IN THE SUPREME COURT OF FLORIDA

ERIC DUANE TURNER

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 79,895
APPEAL FROM JUDGMENT
SENTENCE OF DEATH

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

A. *Jurisdiction*

This is a direct appeal from two sentences of death imposed by the trial court, overriding jury recommendations of life. This Court has jurisdiction pursuant to Rule 9.030(1)(A)(i), Fl.R.Cr.P. and Article V, Section 3(b)(1), Florida Constitution.

B. *Course of Proceedings and Disposition in Lower Tribunal*

Mr. Turner was arrested and ultimately indicted on two counts of first-degree murder, two counts of kidnapping with a firearm, and one count of robbery with a firearm. (R 1858-1859) To these charges, Mr. Turner entered a plea of not guilty. (R-1867) Prior to trial, Mr. Turner's lawyers filed a motion for a competing evaluation to determine if Mr. Turner had the ability to understand the nature of the charges against him and whether he could assist his lawyer in the defense of the case. (R 2330-2332) Two mental health experts were appointed to examine Mr. Turner in accordance with Rule 3.210(b), Fl.R.Cr.P. (R 2399-2401) Pursuant to the written reports filed by the court-appointed mental health experts, the trial court found Mr. Turner incompetent to proceed. (R 2648)

After a stay at the forensic facility at Florida State Hospital, the hospital staff found Mr. Turner was now competent to proceed. (R 2661) After a hearing and further evaluation, the trial court found Mr. Turner competent to proceed. (R 2735) A motion to suppress certain physical evidence and Mr. Turner's pretrial statement was then denied by the trial court. (R 2736)

The jury found Mr. Turner guilty as charged on all five counts of the indictment. (R 2839-2840) After the sentencing phase of the trial, the jury recommended life in prison on both first degree murder convictions. (R 2873) The trial court then entered written sentences of death, overriding the jury recommendations of life. (R 2945)

Mr. Turner was contemporaneously sentenced to 27 years in prison on Counts 3, 4 and 5 to run concurrent with each other, but consecutive to the death sentences. (R 2939-2942)

C. *Statement of the Facts*

The night before the homicides, Eric Turner stayed at the Marie Motel in Panama City, Florida. The next morning he sat behind Lola's Second Chance and planned his robbery. (R-1318) Mr. Turner had not planned to kill the women; he only planned to steal the van and valuables from Lola Toombs. After Mr. Turner approached Mrs. Toombs, she began

to scream and one of her employees, Teresa Clements, came over to help. Mr. Turner ended up taking both of the women in the van. (R-1314)

Mr. Turner's intention was to take their valuables and push them out of the van. He started driving down a dirt road; Mrs. Toombs offered him $300.00. At this time, Mr. Turner was sitting behind Mrs. Toombs with his gun in his hand. The gun went off twice; one shot went through the ceiling of the van. The second shot hit Mrs. Toombs in the head. (R-1315)

Mr. Turner explained to Nolan that he told the younger woman to take her clothes off in order to gain more time for her getaway. Once Mrs. Toombs got shot, he couldn't leave the other woman, so he walked Ms. Clements outside the van, made her lay down, and then shot her in the hand. (R-1316)

Mr. Turner said he didn't keep the jewelry, but he did find Mrs. Toombs' bank bag containing $1100. Mr. Turner said he threw all of the jewelry out somewhere in Montgomery or Dothan. (R-1315)

Mr. Turner opened the van door and pout both women in the clay pit. (R-1317) Mr. Turner then drove to Dothan in the van and checked into the Town Terrace Motel under the name Eric Young. (R-1318) The next day Mr. Turner drove back to place where the women had been killed to find the ejected shell casings. (R-1319)

On November 30, 1989, an employee of Lola's Second Chance--Mrs. Bennett--discovered that neither Mrs. Toombs nor Ms. Clements had gone home the night before. (R-1149) When she went outside the back door of the business, she found Ms. Clements' car in the parking lot and her keys on the ground. Mrs. Bennett then called the Panama City Police Department.

A missing persons report was filed. At the scene, the bushes had been pushed down suggesting that someone had been sitting there. From this spot in the bushes, the back door to Lola's Second Chance. (R-1150)

On December 1, 1989, the bodies of the women were found. A Bay County sheriff's department officer was checking out a car accident near the clay pits when an employee from the Bay County Road Department approached him. (R-001221) The road department employee guided the officer to the clay pits where two drivers said that they thought they had spotted two bodies. (R-1222) That same day, Lola Toombs's van was located in Dothan, Alabama. (R-1151)

On December 13, 1989, Officer Kevin O'Keefe of the College Park Police Department (outside of Atlanta, Georgia) was called to the Red Roof Inn to meet the manager concerning a suspicious person staying in the hotel. (R-1266)

Officer O'Keefe received information from the Panama City authorities that Mr. Turner was staying at the Red Roof

Inn. The officer was also told that although there were no warrants outstanding against Mr. Turner, he was a suspect in a double homicide in Panama City, Florida.

Officer O'Keefe found Turner in the room at the Red Roof Inn. (R-1267)

When Officers O'Keefe and Denson began to speak to Mr. Turner at the Red Roof Inn, Mr. Turner turned, walked away, grabbed his gun, pointed the gun at his head, and said he was going to kill himself. (R-1268)

Officer O'Keefe disarmed Mr. Turner and placed him under arrest. (R-1270)

SUMMARY OF THE ARGUMENT

This case raises many issues relating to the process by which Mr. Turner was convicted of first degree murder and sentenced to die for two homicides. First, the trial court illegally overrode the jury recommendations of life. Even the State Attorney's Office who prosecuted the case fairly stated to the trial court "Jury override in this case cannot survive." (R-3052)

Second, Mr. Turner was not competent to stand trial. Although the trial court had initially agreed with this assessment, it changed course without substantial evidence to support that decision.

Third, the selection of the juror in this case is full of media, death-qualifying and racial bias.

Fourth, the trial court wrongly allowed Mr. Turner's confession and certain physical evidence to be heard by the jury.

Finally, the sentencing order is fraught with findings that are factually and legally inaccurate.

I.

THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATIONS OF LIFE

The trial court simply paid lip service to the *Tedder v. State*, 322 So.2d 908 (Fla. 1975) Standard. In doing to, he simply ignored the overwhelming evidence in mitigation that provided a reasonable basis for the jury recommendation.

1. Numerous statutory and non-statutory mitigators constitute the reasonable basis for the jury's recommendation of a life sentence for Eric Turner. Perhaps the most compelling of these was the unrebutted testimony of Dr. Walker that Mr. Turner suffers from paranoid schizophrenia, a debilitating mental illness characterized by delusions and hallucinations. Both Dr. Walker and family members testified that Mr. Turner suffered from paranoid delusions (R-1695, 1730) and somatic delusions (R-1735); Eric believed that people were out to get him and that he had a contagious disease with which he was going to infect others. (R-1712) Dr. Walker concluded that Mr. Turner's mental status was so compromised that it rose to the level of extreme mental duress at the time of the offense, and that his ability to appreciate the criminality of his

behavior or to conform his behavior to the requirements of law was significantly impaired. (R-1738-1739)

2. Another statutory circumstance which served as a reasonable basis for the jury's recommendation of a life sentence was lack of prior criminal history. In fact, the state stipulated that Mr. Turner had no prior criminal history whatsoever. (R-1779)

3. A number of non-statutory mitigators were established by defense counsel which contributed to the jury's reasonable basis for a life recommendation. Chief among them was the dramatic change in Mr. Turner's personality witnessed by his family and friends over a relatively short period of time. In spite of overwhelming hardships during childhood, family members testified that Mr. Turner had been a "kind, sweet and gentle [child] . . . really special (R-1705) . . . always a happy person . . . always smiling and caring . . . " (R-1719) he was "very outgoing . . . [had] a lot of initiative" (R-1700) and appeared to have the kind of determination to overcome the limitations inherent in his family situation and the ability to achieve important goals and better himself. In fact, prior to the onset of his mental illness, Mr. Turner's future appeared to be bright. He completed high school and was attending junior college. He played basketball and "excelled tremendously at sports." (R-1700) But then Eric's personality began to change. Increasingly, he

"appeared paranoid . . ." (R-1690) Whereas once "he was . . . a neat dresser. He cared about his appearance. He cared about everything . . . everything was always organized," (R-1719) now there was a noticeable change in his appearance. "It was like night and day . . . " (R-1700) Eric turned into someone his family didn't know. "I saw a major change in him . . . he was more withdrawn . . . it baffled me . . . I couldn't understand it. It wasn't the same person that I knew. That I grew up with." (R-1700) Eric's thinking became confused and disjointed. "He would pace back and forth,. back and forth . . . and would ask me questions . . . and within a minute would ask the same question ... Also, he used to sit . . . and all of a sudden yell for no apparent reason to me . . . (R-1699) "He called . . . and said he was at the Comfort Inn and [when] I asked how he got there he said he didn't know." (R-1706) "He's just not the same . . . when I first saw him I didn't recognize him, there was something about him totally different. He seemed distraught . . . he wouldn't speak . . . he would say one thing and then say another thing and . . . his train of thought wasn't in a pattern and he's just not the same person." (R-1719) This devestating change in personality and lifestyle constituted a significant non-statutory mitigating circumstance.

4. Also included in the jury's basis for a life recommendation was the non-statutory mitigator of Mr.

Turner's caring nature and his kindness and compassion toward others, especially children. The jurors heard testimony that prior to the onset of his illness, Mr. Turner was a good man, with no history of fights or violence. He was sensitive, a concerned father, routinely helped his father and was protective and loving toward children. " . . . Eric was a good kid, never had any difficulty in fights or violence, quiet . . . never took drugs or alcohol . . . compassionate and helpful (R-1722) " . . . he was taking care of his son while his girlfriend went to school . . . he cared a lot for Pam . . . " (R-1687) " . . . hhhhhhe sent me money when I was stranded . . . " (R-1687) " . . . he was like a father [to my children] . . . he would get up with them in the morning and saw that they went to school . . . [he was working at] Shoney's . . . he came home and shared his tips with me and gave me what he could (R-1708) . . . he pawned some tapesd . . . and came back with groceries . . " "Eric was a very nice guy, very sensitive . . . anytime there was a holiday or Valentine's Day or a birthday, he always remembered, he always got you a card, he always bought you gifts. He was . . . very caring for children." (R-1716, 1717) " . . . when Eric's father was dying in a veteran's hospital in Albany . . . Eric visited him quite often and also when Eric's grandmother was dying he was very helpful in taking care of the grandmother . . . also, [his

aunt] Delores had a difficult time emotionally and Eric was very loving and supportive [of her]." (R-1723)

5. Another non-statutory mitigator upon which the jury relied for their determination of a life recommendation was Mr. Turner's work history. Testimony was presented that Eric made consistent efforts to find work and assist his family. (R-1724)

6. Eric's difficult childhood, characterized by neglect, poor role models, loss, and severe emotional trauma, constituted yet another non-statutory mitigating circumstance. Unrebutted testimony of investigator Allen Terryberry established that Mr. Turner's mother had a substance abuse problem as well as a criminal history, which resulted in her being confined to a rehabilitation center or jail on numerous occasions. (R-1722) It was also reported that Mr. Turner's mother has tested positive for the HIV virus and that this has deeply affected her son. (R-1713) In 1972, when Mr. Turner was still an adolescent, he witnessed the horrific murder of a man who was shot in the head with a sawed-off shotgun. (R-1723) On another occasion, when Mr. Turner was about 10, his cousin, who was eight-years-old, was struck and killed by a car when Mr. Turner was supposed to be watching him. (R-1723) And in 1989, Mr. Turner's cousin, Charles Knox, committed suicide.

7. Still another mitigating circumstance which the jury heard was the history of mental illness in Eric's

family. Investigator Terryberry testified that Mr. Turner's grandmother has a history of mental problems and resides in a mental hospital. In 1983 she was found to be incompetent to be tried on charges of petit theft and was committed to Marcy Psychiatric Hospital (R-1725). Terryberry also testified that Mr. Turner's mother was seen at a mental health clinic in Schenectady, New York for a period of two years. (R-1728) The jury also heard the testimony of Dr. Ralph Walker, who indicated that Mr. Turner's mother told him there was a history of paranoia in the family and that two family members had been confined to a mental ward. (1762)

The Court's approval of jury overrides cannot extend to the sentencing facts of this case. *Compare Bolender v. State*, 403 So.2d 331 (Fla. 1981)

II.

MR. TURNER WAS NOT COMPETENT TO STAND TRIAL

The central inquiry of an incompetency defense is

> "whether . . . [the defendant] . . . has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding --and whether he has a rational as well as factual understanding of the proceedings against him.'"

Dusky v. United States, 362 U.S. 402 (1960).*

The right not to be tried when one is incompetent in so fundamental to the concept of fairness, *see Bishop v. United States*, 350 U.S. 961 (1956), that special procedures have been developed to protect that right. *Pate v. Robinson*, 383 U.S. 375, 385-386 (1966).

Florida has crafted Rule 3.211, Fl.R.Cr.P. and Section 916.12, Florida Statutes (1991) as its standard. The Rule requires the judiciary to focus on the following:

> (2) In considering the issue of competence to proceed, the examining experts shall consider and include in their report, the following factors and any others deemed relevant by the experts:

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* While this test originated under the federal criminal statutes, it is beyond question that it is also the constitutionally-required (due process) inquiry whenever the competency of a criminal defendant is questioned. Drope v. Missouri, 420 U.S. 162, 172, 179-181 (1975); Lokos v. Capps, 625 F.2d 1258, 1261 (5th Cir. 1980); Reese v. Wainwright, 600 F.2d 1085, 1090-1091 (5th Cir. 1979), cert. denied, 444 U.S. 983 (1979).

> The defendant's capacity to:
> (i) Appreciate the charges or allegations against him;
> (ii) Appreciate the range and nature of possible penalties, if applicable, which may be imposed in the proceedings against him;
> (iii) Understand the adversary nature of the legal process;
> (iv) Disclose to his attorney facts pertinent to the proceedings at issue;
> (v) Manifest appropriate court-room behavior;
> (vi) Testify relevantly.

In this case, the trial court, after reviewing three written reports, initially found Mr. Turner incompetent. (R-2648-2650) Mr. Turner was subsequently committed to Florida State Hospital.

Approximately one month, the hospital advised the trial court that it believed Mr. Turner was now competent to stand trial. (R-2661) After a hearing upon Mr. Turner's return to Bay County, the trial court issued a one sentence determination that Mr. Turner was competent to proceed. (R-2735)

This case had conflicting information regarding certain elements of the competency standard. As such, the trial court had the authority to resolve those conflicts and its decision comes to this Court presumed to be correct. *Ponticelli v. State*, 593 So.2d 483, 487 (Fla. 1991)

There was no substantial disagreement that Mr. Turner could not sufficiently consult with an attorney to assist in his defense.

This record is replete with examples that support this conclusion.

With respect to evidence of the defendant's irrational behavior, a particularly important form of this evidence is, quite obviously, counsel's own observation of the defendant concerning his case.

> "Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, . . . an expressed doubt in that regard by one with 'the closet contact with the defendant,' Pate v. Robinson, 383 U.S. 375, 391 (1966) (Harlan, J., dissenting), is unquestionably a factor which should be considered."

Drope v. Missouri, 420 U.S. at 177, n. 13. Counsel's view of the defendant's alleged incompetence is of paramount importance. *Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir. 1979), *cert. denied*, 444 U.S. 983 (1979).

Both lawyers in this case repeatedly expressed this view. From the beginning, the lawyers had substantial problems communicating with Mr. Turner. His initial lawyer, Mike Stone, related obvious communication problems when he first filed a motion for a competency evaluation. (R-47) Mr. Stone was clear that from his own contact with Mr. Turner and his review of mental health reports that Mr.

Turner was "not competent to proceed . . ." (R-231) Dr. Theodore H. Blau's August 27, 1990 report to Mr. Stone confirms this. Dr. Blau found:

> His appreciation of the charges against him is acceptable. His appreciation of the range and nature of possible penalties is acceptable. It is questionable whether he really understands the adversary nature of the legal process except through his own rigid, distorted thinking. He is unable to disclose to his attorney facts pertinent to the proceedings at issue and his response in this area is unacceptable. It is my opinion that his ability to manifest appropriate Courtroom behavior is unacceptable. It is my opinion that he cannot testify relevantly with coherence and independence of judgment. Neither his cognitive not affective factors seem to be under any kind of reasonable control. (R-2537-2538)

After the public defender's office certified a conflict, Harold Richmond was appointed in November, 1990. (R-2631) Mr Richmond had the identical relationship with Mr. Turner that Mr. Stone had. In a motion to recuse and/or strike the testimony of Harry McClaren, Mr. Richmond told the trial court that Mr. Turner would not talk with him or be able to follow simple instructions. It was only through manipulation that Dr. McClaren was able to speak with Mr. Turner. (R-2714) (This is confirmed in Dr. McClaren's written report: R-3036 - Dr. McClaren told Mr. Turner that he would need "more ammunition" to find him competent). *See also (R-403).*

In Mr. Richmond's motion to continue the trial filed one year after his appointment, he told the trial court that Mr. Turner had not yet spoken with him. (R-2737) This is consistent with prior representations. Mr Richmond stated his "client will not talk to me and has not talked to me . . . I'm concerned about my ability to properly defend under these circumstances." (R-312) Mr. Richmond expressed his belief that Mr. Turner's inability to communicate was a "significant part of his illness. It's not his just deliberately trying to cooperate." (R-333)

Only one mental health examiner found Mr. Turner unequivocally "fully able to stand trial." (R-354) The critical problem with Dr. Michael D'Errico's finding after 30 days of impatient treatment at Florida State Hospital is that he never spoke with any of Mr. Turner's attorneys. (R-355) Even Dr. McClaren, who attempted to get Mr. Turner to talk with Mr. Richmond, described this activity as "hopeless"; "it was obvious he was not going to talk" with Mr. Richmond present. (R-389)

Dr. McClaren found that Mr. Turner's ability to testify and to consult with any lawyer was questionable. (R-400) This was consistent with Mr. Turner's behavior with all of his attorneys. Mr. Richmond's representations to the trial support this conclusion. During jury selection, Mr. Richmond stated

> **MR. RICHMOND:** Your Honor, we had previously discussed with you . . . I renew my motion for the appointment of an expert to examine Mr. Turner. We are still in our present state, noncommunication. He is definitely exhibiting traits such that an overnight examination would be of benefit to this court as to whether there is a change in his condition. I, personally, would state that I feel that Eric is suffering from a mental illness that is there and remains, and I do not believe that he is competent to go forward at this time.

(R-1134) Each day of trial, Mr. Richmond repeated his concern over Mr. Turner's competency. (R-2782); (R-2803); (R-1286); (R-1516) In his motion for new trial, Mr. Richmond asks for a competency evaluation, indicating that Mr. Turner was hearing voices throughout trial. (R-2880-2881) This behavior was confirmed by Dr. Blau; that Mr. Turner's mental illness prevented him from assisting his attorney. (R-434)

Quite simply, the trial court abused its discretion in finding Mr. Turner competent to stand trial. There is not competent and substantial evidence that demonstrates that Mr. Turner has a sufficient present ability to assist and consult with his lawyer about the facts of the case.

III-A.

THE TRIAL COURT IMPROPERLY EXCUSED FOR CAUSE A VENIRE MEMBER WHOSE OPPOSITION TO THE DEATH PENALTY DID NOT PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO PERFORM JURY OBLIGATIONS.

Venire member Lillian Roche was impermissibly struck from the jury venire on the erroneous grounds that her opposition to the death penalty rose to the level of exclusion under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985).

Mrs. Roche, a widow, lived in Panama City for 39 years. She worked at Sear's Department Store in Panama City for 20 years. (R-1066) She is the mother of Hugh Roche, another venire member who the Court struck for cause because he is the manager of a Panama City television station. (R-1066; 1111)

Mrs. Roche said she may have seen a televised news report about the November 1989 killings at the time, but she didn't "even remember about it." (R-764) She saw the January 16, 1992 11 o'clock news report about the upcoming trial and jury selection. (R-1097) Mrs. Roche said she had no opinion about the case and that she could base her decision solely on courtroom testimony. (R-765;1082, 1083)

Before the Court began its inquiry into media taint in the jury pool, Judge Foster asked the entire venire (who were assembled in the jury pool room) whether any one of

them would be absolutely unable to impose the death penalty. Four venire members answered in the affirmative; Mrs. Roche was not one of them. (R-638)

The State's investigation into Mrs. Roche's death penalty beliefs is brief, less than two record pages, and the State speaks the most. Both the State and Mrs. Roche express the belief that her confusion is due to the unfamiliar and dramatic nature of the situation.

MR. APPLEMAN: . . . Is there anyone who does not believe in the death penalty as an appropriate penalty?

LILLIAN ROCHE: I don't know if I do or not.

MR. APPLEMAN: Okay, Mrs. Roche. Is there, in your mind -- you know, obviously, nobody has ever walked up to you, you know, on the streets or put you in this kind of position before or anything like that. Is it a situation where you just, you're just not sure because you've never faced the circumstance?

LILLIAN ROCHE: I, I think so. I really do.

(R-1080)

Mrs. Roche never said that she was unequivocally opposed to the death penalty. What she said is that she found the punishment shocking.

MR. APPLEMAN: What I really want to ask you is this: Can you consider both penalties, the death penalty, as well as the potential of life in prison with a minimum of 25 years?

LILLIAN ROCHE: I believe so.

MR. APPLEMAN: Okay.

LILLIAN ROCHE: It kind of shocks, it's shocking to me.

MR. APPLEMAN: Okay, you mean the penalty itself?

LILLIAN ROCHE: Well, having the death penalty kind of shocks me, you know.

MR. APPLEMAN: Okay. Do you feel that you can apply the death penalty in the appropriate circumstance?

LILLIAN ROCHE: I think I can.

(R-1079)

No inquiry was ever made into whether Mrs. Roche's reaction sprang from personal, ethical or religious beliefs. Finally, the State asked Mrs. Roche if she could give "a little better answer" than "I think I can."

MR. APPLEMAN: Okay. Probably when we were going through all the, the questions that dealt with your opinions and your media things, you may have seen the judge lean over to somebody and say to them, can you give me a little better answer, or is that the best answer you can give me?

LILLIAN ROCHE: I just don't know.

MR. APPLEMAN: Okay. It's a circumstance you've never been in before, and I understand that. And all we want you to do is give us the best that you can from that standpoint.

(R-1078-1080)

Some time after this discussion, the State asked the panel if there was anything "whatsoever that would keep you

from being fair to the State and fair to the Defendant in this case?" Mrs. Roche indicated by a negative nod that there was nothing to impede her fulfilling of her duty as an impartial juror. (R-1088)

Subsequently, the trial court granted the State's motion to excuse Mrs. Roche for cause. The following colloquy took place with respect to that motion.

MR. APPLEMAN: Can we back up to Mrs. Roche.

THE COURT: You want to take her for--

MR. APPLEMAN: Cause.

THE COURT: --cause?

MR. APPLEMAN: On the death penalty.

THE COURT: Okay.

MR. APPLEMAN: Is that granted?

THE COURT: Yes.

MR. RICHMOND: For the record, I don't believe she indicated that she had 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)

The U.S. Supreme Court held in *Witherspoon* that venire members who have general objections to the death penalty could not be excluded from jury service since it would leave a jury composed primarily of people "uncommonly willing to condemn a man to die." 391 U.S. at 521. The Court concluded that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Id. at 522.

The Court later held in *Witt* that the proper standard for determining when a prospective juror could be excluded for cause because of his or her views on capital punishment was whether the juror's views would

> prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

Examining the voir dire examination of Mrs. Roche it is clear that her reservations about the "shocking" nature of the death penalty were not so overwhelming that they would "prevent or substantially impair" her ability to function as a juror. Mrs. Roche's reaction to the death penalty is neither unusual nor inappropriate. The ultimate criminal sanction is designed to be shocking: it is a judgment set aside from all others by its severity and finality. Moreover, Mrs. Roche said more than once that she believed she could fulfill her duties as a juror. (R-1079; 1081) *See Sanchez-Velasco v. State*, 570 So.2d 908, 915-916 (Fla.

1990)(venirepersons who indicated unequivocally that they could not put aside convictions and follow the law properly excluded; "no venireperson was eliminated who indicated in any way that he or she could follow the law.")

While "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism," *Witt*, 469 U.S. at 424, the rest of the voir dire examination gives no hint that Mrs. Roche would be so close-minded as to be unable to function as a juror. On the contrary, she testified she would be able to set aside her cursory contact with one of the victims (R-1081) as a patron at Lola's Second Chance, and that she had no opinion about the case at all. (R-765)

Mrs. Roche's voir dire responses stand in stark contrast to the responses of venirepersons that the Court found were properly stricken for cause in *Randolph v. State*, 562 So.2d 331 (Fla. 1990), and *Lambrix v. State*, 494 So.2d 1143 (Fla. 1986). In *Randolph*, the challenged venireperson had "vacillated badly" on the question of whether she could impose the death penalty under any circumstance. The Court correctly concluded that

> given juror Hampton's equivocal answers, we cannot say that the record evinces juror Hampton's clear ability to set aside her own beliefs "in deference to the rule of law."

526 So.2d at 336-337 (quoting *Buchanan v. Kentucky*, 483 U.S. 402 (1987)). Likewise, in *Lambrix*, the challenged venireperson "reportedly wavered when questioned about her ability to vote in favor of the death." 494 So.2d at 1146. In determining that the venireperson's opposition to capital punishment would "substantially impair her ability to act as an impartial juror," *id.*, the Court particularly noted that "[t]he fact that Mrs. Hill told the trial judge that she could not vote for the death penalty under any circumstances is controlling." *Id.*

The synthesis of the Court's rulings in *Sanchez-Velasco*, *Randolph* and *Lambrix* yields the following rule for determining whether or not a venire member is *Witherspoon /Witt* excludable: if venire members respond in any way that they can follow the law and are not close-minded with respect to their ability to impose the death sentence under particular situations, they cannot be subject to exclusion for cause; if, however, venire members equivocate and leave the impression that they cannot impose the death penalty under any circumstances, then they are excludable for cause. This rule comports with and serves to protect both the defendant's sixth amendment right to have a jury that is not just comprised of people "who are uncommonly willing to condemn a man to die," *Witherspoon*, 391 U.S. at 521, and "the State's legitimate interest" in removing potential

jurors who would "frustrate [it] . . . in administering constitutional capital sentencing schemes by not following their oaths." *Witt*, U.S. at 423.

III-B.

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING MR. TURNER TO BE TRIED BY A JURY SELECTED IN A RACIALLY BIASED MANNER

Eric Duane Turner, an African-American, was tried and convicted for the first-degree kidnapping and murder of Lola Toombs and Teresa Clements, two Caucasian women. The jury pool of 140 members included four African-Americans. (R-1042) Two were excused for cause by the trial court; two sat on the jury.

Jury selection in Mr. Turner's case began on January 27, 1992 in Panama City, Florida. Before starting the voir dire examination in the courtroom, Judge Foster went to the jury pool room to address the pool as a whole to see (1) if there was anyone in the pool who had no knowledge of the case, and (2) if there was anyone in the pool who could absolutely never impose the death penalty. (R-634-640)

Five venirepersons said they had no knowledge of the events in question and were segregated from the rest of the pool. (R-640-641)

Four venirepersons responded affirmatively to Judge Foster's lengthy query about the death penalty. He excused the four venirepersons and sent them to another courtroom. (R-638-639) One of these venirepersons was African-American, although this is not indicated in the jury pool

room record. During the trial it was noted that there were only four African-Americans in the jury pool of 140. (R-1042) One African-American venireperson was excused in the jury pool room, another was excused for cause by the Court (Lanshana Booker). The two remaining African-American venirepersons sat on the jury: Jurors Herbert Nance and Cleola Chase.

Once the voir dire commenced in the courtroom, the venire was divided into six-member panels to be questioned about their knowledge of the crime. (R-630)

Lanshana Booker had been living in Panama City on and off since 1984, while he completed his education. He said he worked as an electrical engineer. He said he had very little information about the crime; he only noticed the photograph in the January 16, 1992 newspaper on his way to the sports page. (R-670; 685; 1023)

While the State was questioning the panel about "premeditated intent", Mr. Booker expressed some hesitance.

> MR. APPLEMAN: . . . In other words, an individual can decide to somebody --to kill somebody and have premeditated intent (snaps fingers) that quick, as long as its before the killing . . .
>
> * * *
>
> MR. APPLEMAN: . . . Sir, bother you at all?
>
> LANSHANA BOOKER: I'm not quite sure.
>
> MR. APPLEMAN: Okay. Not everybody walking down the street said, hey,

let's talk about premeditated intent, right?

LANSHANA BOOKER: Right.

MR. APPLEMAN: Okay. This is a, a legal instruction I anticipate that the court will give you at the end of the case. He'll tell you what we have to prove beyond a reasonable doubt. And he'll define premeditated intent for you. And I anticipate that he'll say the law does not fix the exact period of time that must pass between the formation or the premeditated intent and the killing, itself. Does that help you a little bit?

LANSHANA BOOKER: Well, I understand the definition, what I'm--

MR. APPLEMAN: Okay.

LANSHANA BOOKER: --questioning is exactly how I feel about the definition, itself.

MR. APPLEMAN: Okay.

LANSHANA BOOKER: Yes.

(R 970-971)

Although Mr. Booker was very specific about understanding the definition, Mr. Appleman proceeded to offer another explanation of premeditated intent.

MR. APPLEMAN: Ever watch L.A. Law?

LANSHANA BOOKER: Yes.

MR. APPLEMAN: Perry Mason was one of my favorites. You're too young to--well, they've brought him back, okay, they brought him

back. I forgot about that. Matlock. Some of those shows, you always see the, the evidence, and a lot of times you'll see in the evidence where there is this long, drawn out scheme about, okay, what we're going to do, we're going to go over and do this, and then we're going to do this, and we're going to so that, and we're going to do this, and, and I'll shoot him here, you shoot him there, or you stab him, or, you know, or, these kind of things. What I'm trying to get across to you in this: The law does not require that there be some kind of big formulated plan for there to be a premeditated intent to kill, that decision can be made in a split second. And, unfortunately, nobody can open up somebody's mind and say, hey, here's a lump of premeditated intent I want you to look at.

Okay. Now, with that concept in mind, do you have a problem with that provision of the law?

LANSHANA BOOKER: The same point. It's, it's not the problem with understanding it.

MR. APPLEMAN: Okay.

LANSHANA BOOKER: The problem is exactly knowing my convictions on it.

MR. APPLEMAN: Okay.

(R 971-972)

Mr Booker finally explains that for him it is not a matter of believing instantaneous premeditated intent is possible. In fact, Mr. Booker believes that there is *always* intent where there is murder.

LANSHANA BOOKER: Being, I guess--it might have something to do with a discussion I had with my wife, who is a psychologist.

MR. APPLEMAN: Okay.

LANSHANA BOOKER: Well, soon to be a practicing psychologist. And it's hard for me 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.

MR. APPLEMAN: Okay.

LANSHANA BOOKER: I guess that's the real problem.

MR. APPLEMAN: You mean from the standpoint that you think there ought to be more than a premeditated intent for a conviction of a First Degree Murder?

LANSHANA BOOKER: No. I guess the fact that that's such a fine line--

MR. APPLEMAN: Okay.

LANSHANA BOOKER: --between First Degree. What's premed-, as you point out, that it can be up to the split second, you know, someone could actually grab someone, not have the intent to kill, but in the process have the intent in the mist of, you know, causing bodily harm. So I hate the fine line. I, I guess that's something inside.

(R-972, 973)

Mr. Booker said he believed intent was almost always present in first and second degree murder, and that he did not think there should be a higher standard of premeditated intent for first degree murder. Moreover, he said he could apply the law the judge gave him.

> MR. APPLEMAN: Okay. With, with the feelings that you've given to me, do you feel that, that you can apply the law that the judge will give you in this case?
>
> LANSHANA BOOKER: Yes.
>
> MR. APPLEMAN: Okay.

(R-973-974)

State v. Neil, 457 So.2d 481 (Fla. 1984) and *State v. Slappey*, 522 So.2d 18 (Fla. 1988) held that Article I, Section 16 of the *Florida Constitution* precludes the State challenge of a juror solely on the basis of the juror's race. *Neil* articulated the following test:

> A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race.

Neil, 457 So.2d 481, 486.

The State used its first peremptory strike against Mr. Booker. (R-1040) When challenged by the defense, the Court asked the State to give race neutral reasons for striking

Mr. Booker, the following colloquy transpired. *See Green v. State*, 583 So.2d 647, 651 (Fla. 1991); *Williams v. State*, 574 So.2d 136, 137 (Fla. 1991).

MR. APPLEMAN: Okay. Well, for cause-- not for cause, a pre-emptory on Mr. Booker.

MR. RICHMOND: Immediate objection.

THE COURT: Okay.

MR. RICHMOND: Based upon the fact that out of the four white--four black people on the venire, the first person struck is a black by the State, evidencing a clear-cut passion to keep blacks from determining this case. And renewing my challenge to the panel for that basis.

THE COURT: Give me some nondiscriminatory . .

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-114-115)

This is a fact specific inquiry. *See Files v. State*, 586 So.2d 352, 356 (Fla. 1st DCA 1991). Whatever the reason the prosecutor gives for excluding a minority juror, the trial court must "critically evaluate" them to "assure they are not pretexts for racial discrimination." *Roundtree v. State*, 546 So.2d 1042, 1045 (Fla. 1989). The Florida Supreme Court adopted the Third District's "nonexclusive list of five factors [that] would weigh against the legitimacy of a race-neutral explanation." *State v. Slappey*, 522 So.2d 18, 23 (Fla. 1988).

> We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling out the juror for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to jurors who were not challenged.

Slappey v. State, 503 So.2d 355, 255 (Fla. 3d DCA 1987), *affirmed State v. Slappey*, 522 So.2d at 23.

The State's given reasons for peremptorily excluding Mr. Booker--(1) his profession; (2) his beliefs about

premeditated intent; and (3) his discussion with his graduate student wife about matters psychological--were and are specious.

Mr. Booker was not the only electrical engineer in the venire. David Cleland and Roland Palmer, both Caucasian, were also engineers--in fact, they worked at the same place. Mr. Palmer was pre-emptorally struck from the jury by the defense for his prior knowledge of the crime from television and newspaper reports in November 1989.

However, Mr. Cleland became a juror despite his occupation. He was not specifically questioned about his knowledge of intent. His wife was also a student and a registered nurse, so discussions similar to those between Mr. Booker and his wife may have occurred in the Cleland household.

Further, the State repeatedly and erroneously characterized Mr. Booker as being unable to accept instantaneous premeditated intent. (R-1040, 1045)

Initially, the Court declined to allow Mr. Booker's exclusion.

> THE COURT: Well, let me hear you further on, on any objections that you have to pre-emptorally excuse Booker.
>
> MR. RICHMOND: Judge, I think if he exempts him pre-emptorally, it puts us in the position of having to strike the entire panel and starting over again because it

is a clear-cut racial situation. You have three jurors sitting right now on this panel that are black. The first one he comes to, he moves to strike. There are two remaining, and that's it. There are no more--

THE COURT: Well, I'm going to, I'm going to deny you a pre-emptorally challenge. I do not see his, his answers being anymore confusing that Mrs. Chase's answers.

(R-1043-1044)

But later on, the Court granted the pre-emptory strike by the State, with a caveat about similarly situated Caucasian jurors :

THE COURT: Well, the cases that I have been reading appear to me to almost say that any time that the State excuses a black juror, it's almost incumbent upon them to show some neutral, race neutral reasons or an absence of, of discriminatory reasons, and the cases that I read say that if you excuse one for the, the reasons alleged and jump over a white person for the, that's in the same place, then you've got a problem.

(R-1047)

The trial court was wrong in permitting the State to peremptorily challenge Mr. Booker. In *Mitchell v. State*, 548 So.2d 823, 825 (Fla. 1st DCA 1989), the State challenged an African-American juror because she was divorced and had never served on a jury before. The State purportedly believed this demonstrated instability. In fact, the record

established that this juror had a long-term employment history and that white jurors who had been divorced and never served on a jury before were not challenged. The First District reversed Mitchell's conviction, saying that the discrepancies between the State reasons and the record "weighs against the legitimacy of race-neutral justification."

All three African-American jurors indicated that they could serve as fair and impartial judges of the facts. *Norwood v. State*, 559 So.2d 1255, 1256 (Fla. 3rd DCA 1990). The reasons given by the State were simply not supported by the record or comparable to white jurors who were not only not challenged, but who, in the case of venire member David Cleland, actually ended up on the jury.

In *Roundtree v. State*, 546 So.2d 1042, 1044-1045 (Fla. 1989), the State challenged an African-American juror because of age, marital and employment status. The record showed that many white jurors also had these factors and were not challenged.

In *Hicks v. State*, ___So.2d___, 17 FLW D8 (Fla. 4th DCA 1991), Hicks was charged with possession of cocaine. The State challenged the only African-American juror because she was a teacher and teachers, being more liberal, would have greater tolerance for the use of controlled substances. In addition, the juror was challenged because she had prior jury service and that jury found the defendant not guilty.

In reversing Hicks's conviction, the Fourth District found neither record support for the reasons given nor the questioning of white jurors about the factual basis for challenging the African American juror. No white juror was asked about the outcome of their prior jury service. *See also Gadson v. State*, 561 So.2d 1316, 1318 (Fla. 4th DCA 1990); *McNair v. State*, 587 So.2d 264, 165 (Fla. 2d DCA).

In *Smellie v. Torress*, 570 So.2d 314 (Fla. 3d DCA 1990), the Third District held that it was illegal to strike and African-American juror to get another juror the party liked more. In addition, the reason for challenging a juror should be directly related to the facts and type of the case. *Cure v. State*, 564 So.2d 1251, 1252 (Fla. 4th DCA 1990). By the State's reasoning in this case, any juror with any connection to the criminal justice process should have been challenged. Although the State did this to Ms. prince, it refused to do so regarding the white jurors.

In *Foster v. State*, 557 So.2d 634, 635 (Fla. 3d DCA 1990), there were six prospective African-American jurors. If these, one was struck for cause, one was struck by the defense, and three were struck by the State. The State's reason was that each juror indicated that he or she would have a difficult time sitting in judgment of another person. Although the Third District decided that this was a race neutral reason for exercising a challenge, it reversed Foster's conviction because the State did not challenge any

PAGE(s) MISSING

white juror who gave a similar response. *See also Mayes v. State*, 550 So.2d 496 (Fla. 4th DCA 1989)(State struck juror for being a licensed practical nurse with a young daughter; another white juror with medical experience was not challenged; several white jurors with children were not challenged); *State v. Reynolds*, 576 So.2d 1300, 1302 (Fla. 1991)(black juror felt that law should not apply if marijuana used in someone's house within 1,000 feet of school; white jurors who expressed similar sentiments seated on jury.)

> When any of the [Slappey] factors are present and the State fails to rebut the inference convincingly, the court must find that the state's reason is a pretext.

Parrish v. State, 540 So.2d 870, 872 Note 2 (Fla. 3d DCA 1989).

III-C.

THE TRIAL COURT CREATED REVERSIBLE ERROR IN ITS FAILURE TO STRIKE SEVEN VENIRE MEMBERS FOR CAUSE

A. Venire Members Cleland, Ogborn, Chase, Langley, Lindsay, Dailey and Hengel should have been Excused for Cause Since the Record of their Voir Dire Examinations Clearly Shows that Reasonable Doubt Existed as to their Ability to be Impartial.

There was a significant amount of pre-trial publicity in Mr. Turner's case. In November 1989, the story of Lola Toombs and Teresa Clements was avidly followed in the local newspaper and on Panama City and Tallahassee television stations. The day before jury selection began, there was a newspaper report about Mr. Turner's refusal to cooperate with his attorneys.

Consequently, media taint was an important issue for the jury pool in Mr. Turner's case. Although the defense requested individual voir dire on the matter (R-630), the Court divided the venire into six-member panels for the investigation. Only four venire members could be found who had no knowledge of the crime in the 140 person pool.

1. David Cleland

Unlike many of the venire members, Mr. Cleland said he had not only *seen* the newspaper accounts of the crime, he had *read* them *and* remembered what he read. (R-795, 796)

2. Bonnie Ogborn

Ms. Ogborn said she had seen the televised and newspaper accounts in 1989, and that she had read the January 16, 1992 article about Mr. Turner's unresponsive relationship with his lawyers.

3. Cleola Chase

Ms. Chase worked in the cafeteria at Bay High School in Panama City, Florida. She knew State Attorney Appleman and his wife, who taught at the high school. (R-709, 710). Ms. Chase had seen information about the case in November 1989. Although she had not read the January 16, 1992 article about Mr. Turner's uncooperativeness with his attorneys, she had overheard some people talking about it at a service station and she was concerned about it.

MR. APPLEMAN: Okay. How long ago was the last time you may have seen something in the media about this?

CLEOLA CHASE: Shortly after it happened, and when he was apprehended.

MR. APPLEMAN: All right. Since that time period have you seen anything?

CLEOLA CHASE: Not until this morning.

MR. APPLEMAN: Okay.

CLEOLA CHASE: I heard, I didn't see it then.

MR. APPLEMAN: Okay.

CLEOLA CHASE: I heard, I overheard a conversation that, the lack of communication. And I didn't know that it was this case until they brought him in and he told us it was.

MR. APPLEMAN: Okay. Now, when you're saying that you heard a conversation, was that by somebody who was going to be a witness in this case?

CLEOLA CHASE: No, no, no, no, no.

MR. APPLEMAN: Okay, give me a little bit more information, without telling me the content of the conversation, if you would. Was it just gossip about the case?

CLEOLA CHASE: It was, well, I was at the service station, and somebody said, they were talking about something else that happened I guess on the weekend or a couple of weeks ago, I don't keep up with the news.

MR. APPLEMAN: Okay.

CLEOLA CHASE: What's going on, for the lack of time. I don't have the time, too much time for television and everything. So they said, well, the guy, when they have his trial, said I don't know that the lawyers are going to do because he, the lack of communication, of talking.

MR. APPLEMAN: Okay.

CLEOLA CHASE: And it didn't dawn on me that it was this particular case until after, later.

MR. APPLEMAN: As a result of anything that you may have heard or anything at all, T.V. wise or whatever, do you feel that you have an opinion as to what should happen in this case right now.

CLEOLA CHASE: Yes and now, but there's probably a few things that need to come out in the trial, probably.

(R-710, 711)

4. William Langley

Mr. Langley testified that he had seen the televised coverage surrounding the kidnappings, killings and subsequent arrest of Mr. Turner. He does not take the newspaper. (R-750) He recalled that there were two women killed. (R-1027)

5. John Lindsay

Mr. Linsay's situation was similar to Mr. Langley's--he had information about the crime, mostly garnered from televised news reports in November 1989. (R-736, 1027)

6. Patricia Dailey

Ms. Dailey said she had followed the stories about the crime in 1989 but had seen nothing recently (784;1101).

7. Raymond Hengel

Mr. Hengel testified during the voir dire examination that he had not seen any of the news reports about the crime, but he had overheard people talking about the crimes at his workplace. (R-808)

In all of these instances, the test for jury impartiality is not whether the voir dire of a venire member definitively establishes her inability to be impartial, but rather whether the voir dire leaves "reasonable doubt" about her ability to be impartial. In *Hill v. State*, 477 So.2d 552 (Fla. 1985), the Court reiterated:

> The test for determining juror competency is whether the juror can lay aside any

> bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.

Id. at 555 (*quoting Lusk v. State*, 446 So.2d 1038, 1041 (Fla. 1984)).

In applying the jury-competency test, the Court in *Hill* also reiterated that trial courts must follow the rule set forth in *Singer v. State*, 109 So.2d 7 (Fla. 1959):

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by [the] court on its own motion.

Id. at 24.

Jurors Cleland, Ogborn, Chase, Langley, Lindsay, Dailey and Alternate Hengel all said they had prior knowledge of the crime that they had obtained from the media or from other persons with information. This prior knowledge included the nature of the crimes and the search for and subsequent arrest of Mr. Turner.

In Juror Chase's case, there was an even more compelling reason for excusing her from the jury: she knew the state attorney and worked with his wife at Bay High School. Further, she had specific information about Mr. Turner's refusal to even speak to his attorneys. (R-711)

B. The Failure to Excuse Venire members Cleland, Ogborn, Chase, Langley, Lindsay, Dailey and Hengel was Not Harmless Error.

Mr. Turner submits that it was not harmless error for the trial court to fail to strike venire members Cleland, Ogborn, Chase, Langley, Lindsay, Dailey and Hengel for cause. It would not have been harmless error "because it abridged [Mr. Turner's] right to peremptory challenges by reducing the number of those challenges available [to] him." *Hill*, 477 So.2d at 556. The Court has held that it is reversible error for a trial court to force a party to use its peremptory challenges on persons who should have been excused for cause, provided that party subsequently exhausts all his peremptory challenges and additional challenges are sought and denied. *See Floyd*, 569 So.2d at 1230; *Reilly v. State*, 557 So.2d 1365, 1367 (Fla. 1990); *Moore v. State*, 525 So.2d 870, 872-73 (Fla. 1989); *Hill*, 477 So.2d at 556.

Here, Mr. Turner has met the necessary requirements for a showing that the trial court's failure to excuse the six venire members for cause was not harmless error. Mr. Turner exhausted his 20 peremptory challenges. His request for additional challenges was denied. (R-1117)

THE COURT ERRED IN FINDING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE

The trial court found that the murder of both Ms. Toombs and Clements were committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R-1822) The factual basis for this aggravator primarily turned on Mr. Turner's plan to rob them. (R-1823). The rest of the trial court's findings is unclear for it commented:

> Even if the Defendant had not calculated and planned to do what was necessary to accomplish his purpose, prior to the killing of Toombs he had ample time to reflect on his actions and the killing of Miss Clements during the time that it took him to remove Lola Mae Toombs from the van, place her body on the ground, remove Teresa Clements from the van, place her body on the ground, and kill her. The time between the two killings was more than adequate for the Defendant to reflect on his actions. This is consistent with his admission to Nolin that after he killed Toombs he knew that he could not let Clements go. 114-117 (R-1824)

Under this Court's decisions limiting the application of the cold, calculated and premeditated aggravating circumstance, and under the facts established beyond a reasonable doubt in this case, the court erred in finding this circumstance.

The sequence of events that took place during the course of the robbery established, at most, ordinary

premeditation. In *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988), the Court held that his aggravating circumstance must be based upon "heightened premeditation . . . , which must bear the indicia of 'calculation.'" Further explaining this standard, the Court "conclude[d] that 'calculation' consists of a careful plan or prearranged design . . ." *Id.* With this limitation, the Court has consistently rejected the finding of the circumstance when, as in Mr. Turner's case, "[the defendant's] actions took place over one continuous period of physical attack." *Campbell v. State*, 571 So.2d 415, 418 (Fla. 1990).

The boundaries of this limiting principle demonstrate that the circumstance cannot be based on the sequence of events encompassed within Mr. Turner's killing of the two women. An assault will be deemed "one continuous period of physical attack," Campbell v. State, 571 So.2d at 418, even if there are brief interludes between phases of the assault. Thus, in *Farinas v. State*, 569 So.2d 425 (Fla. 1990), the defendant shot the victim once from a distance. *Id.* at 427. He then walked over to her and attempted to shoot her again, but his gun jammed three times, *Id.* After unjamming the gun the third time, he fired two fatal shots. *Id.* Despite the respite in the assault occasioned by the original distance between the defendant and the victim and the

jamming of the gun, it did not "afford[] [Farinas] time to contemplate his actions, thereby establishing heightened premeditation." Id., at 431.

In *Jackson v. State*, 530 So.2d 269 (Fla. 1988), the assault began when

> Jackson grabbed Moody [the victim] and put a knife to his neck . . . [He] then forced Moody to the floor and directed [a third person] to remove his wallet and keys. As the sixty-four year old Moody begged for mercy, he was bound, gagged, and then choked with a belt until he was unconscious . . . After Moody regained consciousness, Jackson beat him in the face with a cast on his forearm and then straddled his body and repeatedly stabbed him in the chest.

Id. at 270. The repeated efforts to kill the victim following the discovery that he was not dead, coupled with interludes during which the defendant thought the victim was dead, makes *Jackson* worse than Mr. Turner's case. Yet this sequence of events did not provide enough of a break in the attack to afford the defendant sufficient time to contemplate his actions to establish the heightened premeditation necessary for the cold, calculated, premeditated circumstance. The finding of the circumstance in *Jackson* was set aside. 530 So.2d at 273.

One other case illustrates yet again why the sequence of Mr. Turner's actions cannot support a finding of the cold, calculated, premeditated circumstance. In *Thompson v. State*, 565 So.2d 1311 (Fla. 1990), the defendant awoke and

decided to kill his lover, who was still asleep. However, thiry minutes passed between the time Thompson awoke and the time of the killing., Id. at 1318. Despite this passage of time,

> there [was] no evidence in the record to show that Thompson contemplated the killing for thirty minutes. To the contrary, the evidence indicates that Thompson's mental state was highly motional rather than contemplative or reflective.

Id. The record demonstrated a similar occurrence in Mr. Turner's case. In this context, Thomspn's final actions, similar to Mr. Turner's, also fell short of establishing heightened premeditation: "[Thompson] said he shot [the victim] as she lay sleeping, then he stabbed her because she was still moving and he wanted her to feel no pain." Id. at 1313.

The next factor relied on by the judge in Mr. Turner's case -- Mr. Turner's plan to rob Mrs. Toombs -- has expressly been rejected as establishing the cold, calculated, premeditated circumstance. See *Harvey v. State*, 529 So.2d 1083, 1087 (Fla. 1988)("[t]hat [defendants] planned the robbery in advance and even cut the phone lines before going . . . to the [victims'] home would not, standing alone, demonstrate a prearranged plan to kill). See also *Reed v. State*, 560 So.2d 203, 207 (Fla. 1990)("intent . . . to burglarize [victims'] house" does not establish cold, calculated, premeditated circumstance).

V.

EVIDENCE PRESENTED BY THE STATE DID NOT SUPPORT A FINDING OF THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE

The trial court's sentencing order found this aggravating factor to be present, characterizing the evidence as follows: Mr. Turner kidnapped the victims at gunpoint and drove them to a remote area; the victims were uncertain about what the future held for them. Mrs. Toombs was killed in the presence of Ms. Clements. Ms. Clements was forced to get out of the van, get undressed and lay on the ground. Mr. Turner then shot her.

The trial court specifically found there was no physical torture, but indixcated that it did not take a "Rhodes Scholar . . . to understand and appreciate the fear, apprehension, terror, doom, hopelessness, and horror which must have filled every fiber and cell of the victims' being while these events were unfolding." (R-1821)

Nowehere does the trial court cite to the proper legal standard, that is where "the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies -- the consciouslessness or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283

So.2d 1, 9 (Fla. 1973).

The burden rests with the State to prove beyond a reasonable doubt that the crime rises to the crime rises to the requisite level of aggravation pursuant to section (5)(h). "Not even logical inferences drawn by the court will suffice to support a finding" that the murder qualifies in this regard. *Clark v. State*, 443 So.2d 973, 976 (Fla. 1983)(quotations ommitted).

Examination of this Court's previous decisions demonstrates that a finding under section (5)(h) has to satisfy three requirements. First, the quality and duration of the suffering caused by the additional torturous acts must be markedly different from the suffering normally associated with murders. Second, the victim must be conscious during the torturous acts in question. Finally, the defendant must possess the intent to inflict the heightened suffering.

Application of the curent law governing section (5)(h) to the evidence presented by the State at Mr. Turner's sentencing hearing clearly shows that the State failed to meet its burden of proof on the "heinous, atrocious, or cruel" aggravating factor.

The Quality and Duration of the Victim's Suffering Did Not Rise to the Level Required for a Finding under the "Heinous, Atrocious or Cruel" Aggravating Circumstance

It is the State's burden under section (5)(h) to

establish beyond a reasonable doubt that the quality and duration of the suffering caused the victim by the additional torturous acts is markedly different from the suffering normally associated with murders.

This requirement has been met in those instances where the victim's physical pain or emotional anguish rises to a sufficient level to set their death apart from other homicides. See *Reed v. State*, 560 So.2d 203, 207 (Fla. 1990)(victim tied, severely beaten, choked, raped, then murdered by having throat slashed more than a dozen times with serrated-edge knife, requiring "more time and effort.") The requirement has not been met when "death results from a single gunshot and there are no additional acts of torture or harm." *Cochran v. State*, 547 So.2d 928, 931 (Fla. 1989). Nor has it been met when an unprolonged rape or battery occurs and the act of killing is done rapidly. See *Robinson v. State*, 574 So.2d 108, 111-112 (Fla. 1991)(victim raped, soon after shot twice in head; victim "rendered unconscious immediately after the first bullety struck her head"; "death occurred within several seconds").

The "quality and duration" requirement is also met where the particular method of killing causes the victim an extraordinary amount of pain, beyond that necessary to accomplish the killing. For example, the finding of section (5)(h) has been sustained when the victim has been beaten or bludgeoned to death in a particularly vicious manner. See,

e.g., *Penn v. State*, 574 So.2d 1079, 1080, 1083 n. 7 (Fla. 1991)(victim bludgeoned to death with a hammer); *Cherry v. State*, 544 So.2d 184, 187-88 (Fla. 1989)(victim beaten so severely skull was dislocated from spinal chord; beating was sole cause of death); *Chandler v. State*, 534 So.2d 701, 704 (Fla. 1988)(elderly couple beaten to death with baseball bat).

Finally, this requirement may be satisfied upon a showing of the victim's "helpless anticipation of impending death." *Clark v. State*, 443 So.2d at 977. The "helpless anticipation", however, must be prolonged by the defendant's continuing acts or must be extraordinarily severe in order to qualify. See *Douglas v. State*, 575 So.2d 165, 166 (Fla. 1991)(victim expressed to wife "that something bad was about to happen and asked that she promise to stay alive"; wife testified defendant "said he felt like blowing . . . our brains out"; forced victim and wife to engage in prolonged sexual acts "at gunpoint"; "fired the rifle into the air" when they complied; hit victim in head with the rifle so hard "stock shattered"; finally told victim's wife to "get back" and shot victim in head). Where the "helpless anticipation" is not prolonged and severe, the "quality and duration" requirement has not been met. See *Amoros v. State*, 531 So.2d 1256, 1260-1261 (Fla. 1988)(victim realized about to be shot, ran to rear of apartment, shot three times); See also *Lewis v. State*, 377 So.2d 640, 646 (Fla.

1979)(evidence insufficient where defendant "shot the victim in the chest and, as the [victim] attempted to flee, shot him several more times").

Each woman died from one shot to the head from a .45 caliber pistol, causing instantaneous death. There were no defensive wounds indicating a struggle; no evidence that the victims were in any physical pain prior to death. Any potential emotional characterization of the victims is purely speculative; there was no evidence the women were terrorized or pleading for their lives. The only conversation between Mr. Turner and the victims was that he intended to rob them.

Mr. Turner Did Not Possess the Requisite Intent

The final requirement under section (5)(h) is that the defendant must have acted with a desire to inflict the enhanced suffering upon the victim, or at least have shown utter indifference to the heightened suffering which his actions caused.

In *Porter v. State*, 564 So.2d 1060 (Fla. 1990), the Court found significant, in reversing the trial court's findings under section (5)(h), that the crime in question was "a crime of passion" and therefore was not a "crime that was *meant* to be deliberately and extraordinarily painful." *Id.* at 1063 (emphasis in the original). Likewise, in *Shere v. State*, 579 So.2d 86 (Fla. 1991), a trial court's finding under scetion (5)(h) was overturned since the evidence did

not rise to the level of establishing that the defendant "desire to inflict a high degree of pain, or enjoyed or [was] utterly indifferent to the suffering [he] caused." *Id.* at 96.

Under the facts of this case, there is "no evidence trhat [this crime] was committed to 'cause the victim unnecessary and prolonged suffering,'" *Robinson v. State*, 574 So.2d at 112, or that this was "a crime that was meant to be deliberately and extraordinarily painful." Porter, 564 So.2d at 1063. In fact, the events support a finding quite to the contrary.

Mr. Turner simply panicked; he acted impulsively when he killed the two women. When Mr. Turner's actions are viewed in this proper context, it is evident that he had no desire to inflict a high degree of pain upon, or enjoy in any way the suffering of his victim.

VI.

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST

The trial court appeared to find this aggravating circumstance solely as to Ms. Clements. (R-1818) This finding was based on Mr. Turner's statement to Detective Nolan "that after he killed Lola Mae Toombs, he knew that he could not let Teresa Diane Clements go . . . (R-1818) The accuracy of this statement was significantly in doubt.

The testimony of J.D. Nolin regarding the statements by the defendant with regard to this factor was significantly impeached by the fact that, when asked on two prior occasions whether the defendant had made any statements in addition to that which was recorded, J. D. Nolin, under oath, replied: "No". Additionally the notes of Sam Slay, who was also present when these alleged additional statements were made, reflected none of them. The circumstances surrounding the death of Teresa Clements likewise does not support the finding of this aggravating factor. All the evidence introduced indicates that the shootings occurred as a result of panic, not due to any particular motive. Evidence introduced through the testimony of Dr. Ralph Walker indicates that Mr. Turner would have a difficult time formulating any intent at all much less the motive to eliminate a witness. Furthermore,

there is no evidence as to the sequence or time frame in which the events of these killings occurred, and therefore little to dispel the notion that they were the result of panic with no intent or motive involved.

In sum, the evidence presented by the state to establish this factor does not go beyond mere speculation. That evidence often contradicted itself, was substantially impeached and was far from conclusive. *Livingston v. State*, 565 So.2d 1288, 1292 (Fla. 1988) See *Foster v. State*, 436 So.2d 56, 58 (Fla. 1987) When the victim is not a law enforcement officer, "proof of the requisite intent to avoid arrest and detection must be very strong . . ." *Riley v. State*, 366 So.2d 19, 22 (Fla. 1978)

VII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE JURY INSTRUCTIONS ON THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR REQUESTED BY THE DEFENSE, AND THE INSTRUCTION GIVEN WAS CONSTITUTIONALLY INADEQUATE.

The defense requested the following instruction: DEFENSE REQUESTED INSTRUCTION ON THE DEFINITION OF "COLD CALCULATED AND PRE-MEDITATED"

> The phrase "cold, calculated and pre-meditated" refers to a higher degree of pre-meditation than that which is normally present in a pre-meditated murder. This aggravating factor applies only when the facts show a calculation before the murder that includes a careful plan or prearranged design to kill, or a substantial period of reflection and thought by the defendant before the murder.
>
> "Cold" means totally without emotion or passion. "Calculated" means that the defendant formed the decision to kill a sufficient time in advance of the killing to plan and contemplate.
>
> The mere fact that it takes a matter of minutes to complete the killing is not proof that the killing was cold, calculated and premeditated. (R-2852-2853)

This instruction was requested consistent with *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987) and its progeny to guide the jury's, and ultimately the trial judge's consideration of this factor in two crucial ways:

(1) The circumstances could be found only if "the state . . . prove[d] that the homicide was the result a

careful plan or prearranged design."

(2) The "heightened premeditation" reflected in a "careful plan or prearranged design" to kill was different from the premeditation necessary to be convicted of murder in the first degree. "Premeditation" was, therefore, to be defined and contrasted with "heightened premeditation."

The trial judge rejected Mr. Foster's proposed instruction, and gave the following instruction instead:

> [T]he crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R-1799)

This instruction failed to provide the crucial guidance necessary for the limited application of this aggravating circumstance. Pursuant to it, the jury was left to define for itself what "premeditation" was and what more had to be found, beyond "mere" premeditation, to establish this circumstance. Left wholly to their own, unguided discretion, the jury could very well have made the same mistakes the trial judge made in finding that this circumstance had been established.

VII.

THE TRIAL COURT ERRED IN NOT FINDING THAT MR. TURNER HAD NOT ESTABLISHED THE EXISTENCE OF THE MENTAL MITIGATING STATUTORY FACTORS.

The trial court rejected the applicability of both mental health statutory mitigating factors in its sentencing decision. In doing so, the trial court's factual findings are not supported competent evidence. *Campbell v. State*, So.2d 415, 419 (Fla. 1990) requires a sentencing court to "find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." [footnotes omitted]

The only evidence that addressed the statutory factor of that "the capital felony was committed while under the influence of extreme mental or emotional disturbance"* was the testimony of Dr. Ralph Walker. As to the emotional disturbance portion of the statute, Dr. Walker said Mr. Turner was psychotic at the time. (R-1738) In addition, Dr. Walker testified that Mr. Turner was under extreme emotional duress. (R-1739)

The trial court's sentencing order is flawed in many respects. it is clear that Mr. Turner's mental illness occurred later in his life. It is simply not accurate that there was no other evidence that Mr. Turner had a prior

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* Section 921.141(6)(b), Florida Statutes (1991).

history of mental illness or emotional problems. His family members thought he was paranoid (R-1690; 1695) A friend of his described the difference between "night and day". (R-1700) He just was not "the same person that I knew, that I grew up with." (R-1700) His aunt described a time when he called her and said that he was in Ozark, Alabama. He then called back and said he was in the Comfort Inn in Enterprise, Alabama and could not explain how he got there. (R-1706) His sister-in-law observed, "He's just not the same. When I first saw him, I didn't recognize him, there was something about him that was just totally different. He seemed distraught, very upset about something, he wouldn't speak. He would say one thing and then say another thing and he was just, his train of thought wasn't in a pattern and he's just not the same person." (R-1719)

Further, Mr. Turner's mother, grandmother and other family members had a history of mental illness. (R01725, 1762), specifically paranoia. The trial court missed the point; it was not the environment Mr. Turner grew up in, it was his genes. There was no question that Mr. Turner is "extremely paranoid, he is delusional."

This mitigating factor should have been found. *Mines v. State*, 390 So.2d 332, 337 (Fla. 1980).

As Dr. Walker explained, his suffering from this mental illness did not preclude Mr. Turner from knowing what he did and knowing that it was wrong. "[Mr.] Turner knew that what

he was doing was wrong but because of his mental illness, he was not strong enough to conform his behavior to what he was doing that he thought was wrong, to prevent doing what he did." (R-1740) The trial court's rejection of the statutory mitigating circumstance* to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired was wrong. See *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990)

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* Section 921.141(b)(f), Florida Statutes.

IX.

THE TRIAL COURT ERRED IN DENYING MR. TURNER'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND HIS CONFESSION

Kevin O'Keefe, a detective with the College Park, Georgia Police Department, was called to the Red Roof Inn to respond to a "suspicious" person. (R-555) En route to the hotel, Mr. O'Keefe was notified that Eric Turner was wanted for questioning in a double homicide in Panama City, Florida. (R-555) At this time no arrest warrant had been issued. He went to the hotel and knocked on Mr. Turner's door with the intention of questioning him about the murders in Florida. Because Mr. Turner has been described as armed and dangerous, Mr. O'Keefe had his weapon drawn but down to his side. His partner, Officer Denson, had secured a shotgun from a police car. (R-556-557)

Mr. Turner responded promptly to the officer's knock. Mr. O'Keefe informed him that he wanted to speak to him "about something that happened down in Florida." (R-557) Mr. O'Keefe stated that Mr. Turner said something which Mr. O'Keefe could not understand, and then "turned and walked back into the room." (R-557) Mr. O'Keefe told Mr. Turner to stop but Mr. Turner did not respond. Mr. O'Keefe noticed the handset of the telephone laying on the bed as if Mr. Turner has been speaking to someone prior to answering the

door. Mr. O'Keefe testified that Mr. Turner sat on one of the two beds in the room and "reached down like he was reaching for the receiver [of the phone] but then reached down at the bottom of the bed and come (sic) up with a .45 caliber semi-automatic. . . and ". . .kept saying that he was going to kill himself." (R-558) Mr. O'Keefe stated that as soon as he saw the weapon he pointed his own gun at Mr. Turner and then entered the room. At this time a struggle ensued during which Mr. O'Keefe attempted to get Mr. Turner's gun from him. Mr. O'Keefe stated that during the struggle Mr. Turner ". . .kept trying to pull the gun toward his head. . ." (R-559) and stated several times that he intended to kill himself. During the struggle Mr. O'Keefe's gun discharged twice, after which "Mr. Turner went limp. I believe he thought he was shot. . ." (R-561)

Mr. O'Keefe further testified that there was no round in the chamber of Mr. Turner's gun and the safety was on, meaning that even if Mr. Turner had attempted to fire the weapon it would not have discharged. (R-561-562)

Mr. O'Keefe testified that at this time the Georgia Bureau of Investigation arrived at the scene and took several items from the room, including Mr. Turner's weapon. Mr. Turner was then charged with two counts of aggravated assault and one count of receiving stolen property as the gun was learned to have been stolen. (R-563)

When Officer O'Keefe entered the hotel room, he had his gun pointed at Mr. Turner. (R-565) At this point, Mr. Turner had nothing in his hands (R-566) and Officer O'Keefe had no basis for any arrest. (R-566)

Deputy Sheriff James Nolin came to College Park, Georgia to interview Mr. Turner about the homicides in Bay County. Mr. Nolin testified that he read Mr. Turner his Miranda Rights from a pre-printed form and then allowed Mr. Turner to read the form. Mr. Nolin testified that he discussed Mr. Turner's Miranda Rights with him, "made sure he completely understood them, and allowed him to sign the form. . . waiving those rights." (R-575)

The state entered the statement of Miranda Rights and Waiver of Rights signed by Mr. Turner as State Exhibit 1. Mr. Turner had signed in two places. (R-575-576)

Mr. Nolin testified that after he read Mr. Turner his rights he asked him if he had any knowledge of the killings in Panama City, whereupon Mr. Turner confessed to the offense, stating, "I did it, man." (R-579) Mr. Nolin further stated that Mr. Turner said he had used the same gun which had been confiscated from him in College Park and informed Mr. Nolin that he had given away the shoes he had worn at the time of the offense. Mr. Turner then stated, "I did it, man, I did it. I don't know what else to say. I don't think I can talk right now." (R-579)

Mr. Nolin testified that although Mr. Turner confessed to the crime when interviewed in College Park, after speaking with an attorney in Panama City, he indicated that he wished to give a second statement.

Mr. Turner had signed the form waiving his rights and had confessed to the offense, he agreed to a taped interview. Mr. Nolin stated that Mr. Turner provided "graphic details" as to how the killings occurred," (R-582) and that Mr. Turner stated on the tape that he had not been coerced, threatened or mistreated. Mr. Nolin further testified that Mr. Turner stated that he did not want a lawyer.

Mr. Turner was then flown back, with Mr. Nolin, to Panama City. (R-588)

Mr. Nolin testified that Mr. Turner consented to assist Mr. Nolin with the investigation. Mr. Turner showed Mr. Nolin "his route of travel . . .where the park was . . .and where he had taken the women," at which time the women were abducted. Mr. Nolin stated that Mr. Turner also showed him his route down Highway 231 to the wooded area where Mr. Turner had taken the women. Mr. Nolin stated that Mr. Turner didn't want to go to the scene and was then returned to the jail. Mr. Nolin stated that the following day Mr. Turner went with Mr. Nolin to the Marie Motel where he showed Mr. Nolin where his name was indicated on the back of a registration card. (R-588-589)

Mr. Nolin testified that Mr. Turner waived his rights to First Appearance and then met with his attorneys, Mike Stone and Pam Sutton. Mr. Turner had not talked with an attorney prior to assisting Mr. Nolin with the investigation. (R-591)

Mr. Nolin testified that after Mr. Turner had spoken with his attorneys he asked to give Mr. Nolin a second statement. In this statement, which was not recorded in any way, Mr. Turner indicated that he had not killed the women. He stated that he had waited for the women to emerge from the building but then "changed his mind" (R-593) and walked away. He said that at this point an Hispanic man carrying a .38 arrived on the scene and asked Mr. Turner if he knew of someone they could rob, at which time Mr. Turner took him to the store. Mr. Turner stated to Mr. Nolin that it was this Hispanic man and not he who killed the women.

Mr. Nolin testified that when he told Mr. Turner that this story was unbelievable Mr. Turner admitted he had fabricated it when an attorney told him that Florida had a death penalty. Mr. Turner told Mr. Nolin that while "he wanted to be in prison all his life for what he had done, he didn't want to die." (R-594) "He told me it was absolutely not the truth, it was a lie and he was ashamed that he had made it up and that he had just got scared after the lawyer

told him we had a death penalty here . . .that's a synopsis of what he said." (R-594-595)

On cross-examination, Mr. Nolin testified that it was not his understanding that Mr. Turner had refused to talk with College Park police. "Mr. Turner told me that they didn't want to talk to him, that they told him to be quiet. He told me he didn't mind to talk to anybody." (R-597) He further testified that no one had told him that Mr. Turner had refused to speak with him.

No search warrant was ever obtained to enter and search Red Roof Inn, Room 221. (R-602) Therefore, the entry into and search of the room violated both the state and federal constitutions, *McGibiany v. State*, 399 So.2d 125, 126 (Fla. 1st DCA 1981). Mr. Turner was a bona fide resident of the motel room and thus he was entitled to expect that his privacy not be governmentally invaded without a warrant, *Payton v. New York*, 445 U.S. 573 (1980). The facts of this case do not meet the "exigent circumstances" standards set forth in *Wike v. State*, 596 So.2d 1020, 1024 (Fla. 1992) At the time the Georgia officers entered the motel room, there was no "probable cause to believe [Mr. Turner] committed the crime" or that any "delay could cause the escape of the suspect on the destruction of essential evidence, or jeopardize the safety of officers or the public." *See also Wassmer v. State*, 565 So.2d 856,857 (Fla. 2d DCA 1990).

Therefore all physical items taken from the motel room must be suppressed. (R-2701-2703)

As Mr. Turner was illegally detained, his subsequent confession must also be suppressed. The trial court's order denying the motion to suppress (R-2736) must be reversed.

X.

THE TRIAL COURT WAS IN ERROR IN REFUSING TO GIVE THE JURY INSTRUCTIONS ON THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING FACTOR REQUESTED BY THE DEFENSE, AND THE INSTRUCTION GIVEN WAS CONSTITUTIONALLY INADEQUATE

The trial court gave the following instruction as to this aggravator.

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shocking evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoying of the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was consciousnessly or pitilessly or was unnecessary tortuous to the victim. (R-1799)

It is beyond dispute that this instruction and the trial court's reliance on it, violate the Eighth and Fourteenth Amendments to the United States Constitution, Espinosa v. Florida, 120 L.Ed2d 854 (1992). *See also* Maynard v. Cartwright, 486 U.S. 356 (1988)

Mr. Turner's proposed instruction would have properly channeled both the jury's consideration and the trial judge's understanding of the applicability of this aggravator. (R-2851)

CONCLUSION

For the reasons stated in Mr. Turner's brief, he requests this Court to reverse his convictions and/or sentence of death and remand with instructions to the trial court to enter a life sentence consistent with the jury recommendations.

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CERTIFICATE OF SERVICE

*I **HEREBY CERTIFY*** that a copy of Mr. Turner's Initial Brief has been sent by United States mail to **Ms. Carolyn Snurkowski**, *Assistant Attorney General*, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 15th day of January, 1993.

Steven Seliger

STEVEN L. SELIGER