IN THE SUPREME COURT OF FLORIDA

PAUL HOWELL,

Appellant,

v.

CASE NO. 85,193

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR JEFFERSON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, but, for purposes of clarity, sets forth the following chronological summary:

Beginning in 1990, Appellant was involved in a drug trafficking enterprise which included his brother, Patrick, many of their neighbors in the Parkway section of Ft. Lauderdale - Colin Reddie, Michael Morgan, Hentley Morgan, William West, Lester Watson and Charles Sinclair, as well as other individuals such as Yolanda McAllister, Patrina "Toots" Carter and Tammie Bailey; although based in Ft. Lauderdale, the enterprise also actively flourished in Greenwood, South Carolina, and Marianna, Florida. For the most part, Appellant stayed behind in Ft. Lauderdale and rented the vehicles which were used to transport the drugs and/or couriers (R 2501).[1]

Appellant also performed other functions, however. Appellant lent Colin Reddie his military uniform, so that Reddie, who did not have a valid driver's license, could impersonate him (R 2182), and Reddie also testified that Appellant had personally loaded crack cocaine behind one of the car speakers (R 2211); Hentley Morgan

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[1] (R ___) represents a citation to the record on appeal, whereas (SR ___) represents a citation to the supplemental record.

testified that Appellant had once given him marijuana to sell (R 2404), and, after Patrick Howell's arrest, Appellant had William West sell both marijuana and crack cocaine for him (R 2504-2505). Tammie Bailey testified that the money which Patrick Howell made selling drugs was given to Appellant (R 2237), and Patrina Carter likewise testified that she saw Patrick Howell give Appellant thirty-three thousand dollars ($33,000) on one occasion (R 2330); Yolanda McAllister was present during a similar exchange (R 2442). Likewise, Hentley Morgan testified that Appellant once gave him money to buy crack cocaine in South Carolina, and instructed Morgan to send the proceeds from the sale directly to him (R 2404-2406).

The enterprise suffered a number of setbacks. In March of 1991, the Marianna police arrested Tammie Bailey, Michael Morgan and Patrick Howell, and likewise stopped and seized a rental car occupied by Colin Reddie and Patrina Carter (R 2148-2155); pursuant to police policy, the vehicle was impounded and inventoried (R 2156). Several days later, the chief of police received a very irate phone call from Appellant, who, of course, had rented the vehicles (R 2156-2157). The officer explained to Appellant that whenever an unauthorized driver such as Reddie was found in possession of a car, the vehicle would be seized, impounded and inventoried (R 2157).

In August of 1991, Patrick Howell and William West went for a ride in a blue Ford Probe rented by Appellant, along with Alphonso Tillman, a rival drug dealer; during the ride, Tillman shot Howell and West shot Tillman, resulting in his death (R 2274-2288). After Tillman's death, Appellant sought the assistance of Patrina Carter and Trevor Sealey in the cleaning and disposal of the rental car (R 2321-2330, 2348-2353). Prior to the abandonment of the car, however, Appellant had called Yolanda McAllister who, with Tammie Bailey and her baby, had been visiting Miami (R 2235-2236). Appellant told McAllister that he wanted her to go to the car rental agency with him and to co-sign the rental agreement, so that she would be listed as an additional driver of the vehicle (R 2237-2239, 2443-2444). McAllister complied, and, at Appellant's direction, even "borrowed" Bailey's baby, so that she and Howell could look like a family (R 2239, 2444).

After signing the rental agreement, McAllister and Bailey began their return to Marianna, but, while en route, were 'beeped" by Appellant; accordingly, they pulled over to a toll plaza around Port St. Joe, called Howell, and, at his request, waited several hours for him to arrive (R 2240-2241, 2446). When Appellant did arrive, he was driving the Probe, which still had visible bullet holes and bloodstains; both witnesses observed blood on Howell's

pants (R 2446-2449, 2241-2242). Appellant told McAllister to report the Probe stolen upon her arrival in Marianna, which she did (R 2244, 2259-2264). When Appellant was later interviewed by the Broward County Sheriff's Office, he told them that he had seen the vehicle after Tillman's murder, and it had been "in perfect condition" (R 2281).

In October of 1991, the police were driving by a crack house near Appellant's home when Charles Sinclair attempted to flag them down and sell them drugs (R 2531-2532). When Howell realized the identity of his potential customers, he ran off, stopping to throw away an item on the way (R 2742-2743). The officers stopped, and interviewed and photographed all persons in the vicinity, including Appellant (R 2532-2533, 2743). Appellant told Sinclair that he felt that the police had been harassing him (R 2743), and became even angrier when the police came to his home later as part of a follow-up investigation (R 2530-2531). On November 27, 1991, Howell filed a complaint against the officers, and such document contained the following:

> If legal means fail to end such harassment of me and my family life, then I will gladly cross the line between rational and irrational behavior. SO HELP ME GOD. I am willing to trade my life for that of a police officer that harasses me. You might ask what do I have to gain by it? A political statement is

> one of great importance in this case and I have accepted all the consequences that will follow*

(R 2539) .

When asked about this complaint, Appellant told the officer, "I will handle my own problem my own way." (R 2540).

Apparently during this time, "Toots" Carter, a girlfriend of Patrick Howell, had been staying with Appellant for a week (R 2331-2335). She noted that there was a lot of wiring in Appellant's workroom, and one day heard a loud explosion in the back yard; upon investigation, she saw a hole in the ground, from which smoke was emanating (R 2333-2335). Trevor Sealey and William West, neighbors of Appellant, also testified that in late 1991 and earlier 1992, they saw Appellant constructing pipe bombs, and that once they had taken one and detonated it in a dumpster (R 2353-2362, 2507-2513); West likewise once saw Appellant detonate a bomb in the back yard, leaving 'a big hole." (R 2507-2508). Appellant once told West that he was tired of the police harassing him and that one day he was going to do something to one of them (R 2513) . Both Sealey and Lester Watson accompanied Appellant to gun shows, where he purchased gunpowder, and Watson also purchased pipe for Appellant (R 2364-2367, 2665) .

One day, Appellant asked Sealey if he wanted to take a package "up the road" for him to 'some girls who were snitching on his brother"; Appellant gestured with his hands what would happen when the package was opened (R 2362-2363). For reasons that are not clear, Sealey was unable to accept this assignment, and Appellant asked Lester Watson instead (R 2680); Appellant had previously opened a pager account for Watson, and Watson had wired money to Bailey and McAllister in Marianna at Appellant's direction (R 2670-2671). On January 29, 1992, Watson went with Appellant to purchase a microwave, and indeed Watson actually purchased the item with Howell's money (R 2675); Tammie Bailey had previously told Appellant that she needed a microwave to heat up her baby's bottles, and Howell' had checked with Yolanda McAllister to see whether Miss Bailey did in fact have a microwave (R 2457, 2245). A day or so later, Watson went with Appellant when he rented a Mitsubishi Galant, and Howell asked Watson if he wanted to make two hundred dollars ($200) for taking a package to Marianna (R 2678-2680); Appellant did not tell Watson what was in the package (R 2682).

Watson agreed to the arrangement, and when he arrived at Appellant's home, he found Howell gift-wrapping the microwave, and placing Styrofoam **around or in the box** (R 2682-2683). Watson

stated that the wording had been torn off of the microwave box, and he further noted that Appellant was wearing gloves at this time; when he asked Appellant about this, Howell replied that he did not want to leave any fingerprints on the box, leading Watson to believe there were drugs inside (R 2683-2685). Appellant gave Watson a piece of paper upon which he had written his own beeper number, as well as Yolanda McAllister's phone number, backwards; he instructed Watson to contact McAllister upon his arrival in Marianna (R 2684-2685). As Watson watched, Appellant placed the gift-wrapped microwave into the trunk of the car, and Watson set off (R 2685-2687). Although Appellant had instructed him to travel 'alone, Watson picked up a friend of his, Curtis Williams, and the two stopped in Ft. Pierce and bought and consumed some crack (R 2687); they also stopped in St. Augustine and bought some more crack from "Lizard" (R 2688).

At approximately 3:47 p.m., on February 1, 1992, Trooper Jimmie Fulford pulled Watson over for speeding on 1-10, close to the exit for Route 257 (R 2568). Fulford asked Watson for his license, and Watson supplied him with a false name, 'Lester Williams", and birthdate (R 2688-2689). Fulford then advised headquarters and requested that a check be run on the car registration, as well as its status as a possibly stolen vehicle (R

2568). When he was advised that the car belonged to a rental agency and had not been stolen, the trooper requested a license check on the name that Watson had given him; the dispatcher replied that there was no valid license for that name or birthdate (R 2569). At approximately 4:08 p.m., the trooper radioed back and asked the dispatcher to find out if "Williams" was authorized to be operating the vehicle; the rental company gave the dispatcher Appellant's name, and she called him at his home in Ft. Lauderdale (R 2572). When the situation had been explained to him, Appellant stated that he knew 'Lester Williams", and that he had loaned the car to him, but that he had not known "that he was coming this far in the vehicle." (R 2573). Appellant asked where "Williams" was being taken, and was told that he would be taken to the Jefferson County Jail; it was estimated that this call' took place at around 4:35 or 4:40 p.m. (R 2574).

Meanwhile, two other law enforcement officers had arrived at the scene of the stop, and Watson was asked for permission to search the vehicle; Watson testified that Appellant had told him that if he had gotten into trouble, just to "take the rap", and Appellant would take care of him (R 2690-2691). Accordingly, Watson gave permission for the vehicle to be searched, and Trooper Fulford and Deputy Harrell of the Jefferson County Sheriff's

Department, who had arrived by this point, proceeded to do so (R 2691, 2559). Both Deputy Harrell and another officer, Deputy Blount, observed the gift-wrapped microwave in the trunk of the car (R 2552, 2561), and Harrell testified that during his search of the trunk he had moved the box (R 2562) ; Watson testified that the trooper had picked up the box as well (R 2691). Watson testified that he was placed under arrest for speeding and lack of a valid driver's license, handcuffed and placed into the back of a patrol car (R 2692, 2553). Blount transported Watson and Williams to the jail, and Harrell likewise proceeded to the same location, leaving Trooper Fulford alone at the scene (R 2554, 2562).

As Watson was being booked, Blount heard a radio transmission about an explosion, and he and Harrell returned to the scene (R 2555) . When they arrived, they found that a massive explosion had taken place, setting fire to the grass, and depositing the trooper's body in a ditch by the side of the road (R 2564); they also met up with the motorist who had stopped and utilized the trooper's patrol car to make the call (R 2582-2588). Trooper Murphy was likewise dispatched to the scene, but, finding everything under control, proceeded on to the jail (R 2558-2590). Upon arrival, Murphy took two telephone calls from Appellant, who was inquiring as to the status of his rental car; the officer

described Appellant's voice at this time as calm (R 2591). Appellant repeated that he had lent the vehicle to Watson to go to a street festival in Ft. Lauderdale (R 2590-2593). When Watson was told about the explosion, he informed the authorities that Appellant knew how to make bombs (R 2695). Apparently before this occurrence, an FDLE agent had been dispatched to Appellant's residence in Ft. Lauderdale; at that time, Appellant again contended that he had simply lent the vehicle to Watson in Ft. Lauderdale and that he had not known what he did with it (R 2722-2725).

Charles Sinclair ran into Howell at the Sixth Street Festival, and Appellant told him that his uncle, Lester Watson, had been pulled over in a rental car and that a bomb inside of a gift-wrapped package had gone off (R 2746); Appellant had previously confided to William West that he had sent Watson to Marianna with the pipe bomb in a microwave (R 2516). Howell told Sinclair that if someone touched the package the wrong way, "it was supposed to go off," and asked him if his uncle were a snitch (R 2747); Appellant advised that "stuff happens to snitches" (R 2747). Howell then asked Sinclair to help him move a rug from his workroom, and also to help him transport gunpowder to West's home next door (R 2747-2749); West likewise testified that Appellant had

moved some pipe, fuses, firecrackers and tools over to his home (R 2516-2517). As Appellant was about to drive Sinclair home after this activity, the police pulled into Howell's driveway and arrested him, prompting Appellant to state, "Damn, they come quick." (R 2750). Upon his arrest, Appellant stated that he did not know anything about bombs and did not know how to make them (R 2729-2730); he assured the authorities that they would not find any bomb-making equipment in his home, and stated that the holes in his backyard came from replanting trees (R 2730). During his incarceration, Appellant told another inmate that he wished Watson had gone into the package looking for drugs and gotten his own head blown off; Appellant stated that he would not then presently be where he **was** (R 2770).

The State also called a number of expert witnesses, as well as other law enforcement officers. Joe Hanlin, an explosives enforcement officer with the Bureau of Alcohol, Tobacco and Firearms, testified extensively as to Howell's construction of the bomb. Based on his examination of the scene, as well as of the items seized from Appellant's residence, the witness stated that the explosive device had been constructed from heavy steel pipes, aluminum end plugs, gunpowder and a battery manufactured for use in an emergency exit lighting system (R 2901-2909); the battery had

been secured in a specific location with safety wire, such wire primarily used in aircrafts by the military (R 2710).

Hanlin testified that the microwave had been 'rigged", so that the bomb would explode whenever the door was opened, and stated that the device had been designed to kill whoever opened the door (R 2935); he could tell, from fragments, that the door had originally been taped up (R 2932). The witness stated that the pipe which had been used was extremely hard to find, and further stated that the bomb was an extremely sophisticated and powerful device (R 2955-2956); according to Hanlin, the builder of this bomb had understood well how electricity worked, because a person without such knowledge of explosives would have blown himself up while trying to build it (R 2936). Hanlin testified that if the bomb had detonated in an enclosed area, such as Tammie Bailey's duplex, it would have blown the doors and windows out and started an immediate fire, which would have burned the structure to the ground (R 2949-2953). As it was, the witness stated that the explosion which did occur had been "extremely violent," and noted that the trooper's left leg below the knee had been blown off and had been found one hundred and fifty (150) feet away from the blast site (R 2945).

A search of Appellant's residence had turned up a number of items which could be used in bomb-making, such as spools of stainless steel safety lock wire, wire cutters, pliers, putty and tape, as well as a book entitled, "Explosives and Demolitions" (R 2812-1816); a search of Appellant's backyard turned up pieces of metal pipe in one of the "craters" (R 2824-2827). Likewise, the search of the blast site in Jefferson County turned up large pipe fragments, battery fragments and pieces of the microwave oven, including the label, "Sharp Half-Pint Microwave" (R 2840-2841). Traces of a specific gunpowder, Hercules Red Point Smokeless Powder, were found on the battery parts at the blast site, as well as upon the victim's clothing (R 2847-2849); traces of this same gunpowder were found at Appellant's residence, as was a piece of the label from the microwave (R 2857-2865). A toolmark examiner with the ATF testified that he had examined the piece of aluminum bar stock found at the bomb site, and had compared such with a comparable item from Appellant's residence, concluding that the two pieces had once been part of the same bar of aluminum (R 2972-2974). Additionally, pieces of the pipe bomb were found embedded in the two vehicles at the scene (R 2611).

The medical examiner testified that Trooper Fulford died from massive trauma due to a very violent explosion (R 2799). The

victim had suffered a complex and complicated pattern of trauma to the arms, legs, head, chest and pelvis (R 2795). The victim's left leg was missing from below the thigh, and the right leg had likewise almost been severed; there was also massive trauma to the inside of each foot (R 2795-2796). Similarly, the left arm had been severely traumatized, the left hand severely damaged, and portions of several fingers had been blown away (R 2796). There was some charring and singeing to the victim's hair and face, and the frames of his eyeglasses had been driven into the bones of his face and head by the force of the blast (R 2797).

The explosives expert testified that, from the location and severity of the wounds, it appeared as if the victim had been kneeling on his right knee, holding the microwave in his hands when the bomb went off (R 2947-2949). The expert suggested that the trooper might have been cutting the tape around the microwave at the time of the explosion; fragments of a pocket knife were found at the scene (R 2947-2949, 2621). Among the debris found at the scene were the rental contract for the car, bearing Appellant's name, and Trooper Fulford's "ticket book, with a citation for "Lester Williams" issued at 3:45 p.m., on February 1, 1992 (R 2629, 2643).

SUMMARY OF ARGUMENT

Appellant presents nine (9) points on appeal in regard to his convictions of one count of first degree murder and one count of making, possessing, placing and discharging a destructive device resulting in death, and the resultant sentence of death. Howell's only attack upon his convictions relates to the trial court's decision not to appoint different or additional counsel for Appellant. The court below held sufficient inquiry into any allegation of conflict of interest, and determined that no actual conflict existed, and that no prejudice had been demonstrated; accordingly, no cause existed to remove defense counsel. Likewise, the court held more than sufficient inquiry into Howell's complaints concerning counsel which, for the most part, related to a difference in defense strategy between the two; such difference of opinion was resolved in Howell's favor, and, again, no good cause was presented for the removal of counsel. Likewise, no basis was demonstrated for the appointment of additional counsel.

As to the sentence of death, the denial of Appellant's special penalty phase jury instructions was not error, and the sentencing order clearly reflects that the judge considered, evaluated and weighed all of the evidence in mitigation proffered by the defense; it is not this Court's prerogative to reweigh this evidence on

appeal. Although Howell attacks all five of the aggravating circumstances found as part of his sentence of death, none of his challenges has merit, and that in regard to the felony murder aggravator is not preserved for review. Given the fact that Howell utilized an extremely lethal gunpowder-filled pipe bomb as his chosen means of execution, which he contemplated would be driven across the State of Florida, he clearly created a great risk of death to many persons. The fact that Trooper Fulford was not his originally-intended victim is irrelevant to the finding of any of the aggravating circumstances, especially those in regard to avoid arrest, cold, calculated and premeditated or the victim's status as a law enforcement officer. By virtue of the doctrine of transferred intent, the first two aggravating circumstances clearly apply, and, additionally, they, as well as the other aggravating circumstances, are also supported by evidence in the record to the effect that Howell intended that a law enforcement officer, such as Trooper Fulford, become the ultimate victim of the booby-trapped microwave,

Howell originally intended that Tammie Bailey and Yolanda McAllister, as well as others, be destroyed in a fatal bomb blast in Marianna, to prevent them from testifying against Appellant and/or his brother in upcoming drug or murder prosecutions. Once

Howell was called by the Florida Highway Patrol and advised that the car which he had rented, containing the bomb, had been stopped, Howell chose to warn no one of its presence, despite his knowledge that the car would be impounded and inventoried. Howell had previously expressed the view that he had been harassed by law enforcement officers, and had stated that he was more than willing to exchange his life for one of theirs. Under all of the circumstances of this case, death is the appropriate and proportionate sentence, and such sentence should be affirmed in all respects.

ARGUMENT

ISSUE I

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE TRIAL COURT'S DECISION NOT TO APPOINT DIFFERENT, OR ADDITIONAL, COUNSEL FOR HOWELL

As his primary point on appeal, and his only attack upon his convictions, Howell contends that Judge Steinmeyer committed "numerous errors with respect to a number of issues related to Appellant's representation by court-appointed counsel." (Initial Brief at 36). Specifically, opposing counsel argues that the court below failed to conduct sufficient inquiry relating to allegations that trial counsel had a conflict of interest and/or was rendering ineffective assistance, and, likewise, that the court failed to adequately advise Howell of his options. It is also specifically asserted that the trial court committed reversible error in allowing counsel for a co-defendant to assist in jury selection, and, further, in denying the request that a second or additional counsel be appointed. Appellee would maintain that reversible error has not been demonstrated, and that the instant convictions should be affirmed in all respects.

A. Pertinent Facts of Record

The record in this case indicates that Howell was indicted on the instant charges on February 19, 1992, and that, due to alleged conflict on the part of the Office of the Public Defender, Attorney Frank Sheffield was appointed to represent him at that time (R 13-19, 27). Howell also faced federal charges arising out of much of the same conduct which had given rise to the state indictment, and Sheffield likewise was appointed as Howell's attorney in federal court. On March 18, 1993, the state prosecutor moved to disqualify Sheffield from this case, noting the fact that Sheffield had been allowed to withdraw from the federal prosecution (R 304-308). The State attached a copy of a newspaper article about the federal trial to its motion, and later filed a letter which Howell had written to the judge, dated March 15, 1993 (R 307-308, 310). In this letter, Howell asserted that Sheffield had been removed as his attorney in federal court due to ineffectiveness, and complained that the latter had failed to communicate with him; Howell stated that the two had not gotten along and that he did not trust Sheffield (R 310). Howell wrote that he wanted William Pfeiffer, who had replaced Sheffield at the federal trial, to serve as his counsel in state court, but added that because Pfeiffer had never

handled a death penalty case, he wanted Clyde Taylor to be appointed as well (R 310).

The motion was called up for a hearing on April 16, 1993 (R 1198-1206); at this time, the judge announced that he had, in fact, received Howell's letter (R 1198). The prosecutor stated that the State's unusual motion was not predicated upon any belief that Attorney Sheffield was not rendering effective assistance, but rather had been filed simply to bring certain matters to the court's attention, so that Appellant "could satisfy himself one way or another as to how we're going to proceed from this point." (R 1199). Attorney Sheffield then addressed the court, and stated, consistently with what had been reported in the newspaper article proffered by the State, that although Howell had complained about his representation in federal court, the federal judge had found no cause for counsel's removal on such basis (R 1199-1200). Sheffield added, however, that his office had received a phone threat during the federal trial, and that he had requested leave to withdraw, which had been granted (R 1200). The attorney pointed out that Pfeiffer had no capital experience, and stated unequivocally,

> I am perfectly willing to continue representing Mr. Howell in this state case. I have tons and tons of discovery. We have taken depositions. I have no qualms whatsoever about my reputation as far as my

> abilities to represent him. I have handled over a dozen death cases. I have the experience in handling death cases, and I am more than willing to continue representing him. I see no reason why there should be a change at this point.

(R 1201-1202).

Judge Davey (who was then presiding over this case), then asked Appellant his views, and Howell stated that he did not want Sheffield to represent him, complaining that he had not shared discovery matters with him (R 1203). After hearing further argument from Attorney Sheffield, the court denied the motion, stating that it was satisfied that Sheffield had not been removed from the federal case due to any lack of diligence (R 1204). The court also stated that it found no basis to question the attorney's performance in the instant case, and noted that Attorney Pfeiffer had no experience in capital **cases** (R 1204-1205). At the conclusion of the hearing, the judge asked if anyone wished to say anything further concerning the motion, and no one spoke up (R 1206).

On June 4, 1993, the State filed a motion for rehearing, attaching to such pleading partial transcripts of the prior federal proceedings of January 19, 1993 (R 322-330); further transcripts were filed on September 2, 1993 (R 359-393). This motion was not

called up for hearing until November 19, 1993, by which point Judge Steinmeyer was presiding over this case (R 1223-1250). The prosecutor contended that the transcripts, which shed further light on the telephone threat incident, indicated "an apparent conflict", and stated that he wished the court to inquire further of Attorney Sheffield and Appellant Howell in this respect (R 1227-1231). Attorney Sheffield then addressed the court and recounted some of the difficulties which he had encountered during the federal proceedings (R 1233-1237). He specifically noted that there were differences between the state and federal systems in regard to how discovery was conducted, and stated that during the federal trial, he had continuously been served with new discovery disclosures; this strained his relationship with Howell, as he could not have discussions regarding strategy very much in advance (R 1233). Sheffield also discussed the telephone threat. He stated that an unknown person had called his office and told his wife, "Just tell Mr. Sheffield that if Paul Howell goes down, Mr. Sheffield is going down too." (R 1234). Sheffield stated that this incident precipitated his withdrawal.

Mr. Sheffield then stated, however:

> Since that time Mr. Howell and I have communicated with one another. He has communicated with me in this case. This is

> not a case where there are Jinks Act [sic] rules that you have to deal with and that you don't get discovery in. We are getting discovery. We have taken depositions. I have visited him in the Broward County Jail. We have no problems between us with me continuing to represent him in this case, and the problems that were occurring at that time in the federal case no longer exist.
>
> Secondly, I am not concerned at this point in time that there is somebody out there coming to get me. I have had threats before. I am sure I will have threats again. I am perfectly willing to continue on this case to represent Mr. Howell and to represent his best interests in this case.

(R 1236).

When asked to speak, Howell stated that he wanted to hear what the DEA had to say about the phone threat, claiming that such threat had had an adverse effect upon some of his witnesses, 'My mom and my wife, who this threat supposedly came from." (R 1238). The prosecution then called Agent Sproat of the DEA, who had investigated the phone call (R 1240-1246). The witness testified that he had examined the phone records for Sheffield's office, and had determined that there had been no incoming call at the time that this call was alleged to have come in (R 1242-1243). Howell stated that he had no questions of this witness (R 1247), but said that until "somebody announced" that the call had 'never happened,"

there would 'still [be] a problem." (R 1248). Attorney Sheffield then stated,

> Judge, I can tell you that if it is a problem, it is only a problem with Mr. Howell because I can represent to this Court that I intend to represent Mr. Howell, as I have told him, to the fullest extent I can possibly do so, to whatever it takes. And I have already indicated on the record that if Jefferson County goes broke paying me to represent Mr. Howell, I intend to do it.

(R 1248-1249).

When the prosecutor asked the court to require Howell to make "an affirmative waiver of any sort of conflict that may be caused by this information" (R 1249), Judge Steinmeyer found that such would not be necessary, as he found "there is not a conflict between Mr. Sheffield and Mr. Howell that would interfere with Mr. Sheffield's ability to represent him." (R 1249). The judge did, however, expressly invite Howell 'to be heard in this regard," and Appellant simply stated, 'The court can determine it" (R 1250). At this point, Judge Steinmeyer formally denied the motion (R 1250).

The next event relevant to this point on appeal occurred some nine months later, when Attorney Sheffield moved to have a second attorney appointed, due to the alleged complexity of the case and the extensive preparation involved (R 777-780). The State opposed this motion (R 766-769), and the matter was called up for a hearing

on August 22, 1994 (R 1403-1408). After hearing defense counsel's argument, the court indicated that there did not seem to be any reason to grant the motion, noting that Attorney Sheffield had been able to familiarize himself with the instant charges by virtue of his participating in the federal proceedings (R 1407-1408).

At the next hearing on this case, which occurred on September 8, 1994, Attorney Sheffield advised the court that one of the reasons that he needed a continuance was that Howell was refusing to talk with him and seemed opposed to the presentation of any defense involving mental state, both at trial and penalty phase (R 1475). Sheffield had requested the appointment of a mental health expert, and such appointment had been granted, but he stated that Appellant refused to speak with this individual (R 1475). The attorney further stated that he had doubts as to Appellant's competency to proceed (R 1476). Howell then addressed the court and affirmed that he did not want "any of the incompetency stuff to come up in the trial." (R 1476). The court then asked Appellant if he were cooperating with Sheffield 'in the preparation of his case for everything other than the competency part of it," and Howell noted that the attorney had not mentioned any other area of disagreement (R 1477). Judge Steinmeyer reminded Howell that even if he did not wish to present a competency defense at trial, the

mental health expert could be helpful in the penalty phase, but Appellant remained adamant that he wanted no part of this defense, despite the advice and urging of counsel (R 1479-1484).

The matter was revisited at the next hearing on September 16, **1994** (R 1498-1547). Defense counsel renewed his motion for a continuance, which was denied (R 1513-1516), and **Appellant again** stated for the record his refusal to authorize any psychiatric defense (R **1541).** Howell also stated that his family did not trust Sheffield or wish to speak with him because of the telephone threat (R **1543).** Judge Steinmeyer noted,

> While again, Mr. Howell, your wife and family can either cooperate with Mr. Sheffield or not cooperate with him. That's your choice. You can certainly urge them to or urge them not to, whatever you prefer. But we've considered these things that happened in the federal court a long time ago and have resolved them. And I'm simply not going to reopen and rehash that here on the eve of going to trial.

(R 1543).

Howell then pointed out that the trial was not until Monday, and stated that 'if he saw where he did not want Mr. Sheffield to go to trial with him," it was either 'lead, follow or get out of the way," adding, "If I have to I'll go by myself" (R 1543). The judge responded that that would be a matter which would be considered at a later time, but asked Howell, 'as far as right now is concerned",

whether he was asking to discharge Sheffield (R 1544). Appellant responded that he did not like Sheffield going to trial with him, but added, "I don't even know what to think"; he then asked, apparently rhetorically, if Sheffield was in his best interests or was going against him, and added, "I feel that he is" (R 1544). Judge Steinmeyer noted that this was something which Howell would have to decide, and asked him if there was anything else which he wished to bring up; Appellant responded in the negative (R 1544).

Attorney Sheffield subsequently filed a motion to have Appellant examined pursuant to Fla.R.Crim.P. 3.210 (R 894-913), which was heard on September 19, 1994 (R 1551-1612). After Attorney Sheffield had presented his argument as to the motion, Howell reaffirmed that he did not wish to pursue any incompetency 'defense" (R 1561-1562). The court then verified that Appellant understood that he faced the death penalty and that, regardless of his religious beliefs, "physical death" could occur as the result of his conviction (R 1562-1563). Howell likewise stated that he had previously seen the depositions in this case or their equivalent in prior proceedings and that he understood their content (R 1566-1567). While Attorney Sheffield still maintained that the insanity defense was the 'only defense" available,

Appellant disputed this, and the judge observed that this was Appellant's choice to make (R 1568-1569).

Defense counsel continued to protest and suggested a hearing pursuant to Faretta v. California, 422 U.S. 866, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Judge Steinmeyer, however, pointed out that Appellant had never asked to represent himself (R 1.587). Attorney Sheffield then said that all he was asking for was "an instruction", stating,

> If Mr. Howell does not want me to pursue that defense, and I do not ask those questions, then fine. I want the record to reflect that he has made that decision,
>
> If we get into a penalty phase there are two statutory mitigating factors and a plethora of non-statutory mitigating factors dealing with psychological aspects that I intend to pursue. If he's instructing me not to pursue that, do not prepare that, then fine. I won't pursue it. But I need to know on the record at this point that that is his desire.

(R 1589).

Judge Steinmeyer then asked Appellant if he were instructing Attorney Sheffield not to pursue any psychological or insanity defense, and Appellant responded in the affirmative (R 1589-1590). Attorney Sheffield responded, "That's fine, Judge. I don't have any problem with that." (R 1590).

After the hearing had addressed other matters, Howell expressed some concern as to whether Attorney Sheffield could competently represent him, given the fact that he had previously described the insanity defense as Appellant's "only" defense (R 1600-1601). Judge Steinmeyer inquired of counsel as to what "other work" he needed to do, in light of the decision not to raise this defense, and counsel stated that "a great deal of work needed to be done", in light of this occurrence (R 1602). The court then inquired of counsel as to his preparation or familiarity with the factual aspects of the case, and counsel affirmed that substantial discovery had already taken place, stating, 'We have deposed everybody that I know the State intends to produce of any substance." (R 1602); counsel did, however, indicate that he would not be adverse to receiving more time, in light of some newly-disclosed evidence (R 1603-1604). Judge Steinmeyer ruled that no state witness would be called prior to the time that defense counsel had had an opportunity to review all prior testimony (R 1612).

Two days later, between 3:30 and 5:00 a.m., on September 21, 1994, Howell wrote a letter to Judge Steinmeyer, in which he complained about Attorney Sheffield's prior statements to the effect that insanity had been the "only" defense, and stated that

he did not wish Sheffield to defense him (R 922-923) . Howell wrote that there were irreconcilable differences which had caused a lack of preparation on the attorney's part; although Attorney Sheffield had told the judge that he was prepared to defend Appellant, Howell apparently did not believe him (R 923). Appellant then wrote, 'It is not my intention to wave [sic] counsel allowed me under the rights of the accused and as a citizen of this country," and wrote further that, in federal court, he had gone to trial and utilized a non-insanity defense with which he had felt comfortable (R 923) . Howell claimed that he had discussed other defenses with "former attorneys" and knew that Sheffield's comments and approach to the case were "casual and derelict" (R 923). Appellant devoted the rest of the letter to complaining about the security measures employed by the jail (R 923-924).

A change of venue was subsequently granted and venue changed to Escambia County, with the trial formally commencing on October 10, 1994. At this time, Attorney Sheffield drew the court's attention to this letter, and Appellant addressed the court, complaining about counsel's "attitude" (R 1647). Judge Steinmeyer observed that there had already been discussions of this matter, and stated that he saw no need for Mr. Sheffield to be replaced; the judge also stated that he had not seen anything to suggest that

the attorney's attitude towards the defense was 'lackadaisical" (R 1648). Judge Steinmeyer expressly stated that he would 'be happy to consider anything else which Mr. Howell had," and asked him if there was anything which he wished to say (R 1648-1649). Appellant then asked how an attorney could say there was no defense and still be effective, and the judge reminded Appellant that it was his choice that no insanity defense be presented; the judge also stated that counsel had an obligation to see that all of Appellant's rights were protected, and assured Howell that Attorney Sheffield would do so (R 1649-1650). The judge stated that he would continue with his prior ruling, and had asked Appellant if he wanted to raise anything else; Appellant answered in the negative (R 1650-1651).

The case then proceeded to voir dire, and the record indicates that Attorney Sheffield consulted with Appellant on a regular basis before exercising jury challenges (R 2014, 2018, 2049). At one point in the course of voir dire, the prosecutor noted for the record that Attorney Sheffield had consulted with Attorney Rand who had served as counsel for Appellant's brother, who had entered a plea in this case (R 1848-1849). Defense counsel stated that there **was** no "adversity" involved, and the court specifically inquired of Appellant as to his views on this matter (R 1850-1851) . Appellant

stated that he had 'no problem" with it, and was satisfied that such **was** in his best interests; he affirmatively stated that it was his desire that Attorney Rand be available to Mr. Sheffield (R 1851-1852).

Trial formally began on October 12, 1994, and the next day, Appellant again voiced concerns about counsel. After Sheffield's cross-examination of Tammie Bailey, one of the intended victims in this case, Howell stated that he did not feel that he had 'the best attorney he could have," in that Attorney Sheffield had not asked the questions which Appellant himself had suggested; Howell stated that he did not think that his attorney was prepared (R 2472). Attorney Sheffield stated on the record that he had consulted with Appellant prior to trial and had discussed his approach to the case. Counsel stated that he had told Appellant that he did not find it best to 'challenge certain portions of the evidence," which would 'come in anyway," and that he did not wish to get 'bogged down" in "the little nitty gritty details" (R 2472-2473) . Defense counsel stated that he had told Appellant what he intended to do and that Appellant had concurred, and, further, that he had stuck to that course (R 2473). Attorney Sheffield also stated, however, **that Appellant had refused to talk to him** and that he was concerned that the jury had noted Appellant's outbursts (R 2473).

Appellant then complained that he had requested that Sheffield "call a couple of witnesses," and that counsel had not done so (R 2473-2474). The court pointed out that the State was currently presenting its case, and defense counsel stated that he had advised Appellant of this fact, and had further told him that there was no point in refuting matters which 'are of no consequence as far as the defense of his case is concerned" (R 2474). The court reminded Appellant that Attorney Sheffield had advised the jury in his opening statement that the defense would not be contesting all of the State's case, and advised Appellant that this was an accepted and permissible tactic, which was not uncommon in criminal cases (R 2475-2476). Attorney Sheffield confirmed that he had discussed Appellant's prior cases with his former counsel, and had reviewed all the records and files (R 2478). Judge Steinmeyer stated that he saw no need to 'make any change at this time." (R 2478).

At the time that the defense rested, the court specifically inquired of Appellant as to whether he understood that he had the right to take the stand, and Appellant confirmed that he had discussed the matter with counsel and decided not to do so (R 2980-2983). Following Appellant's conviction, the penalty proceedings began on October 19, 1994. At this time, defense counsel stated that, after talking with the defense mental health expert, Dr.

McClaren, he wished to renew his motion to have Appellant examined (R 3153). After hearing from Dr. McClaren, as well as Appellant himself, Judge Steinmeyer granted the motion, and appointed Dr. McClaren, as well as Dr. Larson, to be the court's experts (R 3172; 1020). Two days later, both experts announced findings to the effect that Howell was, in fact, mentally competent, and the court entered its finding in accordance therewith (R 3186-3190). During his subsequent testimony at the penalty phase before the jury, Dr. McClaren stated that he had met with Appellant in February of 1993, and in August of 1994, and that he had likewise spoken with members of Appellant's family, including his mother, sister and wife (R 3209-3214). The witness testified that he did not believe that Howell had been insane at the time of the offense, although he had been "in decline" (R 3219). The witness affirmatively testified that the mental mitigator relating to mental and emotional distress applied (R 3220), and Judge Steinmeyer found such factor in his sentence (R 1157-1158).

B. No Actual Conflict of Interest Was Demonstrated *Sub Judice*

Among the arguments presented on direct appeal is Howell's claim that a conflict of interest existed between himself and Attorney Sheffield due to the telephone threat during the federal

trial (Initial Brief at 56-58). This matter **was**, of course, first brought to the court's attention not by Appellant but rather by the prosecution out of an abundance of caution; indeed, Howell's letter of March 19, 1993, had made no reference to this matter (R 307-310). Although Appellant suggested at one point that this event had "poisoned" his relationship with counsel, Attorney Sheffield affirmatively stated that the incident had had no such effect. The attorney stated in open court, repeatedly, that the problems which had existed between the two at the time of the federal trial no longer existed, and that he was not concerned about any 'threat" (R 1236). Appellee would maintain that a sufficient inquiry was held as to this matter, and that the trial court's determination that the State's unusual motion to disqualify counsel, largely premised upon this alleged conflict, was not error.

This Court has held that in order to demonstrate a violation of the right to conflict-free counsel, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. See Bouie v. State, 559 So.2d 1113, **1115** (Fla. 1990) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). Additionally, the party seeking withdrawal of counsel bears the burden of demonstrating that substantial prejudice will result if withdrawal is not allowed. Schwab v.

State, 636 So.2d 3, 5-6 (Fla. 1994). Here, the State's motivation in raising this matter was primarily to **allow** a sufficient inquiry to be made, and such was, in fact, conducted; the prosecutor specifically disavowed any suggestion that the State was attacking the competence of counsel (R 1199). After hearing Attorney Sheffield state that he was more than willing to continue to represent Appellant, and that this event had had no effect, Howell essentially told the judge that he would leave it up to the court to determine whether withdrawal or disqualification was necessary (R 1250). The court's decision that withdrawal or disqualification of counsel was not necessary was not error, or an abuse of discretion, given the failure of any party to demonstrate either actual conflict or substantial prejudice.

At the time that the motion was formally denied, ten months had elapsed since the federal trial, and, during that time, despite the fact that Mr. Howell had indeed "gone down" (i.e., had been convicted in federal court), no repercussions had ensued to anyone, including Mr. Sheffield; of course, Appellant's trial would not take place for another eleven months, in any event. Sheffield had, by this point in time, represented Appellant for almost two years on the state charges, and was obviously very familiar with the case, due to his participation in both proceedings. Further,

although Howell asserted that the telephone threat had caused an adverse effect upon his mother and wife "who the threats supposedly came from" (R 1238), this record does not contain any specific accusation by Mr. Sheffield of anyone in regard to the anonymous threat; likewise, it should be noted that Appellant's mother and wife consulted with the defense expert, who testified at the penalty phase (R 3209-3214). While cases involving situations such as that sub judice are not legion, this case would seem to bear great similarity to Maddox v. State, 715 S.W.2d 10 (Mo. App. 1986). In such case, the defendant claimed that a conflict of interest had existed between himself and his attorney, because the latter had believed that Maddox had burglarized his home. The reviewing court found that withdrawal of counsel had not been required, in that, at most, the attorney had had a generalized concern or suspicion. Here, especially in the absence of any desire on Sheffield's part to withdraw on these grounds, as well as the evidence in the record to the effect that no threat may, in fact, have occurred, the trial court's resolution of this matter was not error, and Howell's conviction should be affirmed.

Appellant also contends that conflict of interest existed stemming from the fact that Attorney Rand assisted Attorney Sheffield with a portion of the jury selection (Initial Brief at

56-57). The record reflects that this was likewise a matter brought to the court's attention by the State (R 1848-1852); Rand's client, Patrick Howell, entered a plea of guilty in this case and did not testify at Appellant's trial (R 2102-2103). Once this matter was brought to the court's attention, Judge Steinmeyer fully inquired of Appellant in this regard, and Appellant stated that he had 'no problem" (R 1851-1852). In doing so, the court pointed out that in the past the interests of the two brothers "were in conflict", and noted that Appellant had been attacked physically by his own brother (R 1851). Appellee would suggest that the court's inquiry was sufficient, and that, in fact, no actual conflict of interest existed at the time that Attorney Rand assisted in jury selection; Attorney Sheffield repeatedly consulted with Appellant as to jury challenges, and prior to the actual selection of the jury (R 2014, 2018, 2049), and the record does not reflect any further participation by Rand. Cf. Larzelere v. State, 676 So.2d 394, 403 (Fla. 1996); Bouie, supra.

C. The Trial Court Conducted Sufficient Inquiry Into Appellant's Disagreements With Counsel And No Good Cause Was Demonstrated For Counsel's Withdrawal Or Removal

Appellant likewise maintains that the court below committed reversible error in failing to conduct sufficient inquiry into

Appellant's disagreements and/or dissatisfaction with counsel, pursuant to Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), and that, additionally, the court also erred in failing to remove Sheffield (Initial Brief at 51-55). Appellee disagrees. The record reflects, instead, that Judge Steinmeyer conducted extensive inquiries into all of Howell's complaints concerning counsel, and determined that such did not rise to the level of ineffective assistance of counsel. Likewise, the court recognized that, regardless of whatever rhetoric in this vein was utilized by Howell below (or which is at present utilized by Howell's appellate counsel), Appellant's complaints concerning counsel were the result of a difference in strategy between the two. Appellant insisted that his counsel not present any defense premised upon insanity, and counsel acceded to his client's wishes. To the extent that there was a conflict over strategy between attorney and client, the latter prevailed, and Howell has no basis for further complaint on appeal.

Although Appellant suggests that courts conducting Nelson inquiries should essentially follow a "check list" (Initial Brief at 51-55), the State disagrees, and would note that in Lowe v. State, 650 So.2d 969, 975 (Fla. 1994), this Court held that, as a practical matter, a trial court's inquiry into a defendant's

complaints concerning counsel need be **only** as specific and meaningful as the underlying complaint. See also Kott v. State, 518 So.2d 957, 958 (Fla. 1st DCA 1988) (court's failure to conduct thorough inquiry into defendant's complaints about counsel not in and of itself a Sixth Amendment violation). As noted earlier, it is the State's position that Judge Steinmeyer fully complied with this Court's precedents in all pertinent respects.

At the hearing of November 19, 1993, Appellant and counsel both addressed the court and were able to have their say as to the alleged conflict arising from the phone threat at the federal trial. Appellant expressly stated that he left the matter to the court to determine, which the court did (R 1250). In the subsequent hearings of September 8, September 16, and September 19, 1994, Judge Steinmeyer allowed both Sheffield and Howell to fully state their respective points of view concerning their disagreement involving the insanity defense, and the judge specifically advised Appellant that mental mitigation could be of benefit at any penalty phase (R 1479-1484, 1572-1573). At one point during the proceeding of September 16, 1994, when Mr. Howell again made reference to the prior phone threat and stated that his family did not trust Sheffield as a result, Judge Steinmeyer reminded Appellant that he certainly had the ability to encourage his family to cooperate with

counsel ; the judge also expressly asked Appellant point blank if he was asking to discharge Sheffield, and Appellant essentially demurred (R 1544-1544).

Likewise, the court allowed Howell full opportunity to set forth any further complaints which he had after the matter of the insanity defense had been resolved. Rather paradoxically, Howell then questioned what defense his attorney would be presenting on his behalf, after refusing to authorize counsel to present the defense which counsel himself had felt stood the best chance (R 1600-1601). Judge Steinmeyer extensively inquired of counsel as to his familiarity with the facts of the case and his ability to present an alternative defense (R 1603-1604). When Appellant sent a letter to the court which essentially rehashed his prior concerns at this hearing, the court, on October 10, 1994, again gave Appellant the full opportunity to set forth his concerns. The court reminded Appellant that it had been his decision to forego the insanity defense, and asked Appellant if there were anything new; there essentially was not (R 1647-1650). Finally, when, on the second day of trial, Appellant complained that his attorney was not calling witnesses or cross-examining the State's witnesses sufficiently, the court held a full inquiry on these matters, and allowed both parties to set forth their points of view (R 2472-

2478). Attorney Sheffield maintained that he had discussed his strategy in advance with Appellant, and that Appellant had not objected; Appellant Howell did not contest these representations (R 2473). Judge Steinmeyer noted that he saw no reason to make any "changes" at this time, and it should be noted that Appellant voiced no further dissatisfaction with counsel throughout the rest of the proceedings below.

This Court has held that a trial court is only required to hold a Nelson inquiry if the defendant's complaints concerning counsel involve allegations of ineffective assistance, see Smith v. State, 641 So.2d 1319, 1321 (Fla. 1994), and courts have specifically held that a disagreement or conflict over strategy between attorney and client does not constitute an allegation of ineffective assistance for purposes of Nelson. Johnson v. State, 560 So.2d 1239 (Fla. 1st DCA 1990) (where defendant's motion to discharge counsel premised upon alleged conflict over strategy, rather than incompetency of counsel, court not obliged to conduct inquiry set forth in Nelson). Because, in this case, Appellant's complaints concerning counsel would seem to be more in the nature of strategic differences, rather than allegations of ineffectiveness per se, it is questionable, under the above precedents, the extent to which Nelson applied.

To the extent that it did apply, the court fully complied with it. The purpose of any inquiry would seem to be to determine the nature of a problem and to solve it. Here, the court determined the nature of the disagreement between attorney and client, and resolved such in Howell's favor. Further, to the extent that Appellant contends that the court below erred in not advising Appellant more specifically as to his rights under Faretta, such claim would be without merit. Appellant never made even an equivocal request to represent himself, and, indeed, in his letter to the court of September 21, 1994, affirmatively stated that he did not intend to waive his right to counsel (R 923). Under these circumstances, no error has been demonstrated. See, e.g., Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991) ("While the better course would have been for the trial court to inform Capehart of the option of representing himself, we do not find it erred in denying Capehart's request for new counsel"; defendant never requested to represent himself and indicated dissatisfaction only with counsel); Bowden v. State, 588 So.2d 225, 229 (Fla. 1991) (defendant not entitled to inquiry on subject of self-representation, where alleged requests were at best equivocal, and court conducted adequate inquiry into defendant's complaints concerning counsel); Watts v. State, 593 So.2d 198, 203 (Fla. 1992)

(defendant not entitled to inquiry on self-representation in absence of unequivocal request for such; sufficient inquiry held on defendant's complaints concerning counsel and requested discharge of such); Smith, supra (court not required to inform defendant of right to self-representation and to determine whether defendant knowingly waived counsel, where defendant's letter to court did not contain explicit assertion of such right).

As to Judge Steinmeyer's resolution of Appellant's complaints concerning counsel, Howell has failed to demonstrate any error or abuse of discretion. The trial court felt that it was ultimately Appellant's decision as to whether or not to present a defense of insanity, and opposing counsel has failed to cite any authority for the proposition that such ruling was in error, see, e.g., Curtis v. State, 21 Fla. L. Weekly S442 (Fla. October 10, 1996) (not error for court to deny continuance requested by defense counsel, where defendant opposed such motion, and where defendant's decision "was informed and knowing and was properly within his purview"; citation to 2 Wayne R. Lafave & Jerrold H. Israel, Criminal Procedure §11.6 (1984)); as demonstrated by the later testimony of the mental health expert, it would not appear that, in fact, any viable insanity defense existed (R 3219).

In resolving Appellant's later complaints, the trial court was no doubt well aware that its primary responsibility was to facilitate the orderly administration of justice and that the removal of counsel would not be required **as** long as the court had a reasonable basis to believe that the attorney/client relationship had not deteriorated to a point where counsel could no longer give effective aid in the fair presentation of a defense. Sanborn v. State, 474 So.2d 309, 314 (Fla. 3d DCA 1985). The United States Supreme Court has expressly held that a defendant does not have the right to a "meaningful" relationship with his attorney, see Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), and Appellant Howell sub judice must bear a good deal of the responsibility for any lack thereof sub judice. The record in this case would support no contention that the relationship between attorney and client **was** so irretrievably broken that Appellant's right to a fair trial was denied.[2] Accordingly, the instant

[2] The record reflects that, although the defense did not call any witnesses, Attorney Sheffield fully cross-examined the State's primary witnesses, and argued to the jury that reasonable doubt existed as to Appellant's guilt (R 2336-2444, 2369-2381, 2518-2528, 2541-2548, 2698-2713, 2998-3029, 3078-3095). Opposing counsel suggests no alternative theory of defense which would have created a better chance of success, and the suggestion that Sheffield **was** "unprepared" to cross-examine witnesses (Initial Brief at 50) is specious. The record simply reflects that, at one point, Attorney Sheffield pointed out that the State was changing the order of its

convictions should be affirmed in all respects. See Bowden, supra (not error to deny defendant's request to remove counsel where "any problems with the representation were caused by Bowden's refusal to cooperate with his attorney"); Koon v. State, 513 So.2d 1253, 1255 (Fla. 1987) (not error to deny defendant's motion to discharge counsel where counsel very familiar with facts of case due to participation in prior proceeding, and nothing in record indicated that defendant "could have been better served by other counsel.").

D. Denial Of Howell's Request For ___itional Trial Counsel Was Not Error

As the final portion of this claim on appeal, Howell contends that it was error for the court to have denied Attorney Sheffield's request that another attorney be appointed to assist him. As Appellant concedes (Initial Brief at 60), such ruling is reviewable under the abuse of discretion standard. No abuse of discretion has been demonstrated sub iudice. As this Court held in Armstrong v. State, 642 So.2d 730, 737 (Fla. 1994), appointment of multiple counsel to represent an indigent defendant is within the discretion

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witnesses and that he had not prepared a cross-examination due to other commitments and the change in strategy arising from the recent entry of a plea by Patrick Howell (R 2261-2262). The judge responded that this was understandable, and the State called only one non-critical witness for the remainder of that day (R 2264-2298).

of the trial court, and is based upon a determination of the complexity of a given case and the attorney's effectiveness therein. This Court has consistently affirmed a trial court's decision not to appoint multiple counsel. See Reaves v. State, 439 So.2d 1, 6 (Fla. 1994); Armstrong, supra; Lowe, supra; Ferrell v. State, 653 So.2d 367, 369-370 (Fla. 1995); Larkins v. State, 655 So.2d 95, 100 (Fla. 1995). Appellant's case presents no exception to this rule. While the number of witnesses called was not small, the underlying issue was not complicated - such issue being Appellant's responsibility for the bomb which ultimately killed the trooper in this case. Due to his prior experience with the federal prosecution, Attorney Sheffield was well versed in the facts of this case, and this prosecution was not so unduly complex that multiple representation was required. Reversible error has not been demonstrated, and the instant convictions should be affirmed in all respects.

ISSUE II

DENIAL OF APPELLANT'S REQUESTED PENALTY PHASE INSTRUCTIONS WAS NOT ERROR

As his next point on appeal, Howell contends that his sentence of death must be reversed because the trial court erred in denying his requested penalty phase jury instructions, and, additionally,

in instructing the jury in accordance with the standard instructions. Although Appellant concedes that this Court has consistently rejected comparable arguments in the past (Initial Brief at 61-62), he maintains that this Court should reconsider its prior position in this area of the law. Appellee would contend that Appellant has failed to demonstrate any basis for this Court to depart from the established law, and that the instant sentence of death should be affirmed in all respects.

The requested instructions related to the following matters: Instruction #2 (jury should not form any opinion as to sentence until all evidence, argument and instructions have been presented); Instruction #3 (the fact that the jury had convicted Howell of murder did not mean that death was the appropriate sentence); Instruction #5 (the fact that the trial court had to afford great weight to the jury's recommendation); Instruction #8 (unanimity required as to aggravators, but jury can find mitigation if reasonably convinced); Instruction #9 (finding an aggravating circumstance does not itself authorize a recommendation of death); Instruction #12 (finding an aggravating circumstance does not automatically mean that death should be recommended, as such must be weighed against mitigation); Instruction #14 (mitigation is unlimited and any factor standing alone could support a life

recommendation); Instruction #15 (sentencing is not a counting process and reasoned judgment is required); Instruction #16 (State has burden to prove death is appropriate); Instruction #17 (life can be recommended even in the absence of finding any specific mitigating circumstance), and Instruction #18 (jury's recommendation need not be unanimous) (R 995, 996, 998, 1001, 1002, 1005, 1008, 1009, 1010, 1011). As noted in the Initial Brief, the trial court denied these requested jury instructions, on the grounds that they were either subsumed within the standard instructions or incorrect statements of the law (R 3146-3149).

Under this Court's precedents, error has not been demonstrated. See, e.g., Johnson v. State, 660 So.2d 637, 647 (Fla. 1995) (not error to utilize standard instructions at penalty phase, as such instructions did not fail to advise jury as to how to weigh aggravating and mitigating circumstances, shift burden onto the defense or denigrate jury's role); Gamble v. State, 659 So.2d 242, 246 (Fla. 1995) (not error for court to deny defendant's requested instruction which would have told jury that life could still be recommended in face of aggravation and which would have more fully defined mitigating circumstances) ; Ferrell, 653 So.2d at 370 (not error for court to deny requested instructions that advised jury that death was reserved for the most aggravated and

least mitigated of offenses, that each juror should consider mitigation individually and that defined how mitigating circumstances should be considered); Guzman v. State, 644 So.2d 996, 1000 (Fla. 1994) (trial courts directed to utilize standard jury instructions unless legal justification exists to modify such); Foster v. State, 614 So.2d 455, 462 (Fla. 1992) (not error to deny requested instruction on jury's pardon power); Waterhouse v. State, 596 So.2d 1008, 1017 (Fla. 1992) (not error to fail to instruct jury that each juror should make individual determination as to mitigation); Mendyk v. State, 545 So.2d 846, 849 (Fla. 1989) (not error to deny specific instruction on jury's pardon power). The instant sentence of death should be affirmed in all respects.

ISSUE III

NO ERROR HAS BEEN DEMONSTRATED IN REGARD TO THE SENTENCER'S FINDINGS IN MITIGATION

As his next point on appeal, Howell contends that Judge Steinmeyer erred in failing to adequately weigh and/or "evaluate" the mitigating circumstances, in violation of such precedents as Campbell v. State, 571 So.2d 415 (Fla. 1990). Appellant specifically argues that the judge failed to address the proposed mitigator of age in his original sentencing order, and, further, that the court erred in only allocating little weight to the

statutory mitigating circumstance of extreme mental or emotional disturbance, under §921.141(6)(b), Fla.Stat. (1993). Additionally, it is maintained that the sentencer failed to consider all the non-statutory mitigation in the record, and that its rejection of some such factors was flawed, especially that in regard to the alleged disparate treatment of co-defendants. All of Appellant's complaints are without merit, and the instant sentence of death should be affirmed in all respects.

The record in this case indicates that Attorney Sheffield called three witnesses at the penalty phase (R 3204-3234). The first witness, Dr. McClaren, testified extensively as to all aspects of Howell's life, describing his childhood, marriage, military service, employment history and mental or emotional problems. The witness noted that Appellant's IQ had been measured as 109 when he was in the military, but that recent testing had resulted in a score of 84 (R 3217); Dr. McClaren felt that, because of the significant decline in his level of stability from the time that he left the military to the time of the offense, the mental mitigator of extreme mental or emotional disturbance applied. The expert did not offer a formal diagnosis of Howell, and stated that it was "hard to know" what had caused this decline (R 3218). Both on direct and cross-examination, the expert testified that Howell's

preparation and "sanitization" of the bomb was something which showed understanding or rationality (R 3219, 3223).

The next witness, FDLE Agent Kinsey, testified that one of Patrick Howell's cellmates had indicated that Patrick Howell had once stated that it was he who had directed Appellant to send the bomb to kill Tammie Bailey and Yolanda McAllister (R 3225) . Kinsey also testified that Patrick Howell had entered a plea of guilty to first-degree murder in this case, and had received a life sentence (R 3226). On cross-examination, the witness testified that no evidence had been found to corroborate the cellmate's assertion (R 3228-3229). The final defense witness was Kenneth Fortune, the Sheriff of Jefferson County, who testified that Howell had 'been no major problem while he has been in our custody" (R 3233); on cross-examination, however, the Sheriff stated that a number of items had recently been seized from Appellant's custody, including batteries (R 3234).

In his closing argument to the jury, Attorney Sheffield argued that the two statutory mitigating circumstances of no significant criminal history and extreme mental or emotional disturbance applied (R 3252); he also argued that the jury should consider such non-statutory mitigating factors as Appellant's military service, his status as a good father and family man, and the fact that he

had been a good prisoner (R 3252-3253). Counsel likewise drew the jury's attention to the sentences received by Patrick Howell and Lester Watson, the driver of the car (R 3254-3258). Following the jury's recommendation of death, Attorney Sheffield filed a sentencing memorandum with the court, identifying these same factors for the court (R 1110-1119); a number of letters from various individuals was attached to this memorandum (R 1123). At the sentencing hearing of December 13, 1994, defense counsel essentially relied upon his sentencing memorandum, and four members of Howell's family asked the court for mercy (R 3275, 3320-3325).

In sentencing Appellant to death, Judge Steinmeyer found that five (5) aggravating circumstances had been established beyond a reasonable doubt (see Points IV-VIII, infra). In mitigation, the judge found that two (2) statutory mitigating circumstances had been established - that Howell had no significant criminal history, under §921.141(6)(a), Fla.Stat. (1993), and that the capital felony had been committed while Howell was under the influence of extreme mental or emotional disturbance (R 1157-1158); the court stated that it gave little weight to this latter circumstance, given, inter alia, the "cunning, diabolical and detailed plan" which Appellant had set into motion (R 1157-1158). Judge Steinmeyer noted that, with the exception of age, Howell had not requested

jury instructions on any of the other statutory mitigating circumstances, and found that, in fact, none applied; as to age, the court found that this factor was likewise not applicable, because Howell's age had played no part in his actions at the time of the offense (R 1158).

As to non-statutory mitigation, the judge discussed the four factors identified by counsel in his memorandum (R 1159-1160). As to Howell's military service and honorable discharge, the court found that the evidence established this factor, and that it was afforded little weight (R 1159). As to Howell's good behavior in jail, the court found that this factor had been established and that it had been considered as a mitigating circumstance (R 1159). As to Howell's status as a 'good family man, husband and father", the judge found that, although the testimony had established these matters, their validity was undermined by the evidence of Howell's involvement in drug trafficking and bomb-making while at home; accordingly, the court stated that this mitigating circumstance was "inconsequential" (R 1159). Finally, as to any alleged disproportionate punishment, the court found:

> The Defendant has raised the question of the proportionality of the sentence sought to be imposed on this Defendant in comparison to the sentences imposed on two others involved in this crime. Defendant's brother, Patrick

> Howell, received a sentence of life imprisonment without eligibility for parole for twenty five years. According to the statements made by the prosecutor at the time the Court agreed to accept the plea of the brother, the State only had one uncorroborated witness as to the brother's involvement which was to direct the Defendant to commit the crime. The other defendant, Lester Watson, pled to Second Degree Murder and was sentenced to forty years in prison. His involvement was to drive the car with the giftwrapped bomb in the trunk and deliver the bomb to the intended victim. There was some question as to whether he knew that the bomb was in the car, he indicated that he thought that the package contained drugs for sale. In any event as soon as he learned of the Trooper's death he cooperated completely with law enforcement officers which resulted in a compelling case against the Defendant.
>
> There is no question but that this Defendant is by far the most culpable of those involved and, therefore, that there is no problem of proportionality with a sentence of death for this Defendant.

(R 1160).

In light of the above, Appellant's complaints concerning the sentencing order sub judice are clearly unfounded. To the extent that it is contended that Judge Steinmeyer failed to consider and/or "evaluate" all mitigation argued by the defense, such claim is refuted by the record. As to non-statutory mitigation, the judge addressed in his order all the matters identified by defense counsel in his sentencing memorandum. This Court held in Lucas v.

State, 568 So.2d 18, 24 (Fla. 1990), that because non-statutory mitigation is so individualized, the defense must share the burden in identifying for the court the specific non-statutory circumstances which it is attempting to establish. Although defense counsel did attach a number of letters to his sentencing memorandum, he never discussed, summarized or made reference to their contents in the course of his pleading. Under Lucas it was not the sentencing court's responsibility to cull through these documents for potential non-statutory mitigation. See also Hodges v. State, 595 So.2d 929, 934-935 (Fla. 1992) (not error for court to fail to specifically address as non-statutory mitigation defendant's childhood, educational background, close family relationships and employment history where defense counsel did not point out these matters); Thompson v. State, 648 So.2d 692, 697 (Fla. 1994) (not error for trial judge to fail to specifically delineate in sentencing order certain mitigating factors, in absence of specific request by defense counsel).

Additionally, Appellant's argument concerning the **statutory** mitigating circumstance of age is technical in the extreme. In his original sentencing order, the judge did not address age as a potential mitigating circumstance (R 1097-1106). Following a letter from defense counsel, which is not in the record (R 1134),

an amended sentencing order was filed, which did address age (R 1152-1161). Appellant's argument in this court is that this amended order is a nullity, because it was not filed until after the notice of appeal (Initial Brief at 65-66). This argument, of course, elevates form over substance to an unprecedented degree, and ignores the fact that, in the sentencing memorandum, defense counsel never urged that this statutory mitigating circumstance should be found. Cf. Lucas, supra. Appellant's reliance upon Hernandez v. State, 621 So.2d 1353 (Fla. 1993), in which no sentencing order at all was rendered until twelve (12) days after pronouncement of sentence is clearly misplaced. The judge's reasoning for rejecting age as a mitigating factor is clearly set forth in the record at the time that he denied the defense request that the jury be instructed on the mitigating factor, a ruling unchallenged on appeal.

At such time, defense counsel, although requesting that an instruction be given on this factor, also advised the court, 'The caselaw basically says it's up to you," in that Appellant's age was twenty-five or twenty-six (R 3130-3131). Judge Steinmeyer ruled that, in the absence of any evidence of immaturity on Appellant's part, the instruction would not be given, stating,

> . . . it would seem to me that with Mr. Howell's circumstances as I know them from the evidence, is that he was married, had a child, had spent some substantial amount of time in the military, had previously been employed since he was out of the military. And there just doesn't seem to me to be any significance that could be attached to the age at which he was when the incident occurred.

(R 3131-3132).

This ruling is, of course, completely in accord with this Court's precedent. Under this Court's caselaw, it is clear that no jury instruction was required. See, e.g., Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) (where defendant was twenty-five years of age, no instruction on statutory mitigator required); Washington v. State, 362 So.2d 658, 667 (Fla. 1978) (defendant's age of twenty-six need not be considered in mitigation). Likewise, under this Court's caselaw, an age of twenty-six can properly be rejected when, as here, the defendant has married, fathered a child, lived as an adult, served in the military and been gainfully employed, and there is an absence of any evidence of unexpected immaturity. See, e.g., Gore v. State, 599 So.2d 978, 987, n.10 (Fla. 1992) (defendant's age of twenty-four could properly be rejected where he was of average intelligence, had completed a portion of high school and was 'streetwise"); Routly v. State, 440 So.2d 1257, 1266 (Fla. 1983) (defendant's age of twenty-five could be rejected as

mitigator, based upon court's observations of defendant, features of the crime, etc.). Assuming that the amended sentencing order cannot be considered for any reason, and, further, that it was the judge's obligation to set forth his reasoning for rejecting a mitigating circumstance which: (1) was insufficient to merit a jury instruction and (2) which defense counsel did not urge in his sentencing memorandum, it is clear that error has not been demonstrated.

The remainder of Appellant's claims on appeal relate to the weight which the court afforded the mitigation which it found, as well as to the court's ultimate conclusion that the aggravation outweighed the mitigation and that death was the appropriate sentence. This latter matter is clearly not appealable. See, e.g., Hudson v. State, 538 So.2d 829, 831 (Fla. 1989). As to Howell's other claim, this Court has likewise held that the decision as to whether a mitigating circumstance has been established, as well as the specific weight to be afforded such, lies within the discretion of the trial court. See, e.g., Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996); Foster v. State, 679 So.2d 747, 755-756 (Fla. 1996); Foster v. State, 654 So.2d 112, 114 (Fla. 1995); Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994); Sireci v. State, 587 So.2d 450, 453 (Fla. 1991). The sentencer's findings

as to mitigation are fully supported by the record, and no abuse of discretion has been demonstrated.

As to the statutory mitigating factors, Judge Steinmeyer was justified in allocating little weight to any mental or emotional disturbance suffered by Howell at the time of the murder. Dr. McClaren did not offer any specific diagnosis of Appellant, and all accounts of hallucinations or delusions, etc., on the part of Appellant were simply hearsay from Howell's family. Likewise, the record would fail to support any contention that any mental or emotional disturbance precluded Howell from appreciating his actions at the time of the offense or that such conditions detracted from his culpability in any significant fashion. Lester Watson testified in detail as to the manner in which Howell planned the trip to Marianna and as to the extensive care which he took when, while wearing gloves, Appellant ever so carefully packed the explosive-filled microwave; Watson was, however, unaware at this time of its contents (R 2674-2685). Even the defense expert had observed that Howell's "sanitization" of the bomb had reflected rationality or understanding (R 3219, 3223). No abuse of discretion occurred sub judice. See, e.g., Williamson v. State, 681 So.2d 688, 698 (Fla. 1996) (trial court did not abuse discretion in rejecting mental mitigation, given conflicts in or

insufficiency of evidence); Johnson, 660 So.2d at 647 (sentencer's conclusion that defendant's psychological difficulties only constituted non-statutory mitigation not abuse of discretion, given anecdotal nature of evidence and conflicts therein). Howell's complaints as to the statutory factor relating to lack of significant criminal history (Initial Brief at 68), are without merit. Judge Steinmeyer stated that he found this mitigator proven, and that he considered it in determining the appropriate sentence (R 1157); the fact that the judge did not expressly allocate it a finite amount of "weight" does not mean that it was dismissed, cf. Campbell, supra, and no error has been demonstrated.

Appellant's complaints as to the non-statutory mitigation are equally unavailing. Although Appellant similarly complains that the sentencer did not assign a finite amount of weight to his good behavior while incarcerated, it is clear that there was no requirement to do so. See Atwater v. State, 626 So.2d 1325, 1329-1330 (Fla. 1993) (although court did not indicate extent to which factor existed, evident that non-statutory mitigation was weighed and considered). As to Appellant's complaint that Judge Steinmeyer assigned "inconsequential" weight to Howell's status as a good family man (Initial Brief at 69-70), it is clear that deciding whether a defendant's family history establishes a mitigating

circumstance is within the court's discretion. Sochor v. State, 619 So.2d 285, 293 (Fla. 1993). Indeed, in Sochor, this Court found no error in the sentencer's conclusion that the defendant's family and personal history was so insignificant as to fail to constitute mitigation at all. Here, the sentencer did not abuse his discretion in affording Appellant's family activities minimal weight. As the court correctly noted, Howell chose to conduct his bomb-making activities in the family home; a great amount of bomb-making materials were removed from the home at the time of Howell's arrest, and Howell actually detonated bombs in the backyard, leaving behind "craters" (R 2330-2334, 2353-2361, 2367, 2507-2511, 2516, 2662, 2751, 2815-2820, 2823-2831). No abuse of discretion has been demonstrated sub judice.

Howell's final claim relates to the sentencer's rejection of the mitigating circumstance relating to any alleged disparity between Appellant's sentence and that of former co-defendants Patrick Howell and Lester Watson. Judge Steinmeyer's finding that Paul Howell was 'by far the most culpable of those involved" is clearly supported by the record. Patrick Howell was in jail at the time of the murder, and the only evidence which linked him to the bombing, as opposed to the drug trafficking and the murder of Alphonso Tillman, was the uncorroborated testimony of a cellmate,

which, for purposes of Paul Howell's sentence, the State was not obliged to accept. Cf. Walls v. Stat-e, 641 So.2d 381, 387 (Fla. 1994). None of the witnesses produced by the State offered any testimony consistent with this allegation, and some specifically testified to statements made by Appellant in which he alone took responsibility for this offense (R 2362-2363, 2516, 2747, 2770-2771). As to Lester Watson, there was, as Judge Steinmeyer noted, no definitive proof that Watson knew beforehand that he was carrying a bomb, and Appellant's own statements indicate that he did not know such fact; while incarcerated, Howell lamented to one of his cellmates that if only Watson had gone into the taped-up package looking for drugs, and gotten his own head 'blown off", Appellant "wouldn't be in such a mess" (R 2770).

It is well established that while disparate treatment of an equally culpable co-defendant may render a defendant's sentence disproportionate, disparate treatment is not impermissible when it is the defendant who is the more culpable. See Larzelere, supra; Cardona v. State, 641 So.2d 361, 365 (Fla. 1994); Hannon v. State, 638 So.2d 39, 44 (Fla. 1994); Hoffman, 494 So.2d 1178, 1182 (Fla. 1985) (it is permissible to impose different sentences on capital defendants whose various degrees of participation and culpability are different from one another). There can be no

question that Paul Howell was the dominant force behind this homicide, and the fact that the prosecution entered into plea bargains with other less culpable participants does not mitigate Appellant's sentence or render it disproportionate. See Garcia v. State, 492 So.2d 360, 368 (Fla. 1986); Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987). Finally, to the extent that error has been demonstrated as to this portion of the claim, or any other, such was surely harmless beyond a reasonable doubt, given the overwhelming and substantial aggravation. See, e.g., Cook v. State, 581 So.2d 141, 144 (Fla. 1991); Wickham v. State, 593 So.2d 191, 194 (Fla. 1991); Wuornos v. State, 644 So.2d 1000, 1011 (Fla. 1994). The instant sentence of death should be affirmed in all respects.

ISSUE IV

FINDING OF THE AGGRAVATING CIRCUMSTANCE RELATING TO GREAT RISK WAS NOT ERROR

In sentencing Appellant to death, Judge Steinmeyer found that five (5) aggravating circumstances had been proven beyond a reasonable doubt - that Howell had knowingly created a great risk of death to many persons, under §921.141(5)(c), Fla.Stat. (1993); that the homicide had been committed during the course of an enumerated capital felony, under §921.141(5)(d), Fla.Stat. (1993);

that the homicide had been committed for purposes of avoiding a lawful arrest, under §921.141(5)(e), Fla.Stat. (1993); that the homicide had been committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, under §921.141(5)(i), Fla.Stat. (1993), and that the victim of the homicide was a law enforcement officer engaged in the performance of his official duties, under §921.141(5)(j), Fla.Stat. (1993). Each of these aggravating circumstances is attacked on appeal. See Issues V, VI, VII and VIII, infra. In this point on appeal, Howell contends that this aggravating circumstance was wrongfully applied, because the trooper 'was alone when the explosion occurred" (Initial Brief at 75), and because the court below allegedly engaged in speculation when it examined the number of persons who would have been at great risk had the bomb reached its intended destination (R 1153-1154). Accordingly, Appellant contends that his sentence of death must be vacated.

The State disagrees, and would contend that the record in this case contains two independent bases for affirming this aggravating circumstance. The prosecutor argued below that this aggravating circumstance was properly supported by evidence establishing that Tammie Bailey, one of the intended victims, lived in a duplex with her child and a cousin; additionally, a mother with two small

children lived on the other side of the duplex. It apparently was Howell's intent that the other victim, Yolanda McAllister, be present, as well as Lester Watson; Watson had been instructed to contact McAllister upon his arrival in Marianna, so that she could lead him to Bailey. The prosecutor noted that the explosive expert had testified that the effect of the blast would have been intensified had it detonated in an enclosed area such as the duplex (R 1130).

These facts are supported by the record, and validate the finding of this aggravating circumstance. Tammie Bailey testified that in January of 1992, she had moved to a new home on Orange Street in Marianna (R 2454); a police officer described the site as a duplex (R 2832), and further testimony was adduced to the effect that a woman with two children lived on the other side of the duplex (R 3199). Appellant knew that Ms. Bailey had a baby (R 2444), and during one of their telephone conversations, Ms. Bailey told Howell that she needed a microwave in order to heat up the baby's bottles (R 2457); Appellant had also apparently asked Yolanda McAllister if Ms. Bailey needed a microwave (R 2245). Appellant had originally solicited Trevor Sealey to take the explosive present up to Marianna to give to the two girls whom he described as "snitching on his brother" (R 2362); likewise,

Appellant told William West that he had sent Lester Watson to Marianna with a pipe bomb in a microwave because he had become upset with Bailey and McAllister (R 2513-2516). The explosives expert testified that Howell had constructed a very sophisticated and powerful device and had maximized its destructive potential (R 2956). He stated that had the bomb been detonated in an enclosed structure such as Ms. Bailey's duplex, the doors and windows would have been blown off and the house would have burned to the ground, due to the bomb's "secondary incendiary effect" (R 2952-2953). It is clear that, had this bomb reached its intended target(s), the criteria for this aggravating circumstance would have been satisfied. See, e.g., Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981) (aggravating circumstance properly found where defendant set fire to condominium with six persons inside).

On appeal, Howell contends, essentially, that because, no thanks to him, the bomb did not go off as originally intended, this aggravating circumstance should not be applied sub judice. To some extent, this would seem to be a question of first impression, although it should be noted that it is well established that transferred intent can properly be utilized to support the finding of aggravating circumstances. See Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986) (cold, calculated and premeditated

aggravator could be found in case where persons other than intended victim were killed); Sweet v. State, 624 So.2d 1138, 1142 (Fla. 1993) (both CCP and avoid arrest aggravators could be found even where intended victim not killed). On the basis of these precedents, the finding of this aggravating circumstance should be affirmed.

Alternatively, Appellee would suggest that this aggravating circumstance can properly be based upon the actions which Howell took in regard to the explosion which actually did take place. The bomb which Howell built was designed to kill whoever opened the door of the microwave (R 2935), and Howell himself told Charles Sinclair that if anyone touched the booby-trapped microwave "the wrong way," "it was supposed to go off." (R 2746-2747). Significantly, Howell made this remark after he learned that Watson had been stopped for speeding in Jefferson County and arrested, and it must be noted that Howell had the opportunity to prevent this explosion, and chose to do nothing. Following Watson's arrest, the Florida Highway Patrol duty officer called Appellant and asked him if he knew Watson or Curtis Williams, the passenger whom Watson had picked up (R 2572-2573). Appellant stated that he had lent the car to Watson, but that he did not know 'he was coming this far in the vehicle" (R 2573). Appellant asked where Watson was being taken,

and he was told that he would be taken to the Jefferson County Jail. Appellant asked for the telephone number there, and also told the officer that he had left a baby bottle behind in the car on the day before (R 2573-2575).

While Appellant is correct in noting that this Court has disapproved the finding of this aggravating circumstance when based upon "what might have occurred," see, e.g., King v. State, 514 So.2d 354, 360 (Fla. 1987) (factor stricken when defendant set fire to house with victim as its only occupant, and two firemen suffered from smoke inhalation), this Court, no doubt fortunately, has never been presented with a case in which a defendant committed murder by means of an explosive device of this magnitude. Appellant Howell constructed an extremely sophisticated and lethal bomb, which he knowingly placed into the stream of commerce; Appellant's intent was that the bomb travel on major interstate highways from Ft. Lauderdale to Marianna, a voyage which would take it virtually the length and breadth of the state of Florida. In Appellant's own words, the bomb would go off if someone touched it "the wrong way" (R 2746-2747). The State would maintain that Howell's actions, and failure to act, gave rise to a great risk of danger to many persons per se.

In Xamwff v. State, 371 So.2d 1007, 1009-1010 (Fla, 1979), this Court held that when the Legislature chose the words used to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons:

> 'Great Risk' means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to 'many' persons. By using the word 'many', the Legislature intended that a great risk of death to a small number of people would not establish this aggravating circumstance.

See also Williams v. State, 574 So.2d 136, 138 (Fla. 1991) (factor properly found only where, beyond any reasonable doubt, the actions of the defendant created an immediate and present risk of death to many persons). These criteria are satisfied sub judice.

Appellant's creation and transmission of this bomb created a high probability of the risk of immediate death to many persons. The explosive expert testified that the bomb in this case produced an "extremely violent explosion," which, of course, literally blew the victim, Trooper Fulford, to pieces; portions of his left leg were found one hundred and fifty feet away from the blast site, and the heel of one of his shoes was found on the other side of the highway, a good distance from the site (R 2717, 2945-2946). The

explosion itself caused a fire, and portions of the bomb were found embedded in two vehicles, parked alongside of the exit ramp of the interstate (R 2555, 2564, 2586, 2611, 2838). In Delap v. State, 440 So.2d 1242, 1256-1257 (Fla. 1983), this Court approved the finding of this aggravating circumstance where the defendant was struggling with the victim as to two drove down the highway; this Court held,

> There were numerous vehicles on the highway and defendant should have reasonably foreseen that his erratic driving and possible loss of control of the car would have created a 'great risk' of danger to many persons, including the risk of crashes, possible harm to neighbors and to police responding to the same.

With all due respect to David Delap, his actions pale into insignificance when compared with those of Appellant Howell. The circuit court's finding of this aggravating circumstance should be approved.

Alternatively, should this Court disagree, Appellee would contend that any error in the finding of this aggravating circumstance was harmless beyond a reasonable doubt under Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), given the remaining substantial aggravation and minimal mitigation. See, e.g., Dailey v, State, 659 So.2d 246 (Fla. 1995) (death sentence affirmed, even after striking of two aggravating circumstances, where three

remained to outweigh "numerous mitigating circumstances"); Peterka v. State, 640 So.2d 59, 71-72 (Fla. 1994) (trial court's error in considering and finding two aggravating circumstances harmless, given existence of three other valid factors and unpersuasive mitigation) ; Wyatt v. State, 641 So.2d 355, 360 (Fla. 1994) (elimination of two aggravating factors harmless error, given fact that three factors remained to outweigh minimal mitigation); Castro v. State, 644 So.2d 987, 991 (Fla. 1994) (striking one aggravating circumstance harmless error when three remained and 'weak case" for mitigation); Geralds v. State, 674 So.2d 96, 104-105 (Fla. 1996) (striking one aggravating circumstance harmless error where two remained and little weight afforded to statutory and nonstatutory mitigators). The instant sentence of death should be affirmed in all respects.

ISSUE V

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE SENTENCER'S FINDING THAT THE HOMICIDE WAS COMMITTED DURING AN ENUMERATED FELONY

As one of the five aggravating circumstances in this case, Judge Steinmeyer found that the instant homicide had been committed during the commission of the felony of making, possessing, placing or discharging an explosive device, an enumerated felony under

§921.141(5)(d), Fla.Stat. (1993) (R 1154-1155). On appeal, Howell contends that this finding was error because this aggravating circumstance fails to sufficiently narrow the class of those eligible for the death penalty, and, hence, is "automatic" (Initial Brief at 77-80). While recognizing that this Court has previously rejected this identical argument in such precedents as Johnson v. State, supra, Appellant suggests that such holding is in error and must be re-examined. There are a number of reasons why this Court should decline to reach Appellant's argument.

Initially, the State would question whether any claim of error has been preserved for review. Although Appellant filed a pretrial motion attacking this aggravating circumstance on the grounds now asserted (R 44-49), and such much motion was denied (SR 119), no objection was interposed at the penalty phase charge conference, although defense counsel objected to instruction on a number of other aggravating circumstances at that time (R 3132-3143); in fact, it would seem that defense counsel below stated that this aggravator "certainly applied" (R 3143). In Fspinosa v. State, 626 So.2d 165, 167 (Fla. 1993), this Court found that the defendant's pretrial motion in limine had been insufficient to preserve a constitutional challenge to the factor and/or the jury instruction involved, and that counsel's failure to object at trial resulted in

a procedural bar. Further, in Thompson v. State, 648 So.2d 692, 696 (Fla. 1992), this Court relied upon Espinosa in finding this **same** claim (that the "committed during the course of a felony" aggravating circumstance **was** unconstitutionally broad) to be procedurally barred due to lack of objection at trial. Thompson clearly dictates that this claim is barred, as well.

To the extent that preservation is found, this is an inappropriate **case** for this argument to be made. While the jury did indeed convict Howell of this felony, the same jury, by special verdict, also indicated that its verdict of first-degree murder was based upon both premeditation and felony murder (R 3118, 979). Thus, there was nothing 'automatic" about this aggravating circumstance sub judice, and no relief is warranted. To the extent that further argument is necessary, Appellee would rely upon this Court's precedents rejecting this claim. See, e.g., Sims v. State, 21 Fla. L. Weekly S320, S323 (Fla. July 18, 1996); Johnson, supra; Taylor v. State, 638 So.2d 30, 32 (Fla. 1994). The instant sentence **of death should be affirmed in all** respects.

ISSUE VI

THE FINDING OF THE AVOID ARREST AGGRAVATING CIRCUMSTANCE WAS NOT ERROR

Appellant next complains that Judge Steinmeyer erred in instructing the jury upon, and in ultimately finding, the aggravating circumstance relating to avoidance of arrest, under §921.141(5)(e), Fla.Stat. (1993). In his sentencing order, the judge found that this aggravating circumstance was present because Appellant had constructed the bomb in order to eliminate Tammie Bailey and Yolanda McAllister as potential witnesses in another prosecution; the judge noted that, under Sweet v. State, supra, the fact that someone else was killed by the bomb was not determinative (R 1155). On appeal, Howell seems to take no issue with the sentencer's reliance upon Sweet (Initial Brief at 85), but contends that witness elimination was not the primary or dominant motive for this offense. Appellee disagrees, and would contend, as in Issue IV, supra, that at least two independent bases exist for the finding of this aggravating circumstance.

The record in this case indicates that Tammie Bailey and Yolanda McAllister were involved in the interstate drug trafficking empire operated at least in part by Appellant and his brother, Patrick, and, further, that both were involved in the cover-up

following the murder of Alphonso Tillman by Patrick Howell and/or Mike Morgan. The two had personal knowledge of Appellant's attempts to dispose of the blood-stained and bullet-punctured vehicle in which Tillman had been murdered (R 2228, 2237-2243, 2426-2440, 2443-2448); Appellant was charged with murder in regard to his involvement in this respect. When Howell tried to recruit Trevor Sealey to transport the bomb to Marianna, he told him that he wanted the package given to "some girls for talking, snitching on his brother" (R 2362-2363).[3] Yolanda McAllister testified during the trial that she had seen Patrick Howell give the proceeds from his drug sales to Appellant (R 2237), and, despite Appellant's many protests to the contrary, one State witness, Hentley Morgan, testified that Appellant himself had given Morgan marijuana to sell (R 2404); Lester Watson likewise testified that he had seen Appellant purchase cocaine (R 2686). After learning that Lester Watson had been arrested, Appellant asked Charles Sinclair if Watson was a "snitch," adding that "stuff happens to snitches" (R 2747).

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[3] Although it is not clear whether Appellant knew this, Tammie Bailey indeed called the Ft. Lauderdale Police after Tillman's murder and asked whether Mike Morgan or Patrick Howell had been involved (R 2451, 2484-2486).

This aggravating circumstance was properly found, as it is well established that this factor can be applied where the defendant's motivation is to eliminate a potential witness to an antecedent offense. See, e.g., Bogle v. State, 655 So.2d 1103 (Fla. 1995); Peterka, supra; Hendrix v. State, 637 So.2d 916 (Fla. 1994); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Swafford v. State, 533 So.2d 270 (Fla. 1988). Fotopoulos makes clear that the fact that a defendant may have had motives in addition to witness elimination (R 2516) does not preclude the application of this aggravating circumstance. This Court has approved sentences of death arising under comparable circumstances, cf. Hodges, supra, Lara, supra, and, as previously noted, under Sweet;, Howell's motivation to murder McAllister and Bailey may be 'transferred" to the actual victim. In Sweet, the defendant had intended to murder an individual who was a witness to a prior offense, but ended up shooting an innocent bystander instead. No error has been demonstrated in regard to the finding of this aggravating circumstance.

Further, as in Issue IV, supra, one cannot ignore the actions, and inactions, of Appellant Howell personally. After Watson's arrest, the dispatcher from FHP called Appellant at home in Ft. Lauderdale and advised him of this fact; Appellant asked where

Watson was being taken, and was told that he would be transported to the Jefferson County Jail (R 2572-2573). Thus, at this time, Howell was aware that the motor vehicle containing the explosive-filled microwave was in police custody, yet he chose to say and do nothing. In March of 1991, a number of months previously, several automobiles rented by Appellant had been seized by the Marianna Police Department, and Appellant had become very irate about this; at that time, he had been specifically advised that if an unauthorized driver had been operating a vehicle, standard procedure was to seize the vehicle, impound it and inventory it (R 2157). Appellant had also previously made statements to the effect that he felt that the police had been harassing him, and that one day he was going to do something to them (R 2513). Indeed, in November of 1991, Howell felt that the police had been rude and forceful, and he advised them that if legal means failed to end what he perceived as harassment, he would "gladly cross the line between rational and irrational behavior" and would be more than "willing to trade [his] life for that of a police officer that harasses [him]" (R 2539). Appellant also stated that he would handle his own problem his own way (R 2540).

These facts clearly indicate that, in addition to Howell's intention to eliminate Tammie Bailey and Yolanda McAllister, he was

also more than willing that a police officer be the victim of his explosive device. When Appellant was advised that Watson had been arrested (and, hence, would not be proceeding on to Marianna), he chose to offer no warning to the authorities; Appellant, of course, had previously stated that if someone touched the bomb the wrong way, it would go off (R 2746-2747). Appellant fully contemplated that a police officer suffer the fate of his originally-intended victims, and because a law enforcement officer became the intended victim, this aggravating circumstance clearly applies. Cf. Cruse v. State, 588 So.2d 983, 993 (Fla. 1991) (defendant's intent to murder police officers supported finding of this aggravating circumstance). Again, to the extent that this Court determines that the finding of this aggravating circumstance was error, or finds that it should be merged with any other aggravating circumstance, any such error would be harmless beyond a reasonable doubt under Rogers, supra. See Peterka, supra; Wyatt, supra; Dailey, supra. The instant sentence of death should be affirmed in all respects.

ISSUE VII

THE FINDING OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS NOT ERROR

Howell next contends that it was error for Judge Steinmeyer to have instructed the jury upon, or to have found, the cold, calculated and premeditated aggravating circumstance, 'based on the unusual facts of this case" (Initial Brief at 86). Appellant concedes that he intended to murder Tammie Bailey, and that, under this Court's decision in Sweet, supra, such heightened premeditation can be 'transferred", but suggests that such result is inequitable in this case, in that Howell was not present at the scene and "had no intent whatsoever to kill James Fulford." (Initial Brief at 87). Appellee disagrees, and would contend that two independent bases exist to support this aggravating circumstance.

This aggravating circumstance properly focuses upon a defendant's state of mind, motivation and intent, see Stano v. State, 460 So.2d 890, 893 (Fla. 1984), and in Walls v. State, 641 So.2d 381, 387-388 (Fla. 1994), this Court recently discussed the four elements of this aggravating circumstance - that the murder be the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; that the murder be the

product of a careful plan or prearranged design to commit murder before the fatal incident; that the murder be the product of heightened premeditation, and that no pretense of moral or legal justification exists. See also Jones v. State, 22 Fla. L. Weekly S25 (Fla. December 26, 1996). This aggravating circumstance has been found when the murder 'began as a caprice," see Wickham, supra, and where the murder did not 'proceed as planned." Asay v. State, 580 So.2d 610, 613 (Fla. 1991). Additional facts which can support the finding of this aggravating circumstance include the advance procurement of a weapon, lack of resistance or provocation and the appearance of a killing carried out as a matter of course. Swafford, supra. It is also beyond question that this aggravating circumstance can apply even if the intended victim is not murdered. This Court held in Provenzano,

> . . . appellant alleges that the proof and testimony that Provenzano planned the death of Officers Shirley and Epperson is irrelevant to finding enhanced premeditation to kill Arnold Wilkerson. We disagree. Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim. Rather, as the statute indicates, if the murder was committed in a ***manner*** that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable. (Emphasis supplied). The facts herein indicate that the manner in which Provenzano effectuated his

> design of death was cold, calculated and premeditated beyond a reasonable doubt.

497 So.2d at 1183. See also Sweet, supra (CCP aggravator applied on transferred intent theory).

In light of this precedent, it is clear that this aggravating circumstance was properly found. This case is virtually the epitome of calculation and preplanning. Joe Hanlin, the explosives enforcement officer with the Bureau of Alcohol, Tobacco and Firearms, testified concerning the extensive effort required and pain-staking care taken in the creation of this bomb (R 2898-2920). Appellant had constructed the bomb with gunpowder and metal pipe, which he had specifically purchased for that purpose, and further utilized a battery from an emergency exit lighting system. The bomb had been placed inside a microwave oven, and Appellant had rigged it so that the bomb would detonate when the door was opened; the witness testified that the person who constructed this bomb had understood electricity well, and that a less experienced person would have blown himself up in the course of constructing such (R 2936). William West testified that a week or so prior to Appellant's arrest, he had gone with him to a gun show where Howell had purchased gunpowder which he had later seen him place into a bomb (R 2514-2516). Likewise, Trevor **Sealey** testified that he had

gone with Appellant to another gun show to buy gunpowder and .22 caliber bullets immediately before the explosion (R 2364).

Appellant originally sought to recruit Trevor Sealey to take the bomb to Marianna (R 2362), but eventually chose Lester Watson instead. Lester Watson had previously bought pipe for Appellant (R 2665-2567), and Howell had opened a pager account on Watson's behalf, and supplied him with a beeper (R 2670) . Watson went with Appellant to purchase the microwave on January 29, 1992, and, indeed, Watson actually purchased the item with Appellant's money (R 2674-2676); Appellant knew that Tammie Bailey needed a microwave and had confirmed this fact with Yolanda McAllister (R 2245, 2457). A day or so later, Watson went with Appellant when he rented the Mitsubishi Galant at the Value Rental lot at the airport, and Watson drove the car back to Appellant's home (R 2676-2680). Appellant had previously offered Watson two hundred ($200) dollars if he would take the 'package" to Marianna, and the latter had agreed (R 2680). When Watson arrived at Howell's home, he saw Appellant gift-wrapping the microwave and placing Styrofoam into the box. The witness noted that the writing had been torn off of the microwave box, and that Howell was wearing gloves at the time (R 2682-2683); when Watson asked Appellant why he **was** wearing gloves, Howell responded that he did not want to leave fingerprints

on the box (R 2685). Appellant instructed Watson to call Yolanda McAllister upon his arrival in Marianna and to take the package to her; Appellant wrote down Miss McAllister's number, as well as his own beeper number, on a piece of paper and gave it to Watson; Appellant wrote all of the numbers backwards (R 2684).

Given the above, the instant murder was clearly the product of cool and calm reflection and not prompted by emotional frenzy or rage; an officer who spoke with Appellant immediately after the explosion described him as calm (R 2591). Further, as noted above, this crime was the product of a careful plan or prearranged design. Howell had ascertained that Tammie Bailey needed a microwave, Howell instructed Watson to buy a microwave, Howell built a pipe bomb and placed it within the microwave, and Howell sent Watson to deliver the microwave; this took place over a period of time and required a number of individual decisions on the part of Howell to continue with the plan. Additionally, Howell's acts exhibited deliberate ruthlessness, in that he chose an appliance which the victim wanted in order to be able to heat up bottles for her baby, and transformed such device into a means of destruction for her and all of those around her.

Howell's actions are similar to, but more egregious than, those of the defendant in Trepal v. State, 621 So.2d 1361 (Fla.

1993). Trepal, after becoming annoyed with his neighbors, left bottles of poisoned soda on their doorstep, which resulted in the death of one, and the serious illness of another six. Appellant's actions in sending the bomb off towards its intended victims at the other end of the state is much like, but again much more egregious than, Mr. Trepal's placement of poison on his neighbor's doorstep, and, of course, there was no pretense of moral or legal justification sub judice. All of the elements of this aggravating circumstance are present, and this Court has approved the finding of this circumstance in comparable factual situations, in which the defendant, for purposes of witness elimination, carefully planned the murder in question. See Hodges, supra; Hendrix v. State, 637 So.2d 916 (Fla. 1994).

Appellant's only real argument on appeal is that, for some reason, the doctrine of transferred intent should not be applied in this case. Howell, however, has not demonstrated any reason why this Court's precedents in Provenzano and Sweet should not control. Appellant's argument that this aggravating circumstance may not properly be found because Howell was not actually present when the bomb exploded (Initial Brief at 87) is without merit. Mr. Trepal was not actually present when his victims drank the poisoned soda, nor was Ronald Williams present when his agents carried out the

murders which he had ordered. See Williams v. State, 622 So.2d 456 (Fla. 1993).

Further, Appellant was aware that Lester Watson had been arrested and that his original plan could not be carried out. During the time that he chose not to make the authorities aware that there was a bomb in the vehicle, he had more than sufficient opportunity to form the heightened premeditation required for this aggravating factor, in that he fully intended that whoever searched and inventoried this vehicle would become the bomb's actual victim. Howell was well aware that in fact the vehicle would be impounded and inventoried, and his long-standing antipathy towards law enforcement officers has already been set forth. Even without the doctrine of transferred intent, this aggravating circumstance can properly be found. Cf. Griffin v. State, 639 So.2d 966, 971-972 (Fla. 1994). No error has been demonstrated, and the instant sentence of death should be affirmed in all respects.

ISSUE VIII

THE FINDING OF THE AGGRAVATING CIRCUMSTANCE RELATING TO THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER WAS NOT ERROR

Appellant next argues that it was error for the court to apply the aggravating circumstance relating to the victim's status as a

law enforcement officer, under §921.141(5)(j), Fla.Stat. (1993), because "the facts did not establish that Appellant knowingly killed a law enforcement officer." (Initial Brief at 88); (emphasis in original). Appellant contends that, in this case of first impression, this Court should find that knowledge by the defendant that the victim is a law enforcement officer is an essential element of this aggravating circumstance, and that, in the absence of such proof, the instant sentence should be reversed. In support, Appellant relies upon a number of cases involving lesser offenses relating to law enforcement personnel. Appellee disagrees with all of the above, and specifically with Howell's representation that, in the sentencing order, Judge Steinmeyer describes Trooper Fulford as "an unintended victim" (Initial Brief at 88); rather, the judge simply noted the trooper had not been the intended victim of Howell's plot (R 1156). As previously argued, Howell had sufficient time to premeditate that a law enforcement officer would in fact become the victim of the explosive device in the vehicle.

The record in this case indicates that Appellant Howell was called by the Florida Highway Patrol and advised of Watson's arrest, prior to the detonation of the bomb. At this time, Appellant was advised that Watson had been arrested and was being

taken to the Jefferson County Jail. Although taking the time to discuss with the duty officer the matter of whether he had left a baby bottle in the backseat (R 2574-2575), Appellant chose to say nothing about the presence of the lethal pipe bomb in the trunk. Based on a prior experience in Marianna, Howell knew that if an unauthorized (i.e., unlicensed) driver had been found operating a vehicle, standard procedure was for a law enforcement officer to seize the vehicle, impound it and inventory it (R 2157). Thus, Howell knew or reasonably could have foreseen that someone connected with law enforcement would search the vehicle and set off the bomb. The fact that Howell did not know that it would be Trooper James Fulford is irrelevant. Howell had previously expressed his negative views of the police, including the fact that he would be more than willing to trade his life for that of a police officer (R 2581). Under the facts of this case, this aggravating circumstance was properly found, and it should be affirmed.[4]

To the extent that this Court disagrees, the State would contend that, in fact, there is no requirement of scienter in

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[4] Because Howell's liability for this aggravating circumstance is not based upon the doctrine of transferred intent, his reliance upon Mordica v. State, 618 So.2d 301, 304-305 (Fla. 1st DCA 1993) (Initial Brief at 89-90), is misplaced.

regard to this aggravating circumstance. This aggravating factor was enacted in 1987, and may in fact have derived at least in part from the United States Supreme Court's observation in Roberts v. Louisiana, 431 U.S. 633, 636-637 (1977), in which the Court specifically held that a victim's status as a **law** enforcement officer could properly be regarded as an aggravating circumstance, in that there is **a** special interest "in offering protection to those public servants who regularly must risk their lives in order to guard the safety of other persons and property." This aggravating circumstance is fairly common among other states with capital punishment, and it would appear that a majority do not require that the defendant must know or have had reason to know that the victim was a law enforcement officer engaged in the performance of his or her official duties. Certainly, had our Legislature wished to add a requirement of knowledge to this statute, it could have done so, and it should be noted that when the next aggravating circumstance, §921.141(5)(k), Fla.Stat. (1988), was enacted the next year, such provision requires that in order for the victim's status as an elected or appointed public official to constitute an aggravating circumstance, the defendant's motivation must have arisen at least in part from the victim's official capacity. The absence of comparable language from

§921.141(5)(j), Fla.Stat. (1987), strongly suggests that the defendant's motivation or knowledge is irrelevant, and that the victim's status alone determines the applicability of this factor.

To the extent that precedent relating to other offenses involving law enforcement officers is relevant, the State would note that in Carnentier v. State, 587 So.2d 1355, 1357 (Fla. 1st DCA 1991), review denied, 599 So.2d 654 (Fla. 1992), the First District expressly held that under §784.07(3), Fla.Stat. (1988), there was no requirement that a defendant convicted of attempted murder of a law enforcement officer have knowledge of his victim's status. The court reasoned:

> The statute simply. does not require that the offender have knowledge that the victim was a law enforcement officer. This is certainly not surprising. In modern day law enforcement, particularly with the high incidents of drug trafficking in today's culture, it is frequently necessary for law enforcement officers to operate undercover and to ostensibly cooperate with the criminal element. The Legislature apparently determined that one who attempts to murder an undercover officer should be dealt with as severely as one who attempts to murder a uniformed officer. Criminals know that the possibility always exist that those with whom they ply their felonious trade may be undercover officers. On this theme, we note that the Legislature recently expressed an intent to provide law enforcement officers with the 'greatest protection which can be provided through the laws of this state'

> because of their exposure to great risk of violence.

The Fifth District apparently does not agree with the result in Carpentier, see Grinage v. State, 641 So.2d 1362, 1364 (Fla. 5th DCA 1994), moved, 656 So.2d 457 (Fla. 1995), whereas the Third District apparently does, see Thompson v. State, 667 So.2d 470 (Fla. 3d DCA), review granted, 675 So.2d 931 (Fla. 1996); both of these cases, however, would seem to have more to do with the consequences of this Court's decision in State v. Gray, 654 So.2d 582 (Fla. 1995), and the abolition of the doctrine of attempted felony murder, than with the issue sub iudice.

Appellee would contend that the reasoning of Carpentier remains correct, and that just as drug traffickers run the risk that the persons they endanger may be undercover police officers, those individuals such as Appellant Howell who choose to introduce lethal explosives into the general public run the risk that their victims may include law enforcement officers in the performance of their official duties. Certainly, Appellant has failed to demonstrate that there is any legislative intent that this aggravating circumstance need not apply to factual circumstances such as those present in this case, and the finding of this aggravating circumstance should be approved. Alternatively, should

error be perceived, Appellee would contend that, at most, this factor might merge with that under §921.141(5)(e), Fla. Stat. (1993). The instant sentence of death should be affirmed in all respects.

ISSUE IX

THE INSTANT SENTENCE OF DEATH IS PROPORTIONATE IN ALL RESPECTS

As his final point on appeal, Howell contends that his sentence of death must be reversed, on the grounds that it is disproportionate under State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Appellant's argument is largely premised upon his belief that this Court will strike much of the aggravation in this case and reweigh the mitigation in his favor; as demonstrated earlier, no error exists in regard to the sentencer's findings. For the most part, Howell relies upon cases in which no more than two aggravating circumstances were present, such as Terry v. State, 668 So.2d 954 (Fla. 1996), Sinclair v. State, 657 So.2d 1138 (Fla. 1995), Thompson v. State, 647 So.2d 824 (Fla. 1994), and Curtis v. State, supra. These cases are clearly distinguishable, and the instant sentence of death should be affirmed.[5]

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[5] Appellant's arguments regarding the status of the co-defendants (Initial Brief at 95-97), have already been addressed in Issue III, infra.

As noted earlier, Appellant Howell would seem to be the first capital defendant to have chosen this precise instrumentality of death - the gunpowder-filled pipe bomb. Nevertheless, this murder unquestionably justifies society's severest sanction. This was an extremely well-planned and coldly calculated offense, motivated originally by a desire to eliminate witnesses to antecedent felonies. The contemplated murders were to have occurred in the course of a felony and would have involved the great risk of death to many persons; the murder which actually did occur was that of a law enforcement officer while engaged in the performance of his official duties. This Court has previously affirmed sentences of death for individuals who 'mastermind" a contract killing, and who leave the actual execution to others, see, e.g., Antone v. St-ate, 382 So.2d 1205 (Fla. 1980), Williams v. State, supra, Archer v. State, 673 So.2d 17 (Fla. 1996), Larzelere, supra; indeed, in Larzelere, the actual killer was never convicted at all. Appellant Howell is much more culpable that these "masterminds", because even in a contract killing, some conscious intent to kill is still required on the part of the actual hitman. Here, Howell manufactured the lethal device, and did not tell its courier that he was carrying a bomb; Watson testified that he believed that the package with which Appellant had taken so much care had contained

drugs (R 2685-2686). The above facts give rise to more than sufficient aggravation, and the mitigation was fully considered and weighed by both the judge and jury, but simply found insufficient, in light of this aggravation; it is clear that whatever mental or emotional disturbance Howell suffered did not detract at all from the cold and calculated nature of his actions in regard to the planning and execution of this crime.

This Court has affirmed sentences of death in which, following a cold and calculated plan, the 'wrong" victim was killed; this includes another instance in which the motive for the original crime was witness elimination. See Provenzano, supra; Sweet, supra. This Court has likewise affirmed sentences of death in which the defendant, most often a drug dealer, has ordered the elimination of inconvenient witnesses. See, e.g., Bolender v. State, 422 So.2d 833 (Fla. 1982); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Williams, supra (defendant sends other members of drug trafficking ring to murder those suspected of "ripping off" the enterprise); Hendrix, supra (defendant murders cousin who will testify against him in upcoming trial, as well as cousin's wife). Despite Howell's after-the-fact statement that the bomb 'wasn't meant for the police officer" (R 2771), Appellant, as noted, had more than sufficient time to form the intent that a law enforcement

officer, such as Trooper Fulford, become the victim of the pipe bomb, regardless of its originally intended victim. Cf. Jones v. State, 440 So.2d 570 (Fla. 1983) (death sentence appropriate where defendant, who felt that the police had been "harassing" him, murdered police officer unknown to him in sniper attack). On the basis of such precedents as Jones, Williams, Provenzano and Sweet, the instant sentence of death should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aformentioned reasons, the instant convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Norgard, Post Office Box 811, Bartow, Florida 33831, this 5 day of March, 1997.

RICHARD B. MARTELL
Chief, Capital Appeals