IN THE SUPREME COURT OF FLORIDA

JAMES TURNER,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC08-975
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

JAMES TURNER, Appellant,	)	
vs.	)	CASE NO. SC08-975
STATE OF FLORIDA, Appellee.	)	

PRELIMINARY STATEMENT

The original record on appeal comprises twenty-five consecutively numbered volumes. The pages of the first five volumes are numbered consecutively from one to 891. Volumes six through eleven are numbered individually. Volume twelve begins renumbering the pages sequentially from page one through 1275 which concludes volume nineteen. Volume twenty begins renumbering the pages sequentially from page one through 431 which concludes volume twenty-three. Volume twenty-four and volume twenty-five begins renumbering the pages sequentially from page one through the end of each volume. Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to

the appropriate pages. The record has a supplemental record and will be identified with the letter S and the page number.

STATEMENT OF THE CASE

James D. Turner, hereinafter referred to as appellant, was indicted by Grand Jury with Murder in the First Degree; Attempted First Degree Murder, Grand Theft, Home Invasion Robbery with Firearm; and Aggravated Assault on a Police Officer. (I 34) The state filed a Notice of Intent to Seek the Penalty of Death. (I 73) The state filed a Notice of Similar Fact Evidence. (I 104) The appellant filed an Objection to State's Use of Alleged Collateral Crimes Evidence. (II 244) After hearing, the trail court overruled the appellant's objection to the use of collateral crimes evidence. (II 296)

The appellant filed a Motion For Findings of Fact by the Jury, and Motion to Preclude Capital Punishment as a Possible Sentence. (I 115, 118) The trial court denied these motions. (II 399,398) The appellant filed nine pretrial motions challenging the constitutionality of the Florida death penalty scheme.[1] The trial court denied these Motions.[2]

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[1] Fact Finding by Judge, Non-unanimous Jury Recommendation, Violates ***Ring v. Arizona*** I 121; Hearsay Evidence in Penalty Phase I 157; Improper Burdens of Persuasion I 163; Felony Murder Aggravator Improper I 170; CCP Aggravating Factor Improper II 201; Under Sentence of Imprisonment Aggravator Improper II 246; Prior Violent Felony Aggravator Improper II 251; Pecuinary Gain Aggravator Improper II 257; Heinous, Atrocious and Cruel Aggravator Improper II 262.

[2] II 390; II 391; II 392; II 393; II 394; II 395; II 396; II 397; II 397.

At the eve of trial, the appellant filed a Notice of Insanity as a Defense with a request that the trial court waive the notice requirement.[3] (II 295) The trial court permitted the appellant to proceed with the insanity defense. (VII 18) The appellant filed a copy of the deposition of Dr. Miguel Mandoki in support of his insanity defense. (XI 3) According to Dr. Mandoki, at the time of the offense the appellant was insane. (SV 100) The insanity was caused by a number of factors: appellant has organic brain damage in his frontal lobe; the appellant suffering from depression; and cocaine intoxication made the appellant's mental defect worse. (SV 101)

The state filed a Motion in Limine to Exclude the Testimony of Dr. Miguel Mandoki. (II 309) The appellant filed a Motion for Rehearing on Notice of Insanity Defense for the purpose of making a record on this matter. (III 549) The trial court ruled that the appellant could not rely upon the insanity defense to the extent that it was a result of cocaine use. (XIV 275)

The case proceeded to trial. During jury selection, the trial court asked the jury venire if they had any physical problems that would make it difficult to serve as a juror. (SI 40) Juror Sewell responded that he had a hearing problem. (SI 40)

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[3] Rule 3.216(c) of the Florida Rules of Criminal Procedure states that: The defendant shall give notice of intent to rely on the defense of insanity no later than 15 days after the arraignment... Upon good cause the trial court may waive this

No other juror responded. (SI 40) Juror Gard stated that he was a Park Ranger with the State of Florida (SI 60)

After jury selection, Juror Gard sent a letter to the trial court disclosing that he had a seizure disorder. (III 437) Juror Gard did not mentioned the seizure disorder during jury selection because "I wanted to go thru the process." (III 437) The trial court held a hearing. (III 440) During the hearing Juror Gard was questioned about his medical condition. (III 446-454) The appellant moved to have Juror Gard excused for cause. (III 455) The trial court denied the cause challenge stating "If something should happen and he can't serve, then, you know, that's why we have alternates." (III 457) The appellant objected to the jury and requested an additional peremptory challenge. (III 463) The trial court overruled the objection and denied the request for an additional peremptory challenge. (III 463) The jury was sworn. (III 467)

During jury deliberations Juror Gard had a seizure and was taken to the hospital. (III 511) The jury had reached a verdict on four of the five counts. The trial court reviewed ***Williams v. State,*** 792 So.2d 1207 (Fla. 2001), and asked the appellant whether they would waive the issue raised by the juror illness and agree to seat an alternate juror. The appellant filed a Motion to Dismiss all charges on

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requirement. Rule 3.216(h).

double jeopardy grounds. The trial court denied the Motion to Dismiss. (XIV 292)

The case proceeded to a second trial. (XVI 611) The state rests. (XVIII 1112) The appellant made a Motion to Direct a Verdict of not guilty to first degree felony murder, premeditated, because the evidence failed to show a premeditated design to kill the victim, and the allegation that the appellant committed a burglary and or robbery was insufficient. (XVIII 1113) The appellant argued that the state's evidenced establishes a second degree murder. (XVIII 1112) Likewise, the appellant argued that the state's evidenced as to Count II establishes an attempted second degree murder. (XVIII 1113) The appellant argued that the state failed to prove a prima facie case on the remaining Counts. (XVIII 1113-1116) The trial court denied the appellant's Motions for Judgement of Acquittal. (XVIII 1119) The appellant rests. (XVIII 1121)

The appellant renewed the objection to the trial court's ruling on the state's Motion in Limine regarding the testimony of Dr. Mandoki. (XVIII 1123) The appellant concedes that the appellant is guilty of second degree murder. (XVIII 1130) The appellant renewed his Motion for Judgement of Acquittal which was denied. (XVIII 1131) The jury returned a verdict of guilty as charged to all counts. (XIX 1267-68)

PENALTY PHASE

The appellant objected to the state seeking the HAC[4] and CCP[5] aggravating factors. (XX 21; 27) The trial court overruled appellant's objection. (XX 26; 35) The appellant objected to a reference in his South Carolina Judgement and Sentence paperwork that he violated probation.[6] (XX 44) The state rests. (XX 57) The jury returned an advisory sentence of death by a vote of 10-2. (XXIII 422)

The trial court issued a Sentencing Order and found that there were six (6) aggravating factors.[7] (V 833-843) The trial court found that there was statutory mitigation. (V 844) The trial court found that the appellant was under the influence of an extreme mental disturbance; and the capacity of the appellant to appreciate the criminality of his conduct or to conform his conduct to the

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[4] The Capital Felony was Heinous, Atrocious or Cruel.

[5] The Capital Felony was committed in a Cold, Calculated and Premeditated Manner.

[6] The Judgement & Sentence was being presented to support the Committed by a Person Under Sentence of Imprisonment aggravating factor.

[7] Capital Felony was Committed by a Person Under Sentence of Imprisonment; Defendant was Previously Convicted of Another Capital Felony or a Felony Involving Violence; Capital Felony was Committed While the Defendant was Engaged in the Commission of a Burglary and or Robbery; The Capital Felony was Committed for Financial Gain; The Capital Felony was Heinous, Atrocious or Cruel; The Capital Felony was committed in a Cold, Calculated and Premeditated Manner.

requirements of law was substantially impaired. (V 844-846) The trial court assigned moderate weight to these statutory mitigating factors. (V 844-846) The trial court found some non-statutory mitigation, but gave it little weight. (V 847-852) The trial court found that the aggravating factors outweigh the mitigating circumstances. (V 853) The trial court sentenced the appellant to death as to Count I; Count II thirty (30) years in prison; Count III five (5) years in prison concurrent to Count I, II and IV; Count IV life in prison; and Count V fifteen years in prison (3 year minimum mandatory) consecutive to other sentences. (V 853-854) The Office of the Public Defender was appointed. (V 883) This appeal follows.

STATEMENT OF THE FACTS

James Daniel Turner was incarcerated in the South Carolina Prison system serving as a trustee at the Newberry County Jail. (XVI 653) He was a very good Carpenter. (XVI 658) On the evening of September 29, 2005, the Newberry County Sheriff's Department discovered that James Daniel Turner escaped from the Newberry County Jail and that a Sheriff's Officer vehicle was missing. (XVI 662-665)

Turner drove to St. Johns County, Florida in a stolen Newberry County Sheriff's Officer Vehicle. (XVI 665) The defendant abandoned the stolen vehicle, a Chevrolet Tahoe SUV, in the parking lot of a business formerly known as KK Tires located on US I in St. Augustine. (XVI 639) The SUV was discovered by workers and later reported to the St. Johns County Sheriff's office on September 29, 2005. (XVI 639) Inside the SUV, sheriff's deputies located the appellant's inmate identification card from the Newberry County Jail and numerous rocks of crack cocaine. (XVI 643-645)

The appellant made his way to the Comfort Inn Hotel located at State Road 207 and Interstate 95 in St. Johns County. He was observed by a hotel guest, Amanda Chanbliss, lurking around the Comfort Inn, in the early morning hours of September 29, 2005. (XVI 681-683) Mr. Chambliss yelled at the appellant to go

away, and the appellant left only to reappear hours later. (XVI 682) A hotel employee observed the appellant in the hotel hallway at 9:30 am. (XVI 692)

On the morning of September 30, 2005, Renee Boling Howard, age 37, and Stacia Raybon, age 19, were packing to leave the Comfort Inn Hotel. (XVI 711) They had spent the night at the hotel in Room 210 with Ms. Howard's four children and and Ms. Howard's grandchild, Mariah McCuen. (XVI 760-61) Prior to packing to leave, Ms. Howard took her son Brandon to work and daughter Christie to school and returned to the Comfort Inn, where Stacia Raybon had remained in the room with the toddlers. (XVI 765) Room 210 was on the second floor of the hotel and facing the parking lot below where Ms. Howard had parked her truck. (XVI 751)

As Howard and Raybon were packing items in their hotel room, the appellant opened the hotel room door. (XVI 770) The appellant began attacking Ms. Howard who was closest to the door. (XVI 771) The appellant then approached Ms. Raybon, grabbing her and stabbing her twice. (XVI 773) When Turner noticed Ms. Howard was still alive and heading towards the front door, the appellant returned to Ms. Howard, stabbing her repeatedly until she died. (XVI 774-775)

Ms. Raybon was able to secure herself in the bathroom. (XVI 774) From

inside the bathroom, Raybon could hear loud hitting noises and the cries of Ms. Howard and the children. (XVI 775) Raybon no longer heard Ms. Howard's voice, then heard the sound of water running in the sink outside the bathroom door. (XVI 775) The appellant then tried to open the bathroom door. (XVI 775) The appellant demanded money and Raybon passed the appellant two credit cards and a $5.00 bill under the door. (XVI 776) Raybon then negotiated for one of the children and she braced herself against the bathroom door to prevent the appellant from entering. (XVI 776) The appellant then handed Mariah, the eight month old to Ms. Raybon and she immediately slammed the door. (XVI 776) Raybon asked the appellant to please leave, and the appellant stated that he was leaving and to give him ten minutes to get away. (XVI 777)

Raybon stayed in the bathroom about five minutes, and then slowly opened the bathroom door to be sure that the appellant had left. (XVI 780) Upon opening the door, she found Ms. Howard lifeless on the floor. (XVI 780) After unsuccessfully attempting to call 911, Ms. Raybon ran out of the hotel room screaming for help. (XVI 780) The Comfort Inn staff came to her aid. (XVI 781) The police were contacted and Ms. Raybon was able to provide a description of Ms. Howard's truck, which was stolen after the murder. (XVI 781) Ms. Raybon also picked the appellant out of a photo lineup. (XVI 785)

The police issued a BOLO for Ms. Howard's truck. (XVII 799) Deputy Graham Harris located the appellant in the truck traveling southwest on SR 207. (XVII 802-803) Deputy Harris pulled in behind the truck, and the appellant began to drive in an erratic manner. (XVII 804) Deputy Harris activated his blue lights and attempted to pull the truck over. (XVII 804) The appellant pulled over to the side of the road, and Deputy Harris pulled over behind the appellant. (XVII 805) The appellant then put the truck in reverse and rammed Deputy Harris' patrol car. (XVII 806) The appellant then turned the truck around and attempted to ram Deputy Harris' patrol vehicle again. (XVII) After ramming the rear of Deputy Harris' patrol vehicle, the appellant crashed the truck on the Deep Creek bridge. (XVII 812)

The appellant got out of the truck and jumped in the water. (XVII 812) The appellant ignored multiple commands to surrender and responded with the words: "Shoot me, Shoot me, I didn't do it" (XVII 840) The appellant was ultimately apprehended with the help of a K9 and stated his name was "Ricky." (XVII 824, 851) Located inside the appellant's pants pocket, were Stacey Raybon's stolen credit cards. (XVII 862) Upon transporting the appellant back to St. Augustine, the appellant mentioned that "he did not want to go back there," meaning the Comfort Inn. (XVII 873)

Upon initial questioning, the appellant stated that he had "smoked crack a couple hours ago." (XVII 895) In a video taped statement given to the Sheriff's Office, appellant indicated that he and a man named "Rick" had planned to steal the victim's truck. (XVII 900) The appellant was positively identified by Stacey Raybon as the person who attacked her and killed Renee Boling Howard. (XVI 771) Additionally, the appellant's DNA was found in room 210 of the Comfort Inn. (XVIII 1045) The appellant's bloody shoe print was also found in room 210. (XVIII 1066) Renee Boling Howard died after suffering 15 separate stab wounds to her face, neck, right arm, left hand, right chest, left chest, abdomen, right leg, and left knee. (XVIII 1107)

PENALTY PHASE

Dr. Terrence Steiner opined that the victim had two wounds in nerve-rich tissue that should have caused some pain. (XX 50) The state introduced a certified copy of a judgement and sentence out of the State of South Carolina to establish that the appellant was under sentence of imprisonment at the time of the murder. (XX 56)

Hope Turner is the younger sister of the appellant. (XX 62) The appellant assisted Turner during her school years. (XX 63) The appellant would get Turner up in the morning, fix her breakfast and take her to school. (XX 64) The appellant

would pick Turner up from school and have dinner ready for her because the appellant's father worked construction and was gone, and Turner's mother drove a truck making local delivers. (XX 64) The appellant would take Turner to the Brownies and would take her door to door to sell cookies. (XX 65) The appellant would attend all of Turner's after school activities. (XX 65) When Turner became older she saw her brother using drugs including "meth, pot, and pills." (XX 66) The appellant would be intoxicated with alcohol on a daily basis. (XX 66)

The appellant was married to Donna Turner and she had three children. (XX 68) The appellant would take the three children fishing, cook them dinner and take them back and forth to school and make sure they had everything they needed. (XX 68) The appellant loved kids and he was very good with kids. (XX 69) The appellant's wife Donna was married once before and had three children with her first husband. (XX 73) Periodically the appellant's wife would leave him and go back to her first husband and then come back to appellant. (XX 74) The appellant was in love with his wife and he loved her kids and it hurt him "real bad" when she would leave him. (XX 74)

Marie Hendrix is the cousin of appellant. (XX 76) The appellant first came to live with Hendrix when he was eleven years old. (XX 78) It was a common occurrence that the appellant's mother would drop him off there; sometimes for a

couple of months, sometimes a year. (XX 78) When the appellant came to the house he would sleep where ever they had room for him. (XX 78) From the age of ten the appellant would be left with his uncles and come back intoxicated. (XX 79) Members of Hendrix's immediate family were not allowed to have contact with these uncles. (XX 79) The appellant's mother would show favoritism to his other siblings. (XX 80) When the appellant stayed with Hendrix he would sometimes cry for his father but he would never cry for his mother. (XX 80) The appellant's father would beat the appellant very hard with a belt until he would scream. (XX 81)

Hendrix would visit the appellant in the Newberry County Jail on a daily basis. (XX 83) About a week before the appellant escaped from the Newberry Jail, Hendrix noticed a change in appellant's personality. (XX 83) The appellant was depressed. (XX 83) Hendrix asked the appellant what was wrong but he would not say. (XX 83) Hendrix knew that the appellant's wife was "playing him" and that she would be with her ex-husband. (XX 84) On one occasion the appellant made "a couple thousand dollars" from a construction job. (XX 94) For the first time the appellant's mother was real nice to him and she went out and got him two bottles of liquor and she "liquored him up" until he passed out. (XX 94) When the appellant woke-up his mother and money was gone. (XX 94)

According to Sally Butler, the grandmother of the appellant's wife, the appellant accepted her granddaughters three children as his own. (XX 98) The appellant was always keeping up his house and cooking and taking care of his family; he was a real family man. (XX 99) The appellant worked at a trailer place, did carpenter work and worked as a mechanic. (XX 101)

The appellant's step-children stated that the appellant was a great man. (XXI 114) The appellant would cook their breakfast and would get their lunch at school. (XXI 114) When it was time to discipline, the appellant would take them to the back bedroom and "whoop the bed" and make them act like they were crying to make it appear that he had punished them. (XXI 115) The appellant never hit his wife even when she tried to bite his finger off. (XXI 115) The step-children told their mother that if the appellant and her ever separated they were going to stay with appellant and come see her every other weekend. (XXI 127) The appellant's wife was not seeing her ex-husband but appellant's wife would try to make him jealous over her ex-husband when she thought the appellant was thinking of going back with his ex-wife Lisa. (XXI 139) At the time that the appellant escaped from Newberry County Jail, his wife's ex-husband was hanging around their home, and the appellant's wife was not taking phone calls from the jail. (XXI 150) The appellant's wife's ex-husband was staying the night with her

also. (XXI 151)

The appellant's uncles would provide him alcohol when he was a minor. (XXI 166) One of the appellant's uncles named Sherman Landers was a drug dealer. (XXI 166) The appellant's uncle Sherman recruited the appellant in helping him sell drugs. (XXI 166)

Following the appellant's arrest a specimen was taken by the Florida Department of Law Enforcement. (XXI 169) A subsequent blood test revealed that the appellant had benzoylegonine, which is a metabolite of cocaine in his blood. (XXI 169) According to the FDLE, benzoylegnine would be in the blood system in a matter of minutes after cocaine was ingested and could remain up to twenty- four hours. (XXI 169) The FDLE could not determine how much cocaine the appellant had ingested. (XXI 169)

Dr. Drew Edwards is a expert in the field of substance abuse issues. (XXI 171) Dr. Edwards obtained a drug history from the appellant. (XXI 182) Dr. Edwards also reviewed medical records of the appellant's hospitalizations relating to emergency room visits in the late 1990s, 2002 and 2003. (XXI 182) The appellant was diagnosed on several occasions as being a polysubstance dependant, with depression and adjustment reaction. (XXI 182) These episodes stemmed from times where the appellant became emotionally distraught over the

relationship with his wife. (XXI 182) Dr. Edwards concurs with a doctor in South Carolina that the appellant is a polysubstance dependant. (XXII 227) This means that the appellant uses a lot of different drugs, not just one specific drug. (XXII 227)

The appellant started drinking alcohol with his uncles at the age of twelve. (XXII 228) The appellant's uncles would put ammonia in the alcohol to enhance the effect. (XXII 228) The appellant did not have much of a choice when it came to drugs and alcohol because his uncles were feeding him alcohol and marijuana at a very young age which is very unusual. (XXII 229) The appellant began using amphetamines at the age of fourteen and cocaine at the age of fifteen. (XXII 230)

In 1994 the appellant had cut himself and they diagnosed him as having adjustment reaction, which means something bad happens in your life and you cannot cope with it and you do self-destructive things. (XXII 234) Depression, suicidal thoughts and hurting yourself would be common for people with adjustment reaction. (XXII 234) During this incident the appellant was very intoxicated and when he received distressing information about his wife the appellant began drinking very heavily and became despondent, depressed and tried to hurt himself. (XXII 234) Two to three days prior to leaving the Newberry County Jail, the appellant was using cocaine that he obtained from another inmate.

(XXII 245) The appellant was using cocaine every two to three hours. (XXII 245) When the appellant escaped the jail he was disoriented, did not know exactly where he was going but headed south. (XXII 247) The appellant pulled-off the road many times and used more cocaine and continued until he ran out of gas in St. Augustine. (XXII 247) When appellant escaped jail he did not return to his wife because he was devastated about his situation and just did not care anymore. (XXII 248)

Stephen Bloomfield is a licensed psychologist that examined the appellant. (XXIII 270) Bloomfield found that the appellant was competent to proceed to trial. (XXIII 270) Bloomfield also determined that the appellant was not insane at the time of the offense. (XXIII 271)

Bloomfield performed a "Comorbid Evaluation" which demonstrates the impact of substance abuse on the appellant's mental health. (XXIII 272) Bloomfield also did an assessment of the intellectual functioning. (XXIII 272) The appellant's brain functioning is on the "borderline range."[8] (XXIII 272) Bloomfield found that the appellant had minor brain damage in the frontal lobe which is the part of the brain that effects decision-making impulse control, but the

[8] The appellant is not mentally retarded but he has below average intellectual functioning. The appellant is able to function in most jobs, but has problems with how he filters information. (XXIII 272)

appellant did not have significant brain damage. (XXIII 272)

The appellant presented as an anxious man, with some level of depression, what is called "sullenness" and unpredictability. (XXIII 273) The appellant has tremendous internal conflicts, which come out in an agitated way. (XXIII 273) The appellant uses drugs at times to quell, or to make the anxiety and depression subside. (XXIII 273) The appellant has long-standing problems related to his childhood, is not very bright intellectually, and fears a sense of abandonment. (XXIII 274) These problems lead to self-destructive behaviors and suicide attempts. (XXIII 274) The appellant also suffers from cognitive deficits. (XXIII 274) The appellant's biggest deficits have to do with decision making, judgement, planning and impulse control. (XXIII 274)

The appellant was diagnosed with alcohol dependancy and polysubstance abuse disorder. (XXIII 276) The appellant had two suicide attempts: one in 1994 and one in 2002. (XXIII 276) The suicide attempts related to relationship problems, the appellant's sense of abandonment, and fears of being abandoned. (XXIII 276)

Bloomfield found that the appellant was under a mental or emotional disturbance at the time of the offense. (XXIII 289) At the time of the offense, the appellant was on a several day binge of crack cocaine and methamphetamine.

(XXIII 290) People who are on two or three day binges of those two drugs are suffering from emotional difficulties at the time greater than the average person. (XXIII 290) The appellant met the criteria for being diagnosed with substance abuse or substance dependancy disorder. (XXIII 291) He may have also had an adjustment disorder, with depressed mood. (XXIII 291)

SPENCER HEARING

William Scott is a mitigation specialist that was appointed by the Court to assist in the development of mitigation in this case. (XXIV 7) The appellant lived in a small town with a population not exceeding three to five thousand people. (XXIV 19) The appellant was raised in an area that had big mills that produced a lot of fabrics. (XXIV 19) Today, most of the mills are closed and unemployment is very high. (XXIV 19) The appellant went through a history of abandonment with his mother. (XXIV 22) The appellant would have to go over and live with his aunt for long periods of time. (XXIV 22) The appellant would come home, and he would not be allowed in the house and would not be given a reason. (XXIV 22)

The appellant's uncles taught Turner drink beer. (XXIV 22) When the appellant was in the seventh or eight grade he was given marijuana by his uncles to sell at school. (XXIV 22) The appellant's uncles encouraged him to quit school and come work with them to make some money and the appellant did. (XXIV 23)

The appellant's role models were people that were criminals and showed poor judgment and complete lacking of caring for a child. (XXIV 23) The appellant was a guy who made bad decisions, but was kind to children and animals and would give you the shirt off his back and loved people and wanted a family more than anything in the world. (XXIV 24) The appellant was trying to accomplish this with a very low intelligence level, history of making terrible decisions in life, including leaving the South Carolina jail "over a woman that he has a history with." (XXIV 24)

Dr. Krop is licensed psychologist who performed neuropsychological testing on the appellant. (XXIV 47) The appellant had considerable difficulty with regard to performance on tests designed to test the functioning of the frontal lobe of his brain. (XXIV 48) The appellant has an IQ of 79, and a test strongly suggesting impairment in the executive functions, which correlates to frontal lobe functioning. (XXIV 48) The frontal lobe of the brain is the front part of the brain and is the area of the brain that develops last in terms of human development. (XXIV 49) The frontal lobe of the brain is responsible for the higher level of functions including planning, problem solving, impulse control. (XXIV 50)
The appellant's use of drugs and alcohol exacerbated his lack of coping skills and problem solving. (XXIV 51)

The appellant never received psychiatric treatment for his frontal lobe impairment. (XXIV 53) Rather, the appellant had crisis interventions when he had suicide attempts: one for a drug overdose, and one for cutting his wrists. (XXIV 54) The appellant was also hospitalized for alcohol intoxication on several occasions. (XXIV 54) The appellant had a lot of freedom in trustee confinement, and had a couple of months to serve on his sentence, yet he used crack cocaine and fled to Florida was an example of his bad judgement linked to frontal lobe impairment. (XXIV 55)

SUMMARY OF ARGUMENT

Point I: The trial court claimed in the sentencing order that the Cold, Calculated and Premeditated (CCP) aggravating circumstance was proven and should be given significant weight. The finding of the CCP aggravating circumstance is not supported by the evidence. Turner engaged in some planning when related to the theft of the victim's truck. However, the state failed to prove that Turner acted with heightened premeditation beyond a reasonable doubt when he murdered Renee Howard.

The trial court found that appellant committed the murder while under the influence of extreme mental or emotional disturbance, and while his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The record does not establish that Turner acted with the calm and cool deliberation required by the circumstance.

Point II: The death sentence is disproportionate when compared with similar cases where the aggravating circumstances are few and the mitigation, especially the mental mitigation, is substantial.

Point III: During jury deliberations Juror Gard had a seizure and was taken to the hospital. The trial court reviewed ***Williams v. State,*** 792 So.2d 1207 (Fla. 2001), and asked the appellant whether they would waive the issue raised by the

juror illness and agree to seat an alternate juror. The appellant after reviewing ***Williams*** moved for a mistrial which was granted by the trial court. The appellant filed a Motion to Dismiss all charges on double jeopardy grounds. The trial court denied the Motion to Dismiss.

The trial court in the instant case never considered less drastic alternatives to a mistrial nor gave any consideration to the appellant's double jeopardy right. This occurred after it was discovered that Juror Gard purposely misled the court when he withheld his medical condition during jury selection. The trial court ignored the appellant's strident objections to Juror Gard remaining on the jury, and agreed with the State's request that Juror Gard remain on the jury. When faced with Juror Gard's seizure during jury deliberation the trial court hade less drastic alternatives to a mistrial.

Point IV: Florida's death sentencing scsheme is unconstitutional under the Sixth Amendment pursuant to ***RING V. ARIZONA***.

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED.

The trial court claimed in the sentencing order that the Cold, Calculated and Premeditated (CCP) aggravating circumstance[9] was proven and should be given significant weight. The trial court noted that several witnesses saw Turner loitering around the Comfort Inn the morning of the murder, and Turner knew where the victim's truck was parked. Turner told police that he had seen the victim at the hotel and he knew where her truck was parked. Turner also indicated that he and a homeless man named "Rick" had planned to steal the truck and that "Rick" would take care of the keys. The trial court further found that:

> 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.

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[9] The capital felony was was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. §921.141(5)(j), Florida Statutes (2005)

(V 841) The trial court found that the murder was a product of heightened premeditation because Turner had a substantial period of time for reflection and that he planned to steal the victim's truck sometime before the crime was committed and waited for the right time to carry out his plan. The finding of the CCP aggravating circumstance is not supported by the evidence.

The CCP aggravating circumstance has four elements. ***Jackson v. State***, 648 So.2d 85 (Fla. 1994); ***Walls v. State***, 641 So.2d 381 (Fla. 1994) As this court explained them in ***Walls***,

> Under ***Jackson***, there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." ***Jackson*** [648 So.2d at 89]....
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> * * * *
>
> Second, ***Jackson*** requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." ***Jackson***,[648 So.2d at 89]....
>
> * * * *
>
> Third, ***Jackson*** requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder....
>
> * * * *
>
> Finally, ***Jackson*** states that the murder must have "no pretense of moral or legal justification." .... Our cases on

> this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide....

Walls, 641 So.2d at 387-388.

LACK OF HEIGHTENED PREMEDITATION

Turner admitted to a plan to steal the victim's truck. He denied participating in the murder claiming that a homeless man name "Rick" went into the hotel room to get the truck keys from the victim. This account is in direct conflict with eyewitness Stacia Raybon. Raybon testified that she was at the sink in the bathroom area making bottles when Turner entered the hotel room. The state asked Raybon the following: Did you hear any sound made when the door was kicked in???[10] Raybon responded: I might have heard a noise, but the main thing that got me was the flash of light that hit the mirror door. Raybon did not immediately turn around to look to see what happened. (XVII 792) When Raybon looked into the room to see what was happening, Turner was assaulting the victim. The true manner of Turner's entry into the hotel room and the initial interaction between Turner and the victim before the frenzied attack are a critical gap in the

[10] This was a leading question by the State. Raybon never explained the manner upon which Turner entered the hotel room. Further, Raybon did not hear

evidence.

This Court's decision in ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992) is instructive on the necessary evidence to support CCP. In ***Geralds***, the victim was found beaten and stabbed to death on the kitchen floor. There were two stab wounds on the right side of the victim's neck and one fatal stab wound on the left side. The wounds were consistent with a knife found in the kitchen sink. The medical examiner found a number of bruises and abrasions on the head, face, chest, and abdomen of the victim caused by some form of blunt trauma. The examiner also determined that the victim's wrists had been bound with a plastic tie for at least twenty minutes prior to her death. The victim's car and jewelry was missing.

Geralds had worked on the remodeling of the victim's house. About one week prior to the murder, the victim encountered Geralds in a shopping mall where Geralds learned that the victim's husband was out of town on business. Geralds again confirmed with the victim's son that the husband was out of town days before the murder. Geralds argued that the court erred in finding that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This court held that:

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anything said by Turner or the victim prior to the assault.

> To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated, and premeditated manner, the evidence must show that the defendant had a "careful plan or prearranged design to *kill*."***Rogers v. State***, 511 So.2d 526, 533 (Fla.1987) (emphasis added), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). A plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony. ***Jackson v. State***, 498 So.2d 906, 911 (Fla.1986); ***Hardwick v. State***, 461 So.2d 79, 81 (Fla.1984), cert. denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985). As we said in ***Hardwick****:* The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue. 461 So.2d at 81.

In ***Geralds*** the State contended that the evidence at trial established more than simple premeditation. The State argued that Geralds planned the crime for a week after Geralds ascertained when family members would be present in the house; Geralds brought gloves, a change of clothes, and plastic ties with him to the house; Geralds left his car at a location away from the house so that no one would see it or identify it later; Geralds bound and stabbed his victim.

Geralds argued that this evidence establishes, at best, an unplanned killing in the course of a planned burglary, and that a planned burglary does not necessarily include a plan to kill. Geralds offers a number of reasonable hypotheses which are inconsistent with a finding of 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.

This Court found that where events were susceptible to different interpretations the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner. ***Geralds*** is indistinguishable from the instant case. As such, the state has failed to prove heightened premeditation beyond a reasonable doubt.

MURDER WAS NOT THE PRODUCT OF COOL, CALM REFLECTION

The trial court found that appellant committed the murder while under the influence of extreme mental or emotional disturbance, and while his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. These findings rested securely on unrebutted evidence of Turner's abused, disordered childhood, cognitive defects, low intelligence, impairment in the frontal lobe of the brain that effects decision making, alcohol and drug addition, three-day cocaine binge, and depression from the belief of his wife's marital infidelity with her former husband. Based upon the

foregoing, the record does not establish that Turner acted with the calm and cool deliberation required by the circumstance.

It is error to find an aggravating circumstance where the evidence does not support it. "[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. ***Clark v. State***, 443 So.2d 1210 (Fla. 1983)" ***Robertson v. State***, 611 So.2d 1228 (Fla. 1993) The uncontested finding of the two statutory mental mitigators by the trial court is contrary to a finding that Turner acted in a calm, reflective manner. Mental mitigating circumstances "weigh against the formulating of a careful plan to kill." ***Besaraba v. State***, 656 So. 2d 441, 445 (Fla. 1995); ***Spencer v. State***, 645 So.2d 377, 384 (Fla. 1994) ("Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator")

In ***Santos v. State***, 591 So.2d 160 (Fla. 1991), after threatening to kill Irma Torres two days before, Carlos Santos purchased a gun and took it to her home. Seeing Torres and her children, Santos chased them down and shot them. This Court struck the CCP circumstance, reasoning that, although Santos "acquired a gun in advance and had made death threats – facts that sometimes may support the State's argument for cold, calculated premeditation", the shooting was the product

of the defendant's emotional turmoil arising from his domestic relationship with Torres. ***Santos*** at 162 This Court so ruled even though the trial judge rejected both statutory mental mitigating circumstances.

Like ***Santos***, Turner was suffering from emotional turmoil relating to the belief that his wife had been engaged in marital infidelity with her ex-husband while completing his prison term in a nearby jail. Unlike Santos, Turner had a long history of drug abuse, cognitive defects (borderline retardation), brain impairment in his frontal lobe, and a history making very poor decisions when placed in emotionally charged situations. In the past these situations have led to suicide attempts and acts of violence.

In 1994 the appellant had cut himself and they diagnosed him as having "adjustment reaction," which means something bad happens in your life and you cannot cope with it and you do self-destructive things. Depression, suicidal thoughts and hurting yourself would be common for people with adjustment reaction. During this incident in 1994, the appellant was very intoxicated and when he received distressing information about his wife the appellant began drinking very heavily and became despondent, depressed and tried to hurt himself.

In the case at bar, Turner left a minimum security jail working as a trustee months before his release date. Consistent with Turner's past pattern, when faced

with an emotionally difficult situations, Turner sought drugs. Two to three days prior to leaving the Newberry County Jail, Turner began using cocaine that he obtained from another inmate. Turner was using cocaine every two to three hours. When Turner escaped the jail he was disoriented, did not know exactly where he was going but headed south. Turner pulled-off the road many times and used more cocaine and continued until he ran out of gas in St. Augustine. When Turner escaped jail he did not return to his wife because he was devastated about his situation and just did not care anymore.

Turner's emotional state was that of a walking time bomb where he was going to hurt himself or others. The brutal slaying at the Comfort Inn was not the action of a rational, calm and calculating man, but rather the actions of an emotionally crippled, drug binging, spurned husband. Ramming a patrol car, and making frantic pleas to law enforcement to kill him before being taken into custody minutes after the slaying, are not consistent with the trial court's finding that the killing was the product of cool and calm reflection, nor are they consistent with a careful plan or prearranged design to commit murder before the fatal incident. As such, the state has failed to prove heightened premeditation beyond a reasonable doubt. ***See White v. State***, 616 So.2d 21 (Fla. 1993) ("the evidence of White's excessive drug use and the trial judge's express finding that White committed this

offense ‘while he was high on cocaine’ leads us to find that this aggravating factor was not established beyond a reasonable doubt and that the jury should not have been instructed that it could consider this aggravating factor in recommending the imposition of the death penalty.”)

The conclusion of the trial court should be rejected. The instruction to the jury and the finding of this weighty aggravating circumstance requires that the death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT II

THE DEATH SENTENCE IS DISPROPORTIONATE WHEN COMPARED WITH SIMILAR CASES WHERE THE AGGRAVATING CIRCUMSTANCES ARE FEW AND THE MITIGATION, ESPECIALLY THE MENTAL MITIGATION, IS SUBSTANTIAL.

In ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973) this Court held that the death penalty statute provides the capital defendant "concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient." The "concrete safeguards" include proportionality review:

> Review of a sentence of death by this Court, provided by Fla. Stat. 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

Accordingly, "Our law reserves the death penalty only for the most aggravated and least mitigated murders." ***Kramer v. State***, 619 So.2d 274, 278 (Fla. 1993) ***See also Almeida v. State***, 748 So. 2d 922 (Fla. 1999)(crime must fall within the category of both the most aggravated and least mitigated of murders); ***Terry v. State***, 668 So. 2d 954, 965 (Fla. 1996) (Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances

exist).

This was an unplanned, senseless murder committed by an emotionally disturbed person who has a history from childhood of drug abuse. Turner was diagnosed as having adjustment reaction, which means something bad happens in your life and you cannot cope with it and you do self-destructive things. The improper finding of the CCP aggravating circumstance (See Point I), the facts and circumstances of this case, and the previous rulings of this Court in similar cases support the finding that Turner's death sentence is disproportionate in this case.

Proportionality review is not merely a comparison between the number of aggravating and mitigating circumstances. Proportionality review requires a discrete analysis of the facts, entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. ***Urbin v. State***, 714 So. 2d 411, 416 (Fla. 1998)(quotations and citation omitted; emphasis in original). Proportionality analysis requires the Court to consider the totality of circumstances in a case, in comparison to other capital cases. ***See Porter v. State***, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). The Court must compare similar defendants, facts, and sentences. ***Brennan v. State***, 754 So. 2d 1, 10 (Fla. 1999). The standard of review is de novo. ***See Larkins v. State***, 739 So. 2d 90 (Fla. 1999)

In the present case, the aggravating circumstances are arrayed against extensive mitigation, especially mental mitigation. Furthermore, this Court repeatedly has held that substantial mental mitigation makes the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved. ***See Robertson v. State***, 699 So. 2d 1343 (Fla. 1997); ***Sager v. State***, 699 So. 2d 619 (Fla. 1997); ***Voorhees v. State***, 699 So. 2d 602 (Fla. 1997); ***Morgan v. State,*** 639 So. 2d 6 (Fla. 1994); ***Kramer v. State***, 619 So. 2d 274 (Fla. 1993); ***Penn v. State***, 574 So. 2d 1079 (Fla. 1991); ***Farinas v. State***, 569 So. 2d 425 (Fla. 1990) This is true especially where the heinous nature of the offense resulted from the defendant's mental illness. ***Miller v. State***, 373 So. 2d 882, 886 (Fla. 1979); ***see also Huckaby v. State***, 343 So. 2d 29 (Fla. 1977)(death sentence reversed where evidence showed Huckaby's mental illness was motivating factor in commission of crime), cert. denied, 434 U.S. 920 (1977). As this Court observed in ***Miller***:

> a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse.

Application of these principles mandates a reduction of Turner's death sentence to life in prison. Turner's abusive childhood, cognitive deficits, brain

impairment, history of drug abuse, and emotional disturbances places this case among the most mitigated of capital cases. Moreover, the aggravated nature of the crime, as well as the motivation for the crime, were the result of Turner's emotional disturbance not a desire or design to inflict pain.

Turner has a history of mental health problems. Turner had two suicide attempts: one in 1994 and one in 2002. The suicide attempts related to relationship problems, the appellant's sense of abandonment, and fears of being abandoned. He also had an adjustment disorder, with depressed mood.

Turner also has a long history of drug and alcohol abuse. Turner started drinking alcohol with his uncles at the age of twelve. Turner's uncles would put ammonia in the alcohol to enhance the effect. Turner did not have much of a choice when it came to drugs and alcohol because his uncles were feeding him alcohol and marijuana at a very young age. Turner began using amphetamines at the age of fourteen and cocaine at the age of fifteen. Turner was eventually diagnosed with Polysubstance Dependence and Alcohol Abuse.

In addition to longstanding drug and alcohol abuse, Turner has been diagnosed with cognitive defects (borderline mental retardation), was emotionally abused by his mother, physically abused by his father, and may have suffered brain damage to his frontal lobe. The brain damage in the frontal lobe is the part of the

brain that effects decision-making and impulse control. The appellant never received psychiatric treatment for his frontal lobe impairment. Rather, the appellant had crisis interventions when he had suicide attempts: one for a drug overdose, and one for cutting his wrists. Turner was also hospitalized for alcohol intoxication on several occasions.

Turner's sentence of death is disproportionate when compared with other cases in which this Court reversed the death sentence on proportionality grounds. ***See Larkins v. State***, 739 So. 2d 90 (Fla. 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); ***Fitzpatrick v. State***, 527 So. 2d 809 (Fla. 1988); ***Nibert v. State***, 574 So. 2d 1059 (Fla. 1990).

In ***Kramer***, the defendant killed the victim during a fight. The trial court found two aggravating factors: prior violent felony and that the murder was heinous, atrocious, or cruel. On appeal, this Court vacated the death sentence due to the substantial mitigating evidence: the defendant was under the influence of mental or emotional stress at the time the crime was committed; the defendant's capacity to conform his conduct to the requirements of the law was severely impaired at the time of the crime; the defendant was a model prisoner; the defendant suffered from alcoholism and drug use.

In ***Nibert***, the defendant stabbed a companion seventeen times in the victim's home. This Court approved the aggravating circumstance of heinous, atrocious, or cruel, but nonetheless found the defendant's death sentence disproportional based upon the mitigating evidence, which included physical and psychological abuse and extreme mental and emotional disturbance and impaired capacity due to alcohol abuse.

This Court also found evidence of mental or emotional disturbance dispositive in vacating sentences of death in ***DeAngelo***, ***Fitzpatrick***, and ***Robertson***. In ***DeAngelo***, the defendant strangled the victim manually and with a ligature. The defendant presented significant mental mitigation, including evidence he suffered from bilateral brain damage, hallucinations, delusional paranoid beliefs and mood disturbance. The trial court rejected this evidence as sufficient to establish the statutory mental mitigators but found the defendant suffered from the mental illnesses testified to by the expert. On appeal, this Court concluded the single aggravating circumstance of cold, calculated, and premeditated did not warrant death in light of the substantial mitigation.

In ***Robertson***, the defendant strangled to death a young woman who he believed had befriended him. Although there were two valid aggravating circumstances (committed during a burglary and heinous, atrocious, or cruel) this

Court found the death penalty not proportionately warranted in light of the mitigation, which included Robertson's age of 19, impaired capacity at the time of the murder, abused and deprived childhood, history of mental illness, and borderline intelligence.

In ***Fitzpatrick***, the defendant fatally shot a police officer while holding several people hostage. The trial court found five aggravating circumstances and three mitigating circumstances, the defendant was mentally and emotionally disturbed; his capacity to conform his conduct to the requirements of the law was substantially impaired; and he suffered from a low mental age. The Court vacated the death sentence because compared to other cases the killing in this case resulted more from the acts of a man-child than from a hard-blooded killer.

In ***Hawk***, the defendant brutally beat two elderly persons. This Court reversed the sentence of death, finding the two aggravating factors, which included heinous, atrocious, or cruel, failed to outweigh copious mitigation. The Court noted Hawk started seeing a psychologist at the age of 5 and had poor impulse control even as a child. The trial court found the statutory mitigating factor of substantial impairment and several nonstatutory mitigators, including emotional disturbance, brain damage, and abusive childhood. Considering the nature and extent of both the aggravating and mitigating circumstance, the Court found life in prison the

more appropriate sentence.

When the facts of the present case are compared to the preceding cases, it is clear that equally culpable defendants have received sentences of life imprisonment. This a senseless murder by an emotionally disturbed individual with poor impulse control on a cocaine binge. This is not one of the most aggravated and least mitigated of capital crimes. The death penalty is not the appropriate punishment for Turner, and this Court should reverse his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

POINT III

THE APPELLANT'S RETRIAL VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND FLORIDA CONSTITUTION.

During jury selection, the trial court asked the jury venire if they had any physical problems that would make it difficult to serve as a juror. Only one juror revealed any physical problems. After jury selection, Juror Gard sent a letter to the trial court disclosing that he had a seizure disorder. Juror Gard did not mentioned the seizure disorder during jury selection because "I wanted to go thru the process." The trial court held a hearing. During the hearing Juror Gard was questioned about his medical condition. The appellant moved to have Juror Gard excused for cause. The trial court denied the cause challenge stating **"If something should happen and he can't serve, then, you know, that's why we have alternates."** (Emphasis added) (III 457) The appellant objected to the jury and requested an additional peremptory challenge. The trial court overruled the objection and denied the request for an additional peremptory challenge. The jury was sworn.

During jury deliberations Juror Gard had a seizure and was taken to the hospital. The trial court reviewed ***Williams v. State,*** 792 So.2d 1207 (Fla. 2001), and asked the appellant whether they would waive the issue raised by the juror

illness and agree to seat an alternate juror. The appellant after reviewing ***Williams*** moved for a mistrial which was granted by the trial court.[11] The appellant filed a Motion to Dismiss all charges on double jeopardy grounds. The trial court denied the Motion to Dismiss.

The Fifth Amendment prohibits the State from putting a defendant in jeopardy twice for the same offense. ***Arizona v. Washington***, 434 U.S. 497, 503 (1978) Jeopardy attaches in a jury trial when the jury is empaneled and sworn. ***Crist v. Bretz***, 437 U.S. 28, 35 (1978); ***Downum v. United States***, 372 U.S. 734, 735-736 (1963) But the double jeopardy clause does not mean that every time a defendant is put to trial he is entitled to go free if the trial ends in a mistrial. If the mistrial was with the defendant's consent[12] or based on "manifest necessity," a re-trial is not jeopardy barred. ***Oregon v. Kennedy***, 456 U.S. 667, 672 (1982)

Although the Supreme Court has not set forth precise circumstances in which manifest necessity exists, a trial judge's discretion to declare a mistrial based on manifest necessity is limited to "very extraordinary and striking circumstances."

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[11] This Court in ***Williams*** determined that whenever a juror becomes unable to proceed during deliberations, a new trial of the matter which was the subject of those deliberations is required.

[12] The appellant argues that the mistrial was not with his consent, because the trial court made it clear that based upon this Court's ruling in ***Williams*** that unless appellant allowed an alternate juror to be seated the trial court would declare

United States v. Jorn, 400 U.S. 470, 480 (1971); ***Downum***, 372 U.S. at 736 (1963) Although each case must turn on its own facts, ***Downum v. United States***, 372 U.S. 734 (1963), the determination of whether a trial judge exercised sound discretion normally requires the trial judge to consider less drastic alternatives to a mistrial and he must give adequate consideration to the defendant's double jeopardy right before declaring a mistrial. ***See Cherry v. Director, State Bd. of Corrections***, 613 F.2d 1262 (5th Cir. 1980); ***Grooms v. Wainwright***, 610 F.2d 344 (5th Cir. 1980); ***Harris v. Young***, 607 F.2d 1081 (4th Cir. 1979); ***United States v. MacQueen***, 596 F.2d 76 (2d Cir. 1979) Moreover, the "valued right to have his trial completed by a particular tribunal," ***United States v. Jorn***, 400 U.S., at 484 (1971) is not to be foreclosed "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

The trial court in the instant case never considered less drastic alternatives to a mistrial nor gave any consideration to the appellant's double jeopardy right. This occurred after it was discovered that Juror Gard purposely misled the court when he withheld his medical condition during jury selection. The trial court ignored the appellant's strident objections to Juror Gard remaining on the jury, and agreed with

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a mistrial *sua sponte*.

the State's request that Juror Gard remain on the jury. When faced with Juror Gard's seizure during jury deliberation the trial court had less drastic alternatives to a mistrial. For example, the trial court could have ordered that jury deliberations end for the day, sequestered the jury, and have the jury resume deliberations the following day if Juror Gard recovered from his seizure. The trial court abused his discretion, and deprived the appellant of a fundamental right. This Court should find that the state and trial court actions were tantamount to an acquittal and find that double jeopardy attached. Therefore, the appellant's judgement and sentence should be reversed, and the appellant released from custody.

POINT IV

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida's Capital Sentencing Scheme. None of the challenges were successful and James Turner was ultimately sentenced to death. Some challenges were based on a denial of Turner's Sixth Amendment rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002). The jury was repeatedly instructed that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant also acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied***, 537 U.S. 1069 (2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and

that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

In the instant case, the jury recommendation for Turner's death sentence was a majority of ten (10) to two (2). Moreover, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985).

Since the jury did not make specific findings as to aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, appellant asks this Court to reconsider its position in ***Bottosom*** and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of

life imprisonment without the possibility of parole. ***Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 417.***

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate the sentence of death and remand for a new penalty phase, or remand with directions that the appellant receive a life sentence as to Point I and Point II; vacate the judgement and sentence guilty and sentence of death with directions that the appellant be released from all charges as to Point III; and vacate the sentence of death and remand with directions that the appellant receive a life sentence as to Point IV.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to James Turner, DC#V29754, Florida State Prison, 7819 N.W. 228th St. Raiford, FL 32026, this 6th day of April, 2009.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
GEORGE D.E. BURDEN
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