explanation is supported by the record, and, perhaps more importantly, was accepted by the judge, who likewise expressed concern as to the fact that Booker "appeared not to accept" the definition of first-degree murder (R 1042). As this court held in Reed v. State, supra, and forcefully reiterated in Files v. State, a trial court is vested with broad discretion in determining whether peremptory challenges are racially intended; this court noted that it must rely "on the superior vantage point of the trial judge", who is present and can consider the demeanor of those involved. See also Fotopoulos, supra. As in Files, it is worth noting that other minority jurors eventually did serve, and, conversely, that no juror, black, white or other, who disagreed with the definition of first-degree murder, was allowed to sit on Turner's jury. The instant convictions should be affirmed in all respects.[3]

C. The Trial Court's Denial of Appellant's Belated Challenges for Cause to Seven Prospective Jurors was not Error; Neither Preservation nor Prejudice has been Demonstrated

Appellant next contends that the trial court erred in denying his challenges for cause to prospective jurors Cleland,

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[3] It is also worth noting that Booker's status as a crime victim, one who had had his car stolen and whose sister had been raped (R 1029), serves as another race-neutral basis for his excusal. See, Adams v. State, 559 So.2d 1293 (Fla. 3rd DCA), cert. dismissed, 564 So.2d 488 (Fla. 1990) (prospective juror's status as victim racially-neutral basis for excusal, even though, apparently, state never proffered such as explanation to trial court). Additionally, given Booker's knowledge of the case, (R 669-670, 1023), it is doubtful that defense counsel would have wished him to serve on the jury, in any event. See, Part III C, infra.

Ogborn, Chase, Langley, Lindsay, Dailey and Hengel, such challenges interposed on the grounds that these veniremen had been exposed to pretrial publicity; the first six individuals actually served on Turner's jury, whereas Hengel was an alternate juror. The state would contend that Judge Foster did not abuse his discretion in denying these challenges for cause, and would further contend that defense counsel, who asked for and received additional peremptory challenges, could have stricken these prospective jurors at any time. Because of the unorthodox manner in which voir dire was conducted below, it is, however, necessary to review the events in some detail.

The record indicates that defense counsel filed an extremely cursory motion for change of venue, based upon unspecified pretrial publicity (R 2772-2780). Despite the filing of this motion, however, defense counsel chose to proceed with jury selection on January 27, 1992. At this time, the judge asked the entire venire of one hundred and four (104) persons, whether there was anyone who knew nothing at all about the case; five prospective jurors, including one at issue, Mr. Langley, so indicated, and they were excused at that time (R 640-1); as will be clear, however, many of the other prospective jurors fell into this category, as well. The venire was then divided into groups of six, although some of the later groups contained a greater number. The first panel did not contain any of the jurors now at issue. Even though a number of the veniremen indicated that they could put aside any prior knowledge of the case and base their verdicts only upon the evidence presented in court, defense counsel, as he was to do so often, moved to strike the entire

panel (R 664-7); Judge Foster did grant three of his specific cause challenges (R 664-7). The second panel likewise did not contain any of the jurors now at issue; defense counsel move to strike three (3) veniremen, and the court granted his challenge as to two (2) (R 687).

The third panel included Bonnie Ogborn. When questioned as to her knowledge of the case, Mrs. Ogborn stated that while she had heard something about the murder at the time that it first occurred, she remembered very little about it (R 699). She believed that she had seen Turner's picture in the paper recently, but expressly stated that she had not had an opportunity to read the article itself (R 698-9). She stated unequivocally that she had no fixed opinion about the case and could presume Turner innocent (R 699). During defense voir dire, the following exchange took place:

> MR. RICHMOND: Have you ever in your own mind thought, in reading those articles back then, and, and you may not have read the articles where Mr. Turner was arrested, but did you ever think, well, where there's smoke, there's fire, he must be guilty or something of this sort, based on what you saw---
>
> BONNIE OGBORN: No, sir, I did not.
>
> MR. RICHMOND: Okay.
>
> BONNIE OGBORN: I do not. I believe that innocent people are arrested as well as guilty (R 700).

After examining all the members of this panel, defense counsel stated that he "renewed" his request for a change of venue, because "these people all have general information which may become more familiar to them as they get into the evidence", and such was an "unfair situation for the Defendant" (R 705).

Defense counsel specifically challenged one venireman, and such challenge was granted (R 705-6); defense counsel expressed concern in regard to another prospective juror, who was the mother of an assistant state attorney, and, without objection, Turner was allowed to remove her (R 705-6). Defense counsel said nothing about Ms. Ogborn at this time.

The fourth panel included another juror now at issue, Cleola Chase; as Appellant notes in his brief, Mrs. Chase is black (Initial Brief at 28). Mrs. Chase stated that she worked at a local high school and that she was acquainted with the prosecutor's wife, who also taught there; she said that this would not give the state an advantage (R 709-710). As to any knowledge of the case, Mrs. Chase stated that she had seen something about the case in the media around the time that it occurred (R 710). Although she had neither seen nor read anything in the media since then, (R 714), she testified that, that morning, she had overheard a conversation at the gas station, in which one person had indicated to another that Appellant was not communicating with his attorney (R 710-711). When asked whether she had an opinion as to what should happen in the case, Mrs. Chase answered, "yes and no" (R 711). Mrs. Chase specifically said that Turner was presumed innocent and entitled to a fair trial; she further agreed that it was the state's burden to prove his guilt (R 712). On defense voir dire, the following took place:

> MR. RICHMOND: Okay. Did you form any opinion when you heard this talk about the communication?
>
> CLEOLA CHASE: No, I didn't. I did not.

MR. RICHMOND: Okay. So you basically feel you could be totally fair and impartial in this matter?

CLEOLA CHASE: Yes.

MR. RICHMOND: Okay. And you have no opinion at all about the guilt or innocence of this defendant?

CLEOLA CHASE: (nod, no) (R 731).

Defense counsel subsequently move to strike the entire panel because of Mrs. Chase's reference to the "question of communication", stating that the jury could not "respect him as an attorney"; the motion was denied (R 732). Defense counsel then mentioned three other prospective jurors, including Mrs. Chase; the judge announced that he would excuse one of these jurors for cause, other than Mrs. Chase and nothing further was said about this venire person (R 732-3).

The fifth panel included John Lindsay. Lindsay stated that while he had seen or read something about the incident when it had first happened, he had not seen anything about it in the last few years (R 736). Lindsay stated that he could not recall any details about what he had seen, and specifically stated he would base his verdict solely upon the evidence presented in court (R 736-7). He likewise agreed that the burden of proof was on the state and that the defense did not have to prove anything (R 737-8); Lindsay said that he had no opinion about the case, other than the fact that Turner was presumed innocent (R 739-740). On defense voir dire, defense counsel simply asked all the jurors if they had any prior opinion, and Lindsay replied did not (R 745-7). Defense counsel then moved to strike the entire panel

because "they all have some degree of information about this case"; the motion was denied (R 748). The court granted a cause challenge as to one juror who went to school with the victim's children and who stated that he could not be impartial, and denied a challenge to another venireman (R 748-9). No mention was made of Mr. Lindsay.

The next panel consisted of those five prospective jurors who had previously indicated a total lack of knowledge about the case; this panel included William Langley. When three members of the panel reiterated their contention that they knew absolutely nothing about the case, they were excused. Mr. Langley stated that he "vaguely recalled reading the story"; he said that such had occurred around the time of the incident and that he did not recall any details (R 750, 753). Langley said that he could presume Turner innocent and that his verdict would be based solely upon the testimony presented in the courtroom (R 755-756); he likewise stated that he had no opinion at this time as to the outcome of the case (R 756). On defense examination, Mr. Langley said that he did not even subscribe to the newspaper (R 757). Defense counsel then challenged Mr. Langley and another venireman for cause, which was denied (R 758). The next panel did not include any of the prospective jurors at issue. Defense counsel's challenge to the entire panel, due to the fact that they had "inappropriate information to make jurors in this case", was denied (R 776).

The eighth panel included another juror now at issue, Patricia Dailey. Mrs. Dailey testified that the last time that she had seen something about this case had been in 1989, and that

she had no opinion at this time (R 784). On defense examination, Mrs. Dailey reiterated that she had no fixed opinion (R 790). Defense counsel subsequently moved to strike the entire panel due to "pervasive publicity", and such motion was denied (R 792). He then specifically challenged two jurors, other than Mrs. Dailey, and one was excused (R 792).

The ninth panel included two jurors now at issue, David Cleland and Raymond Hengel. Mr. Cleland stated that he believed that he had seen or heard about the case in 1989, but that he had not seen anything since; he specifically stated that he had not seen Sunday's newspaper (R 795). Cleland said that he could presume Turner innocent and would base his verdict solely upon the evidence presented in the courtroom (R 796-797). He said that he had no opinion as to what should happen in the case, and that he had not had any reaction, "one way or the other", to the prior article which he had read (R 797). Defense counsel did not question Mr. Cleland at all at this time. Raymond Hengel stated that he had not read anything about the case or heard about it in the media; at work, however, he had heard two co-workers discussing it (R 808-809). Hengel stated that he had not participated in the discussion, and that he could presume Turner innocent and base his verdict solely upon the evidence presented (R 809). On defense voir dire, Mr. Hengel said that he had no opinion at this time (R 811). Defense counsel subsequently challenged the entire panel, which was denied (R 814-815). He also challenged other veniremen, other than Cleland or Hengel, and two of those challenges were granted (R 814). The remaining panels did not include any of the jurors now at issue. True to

form, defense counsel unsuccessfully moved to strike each panel due to publicity (R 854, 828, 903, 923); defense counsel's specific challenges to twelve of the specific veniremen were, however, granted (R 878, 903, 923).

When the proceedings resumed on January 28, 1992, defense counsel formally argued his motion for change of venue, introducing at this time a composite exhibit of nine (9) newspaper articles from a local newspaper (R 929); the articles were dated December 2, 1989, December 14, 1989, December 15, 1989, January 4, 1990, May 28, 1991, November 1, 1991, November 2, 1991, and January 26, 1992 (See Exhibits). No videotape of any television coverage was introduced. Defense counsel contended that the media coverage had tainted and inflamed the entire community, and specifically stated,

> There could be no impartial jury given this publicity. I don't care, people are going to say, when you ask them a question, can you be fair, as Mr. Appleman did all afternoon yesterday, can you be fair. Every juror that comes into the courtroom in America is going to meet that challenge with, yeah, I can be fair. I intend to be fair. The problem is the information they have received won't allow them to, subconsciously or otherwise.

(R 934).

Judge Foster denied the motion, finding that there was no indication of a "general state of mind in the community", which would prevent a fair trial (R 946-947). The judge also found,

> . . . And from the Voir Dire yesterday I was amazed at the number of jurors who do not read the newspaper, who see a headline and do not look further, who scan an article, so while there has been some publicity about this trial and this case, most of it is old, and there is no indication that it at all, in any way has infected the jurors that were

> selected to, in the pool from which this jury will be selected, many of those that were excused or felt that they could not render a, a fair verdict in the case did so from reasons other than publicity. Some of them knew the victims, some of them knew the families of the victims, some of them-- I remember one who had a, a daughter by the name of one of the victims.
>
> Your Motion for Change of Venue is denied at this time.

(R 947).

General voir dire was then conducted, and the prospective jurors were brought into court in panels of twenty-one; Bonnie Ogborn, Cleola Chase, William Langley and John Lindsay were in the first panel (R 950). Defense counsel utilized his voir dire to question the prospective jurors specifically as to what they had seen or heard about the case. At this time, Mrs. Chase reiterated that she had heard about the crime when it first occurred in 1989, and had overheard the recent conversation (R 1024-1025). Mrs. Ogborn repeated that she had heard about the crime when it first happened and had seen Appellant's photograph in the Sunday paper (R 1025). Mr. Langley stated that he had a vague recollection of seeing on television the fact that two women had been murdered "a couple of years ago" (R 1027). Mr. Lindsay likewise stated that he had seen something about the murder in 1989, and nothing since (R 1027). All four prospective jurors expressly stated, in answer to defense counsel's question, that they could base their verdict solely upon the law and evidence (R 1035-1037).

At the conclusion of examination, defense counsel challenged eight prospective jurors for cause. Six challenges were based on

the fact that the juror had seen or heard about the case, one was based upon the fact that the juror had relatives who had been murdered and another was based upon the fact that the prospective juror had expressed sympathy for the victim; only the latter challenge was granted, and the remainder were denied (R 1042-1052). Defense counsel than utilized peremptory challenges on six of the remaining jurors (R 1048-1052). Significantly, defense counsel did not utilize a peremptory challenge on Mrs. Ogborn (R 1052). Even more significantly, the following exchange took place:

> MR. RICHMOND: Let me see where I'm going on this, Judge... I've got three challenges left if I do Mrs. Ogborn. How many - and I understand I am not going to get an unlimited supply to bust the panel, but realistically, how many ... because of this concern for the overwhelming publicity?
>
> THE COURT: How many do you think you need?
>
> .....
>
> MR. RICHMOND: I'd ask for an additional ten, your honor.
>
> THE COURT: I will give you an additional ten (R 1053).

Once he received his additional ten challenges, counsel then proceeded to exercise four of them on veniremen other than Mrs. Ogborn (R 1053-7). Counsel also unsuccessfully challenged juror Langley for cause, but did not use a peremptory challenge upon him after the cause challenge was denied, as he had done with so many other prospective jurors (R 1057). No challenge of any kind was made as to veniremen Chase and Lindsay.

The next panel of twenty-one was brought in, and jurors Dailey, Cleland and Hengel were included in this panel. As before, defense counsel utilized his voir dire to question the prospective jurors as to their knowledge of the case. Mr. Hengel reiterated he had some knowledge of the case from hearsay at work and the newspaper (R 1099). Mr. Cleland stated that he had seen something about the crime in 1989 and nothing since (R 1100). Mrs. Daily stated that she had seen coverage in 1989 and nothing since (R 1101). As before, it would appear that all prospective jurors indicated that they could base their verdict solely upon the law and evidence (R 1101-2). Following the examination, the following exchange took place:

> MR. RICHMOND: I've got ten left?
>
> THE COURT: You have ten left, right. You've used ten.
>
> MR. RICHMOND: Yeah, I know. Well, I'm sitting here saying I think if I got another ten, we could get us a jury with what we got.
>
> THE COURT: You have ten left.
>
> MR. RICHMOND: I am talking about twenty, total. Another ten.
>
> MR. APPLEMAN [prosecutor]: You are asking for ten more?
>
> MR. RICHMOND: Um hum, (yes).
>
> MR. APPLEMAN: Well, I ---
>
> MR. RICHMOND: Because if I can get rid of alot of the publicity and get --
>
> THE COURT: Well, let's wait until you, let's wait until you use those ten and see what your reasons are on the rest of them.
>
> MR. RICHMOND: That's fine (R 1107-8).

At this point, defense counsel challenged one juror for cause, who was the manager of a local television station; this challenge was granted (R 1111). Defense counsel then challenged ten (10) prospective jurors for cause due to their alleged knowledge of the case; all challenges were denied, and defense counsel utilized ten (10) peremptory challenges upon them (R 1109-1114). No attempt was made to challenge veniremen Dailey, Cleland or Hengel on any basis. Defense counsel then moved to strike prospective juror Ard, on the grounds of his knowledge of the case, as well as due to the fact that he had allegedly purchased tires from the husband of one of the victims; the motion was denied. When defense counsel started to indicate that he wanted additional challenges, the court stated:

> Mr. Richmond, I don't think more peremptory challenges will solve the problem that, that you perceive because the peremptory challenges that you have, have exercised primarily relate to persons that have some knowledge of the, of the crime. And I think that all of them, with the exception of Sprankle, Levasseur, Lewis, and Stanley have some knowledge of the crime. And I would assume that additional peremptories would be used pretty much as the prior usage of peremptories, so I'm not going to permit any further peremptory challenges (R 1116-7).

Defense counsel then moved to strike the panel, which was denied, and indicated that if he had additional peremptory challenges, he would use them against veniremen Ard and Stanley; the state obligingly exercised a strike on Mr. Stanley (R 1117-8). Defense counsel then stated that "out of an abundance of caution", he moved to strike Mr. Cleland for cause, because he had read about the case; the motion was denied (R 1119). Defense counsel then announced that he wanted to strike veniremen

Ogborn, Chase, Langley, Lindsay, Dailey and Cleland for cause, due to their knowledge of the case; the motions were denied (R 1120-1). At this point, there were twelve jurors, and selection of the alternates began (R 1122). Appellant successfully struck veniremen Monroe for cause, but Mr. Hengel was accepted as an alternate, over his objection (R 1122). Although the jury was not sworn until the next morning, defense counsel did not request further peremptory challenges or challenge any of the jurors further.

As noted, Appellant contends that Judge Foster erred in denying his final cause challenges to jurors Ogborn, Chase, Langley, Lindsay, Dailey, Cleland and Hengel. Turner argues that this was error, in that there allegedly was a reasonable doubt as to their ability to be impartial. Assuming that the merits of this claim need to be reached, it is clear that Turner is entitled to no relief. As this court has consistently held, the competency of a challenged juror is a mixed question of law and fact, the resolution of which is within the trial court's discretion. See, e.g., Hall v. State, 18 FLW S63, 64 (Fla. January 14, 1993); Pentecost v. State, 545 So.2d 861, 862 (Fla. 1989); Cook v. State, 542 So.2d 964, 967 (Fla. 1989); ("There is hardly an area of the law in which the trial court is given more discretion than in ruling on challenges of jurors for cause."). In order to justify reversal, manifest error must be demonstrated. See, e.g., Christopher v. State, 407 So.2d 198, 200 (Fla. 1981); Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985). The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his or her

verdict solely upon the evidence presented and instructions on the law given by the court. See, e.g., Singer v. State, 109 So.2d 7 (Fla. 1959); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Pentecost, supra.

Error has not been demonstrated in this regard. Each of the veniremen stated unequivocally that he or she had no prior opinion about the case and could base the verdict solely upon the evidence presented in court and the law as instructed by the judge (R 699-700, 731, 745-7, 756, 784, 797, 811, 1035-7, 1101-2); likewise, they stated that they could presume Turner innocent, and recognize that the state had the burden of proof (R 699, 712, 737-8, 755-6, 796-7, 809). It is clear from the record that these jurors had, in most instances, only fragmentary knowledge of the case, if that. Bonnie Ogborn stated that she simply knew that the incident had occurred in 1989, and had seen Turner's picture in the paper recently, not reading the article in which it appeared; she stated that she presumed Turner innocent and that innocent people could be arrested, as well as guilty (R 699-700). William Langley had only a "vague recollection" of seeing a television account several years ago about the fact that two women had been murdered (R 1027). John Lindsay had seen something about the crime two years ago and remembered no details (R 736-7). Patricia Dailey stated that she had seen some coverage in 1989, and nothing since (R 1101). David Cleland gave an identical answer (R 1100). Raymond Hengel stated that he had never seen or read anything about the crime in the media, and had simply overheard two co-workers discussing an article about it (R 808-9); as noted, Hengel served only as an

alternate juror. Cleola Chase had read something about the crime when it first occurred in 1989, and had not seen any media coverage since; she, like Mr. Hengel, had overheard a conversation about the case (R 714).

This case is distinguishable from those relied upon by Appellant, such Reilly v. State, 557 So.2d 1365 (Fla. 1990), in which this court held that a juror, who knew that the defendant had given a confession to the crime, such confession not admissible at trial, should have been stricken for cause. Here, the jurors did not know of any impermissible matters; there were only three newspaper articles about the case in 1989, and only one of them mentioned the fact that Turner had confessed, such confession, of course fully admissible in this case. Cf. Holsworth v. State, 522 So.2d 348 (Fla. 1988) (publicity about a confession not per se ground for change of venue). As will be argued more fully below, it is not constitutionally required that prospective jurors be totally ignorant of the facts and issues involved in a case. See, Murphy v. Florida, 421 U.S. 794, 800-1, 95 S.Ct. 2031, 44 L.Ed.2d 589 (Fla. 1975). Judge Foster did not abuse his discretion in denying the cause challenges at issue. See, e.g., Hall, supra (trial court did not abuse discretion in denying cause challenge to juror, based on pretrial publicity); Pentecost, supra; Penn v. State, 574 So.2d 1079 (Fla. 1991); Noe v. State, 586 So.2d 371 (Fla. 1st DCA 1991), cert. denied, 598 So.2d 77, 78 (Fla. 1992). While Mrs. Chase indicated that she had heard a conversation, in which it was mentioned that Turner was not communicating with his attorney, she stated that she had no opinion about the case, and that she could base her

verdict solely upon the evidence presented in court and the law (R 712, 731, 1035-7); she agreed that Turner was presumed innocent, that he deserved a fair trial and that the state bore the burden of proof (R 712). Error has not been demonstrated in this regard. See, Lusk, supra (trial did not abuse discretion in denying challenge for cause, in regard to prospective juror who worked at prison where murder had occurred and who had overheard conversations about offense); Noe, supra (court did not abuse discretion in denying cause challenge to juror who believed that if defendant confessed, she was "probably" guilty, and who could only state that she would "try her best" to be impartial).

Further, even if this court disagrees with any of the above, it is difficult to see how Turner was "forced" to accept any of these jurors. The traditional scenario for claims of this nature would seem to be that in Hill v. State, 477 So.2d 553 (Fla. 1985), where, due to the trial court's erroneous denial of cause challenges, the defense was "forced to use peremptory challenges on persons who should have been excused for cause", harming the defense by "reducing the number of [peremptory] challenges available." The voir dire in this case, of course, did not proceed in such manner. Rather, Appellant did not levy these final cause challenges until he had not only exhausted his original ten peremptory challenges, but had also requested and received an additional ten challenges, which he chose to exercise against other veniremen; defense counsel did not subsequently request peremptory challenges to utilize against these seven jurors. The denial of these cause challenges did not "cost" the defense anything, and it is clear that, due to his quixotic view

of the law, defense counsel would never be satisfied with ninety-nine percent (99%) of the venire. Because defense counsel believed that the jury should only be composed of those who knew absolutely nothing about the case, it is fair to say that he struck, at one time or another, individually or collectively, virtually every prospective juror in this case. Appellant, of course, was not entitled to a jury composed solely of those completely ignorant of the case. See Murphy v. Florida, supra. As this court held in Puiatti v. Dugger, 589 So.2d 231, 235 (Fla. 1991), "The fact that a juror knows something about the case or knows individuals who may be witnesses clearly is not grounds per se to excuse the juror for cause". As the judge below correctly recognized, Turner's counsel was unlikely to be satisfied no matter how many peremptory challenges he was allowed.

It is difficult to avoid the conclusion that defense counsel below was simply manipulating the record and engaging in shadow play in hopes of unwarranted appellate reversal, when he launched these final "kamikaze" challenges. Defense counsel, who had received additional peremptory challenges which he used against other veniremen, had every opportunity to strike these jurors, and simply chose not to do so. His failure to do so then should disentitle him to relief now. This is most clear as to juror Bonnie Ogborn. After defense counsel had utilized six of his original challenges, he observed that he would only have three left, if he used a peremptory on Mrs. Ogborn (R 1053). Defense counsel then indicated that he wanted more challenges, and was asked how many he wanted; when defense counsel indicated that he wanted ten more, the judge gave him ten more (R 1053). With

fourteen peremptory challenges in hand, defense counsel then proceeded not to use one of them upon Mrs. Ogborn, despite the fact that she was, presumably, just as "unacceptable" then, as she was at the conclusion of voir dire. Reversal can simply not be allowed under these circumstances. See Aguilera v. State, 606 So.2d 1194, 1200-1202 (Fla. 1st DCA 1992) (defendant's claim for relief based upon denial of cause challenge to juror who actually sat on jury, not preserved for review, where defendant chose not to exercise peremptory challenge upon juror, despite opportunity, and where counsel never requested further challenge to strike juror, after exhausting peremptories); Trotter v. State, 576 So.2d 691 (Fla. 1990); Penn, supra; Floyd, supra; Pentecost, supra. The instant convictions should be affirmed in all respects.

POINT IV

THE SENTENCER DID NOT ERR IN FINDING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE TO BE APPLICABLE.

Turner next contends that Judge Foster erred in finding this aggravating circumstance applicable as to both murders, in that, allegedly, there was no heightened premeditation. Initially, the state would contend that, in fact, this aggravating circumstance was found only as to the sentence imposed for the murder of Teresa Clements, as the sentencing order only describes her murder as cold, calculated and premeditated (R 2950-4). Judge Foster observed that, even if Turner's actions had not been calculated prior to the murder of Lola Toombs, Appellant had still had ample time to reflect upon his actions and the killing of Ms. Clements, "during the time that it took for him to remove

Lola Mae Toombs from the van, place her body on the ground, remove Teresa Diane Clements from the van, place her on the ground, and kill her." (R 2953). The court did not err in finding this aggravating circumstance.

This court has previously upheld the finding of the circumstance, in situations such as that sub judice, where multiple murders have occurred and where the defendant has had an opportunity to reflect upon his actions, between the time that he has killed the first and second victims. See, Jackson v. State, 522 So.2d 802, 810 (Fla. 1988); Maharaj v. State, 597 So.2d 786, 791 (Fla. 1992). The fact that this murder may not have proceeded as planned, or that Turner may not have initially intended to kill either victim does not mean that this aggravating circumstance is inapplicable. See, Scott v. State, 494 So.2d 1134, 1138-9, (Fla. 1986) (fact that the defendant claimed that he did not originally intend to kill victim, but simply wanted to steal his van, did not preclude finding of factor, where defendant could have simply left victim behind, instead of transporting him to a remote area and killing him); Asay v. State, 580 So.2d 610, 613 (Fla. 1991) (fact that murder did not proceed as planned did not preclude finding of heightened premeditation); Wickham v. State, 593 So.2d 191, 194 (Fla. 1992) (fact that murder may have "begun as caprice" did not preclude finding of aggravating factor); Durocher v. State, 596 So.2d 997, 1001 (Fla. 1992) (circumstance properly found where defendant wanted money and transportation and killed store clerk to facilitate plan).

If Turner had truly intended simply to rob the victims, he could have abandoned them at the claypit. Even after he shot Lola Toombs, he could have left Teresa Clements alive, inasmuch as he had already forced her to remove all of her clothing, so as to delay her summoning assistance. Instead, Turner chose to cold-bloodedly execute her, in order to avoid detection for his other crimes. Cf. Hall,. supra, (aggravating circumstance properly found, where, instead of simply stealing victim's car, and leaving her in the parking lot, defendant abducted and murdered her); Scott v. State, supra; Eutzy v. State, 458 So.2d 755 (Fla. 1984) (heightened premeditation found where defendant procured gun in advance, forced victim to drive to remote location and executed him with single shot to head). Turner's alleged mental and emotional problems do not preclude the finding of this aggravating circumstance. See, Michael v. State, 437 So.2d 138, 141-2 (Fla. 1983); Card v. State, 453 So.2d 17, 23-4, (Fla. 1984). Error has not been demonstrated in this regard.

POINT V

THE SENTENCER DID NOT ERR IN FINDING THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE APPLICABLE.

Turner next argues, in a similar vein, that Judge Foster erred in finding the heinous, atrocious or cruel aggravating circumstance applicable to both murders, in that, under State v. Dixon, 283 So.2d 1 (Fla. 1973), the murders were not accompanied by "additional acts", so as to set them apart from the norm of capital felonies; Appellant points out that the victims each died from a single gunshot to the head, and maintains that Turner did not "intend" that they suffer, but simply "panicked" and

"impulsively" shot them (Initial Brief at 56). As in Point IV, supra, it is the state's position that this aggravating circumstance was only found as to the sentence imposed for the murder of Teresa Clements, in that the sentencing order, while making some reference to the murder of Lola Toombs and her suffering, only expressly discusses Ms. Clements' murder as merciless, "ruthless, brutal and lacking in compassion." (R 2950). The judge's finding of this circumstance, as to the murder of Teresa Clements, would seem to be premised upon the "fear, apprehension, terror, doom and hopelessness", which she suffered as Turner led her to her execution (R 2949). Even if this factor should be found to merge with any other, its finding was not error.

As Appellant correctly notes, under this court's precedents, an instantaneous or near-instantaneous death by gunfire ordinarily does not satisfy the aggravating circumstance of heinous, atrocious or cruel. See, e.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Robinson v. State, 574 So.2d 108, 112 (Fla. 1991). However, Appellant's reliance upon such cases as Robinson or Shere v. State, 579 So.2d 86 (Fla. 1991) is misplaced. In such cases, there was no awareness of impending death on the part of the victims; indeed, in Robinson, the victim had been assured quite incorrectly that she would not be killed. The situation of Teresa Clements was markedly different. Ms. Clements had witnessed Appellant's murder of Lola Toombs, and when Appellant led her out of the van at gunpoint, she could have harbored no misapprehension as to her ultimate fate. Dicta in Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990) or Shere supra,

notwithstanding, this aggravating circumstance focuses upon the perception and state of mind of the victim, and not that of the defendant. See, Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990), reversed on other grounds, ___ U.S. ___ 112 S.Ct. 3020, 120 L.Ed.2d 254 (1992); Clark v. State, 443 So.2d 973, 977 (Fla. 1983) (it is the effect of defendant's actions upon the victim which must be considered in determining application of aggravating factor). While the mode of the killing is different, this case is comparable to Preston v. State, 607 So.2d 404, 409 (Fla. 1992) (circumstance properly found, where defendant "forced victim to drive to a remote location, made her walk at knife point through a dark field, forced her to disrobe and then inflicted a wound certain to be fatal"; circumstance premised upon victim's fear and mental strain prior to murder). To the extent that this court finds a merger with this aggravating circumstance and any other, any error would be harmless, and to the extent that this court disagrees to the application of any of the aggravating circumstances now attacked on appeal, any erroneous finding would be harmless error; this court has previously affirmed jury overrides, where as many as three aggravating circumstances have been stricken. See, e.g., White v. State, 403 So.2d 331 (Fla. 1981); Bolender v. State, 422 So.2d 833 (Fla. 1982) (two aggravating circumstances stricken); Mills v. State, 476 So.2d 172 (Fla. 1985) (same). Turner is entitled to no relief as to this claim.

POINT VI

THE SENTENCER'S FINDING, THAT THE MURDER OF TERESA CLEMENTS HAD BEEN COMMITTED TO AVOID ARREST, WAS NOT ERROR.

Appellant next contends that Judge Foster erred in finding, as an aggravating circumstance, that the murder of Teresa Clements had been committed for purposes of avoiding arrest, under §921.141(5)(e). In his sentencing order, the judge found that Turner's "sole motive for killing Teresa Diane Clements was to eliminate her as a witness," in that she had observed the murder of Lola Toombs (R 2947). The judge noted that Appellant had told Dectective Nolin that, after he had shot Mrs. Toombs, he "could not let Teresa Diane Clements go" (R 2947). On appeal, Turner contends that this finding was error, in that Appellant's statement to Nolin was allegedly not credible, and that Appellant committed this murder " in a panic." The state disagrees.

Detective Nolin testified that he continued to talk with Appellant after Turner had given his tape-recorded statement, and that, at such time, Appellant had stated to him that after he had shot Mrs. Toombs, "he knew he could not leave the other one." (R 1316). Accordingly, Appellant stated that he had "walked" Teresa Clements out of the van, "laid her face down and shot her in the back of the head." (R 1316). Defense counsel below cross-examined Nolin extensively, and suggested that this testimony was not credible in that Nolin had failed to mention Turner's statement earlier (R 1378-1381, 1392). As the finder of fact, it was Judge Foster's prerogative to assess credibility and to resolve any conflicts in the evidence; the judge did not abuse his discretion in crediting this testimony. As this court has

held, evaluating the evidence, and resolving factual conflicts in regard to the establishment of an aggravating circumstance, is the responsibility of a trial judge. See, Swafford v. State, 533 So.2d 270, 277 (Fla. 1988); Bryan v. State, 533 So.2d 744, 749 (Fla. 1988). In this case, Turner's statement to Detective Nolin to the effect that he knew that he could not "leave the other one", is sufficient to support the finding of this aggravating circumstance. See, e.g., Lopez v. State, 536 So.2d 226, 230 (Fla. 1988) (defendant's statement that he "had to" shoot the victims because he "could not afford to leave any witnesses behind" sufficient to support aggravating factor).

Additionally, this court reconized in Swafford, that "express statements" of this nature are not required. Even without the instant statement, it is clear that Turner executed Teresa Clements because she had the misfortune to witness the murder of Lola Toombs. Appellant's contention that "there is no evidence as to the sequence or timeframe in which the events of these killings occurred" (Initial Brief at 58) is simply incorrect. From Turner's own confession, it is clear that Lola Toombs was killed first. (State's Exhibit #54; 1315-18). Further, the physical evidence supports this. Lola Toombs was shot while she was sitting in the driver seat of the van, and blood was found inside this area of the van, as well as on the running board outside (R 1203-4). When Teresa Clements was found in the claypit, there was blood on the soles of her feet, which the pathologist testified was "extremely unlikely" to have come from her (R 1431). This court has recognized that, in arriving at a determination as to whether an aggravating

circumstance has been proven, a court may apply a "common-sense inference from the circumstances." See, Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991). Here, the evidence is clear that Teresa Clements, who had a bruise on her arm consistent with being "grabbed and led" (R 1432), was taken from the van, stepped into the blood of Lola Toombs, and then led to a spot in the claypit where she was placed face down and shot once in the back of the head at "contact range"; Ms. Clements was, of course, completely nude at this time.

These circumstances are hardly consistent with a murder committed during a "panic", and this court has consistently upheld the finding of this aggravating circumstance, where one victim has witnessed the murder of another and, consequently, has been "eliminated" by the defendant. See, e.g., Maharaj v. State, supra; LeCroy v. State, 533 So.2d 750, 755 (Fla. 1988) (defendant murdered woman who observed husband's murder, to prevent her from reporting crime); Correll v. State, 523 So.2d 562, 567-8, (Fla. 1988) (defendant murdered child who had observed mother's murder, and killed sister who arrived home last, to prevent discovery of other murders); Thomas v. State, 456 So.2d 454 (Fla. 1984) (defendant murdered second victim who had witnessed prior murder). The finding of this aggravating circumstance was not error, and the sentence of death imposed for the murder of Teresa Clements should be affirmed.

POINT VII

ANY ERROR, IN REGARD TO THE INSTRUCTION GIVEN THE JURY ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE, WAS RENDERED MOOT BY THE JURY'S RECOMMENDATION OF LIFE.

Appellant next contends that Judge Foster erred in denying the defense's requested instruction on the cold, calculated and premeditated aggravating circumstance. Prior to trial, defense counsel submitted two lengthy proposed instructions, containing definitions of the terms utilized in this factor, allegedly based upon this court's decisions. (R 2852, 2853). At the charge conference, the judge stated that he would give the standard instruction, which he, in fact, did (R 1774, 1799). On appeal, Appellant contends that this was reversible error, in that the standard instruction fails to provide sufficient guidance to the jury. Under the circumstances of this case, Turner is clearly entitled to no relief.

Initially, while Turner did request a more detailed instruction than that given, he never raised any objection, on constitutional grounds, to the standard instruction, thus waiving any constitutional claim which he might have on appeal. See, Griffin v. State, 372 So.2d 991, 992 (Fla. 1st DCA 1979). This court has previously upheld the constitutionality of this jury instruction, see, Brown v. State, 565 So.2d 304, 308 (Fla. 1990), and the recent decision by the United States Supreme Court, Arave v. Creech, ___ U.S. ___, 52 Crim. L.Rptr. 2371 (March 30, 1993), certainly suggests that the terms utilized in Florida's standard instruction are not unconstitutionally vague. Further, even if the instruction given in this case was defective, Turner is

hardly in any position to complain. The jury resolved any doubt in this regard in his favor, and recommended life, thus mooting any point on appeal. See, Torres-Arboledo v. State, 524 So.2d 403, 413 (Fla. 1988) (jury's recommendation of life rendered harmless alleged errors at penalty phase); Eutzy v. State, supra, (defendant unable to demonstrate harm in regard to allegedly unconstitutionally inaccurate penalty phase jury instructions, where jury recommended life). Turner is entitled to no relief.

POINT VIII

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S REJECTION OF THE STATUTORY MITIGATING CIRCUMSTANCES INVOLVING MENTAL STATE.

Appellant next contends that Judge Foster erred in rejecting three of the statutory mitigating circumstances urged by defense counsel below - that Turner committed the murders under extreme mental or emotional distress, §921,141(6)(b), that Turner committed the murders while he was under extreme duress or substantial domination of another, §921,141(6)(e), and that Turner's capacity to conform his conduct to the requirements of the law was substantially impaired, under §921.141(6)(f); the judge, of course, did find in mitigation that Turner lacked a significant history of prior criminal activity, under §921.141(6)(a) (R 2954). Appellant maintains that this was error, under Campbell v. State, 571 So.2d 415 (Fla. 1990), in that the defense presented expert and lay testimony in regard to Turner's mental problems, at the penalty phase. The state disagrees, and would contend that reversible error has not been demonstrated.

Initially, as to the mitigating circumstance involving duress or domination, the sentencer was correct in finding this circumstance inapplicable, in that, regardless of Turner's mental state, this factor refers only to external provocation, "such as imprisonment or use of force or threats," Toole v. State, 479 So.2d 731, 734 (Fla. 1985); no evidence exists to support this factor. As to the other statutory mitigating circumstances, this court has consistently held that the decision as to whether a potential mitigating circumstance is established lies within the discretion of the trial court, whose duty it is to resolve conflicts in evidence. See, Sireci v. State, 587 So.2d 450, 453 (Fla. 1991). A trial court's ruling in this regard will not be disturbed, as long as there is competent, substantial evidence to support it. See, Johnson v. State, 608 So.2d 4, 12 (Fla. 1992); Preston, supra; Ponticelli, supra. This court has previously held that a sentencer may reject even uncontradicted expert testimony as to the applicability of these mitigating factors. See, Roberts v. State, 510 So.2d 885, 894 (Fla. 1987); Bates v. State, 506 So.2d 1033, 1034 (Fla. 1987); Thompson v. State, 553 So.2d 153, 156-8, (Fla. 1989) (jury override approved, where trial court rejected testimony of defense expert).

In this case, Judge Foster rejected the testimony of Dr. Walker, the defense expert, to the effect that the two "mental mitigators" applied, and set forth in great detail his reasons for doing so (R 2954-2961). The judge cited specifically to the prior testimony, and reports, of the other experts (R 2955), and concluded that Turner's actions at the time of the murders were inconsistent with any view that he was under the influence of

extreme mental or emotional distress or that he was unable to conform his conduct to the requirements of the law. This was not an abuse of discretion. In his report, Dr. Annis concluded that, at the time of the murders, Turner "was meeting the typical demands of daily living, behaving in a purposeful and goal-oriented fashion, and was aware of time and place"; he likewise stated that Turner appeared to have been "cognizant of his own actions and aware of the possible outcomes" (R 3072). The doctor stated that Turner's self-report and "reported behaviors around the time of the alleged offense" "indicate alertness to the differentiation between right and wrong" (R 3072). Although the jury did not have this report, it was not error for the judge to consider it. Cf. Cochran v. State, 547 So.2d 928, 931 (Fla. 1989) (judge may consider information unknown to jury, in overruling life recommendation); White, supra, (same).

The record supports the sentencer's conclusion that the opinion of the defense expert was contradicted by other evidence. As Dr. Annis stated, Turner's actions at the time of the murder were, indeed, "goal-oriented." Turner knew that he needed money and/or a vehicle in order to return to Alabama, and he set out to acquire them. He hid outside of the victim's store, waiting for it to close. When Mrs. Toombs came out, he forced her into the van, sweeping Ms. Clements along as well. Despite Appellant's later assertion of "panic", the fact remains that he shot Mrs. Toombs at point blank range as she sat in the van; the pathologist specifically testified that the gun had been held tightly up against her head (R 1420). After dispensing with Mrs. Toombs in such a manner, Turner removed her body from the van and

dumped it in the claypit. He then forced Ms. Clements, who was totally nude, out of the van, laid her face down on the ground and executed her at point blank range, with a bullet to the back of the head. On his way to Alabama, he had the presence of mind to pull over and to get some water to wash the blood off of the outside of the van. Once he arrived in Dothan, he abandoned the van, after making sure that there were no spent cartridges in it. In his confession, Turner specifically stated that he had used no drugs or alcohol that day.

Dr. Walker's opinion that the mental mitigating circumstances applied, was largely based upon his view, that, because Turner had been mentally ill for several years, he must have been in such condition at the time of the murders; it would not appear that Turner was very forthcoming in discussing these murders with the expert (1739). Accordingly, it was not error for Judge Foster to have rejected the application of these mitigating circumstances. See, e.g., Lucas v. State, 18 FLW S15, 16, n.4 (Fla. December 24, 1992) (trial court's rejection of expert testimony as to statutory mental mitigators proper, where such based upon fact that defendant's behavior before, during and after murder showed "clear pattern of purposeful behavior"); Johnson, supra, (trial court did not err in rejecting expert testimony as to mental mitigators, given that defendant demonstrated "too much purposeful conduct" at time of murder); Preston, supra, (same, where defendant's actions on night of murder indicated "he was capable of planning and deliberate thought"); Ponticelli, supra; Sireci, supra, (trial court did not err in rejecting mental mitigators, even though defense

experts testified that defendant suffered from severe brain damage and psychosis); Provanzano v. State, 497 So.2d 1177 (Fla. 1986) (not error for trial court to reject two mental mitigators, even though defendant relied upon insanity defense at trial); King v. State, 430 So.2d 50 (Fla. 1983) (same, even where defendant refused to dress in civilian clothes during trial, insisted that he was black [when in fact he was white], and insisted on testifying at penalty phase, only to take the Fifth). Turner is entitled to no relief as this point.

POINT IX

DENIAL OF APPELLANT'S MOTION TO SUPPRESS CONFESSION AND PHYSICAL EVIDENCE WAS NOT ERROR.

As his final attack upon the convictions, Turner contends that the trial court erred in denying his motion to suppress his confession and the physical evidence seized from him at the time of his arrest, on the grounds that Appellant was allegedly illegally detained, in that neither an arrest nor search warrant existed. The trial court held a pretrial hearing on this motion, and an additional hearing was held at the time of trial. Appellee suggests that the trial court did not err in denying Turner's motions, in that the instant convictions should be affirmed in all respects.

On June 14, 1991, attorney Richmond filed a motion to suppress evidence and confession, on the grounds, inter alia, that the physical evidence had been illegally seized without a warrant and that no warrant had existed for Turner's arrest (R 2698-2702). The motion was called up for a hearing on November

1, 1991, at which three witnesses, Detective O'Keefe, Investigator Nolin and Captain McKeithen, testified (R 553-603). O'Keefe testified that, on December 13, 1989, he had been employed as a police officer in College Park, Georgia (R 554). He stated that at around noon that day, he had been dispatched to the Red Roof Inn "in reference to a suspicious person" (R 555). Upon arrival, the manager of the motel advised him that he had been contacted by the authorities in Panama City, concerning Turner, who was then in Room 221, and that Turner was "wanted for questioning" (R 555). At this point in time, O'Keefe received a radio communique from his superiors, who confirmed that Turner was wanted for questioning in a double homicide, adding that Appellant was to be considered "armed and dangerous", and that no warrants had been issued (R 555-556).

Accordingly, O'Keefe and another officer proceeded to Room 221 and knocked on the door (R 556); O'Keefe testified that his intentions were,

> to identify him and to speak to him about what happened down in Florida and find out <u>if he would come with us</u> to let us interview him and maybe have Panama City authorities come, you know, <u>if he was willing</u>.

(R 556) (emphasis supplied).

Because Turner had been described as armed and dangerous, O'Keefe and his partner drew their weapons, although O'Keefe stated that he kept his down by his side (R 556-557). The witness stated that Appellant opened the door and then O'Keefe asked him his name; Appellant replied that he was Eric Turner (R 557). O'Keefe stated that he told Appellant that he needed to talk to him about "something that happened down in Panama City", and that Appellant

simply turned his back and walked rapidly into the room, leaving the door open (R 557, 570). Fearing that Turner might be going for a weapon, O'Keefe told him to stop; Appellant paid no attention and sat down on one of the beds (R 557). He then reached down and picked up a .45 automatic; at this point, the officers had still not entered the room and were standing in the doorway (R 558, 566-567). Turner then put the gun up to his head, stating that he was going to kill himself (R 558).

O'Keefe testified that he was not sure whether Turner really intended to kill himself or the officers, and stated that he entered the room and edged toward Appellant, eventually grabbing for the gun (R 559); the officer stated that, at the time, he was "scared to death" (R 559). At this point, the two struggled, and Turner kept trying to pull the gun towards his head (R 559). O'Keefe stated that the gun "turned several times", and that, during the struggle, it was pointed towards him [O'Keefe] several times (R 557-560, 567); O'Keefe's firearm discharged twice during the struggle (R 560). O'Keefe's partner stepped in, and Turner was disarmed and subdued; when he was handcuffed, he kept asking the officers, "Why didn't you let me do it?" (R 561). When O'Keefe's partner examined Turner's gun, however, he found that the safety had been on and that the only round in the magazine had not been chambered (R 561-562). Other officers arrived and searched the room, taking charge of the gun (R 563). Turner was charged with two counts of aggravated assault, for pointing the gun at the officers, as well as with possession of stolen property, in that a serial number check on the firearm indicated that it had been reported stolen in Alabama (R 563). Apparently, all of this transpired within a matter of seconds (R 569-570).

Investigator Nolin testified that he flew to College Park, Georgia, that day, and arrived between 2:00 and 3:00 in the afternoon; when he had left Panama City, Nolin had known that Appellant had been located at the motel (R 572). Nolin's purpose was to interview Turner in regard to the double homicide in Panama City (R 573). When he arrived, he found that Turner had already been taken into custody by the Georgia authorities (R 573). Nolin met with Appellant at the police station in College Park, and spoke with him in an interview room (R 574); another officer, Detective Slay, was present (R 575). Nolin advised Appellant that he wanted to talk to him about the murders in Panama City, and read him his rights, under Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), from a pre-prepared form (R 575). Nolin stated that he read the form to Turner and allowed Turner to read it to himself as well; he discussed the rights with Appellant, made sure that he understood them and had Appellant sign the form in two places (R 575). Nolin testified that it was clear to him that Turner completely understood his rights and made a conscious decision to waive them; he stated that Appellant seemed somewhat depressed, but talked willingly (R 578-579).

After Nolin had read Turner his rights, Appellant stated, "I did it, man" (R 579). The two talked, and Appellant admitted committing the instant offense (R 579). Turner agreed to give a tape-recorded statement, and such was conducted (R 582); during the taped statement, Turner reiterated that he was speaking freely and did not want an attorney (R 583). Nolin spoke with Appellant again after the taped statement, and then advised the

Georgia authorities that Appellant had confessed and that they needed to return to Florida (R 587). Nolin stated that Appellant had told him that he did not mind talking to anybody, and that the Georgia authorities had previously told him that they had not wanted to talk to him (R 597). Appellant was flown back to Florida that night, and made "small talk" with Nolin on the way (R 597). When they arrived in Panama City, Turner agreed to show the officers the route which he had taken on the night of the murders, and pointed out the spot where he had waited behind the store, as well as the location where they had first pulled off the highway (R 588-589).

Nolin stated that, the next day, he had had some difficulty verifying Turner's stay at a local motel, and had asked Turner for more details, which, in turn, checked out (R 589). He stated that he had talked to Turner again that day, after Appellant's attorneys had been appointed and had come to see him (R 591); Nolin stated that at this time, however, it was Appellant who initiated the meeting (R 592). At this time, Turner gave a completely different version of events, in which he claimed that another individual, a Puerto Rican from New York named Hosea, who had picked Turner up in his yellow Cadillac, had actually committed the murders (R 593). Hosea was allegedly a member of a street gang and wished to return to Los Angeles; he asked Turner if he knew anybody that they could rob for money, and Turner suggested the victims in this case (R 593-594). Hosea wore gloves, which explained the absence of any of his fingerprints at the scene, and shot the two victims with Turner's gun, before walking away and leaving Turner with the van (R 594).

Unsurprisingly, Nolin told Turner that he did not believe this story, and Appellant then admitted that it was not true (R 594).[4]

After Detective McKeithen briefly testified as to the items which had been recovered from Turner's motel room, i.e., the gun and the Cross pen (R 599-603), the parties presented their legal arguments (R 604-614). Defense counsel argued, inter alia, that the items from the motel room had been illegally seized, in that there had been no search or arrest warrant; because Turner had been illegally arrested, his confession had to be suppressed, as well (R 604-606). On November 5, 1991, the court denied Appellant's motion to suppress (R 2736). At the time that Detective O'Keefe testified at trial, defense counsel renewed the motion to suppress, citing additional case authority; the motion was denied (R 1261-1265). Counsel also renewed the motion at the time that the taped confession and physical evidence was introduced (R 1283, 1300, 1312).

On appeal, Turner contends, as he did below, that admission of the taped confession, as well as of the physical evidence, was error, because he was arrested without a warrant in his motel room in Georgia; Appellant cites to such cases as McGiabiany v. State, 399 So.2d 125 (Fla. 1st DCA 1981), and Wassmer v. State, 565 So.2d 856 (Fla. 2nd DCA 1990), which stand for the proposition that a guest has privacy rights in his motel room. Appellee respectfully suggests that this point does not turn upon whatever rights Turner had to his motel room, but rather upon

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[4] The State announced that it would not seek to introduce this statement and, in fact, neither of the statements from December 15, 1989, were admitted at Turner's trial (R 609-610).

whatever rights of his, if any, were violated by the authorities. The State respectfully suggests that, under the facts of this case, it is extremely difficult to perceive a constitutional violation of any sort, and would further observe that, if the authorities had adopted the course of action now apparently advocated by opposing counsel, Turner would be dead.

There should be no dispute that the Georgia authorities were justified in knocking on the door of Turner's motel room and asking to speak with him, given the request from their fellow officers in Panama City; Officer O'Keefe stated that his intention was to speak with Turner about the Florida offense "if he was willing", or to "maybe have the Panama City authorities come" (R 556). This is not the type of encounter between police and citizen which implicates the Fourth Amendment. Cf. Florida v. Rodriguez, 469 U.S. 1, 105 S.Ct. 303, 83 L.Ed.2d 165 (1984); Lightbourne v. State, 438 So.2d 380 (Fla. 1983). Although the officers were armed, given the fact that Turner had been described as "armed and dangerous", O'Keefe stated that he kept his weapon down at his side (R 557); the State disagrees with any suggestion in the Initial Brief (Initial Brief at 66) to the effect that the officers pointed their weapons at Turner prior to Turner's own production of a weapon. The officers asked Appellant if he was Eric Turner, and he replied that he was. When, however, they explained their purpose, he simply walked back into the room, leaving the door open, and, apparently within a matter of seconds, proceeded to put a gun to his own head. If Turner had not wished anything further to do with the officers, he could simply have slammed the door in their face. Instead, he

left it open, and walked further inside; in Byrd v. State, 481 So.2d 468 (Fla. 1985), this Court found that a defendant who had opened the door to his motel room and then "stood back" had consented to the officers' entry, and waived any challenge to his warrantless arrest under Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Byrd would surely seem to apply sub judice.

In this case, however, the officers did not cross the threshhold of Turner's motel room until they saw him point a gun to his own head, endangering himself and others. It is, of course, well recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they believe a person inside a residence is in need of immediate aid. See, e.g., Mincey v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); Zeigler v. State, 402 So.2d 365, 371 (Fla. 1981). The state would respectfully suggests that no individual was more in need of "immediate aid" than Eric Turner and that the peace officers involved would have been derelict in their duties, had they failed to act as they did; of course, O'Keefe also testified that, even though Turner was holding the gun to his own head, he was still concerned, and justifiably so, that Appellant might turn the gun on him, as well. It is impossible to fault these officers for their actions. Cf. Wayne v. United States, 318 F.2d 205 (DC Cir.), cert. denied, 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86 (1963); Jones v. State, 440 So.2d 570 (Fla. 1983); Wooten v. State, 398 So.2d 963, 966 (Fla. 1st DCA), cert. dismissed, 407 So.2d 1107 (Fla. 1981) (Florida is among those jurisdictions interpreting the Fourth Amendment to

include an exception for certain emergency situations); Webster v. State, 201 So.2d 789 (Fla. 4th DCA 1967).

While there are not numerous cases in this area, Appellee would contend that this case is analagous to State v. Hetzko, 283 So.2d 49 (Fla. 4th DCA 1973) and Menendez v. State, 368 So.2d 1278 (Fla. 1979). In Hetzko, the officers had been dispatched to the defendant's residence in regard to a complaint about a disturbance. When they arrived, they found the door open, and saw the defendant inside "lying motionless in a chair." After knocking loudly and receiving no answer, the officers entered the premises to check on Hetzko's condition; they found marijuana in plain view, and arrested him. While the officers had neither a warrant nor probable cause prior to their arrival at the scene, the Fourth District held that their entry, to determine the defendant's condition, had been proper, as an emergency measure; the court observed that they would have been derelict in their duty as peace officers, had they failed to act as they did. In Menendez, the police received a tip that a car, similar to that used in a robbery, was parked at Appellant's apartment house; the police, lacking either a warrant or a probable cause, knocked on his door, to ask him if he knew anything about it. When the door opened, the officer saw an individual holding a gun. The officer pushed the door completely open, revealing Menendez and the proceeds of the robbery in plain view. This court held that there had been "absolutely nothing improper" about the officer knocking on Appellant's door, and that the officer had acted prudently in attempting to protect himself by opening the door completely. With the door fully open, contraband was in plain

view, and the officer had probable cause to arrest; it was adjudged "immaterial" that the officer had lacked probable cause prior to his knocking on the door.

Hetzko and Menendez dictate that the instant convictions be affirmed. While the Georgia officers lacked a warrant or probable cause to arrest prior to their knocking on Appellant's door, Turner himself provided them with grounds to enter the room (through an open door), by pointing the gun at himself. He subseequently provided them with grounds to arrest him, by pointing the gun at the officers during their attempt to disarm him; as noted, the Georgia authorities arrested Turner for aggravated assault. Cf. Griffin v. State, 419 So.2d 320, 322 (Fla. 1982) (where defendant committed felony in his own home in presence of an officer, Payton rule not applicable). The officers were certainly entitled to seize the gun and to run its serial number through a computer; when the gun turned out to be stolen, the authorities had an additional ground to arrest Turner, which they did. Being lawfully upon the premises, the officers were entitled to seize any contraband in plain view and/or to conduct a search incident to a lawful arrest under Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). See, also, Savoie v. State, 422 So.2d 308 (Fla. 1982); Menendez, supra; Walker v. State, 483 So.2d 791 (Fla. 1st DCA), cert. denied, 492 So.2d 1336 (Fla. 1986). Further, given the fact that Turner's confession was given outside of the motel room, it would not appear that suppression would be appropriate, even if the arrest were

illegal. See, New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990). The denial of Appellant's motion to suppress evidence and confession was not error, and the instant convictions should be affirmed in all respects.[5]

POINT X

ANY ERROR, IN REGARD TO THE INSTRUCTION GIVEN THE JURY ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE, WAS RENDERED MOOT BY THE JURY'S RECOMMENDATION OF LIFE.

As his final claim, Turner contends that the instruction given his jury on the heinous, atrocious or cruel aggravating circumstance, was "beyond dispute" unconstitutionally vague under Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (Initial Brief at 71). Appellee disputes this. The instruction given Turner's jury included definitions of the terms, as well as an admonition to the effect that the kind of crime intended to be included was one accompanied by acts showing that it had been conscienceless or pitiless and unnecessarily torturous to the victim (R 2866). As this court has noted, this

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[5] In regard to the Cross pen, Detective McKeithen testified at the suppression hearing that he had received the item, as well as the rest of Turner's property, from Investigator McLeod, who, apparently, had in turn received the items from the Georgia authorities who had first searched and secured the room (R 601-3). Accordingly, these items might have been seized as part of a routine inventory search, another proper exception to the warrant requirement; given Turner's arrest by the Georgia authorities, it was "inevitable" that these items be turned over to Florida. Cf. Nix v. Williams, 467 U.S. 331, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); Craig v. State, 510 So.2d 857 (Fla. 1987). In any event, any error in the admission of the pen would be harmless beyond a reasonable doubt under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), given the other evidence against Turner, including his confession and the fingerprint evidence. See, Farinas v. State, 569 So.2d 425 (Fla. 1990) (erroneous admission of murder weapon harmless error).

is not the instruction condemned in Espinosa. See, e.g., Hall v. State, supra; Preston, supra.

Further, it is questionable whether any claim of error has been preserved for review, in that while defense counsel contended that this aggravating circumstance was not applicable (R 1768-9), and while he submitted a proposed instruction which (erroneously) included a requirement of intent (R 2851), no contemporaneous objection was interposed, on constitutional grounds, to the instruction actually given. Accordingly, no claim of error has been preserved. See, e.g., Griffin, supra; Burns v. State, 609 So.2d 600, 607, n.9 (Fla. 1992); Ragsdale v. State, 609 So.2d 10, 14 (Fla. 1992); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___ U.S ___, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992). Finally, as in Point VII, supra, any error in this regard was rendered harmless, given the fact that the jury recommended life. See, Torres-Arboledo, supra; Eutzy, supra. Turner is entitled to no relief.

CONCLUSION

Based on the foregoing arguments and authorities, the state respectfully requests that this Honorable Court affirm Appellant's convictions and sentences.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

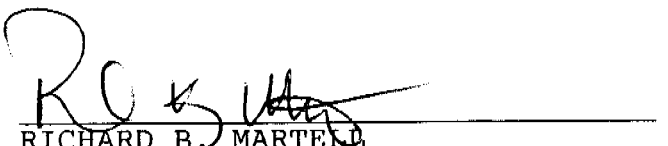
RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. 0300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven L. Seliger, Esquire, 16 N. Adams Street, Quincy, Florida 32351, this 9 day of April, 1993.



RICHARD B. MARTELL
Assistant Attorney General