IN THE SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

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

The state argues that this Court's decisions in ***Owen v. State***, 862 So.2d 687 (Fla. 2003) and ***Evans v. State***, 800 So.2d 182 (Fla. 2001) is authority for this court to ignore the weighty mental mitigation in this case and uphold the CCP aggravating factor. The ***Owen*** and ***Evans*** case are distinguishable from the instant case.

In ***Owen*** and ***Evans*** there was substantial planning and a series of actions taken by the defendants that belie the subsequent findings of mental mitigation. In

Owen the defendant had murdered before and used the same methods of preparation to commit this murder. Moreover, the defendant had broken into the home and observed his victim and left the scene, to only return later in commit the murder. In upholding heighten premeditation this Court held:

> When Owen first entered the home and saw the fourteen-year-old babysitter styling the hair of one of her charges, he had the opportunity to leave the home and not commit the murder. While he did exit the home at that time, he did not decide against killing Slattery. Instead, he returned a short time later, armed himself, confronted the young girl, and stabbed her eighteen times. Owen clearly entered the home the second time having already planned to commit murder. Heightened premeditation is supported under these facts.

Owen at 701.

In ***Evans,*** the defendant was a gang leader that was left behind by a fellow gang member (the victim) after a botched home invasion. Evans was angry and felt betrayed over being left behind. In finding CCP this Court held:

> The trial court in the sentencing order recognized that irrespective of Evans' mental illness at the time of the crime he was able to control his actions and plan his next steps. The trial judge said that Evans was quite capable of recovering from the sudden break down in the plans to commit the home invasion robbery. He was capable of making his way to a nearby residence and securing transportation back to Orlando. He managed to get back to Orlando before Mr. Lewis so that he could await his victim's arrival. Defendant was in control enough to first interrogate Mr. Lewis and then have him bound and

> gagged. He was thinking clearly enough to avoid connection to the murder by removing Mr. Lewis from the apartment before shooting him. Mr. Lewis [sic] [Mr. Evans] was rational enough to place a silencer over the barrel to further avoid detection.

Evans at 193.

In the case at bar, Turner was not a serial rapist/murder or gang leader engaging in home invasions. Turner was suffering from emotional turmoil over the alleged infidelity of his wife. To medicate the emotional turmoil, Turner began using cocaine that he obtained from another inmate at the Newberry Jail. Turner was using cocaine every two to three hours. When Turner escaped the jail as a trustee 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.

Due to the extensive drug use and emotional turmoil, Turner was incapable of the extensive planning described in ***Owen*** and ***Evans***. 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.

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

IN REPLY AND IN SUPPORT THAT 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.

The state argues that this case is proportional to other cases where is this Court has upheld the death penalty. The state argues that the following cases of ***Wheeler v. State***, 4 So.2d 599 (Fla. 2009); ***Pooler v. State***, 704 So.2d 1375 (Fla. 1997); and ***Buzia v. State***, 926 So.2d 1203 (Fla. 2006) are comparable to the instant case, and this Court affirmed the death penalty after proportionality review. The appellant argues that these cases can be distinguished from the instant case.

In ***Wheeler*** the appellant did not challenge the proportionality of the death sentence. Unlike Turner, the murder in ***Wheeler*** involved the weighty aggravator of CCP[1] involving the murder and attempted murder of law enforcement officers while responding to a domestic violence call. In finding that the death penalty was proportionate in ***Wheeler*** this Court held that:

> This case involves the premeditated murder of a law enforcement officer who was acting in the course of his official duties and the attempted murder of two other deputies. Thus, there are multiple crimes involving law

[1] Turner argues that it was error to find the CCP aggravating factor. **See Point 1**

> enforcement officers, and the murder was committed to avoid arrest. Not only was the murder committed without legal justification but the trial court concluded that the CCP aggravator was established. None of the aggravators found by the trial court has been challenged and they are all clearly supported by competent, substantial evidence. Statutory mental mitigation was found and accorded some weight by the trial court.

Wheeler at 611.

In ***Pooler***, unlike Turner, the trial court only found only one of the statutory mental mitigators. (Pooler was under the influence of extreme mental or emotional disturbance) The trial court rejected the other statutory mitigation requested by Pooler.[2] Also, the decision in ***Pooler*** was a 5-2 decision by this Court on the issue of proportionality.

In ***Buzia***, unlike Turner, the trial court did not find any statutory mitigating factors. Moreover, in ***Buzia***, the trial court found and this Court upheld the weighty CCP aggravating factor.

The state's argument presented in their answer brief is not persuasive. This murder 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

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[2] The state argued that in ***Pooler*** the trial court found statutory mitigation that Pooler "was substantially impaired; under extreme duress or under substantial domination of another person; and age (he was 47)." Appellee Brief page 50. This claim is in error.

should reverse his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

POINT III

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

The appellant relies upon the initial brief in reply to the appellee.

POINT IV

IN REPLY AND IN SUPPORT THAT THE FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

The appellant relies upon the initial brief in reply to the appellee.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief and Reply Brief, Appellant respectfully requests this Honorable Court to order a new penalty phase trial as to Point I; reverse the judgement and sentence as to all Counts of the indictment and release appellant as to Point III and reverse the judgement and sentence of death as to Count I of the indictment and remand to the trial court with directions to sentence appellant to life imprisonment as to Point II & 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 Charles Crist, 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 NW 228th St., Raiford, FL 32026, this 31st day of August, 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
ASSISTANT PUBLIC DEFENDER