IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-975

JAMES DANIEL TURNER,
Appellant,

v.

THE STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR ST. JOHNS COUNTY, CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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STATEMENT OF CASE[1]

Stacia Raybon and Renee Howard were attacked at the Comfort Inn in St. Augustine on September 30, 2005. Howard died. Appellant, James Turner ("Appellant") was apprehended shortly after the attack driving Howard's Ford F150 truck. (V1, R4-5). Appellant was indicted on charges of:

(1) First degree murder of Renee Howard;

(2) Attempted first degree murder of Stacia Raybon;

(3) Grand theft of a motor vehicle;

(4) Home invasion robbery with a deadly weapon;

(5) Aggravated assault on a police officer.

(V1, R34-35).

Jury selection for trial began July 18, 2007. (Supp. R22). During jury selection, the trial judge indicated that any juror who did not feel comfortable answering questions could raise their hand and would be heard at sidebar. (Supp. R26-27). Thereafter, the trial court asked the potential jurors whether any of them

[1] Cites to the Record on Appeal are as follows:
"V" indicates the volume number, which will be followed by:
"R" - pleadings;
"TT" - trial transcript;
"PPh" - penalty phase proceedings;
"H" – hearing, including *Spencer* and sentencing hearings.
"Supp. R" indicates the supplemental record, which will not reflect a volume number.

had any physical problems that would make it difficult for them to serve on the jury. (Supp. R39-40). One venire member, Mr. Sewell, indicated that he had a hearing problem. (Supp. R40-41). The trial judge then moved on to general questions about any scheduling conflicts or other problems that would prevent the venire members from giving the case their undivided attention. (Supp. R40-41). Many venire members expressed conflicts due to prearranged trips and medical issues in response to this question. (Supp. R42-46). Thereafter, the trial court proceeded with general questions regarding the venire members' ability to understand the proceedings, prior jury service, understanding of the law, and general ability sit on a capital jury. (Supp. R46-54). Juror Stephen Gard, who was part of the first group of jurors questioned by the court, did not inform the court of any medical issues or problems during this questioning and was amongst the jurors generally responding that they did not have personal issues that would prevent jury service. (Supp. R23, 39-54).

The trial court then moved on to individual questioning of the venire. (Supp. R54-73). Juror Gard indicated that he worked as a park ranger for the Florida State Parks, was married with two children. (Supp. R59-60). At the end of questioning, the trial court repeated its question regarding the ability of anyone to not give the case their undivided attention, and Juror Gard again responded in the negative along with the other venire members. (Supp. R73-75).

The State questioned the venire whether they had any physical problems that had not already been made known. (Supp. R79-80). The State reiterated the importance of being forthcoming with information. (Supp. R80). The State then moved on to questions about whether the venire could follow the law, whether they had any personal feelings that would prevent them from rendering a verdict and whether they could impose the death penalty. (Supp. R80-98; 111-115). Thereafter, Defendant questioned the venire and reiterated that they should not feel embarrassed, but if they did, they could speak privately with the court. (Supp. R115-199). During individual questioning regarding the venire's thoughts on the field of psychology, Juror Gard responded that he had a positive experience with psychologists when dealing with family issues as a counselor. (Supp. RI 141-42). Otherwise, Juror Gard did not respond individually to any other questions. (Supp. R115-199).

Neither the State nor Defendant moved to strike Juror Gard for cause or attempted to utilize a peremptory challenge during the selection procedure of this portion of the venire. (Supp. R226-273; SR517-21). Defendant did request more peremptory challenges in order to strike Juror Davis, which request was denied. (Supp. R521-22, 523-24, 530, 533-34). After the jury and alternates were selected, the State requested that the jury not be sworn until trial started the following Monday. (Supp. R525).

The day after jury selection concluded, on Friday, July 20, 2007, Juror Gard hand delivered a letter to the trial court indicating that he suffered from a seizure disorder and attached a physician's note which requested that he be excused from the jury. (V2, R306-07; V8, H7). Juror Gard stated in his letter that he felt he could serve, and explained that the disorder was under control through medication and lifestyle changes. (V2, R306). However, the physician's note indicated that Juror Gard should be excused because the seizure disorder is aggravated by stress. (V2, R307). Juror Gard did not inform the trial court of this circumstance, or regarding an impending family reunion within the week, because he wanted to participate in the process. (V2, R306).

The trial judge held a hearing on Monday, July 23, 2007. (V8, H1-29).[2] Juror Gard was questioned regarding his seizure disorder. He explained that the disorder was under control, he had not had an aura episode in three months, had not had one a year prior to that, felt that he could serve, and did not mention the seizure disorder or family reunion plans because it was not an issue to him due to his desire to serve as a citizen of the State of Florida and St. Johns County. (V8, H7-15). Juror Gard noted that the disorder was controlled by medication and healthy eating and exercise habits. (V8, H8). Juror Gard explained that he has

[2] The proceedings surrounding the mistrial and Juror Gard are duplicated in the record. Volume 3 of the record is a composite of the proceedings; however, the different proceedings also appear chronologically in the record.

warning regarding when a seizure may occur because he will not feel right in the morning. (V8, H9-10). While his physician wrote the note to excuse him from the jury, Juror Gard explained that he did not speak with his physician and that note was probably written the way it was because his physician believed that he wanted to get off the jury, which was not the case. (V8, H13). Juror Gard stated that he did not feel that the nature of the proceeding would affect him and believed that he could serve on the jury. (V8, H9, 12, 15).

Appellant moved to excuse Juror Gard for cause, arguing that as reason for not telling the court about his seizure disorder and family reunion was his desire to serve, which indicated he had an unknown agenda. (V8, H16-17, 18). The State responded that his main motivation appeared to be a willingness to serve out of a duty under the law. (V8, H17). The trial court denied Appellant's motion and ruled:

> I'm not going to strike him for cause. If something should happen and he can't serve, then, you know, that's why we have alternates.

(V8, H18).

Appellant requested additional peremptory challenges, arguing that he was forced to exhaust peremptories for the improper denial of cause challenges. (V8, H18). Appellant noted that he could use the peremptory challenge to excuse Juror Gard for any reason in response to the trial court's inquiry regarding Appellant's

using a peremptory challenge based on Juror Gard's health issue. (V8, H18-19). The trial court denied the motion for additional peremptory challenges. (V8, H19). The jury was sworn, including Juror Gard. (V8, H27-28).

On Wednesday, July 25, the jury retired to deliberate at 2:06 p.m. (V3, R475). At 6:48 p.m., the trial court noted on the record that Juror Gard had a seizure and was taken to the hospital. (V3, R511). While the parties were discussing the situation, the jury sent the judge a note advising they had already decided four out of the five counts before Juror Gard had the seizure. (V3, R469, 526-27). After continued discussion and research, the trial court cited *Williams v. State*, 792 So. 2d 1207 (Fla. 2001), and discussed the holding of that case. (V3, R532-33). The trial court noted that *Williams* was reversed because the trial court substituted a juror after deliberations began. (V3, R533).

After reading *Williams* and discussing the situation with Appellant, defense counsel requested a mistrial. (V3, R535). The parties discussed the instruction to be given the jury and agreed the verdicts should be sealed. (V3, R537-39). The trial judge declared a mistrial and released the jury. (V3, R540-41). The re-trial date was set for September 17. (V3, H547). The September trial was continued on defense motion because Appellant was ill. (V3, R400-02).

On November 19, 2007, Appellant filed a Motion to Dismiss the charges, alleging the double jeopardy clause precluded the State from re-trying him. (V3,

R434-436). Although Appellant acknowledges that he moved for a mistrial, he argued that Appellant:

> (a) was placed in a position that he either had to waive his request for a mistrial or have an alternate juror seated to replace the juror who became ill after over four hours of deliberation; and
>
> (b) the twelve person jury who had been selected and sworn had reached an agreement on four of the five counts, leaving the Defendant with the only option of requesting mistrial.

(V3, R435-436).

The re-trial began November 26, 2007. The trial court held a hearing on the motion to dismiss on November 27, 2007. (V14, R277-292). Defense counsel argued that:

> The case law is clear that if a defendant asks for a mistrial, there's no issue. But our position is that we asked for a mistrial based on really inaccurate information at the time. We had the *Williams* case that we were relying on.
>
> Nobody in this courtroom had experienced this particular situation before. . . And so we were doing the best that we could to make decisions, you know, with what was available to us at the time. And in addition, the Court's instruction to talk to our client about what options we had.

(V14, TT283). Defense counsel then asked the trial court to treat the situation as if the mistrial had been "declared over defendant's objection" and apply the standard of "manifest necessity." (V14, TT284). Defense counsel suggested that what should have happened is that "we request a – have a recess" for everyone to

conduct research and then see if the juror could continue deliberations the following morning. (V14, TT284, 285). The trial judge observed that defense counsel had never suggested what was now being advocated, and defense counsel agreed. (V14, TT285). The trial judge denied the motion to dismiss. (V14, TT292).

On November 29, the jury convicted Appellant on all five counts as charged in the indictment. (V19, TT1267-68). The penalty phase began on December 4, 2007, and on December 5, 2007, the jury recommended a sentence of death by a margin of ten to two. (V23, PPh422). The *Spencer*[3] hearing was held March 5, 2008. (V24, H1-82). Appellant was sentenced to death on April 24, 2008.

The trial court found five aggravators:[4]

> (1) committed while under sentence of imprisonment – moderate weight;
>
> (2) contemporaneous convictions of attempted first degree murder and aggravated assault on a law enforcement officer - – great weight;
>
> (3) committed during the commission of a robbery merged with pecuniary gain – great weight;
>
> (4) heinous, atrocious and cruel (HAC) – great weight; and
>
> (5) cold, calculated and premeditated (CCP) – significant weight.

(V5, R833-843).

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[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[4] The aggravating circumstances of during-a-robbery and pecuniary gain were both found and properly merged.

In mitigation, the trial court found the statutory mitigating circumstances of:

> (a) extreme mental or emotional disturbance – moderate weight; and
>
> (b) impaired capacity to conform conduct to the requirements of the law – moderate weight.

(V5, R845-46).

The trial court also found the following nonstatutory mitigating circumstances:

> (1) loving and caring brother;
>
> (2) loving and caring step-father;
>
> (3) loving and caring husband;

The above mitigation was found to exist and given "some weight." (V5, R848).

> (4) abandonment by mother;
>
> (5) verbally abused by mother:
>
> (6) physically abused by father

The above mitigation was found to exist and given "little weight." (V5, R849).

> (7) uncles gave Appellant drugs and alcohol an early age – some weight;
>
> (8) cognitive development impaired due to alcohol and drug use – some weight;
>
> (9) chronic alcohol and drug problem – moderate weight;
>
> (10) murder committed while Defendant was under the influence of crack cocaine – some weight;

(11) hard worker and skilled carpenter – little weight;

(12) good trustee at out-of-state jail until he absconded – slight weight; and

(13) appropriate courtroom behavior – some weight.

(V5, R849-51).

Defendant was additionally sentenced to imprisonment for 30 years for the attempted murder of Stacia Raybon, 5 years for the grand theft, life imprisonment for the home invasion robbery with a deadly weapon, and 15 years for the aggravated assault on Deputy Harris. (V5, R822-826, 853-54).

This appeal follows.

STATEMENT OF FACTS

On September 30, 2005, a St. Johns County Sheriff's deputy found a suspicious abandoned vehicle in the parking lot of KK's Tires in St. Augustine. (V16, TT637-39). The abandoned SUV belonged to the Newberry County Sheriff's Office in South Carolina. (V4, TT645, State Exh. 17; V16, TT643, 644). Deputies searched the vehicle and found Appellant's Newberry County Jail inmate identification card and a bag of crack cocaine. (V4, TT702, State Exh. 80; V16, TT642, 645, 667).

Appellant had been a trustee at the jail in Newberry County, South Carolina. (V16, TT655, 658). Occasionally he worked at the Sheriff's office. (V16, TT669).

With the exception of the communications area, Appellant had access to almost every area of the office. A locked parking lot surrounded the sheriff's office and contained lawn equipment and vehicles. Trustees had access to the keys for the gates. (V16, TT661).

On the evening of September 29, 2005, Appellant stole a sheriff's SUV and escaped.[5] (V16, TT662-63, 665, 672). It was common knowledge the vehicle's keys were stored in a folder on top of a mailbox located in the dayroom, an open area. Appellant had daily access to this room and the kitchen area. (V16, TT663, 664). A statewide be on the lookout ("BOLO") was issued. (V16, TT665).

Amanda Chambliss and her husband were guests at the St. Augustine Comfort Inn in September 2005. (V16, TT685-86). At 3:00 a.m., on September 30th, they were swimming in the hotel pool when Chambliss noticed Appellant nearby "just staring at us." Chambliss' husband yelled at him to "get away." Appellant went up the stairs to the second floor of the hotel stairway. (V16, TT677-78, 679, 681-82, 683).

Maria Colon, Jessica Lore, and Cassie James were housekeepers at the St. Augustine Comfort Inn. (V16, TT689, 690, 705, 719). On September 30, at 9:30 a.m., Colon saw Appellant getting ice from a machine in the hallway near the

[5] Appellant was scheduled to be released from the sentence he was serving at the Newberry County jail at the end of 2005. (V16, TT673).

laundry room on the first floor. (V16, TT692-93, 694, 702). Shortly thereafter, co-workers Lore and James ran toward her, each holding a baby. (V16, TT69-95). Lore was "screaming." After being advised that the baby came from Room 210[6] on the second floor, Colon went to that room and found Renee Howard lying on the floor. (V16, TT696). There was blood "all over her body. Including her face." (V16, TT697). Colon noticed Howard the day before driving a Beige Ford F150. Colon ran to the front office and told the clerk to call 911. (V16, TT697). Lore and James took the babies to another room. (V16, TT698). The children each had a moderate amount of blood "scattered on them." (V16, TT701). Colon then noticed Howard's truck was missing from the parking lot. (V16, TT703-04). Police arrived within five minutes. (V16, TT701).

On the morning of the 30th, Lore was on the second floor filling her laundry cart with linens. She noticed Appellant standing in the breezeway on the second floor and thought he was a hotel guest. (V16, TT707-08, 715, 716). After she and Appellant greeted each other, he walked in the opposite direction. (V16, TT709, 716). She started cleaning her assigned rooms for the day. About an hour later, Lore saw Appellant walking toward Room 210. (V16, TT710, 716). He turned in her direction, and asked her for a towel. He again walked in the opposite direction, toward the pool area. (V16, TT710, 717). Lore saw Howard going up and down the

[6] Room 210 was a few doors down from the stairwell. (V16, TT734).

stairs loading her beige Ford F150 truck. (V16, TT711). She heard screams coming from Room 210. (V16, TT711-12). As she called 911 from her cell phone, Stacia Raybon exited Room 210 and grabbed her phone. (V16, TT712, 713, 780). Raybon told Lore someone had come into their room and "started stabbing." Lore saw a baby on the bed and another baby near Howard, who was lying on the floor. Later that day, she identified Appellant to police. (V16, TT713-14, 717; V18, TT 976).

Early on the morning of September 30, 2005, housekeeper James gave Renee Howard a trash bag so she could clean out her truck. Within an hour, James noticed Appellant on the first floor hallway walking toward the lobby. (V16, TT721-22). She greeted Appellant but he did not respond. (V16, TT723, 726). About an hour later, James was cleaning a room when she heard screams. She called 911 and ran to Room 210. (V16, TT723, 724, 727). James saw Stacia Raybon crying and Howard on the floor. (V16, TT724). James later identified Appellant for police. (V16, TT725-26, 727, 729; V18, TT976).

Deputies responded to the homicide scene. (V16, TT731, 732). Stacia Raybon had a stab wound on her arm but appeared to be mobile. (V16, TT733). Rescue personnel pronounced Howard dead. (V16, TT735). Howard had multiple stab wounds and there was "blood all over the second bed." (V16, TT736). A two-

year-old child was hiding underneath the covers between the bed and the wall. He "was covered in blood." (V16, TT737-38).

Stacia Raybon lived with Renee Howard's oldest son, Brandon McCuen. (V16, TT759). On September 29, 2005, she accompanied the family to the St. Augustine Comfort Inn. The family included Renee Howard and her children: Brandon-18 years old, Christina-14 years old, Jeffrey-2 years old, and Jared-10 months old, as well as Howard's granddaughter, Mariah-8 months. Mariah was the child of Stacia and Brandon. (V16, TT617, 760-61, 764; V20, PPh55).

Early on the morning of September 30, Raybon and Howard walked to the hotel lobby for breakfast. Raybon noticed Appellant pass them on the sidewalk, "almost pushing us off" as he walked by. He was wearing a hat and looking down. (V16, TT766, 771; V17, TT790).

Howard drove Brandon to work and Christina to school. (V16, TT765). When she returned to the motel, Howard started packing their belongings to leave the motel. She and Raybon made sure their motel door was latched.[7] (V16, TT768; V17, TT791). Raybon was at the sink when she saw a "big thing of light hit the mirror door ... and that's when I saw him come in the room." (V16, TT770; V17, TT792). Appellant made hand motions toward Howard, "like hitting her in the

[7] Detective Burres testified that the door did not latch properly. The lock did not engage the hatch. (V18, TT975).

stomach." (V16, TT771). The hand motions were "hard enough to hear like hitting." (V16, TT772). When Howard hunched over, Appellant approached Raybon. (V16, TT771, 772; V17, TT792-93). Raybon covered her face with her hands and dropped to the floor. Appellant grabbed her by the arm and tried to pull her up. He stabbed her in the elbow.[8] (V16, TT772; V17, TT793). Raybon did not see the knife because Appellant was covering it up with his thumb.

Appellant returned to Howard, who was trying to get to the door. (V16, TT773). He attacked Howard a second time. (V16, TT774; V17, TT794). Raybon panicked; she went into the bathroom and locked the door, grabbing her purse as she passed by the sink. (V16, TT773, 774). She could hear "fighting, hitting" going on in the other room. (V16, TT774). She knew one of the children was on the bed and the other two were closer to the door. (V16, TT773-74). She looked for her cell phone in her purse but could not find it. (V16, TT774). She continued to hear loud hitting noises. "The babies were screaming." (V16, TT775). A few minutes later, the hitting noise ended. She heard the water running in the sink outside the bathroom door. Raybon could hear the water in the sink running the entire time she was in the bathroom. She heard "hands washing" for a few minutes. (V16, TT778).

Appellant tried to get into the bathroom. He kept telling Raybon to unlock the door, but she refused. She begged Appellant to bring Mariah to her. (V16,

[8] Raybon also sustained a broken elbow from the stab wound. (V16, TT783).

TT775). Appellant asked her for money. Raybon shoved credit cards and a five dollar bill under the door. (V16, TT776). Raybon told Appellant that Mariah was her child and and asked to see if the child was okay. Appellant brought Mariah to the bathroom door. Raybon propped herself between the tub and the door and unlocked it. Appellant told her to cover her face. (V16, TT777). He handed Mariah through the door. Raybon "snatched her ... and slammed the door." (V16, TT776; V17, TT794). Appellant "basically [threw] her through the door." Raybon repeatedly asked Appellant to leave. He said he was leaving but to "give him ten minutes." (V16, TT777).

After she heard the hotel room door shut, Raybon called out to see if anyone would answer. When no one did, she exited the bathroom, placed Mariah on the floor, and attended to Howard. (V16, TT780). She tried to call 911 from the hotel room but could not get through. She ran out of the room, screaming for someone to call 911. (V16, TT780).

Raybon saw housekeeper Lore a few doors down from Room 210. She used Lore's phone, called 911, and reported that she and Howard had been stabbed. When police arrived, she gave a description of Howard's missing truck. (V16, TT781). Later that day, Raybon identified Appellant from a photo lineup "almost immediately." (V16, TT785; V18, TT977, 978).

Deputy Harris heard the BOLO for Howard's stolen vehicle.[9] (V17, TT796, 798-99, 801). He saw a truck matching the description and pursued it. Harris wanted to report the license tag number to police dispatch. (V17, TT802, 803). As Harris got closer, Appellant started driving erratically. (V17, TT804, 811-12). Appellant pulled off the road and Harris pulled up behind him. Appellant then put the truck in reverse and slammed into Harris' vehicle, disabling the siren. (V17, TT805, 806). Appellant took off, cut across two lanes, and then turned in the median. He aimed the truck at Harris' driver's side door. (V17, TT807). Harris pulled forward as Appellant got behind him. Appellant was "trying to ram me from behind." (V17, TT807). Appellant then pursued Harris' vehicle, ramming into the rear end. (V17, TT808-09). He pushed Harris' vehicle into a guardrail as he went across two lanes and hit the opposite guardrail. (V17, TT811). Appellant jumped into a nearby creek while Harris checked Howard's truck for a possible missing child. (V17, TT812). He contained the area until other law enforcement arrived. (V17, TT813).

K-9 handler Deputy Underwood and his dog C-ZR assisted in apprehending Appellant. (V17, TT819-20, 821, 825). Appellant was warned three times to exit

[9] The BOLO indicated the possibility that a missing child might be in the truck. (V17, TT799). However, the third child was found hiding in Room 210 when the police and rescue personnel responded. (V16, TT737-38).

the creek before Dep. Underwood gave C-ZR the apprehension command. (V17, TT823-24). C-ZR grabbed Appellant on his left arm. Appellant swam for deeper water and proceeded to push C-ZR under water. Dep. Underwood commanded the dog to let go. (V17, TT25-26). He forcefully pulled C-ZR from the water as Appellant continued to push him under. (V17, TT827). Appellant refused to exit the creek, stating, "shoot me, shoot me." (V17, TT828, 840, 851, 859, 867). As deputies surrounded him, Appellant surrendered. (V17, TT831).

Appellant had Raybon's two credit cards in his shorts. (V17, TT861-62).

Appellant was taken back to the Comfort Inn for witness identification. Appellant requested, "Please don't take me back to the hotel." (V17, TT872, 874). Sgt. West, the transporting officer, had neither told Appellant he was under arrest nor had he or any other deputy mentioned the hotel. Appellant told Sgt. West, "You all may have the wrong person. You may be looking for Rick." (V17, TT876, 877). Appellant had to be forcibly removed from the back of West's car at the hotel. (V17, TT878, 884, 886). Appellant kept his head down and kept repeating, "I do not want to be here, I do not want to be here." (V17, TT884). Appellant was not disoriented or confused. (V17, TT885). Witnesses at the hotel had several minutes to identify Appellant. (V17, TT874, 886-87).

Appellant was taken to the hospital for medical treatment for scratches and scrapes. He had a laceration on his left hand, a puncture wound on his left forearm, and laceration above his left knee. (V17, TT875, 885, 887-88).

Sgt. Werle took Appellant to the St. Johns Sheriff's office and read him his *Miranda* rights.[10] Appellant acknowledged he understood and signed a written waiver form. (V4, R696; V17, TT893-94; State Exhibit #72). Appellant consented to video- and audio-taped statements.[11] (V17, TT904). He also consented to giving a DNA sample and a buccal swab was taken. (V17, TT896, 897; V18, TT981).

Appellant told Werle he smoked crack cocaine earlier that day. (V17, TT895, 941). Appellant insisted he did not recall how he ended up in jail. (V17, TT943-44). He admitted he stole the SUV from the Newberry County, South Carolina, Sheriff's Office, and drove "down the interstate." (V17, TT899, 900). He said he had been "around" the Comfort Inn for a few days with a man he met there named "Rick."[12] Appellant said he "would get high" and then walk around the Comfort Inn and that he had been smoking crack cocaine since he left South

[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[11] The audiotapes were published for the jury. (V17, TT907-938).

[12] Appellant described "Rick" as a white male, 28 years old, tall and skinny, with long, black hair. He was wearing blue jean shorts, slippers, and a blue or black shirt. (V17, TT900). Law enforcement searched for a person matching this description but found no one. (V18, TT979, 985-86).

Carolina. (V17, TT902, 943). Initially, Appellant denied being in Howard's truck and said he did not recall being chased by police. (V17, TT903). He said that he and "Rick" planned for Rick to go into Howard's hotel room and steal the truck keys; however, they did not go through with the plan. (V17, TT902-03, 943).

Appellant said he threw out the knife used in the attack when he was a mile "down the road". (V17, TT904). St. Johns Sheriff deputies searched for the knife but could not find it. (V17, TT863). Appellant did remember being in the water and telling a deputy his name was Rick or Richard when he was apprehended. (V17, TT919, 920). Appellant claimed he did not remember being in Howard's hotel room. (V17, TT922-23). He claimed, "All I remember is what people is telling me." (V17, TT924).

During a second interview, Appellant admitted he was in Howard's truck and then in the "swamp." (V17, TT928). He said he could not swim, "I can't even dog paddle." (V17, TT933). He remembered seeing a "cleaning up lady upstairs" at the hotel. (V17, TT929). He said he and "Rick" smoked crack cocaine in the woods near the hotel. (V17, TT929-30, 941-42).[13] He recalled Howard's truck being parked near the stairs. (V17, TT931). He denied being present in Howard's hotel room and claimed he could not recall stabbing the two women. (V17, TT932-

[13] A lounge chair was found in the bushes nearby. It appeared to have been there for quite a while. (V17, TT942; V18, TT979, 986).

33). He thought he cut his hand when he "wrecked that truck." (V17, TT934, 936). Appellant conceded that if his blood was in the hotel room, then he was there. (V17, TT934). He admitted he walked around the top floor of the hotel several times. (V17, TT942). He claimed he could not remember washing his hands in the hotel room sink or how Raybon's credit cards got in his pants' pocket. (V17, TT935). Appellant concluded, "If I done it, it still wasn't me." (V17, TT937).

A buccal swab was taken from Stacia Raybon to compare to biological evidence found in the hotel room. DNA samples were taken from Renee Howard at the medical examiner's office. (V18, TT981).

Howard's truck was processed for fingerprints. (V18, TT982). Blood, personal items, and the truck's keys were located in the truck. (V18, TT983). There were blood stains on the interior and exterior of the vehicle. (V18, TT1005-06). Swabbings were taken from the interior armrest, steering wheel, floorboard, center console, and glove box. (V18, TT1006-07, 1008). Seven of the eight swabs from Howard's truck contained Appellant's DNA. The eighth swabbing was inconclusive. The blood on the truck keys contained Appellant's DNA. (V18, TT1047).

Blood was found throughout the entire motel room. There was blood on the inside surface of the door, entryway, dressers, vanities, bathroom doorknob and door frame. There were very large blood stains located on the floor and around the

body. (V18, TT995-999). Diluted blood was observed in the sink as well as on the vanity area. (V18, TT996, 998). All areas were swabbed and samples from bloodstained areas were collected and submitted to FDLE for DNA analysis. (V18, TT996, 997). The swabs obtained from the bathroom door frame and door knob contained Appellant's DNA. The swab from the door knob was a mixture containing the DNA of Appellant, Howard, and Raybon. (V18, TT1041-42, 1044, 1045, 1049). The lab analyst testified that DNA testing was not performed each piece of evidence due to laboratory policy. (V18, TT1051, 1052).

Latent fingerprints and footprints were collected. (V18, TT1001, 1002). No identifiable fingerprints were lifted from the bathroom doorknob. (V18, TT1081, 1084-87). Appellant's tennis shoes were collected and sent to FDLE for testing. The shoes were compared to a shoe print located inside Howard's hotel room. (V18, TT985). Appellant's left shoe made the shoe impression in the motel room "to the exclusion of all the shoes in the world." (V18, TT1063-64, 1066).

Dr. Terrence Steiner, medical examiner, conducted the autopsy on Renee Howard. (V18, TT1098-99, 1101). She had three stab wounds on her face: one above her left eye, one to the inside corner of her right eye, and one on the bridge of her nose. There were abrasions on her face caused by something rubbed across her skin. (V4, R684, State Exh. 56, V18, TT1107). A stab wound to the left side of Howard's neck did not penetrate any major blood vessels. (V18, TT1108). There

were two stab wounds to her right arm and two below her right breast. One of these stab wounds cut a rib in half. (V18, TT1109). There were two stab wounds to her abdomen and another to her left chest. (V18, TT1109, 1110). There were stab wounds to Howard's right leg and left knee, together with abrasions caused by "the blade ... coming in or going out, was drug over the skin." (V18, TT1109). A stab wound penetrated the palm of Howard's left hand "all the way through and out the top of her hand." (V18, TT1111). A fatal stab wound inflicted above Howard's collar bone cut her aorta and vena cava vein, and caused extensive blood loss into her chest. (V15, TT1107). There were a total of fifteen stab wounds to Howard's body. (V18, TT1107). In Dr. Steiner's opinion, Howard was alive while each stab wound was inflicted because "these wounds all showed vital reaction, hemorrhage and bruising and bleeding into the skin that you wouldn't have got if the heart wasn't pumping." (V18, TT1108). The two deepest wounds were three inches deep. (V18, TT1108). Howard died as a result of shock and blood loss due to multiple stab wounds. (V18, TT1104).

Penalty phase testimony. The penalty phase began on December 4, 2007. The State called three witnesses and Appellant called ten. (V20-24, PPh1-431).

The State called Dr. Terrence Steiner, medical examiner. (V20, PPh48). Dr. Steiner said there were 15 stab wounds to Howard's body. One of these wounds was a defensive wound to her hand. (V20, PPH49). Dr. Steiner could not determine

the order of the stab wounds; however, Howard was alive when all the wounds were inflicted as “you still have blood pressure in your body when the wound's made, so you do bleed from the trauma of the wound and from the wound, so you bleed into the skin or the surrounding soft tissues or covering of underlying bone, chest cavity, et cetera.” (V20, PPh50, 51).

Pat Brown, Renee Howard’s aunt, read a statement (written by Howard’s grandmother) to the jury. (V20, PPh52-54).

Brandon McCuen, Howard’s oldest child, was eighteen years old when his mother was killed. (V20, PPh54-55). He read a statement to the jury. (V20, PPh55).

Hope Turner, Appellant’s younger sister, was his first witness. (V20, PPh61-62). Hope is thirteen years younger than her brother. Appellant took care of Hope while their parents worked long days. She considered Appellant to be her parent. (V20, PPh62, 64). Appellant assisted his parents with anything he could. (V20, PPh69).

Hope testified that Appellant abused drugs, including Methamphetamine, Marijuana, and Lortabs. He was intoxicated several times a week “almost every day, really.” (V20, PPh66).

Hope lived on the same street as her brother and his wife, Donna. Donna had three children from a previous marriage. Appellant was very involved with his

stepchildren. (V20, PPh68). Donna occasionally reconciled with her first husband. She would "just go back and forth." (V20, PPh73-4).

Hope often visited her brother during his incarceration in the South Carolina jail. (V20, PPh70). At times, jail personnel dropped him off at her house when he worked at off-site local businesses. (V20, PPh72).

Marie Hendrix, Appellant's cousin, said Appellant lived with her off and on while he was growing up. His mother sometimes "dropped him off" for a few months or even up to a year. (V20, PPh75-6, 78). At eleven years old, Appellant's mother forced him to work with her brothers in the carpentry business. His uncles allowed him to have alcohol. (V20, PPh79, 89, 90, 91, 93). He enjoyed working with them. (V20, PPh91). Appellant was very good at carpentry and mechanics. (V20, PPh90). Hendrix saw Appellant intoxicated many times. (V20, PPh81).

Hendrix said Appellant's mother favored her other children. At his mother's urging, Appellant's father beat him with a belt. (V20, PPh80, 81). When Appellant married Donna, he treated Donna's children like his own. (V20, PPh82, 88, 95). Appellant believed Donna when she told him she was not getting back with her ex-husband. (V20, PPh92). She was in and out of the relationship with Appellant and her ex-husband. This drove Appellant "crazy." (V20, PPh94-5). He was never violent with Donna, he was "good as gold." (V20, PPh95).

Hendrix visited Appellant at the Newberry County jail every day.[14] Prior to his escape, Appellant was depressed. (V20, PPh83, 87).

Sally Butler, Donna Turner's grandmother, said Appellant treated Donna's children as his own. They accepted him "as their daddy." (V20, PPh96, 98). When Donna married Appellant, it was the first time Butler "ever seen her real happy." (V20, PPh98). Appellant "was a real family man." (V20, PPh99). He worked regularly as a carpenter or mechanic. (V20, PPh101). He cared for his father when he became ill. (V20, PPh101).

Katie and Kayla Estes said Appellant was a good stepfather to them and "a great man." (V21, PPh112, 123-24). The family camped, went to the movies, shopped, fished, and "just did stuff that a regular family does." (V21, PPh1127, 131). Appellant did not abuse drugs and was not an angry person. (V21, PPh128, 130). Kayla said he was not addicted to drugs or alcohol. (v21, Pph131). He drank "every now and then" but he was "perfectly fine." (V21, PPh132). Katie and Kayla visited Appellant in the Newberry County jail almost every weekend. They also saw Appellant when deputies dropped him off at home. (V21, PPh116-17, 128, 129-30). The family lived close to the jail. (V21, PPh120, 128). Appellant was always welcome at their home. (V21, PPh121, 128).

[14] Appellant was convicted of domestic violence against his ex-wife, Lisa Turner. (V20, PPh84, 139).

Bonnie Whelchel, Donna Turner's mother, said "there was something special" about Appellant. (V21, PPh139-40, 141). He treated Donna's children as his own and had a special bond with Donna's son, James. It was a close family. (V21, PPh142, 152). Appellant was not a big drinker and did not abuse drugs. (V21, PPh152-53). The Appellants were "very much in love." (V21, PPh149). However, prior to escaping from jail, Donna refused to take calls from Appellant. He knew Donna's ex-husband had been hanging around the family. (V21, PPh150).

Michael Turner, Appellant's younger brother, said Appellant was intoxicated "a good bit" when he was with their uncles. (V21, PPh164-65). Their uncles used Appellant to help them sell drugs. (V21, PPh166). As they got older, the Turner brothers grew apart. Michael Turner said, "Me and him never got along." (V21, PPh168).

Following Appellant's arrest, a blood specimen was taken by the Florida Department of Law Enforcement. (V21, PPh169). A subsequent blood test revealed the presence of Benzoylegonine, a metabolite of cocaine. (V21, PPh169). According to FDLE's crime lab analyst Benzoylegonine would be in the blood system in a matter of minutes after cocaine was ingested, and could remain up to twenty- four hours. (V21, PPh169). It could not be determined how much cocaine Appellant had ingested. (V21, PPh169).

Dr. Drew Edwards, Ph.D, operates a nonprofit organization "to rescue teenagers from drugs, alcohol, sex and ... help parents." (V21, PPh170). He has counseled two to three thousand people for drug problems. (V21, PPh171). He obtained a drug history from Appellant. (V21, PPh182). Dr. Edwards also reviewed medical records of Appellant's hospitalizations relating to emergency room visits in the late 1990s, 2002 and 2003. (V21, PPh182; V22, PPh227). On several occasions, Appellant was diagnosed as being "polysubstance dependant, depression, and adjustment reaction." (V21, PPh182). During these times, Appellant was emotionally distraught over the relationship with his wife. (V21, PPh182). Dr. Edwards agreed with a doctor in South Carolina that Appellant is polysubstance dependant. (V22, PPh227). Appellant used "lots of different drugs, not just one specific drug." (V22, PPh227).

Appellant started drinking alcohol with his uncles at twelve-years-old. (V22, PPh228). His uncles put ammonia in the alcohol "to enhance the effect." (V22, PPh228). Appellant described it as being "wildly intoxicating." (V22, PPh229). Dr. Edwards opined Appellant did not have "much of a choice" because his uncles were giving him alcohol and marijuana at a very young age, "which is a little unusual from what we normally see." (V22, PPh229). By age thirteen, Appellant was intoxicated several times a week. At age fourteen, he started abusing amphetamines and cocaine. (V22, PPh230, 241).

In 1994, Appellant intentionally cut himself. He was diagnosed as having adjustment reaction. This meant "something bad" had happened in his life. He could not cope with it, and, as a result, did self-destructive things. (V22, PPh234). During this incident, Appellant was very intoxicated and learned of "distressing information about his wife." He began drinking heavily, got depressed, and tried to hurt himself. (V22, PPh234). Depression, suicidal thoughts, and hurting oneself are common for people with adjustment reaction. (V22, PPh234). In Dr. Edwards' opinion, Appellant was a chronic substance abuser, and, as he was diagnosed in 2002, was polysubstance dependent. Further, "there's nothing to suggest that he wasn't still polysubstance dependent (in 2005) now or for the rest of his life." (V22, PPh239, 245). Two to three days prior to escaping from the Newberry County Jail, Appellant was using cocaine that he obtained from another inmate. He was using cocaine every two to three hours. (V22, PPh245). Appellant's addiction "influenced" murdering Renee Howard. (V22, PPh243).

Appellant told Dr. Edwards that he had a lot of privileges at the jail. He had "free reign to do lots of things." (V22, PPh247). He stole the keys to the Sheriff's office vehicle and "began driving." (V22, PPh247). Appellant claimed he was disoriented when he escaped, did not know exactly where he was going, but headed south. (V22, PPh247). He pulled off the road many times and used more cocaine. He continued to drive until he ran out of gas in St. Augustine. (V22,

PPh247). Appellant did not return to his wife because he "didn't care anymore." (V22, PPh248).

Dr. Stephen Bloomfield evaluated Appellant prior to trial and determined he was competent to proceed. (V23, PPh270). Dr. Bloomfield also determined that Appellant was not insane at the time of the murder. (V23, PPh271). He knew right from wrong. (V23, PPh292, 301).

Dr. Bloomfield conducted a complete psychological evaluation of Appellant. (V23, PPh271). He administered a "Comorbid Evaluation" which evaluated the impact of substance abuse on Appellant's mental health. He also administered an assessment of Appellant's intellectual functioning. (V23, PPh272). Appellant's brain functioning was at the "high end" of the "borderline range." (V23, PPh272). Appellant is not mentally retarded. He is able to function in most jobs, but has problems with how he filters information. (V23, PPh272). He has "minor issues" in the frontal lobe area of his brain which affects decision-making and impulse control. Appellant does not have "significant brain damage." (V23, PPh272).

Dr. Bloomfield administered a personality assessment. Appellant is "an anxious man, with some level of depression what is called sullenness and unpredictability." He has "tremendous internal conflicts, which come out sometimes in an agitated way." (V23, PPh273). He abused drugs and alcohol to make the anxiety and depression subside. (V23, PPh273). Appellant has long-

standing issues related to his childhood. He has intellectual problems but is not mentally retarded. He fears a sense of abandonment which sometimes leads to self-destructive behaviors or suicide attempts. (V23, PPh274). He suffers from cognitive deficits. (V23, PPh274). His biggest deficits have to do with "decision making, judgment, planning and impulse control." (V23, PPh274). Dr. Bloomfield said he knew Appellant was diagnosed with alcohol dependency and polysubstance abuse disorder. He had attempted suicide twice: in 1994 and again, in 2002. (V23, PPh276, 302). The suicide attempts related to relationship problems and fears of being abandoned. (V23, PPh276, 303). Notwithstanding the suicide "attempt," the self-inflicted wounds were superficial. (V23, PPh304).

Dr. Bloomfield interpreted that Appellant was repeatedly abandoned by his mother. He never verbalized abandonment. (V23, PPh281, 318, 319). His parents did not abuse him. (V23, PPh310). Appellant admitted that, at a very young age, he participated in criminal activity with his uncles. (V23, PPh278, 299). Dr. Bloomfield did not interview family members. (V23, PPh297, 312).

Several days prior to the murder, Appellant said he had been on a binge of crack cocaine and methamphetamine.[15] (V23, PPh290, 294). In Dr. Bloomfield's opinion, "People who are on two or three day binges of those two drugs are

[15] There was no methamphetamine found in Appellant's blood sample. (V23, PPh293-94). However, Dr. Bloomfield said the lack of methamphetamine would not change his diagnosis. (V23, PPh296, 313-14).

suffering from emotional difficulties at the time greater than the average person." (V23, PPh290, 292-93). Dr. Bloomfield believed Appellant was under a mental or emotional disturbance at the time of the offense. (V23, PPh289). He believed Appellant also meets the criteria for a diagnosis of substance abuse or substance dependency disorder. (V23, PPh291). And, at some point, he was diagnosed with an adjustment disorder, with depressed mood. "That may have kicked in." However, Dr. Bloomfield opined, "I don't know at that point." (V23, PPh291).

The parties filed a stipulation that the St. Johns County Sheriff's Office recovered 7.5 grams of crack cocaine from the cab of the vehicle stolen by Appellant from the South Carolina Newberry County Sheriff's Office. (V23, PPh340).

Spencer hearing testimony. William Scott, a mitigation specialist retained in September 2005, met with Appellant on a weekly basis. (V24, H7, 25). Appellant was cooperative but somewhat defensive. (V24, H7, 26). Scott met with family members in South Carolina and St. Augustine. (V24, H10). Several family members provided "verbal stories" of Appellant's history. (V24, H12). Appellant was raised in a very rural area in South Carolina. (V24, H19). Scott described him as "somewhat of a broken toy that was discarded by his family." (V24, H22). He had a history of abandonment by his mother. (V24, H22, 39). At times, he came home and would not be allowed in the house. (V24, H22). As a result, Appellant

would have to live with his aunt for long periods of time. (V24, H22). At a young age, his uncle often gave him beer laced with ammonia. (V24, H22). There were no hospital records that Appellant was ever hospitalized for the effects the ammonia had on his body. (V24, H28). When Appellant was in the seventh or eighth grade, he was given marijuana by his uncles to sell at school. (V24, H22). His uncles encouraged him to quit school in order to work with them, which Appellant did. (V24, H23). His role models were people that were criminals and showed poor judgment and complete lack of caring for a child. (V24, H23). Appellant was a person "who's almost never made a good decision in his life." (V24, H23).

Appellant was kind to children and animals and would give the shirt off his back. He loved people and wanted a family more than anything in the world. (V24, H24). Scott opined that Appellant was not a malingerer, "just a person who makes bad decisions." (V24, H31-2). Under "normal circumstances," Appellant knows right from wrong. (V24, H34).

Dr. Harry Krop, psychologist, administered neuropsychological testing to Appellant on February 22, 2008.[16] (V24, H42, 45, 56). The tests included the Wisconsin Card Sort test, the Booklet Categories test, the Trail-Making test, and a

[16] Dr. Krop reviewed Appellant's case file, medical records, school records, depositions, trial transcripts, and police and FDLE reports. He also reviewed the raw data prepared by Dr. Young and Dr. Bloomfield. (V24, H52, 57).

Verbal Fluency test. (V24, H46, 57). Dr. Krop was focusing on the frontal lobe area of Appellant's brain. (V24, H47). Dr. Krop found that Appellant had considerable difficulty with regard to performance on tests designed to test the executive functions of his brain. (V24, H48). His IQ is 79, in the high borderline range. (V24, H48). The test results strongly suggested impairment in the executive functions, which correlates to frontal lobe functioning. (V24, H48). The frontal lobe of the brain is responsible for the higher level of functions including planning, problem solving, impulse control. (V24, H49-50). Appellant's abuse of drugs and alcohol exacerbated his lack of coping skills and problem solving. (V24, H51).

Appellant's school records indicated behavioral and impulse problems, typical of a person who "could have frontal lobe impairment." (V24, H53) . He did not have "a whole lot of psychiatric treatment." (V24, H53). Appellant had crisis interventions when he had suicide attempts: one for a drug overdose, and one for cutting his wrists. (V24, H53-4). He was also hospitalized for alcohol intoxication on several occasions. (V24, H54). Appellant's adjustment issues were consistent with very poor judgment. He had a lot of freedom as a trustee in the South Carolina jail. With only a few months left to serve on his sentence, he used crack cocaine and then fled to Florida. (V24, H54). This was an example of bad judgment linked to existing neurological impairment. (V24, H55). He did, however, have a fairly

stable and decent work record. (V24, H59). Nonetheless, Appellant "was responsible for his actions." (V24, H56).

SUMMARY OF THE ARGUMENT

1. The trial judge did not err in finding the aggravating circumstance of cold, calculated and premeditated. This aggravator was proved beyond a reasonable doubt. Appellant waited until the two female victims were unaccompanied by any male and were caring for three infants before he attacked. He forcibly entered their motel room. He brought a knife to the scene and immediately started stabbing Renee Howard. When Howard was disabled, he went after Stacia Raybon until she escaped to the bathroom. He then returned to Howard, who was trying to reach the door, and stabbed her to death. The fact the judge found mental-health statutory mitigating circumstances does not diminish the coldness and calculation involved in this murder. This was not a crime of passion or frenzied attack. Error, if any, was harmless.

2. The sentence of death is proportionate to other death-sentenced defendants. The trial judge found five aggravating circumstances: HAC, CCP, prior violent felony, under sentence of imprisonment, and during a robbery/pecuniary gain. The aggravators of HAC, CCP and prior violent felony are the weightiest aggravating circumstances that exist. Appellant was 33 years old when the murder occurred. He escaped from a South Carolina jail and stole a sheriff's vehicle. He stalked the two victims and brutally murdered one of them so he could steal their vehicle. The aggravation far outweighs the mitigation, and this

compares to other death-sentenced defendants.

3. The re-trial did not violate double jeopardy. Appellant requested and was granted a mistrial after a juror had a seizure during deliberations and was taken to the hospital. Appellant claims this waiver should be disregarded, but concedes he requested a mistrial. Even if Appellant had objected to a mistrial, there was a manifest necessity for the mistrial. This Court held in *Williams v. State*, 792 So.2d 1207 (Fla. 2001), that retrial is **required** if a juror falls ill during deliberations.

4. Florida's death penalty statute is not unconstitutional under *Ring v. Arizona*. Appellant was convicted of a contemporaneous violent felony and the murder was committed during the course of a robbery. The jury unanimously convicted Appellant for both the contemporaneous attempted murder and the home invasion robbery.

5. There is sufficient evidence of first degree murder. One victim survived and provided an eye-witness account. This is a direct-evidence case, not a circumstantial evidence case. Appellant lurked around the Comfort Inn until his two female victims were alone with three babies. He broke into their motel room, bringing with him a knife. He immediately attacked. He disabled one victim, then attacked the other. When the second victim locked herself in the bathroom, he returned to the first victim and stabbed her to death.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED

Appellant first argues that the State failed to prove the cold, calculated and premeditated ("CCP") aggravating circumstance beyond a reasonable doubt. (Brief at 28-35). Appellant compares his case to *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992) and *Santos v. State*, 591 So. 2d 160 (Fla. 1991). He claims his only intent was to steal the truck, and the attempted murder and murder were unanticipated events. Last, he claims the murder was not the product of cool, calm reflection because he was under the influence of extreme mental or emotional disturbance and his ability to appreciate the criminality of his conduct was substantially impaired.

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997); see also *Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998). In finding CCP, the trial court stated:

> **The crime for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.**

In *Jackson v. State*, 648 So. 2d 85 (Fla. 1994), the Florida Supreme Court set forth four factors the State must establish in order to satisfy this aggravating factor. First, the killing was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or fit of rage. Second, the Defendant had a careful plan or prearranged design to commit murder before the fatal incident. Third, the Defendant exhibited heightened premeditation. Fourth, the defendant had no pretense of moral or legal justification.

The State has proven beyond a reasonable doubt that the killing was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or fit of rage. The Defendant left the Newberry County Jail in Newberry, South Carolina in a stolen sheriff's office vehicle on September 28, 2005. He drove to St. Augustine, Florida and left the vehicle in the parking lot of a local business. He then made his way to the Comfort Inn hotel located at SR 207 and I-95 in St. Johns County.

Amanda Chamblis, a guest at the hotel, testified that on September 29, 2005, she and her husband were swimming in the pool around 1:00 a.m. when they noticed the Defendant watching them. At trial, she identified the Defendant as the man who was watching her and testified that the Defendant left when her husband told him to go away. Mrs. Chamblis testified that she saw the Defendant again at about 3:00 a.m., standing on the second floor of the hotel.

Three hotel housekeepers, Maria Colon, Jessica Luhr, and Cassie James, all testified that they saw the Defendant near the laundry room around 9:30 a.m. Jessica Luhr testified that she got to work around 3:20 and began cleaning the rooms on the Room 210 side of the hotel. She stated she saw the Defendant in the breezeway and that they exchanged "good mornings." About an hour later, while cleaning Room 216, Miss Luhr testified that the Defendant approached her and asked her for a towel. She assumed he was a guest at the hotel. After giving him a towel, she testified [sic] the Defendant walked toward the pool in the direction of the victim's hotel room (Room 210). Throughout the morning, Miss Luhr testified she saw the victim going up and down the stairs loading her truck, which Miss Luhr described

as a gold F-150. Cassie James testified that she began working at the hotel between 8:00 a.m. and 9:00 a.m. on September 30, 2005. She was assigned to clean the rooms on the bottom floor on the Room 210 side of the building. She testified that she spoke with the victim that morning while the victim was cleaning out her truck, a light colored F-150. After talking to the victim, Miss James testified that she saw the Defendant in the hallway heading toward the lobby. Within an hour after her encounter with the Defendant, Miss James testified that she heard screaming.

The Defendant, in his statement to Detective Worley, indicated that he had been staying around the hotel for a day and a half to two days. He stated that he seen [sic] the victim at the hotel and knew where her truck was parked. The Defendant also indicated that he and a homeless man named "Rick" had planned to steal the truck and that "Rick [sic] would take care of the keys. According to the Defendant, he was supposed to stay near the pool. Rick would take care of the keys and drop them off to the Defendant. The Defendant stated he was supposed to run as fast as he could and get in the front of the truck and wait. Despite these statements, the Defendant indicated he had no memory of the incident. Interestingly, the Defendant could remember nearly every aspect of what occurred from the time he left Newberry County to and including the time he spent at and around the Comfort Inn hotel, which included, among other things, entering one of the hotel rooms on the morning of the homicide, saying hello to one of the housekeepers, and even describing "Rick." However, when it came to the facts and circumstances surrounding this homicide, he had no memory at all – at least until he provided a statement for the Pre-Sentence Investigation, which the Court would note goes into vivid detail.

The evidence presented at trial establishes that the Defendant spent at least a day lurking around the Comfort Inn hotel. He knew where the victim's truck was parked and in which room she was staying. The Defendant did not enter the victim's room until her teenage son and daughter were gone. The evidence suggests the Defendant, who had seen the victim loading her truck, waited for the opportune moment, when the victim and Miss Raybon were alone with the small children, to initiate his attack. The evidence indicates that the Defendant chose

his victims carefully, as he watched them both go back and forth from the hotel room to the truck. He entered the room, knife drawn, prepared to kill. And, as a further indication that the Defendant's acts were the product of cool and calm reflection, after committing the murder, the Defendant took the victim's keys and immediately left in her truck. Stacia Raybon did not give the Defendant the keys, nor did she tell him where the victim's truck was parked. Furthermore, no one testified that the Defendant was frantically searching the parking lot for the car that marched the keys in his hand. To the contrary, the evidence suggests the Defendant went right to the very vehicle he had previously planned to take.

The State had proven beyond a reasonable doubt that the Defendant had a careful plan or prearranged design to commit murder before the fatal incident. Again, the evidence establishes that the Defendant went to the victim's hotel room with the intent to rob and kill. He waited for hours until the opportunity was right. When he entered the room, he had his weapon in a ready to stab position and stabbed Renee Boling Howard multiple times to ensure that she would die. When she was dead and he realized Stacia Raybon was not a threat, he took the keys to the victim's truck and left, thereby carrying out his prearranged design to rob and kill. If his plan was only to steal the truck, he would not have initiated his brutal attack on the victim upon immediate entry into the room.

The State has proven beyond a reasonable doubt that the Defendant exhibited heightened premeditation. Heightened premeditation in demonstrated by a substantial period of reflection. The Defendant was at or around the Comfort Inn hotel for hours, if not days, before he committed this murder. He planned to steal the victim's truck some time before the crime was committed and waited for the opportune moment before carrying out his plan. When he entered the victim's room, he did so, knife in hand, ready to attack. In total, he stabbed Renee Boling Howard fifteen (15) separate times in two separate attacks. After the Defendant's initial attack on the victim, he turned his attention to Stacia Raybon. The Defendant grabbed Stacia Raybon and stabbed her twice. When he realized Ms. Howard was still alive and headed for the door, he abandoned his attack on Miss Raybon, who was at the rear of the hotel room, and turned his sights,

once again, on Ms. Howard. He did not stop the attack on Ms. Howard until he had finished the job he had begun when he initially entered the room. When Ms. Howard was dead and Stacia Raybon was locked in the bathroom, the Defendant left with what he had come for – the keys to the victim's truck. These facts show a substantial period of reflection and thought by the Defendant.

Finally, the State had proven beyond a reasonable doubt that the Defendant had no pretense of moral or legal justification. There is no justification or excuse for committing such a brutal and atrocious act. The victim was an innocent, unsuspecting victim. Neither she nor Miss Raybon had provoked the Defendant in any way whatsoever. Although the Defendant's intent to kill was clear when he entered the room, he did not need to kill Ms. Howard in order to steal her car. Renee Boling Howard and Stacia Raybon are petit women. They were alone in the hotel room with three toddlers. If the Defendant's intent was only to take the car and not kill in order to accomplish that act, he could have easily taken the truck without harming the victim.

The Court would note that there is evidence to suggest that the Defendant had been using crack cocaine in the days leading up to the homicide and that, although questionable, he may suffer from frontal lobe deficits that have an effect on decision making and impulse control. The facts as previously described in detail, however, do not appear to support a finding that the Defendant did not know what he was doing or that his acts did not rise to the level of heightened premeditation. The Court finds the facts in this case distinguishable from those in Almeida v. State, 748 So. 2d 922 (Fla. 1999), where the Florida Supreme Court determined that the facts did not support a finding that the murder was cold, calculated, and premeditated where the Defendant established both statutory mental mitigating circumstances, and there was evidence he committed the murder after getting drunk and on impulse. In this case, although the ultimate motivation for this homicide and robbery may have been for the purpose of obtaining more crack cocaine (or, arguably, for the purpose of furthering the Defendant's escape from South Carolina), the Defendant's actions before and after this homicide, indicate this Defendant had complete control of his faculties.

> The Court finds that this aggravating circumstance has been proven beyond a reasonable doubt and assesses it significant weight.

(V5, R839-43 (emphasis in original)).

As seen from the foregoing, the trial court properly set forth the test that this Court established in *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994). As such, the trial court applied the correct law. Moreover, the factual findings are supported by the record. Because the trial court applied the correct law and its findings are supported by the evidence, it's determination that CCP applied in this matter should be affirmed. *Willacy*, 696 So. at 695; *see also Cave*, 727 So. 2d at 230.

Geralds* and *Santos. Although Appellant attempts to fit the square peg of his facts into the round hole of *Geralds* and *Santos*, the latter cases are distinguishable. In *Geralds*, this Court repeatedly noted that the evidence was circumstantial; thus the evidence "must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." This Court then noted that *Geralds* presented a "number of reasonable hypotheses" which were inconsistent with heightened premeditation:

> Geralds argues, first, that he allegedly gained information about the family's schedule to avoid contact with anyone during the burglary; second, the fact that the victim was bound first rather than immediately killed shows that the homicide was not planned; third, there was evidence of a struggle prior to the killing; and fourth, the knife was a weapon of opportunity from the kitchen rather than one brought to the scene.

Geralds, 601 So. 2d at 1163-64. Additionally, this Court noted that another reasonable hypothesis was that Geralds tied the victim's wrists in order to interrogate her regarding the location of money hidden in the house and, (1) after the victim refused, Geralds became enraged and killed her in sudden anger; or (2) the victim struggled to escape and was killed in the struggle.

In the present case, Stacia Raybon survived the attack and gave an eyewitness account. This is a direct evidence case, not a circumstantial evidence case. *Wheeler v. State*, 4 So.3d 599, 605 (Fla. 2009). Unlike Geralds, Appellant lurked around the motel casing the area until Howard's son and daughter left the motel and Howard and Raybon were alone with three infants. Appellant brought a weapon to the room and attacked without any warning, busting through the door and stabbing Howard before she could protect herself or the babies. After he disabled Howard, he went after Raybon. When Raybon managed to retreat to the bathroom and Appellant realized Howard was still alive, Appellant returned to stab her to death. Unlike Geralds, Appellant did not try to confine the victims so he could simply rob them: he sprang through the door and attacked viciously. Even though he had disabled Howard and could have left with the keys to the truck, he stabbed Howard to death.

In *Santos*, this Court held that "the fact that the present killing arose from a domestic dispute tends to negate cold, calculated premeditation." *Santos*, 591 So.

2d at 162. Citing *Douglas v. State*, 575 So. 2d 165 (Fla. 1991), this Court held that:

> The opinion in *Douglas*, however, rested on our conclusion that the killing arose from violent emotions brought on by the defendant's hatred and jealousy. In other words, the murder in *Douglas* was a classic crime of heated passion. It was not "cold" even though it may have appeared to be calculated. There was no deliberate plan formed through calm and cool reflection, *see Rogers*, only mad acts prompted by wild emotion.

Santos, 591 So. 2d at 163 (Fla. 1991). During this unfortunate era of the "domestic violence" or "one-free-wife" exception to the death penalty, domestic violence cases were even viewed as being disproportionate.[17] This Court had even stated that "when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted." *Blakely v. State*, 561 So. 2d 560, 561 (Fla. 1990). In 2003, this Court finally put to rest the theory that a murder committed during domestic violence is excusable. In *Lynch v. State*, 841 So. 2d 362, 377 (Fla. 2003), this Court stated: "This Court does not recognize a domestic dispute exception in connection with death penalty analysis." More recently, this Court

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[17] *See Cheshire v. State*, 568 So. 2d 908, 911 (Fla. 1990) (murders reasonably could be characterized as "the tragic result of a longstanding lovers' quarrel"); *Farinas v. State*, 569 So. 2d 425 (Fla. 1990) (death sentence disproportionate where defendant obsessed with idea of reconciling with former girlfriend, kidnapped her, and shot her in the back as she tried to escape); *Douglas v. State*, 575 So. 2d 165, 166-167 (Fla. 1991) (death sentence disproportionate where defendant had been involved with victim's wife, abducted victim and wife and killed victim); *White v. State*, 616 So. 2d 21 (Fla. 1993)(death sentence disproportionate where defendant and victim dated, he was jailed for assaulting her new boyfriend, and vowed to kill her when he got out).

clarified that the domestic-violence "exception" to the death penalty is unfortunate history. *Floyd v. State*, 34 Fla. L. Weekly S 359 (Fla. June 4, 2009).

Not only are *Santos* and the domestic-violence scenario inapplicable to the current situation, but also the facts in this case fail to support frenzy, anger, passion or loss of control. Appellant patiently waited for Howard's son and daughter to leave and for Howard to return with the truck. He patiently waited while Howard and Raybon were caring for the infants in the motel room. Then he sprang into action, knife poised to attack the victims. There was no frenzy. The only reason there were multiple (15) stab wounds to Howard was because she survived the attack and defended herself. Appellant coldly returned to her to ensure she was dead. The "frenzied maniac" theory is also debunked because, when Appellant realized Howard was disabled and Raybon was safely entrenched in the bathroom, he brought her crying child to Raybon and made her slide money and credit cards under the door. He then walked directly to the truck and drove away. Appellant's case is not comparable to *Santos.*

Mental health mitigation negates CCP. Defendant asserts that the mental health mitigation found by the trial court negates a finding of CCP. However, this Court has held:

> Owens' claim that his mental illness must negate the CCP aggravator is unpersuasive. We have held: "A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the

> ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation." *Evans*, 800 So. 2d at 193.

Owen v. State, 862 So. 2d 687, 701-702 (Fla. 2003).

In *Evans v. State*, 800 So. 2d 182 (Fla. 2001), the defendant raised the argument now raised by Appellant, and this Court held:

> The fact that the trial court recognized and gave substantial weight to the mental mitigator does not necessarily mean that the murder was an act prompted by emotional frenzy, panic, or a fit of rage, as Evans argues here. A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation. See *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000) (evidence established heightened premeditation, lengthy and careful planning and prearrangement, and an execution-style killing to support CCP aggravator despite "great weight" given to the defendant's mental impairment). While the events leading up to the murder may have made Evans emotionally charged, his actions do not suggest a frenzied, spur-of-the-moment attack. The evidence in this case supports the trial court's findings; therefore, the trial court did not err in finding CCP.

Evans v. State, 800 So. 2d 182, 193 (Fla. 2001). *Owens* and *Evans* directly contradict Appellant's theory regarding CCP versus the mental health mitigators.

If this Court should invalidate the CCP aggravating circumstance, any error would be harmless. The trial judge found five aggravating circumstances and the brutal attack on two women is not mitigated by the circumstances surrounding these crimes.

POINT II

APPELLANT'S SENTENCE OF DEATH IS PROPORTIONATE

Appellant next addresses the proportionality of his sentence. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright*, 460 So. 2d 362, 362 (Fla. 1984). This Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990).

Here, the trial court found the following aggravating circumstances:

> (1) committed while under sentence of imprisonment – moderate weight;
>
> (2) contemporaneous conviction of attempted first degree murder and aggravated assault on a law enforcement officer - – great weight;
>
> (3) committed during the commission of a robbery merged with pecuniary gain – great weight;
>
> (4) heinous, atrocious and cruel (HAC) – great weight; and
>
> (5) cold, calculated and premeditated (CCP) – significant weight.

This Court has recognized that CCP and HAC are "two of the most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999); see also *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002).

Furthermore, this Court has upheld death sentences where the prior violent felony aggravator was the only one present. *See Rodgers v. State*, 948 So.2d 655 (Fla. 2006); *LaMarca v. State*, 785 So.2d 1209, 1217 (Fla. 2001); *Ferrell v. State*, 680 So.2d 390, 391 (Fla. 1996).

This case is proportional to *Wheeler v. State*, 4 So. 3d 599 (Fla. 2009), in which the defendant killed one person and attempted to murder two others. Wheeler was convicted of first-degree murder, attempted murder, and aggravated battery. This Court found three aggravators: CCP; avoid arrest; and prior violent felony (the contemporaneous attempted murder). Wheeler had the statutory mitigation of extreme mental disturbance and substantially impaired. Nonstatutory mitigation included appropriate courtroom behavior; good family background and close knit, caring family; loving and devoted father; did well in grammar and middle school; engaged in public service friendship ties; hard worker; showed remorse; will live the rest his life paralyzed drug and alcohol use; and was under stress from job loss, his relationship with Heckerman, and damage to his home.

This case is also proportional to *Pooler v. State*, 704 So. 2d 1375, 1377 (Fla. 1997): defendant convicted of murder, attempted murder and burglary. The trial court found three aggravators: prior violent felony conviction (the contemporaneous attempted first-degree); committed during a burglary; and HAC. The trial court found as statutory mitigation that the crime was committed while

Pooler was under the influence of extreme mental or emotional disturbance, was substantially impaired; under extreme duress or under the substantial domination of another person; and age (he was 47). As nonstatutory mitigation, the trial court found the defendant's honorable service in the military and good employment record, as well as the fact that he was a good parent, had done specific good deeds, possessed certain good characteristics, and could be sentenced to life without parole or consecutive life sentences.

This case is proportional to *Buzia v. State*, 926 So.2d 1203 (Fla. 2006), during which the defendant killed one person and attempted to murder another. Buzia had four aggravating circumstances: CCP; HAC; avoid arrest; and prior violent felony (the contemporaneous attempted murder). Buzia had no statutory mitigation; however, the trial judge found both extreme emotional disturbance and substantial impairment as nonstatutory mitigation. Additionally, the trial judge found gainful employment, appropriate courtroom behavior, cooperation with law enforcement, difficult childhood, and remorse as nonstatutory mitigation. *See also*, *Diaz v. State*, 860 So. 2d 960, 964 (Fla. 2003), which involved the murder of Charles Shaw, the attempted murder of Lissa Shaw, and aggravated assault with a firearm on the neighbor. This Court affirmed two aggravating circumstances: CCP; and prior violent felony. Diaz had five statutory mitigating circumstances: no prior criminal activity; extreme mental or emotional disturbance; substantially impaired

capacity: age; and "the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty:" (a) the defendant was remorseful; and (b) the defendant's family history of violence; *James v. State*, 695 So. 2d 1229 (Fla. 1997) (stabbed one victim, strangled the other; aggravators of prior violent felony for contemporaneous murder, HAC; one statutory and one nonstatutory mitigator); *Henyard v. State*, 689 So. 2d 239 (Fla. 1996) (two victims shot, aggravators of prior violent felony, during a felony and for pecuniary gain, and HAC; mitigators of age (18), extreme emotional disturbance and impaired ability to conform conduct; numerous nonstatutory mitigators); *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997) (two murders, aggravators of prior violent felony, CCP; five statutory mitigators plus four nonstatutory factors; co-defendant was actual killer).

The circumstances of this case are similar to other cases in which this Court has upheld the death penalty. *See Butler v. State*, 842 So. 2d 817, 833 (Fla. 2003) (holding the death sentence proportional for the first-degree murder conviction where only the HAC aggravator was found); *Singleton v. State*, 783 So. 2d 970, 979 (Fla. 2001) (holding the death sentence proportional for the first-degree murder conviction where the aggravators included prior violent felony conviction and HAC); *Mansfield v. State*, 758 So. 2d 636, 647 (Fla. 2000) (death sentence was proportionate where trial court found two aggravating factors, HAC and murder

committed during the course of enumerated felony, measured against five nonstatutory factors that were given little weight); *Geralds v. State*, 674 So. 2d 96 (Fla. 1996) (death sentence was proportionate where trial court found only two aggravating circumstances, HAC and murder in course of felony, and some nonstatutory mitigation); *Branch v. State*, 685 So. 2d 1250, 1253 (Fla. 1996) (holding death sentence proportional in a case where the aggravators were murder committed during the course of enumerated felony, prior violent felony, and HAC, and the following nonstatutory mitigating factors were found: remorse, unstable childhood, positive personality traits, and acceptable conduct at trial.

Turner compares his case to *Larkins v. State*, 739 So. 2d 90 (1999); *Hawk v. State*, 718 So. 2d 159 (Fla. 1998); *Robertson v. State*, 699 So. 2d 1343 (Fla. 1997); *Kramer v. State*, 619 So. 2d 274 (Fla. 1993); *DeAngelo v. State*, 616 So. 2d 440 (Fla. 1993); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); and *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988). These cases are distinguishable.

Mr. DeAngelo killed a woman that lived with him and his wife. The only aggravating circumstance was CCP. There had been an ongoing quarrel between the victim and defendant. DeAngelo was a volunteer firefighter, served in the Army, and confessed to the crime. He suffered from bilateral brain damage, and had hallucinations, delusional paranoid beliefs and mood disturbance. *DeAngelo*, 616 So. 2d at 443.

Likewise, Mr. Kramer got into an argument with another man and killed him with a rock and/or knife. There were two aggravating factors: prior violent felony and HAC. Statutory mitigation included extreme emotional disturbance and inability to conform his conduct to requirements of law. Nonstatutory mitigation included model prisoner, good worker, alcoholism and drug abuse. This Court found that:

> The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk.

Kramer, 619 So. 2d at 278.

The defendant in *Fitzpatrick* had the three statutory mitigating factors of age, extreme emotional disturbance, and inability to appreciate the criminality of their conduct. This Court described Fitzpatrick as "a man child" who was, "in lay terms, "crazy as a loon." *Fitzpatrick*, 527 So. 2d at 812.

The pattern that emerges from the cases Appellant cites is that the murders occurred during a heated dispute or ongoing battle between the victim and the defendant. The defendants all had mental health problems and sometimes alcohol or drug abuse problems. *See Hawk v. State*, 718 So. 2d 159, 163-64 (Fla. 1998) (mental mitigation was substantial); *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999) ("The killing here appears to be similar to the killing that occurred in *Livingston* and to have resulted from impulsive actions of a man with a history of mental

illness who was easily disturbed by outside forces."). In *Hawk*, this Court described the defendant as "suffering from brain impairment from a brain injury and damage to the cerebral cortex, which probably was caused by spinal meningitis Hawk suffered as a child at which time he also became deaf." Hawk was also nineteen and under the influence of drugs and alcohol at the time of the offense. Hawk started seeing a psychologist at the age of five and "had poor impulse control even as a child." *Id*.

In *Larkins*, the defendant had an extensive history of mental and emotional problems. He suffered from organic brain damage possibly in both the left and right hemispheres, which affects both his mental and emotional components. Larkins had a substantial memory impairment, which ranked him in the lower one percent of the population. Larkins' cerebral damage also affected his emotional component which made it difficult for him to control his behavior. Benign occurrences would "call forth a great rage." Larkins had a low average level of intelligence, and functioned within the lower twenty percent of the population; he dropped out of school in the fifth or sixth grade; had a history of drug and alcohol abuse; and that he had difficulty learning and socializing with others. This Court noted that the most serious aggravator, the prior violent felony aggravator, was predicated upon two convictions which were committed almost twenty years before the murder in the instant case, and the defendant apparently led a

comparatively crime free life in the interim. This Court specifically noted that, unlike the present case, neither HAC nor CCP were present and that "[t]hese, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is also not without some relevance to a proportionality analysis." This Court described Larkins' crime as similar to the killing that occurred in *Livingston* and to have resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces.

In *Robertson,* there were two aggravating circumstances weighed against the mitigating circumstances of age of nineteen; impaired capacity due to drug and alcohol use; abused and deprived childhood; history of mental illness; and borderline intelligence. Robertson strangled a young woman who he believed had befriended him. It was an "unplanned, senseless murder committed by a nineteen-year-old, with a long history of mental illness, who was under the influence of alcohol and drugs at the time." *Robertson v. State*, 699 So. 2d 1343, 1347 (Fla. 1997).

Last, in *Nibert,* there was one aggravating circumstance weighed against "a large quantum of uncontroverted mitigating evidence" that Nibert was under the influence of extreme mental or emotional disturbance, and that his capacity to control his behavior was substantially impaired; physical and psychological abuse

throughout Nibert's youth; that Nibert felt a great deal of remorse; and that he had good potential for rehabilitation, especially in the kind of structured prison environment where his mental condition improved markedly since the crime. Moreover, there was proof that Nibert suffered from chronic and extreme alcohol abuse since his preteen years; that he was a nice person when sober but a completely different person when drunk; that he had been drinking heavily on the day of the murder; and that, consistent with the physical evidence at the scene, he was drinking when he attacked the victim. *Nibert v. State*, 574 So. 2d 1059, 1062-1063 (Fla. 1990).

The present case is comparable to *Wheeler, Buzia, Pooler* and *Diaz* and unlike the cases cited by Appellant. This case involves a staking out of two female victims caring for three infants, a methodical and stealthy attack on both victims, and a vicious stabbing followed by robbery and escape in the victims' truck.

POINT III

THE TRIAL JUDGE GRANTED APPELLANT'S MOTION FOR MISTRIAL; THE PROSCRIPTION AGAINST DOUBLE JEOPARDY WAS NOT VIOLATED

Appellant states that he moved to challenge Juror Gard for cause, but does not raise on appeal that there was any error in denying the cause challenge. (Brief

at 44, 47). Thus, any issue relating to cause challenges, additional peremptories, *etc*., is waived. *Rose v. State*, 985 So. 2d 500, 503, n.3 (Fla. 2008).

Appellant concedes that he moved for a mistrial, but claims it was not "consensual" because the trial court somehow forced him into moving for a mistrial after reading the *Williams*[18] case. (Brief at 45, n12.). Appellant fails to explain precisely what a "nonconsensual" motion entails. The record shows the following: On Wednesday, July 25, the jury retired to deliberate at 2:06 p.m. (V3, R475). At 6:48 p.m., the trial court noted on the record that Juror Gard had a seizure and was taken to the hospital. (V3, R511). While the parties were discussing the situation, the jury sent the judge a note advising they had already decided four out of the five counts before Juror Gard had the seizure. (V3, R469, 526-27). After continued discussion and research, the trial court cited *Williams* and discussed the holding of that case, noting that *Williams* was reversed because the trial court substituted a juror after deliberations began. (V3, R532-33).

After reading *Williams* and discussing the situation with Appellant, **defense counsel requested a mistrial.** (V3, R535). The parties then discussed the instruction to be given the jury and agreed the verdicts should be sealed. (V3, R537-39). The trial judge declared a mistrial and released the jury. (V3, R540-41). Appellant requested a mistrial, and any error in granting the mistrial is waived.

[18] *Williams v. State*, 792 So. 2d 1207 (Fla. 2001).

On November 19, 2007, Appellant filed a Motion to Dismiss the charges, alleging the double jeopardy clause precluded the State from re-trying him. (V3, R434-436). Although Appellant acknowledged that he moved for a mistrial, he argued that Appellant:

> (a) was placed in a position that he either had to waive his request for a mistrial or have an alternate juror seated to replace the juror who became ill after over four hours of deliberation; and
>
> (b) the twelve person jury who had been selected and sworn had reached an agreement on four of the five counts, leaving the Defendant with the only option of requesting mistrial.

(V3, R435-436).

The re-trial began November 26, 2007. The trial court held a hearing on the motion to dismiss on November 27, 2007. (V14, R277-292). Defense counsel argued that:

> The case law is clear that if a defendant asks for a mistrial, there's no issue. But our position is that we asked for a mistrial based on really inaccurate information at the time. We had the *Williams* case that we were relying on.
>
> Nobody in this courtroom had experienced this particular situation before. . . And so we were doing the best that we could to make decisions, you know, with what was available to us at the time. And in addition, the Court's instruction to talk to our client about what options we had.

(V14, TT283). Defense counsel then asked the trial court to treat the situation as if the mistrial had been "declared over defendant's objection" and apply the standard

of “manifest necessity.” (V14, TT284). Defense counsel suggested that what should have happened is that “we request a – have a recess” for everyone to conduct research and then see if the juror could continue deliberations the following morning. (V14, TT284, 285). The trial judge observed that defense counsel had never suggested what was now being advocated, and defense counsel agreed. (V14, TT285). The trial judge denied the motion to dismiss. (V14, TT292).

Appellant now claims that the trial court never considered less drastic alternatives. (Brief at 46). As the trial judge observed at the hearing on the motion to dismiss, Appellant never requested any other alternative, and these arguments were waived for failing to raise the issue contemporaneously. *Farina v. State,* 937 So. 2d 612, 628 (Fla. 2006). Notwithstanding the fact that Appellant moved for a mistrial and failed to raise any objection at the trial, he claims he cannot be retried or it would constitute double jeopardy.

This Court summarized the applicable law in *Fuente v. State*, 549 So. 2d 652, 657-658 (Fla. 1989):

> The double jeopardy clause of the fifth amendment of the United States Constitution bars repeated prosecutions for the same offense. Where a mistrial is granted over defense objection, a second trial is barred unless a "manifest necessity" for the mistrial is established. *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S. Ct. 2083, 2087, 72 L. Ed. 2d 416 (1982). Double jeopardy is generally no bar to a subsequent prosecution when a mistrial was granted in the original trial upon the defendant's motion. *Id*. at 673, 102 S. Ct. at 2088; *Bell v. State*, 413 So. 2d 1292, 1294 (Fla. 5th DCA 1982). In *Oregon v.*

> *Kennedy*, the United States Supreme Court held that there is a narrow exception to this rule where it can be shown that the prosecution's "conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." 456 U.S. at 679, 102 S. Ct. at 2091. In rejecting the "overreaching" standard for determining when retrial is barred that was adopted by the Oregon Court of Appeals, the Court explained that prosecutorial conduct that might be viewed as harassment or overreaching sufficient to justify a mistrial, is insufficient to bar a retrial absent such an intent. *Id*. at 675-76, 102 S. Ct. at 2089-90. "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id*. at 676, 102 S. Ct. at 2089. **Thus, absent improper governmental action intended to provoke the defendant's mistrial request and subject the defendant to the substantial burden imposed by multiple prosecutions, the defendant waives his or her constitutional double jeopardy rights where the defendant moves for a mistrial, consents to one, or by his or her conduct causes one.** *See Kennedy*, 456 U.S. at 672; *United States v. Dinitz*, 424 U.S. 600, 611, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1976). (Emphasis added)

Appellant moved for a mistrial, and the issue is waived. He cannot point to any "government misconduct" which provoked his request for a mistrial. *Cf. Robinson v. State,* 574 So. 2d 108, 112-113 (Fla. 1991) (prosecutor's comment determined not to have been a deliberate attempt to provoke a mistrial; nothing in the record to indicate that the prosecutor wanted a mistrial or that a mistrial would have benefited the state in any way); *Rutherford v. State,* 545 So.2d 853, 855 (Fla.1989) (this Court's review of the record in the first case showed that the prosecutor's motive was to introduce evidence intended to convict the defendant,

not to create error that would force a new trial); *Keen v. State*, 504 So. 2d 396, 402 n.5 (Fla. 1987) ("In our view, the misconduct sub judice was engaged in by the prosecutor in the heat of trial in order to win his case, and was not done intentionally to afford the state 'a more favorable opportunity to convict the defendant.'"); *Gibson v. State*, 475 So. 2d 1346, 1347 (Fla. 1st DCA 1985) (stating that for double jeopardy to attach after a mistrial due to prosecutorial misconduct, court must find that prosecution intended to "goad" defendant to move for mistrial). Only under such a scenario of intentional prosecutorial misconduct, will double jeopardy attach); *Rodriguez v. State*, 622 So. 2d 1084 (Fla. 4th DCA 1993) (finding that retrial did not violate double jeopardy because prosecutorial misconduct, although present, was not intentional).

Moreover, even if Appellant had **objected** to the mistrial, absence of the unavailability of the juror after deliberations began was a manifest necessity. *See Thomason v. State*, 620 So. 2d 1234, 1237-1238 (Fla. 1993) (Where a defendant objects to the declaration of a mistrial, the burden is on the State to show that there was a manifest necessity for the trial court's determination; otherwise, double jeopardy attaches). For example, jury deadlock is a valid ground for the declaration of a mistrial. *Lebron v. State*, 799 So. 2d 997, 1010 (Fla. 2001); *See also State ex rel. Williams v. Grayson*, 90 So. 2d 710, 713 (Fla. 1956) ("Illustrative of the urgent or necessary reasons that would justify the discharge of the jury at the stage of the

trial mentioned would be: (a) the illness of the judge, the accused, or a juror requiring the absence of any of them from the court, or (b) the inability of the jury to agree on a verdict after due and proper deliberation, or (c) a consent of the accused himself."). In *Adkins v. Smith*, 205 So. 2d 530, 532 (Fla. 1967), this Court found that the reasons outlined in *Grayson* were "illustrative but not exclusive." 205 So. 2d at 532. For example, in *Walsh v. State*, 418 So. 2d 1000, 1002 (Fla. 1982), the trial court did not err in declaring a mistrial after the defendant made improper comments on the witness stand regarding polygraph results that the trial judge previously ruled inadmissible. This Court agreed with the trial judge that this type of testimony would be difficult for the jurors to disregard and that the evidence would likely influence the jury's decision and that there was a sufficient "manifest necessity" to grant a mistrial.

In *Williams*, this Court discussed whether to follow the "bright-line" rule that once the jury door closes and deliberations begin, an alternate juror cannot replace an incapacitated juror. Ultimately, this Court determined that:

> [w]henever, as here, a juror become unable to proceed during deliberations, a new trial of the matter which was the subject of those deliberations is required.

Williams, 792 So.2d at 1210. Although this Court did not address whether the incapacitated-juror situation fit into the buzz words "manifest necessity," it is implicit in this Court's statement that a new trial is "required." Thus, the trial judge

would have been within her discretion to grant a mistrial even if Appellant had objected.

POINT IV

THE *RING* CLAIM HAS NO MERIT

Appellant acknowledges that *Ring v. Arizona*, 536 U.S. 584 (2002), does not apply to this case but asks this Court to overrule years of precedent. (Brief at 48-49). Appellant provides no compelling reason for this Court to reverse itself. Moreover, the trial court found the aggravating circumstances of during-a-felony and prior-violent-felony. Appellant was convicted of the attempted murder of Stacia Raybon and home invasion robbery. Thus, *Ring* does not apply to this case. *See Walker v. State*, 957 So. 2d 560, 576 (Fla. 2007); *Troy v. State*, 948 So. 2d 635, 653 (Fla. 2006). *See Overton v. State*, 976 So. 2d 536 (2007); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003).

POINT V

THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT

While Appellant has not addressed the sufficiency of the evidence to sustain his convictions, this Court is obligated to review the record of each death penalty case on direct appeal to determine whether the evidence is sufficient to support the murder conviction. See Fla. R. App. P. 9.142(a)(6); *Davis v. State*, 859 So. 2d 465,

480 (Fla. 2003). In conducting this review, this Court views the evidence in the light most favorable to the State to determine whether "a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *See Rodgers v. State*, 948 So. 2d 655, 673-674 (Fla. 2006), *citing Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001); *see also McCoy v. State*, 853 So. 2d 396, 408 (Fla. 2003).

The State submits that the evidence was sufficient to support Appellant's murder conviction. Stacia Raybon survived the attack and identified Appellant as the man who murdered Renee Howard and stabbed her. Raybon testified that Appellant forcibly entered the motel room with a knife. Appellant was wounded in the attack and DNA from his blood was identified on the bathroom door frame. The swab from the door knob was a mixture containing the DNA of Appellant, Howard, and Raybon. Appellant was driving Howard's truck when he was apprehended. He had Howard's credit cards in his pocket.

Although Appellant claims this is a circumstantial evidence case, Stacia Raybon's eyewitness testimony makes this a direct evidence case. *Wheeler v. State*, 4 So. 3d 599, 605 (Fla. 2009).

The trial court's detailed fact findings illustrate that the evidence was not just sufficient, but overwhelming:

On September 28, 2005, the Defendant, James Daniel Turner, escaped

from the Newberry County Jail in South Carolina and drove to St. Johns County, Florida in a stolen Newberry County Sheriff's Office vehicle. The Defendant parked and then abandoned the stolen 'vehicle, a Chevrolet Tahoe SUV, in the parking lot of a business formerly known as K.K.'s Tires, located at 1685 U.S. 1 South in St. Augustine. The SUV was discovered by workers and later reported to the St. Johns County Sheriff's Office on September 29, 2005. Inside the SUY, sheriff's deputies located the Defendant's inmate identification card from the Newberry County Jail and numerous rocks of crack cocaine. At some point after abandoning the SUV, the Defendant made his way to Comfort Inn hotel located at SR 207 and 1-95 in St. Johns County. He was observed by a hotel guest, Amanda Chamblis, lurking around the Comfort Inn, in the early morning hours of September 29, 2005.

On September 30, 2005; Renee Boling Howard, age 37, and Stacia Raybon, age 19, were packing to leave the Comfort Inn hotel. They had spent the night at the hotel in Room 210 with Ms. Howard's four (4) children: Brandon McCuen, age 17, Christy McCuen, age 14, Jeffrey Howard, age 2, Jarod Howard, age - 11 months, and Ms. Howard's grandchild, Brandon's daughter, Mariah McCuen, age 8 months. Prior to checking out of the hotel on the morning of September 30th, Ms. Howard took Brandon and Christy to school and returned to the Comfort Inn, where Stacia Raybon had remained in the room with the toddlers. Room 210 was on the second floor of the hotel and faced the parking lot below where Ms. Howard had parked her truck, a champagne colored Ford F-l50 pick-up.

The evidence established that after returning to the hotel from taking her children to school, Renee Boling Howard and Stacia Raybon began loading the truck so they could leave the hotel. When Ms. Howard came up to the room a final time prior to checking out, Miss Raybon testified that the two were focused on the children. Miss Raybon was at the sink making bottles, while Ms. Howard was toward the front of the room. Stacia Raybon testified that she saw a flash of light through the bathroom mirror, which occurred when the Defendant opened the hotel room door. She stated when the Defendant entered the room that he immediately began attacking Ms. Howard, who was closest to the door. When the Defendant noticed

Miss Raybon, he left Ms. Howard and turned his attention to her, grabbing her and stabbing her twice. When he noticed Ms. Howard was still alive and headed toward the front door, the Defendant released Miss Raybon from his hold and returned to Ms. Howard, stabbing her repeatedly until she died. It is during this time that Miss Raybon was able to secure herself in the bathroom. She testified that she could hear the sounds of the attack on Ms. Howard from inside the bathroom. She testified that Ms. Howard and the children were crying. At some point, Miss Raybon testified she could no longer hear Ms. Howard's voice. She next heard water running in the sink and testified that the Defendant tried to open the bathroom door. She stated the Defendant demanded money and she passed him two credit cards and a $5.00 bill under the door. Miss Raybon testified that she negotiated for one of the children and that she was careful to brace herself behind the bathroom door to prevent the Defendant from entering. The Defendant then handed Mariah, the 8 month old, to Miss Raybon, and she immediately closed and locked the door. She waited in the bathroom until she was certain the Defendant had left. Upon opening the door, she found Ms. Howard lifeless on the floor. After unsuccessfully attempting to call 911, Miss Raybon ran out of the hotel room screaming for help. Comfort Inn staff came to her aid. The police were contacted and Miss Raybon was able to provide a description of both the Defendant and Miss Howard's truck, which was stolen after the murder.

Police issued a BOLO (be on the lookout) for Ms. Howard's truck. Deputy Graham T. Harris located the truck traveling southwest on SR 207 near the town of Hastings. He pulled in behind the truck, activated his blue lights and attempted to pull the truck over. As he was running the tag, Deputy Harris testified that he saw the truck's reverse lights come on. He testified that that the Defendant then rammed him and took off. Just prior to Deputy Harris ending the pursuit, the Defendant crashed the truck on the Deep Creek Bridge. He then got out of the truck and jumped in the water. Deputy Harris testified that only one person, the Defendant, got out of the truck. Multiple deputies arrived on the scene and the Defendant was ultimately apprehended with the help of a canine. Located inside the defendant's pants pocket, were Stacia Raybon's stolen credit cards.

> During the apprehension and arrest of the Defendant, he was heard to say: "I did not do it." "Shoot me, just shoot me." "It wasn't me, it was the other guy." "My name is Ricky." Additionally, upon transporting the Defendant back to St. Augustine, the Defendant mentioned that "he did not want to go back there," meaning the Comfort Inn. In a videotaped statement given at the Sheriff's Office, the Defendant indicated that he and a man named "Rick" had planned to steal the victim's truck.
>
> Three Comfort Inn housekeepers, Maria Colon, Jessica Luhr, and Cassie James, each testified that they had seen the Defendant near the victim's room on the morning of the murder.
>
> The Defendant was positively identified by Stacia Raybon as the person who attacked her and killed Renee Boling Howard. Additionally, experts from the Florida Department of Law Enforcement (FDLE) testified that the Defendant's DNA was found both in Room 210 of the Comfort Inn and inside the victim's truck. The Defendant's bloody shoeprint was also found in Room 210. Renee Boling Howard died from shock and blood loss after suffering 15 separate stab wounds to her face, neck, right arm, left hand, right chest, left chest, abdomen, right leg, and left knee.

(V5, R832-833).

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by hand delivery to George Burden, Office of the Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118, this _____ day of July, 2009.

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Times New Roman 14-point font.

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BARBARA C. DAVIS
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