IN THE SUPREME COURT OF FLORIDA

PAUL AUGUSTUS HOWELL, :

Appellant, :

vs. : Case No. 85,193

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR JEFFERSON COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

ROBERT A. NORGARD
ATTORNEY AT LAW
FLORIDA BAR NUMBER 322059

POST OFFICE BOX 811
BARTOW, FL 33831
(941) 533-8556

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

Appellant, PAUL AUGUSTUS HOWELL, was the Defendant in the lower court. He will be referred to as "Appellant" or by name in this brief.

Appellee, the State of Florida, is the prosecuting authority in both the lower court and the instant proceedings.

The record on appeal consists of Thirty Eight Volumes. Volumes One through Thirty are numbered, and shall be designated "R". Volumes Thirty One through Thirty Four contain investigative reports, which had been sealed by the lower court pending appeal. Volumes Thirty Four and Thirty Five include a list of exhibits. The last three Volumes on appeal are the Supplemental Records on Appeal, Volumes One through Three, and will be referred to as "SR".

STATEMENT OF THE CASE

Appellant, PAUL AUGUSTUS HOWELL, was charged by Indictment on February 19, 1992 with First Degree Murder (Count I); Making, Possessing, Placing or Discharging a Destructive Device, Death (Count II); Making, Possessing, Placing or Discharging a Destructive Device, Property Damage (Count III); and Possession of an Explosive Device (Count V). (R14-18) Also, charged in miscellaneous counts of this Indictment were Lester P. Watson, Leroy C. Williams and Patrick Howell. (R 14-18)

On February 17, 1992, the Public Defender's Office for the Second Judicial Circuit filed a Certification of Conflict of Interest and Motion for Appointment of Separate Counsel in Appellant's case. (R13) On February 21, 1992, Frank Sheffield filed his Notice of Appearance. (R27)

On March 18, 1993, the State filed a Motion to Disqualify Counsel. (R304-308) On April 17, 1993, a letter from Appellant to the trial court was filed requesting the appointment of specific substitute counsel for various reasons. (R310) On April 16, 1993, a hearing was held on the issues raised in the Appellant's letter and the State's motion. (R446-456, R1196-1206) The trial court denied the State's Motion to Disqualify Counsel and Appellant's request for substitute counsel. (R454-456)

On June 4, 1993, the State filed a Motion to Rehear the Motion to Disqualify Counsel. (R322-330) On June 10, 1993, Frank Sheffield filed a Response to Motion to Rehear, (R331-333) On November 18, 1993, excerpts from a Federal jury trial were filed,

which provided details regarding Sheffield's removal from the representation of Appellant in that case. (R359-393) On November 19, 1993, a hearing was held on this matter. (R1226-1250) The trial court denied the request to disqualify Sheffield and appoint substitute counsel. (R1250)

On August 18, 1994, Appellant filed a Motion to Appoint Second Attorney. (R777-780) On August 22, 1994, a hearing was held on this motion. (R1402-1409) The trial court denied this motion. (R1407-1409)

On September 16, 1994, Appellant again expressed his dissatisfaction with Sheffield and indicated he wanted substitute counsel for various reasons. (R1497-1548) On September 19, 1994, Sheffield raised matters regarding problems between Appellant and him, and an indicated that Appellant wanted to assert his right of self-representation. (R1549-1613) During this hearing Appellant stated that he had cooperated with Sheffield contrary to Sheffield's assertions, and that he had a conflict with Sheffield. (R1561-1601) The trial court made a limited inquiry into these matters. (R1549-1613)

On September 21, 1994, a letter from Appellant addressed "To Whom It May Concern" was filed that further detailed problems between him and Sheffield. (R924) On October 10, 1994, Sheffield on Appellant's behalf requested that he be removed from the case. (121647) Appellant also personally requested that Sheffield be removed from the case based on a claim of ineffective assistance of counsel, and that substitute counsel be appointed. (R1647-1649)

The trial court failed to make a proper inquiry into these matters. (R1647-1650) Sheffield on Appellant's behalf also requested that Appellant's letter of September 21, 1994 be treated as a Motion for Recusal of the Trial Judge. (R1647) The trial court denied this motion. (R1648-1649)

On September 19, 1994, jury selection began in Jefferson County. (R 1612) On September 26, 1996, the State filed a Joinder in Defendant's Motion for Change of Venue. (R 927-930) On October 11, 1994, Nunc Pro Tunc September 26, 1994, the trial court signed an Order Granting Mistrial and Change of Venue. (R972-973)

On January 10, 1995, the State filed a document entitled Counts III and IV Nolle Prosequi to confirm the State's announcement at the time of trial. (R1107) It should be noted that based on the way the Counts are numbered in the Indictment, the IV should actually have been V. (R14-18) Thus the Counts pending for trial for Appellant were Counts I and II. (R 1654-1655)

On October 10 and 11, 1994, jury selection took place in Escambia County and a jury was selected for the trial. (R1651-2094) The guilt phase of the trial was conducted October 12 through October 18, 1994. (R2106-3123) On October 18, 1994, the jury found Appellant guilty as charged in Counts I and II of the Indictment. (R975-978) On this date the jury also returned a Special Verdict finding the charge of First Degree Murder was established by both proof of premeditated design and felony murder. (R979)

The penalty phase of the trial was conducted on October 21, 1994. (R3191-3272) Although there was only one homicide victim,

the State sought the death penalty under alternative theories, to-wit Count I, First Degree Murder; and Count II, Making, Possessing, Placing or Discharging a Destructive Device Resulting in Death, both capital felonies. (R 14-18) On October 21, 1994, the jury on Counts I and II returned an Advisory Sentence recommending the death penalty by a vote of 10-2. (R1022-1024)

A Sentencing Hearing was held December 19,1995. (R3273-3278)

On January 10, 1995, Appellant filed a Sentencing Memorandum. (R1110-1119) On the same date, Appellant also filed a number of mitigation letters. (R1120-1128) On January 10, 1995, the State filed a sentencing memorandum in the form of a letter. (R1129-1133)

On January 10, 1995, Appellant was adjudicated guilty of Count I, First Degree Murder, and sentenced to death. (R1071-1074, 3334-3345) The trial court did not impose sentence on Count II, since the charges in Counts I and II arose from a single underlying offense. (R1097) Also on January 10, 1995, the trial court filed its Findings in Support of the Sentence of Death. (R1097-1106)

On February 6, 1995, the State wrote to the trial court indicating that Appellant did request age as a mitigator and the trial court rejected the request. (R1134) On February 13, 1995 the trial court filed its Amended Findings in Support of the Sentence of Death. (R1152-1161)

On February 7, 1995, Appellant filed a timely Notice of Appeal. (R1135-1136)

STATEMENT OF THE FACTS

The instant case arose from the death of Trooper Jim Fulford, a Florida Highway Patrolman. Trooper Fulford was killed by a bomb which was in the trunk of a car being driven by Lester Watson and Curtis Williams. Trooper Fulford had pulled the vehicle over. No witnesses were present at the time of the explosion.

Betty Odom testified she is a duty officer with the Florida Highway Patrol. (R2566) She handles radio calls for the troopers. (R2566-2567) Odom knew the victim, Trooper James Fulford. (R2567)

Odom testified that on February 1, 1995 at 3:47 P.M. Fulford radioed Odom that he had a car stopped at Interstate 4 and State Road 257. (R2568) Fulford had Odum run a registration and stolen car check on the car, and driver's license and warrants check on Lester Paul Williams (a false name used by Lester Watson) and Curtis Lee Williams. (R2568-2570) Neither person had a record of a drivers's license. (R2569-2570)

Odom testified that at 4:08 P.M. she received another Fulford radioed and asked her to call the rental car company about the authorized drivers for the car. (R2570) Odom radioed this information to Fulford. (R2571) Odom then called a tow truck for the car. (R2572)

Odom further testified that she then called Appellant. (R2572) Appellant advised Odom he did not know Curtis Williams, but that he had loaned the car to Lester Williams, but that he did not know Lester Williams was traveling that far in the car. (R2573) Odom told Appellant that Lester Williams was being taken to the

Jefferson County Jail, and she gave Appellant the phone number of the jail. (R2573)

Wallace Blount testified he is a patrol sergeant with the Jefferson County Sheriff's Office. (R2548) Blount knew the victim Jimmy Fulford, who worked with the Florida Highway Patrol. (R2548) On February 1, 1992, at approximately 4:00 P.M. Blount and Jefferson County Sheriff's Office Sergeant Robert Harrell assisted Trooper Fulford with a traffic stop he had made on Interstate 4 and County Road 257 in Jefferson County, Florida involving a Mitsubishi occupied by two black males. (R2548-2552) The trunk of the car was open, and Blount observed a large vinyl suitcase, a child's toy, and a gift wrapped package. (R2552)

Blount learned the driver was under arrest for no valid driver's license. (R2552-2553) Blount transported the arrested black male to the Jefferson County Jail, as well as giving the other black male a ride. (R2553-2555)

Blount, while at the jail, heard a radio call regarding an explosion involving a death at Interstate 4 and County Road 257. Harrell told Blount that Fulford was the victim. (R2555)

Robert Harrell testified he is a K-9 Sergeant with the Jefferson County Sheriff's Office. (R2556-2557) Harrell knew the victim, Jimmy Fulford. (R2557) On February 1, 1992, Harrell and Blount assisted Fulford with a traffic stop he had made on Interstate 4 and County road 257 in Jefferson County, Florida, involving a Mitsubishi Gallant driven by a black male with a black male passenger. (R2558-2559) Harrell assisted Fulford in a

preliminary search of the car. (R2559-2560) During the search Harrell observed miscellaneous items, including a gray suitcase, a child's toy, and gift wrapped box in the trunk. (R2561-2562)

Harrell left the scene after the preliminary search and before any arrest of the black male driver was made, and went to the Jefferson County Sheriff's Office. (R2560-2562) While at the Sheriff's Office, Harrell heard a radio call regarding an explosion resulting in a death at Interstate 4 and County Road 257. (R2563) Barrel1 and Blount went back to this area.(2563) Harrell observed miscellaneous things at the scene including the Mitsubishi, Fulford's car, Fulford's body, and scattered items of Fulford's personal property. (R2563-2564)

Clarence Parker testified he knew the victim, Trooper James Fulford. (R2858) On February 1, 1992, Parker went to the explosion scene after receiving a call on his CB radio and observed Fulford's car, the car Fulford stopped, and Fulford's body. (R2585-2586)

Parker also testified that two other people arrived about the same time as him. (R2585) Parker and the others moved the vehicles, because of a brushfire caused by the explosion. (R2586-2587) Parker then radioed that Fulford had been in an accident. (R2587-2588) Parker next began beating out the fire. (R2588)

Thomas Wood testified he is a medical doctor specializing in pathology. He is employed as an associate medical examiner for the Second Judicial Circuit. (R2789-2790) Wood then testified regarding his duties and experience in these areas of medicine.

(R2789-2791) Wood was found to be an expert in the areas of pathology and forensic pathology. (R2791)

Wood then explained the purpose of an autopsy and stated that he did the autopsy on Fulford. (R2791) During the autopsy Wood recovered certain evidence from the body, including a number of metallic particles, a bolt with a nut on it, and portions of paint or plastic. (R2792) Wood also identified two autopsy photographs of the body and a photograph of the body at the scene , which were admitted into evidence. (R2792-2793)

Wood then testified about what he did during the autopsy. (R2793-2794) Wood's examination revealed a very complex and complicated pattern of trauma which included trauma to numerous parts of the body. (R2795-2800) This trauma in all likelihood occurred due to an explosion while the Trooper was very close to the center of the explosive force. (R2798-2800) The cause of death was as a result of the massive trauma. (R2799) The death was very, very quick. (R2800)

Glen Anderson testified that in February 1992, he was an explosive and arson investigator with the Bureau of Alcohol, Tobacco, and Firearms (BATF). (R2594-2595) Anderson then testified regarding his training and experience. (R2595-2596)

Anderson stated that on February 1, 1992, the BATF was requested to assist in this case. Anderson was appointed as team leader. (R2596-2597)

On February 1, 1992, Anderson had a witness to the scene, Danny Gibson, reconstruct the scene with respect to the location of

the cars and body. (R2598) Anderson next set up a search of the entire area of the blast. (R2599-2601, R2604) Once the search was completed, a crime scene sketch was done, the evidence was photographed, the evidence was collected. (R2601-2606)

Anderson then testified they went back to the scene the next day to make sure they had everything. (R2506-2607) Based on an examination of the collected evidence, it was determined that a pipe bomb was involved and that one of the end caps was missing. (R2607-2608) The missing end cap was never found. (R2610)

Anderson attended Fulford's autopsy for the purpose of assisting the pathologist with evidence collection. (R2609) Anderson viewed and photographed the body. (R2609-2610)

Anderson also testified that the Trooper's car and the rental car were transported to the Florida Department of Law Enforcement laboratory and searched. (R2610-2611)

Anderson stated that some aircraft wire was found at the scene, which may have been part of a triggering device. (R2612-2613) This evidence, as well as all the other evidence, was sent to the lab for analysis. (R2612)

Joe Sorci testified that he is a special agent with the BATF. (R2613) On February 1, 1992, he was dispatched to the explosion scene and was assigned to be the evidence custodian. (R2614-2615)

Sorci also testified that he was present during the search for evidence, and the collection of the evidence. (R2615) The evidence was sent to the BATF Atlanta laboratory for analysis. (R2615-2616)

Sorci further testified that a search was done of the vehicles. (R2622)

Laura Schlater testified she is a special agent with the BATF. (R2626-2627) On February 1, 1992, she was dispatched to the scene of the explosion, and assisted with the collection of evidence at that scene. (R2627) She collected evidence from the cars which had been removed from the scene. (R2627) She also collected evidence at the autopsy. (R2630)

Jim Gettemy testified he is a Senior Crime Laboratory Analyst with the Florida Department of Law Enforcement (FDLE) Tallahassee Regional Crime Laboratory. (R2633) On February 1, 1992, Gettemy was dispatched to the explosion scene. (R2633) He decided to call BATF for assistance. (R2633-2634) Once BATF arrived, Gettemy was primarily assigned to videotape and photograph the scene. (R2634)

Lloyd Erwin is a forensic chemist with BATF.(R2835) He examined the evidence collected from the scene and determined that an explosive device had been involved. (R2839) Pieces of a microwave oven and a pipe were identified in the evidence collected. (R2841) Certain component parts of the explosive device matched items recovered from Appellant's house. (R2866-2888)

Joe Hanlin is an explosives expert with BATF. (R2892) Hanlin concluded that a pipe bomb concealed inside a microwave oven had detonated. (R2898,2901-2902) The pipe bomb was designed to detonate when the door of the microwave oven was opened. (R2934) Hanlin opined that Trooper Fulford was kneeling on one knee,

holding the microwave in his hands and attempting to remove nylon tape that was wrapped around it when it detonated. (R2947)

John O'Neill is a toolmarks expert. (R2961-2962) He examined wire cutters and other tools taken from Appellant's house and compared them with items from the crime scene. (R2962-2975) Matches were made between components found at the scene and items found at Appellant's house. (R2962-2975) Appellant's tools left marks on items recovered at the scene. (R2962-2975)

Bobby Kinsey is a special agent with the FDLE. (R2644) Kinsey played a tape recording for Hentley Morgan. (R2645)

Harold Murphy testified he is a sergeant with the Florida Highway Patrol. (R2588-2589) Murphy was dispatched to and observed the scene of the explosion. (R2589-2590)

Murphy was then dispatched to the Jefferson County Jail where he received a phone call from Appellant. (R2590-2591) Appellant asked about the rental car. Murphy obtained information from Appellant, such as his address, driver's license number, that he had been in the military, and that he had loaned the car to Lester. (R2591-2592)

Murphy then received a second phone call from Appellant. Appellant gave Murphy additional information regarding Lester and how he came to have the rental car. (R2592-2593) Appellant indicated he rented cars for people because he had a credit card. Appellant denied any knowledge of the cars' being used to transport drugs. (R2593) Murphy determined that Lester Watson had given the fake name Lester Williams. (R2594)

Dennis Williamson testified he is a special agent with the FDLE. (R2713) Williamson participated in the search of the explosion, and located the heel of a shoe. (R2417)

Williamson also testified that he was involved in an interview of Lester Watson. (R2714) During the interview Kinsey pointed out and Williamson recovered a piece of paper which Watson had dropped on the floor. (R2714-2715) The piece of paper and a blown up photograph of the piece of paper were admitted into evidence. (R2715-2716). The paper had numbers written on it, which through the interview process were determined to be a phone number written in reverse. (R2716)

Lester Watson testified that he lived in the same neighborhood in Ft. Lauderdale as a number of people connected to the case. (R2650-2654) Watson knows Patrick Howell, Appellant, Michael Morgan, William West, and Charles Sinclair. (R2651-2654) Watson has been convicted of four felonies. (R2654) Watson was indicted for murder along with Appellant, and was testifying pursuant to a plea agreement. (R2654-2655)

Watson testified that in early September, 1991, he went to South Carolina with Patrick Howell, Yolanda McCallister and others to deal drugs. (R2655-2656) The trip was made in a car rented by Appellant. (R2656) The drugs were put in the rental car by Patrick Howell after he received them from Appellant. (R2656-2657) Watson also testified regarding a telephone they used while in South Carolina.(R2657)

Watson further testified that he made another trip to South Carolina with Patrick Howell and Hentley Morgan to deal drugs. (R2658) Watson identified the motels they stayed at in South Carolina. (R2658) When Patrick Howell and Morgan returned to Ft. Lauderdale, Watson stayed in South Carolina for about a month, because of a disagreement over drugs with Patrick Howell resulting in a bad relationship between Watson and Patrick Howell and Appellant. (R2658-2859)

Watson then testified that he learned Patrick Howell was arrested, and that he resumed friendly relations with Appellant. (R2659) Watson was present when Appellant received packages of money sent by Morgan from South Carolina. (R2660)

Watson also testified that Appellant had a room in his house where he would work on electronic equipment. (R2661-2662) Appellant would make pipe bombs. (R2662-2663) Watson heard the pipe bombs go off in the neighborhood and, on one occasion, Watson and Trevor Sealey set off a pipe bomb for Appellant that he had made. (R2662-2664) On another occasion Appellant showed Watson a dumpster which had been damaged by one of Appellant's pipe bombs. (R2667-2668)

Watson testified that in late 1991 he had another falling out with Appellant when Appellant accused Watson of stealing money from him, but they again developed friendly relations. (R2664-2665) Watson went with Appellant when Appellant bought some pipe. (R2665-2666) Watson later went back and got some more pipe for Appellant

and, on another occasion, went back and got some steel coupling parts for Appellant. (R2667-2668)

Watson further testified that he bought a pager for Appellant. (R2668-2670) Watson also wired money to Tammie Bailey in Marianna for Appellant on two occasions. (R2670-2672, R2673-2675) Appellant would use Watson's mother's phone and on one occasion Appellant had Watson attempt to call Yolanda McCallister for him. (R2672-2673)

Watson went with Appellant to purchase a microwave oven. (R2674-2678) Watson gave the clerk the money and used the fake name of "Ken Williams" on the receipt and pick-up log. (R2674-2677)

Watson went with Appellant to rent a Mitsubishi Gallant at the Ft. Lauderdale airport. (R2678) Appellant paid for the car. (R2679) Watson drove the rental car, even though he did not have a valid license. Appellant knew that Watson did not have a valid license. (R2680) Watson went to a girlfriend's house and did not get to Appellant's house until about 11:30 p.m. (R2581)

Appellant then took Watson home, and told him to get some clothes and come to his house. (R2682) Watson did, and found Appellant wrapping a package with wrapping paper while wearing gloves. (R2682-2683)

Appellant told Watson to take the package to Yolanda in Marianna. (R2684) Appellant gave Watson a paper with her phone number on it, his beeper number, and $200. (R2684) Appellant also wore gloves while putting the package in the trunk. Appellant said he didn't want any prints on the box. (R2685) Appellant told Watson to go alone so he wouldn't look suspicious. (R2687)

Appellant told Watson that if he got stopped and caught for any reason to take the rap and Appellant would look out for him. (R2691) Watson left in the rental car.(R2685) Watson disobeyed Appellant by picking up Williams. (R2686)

He and Williams stopped in Fort Pierce to buy drugs. (R2687) They stopped again in St. Augustine to buy more drugs. (R2688)

Eventually they arrived in Jefferson County, where Watson was stopped for speeding.(R2688) Watson gave the Trooper a false name. (R2689) Watson gave the Trooper permission to look in the vehicle. (R2690) The Trooper picked up the package and shook it. (R2691)

Sometime later Watson was advised that he was under arrest. (R2692) He and Leroy Williams were taken to the Jefferson County Jail. (R2693)

While at the jail Watson was questioned a lot. He was eventually told that the Trooper had been killed in an explosion. (R2694) After he was told this, Watson told of Appellant's involvement. (R2695)

Watson testified that he thought drugs were in the box. (R2686) He thought this because he had seen Appellant a day or two before purchase $2,000 worth of cocaine. (R2686)

John Coffey testified he is a special agent supervisor with the FDLE. (R2718) After being briefed regarding the death of the Trooper, Coffey along with two other law enforcement officers interviewed Appellant. (R2719-2721)

Coffey was told by Appellant that he had done electronics work on aircraft while in the military. (R2721) After the military, he

did similar work with AMR Combs in Ft. Lauderdale. (R2721) At the time of the interview Appellant was unemployed. (R2721-2722)

Coffey was also told by Appellant that he rented the car from Value Rental Car on January 31, 1992, at about 2:00 P.M. for one full week using his Visa card. (R2722-2724) Appellant told Coffey that he and Lester Watson went to rent the car Appellant's mother's car. (R2722) Appellant said he drove home in his mother's car, that Watson left in the rental car, but that he did not show up for about six hours. (R2722-2724)

Coffey further testified that Appellant told him that about midnight of the same day he loaned Watson the car to use in the local area. (R2724) Appellant told Coffey the next time he heard about the rental car was when he received a phone call from the Florida Highway Patrol in the evening hours of February 1, 1992, advising him that Watson and another guy were in the car in North Florida. (R2724-2725)

Coffey then testified that on February 2, 1992, at about 4:00 A.M. he arrested Appellant. (R2725-2727) At the time of Appellant's arrest Coffey seized Appellant's wallet, its contents, and his beeper, which were admitted into evidence . (R2727-2728)

Coffey further testified that Appellant was advised of his Miranda rights at the scene of the arrest and again at the FDLE office in Pompano Beach. (R2728-2729) After being advised of his Miranda rights, Appellant agreed to talk further with Coffey. Appellant said that he knew Lester Watson, but didn't know Leroy.

Appellant also said there was nothing in the car when he gave it to Watson. (R2729)

Coffey also asked Appellant a number of questions regarding bombs. Appellant said he did not know anything about a bomb or bombs in general. (R2729-2730)

Coffey then asked Appellant about the purchase of a microwave oven and Appellant acknowledged he had done this with Watson. (R2730-2731) When asked about purchasing fireworks Appellant acknowledged he had done this along Beach Boulevard. (R2731) When asked about Yolonda and Tanunie, Appellant stated Yolonda was his brothers' girlfriend, but he did not know Tanunie. (R2731-2732)

Coffey also testified that he went to McKinley Steel in Ft. Lauderdale and got a piece of pipe, which was admitted into evidence. (R2732-2735)

Bruce Nill testified he is a special agent with the FDLE (R2804) Nill was involved in the execution of a search warrant at Appellant's residence and the collection of evidence. (R2804-2808)

Nill identified a large number of exhibits, which included: A book entitled "Explosives and Demolitions"; a tool chest which contained a pair of wire cutters; a pair of insulated needle nose pliers; a pair of insulated wire cutters; and another pair of insulated wire cutters; two photographs of the outside of trash can ; a photograph of a crater in the backyard; and a photograph of a piece of pipe. (R2815-2820) Nill looked at a photograph of the room where Appellant did electronics work and noted that a portion of the red carpet appeared to have been torn out. (R2820-2821)

Lawrence O'Dea testified he is a special agent with the BATF, (R2923) O'Dea testified about his experience in dealing with the results of explosions and pipe bombs. (R2823-2824)

O'Dea stated that on February 2, 1992, he participated in a search of Appellant's house. (R2824) In the backyard O'Dea observed several holes, including a hole which was about five and half feet deep. (R2824-2825) O'Dea examined the big hole and found pieces of metal pipe. (R2825-2826) The pipe had the characteristics of pipe that had been exploded.(R2826)

Martha Whitakertestified regarding phone toll records related to Cebert Howell. (R2763-2766) Whitaker testified she prepared a chart based on toll records of phone calls from the Broward County Jail to the Cebert Howell household, which was admitted into evidence. (R2763-2764) These records reflect sixty-eight of these phone calls during the time period of January 17, 1992, to February 1, 1992. (R2764-2765) Whitaker also prepared an exhibit based on toll records of these phone calls on February 1, 1992, which was admitted into evidence. (R2765) The exhibit reflects three of these phone calls. (R2765-2766)

Whitaker then testifed about the following items of evidence: Appellants ' transcripts from the Cleveland Institute of Electronics (R2801-2802), and Appellant's rental car agreement for the Mitsubishi Gallant.(R2802-2804)

Marlene Hunter testified that she works for Magic Pager. (R2736) Hunter identified the contract between her company and Lester Watson for the purchase of a beeper. Hunter testified that

the numbers on the piece of paper recovered from Watson at the Jefferson County Jail were the numbers for the beeper Watson purchased in reverse order. (R2736-2738) Hunter examined a beeper and identified it as the one Watson purchased. (R2738-2739)

Charles Sinclair testified that he has been previously convicted of two felonies and is in custody for violation of probation. (R2740-2741) Sinclair and his uncle, Lester Watson sometimes stayed in the Parkway neighborhood of Ft, Lauderdale. (R2739-2740) Sinclair knows Appellant, William West, Patrick Howell, and Trevor Sealey. (R2741-2743) On one occasion Sinclair was seen by the police selling drugs. He threw away the drugs and ran, but the police caught him and took his picture. (R2742-2743) They also took Appellant and West's pictures because they were in the area at the time. (R2742) Appellant said he was upset about the police harassing him. (R2743)

Sinclair testified that in February, 1992, he had a conversation with Appellant about the bomb exploding in the rental car. Appellant told Sinclair he had received a phone call from Tallahassee from someone saying that Watson had gotten pulled over in Appellant's rental car and a bomb went off. Appellant also told Sinclair there was a gift wrapped microwave in the car that would go off if you opened it or moved it the wrong way. (R2743-2747) Appellant also asked Sinclair if Watson was the type to snitch and told Sinclair that "stuff happens to snitches." (R2747)

Sinclair then testified that he helped Appellant move a rug out of the room of Appellant's house where he worked on electronics

Sinclair then testified that he helped Appellant move a rug out of the room of Appellant's house where he worked on electronics to an abandoned house. (R2747-2748) Appellant also moved some gunpowder from this room to West's house. (R2749) Sinclair testified that he has seen Appellant make pipe bombs. (R2751-2752) After moving these items, Appellant was driving Sinclair home, when they got pulled over by the police. (R2750)

Kevin Lowrey testified he is thirty one years old, and has eleven prior felony convictions. (R2769) Lowrey knows Appellant. (R2769-2770) In the spring of 1992 Lowrey spoke with Appellant regarding a situation that involved an explosion. (R2770) Appellant told Lowrey that Black stole a camcorder from him, and that if Black had gone into the package to steal what he thought was dope, that Black would have gotten his head blown off and he wouldn't be in this mess. (R2770) Appellant also said he could make a bomb out of any device with a switch on it. (R2771) Appellant further stated that the bomb wasn't meant for the police officer. (R2771)

Lowrey also testified he came to know Lester Watson and that Watson's nickname was Black. (R2771) Lowrey told Watson and then Watson's attorney about Appellant's statements. (R2771-2772)

Trevor Sealey testified he lives in Ft. Lauderdale and works at a car dealership. (R2345) Sealey knows Appellant, Patrick Howell, and their sister Faye Howell, who was his girlfriend, and he also knows where they lived. (R2345-2346) Sealey knows other people connected to this case. (R2346-2347)

Sealey testified that in August 1991, Appellant showed him the rental car involved in another homicide, the Tillman murder. (R2347-2350) Sealey later saw this car in Avon Park, Florida. (R2350-2351) Sealey helped Appellant clean up the car and get rid of it in an orange grove. (R2351-2353)

Sealey testified that in late 1991 and early 1992 he observed Appellant make and detonate bombs. (R2353-2362, 2367-2368) Sealey was shown photographs of the room where Appellant made the bombs and noted that a red carpet was missing. (R2366-2367)

Sealey also testified that Appellant asked him if he would take a package up the road to some girls who were snitching on his brother. (R2362-2363) Appellant, in describing what would happen when the package was opened, made a gesture that Sealey interpreted as an explosion. Sealey told Appellant he did not want to do this because he was tired. (R2363)

Sealey testified on the day he was asked about the package, he saw a Mitsubishi Gallant rental car at Appellant's house. The next day the car was gone. (R2363)

Sealey further testified that during this time period he went to a gun show with Appellant. (R2363-2364) Sealey purchased several different types of gunpowder and .22 caliber bullets for Appellant. (2364-2365) Appellant put these items in the room where he made explosive devices. (R2365)

Sealey stated that on the day of the explosion he received a page with Appellant's phone number, but he did not return the call.

(R2365-2366) Sealey assumed the call had something to do with the explosion. (R2365)

Roland Lipford testified he is a captain with the Marianna Police Department. (R2148) On March 15, 1991 while serving arrest warrants at the Marianna Garden Apartments, Lipford came in contact with several people connected to this case (but not Appellant), and seized several rental cars. (R2151-2154)

Lavon Parmer testified he is the chief of the Marianna Police Department. (R2155) Appellant called Parmer regarding the rental cars seized by Lipford. (R2156-2157)

Martha Whitaker testified again. Whitaker developed and analyzed data from telephone tolls, including subscriber and toll information for Cebert Howell. (R2158-2162, 2163-2165) An analysis of these records reflected two phone calls to the Marianna Police Department. (R2165-2167) Whitaker also collected information from various beeper and pager companies. (R2162-2163)

Danny Reardon testified he is a police officer with the Greenwood City Police Department. (R2167-2168) During narcotics investigations in the Greenwood, South Carolina area in 1991, Reardon came in contact with several people connected to this case (but not Appellant). (R2168-2175)

Colin Reddie testified pursuant to a plea and cooperation agreement with the United States Government. (R2176-2178) Reddie knows Appellant and two other people connected with this case. (R2178-2179) Reddie made a trip from South Florida to Marianna with illegal drugs. (R2179-2184, 2211-2212) The trip was made in

a car Appellant rented. (R2181-2211) Reddie at first testified Appellant helped him and Patrick Howell conceal the drugs in the car, but later said Appellant was just around and did not handle the drugs. (R2211,2222-2223) Because Reddie's driver's license was suspended, Appellant gave Reddie his old military uniform and driver's license information, so if Reddie was stopped by law enforcement officers, he could pretend to be Appellant. (R2182)

Reddie also testified about information he had regarding another drug trip from South Florida to Marianna. (R2184-2190) Appellant rented two cars for this trip, because Patrick Howell told Appellant the first car rented could not be used because it's bright color would attract police attention. (R2186-2212) The people who made this trip got arrested and the rental car was impounded. (R2185)

Reddie then testified about a third trip to Marianna to pick up the impounded rental car and drugs. (R2190-2194, 2212) Appellant rented the car for this trip as well. (R2190) While in Marianna, Reddie was arrested for driving with a suspended driver's license and this rental car was also impounded. (R1293)

Reddie further testified that in the summer of 1991 Patrick Howell told Reddie about his involvement in a drug rip-off and homicide. (R2212-2215) In connection with this incident, Appellant asked Reddie to get parts for the gunshot damage to the rental car and chemicals to clean up the blood in the car. (R2215-2217)

Yolonda McCallister testified pursuant to a plea and cooperation agreement with the United States Government. (R2224-2225)

McCallister lived in Marianna. (R2225) She knows Appellant and was Patrick Howell's girlfriend. (R2225-2228) McCallister knew Patrick Howell was transporting drugs to Marianna and on one occasion, at his request, she got some drugs from an apartment in Marianna. (R2228-2230)

McCallister also testified that she and Patrick Howell dealt drugs in Greenwood, South Carolina. (R2228-2229, R2235-2237) Patrick Howell gave Appellant the money from these transactions. (R2236-2237) McCallister never saw Appellant possess or sell drugs. (R2251)

McCallister further testified that Patrick Howell told her about his involvement in drug rip-off and homicide. (R2231-2233) Appellant had McCallister add her name to his rental car agreement on the car that was involved in the homicide. (R2237-2239) Shortly after this McCallister saw Appellant with the rental car, which had apparent bloodstains and bullet holes. (R2241-2242) Appellant at this time (and later) asked McCallister to report the car as stolen, which she eventually did. (R2241-2244) Appellant told McCallister that he was going to trash the rental car. (R2242)

McCallister also testified that in early 1992 Appellant called her and asked if Tammie Bailey had a microwave. (R2244-2246) Prior to trial McCallister had told law enforcement officers that she had no information regarding this. (R2245-2246)

McCallister also testified about the phones she would use and the places she would stay. (R2230-2231, R2247-2249) McCallister

also testified that Patrick Howell had a beeper, which Appellant used when Patrick Howell was out of town. (R2236)

William L. McCloud testified he is a deputy with the Jackson County Sheriff's Office. (R2259) On September 6, 1991 Yolanda McCallister reported the rental car stolen to him. (R2210)

Eli Thomasevich testified he is a detective with the Broward County Sheriff's Office. (R2264) On August 26, 1991 he was assigned to investigate the homicide of Alphonso Tillman, a known drug dealer. (R2265, R2268-2269) Another drug dealer, Andrew Jackson, showed Thomasevich the Howell home, and said that he and Tillman and he had done drug deals there. (R2270-2271)

Thomasevich also testified about receiving information that Tillman was involved with people who were dealing drugs in Marianna. (R2271-2272) Thomasevich obtained photographs of some of these people and witness were able to pick out Colin Reddie and Emerson Davis' pictures. They were arrested for the Tillman homicide but were never formally charged. (R2273)

Thomasevich eventually learned that Appellant's rentalcarwas involved in the homicide and that the car had been recovered and processed.(R2274-2278) Thomasevich spoke with Appellant and Appellant said he rented the car for Reddie, that eventually he let McCallister use it, but that he had no knowledge of the car's use in the Tillman homicide, and that he had no knowledge of any coverup regarding the car after the homicide. (R2279-2283) Appellant gave Thomasevich copies of his correspondence with the

rental car company about the car being reported stolen and later recovered. (R2283-2285)

Thomasevich determined that Patrick Howell, Michael Morgan and Tillman were in the rental car; that Morgan shot and killed Tillman; and that after the homicide an Uzi, a kilogram of cocaine, and scale were taken from Tillman. (R2285-2287)

After Thomasevich testified a stipulation was published to the jury regarding information about the Tillman homicide, including the fact that Appellant and Lester Watson were not involved in that homicide. (R2288-2289)

Patricia Clark testified she lived in Ft. Lauderdale from July 1990 to January 1992. (82299) Carter was another girlfriend of Patrick Howell. (R2299-2300) Carter knew about, and sometimes accompanied Patrick Howell on drug trips to Marianna and Greenwood. (R2301-2312) The Marianna trips were in cars rented by Appellant. (R2303-2304, R2305-2306) Reddie accompanied Clark and Patrick Howell on two of these trips. (R2304-2312) When Partick Howell returned from these trips he gave Appellant large sums of money. (R2330) Clark had no information that Appellant was in the drug business with Patrick Howell and the others. (R2337)

Clark also testified that in August 1991, Clark met with Patrick Howell and Morgan at her room. (R2312-2314) Appellant and others also came to her room. (R2317-2320) Patrick Howell told Clark about the Tillman homicide. (R2320) About three weeks later Patrick Howell asked Clark to help Appellant clean up and get rid of the car, which she did. (R2323-2329)

Clark further testified that in November 1991, she resided in Appellant's house. (R2331-2332) Appellant had a room in the house where he worked on electrical things. (R2333-2334) One day, while at the residence, Clark heard an explosion, and Appellant showed her a hole in the ground. (R2234-2335)

Frank Rivers testified he is an area manager for Budget Rent-A-Car and acts as a record custodian. (R2381-2382) Rivers testified regarding various records associated with the rental car involved in the Tillman homicide. (R2382-2387)

Hentley Morgan testified pursuant to a plea and cooperation agreement with the United States Government. (R2388-2390) Morgan knows Appellant and other people connected to this case. (R2390-2393) Morgan was involved in drug dealing with Patrick Howell and Appellant. (R2393-2394) On one occasion Morgan and Patrick Howell transported drugs to Marianna. (R2393-2396) Morgan also transported drugs to South Carolina at Patrick Howell's request. (R2401-2403) Morgan got the drugs from Appellant. While Morgan was in South Carolina he would send the money from the drug transactions to various people in the South Florida area as directed by Appellant. (R2403-2417) Morgan described the various places he stayed at in South Carolina. (R2417-2419)

Morgan also testified that in August 1991, Patrick Howell and Michael Morgan came to his house in a rental car following the Tillman homicide. (R2396-2397) The car was full of blood. (R2396) Patrick Howell stated they had been in a fight. (R2397) Michael Morgan later tried to clean up the blood in the car. (R2397, R2399-

2400) During this time period a number of people, including Appellant, came and went from Morgan's house. (R2398-2399) Later that day Appellant returned and asked Morgan and Clark to move the car. (R2400-2401) Morgan said he would not do it, so Clark drove it away. (R2400-2401)

Morgan further testified that he obtained a cassette tape from Appellant's residence, which he gave to some family members. (R2419-2420) After his arrest, Morgan told law enforcement officers about the tape, and gave them permission to recover it.

Tammie Bailey testified that in 1991 she was living in Marianna, Florida and was presently serving a prison sentence for drug trafficking. (R2426-2427) Bailey knows Michael Morgan and his sister, Patricia Clark. (R2427-2428) Morgan was from Ft. Lauderdale. He was her boyfriend, and the father of her child. R(2428) Morgan sold drugs in Marianna. (R2428)

Bailey also knows Patrick Howell, Colin Reddie and Appellant. (R2429-2430) Patrick Howell and Reddie sold drugs in Marianna. (R2429-2430) On one occasion Reddie was in a car rented by Appellant and in it was Appellant's old Army uniform. (R2430-2431)

Bailey was arrested for drugs found in her apartment. (R2431-2433) Patrick Howell, Morgan, and others were present at the time of her arrest. (R2431) In addition to the drugs that were found, Patrick Howell and Morgan had hidden drugs in her apartment that were not found. (R2431-2432)

Bailey went to Ft. Lauderdale with her cousin, Yolanda McCallister, after her release from jail. (R2433) McCallister was

Patrick Howell's girlfriend. (R2433) During the summer of 1991 they made several trips to Ft. Lauderdale. (R2433-2434)

Bailey and McCallister, on one occasion, met Patrick Howell in Tallahassee and traveled various places with him. (R2434-2439) At one point they were in Ft. Lauderdale and saw Patrick Howell cleaning a scale with alcohol. (R2439-2440)

Bailey, McCallister and Patrick Howell then went to South Carolina to sell drugs. (R2440) Bailey identified where they stayed and what phones they used. (R2440-2441) Upon returning to Ft. Lauderdale, Patrick Howell gave Appellant a bag of money. (R2441-2442) Patrick Howell then went back to South Carolina, and Bailey and McCallister went to Miami. (R2442-2443)

Bailey then testified that Appellant called McCallister in Miami and asked her to come to Ft. Lauderdale. (R2443) While Bailey and McCallister were in Ft. Lauderdale Appellant had McCallister's add her name on a rental car. (R2443-2445) Shortly after this Bailey saw Appellant with the rental car and observed apparent blood in the car and on Appellant's pants. (R2445-2449) After this contact with Appellant, McCallister told Bailey that he told McCallister to report the rental car as stolen, which she eventually did. (R2449, 2451-2452)

Bailey, because of the situation with the car and for other reasons, anonymously called the Ft. Lauderdale Police Department to find out if Morgan and Patrick Howell had been involved in a homicide. (R2449-2451) Eventually Bailey learned that Patrick Howell had been arrested. (R2453) Following his arrest, Bailey

(and McCallister) would have contact with Patrick Howell by way of three-way phone calls set up by Appellant. (R2453-2454) During this time period Bailey lived with her grandmother, and then moved to Orange Street in Marianna in January, 1992. (R2454-2455, R2464)

Bailey then testified that in January, 1992, Appellant began repeatedly calling her with requests for her and McCallister to come to Ft. Lauderdale and listen to a tape in relation to a murder or something. (R2455-2464) Appellant, on two occasions, had Lester Watson send Bailey money via Western Union so they could make the trip to Ft. Lauderdale. (R2456-2464) Bailey never did go to Ft. Lauderdale. (R2461, R2463) This series of events apparently made Appellant mad at Bailey. (R2464) On February 2, 1992, Bailey learned about the trooper's death. (R2465)

Arthur Jones testified he is a detective with the Ft. Lauderdale Police Department. (R2484) On September 5, 1991, he received a phone call from a black female requesting information about Patrick Howell and Appellant's possible involvement in homicide in Ft. Lauderdale. (R2484-2486)

Martha Whitaker testified further as to her collection and analysis of phone tolls and subscriber information regarding people and locations associated with the case. (R2487-2495)

William West testified pursuant to a plea and cooperation agreement with the United States Government. (R2495-2498) West lived in Ft. Lauderdale before going to prison. (R2495, R2498) West knows Appellant, Patrick Howell, Michael Morgan, Lester Watson, and Trevor Sealey. (R2501-2502)

West sold drugs in the Ft. Lauderdale area for Patrick Howell and Appellant. (R2500, R2503-2505) Watson, Morgan, and Patrick Howell would leave town in cars rented by Appellant to sell drugs. (R2500-2501) On one occasion Appellant and West took Watson to the bus station for the purpose of Watson leaving town to sell drugs. (R2502-2503) On one occasion Morgan sent money from Greenwood, South Carolina to West for Appellant. (R2505-2507)

West in late 1991 and early 1992, heard bomb noises in his neighborhood. (R2507) On one occasion Appellant exploded a pipe bomb in his backyard. (R2507-2508) On another occasion Appellant made a pipe bomb and gave it to Sealey and West, who then set it off in a dumpster. (R2509-2510, 2526-2528) West has seen Appellant make bombs in a room in his house. (R2511-2512) West was shown photographs of this room taken at the time of the police search and West noted that a rug that was usually in the room was not there. (R2517-2518) Prior to his arrest, Appellant put some pipes, fuse stems etc. at West's house. (R2516-2517) Approximately a week or two prior to Appellant's arrest West saw Appellant purchase gunpowder for making bombs. (R2514-2515)

West testified that Appellant made statements to him that the police were harassing him. (R2513) Appellant also stated that one day he would like to do something to one of them. (R2513)

West met Tammie Bailey and Yolanda McCallister when they came to Ft. Lauderdale from Marianna. (R2514) Appellant told West that he sent Watson to Marianna in a brownish, goldish car with a pipe bomb in a microwave for Bailey and McCallister. (R2515-2517)

Appellant said he did this because he was upset with them, because he sent money to them to come to Ft. Lauderdale and they did not come. (R2515-2516)

Joseph Damiano testified that he is a detective with the Broward County Sheriff's Office. (R2528-2529) On November 26, 1991, Damiano and Detective Rudolph came in contact with Appellant while trying to identify the occupants of a residence in Ft. Lauderdale. (R2529-2533) Damiano and Rudolph recognized Appellant from the situation with Sinclair. (R2531-2533)

Damiano also testified that as a result of the November 26, 1991, contact Appellant lodged a complaint with the Broward County Sheriff's Office against Damiano and Rudolph. (R2533-2534) Damiano read Appellant's two written complaints into the record. (R2534-2539, R2451-2545) As part of the internal affairs investigation Sergeant Wright (in Daminano and Rudolph's presence) phoned Appellant to discuss the complaint, but Appellant said he would handle the problem in his own way. (R2539-2540) Wright also went to Appellant's house and discussed the matter. (R2540) Appellant then sent a follow-up statement expressing his satisfaction with how the Broward County Sheriff's Office handled the matter and the Broward County Sheriff's Office sent Appellant a letter closing out the investigation. (R2539-2540, R2545-2546)

Donnie Branch testified he is a special agent for the FDLE. (R2831) Branch identified a photograph of Bailey's residence, which was admitted into evidence. (R2831-2832)

SUMMARY OF THE ARGUMENT

The trial court erred in denying both Appellant's and the State's request to have Appellant's attorney ,Frank Sheffield removed from his representation of Appellant. Sheffield had been removed by a Federal judge in Appellant's Federal case due to problems between Appellant and Sheffield, and a conflict of interest, that resulted in Sheffield advising that court he could not ethically represent Appellant. The trial court failed to conduct adequate hearings into Appellant's claims that Sheffield was not providing effective assistance of counsel and that he still had a conflict of interest.

The trial court based on the facts in this case erred in refusing to appoint a second attorney to assist in the defense.

The trial court erred in only giving the Standard Penalty Phase Jury Instructions. Appellant urges this Court to reconsider its prior rulings in this area.

The trial court erred in preparing the sentencing order. The trial court failed to consider numerous mitigating circumstances. The trial court also abused its discretion in the assignment of the weight it gave to several mitigating factors. The trial court also erred in its weighing of the aggravating and the mitigating circumstances.

The trial court erred in finding the aggravating factor of great risk to many people where such a finding was not supported by the facts and the trial court's reasoning was based on impermissible speculation.

The felony murder aggravating factor is unconstitutional in that it fails to narrow the class of persons eligible for the death penalty. The trial court erred in finding this aggravator.

The trial court erred in finding that the witness elimination aggravator applied in this case. Although the victim was a law enforcement officer, he was an unintended victim. The intended victim in this case was not a law enforcement officer. The dominant motive with respect to the intended victim was not witness elimination. Under the facts of this case, the aggravator should not apply.

The trial court erred in finding that the cold, calculated, and premeditated aggravator applied under the unique facts of this case. This Court should reconsider its prior rulings in this area.

The trial court erred in applying the aggravating factor that the victim was a law enforcement officer. Appellant contends this aggravator should not apply if the defendant has no knowledge that the victim is a law enforcement officer, especially in this case where the theory of guilt was based on transferred intent related to the intent to kill a layperson.

A sentence of death is not proportionate in this case. The trial court's failure to properly find and weigh the mitigating and aggravating circumstances preclude reliance on its findings. The facts demonstrate that this is not one of the most aggravated and least mitigated of first degree murders. When the mitigating and aggravating circumstances are properly considered, a sentence of death is unconstitutional.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REFUSING TO APPOINT DIFFERENT COUNSEL FOR APPELLANT AND IN REFUSING TO APPOINT A SECOND ATTORNEY.

The trial court committed numerous errors with respect to a number of issues related to Appellant's representation by court appointed counsel. The trial court failed to properly handle valid claims regarding court appointed counsel's ineffectiveness. The trial court failed to handle legitimate claims regarding court appointed counsel's conflicts of interest related to Appellant. The trial court failed to properly determine issues related to Appellant's right to self-representation. The trial court further erred by failing to appoint second counsel under circumstances in this case which mandated such an appointment. The trial court committed additional error by allowing trial counsel for a hostile co-defendant (who had pled) to assist Appellant's counsel in selecting a jury in Appellant's trial.

I. THE NEED FOR DIFFERENT COUNSEL

A. The Facts

The issue of whether or not different counsel was needed in order for Appellant to have adequate representation was first brought to the trial court's attention on March 18, 1993. The State filed a Motion to Disqualify Counsel. (R304-308) The State advised the court that Appellant's lawyer, Frank Sheffield, had been appointed to represent Appellant in both Federal and State

court.(R304) The State quoted various newspaper articles in which Sheffield had stated that there were problems between he and Appellant in the Federal trial and that Appellant was not cooperating with him and had requested another lawyer.(R304,307-308) The Motion furthur alleged that Sheffield had received a threatening phone call at his office and the anonymous caller had stated that "If Paul Howell goes down, Frank Sheffield goes down." The State's Motion cited another newspaper quote from Sheffield stating that "I went to the judge, with all this combined, I can't adequately represent him."(R305,307-308)

On April 17, 1993, Appellant sent a letter to the trial court whichmade allegations of ineffective assistance of counsel against Sheffield. Appellant requested the appointment of specific substitute counsel. Appellant claimed that Sheffield had been removed from his Federal case because he was ineffective and that William Pfeiffer had been appointed. Appellant stated that Sheffield failed to communicate with him, that they didn't get along, and that he didn't trust him. Appellant specifically requested that Pfeiffer be appointed as counsel in this case. Appellant also requested that a second lawyer, Clyde Taylor, be appointed to assist Pfeiffer because Pfeiffer had never handled a capital case.(R310)

On April 16, 1993, the trial court held a hearing on the State's Motion and Appellant's letter. (R1196-1206) At the hearing the trial court conducted a Nelson inquiry.(R1206) Appellant specifically requested the discharge of Sheffield.(R1203)

Appellant gave the court numerous reasons why he requested the discharge including the matters contained in the newspaper article, Sheffield's failure to review discovery with him or provide him with a copy of discovery, and Sheffield's seeming uncaring attitude. (R1203) The trial court only made this preliminary inquiry of Appellant. The court, before obtaining Appellant's position on the issue, questioned Sheffield as to his position. Despite lengthy commentary, Sheffield's statements axe more remarkable for what they failed to address than for their actual content. Sheffield failed to deal with the significant concerns raised by the State and Appellant, and never explained how he would resolve the conflicts in such a fashion as to allow him to effectively represent Appellant. Sheffield did not explain why he had not provided discovery to Appellant. He did not explain the newspaper quotes where he admitted that he <u>was not</u> providing Appellant with adequate representation. The trial court denied the motion and request, finding that Sheffield was removed in the Federal case not for lack of diligence on his part, but because of concerns for Sheffield's safety if he continued to represent Appellant. The court also felt that Sheffield was more qualified to represent Appellant than Pfeiffer. (1205-1206)

On June 4, 1993, the State filed a Motion to Rehear the Motion to Disqualify Counsel. (R322-330) Attached to the Motion were transcripts from Appellant's Federal case.(R324-330) In these transcripts Sheffield outlined significant problems between he and Appellant.(322-327) Sheffield also advised the Federal judge that

he could not ethically represent Appellant.(R326) The State filed additional transcripts on November 18, 1993. (R359-393) The first portion of these excerpts contains Appellant's explanation to the Federal judge of the problems between he and Sheffield.(R360-364) The second portion is a hearing held in chambers outside Appellant's presence that was requested by Sheffield.(R366) In this hearing the transcripts reflect that Sheffield renewed his request to withdraw as Appellant's attorney.(R366) Sheffield referred to his ongoing problems with Appellant.(R366) Sheffield noted that Appellant's family had hired a lawyer whom Sheffield believed was looking over his shoulder and "birddogging" him.(R366-368) The other attorney disputed these claims when the judge spoke to him by phone. (R379)

Sheffield then related that the day before at around 4:00p.m. his wife/secretary had received an anonymous phone call at his office.(R367) The male caller had stated that "If Paul Howell goes down, Sheffield is going down also".(R367) As a result of this call, Sheffield was really nervous, worried, and fearful for his own safety and that of his wife and children because, as he put it ". ..these guys have already got three murders.".(R367) After the call Sheffield had a Billy Joyce and Sheriff Boone and would have called the Assistant U.S. Attorneys if he had had their home phone number. (R368-369)

Sheffield and one of the Assistant U.S. Attorneys discussed the idea of putting taps on his phones. Sheffield told the judge that even though the phone could be tapped, this did not give him

a whole lot of comfort.(R368-369,371) Sheffield told the court he did not feel this was an idle threat, that he treated it seriously, and was genuinely concerned because he believed that these guys could carry out their threat.(R370) Sheffield again stated his concerns for himself and his family and stated he could not sleep the night before because of the call. Sheffield advised the court that he could not adequately represent Appellant because of the threat.(R371)

The transcript reflects Sheffield told the Federal judge that Appellant was sure to be convicted and he didn't know what the consequences would be for himself.(R371) Sheffield added that he couldn't walk around with a bodyguard for forty or fifty years.(R371) Sheffield believed this threat was the tip of the iceberg, that there were lots of people out there connected with Appellant, and that he took the threat seriously.(R371-372)

In the course of discussions of how this would affect the trial, the transcripts reflect that Sheffield stated that he did not want to be the one "rolling the dice", that he didn't care what happens, and that it was not his problem.(R372-373) When it was suggested by the Assistant U.S. Attorney that Sheffield and his family could be given protection, Sheffield responded that that did not give him a whole lot of confidence.(R373-374)

During these discussions, the Assistant U.S. Attorneys repeatedly stated that Appellant was the person behind the call.(R369-370) Sheffield agreed, stating that Appellant's problems with him were a factor in the threats.(R375-376)

Sheffield told the Federal judge that the threats were a stopping block in the road regarding his work on the case.(R377) Sheffield worried that these guys could carry out their threat.(R377) Sheffield had not discussed the matter with Appellant, but had gone straight to the judge.(R384)

As a result of these allegations, Appellant was separated from the other defendants to prevent word of this situation from spreading to the others, thereby causing them to threaten their lawyers.(R380,391) An investigation was also initiated into the threat, which included checking with the phone company for information they could develop on the call, an investigation by law enforcement officers in Broward County regarding this and the detention center's investigation of all Appellant's calls as part of their effort to determine the source of the call and the likelihood of future calls.(R380-381,390)

During this hearing, the Federal judge stated that because Appellant was constantly dissatisfied with his attorney and because of the threats, he might have to represent himself because no one would want to represent him.(R382,385) It was agreed that the discussions in this hearing would be kept secret from Appellant.(R392) It was further agreed that the reason Sheffield was being removed from the case was because of the threat, but that Appellant would be told the reason was because of Appellant's continued dissatisfaction with him.(R392)

On November 19, 1993, a hearing was held by the state trial court on these matters.(R1226-1250) At this hearing, Sheffield

stated that although he had had problems in the past communicating with Appellant, he no longer had a problem.(R1233-1236) Sheffield gave an account of the threat situation which greatly played down his reactions, compared to what was contained in the Federal transcripts.(R1234-1236) Sheffield opined that Appellant did not want a change of counsel.(R1237)

Appellant stated that he felt the threat situation had had an adverse effect on his witnesses (especially on Appellant's wife and mother, whom it was felt the threat had come from), that the threat situation had not been resolved, and an investigation would reveal that the threat had not occurred.(R1238-1239)

Larry Sproat, an agent with DEA in Tallahassee, testified that he was assigned to investigate the threat allegation. He had interviewed Sheffield's wife/secretary, and recounted her version of the event.(R1240-1241) Sproat testified that the phone company was able to check all the incoming calls to Sheffield's business phone, both local and long distance, and had determined that no call had been incoming at the time of the threat.(R1241-1243) On cross, Sheffield asked Sproat if he felt that his wife was lying, if the phone company's determination of no such call could be incorrect, and, if in Sproat's opinion, the threatening call had never occurred. Sproat responded that he felt Sheffield's wife was lying, that the phone company's information was not erroneous and in his opinion the call had not occurred.(R1243-1246)

At the conclusion of his questioning of Sproat, Sheffield stated that Appellant was leaving the matter up to the court and that Appellant did not want him off the case.(R1246)

At this point, Appellant stated that he knew there wasn't anything to the claim regarding the threat and that he questioned the integrity of who ever the claim had come from.(R1247) Appellant felt that the threat allegation was a matter that was still poisonous as far as the integrity between he and Sheffield.(R1247-1248) Appellant expressed concerns about something else like this happening again.(R1248) When asked by the trial court if there was a problem between he and Sheffield, Appellant responded that the matter had not been resolved and that it would remain a problem until somebody admitted that the threats never happened.(R1248)

In response Sheffield stated that it there was a problem, the only problem was with Appellant because he was willing to represent Appellant.(R1248-1249)

Despite what was an obvious conflict of interest, the trial court stated that there was not a conflict of interest between Appellant and Sheffield that would interfere with Sheffield's ability to represent Appellant.(R1249-1250) The court felt Appellant and Sheffield were able to communicate.(R1249)

The State requested that the court obtain an affirmative waiver from Appellant.(R1249) The trial court refused to do this.(R1249) When Appellant was asked if he had any furthur comments, he stated that he would leave it up to the court.(R1250)

The trial court denied the motion to disqualify Sheffield since Appellant was leaving the matter up to him.(R1250)

On September 16, 1993, during a motion for continuance, Sheffield advised the trial court that Appellant and his family would not co-operate with the defense psychologist, Dr. McClaren, that Appellant would not co-operate with Sheffield, that Appellant was not happy with what Sheffield was doing in the case, and that Appellant wanted another attorney.(R1513-1514)

When Appellant was given an opportunity to speak, he expressed concerns with Sheffield's representation of him because it seemed the only thing Sheffield was concentrating on was the psychiatric aspect of the case.(R1541) Appellant stated he did not want to talk to the psychiatrist and Sheffield's insinuations that he was incompetent caused him to have animbsity toward Sheffield.(R1541)

The trial court took no action other than to attempt to placate Appellant by telling him that these were matters that he should not worry about.(R1541-1542)

Appellant then mentioned the reason his family and wife would not speak with Sheffield was related to the threat situation and Sheffield's implications that his family was responsible.(R1542-1543) Appellant advised his family went through a great deal because of the situation, that they did not trust Sheffield, and that this caused him concern about Sheffield calling them as witnesses.(R1543) The trial court did not conduct any inquiry into these matters. The court's response to this was that it Appellant's choice with respect to his family co-operating or not. The court

told Appellant he could either urge or not urge them to co-operate and that the threat situation had been occurred a long time ago and had been resolved.(R1543)

Appellant then stated that Sheffield had been appointed because he was indigent and couldn't afford his own attorney, that he did not want Sheffield to go to trial with him, and that if he had to, he would rather go to trial himself.(R1543) The trial court did not conduct any type of Faretta inquiry or any other type of hearing. The court just told Appellant that this was a choice he would have to make and he would consider it at a later time.(R1544)

The trial court then asked Appellant if he wanted to discharge Sheffield.(R1544) Appellant stated that he did not like Sheffield going to trial with him and that he felt Sheffield was going against him.(R1544) The trial court told Appellant this was a matter he would have to decide and urged him to keep Sheffield.(R1544) The court asked Appellant if there was anything else he wanted to bring up and Appellant responded there was not.(R1544)

In September 1994 Sheffield filed a motion in which Sheffield alleged Appellant was incompetent to proceed to trial.(R1549-1613) At the hearing on the issue, Sheffield stated that Appellant had told him that if he filed the motion that he intended to ask the trial court to fire Sheffield as his attorney and that Appellant would represent himself.(R1555) Sheffield stated that Appellant had refused to co-operate with all efforts to prepare a defense and

had been antagonistic to everyone involved, including the psychologist.(R1555)

When questioned, Appellant stated that he understood all the charges that he was facing and that he was competent.(R1561) Appellant also stated that all of Sheffield's motions were directed toward the competency issue, which was an avenue Appellant did not want to pursue.(R1561-1563) Appellant said he had co-operated with Sheffield contrary to Sheffield's assertions, that he had a conflict with Sheffield, that he didn't believe in Sheffield, and that Sheffield was going in a direction that Appellant did not agree with.(R1563)

Sheffield responded that Appellant also refused to review the depositions and statements. Sheffield told the court that without psychological testimony, there was nothing he could do for Appellant and Appellant could represent himself.(R1564-1565)

Appellant told the court that he had looked at the depositions and other materials in the case.(R1565-1567) Appellant told the court the greatest conflict between him and Sheffield was that Appellant did not want to pursue an insanity defense. The trial court said this was Appellant's choice.(R1567)

Sheffield said he agreed it was Appellant's choice, but that he was going to continue to raise the issue anyway. Sheffield then told Appellant that he should either have him represent him, (impliedly on Sheffield's terms), or represent himself.(R1567) Without doing a Faretta inquiry, the court told Appellant he could not represent himself.(R1568)

The court told Appellant that even though he and Sheffield might be in an antagonistic position regarding the insanity defense, Appellant had competently indicated that he did not want to pursue this. (R1568) Sheffield responded that an insanity defense was the only defense.(R1581) Appellant interjected that this was where the conflict was, that from day one insanity was the only thing Sheffield wanted to pursue and that Appellant would not do it.(R1569) The court told Sheffield that this was Appellant's choice, to which Sheffield again responded there was no other defense and that if Appellant wouldn't pursue it that, while he would stay on the case, Appellant would have to be lead counsel.(R1569)

In response to Sheffield's comments, Appellant stated that these were Sheffield's opinions. Sheffield strongly reasserted that there was no other defense and that Appellant might as well plead guilty.(R1569-1570) The trial court told Sheffield that Appellant didn't have to plead guilty, to which Sheffield responded that he knew that, but since he couldn't defend Appellant it would be as though he were sitting at trial with his hands tied behind his back and his mouth taped shut.(R1570)

There was then a lengthy discussion regarding Appellant's mental health, which ended with Sheffield again stating that without an insanity defense he would be ineffective.(R1570-1580) Appellant stated his attorney in Fort Lauderdale had done the same thing Sheffield was doing.(R1580-1582) That lawyer was eventually

removed, another lawyer appointed, and Appellant went to trial and was acquitted.(R1583)

Sheffield continued to assert that without an insanity defense he couldn't represent Appellant and that Appellant should represent himself.(R1585-1590) The trial court continued to explain to Sheffield that it was up to him to defend Appellant within these parameters.(R1585-1590) The trial court elicited from Appellant again that he did not want to pursue and insanity defense and got Sheffield to agree to this.(R1585-1590)

After lunch Appellant again raised concerns about Sheffield stating there was no defense.(R1600-1601) The trial court asked Sheffield if Appellant's decision to forgo an insanity defense would require further work, and Sheffield responded that insanity was the only thing he had prepared.(R160-1602) Sheffield stated more work would be needed to come up with another defense.(R1603)

On September 21, 1994, a letter written by Appellant and addressed "To Whom It May Concern" was filed.(R922-924) In it Appellant wrote that there were serious conflicts between him and Sheffield. They included: Sheffield selectively listening to Appellant's suggestions; Sheffield pursuing an insanity defense contrary to Appellant's wishes; and that when Sheffield had been forced to abandon that defense, he had maintained there was no defense. Appellant questioned Sheffield's ability to represent him for other reasons as well.(R922-923) Appellant wrote the differences were irreconcilable and they had caused that lack of preparation on Sheffield's part. Appellant wrote that he did not

want to give up his right to counsel, and that he had had other attorneys who had gone to trial without an insanity defense and he was certain there was another defense.(R923) Appellant also wrote that he had discussed his case with four other attorneys, therefore he knew that Sheffield's representation of him was deficient.(R923) Appellant wrote that the trial court's failure to deal with the counsel problem was a dereliction of the court's duty.(R922)

On October 10, 1994, at Appellant's request, Sheffield brought to the court's attention this letter. Sheffield advised the court that Appellant wanted Sheffield off the case and that he wanted the letter to be treated as a motion to recuse the judge as well. Sheffield told the court that Appellant wanted the letter forwarded to the JQC.(R1647)

Appellant then told the court that Sheffield continued to tell him that he had no defense. Appellant stated that he was not going to plead, that he was going to trial and he wanted a lawyer who would not continue to tell him that there was no defense. Appellant felt Sheffield had a lackadaisical attitude toward the case.(R1647)

The trial court denied Appellant's request to remove Sheffield without further hearing.(R1648) The motion to recuse was also denied as legally insufficient because it was based on dissatisfaction with the trial court's rulings.(R1648-1649)

Appellant continued to question the effectiveness of an attorney who tells his client there is no defense. Without a

Nelson hearing, the trial court denied Appellant's request to have Sheffield removed on the grounds of ineffectiveness.(R1649-1650)

During trial Appellant again brought to the trial court's attention that Sheffield was doing an extremely poor job, that he did not feel he had an effective attorney, that it was hard for him to sit there and watch Sheffield, that Sheffield ignored his suggestions for questions and that Sheffield was not prepared for trial.(R2472)

Sheffield denied that he was unprepared, even though a recess had been taken earlier in the trial because Sheffield was not prepared to cross-examine certain witnesses.(R2261) Sheffield had been unprepared because they had not been on the list the State had given him for that day and he was only preparing his cross the night before each witness testified.(R2261-2262) Sheffield felt Appellant wasn't co-operating with him and wouldn't communicate with him.(R2473)

Appellant countered that he had requested Sheffield call certain witnesses, who could refute what the State witnesses were saying. Sheffield responded that he felt the witnesses were inconsequential.(R2473)

The trial court told Appellant, in essence, that it was up to Sheffield to defend him the way Sheffield wanted to and that the court would not appoint another lawyer.(R2472-2476) The court also told Appellant that it was not in his best interest to represent himself.(R2476)

Appellant continued to object to Sheffield's performance as compared to the other lawyers he had had.(R2476-2477) Again the trial court refused to appoint another attorney.(R2478)

B. Claims of Ineffective Assistance

In Nelson v State, 274 So.2d 256 (Fla. 4th DCA 1973), the lower court outlined the proper inquiry for dealing with claims of ineffective assistance of court-appointed counsel. The Nelson court set forth a procedure that requires the trial court to first inquire as to the reason that the defendant seeks to have counsel removed. If incompetency is alleged as the reason, the trial court should make sufficient inquiry of the defendant and counsel in order to determine whether or not there is reasonable cause to believe that court-appointed counsel is not rendering effective assistance of counsel. The court's findings should appear in the record. In Hardwick v State, 521 So.2d 1071 (Fla.) cert. denied 488 U.S. 871 (1988), this Court specifically adopted the procedure in Nelson in these situations.

In Jones v State, 658 So.2d 122,127 (Fla. 2nd DCA 1995), Judge Altenbernd in a concerning opinion laid out a step by step procedure for trial judges in conducting a proper Nelson inquiry:

1. Remove any doubt about the need for a Nelson inquiry in favor on a inquiry.
2. Ask the defendant whether or not he or she is asking to discharge the attorney.
3. If the defendant indicates a desire to discharge the attorney, ask for the reasons why he or she wishes to discharge the attorney.
4. If the defendant's explanation could reasonably be interpreted as a layperson's allegations of incompetence, then
   a. Make a further inquiry of the def-

endant to determine whether there is reasonable cause to believe the court-appointed counsel is not rendering effective representation;
AND
b. Make a similar inquiry of the defendant's counsel to determine whether the attorney is rendering effective representation. This inquiry should include:
(1) The extent of counsel's investigation of the facts.
(2) Counsel's knowledge of the law.
(3) The presence or absence of influence or prejudice.
(4) Any other factor material to the specific case.

5. If you find "reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant, then
a. Make that finding on the record and appoint substitute counsel.
b. Give the new attorney adequate time to prepare the defense.
6. If you find "no reasonable cause to believe counsel is rendering ineffective representation", then
a. Make that finding on the record and
b. Advise the defendant that:
(1) The court will not replace the attorney;
(2) If the defendant chooses to discharge the attorney, then the state will not be required to appoint a substitute,
AND
(3) If the defendant chooses to discharge the attorney, then the court will treat that decision as an exercise of the defendant's right of self-representation.
7. If the defendant fails to make an unequivocal request for self-representation, then the trial may proceed with the defendant represented by the original attorney.
8. If the defendant makes a request for self-representation, conduct a Faretta inquiry.

(footnotes omitted)

Utilizing Judge Altenbernd's procedures is illustrative in analyzing and pointing out the inadequacies of the trial court's

performance of these requirements. For example, at the April 16, 1993, hearing on the Motion to Disqualify Counsel and Appellant's letter, an analysis of this hearing using the steps outlined in Jones is as follows:

1. The trial court did conduct a Nelson inquiry. (R1196-1206)

2. The Appellant clearly requested the discharge of his attorney. (R1203)

3. The Appellant gave the trial court a number of reasons regarding why he wanted to discharge counsel, including the matters contained in the newspaper article, counsel not reviewing discovery with him, counsel not providing him with a copy of discovery, and the fact that counsel doesn't really care what happens. (R1203)

4a. Other than the preliminary inquiry the trial court made of Appellant at R1203, the trial court did not make any further inquiry of Appellant. The nature of these claims should have prompted a more extensive inquiry, especially in light of the conflicts between Appellant's claims, andcounsel's representations regarding these matters.

4b. The main focus of the trial court's inquiry was on Sheffield's position regarding the situation (R1199-1203, R1203-1204) Despite the length of these comments by Sheffield, he never adequately dealt with the fact that there were significant problems between him and Appellant, and how he was going to resolve these problems so he could effectively represent the Appellant at trial. Sheffield also did not address the conflict between him and

Appellant regarding Appellant's opportunity to review discovery and discuss it with counsel. Sheffield also completely failed to address the fact that he is quoted in the newspaper as saying he could not adequately represent Appellant because of the problems between him and Appellant, and because of the threat.

5. Not applicable.

6a. The trial court's reasons for denying the Motion to Disqualify were inadequate. One of the trial court's reasons was that Sheffield was removed from the Federal case not because of the lack of diligence etc., but because of the Federal judge's concern for Sheffield's safety. (R1204) This reasoning is flawed, first, because Sheffield himself is quoted as saying he could not adequately represent Appellant in Federal court because of the problems between him and Appellant, and the threat. This reasoning is also flawed in that Appellant is being forced to be represented by an attorney who claims Appellant through someone else threatened him. This issue was never adequately addressed.

The trial court's reasoning is, also in part, based on its review of Sheffield's times sheets and the fact there was an all day motion hearing. (R1204-1205) Not addressed in this reasoning is anything to refute Appellant's claim that Sheffield has not reviewed the discovery with him, despite the trial court's acknowledgement that there was a lot of discovery in this case. (R1205)

The trial court's reasoning is also based on the fact that it perceives Sheffield to be more experienced than Pfeif fer in

death penalty cases. (R1205-1206) If that is the case, then the trial court could have appointed other death- qualified counsel to represent Appellant.

The bottom line is that this hearing left unresolved the clearly established fact that there were problems between Appellant and Sheffield, that Sheffield had been threatened regarding his representation of Appellant, and that Sheffield had previously stated he could not adequately represent the Appellant because of the problems in their relationship and because of the threats. The hearing also brought out unresolved disputes as to whether or not Sheffield had reviewed discovery with Appellant and whether or not Sheffield provided Appellant with an opportunity to review the discovery. Overall the hearing was inadequate for the reasons presented above.

6b. The trial court failed to advise the Appellant that if he still chose to discharge his attorney that the State is not required to appoint another one. The trial court also failed to advise Appellant, if he made the choice to discharge counsel, that this request would be treated as an exercise of his right of self representation. See, Matthews v State, 584 So.2d 1105 (Fla. 2nd DCA 1991).

A review of the other instances in which Appellant claimed that he was not being effectively represented by counsel reveals that the trial court failed to comply with Nelson. The trial court's failure to properly conduct these hearings requires that Appellant be given a new trial.

C. Claims of Conflict of Interest

In the State's Motions to Disqualify Counsel, portions of transcripts from Appellant's Federal Court case were attached. (R324-330) In those transcripts Sheffield outlined significant problems between him and Appellant and stated that he could not ethically represent Appellant. (R326) Other excerpts told of his fear relating to the threats and his advising the court that he could not adequately represent Appellant. The Federal judge removed Sheffield from the case for these reasons.

Nevertheless, Sheffield told the state court judge that he did not have a problem representing the self-same defendant. The record, however, reflects that in addition to the conflicts before the Federal judge, Appellant and Sheffield were at odds in the state case over Sheffield's level of communication with Appellant, his level of preparation, his entire trial strategy, his insistence on presenting an insanity defense, and his handling of the case in general.

Another conflict arose during jury selection when it came out that Sheffield was consulting with another attorney, Mr. Rand, who had represented one of the other co-defendants, Patrick Howell. Sheffield stated that Rand was helping him because the court had not allowed him to have a second lawyer.

The trial court told Appellant that he was aware that Appellant and Patrick's interests were different and he knew that Patrick had gotten into a physical altercation with Appellant in the courtroom back in Monticello. Because of this situation the

trial court asked Appellant if he had any problems with Sheffield consulting with Rand. Appellant said he would let Rand help because he thought there was strength in numbers.(R1851)

Appellant has a fundamental right to conflict-free counsel. While that right can be waived, certain procedures must be followed to insure that the waiver is intelligently, knowingly, and voluntarily made. United States v. Rodriguez, 982 F.2d 474 (11th Cir.), cert.denied, 114 S.Ct. 275 (1993). When the issue of a conflict of interest regarding counsel arises, it is incumbent upon the court to make a proper inquiry into the conflict, and if a conflict is found to either substitute counsel or obtain a proper waiver. See, Holloway v. Arkansas, 435 U.S. 475 (1978), and Boutwell v. State, 530 So.2d 1092 (Fla. 1st DCA 1988).

This Court most recently reaffirmed the procedure that the trial court should follow in such cases. In Larzelere v. State, 21 FLW S147 (Fla. March 28, 1996), this Court held that for a waiver to be valid, the record must show that the defendant was aware of the conflict, that the defendant realized that the conflict could affect the defense, and that the defendant knew of his right to obtain other counsel. It is the trial court's duty to ensure that a defendant fully understands the adverse consequences a conflict may impose.

In the instant case, the trial court failed to comply with these requirements when faced with the State's allegations that Sheffield should be removed, (and when faced with the situation of Rand assisting Sheffield). It is clear that a conflict existed.

This determination had already been made by the Federal court judge. It is preposterous to assume that the conflict was only in that courtroom and did not extend to the state court as well. The parties were the same, the problems which gave rise to the conflict were the same. It was ludicrous to believe that Sheffield could not work with Appellant or, by his own admission, be unable to provide effective assistance of counsel, only in the Federal case. Although Appellant was aware of the conflict, the trial court refused to be. The court went so far as to even refuse the State's request that a waiver of the conflict be obtained from Appellant on the record.

The trial court wholly failed to advise Appellant of the adverse effect the conflicts with Sheffield, and the conflict with Mr. Rand could have on his case.

The trial court completely failed to advise Appellant of his right to conflict-free counsel. Even when Appellant specifically asked for the same lawyer that had been appointed to him in Federal court, the judge denied his request.

Every time Appellant indicated to the court that he felt the problems were so bad that he would risk going without counsel, the trial court still did not advise him of his rights in this regard. The trial court never held a Faretta inquiry to determine if Appellant understood the ramifications of self-representation. Instead, the judge urged him to stay with Sheffield.

The trial court abused it's discretion in denying Appellant's request for conflict-free counsel, especially when another court

had already determined that Sheffield should not represent Appellant. The error was further compounded by the court's failure to follow the appropriate procedures in such cases or to obtain a knowing, intelligent, and voluntary waiver from Appellant himself. Because of these errors, Appellant is entitled to a new trial at which Frank Sheffield is absent as counsel.

II. The Necessity of a Second Attorney

On August 18, 1994, Appellant filed a Motion to Appoint Second Attorney.(R777-780) On August 22, 1994, a hearing was held on this motion.(R1402-1409) This request was made approximately one and a half months prior to the start of jury selection on October 10, 1994.(R1651-2094)

Sheffield at this hearing noted there was still discovery to complete, that deposition transcripts not yet received, and an additional 1000 to 1500 pages of materials that he would not get for two weeks.(R1404) Sheffield described going through these materials as a monumental task. (R1404) Sheffield also noted that getting the case ready for trial (both guilt and penalty phases) was a monumental task requiring the assistance of another attorney. (R1404-1405) Sheffield stated that it was physically impossible to adequately represent Appellant based on the amount of work in this case, while at the same time handling all his other cases as a sole practitioner. (R1405)

Mr. Morphonious, one of the co-defendant's attorneys, joined in the motion and stated that this case was unique due to the number of witnesses and amount of trial preparation. (R1405-1406)

Morphonious stated that in ten years of practicing law he has never been involved in a case of this magnitude and that this case stands on its own in comparison to other cases in the jurisdiction in terms of sheer grandeur. (R1406-1407)

The trial court denied the motion, even though the court acknowledged there was quite a bit of documentary evidence to review and that this case was unusual from the stand point of the state investigation. (R1407-1408)

Sheffield asked that the trial court at least appoint a law clerk. The trial court stated that there were three attorneys on the case (one for each of the 3 co-defendants), and, although their interest weren't totally the same, he assumed they were working somewhat together. (R1408) Sheffield stated that they could not do this because of their adverse interest. (R1408-1409) Sheffield's final comment was that he could not effectively represent Appellant without some assistance at this point. (R1409)

Although there is not a constitutional requirement that a second attorney be appointed, it is a matter within the trial court's discretion based on a determination of the complexity of a given case and the attorney's effectiveness therein. See, Armstrong v. State, 642 So. 2d 730 (Fla. 1994). Based on the facts of this case, the trial court abused its discretion in not appointing a second attorney. This is based not only on the matters raised at hearing requesting a second attorney regarding the complexity of the case, but also on the fact that there were serious problems related to Sheffield effectively representing

Appellant when trying to work alone. The conflict of interest between Sheffield and Appellant furthur created a need for a second attorney. The fact that Sheffield enlisted the aid of a co-defendant's attorney demonstrates the desperate need for a second attorney in this case. Appellant should receive a new trial in which two, competent, conflict-free attorneys are appointed to represent him.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO GIVE APPELLANT'S SPECIAL REQUESTED PENALTY PHASE JURY INSTRUCTIONS

Prior to the penalty phase of the trial Appellant filed a written request for special penalty phase jury instructions entitled "Defendant's Requested Penalty Phase Jury Instructions" that contained Defendant's Penalty Instruction No. 1 through No. 20. (R993-1019) At the charge conference prior to the penalty phase, Appellant specifically requested Defendant's Penalty Phase Instruction Numbers 2, 3, 5, 8, 9, 12, 14, 15, 16, 17 and 18. (R3145-3149) The trial Court denied giving any of these special requested instructions and instead chose to rely on the standard penalty phase jury instructions. (R3145-3149) Appellant renewed these requests at the charge conference prior to the jury being instructed and the trial court again denied these request. (R3238)

Appellant is well aware of the fact that this Court has repeatedly held the Florida Standard Jury Instructions regarding the Penalty Phase Instructions are adequate. For example, see

Archer v. State, 673 So. 2d 17 (Fla. 1996), Bonda v. State, 536 So. 2d 221 (Fla.1988), Guzman v. State, 644 So. 2d 996 (Fla. 1994), and Parker v. State, 641 So. 2d 369 (Fla. 1994). Appellant, however, would ask this Court to reconsider its position in this area of the law, in that Appellant's requested instructions modify and/or amend the standard jury instructions, so as to correct erroneous and/or inadequate instructions, so that the jury is accurately and sufficiently instructed.

Should this court fail to reconsider its position in this area, there would be a violation of Appellant's constitutional rights, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2,9,16,17, and 22 of the Florida Constitution.

This is especially true in light of this Court and the United States Supreme Court's recent holdings that other standard jury instructions (in many instances previously upheld on appeal numerous times) were unconstitutional. For example, see Jackson v. State, 648 So. 2d 85 (Fla. 1994) and Espinosa v. Florida, 505 U.S. 1079 (1992).

ISSUE III

THE TRIAL COURT ERRED IN ITS SENTENCING ORDER BY FAILING TO ADEQUATELY EVALUATE THE MITIGATING CIRCUMSTANCES, AND THEN PROPERLY WEIGH THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING CIRCUMSTANCES

The trial court erred in its sentencing order by failing to adequately evaluate the mitigating circumstances. The trial court also erred by failing to properly weigh the aggravating circumstances against the mitigating circumstances.

In Campbell v State, 571 So.2d 415 (Fla. 1990), this Court set forth the appropriate procedure that the trial courts should use in evaluating mitigating circumstances and then weighing them and the aggravating circumstances in order to comply with the constitutional considerations of Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The proper procedure requires that:

> "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. [Citation omitted] The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supparted by "sufficient competent

evidence in the record."[Citation omitted]."

At the preliminary penalty phase charge conference Appellant proposed the statutory mitigating circumstances of "extreme mental or emotional disturbance" and age. (R3129-3132) The trial court refused to instruct the jury on age as a mitigating circumstance. (R3132) At the final penalty phase charged conference Appellant renewed his objections to the adverse rulings at the preliminary penalty phase charge conference. (R3238)

In the penalty phase closing argument Appellant proposed and argued extreme mental or emotional disturbance and no significant history of prior criminal activity as the statutory mitigating circumstances that exist in this case. (R3252) Appellant also proposed and argued as non-statutory mitigating circumstances that Appellant honorably served in the military; that Appellant was a good father and family man; that Appellant had been a model prisoner and would continue to be one; that Appellant had become religious; and that disparate treatment between equally culpable or more culpable co-defendants would result if Appellant was sentenced to death. (R3252-3260) The same mitigating factors were requested in Appellant's Sentencing Memorandum. (R1110-1119)

In addition to the Sentencing Memorandum, Appellant also submitted numerous mitigation letters from various people who know Appellant. (R1120-1128) A number of proposed non-statutory mitigating circumstances were mentioned in these letters including: that Appellant was a good child and son; that Appellant graduated

from high school; that Appellant is a good person; that Appellant is religious and was very active in his church; that Appellant willingly helped other people; and that Appellant had been a positive influence on younger men. (R1120-1128)

In a letter to the trial court dated January 27, 1995, the State acknowledged that Appellant had requested age as a mitigating circumstance. The State was referring to a letter from Appellant's counsel dated January 17, 1995, which brought this matter to the trial court's attention. (R1134)

In its sentencing order entitled Findings in Support of the Sentence of Death, the trial court failed to consider any of the non-statutory mitigating circumstances raised in the mitigation letters. (R1097-1106) Thus, there is not an express evaluation in the written order of each mitigating circumstance proposed by Appellant, as is required by Campbell, supra. This is reversible error.

The trial court also failed to expressly evaluate the statutory mitigating circumstance of age in its original sentencing order. (R1097-1106) Although the trial court did expressly address this mitigator in its Amended Findings in Support of the Sentence of Death (R1152-1161), this amended sentencing order was not contemporaneous as required by Hernandez v State, 621 So.2d 1353 (Fla. 1993) and numerous other cases. The amended sentencing order was filed after the Notice of Appeal was filed. (R1135-1136) Thus, it was entered at a time when the trial court was divested of

jurisdiction, and therefore without power to amend its sentencing order. See, Duncan v. Duncan, 598 So.2d 205 (Fla. 4th DCA 1992).

Although the trial court considered and found the statutory mitigating circumstance of extreme mental or emotional disturbance, it gave this mitigator little weight. (R1104) The trial court in giving this mitigator little weight abused its discretion. The trial court's conclusion was, to a large extent, based on it's observations of Appellant in the courtroom. (R1102) The fact that Appellant did not demonstrate an extreme mental or emotional disturbance in the courtroom has no relevance or bearing on Appellant's mental state at the time "the capital felony was committed..." See, Fla. Stat. § 921.141(6)(b)(1992). For the trial court's finding of little weight to be sustained under Campbell, there must be sufficient competent evidence in the record to support that conclusion. The record in this case contains sufficient evidence to refute this assignment of little weight.

Dr. Harry McClaren, a licensed psychologist, testified that he performed a psychological examination of Appellant with reference to his state of mind at the time the crime occurred. (R3208) Another psychologist working with McClaren interviewed Appellant, McClaren interviewed Appellant numerous times and Appellant was given a battery of psychological tests. (R3211-3212) Other people in contact with Appellant at the time of the crime were interviewed and Appellant's school records, military records, and prior VA psychiatric records were also considered. (R3212-3213)

McClaren testified that at first Appellant was a model soldier, but near the end of his seven year tenure he began to have strange outbursts which led to his discharge from the military due to a personality disorder. (R3216) Appellant continued to decline mentally after his discharge. (R3217) McClaren found a significant decline in Appellant's IQ tests- in February of 1993, Appellant had an IQ of 83. This was an 18 point drop from his IQ of 109 during his military service. (R3217) McClaren was not sure what caused this in Appellant, but stated the usual reasons are brain damage or dysfunction. (R3218) Appellant began to hear voices and suffer various hallucinations which resulted in his hospitalization in a Veteran's Administration psychiatric hospital shortly long before the instant offense. (R3218) Appellant was diagnosed by the VA as delusional, paranoid, suspicious, and suffering from a personality disorder. They could not rule out schizophrenia. (R3218) Appellant was also seeing American "voodoo" doctors, not an uncommon practice with people of Caribbean heritage. (R3218,3221-3222) McClaren stated that his friends described him as odd or crazy, and his wife felt he was depressed, hearing voices, and losing weight in the time period just before this incident. (R3219) In McCLaren's uncontroverted opinion, Appellant was under extreme emotional distress and disturbance at the time of the murder. (R3220)

The uncontroverted evidence in the record establishes that not only was the mental mitigator proven, but that it should have

been given significant weight. The trial court erred in assigning it little weight.

With respect to the statutory mitigating circumstance of no significant prior criminal history, the trial court did expressly consider and find this mitigator. (R1102) The trial court, however, failed to specifically assign this mitigator any relative weight in its consideration. (R1102) This is a significant error since this Court has repeatedly found that this is a very significant mitigating factor. See, McKinney v State, 579 So.2d 80 (Fla. 1991); Lloyd v State, 524 So.2d 396 (Fla. 1988); and Proffitt v State, 510 So.2d 896 (Fla. 1987).

With respect to the proposed mitigating circumstance that Appellant had been a good prisoner and would continue to be a good prisoner in the future, the trial court failed to adequately address this issue. Although the trial court expressly considered and found that Appellant had been a good prisoner, it failed to specifically assign this mitigator any relative weight in its consideration. (R1104) The trial court should have given this mitigation great weight. The trial court also failed to consider the claim that Appellant would continue to be a good prisoner in the future. This is very important mitigation. It includes matters relevant to the issue of Appellant's lack of future dangerousness and his potential for rehabilitation. See, Nibert v State, 574 So.2d 1059 (Fla. 1990); Brown v State, 526 So.2d 903 (Fla. 1988); Frances v Dugger, 514 So.2d 1097 (Fla. 1987); and

Valle v Florida, 476 U.S. 1102 (1986)(citing Skipper v South Carolina, 476 U.S. 1 (1986)).

Although the trial court considered and found that Appellant was a good family man, husband and father, it stated the weight of this was inconsequential. (R1104) The trial court abused its discretion in determining the weight of this mitigator to be inconsequential. This conclusion was based on the trial court's findings that Appellant's criminal activities in this case to some extent had taken place in his home, and thus Appellant was not setting a good example for his family. (R1104) The trial court's logic in using these facts to detract from the weight of this mitigator is faulty.

First, there was no evidence that Appellant's wife or other family members were even aware of any criminal activity in the home. Thus, none of these activities were observed by them or could have resulted in Appellant setting a bad example. Second, but for the criminal activities presented in this case, there is no evidence that Appellant was anything but a gaod family man, father and husband. To use the criminal activities presented in this case as a means to diminish this mitigator is improper. The purpose of the mitigator is to evaluate the appropriateness of a death sentence by focusing on the entire life of the individual, not just the brief moment which precedes a criminal act. If all mitigation in all cases was evaluated in the way the trial court did here , no mitigation would ever have any weight compared to the facts of a murder. It is illogical to diminish a mitigator which spans years

because Appellant performed some acts in his home which led to this crime occurring.

Although the court expressly considered the disparate treatment of co-defendants, it erred in failing to find this as mitigating circumstance. (R1104-1105) The trial court stated in its order that "Defendant's brother, Patrick Howell, received a sentence of life imprisonment without eligibility of parole for twenty five years." (R1105-1106) The trial court also stated that, based on statements by the prosecutor, Patrick Howell directed Appellant to commit the crime. (R1105) Thus, Patrick Howell is clearly equably culpable or more culpable then Appellant. The trial court's rationale in rejecting this mitigator was that the prosecutor claimed the case against Patrick Howell was weaker that the case against Appellant, and therefore a plea bargain was offered to Patrick Howell. (R1105) This does not, however, change the fact that there was evidence that Patrick Howell was equally or more culpable that Appellant. Not only was Patrick Howell equally or more culpable than Appellant, but there was also significant aggravation that applied to Patrick Howell and not Appellant, to-wit a prior conviction for murder. (R3226-3227)

Not only did Patrick Howell receive favorable treatment, but Lester Watson also received favorable treatment, despite the fact that he was equally or more culpable than Appellant. In its sentencing order the trial court noted that "The other defendant, Lester Watson, pled to Second Degree Murder and was sentenced to forty years in prison". (R1105) The trial court also wrote that

"His involvement was to drive the car with the gift-wrapped 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." (R1105) It is interesting that the trial court never resolved this question as to Watson's knowledge regarding what was in the package because, as Appellant's counsel argued in his penalty phase closing argument and in his sentencing memorandum, there was compelling evidence that Watson knew there was a bomb in the package, and therefore was clearly an equally or more culpable co-defendant. (R1115-1119, R3255-3259) The trial court never made a finding that Watson was less culpable than Appellant, but dismissed this mitigator based on the fact Watson was a compelling witness against Appellant. (R1105) Even though Watson testified against Appellant, this does not change the fact that there is substantial evidence that Watson is equally or more culpable that Appellant.

The trial court, in failing to find the disparate treatment of equally or more culpable co-defendants as a mitigating circumstance, ignored a well recognized and very significant non-statutory mitigating circumstance. See, Brookings v State, 495 So. 2d 135 (Fla. 1986); Harmon v State, 527 So.2d 182 (Fla. 1988); Craig v State, 510 So.2d 857 (Fla. 1987); and Slater v State, 316 So.2d 539 (Fla. 1975).

The trial court also erred in its weighing of the aggravating circumstances against the mitigating circumstances. The trial

court in its order considered aggravating circumstances that were not supported by either the facts or the law, or both - great risk (See Issue IV); felony murder aggravator (Issue V); witness elimination (Issue VI); cold, calculated and premeditated manner (Issue VII); and law enforcement officer victim (Issue VIII). (R1098-1101) Even if the trial court was correct in considering one or more of the aggravating circumstances, since the trial court did not assign any relative weight to each specific aggravator, it is impossible to determine how much weight the trial court assigned an improper aggravator or aggravators in arriving at its conclusion that a death sentence was appropriate. See, Campbell.

These errors in the weighing process are further compounded by the trial court's failure to even consider a number of proposed mitigating circumstances, by its failure to assign a specific relative weight to mitigating factors that were found, by its failure to find a mitigating circumstance that was supported by the evidence, and by its failure to accord the proper weight to other mitigating circumstances that it did find. The trial court, simply put, failed to find and properly weigh the significant mitigation in this case.

The weighing process was further flawed by the trial court's erroneous and cursory weighing of the aggravating circumstances and mitigating circumstance. The sentencing order merely states that "A review of all of the evidence, the testimony and demeanor of the witnesses at both the guilt and penalty phases of the trial and at the sentencing hearing causes the evidence in mitigation to pale

into insignificance when considering the enormity of the proved aggravating factors weighed against the want of mitigating circumstances.." (R1105) It was error for the trial court to consider "all the evidence, the testimony and demeanor of the witnessess at both the guilt and penalty phases of the trial..." (R1105)(emphasis supplied). By considering "all..." the trial court clearly considered matters other than just the mitigating and aggravating circumstances, as required in Campbell, supra.

It was also error for the trial court to dismiss in a very cursory manner the significant and substantial mitigation with phrases such as "pale into insignificance," and " want of mitigating circumstances." (R1105) The trial court failed to follow the dictates of Campbell by determining which mitigators were established by a greater weight of the evidence and to consider each of the mitigating factors before it to determine which were truly mitigating factors.

The trial court also erred in considering aggravating circumstances that were unsupported by the facts and/or law and then making to cursory conclusions regarding "the enormity of the proved aggravating factors." (R1105)

A resentencing before the trial court is required so that a proper evaluation and reweighing of the aggravating and mitigating circumstances can occur in accordance with the requirements in Campbell, supra.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTOR THAT APPELLANT CREATED A GREAT RISK OF DEATH TO MANY PEOPLE APPLIES IN THIS CASE.

Over defense counsel's objection, the trial court instructed the jury that they could consider that Appellant's actions created a great risk of death to many people during penalty phase. (R3134-3139,3261) The trial court then relied upon this aggravating circumstance in sentencing Appellant to death. The court's written order is as follows:

> (C) The Defendant knowingly created a great risk of death to many persons.
>
> The evidence presented compelled the conclusion that the Defendant constructed the bomb, which exploded and killed Florida Highway Patrol Trooper James Fulford, for the specific purpose of killing Tammie Bailey at her home in Marianna, Florida. The Defendant knew that the intended victim had at least one small child who lived with her and that Lester Watson, who he paid to deliver the bomb would be present when the bomb was delivered. The Defendant also sent Lester Watson to Yolanda McAllister to take him to Tammie Bailey's house and, therefore, could reasonably have expected her to accompany him to the house. In fact, Tammie Bailey lived in a duplex with a mother and two children living in the other side.
>
> The photographs of the scene of the explosion introduced into evidence in the guilt phase of the trial showed the magnitude of the force of the bomb. The testimony indicated that on more than one occasion the Defendant, or friends of his, had exploded other pipe bombs so that the Defendant knew of the force of the intended explosion and the effect it would have on anyone close by as well as the structure in which the explosion would take place. The Defendant concealed the bomb in a microwave oven wrapped as a gift and it, therefore, created a high probably that many persons would be present to open the gift. This aggravating circumstance was proved beyond a reasonable doubt, (R1098-1099)

The trial court's instructing on this aggravating factor and his reliance on it was error. Appellant is entitled to a new

sentencing hearing which is free from the taint of the improper instruction and to be resentenced.

The law is clear that the aggravating factor of "great risk of death" means a high probability of death to others. This Court in Coney v. State, *653* So.2d 1009 (Fla. 1995), affirmed it's prior holding in Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), that "Great risk" means not a mere possibility, but a likelihood or high probability." The aggravator was then struck under facts that established that Coney had set his lover on fire in a prison cell. No one else was present when the fire occurred. This Court has also clearly established that the risk of death must be immediate. See, Williams v. State, *574* So.2d 136 (Fla. 1991).

These criteria were clearly not present in this case. The undisputed facts were that Trooper Fulford was alone when the explosion occurred. While the trial court's order lays out what are purported to be "facts" about who might have been killed, these are, in reality, nothing but conjecture and speculation as to what might have occurred if the bomb had been delivered to Tammie Bailey. Repeatedly and emphatically, this Court has ruled that conjecture and speculation about what might have occurred cannot be used as a basis to support this aggravator.

In King v. State, 514 So.2d 354, 360 (Fla. 1987), this Court reiterated what it had said many times previously- "A person may not be condemned for what *might* have occurred." See also; Lusk v. State, 446 So.2d 1038 (Fla. 1984); Jackson v.State, 599 So.2d 103,109 (Fla. 1992). Thus, the trial court's consideration of who

might have been present when the bomb went off was impermissible speculation and could not serve as a basis for the finding of this aggravator.

The second aspect of the aggravator is that the risk must be to "many persons". This Court has consistently ruled that "many persons" means more than three. See; Alvin v. State, 548 So.2d 1112 (Fla. 1989)(two is not enough); Be110 v. State, 547 So.2d 914 (Fla.1989) and Johnson v. State, 393 So.2d 1069 (Fla. 1980)(each holding that three is not enough); and Fitzpatrick v. State, 437 So2d 1072 (Fla.1983)(more than three persons in addition to the homicide victim are required). Once again, the facts do not support the conclusion that many people were in danger. Only Trooper Fulford was present at the scene. Again, it is improper for speculation and conjecture to form the basis for this aggravator, so the trial court's ruminations as to what could have happened if such and such had occurred cannot be used to support this aggravator.

Because it cannot be determined whether or not the jury improperly relied upon this factor in reaching their recommendation, a new sentencing proceeding is required, It is certainly likely that the jury would be more inclined to return a death recommendation after being told they could, in essence, speculate as to who could have been killed, especially if some of those potential victims were children. Appellant is entitled to a new sentencing hearing at which the jury is precluded from considering this aggravating factor.

ISSUE V

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, THEREBY FAILING TO CHANNEL THE SENTENCE'S DISCRETION IN WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES TO DETERMINE WHETHER DEATH IS THE APPROPRIATE PENALTY.

The felony murder aggravating circumstance, provided by section 921.141(5)(d), Florida Statutes (1991), violates the Eighth and Fourteenth Amendments to the United States Constitution because it is unconstitutionally overbroad under Zantv. Stephens, 462 U.S. 862 (1982). The decisions of this Court which reject this argument, such as Johnson v. State, 660 So.2d 637 (Fla. 1995), Johnson v. State, 660 So.2d 648 (Fla. 1995), and Wuornos v. State, 676 So.2d 966 (Fla. 1995), conflict with the United States Supreme Courts' decisions in Zant and Stringer v. Black, 503 U.S. 222 (1992).

The felonymurder aggravating circumstance duplicates elements of first-degree murder as defined by section 782.04(1)(a), Florida Statutes (1991). This statute provides twelve ways to commit first-degree murder--premeditated murder and eleven varieties of felony murder. The felony murder aggravating circumstance covers seven forms of felony murder, including the underlying felonies of robbery, sexual battery, arson, burglary, kidnapping, aircraft piracy, and the throwing placing, or discharging of a destructive device or bomb.

The aggravating circumstance omits only the underlying felonies of escape, drug trafficking, aggravated child abuse, and distribution of cocaine or opium. However, escape has its own separate aggravating circumstance provided by section 921.141-(5)(e), Florida Statutes (1991). The statute was amended in 1995 to include a mew aggravating circumstance applicable when the victim of the murder was less then 12 years old, section 921.-141(5)(1), Florida Statutes (1995). This, all felony murders in Florida, except those involving drug sales and aggravated child abuse upon a victim 12 years old or older, are automatically aggravated and qualify for the death penalty. Furthermore, the felony murder aggravating circumstance applies to many premeditated murders, as found by the trial court in this case.

Because of this overbreadth, the Florida felony murder aggravating circumstance violates the Eighth Amendment requirements that an aggravating circumstance must genuinely narrow the class of persons who are eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant as compared to others convicted of murder. Zant v. Stephens, 462 U.S. at 877.

This Court's decisions in Johnson v. State, 660 So.2d 637, 647-648 (Fla. 1995) and its progeny need to be reexamined. In Johnson, this court rejected an argument that felony murder was an improper "automatic" aggravator because, "This contention had been repeatedly rejected by state and federal courts. "Id., at 647. The only federal decision cited, however, was Lowenfield v. Phelps,

484 U.S. 231 (1988), in which the United States Supreme Court upheld the Louisiana felony murder aggravating circumstance because the Louisiana statute narrowly defined death-eligible capital murders and does not require the jury to weigh aggravating and mitigating factors to determine the appropriate sentence.

In Stringer, 503 U.S. at 231-236, the United States Supreme Court ruled that Lowenfield daes not apply to weighing states like Florida and Mississippi. The United States Supreme Court explained that

> if a State uses aggravating factors in deciding who shall be eligible for the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion.

503 U.S. at 235. The Court further explained,

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.

Id.

While the Florida felony murder aggravating factor is not vague, it suffers from the same constitutional defect because of its overbreadth -- it fails to "genuinely narrow the class of persons eligible for the death penalty," and it does not "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty or murder." Zant v. Stephens, 462 U.S. at 877

There is a conflict of authority among the state courts on this issue. The Tennessee Supreme Court ruled that the Tennessee felony murder aggravating circumstance could not be applied to defendants convicted of felony murder and based its decision on both the Eighth Amendment and state constitutional grounds. State v. Middlebrooks, 840 S.W.2d 317,341-346 (Tenn. 1992), cert. dismissed, 510 U.S. , 114 S.Ct.651, 126 L.Ed.2d 555 (1993). The Wyoming Supreme Court relied on an Eighth Amendment analysis to hold that the Wyoming felony murder aggravating circumstance could not be applied to defendants convicted of felony murder. Engberg v. Meyer, 820 P.2d 70,89-90(Wyo.1991). In contrast, the Mississippi Supreme Court rejected an Eighth Amendment argument and relied on Lowenfield to allow the application of Mississippi's felony murder aggravating circumstance, expressly rejecting this Court's ruling in Stringer that Lowenfield does not apply to Mississippi. Ballenger v. State, 667 So.2d 1242, 1260-1261 (Miss. 1995).

This Court should re-examine this Court's decisions and the United States Supreme Courts decisions in Zant v. Stephens and Stringer v. Black, and resolve this issue in Appellants favor.

ISSUE VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED FOR PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The trial court erred in instructing the jury on the aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The trial court also erred in finding this aggravating circumstance.

At the preliminary penalty phase charge conference Appellant objected to the jury being instructed on this aggravating circumstance. (CR3139-3141) The trial court indicated that it would give the jury instruction on this aggravating circumstance. (R3141) At the final charge conference, Appellant renewed his objection and the trial court maintained its same ruling. (R3238) The jury was instructed on this aggravating circumstance. (R3261-3262)

The trial court in its sentencing order found:

> "The evidence presented compelled the conclusion that the Defendant constructed the bomb, which exploded and killed Florida Highway Patrol Trooper James Fulford, for the specific purpose of the killing Tammie Bailey..." "The evidence in the guilt phase established that the reason for the construction and delivery of the bomb was to eliminate the intended victim as a witness that could link the Defendant and his brother to a prior murder...The killing of an unintended victim is immaterial because the intended act remains

> the same. (citation omitted) Thus, the intended victim and subject of the witness elimination was a lay witness, and the law enforcement victim was an unintended victim. (R1098,1100)

The trial court erred in instructing the jury on the witness elimination aggravator and in using it as a basis to support a death sentence in this case.

Appellant submits that under the unique facts of this case this aggravator should not apply even though the victim was a police officer. It is inappropriate to automatically apply this aggravator when the intended victim is a lay person, (here, Tammie Bailey), and the law enforcement officer was an unintended victim. While the doctrine of transferred intent may apply for the purposes of determining guilt, it should not be used in the fashion it was here to establish an aggravating circumstance. Appellant submits that the proper standard against which the propriety of this aggravator must be judged is determined by who Appellant actually intended to kill. Thus, the correct analysis of the applicability of this aggravating circumstance must be whether or not it would supported by the evidence as applied to Tammie Bailey, the intended victim.

The law is clear that where the intended victim of the witness elimination is not a law enforcement officer, that the dominant motive for the murder must be to avoid or prevent a lawful arrest. For example, in Davis v. State, 604 So.2d 794,798 (Fla. 1992), this Court reaffirmed it's long standing ruling that in order for this aggravator to apply when the victim is a lay person the State must

prove that the sole or dominant motive for the murder was the elimination of the witness. The opinion states that "The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance." See also, Bruno v. State, 574 So.2d 76,81 (Fla. 1991); Livingston v. State, 565 So.2d 1288,1291 (Fla. 1990); Scull v. State, 533 So.2d 1137 (Fla. 1988).

In instructing the jury and finding this aggravating circumstance, the trial court erred because the facts do not establish that witness elimination was the dominate motive. The State, in its arguments to the trial court and the jury, acknowledged that the evidence demonstrated more than one motive. In it's guilt phase closing argument, the State acknowledged that money was a motive and even suggested a third motive- Appellant's dislike of law enforcement officers. At the penalty phase charge conference the State admitted that a motive for the crime was pecuniary or financial in nature. (R3132, 3149-3141) In its penalty phase closing argument the State conceded that money was one of two possible motives for the crime.(R3243)

At trial evidence regarding each of the above motives was presented. The evidence regarding witness elimination is as follows: Tammie Bailey knew about Patrick Howell's arrest and Appellant's involvement with the rental car involved in the Tillman homicide. (R2453-2454,2443-2452) Trevor Sealey testified Appellant asked Sealey to take the package up the road to some girls who were snitching on Appellant's brother. (R2362-2363)

The evidence regarding a money dispute as the source of Appellant's problems with Bailey was equally compelling. Tammie Bailey testified that Appellant sent her money on several occasions for the purpose of traveling from Marianna to Ft. Lauderdale, but that she never did make the trip to Ft. Lauderdale. (R2456-2464) As a result of this, Bailey testified Appellant was mad at her. (112464) Lester Watson corroborated that fact that Appellant had sent Bailey money. (R2670-2672,2673-2675) William West testified that Appellant told him he sent the bomb to Bailey and Yolanda McCallister because he was upset with them. According to West, Appellant said he had sent money to them to come to Ft. Lauderdale and they did not come. (R2515-2517)

The State was unable to prove that the sole or dominant motive to kill Tammie Bailey was to silence her as a witness so Appellant's brother could avoid arrest. Appellant's anger at her taking his money was also offered by the State as a motive. Because dual motives were present, the aggravator cannot apply.

The law is also clear that more than knowledge that a crime has been committed and the identity of the perpetrator is known by the victim is required to establish this aggravating circumstance. See, Perry v. State, 522 So.2d 817 (Fla. 1988). Even though Appellant knew Tammie Bailey and she knew him, this fact does not present a compelling reason for Appellant to eliminate her as a witness in this case. A large number of people knew information about the Tillman homicide, but were never intimidated, threatened, or harmed in any way because of this knowledge.

Appellant's analysis of which standard to use in this case is not in conflict with the Court's opinion in Sweet v. State, 624 So.2d 1138 (Fla. 1993). According to the opinion, Sweet intended to kill Marcine Cofer because she could possibly identify Sweet as having committed a burglary and beating of her. Sweet saw Cofer talking to the police. Later that evening Sweet returned to Cofer's apartment, broke down the door and fired into the apartment. Sweet shot Cofer as well as a second person. He shot and killed a third person. This Court upheld the application of the avoiding arrest aggravator because the dominant motive for the murder was to kill Cofer to prevent her from identifying him. This Court held that the aggravator applied even though someone else was killed. Sweet is not in conflict with Appellant's position because the dominant motive was proven to be elimination of a witness to avoid arrest. The Court correctly applied the "dominant motive" standard to a transferred intent situation. This is not in conflict with Appellant's position that the correct standard to apply is the one which would have applied to the intended victim.

Because of the conflicts regarding what the dominate motive was in this case and clear evidence that a motive relating financial concerns existed, it is impossible to say that the dominant motive was witness elimination. The State acknowledged fact at trial.

This failure to establish a dominant motive precludes the use of witness elimination as an aggravating factor. This error mandates reversal of the sentence of death.

ISSUE VII

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS A HOMICIDE THAT WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court erred in finding that the capital felony was a homicide that was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Based on the unusual facts of this case, there is no legal basis for finding premeditation or CCP.

The facts of the this case are that Appellant intended to kill Tammie Bailey. (R1098) To accomplish this end Appellant engaged in the overt acts of making a bomb, concealing it in a microwave oven wrapped as a gift, and hiring another person to deliver the bomb to Tammie Bailey. (R110) Before the bomb reached it's intended victim, the car which was carrying it was stopped by Trooper Fulford. Fulford detonated the bomb when he opened the package. Appellant was not at the scene of the stop. Appellant submits that under these facts, the heightened level of premeditation necessary for a finding of CCP should not be subject to transferred intent.

Appellant acknowledges this Court's opinion in Sweetv. State, 624 So.2d 1138 (Fla. 1993), where this Court held that the CCP can apply in cases of transferred intent. In Sweet the defendant planned to kill a person by the name of Cofer who could potentially identify him in a burglary. Cofer and two neighbor children were in Cofer's apartment when Sweet came to the apartment and forced

his way in. Sweet then shot Cofer and the two children. One of the children was killed. This Court held that in determining the applicability of the CCP factor the manner of the killing, not the intended victim is the determining factor. Heightened premeditation does not have to be directed at the specific victim.

Appellant submits that the facts of his case deserve a reconsideration of the applicability of Sweet. In Sweet the defendant knew whom he was shooting when he entered the apartment and realized that there were others there besides his intended victim. He was well aware that, once he began shooting, he intended to kill not only Cofer, but those who were with her as well. Thus, a certain level of premeditation was specifically directed at the two other victims. It was not a pure case of transferred intent. On the other hand, Appellant had no intent whatsoever to kill James Fulford. He was not even present at the scene. Appellant submits that the aggravator of CCP, which requires a heightened level of premeditation, should not be applied in cases where the only premeditation arises solely from transferred intent.

ISSUE VIII

THE TRIAL COURT ERRED IN FINDING THAT THE VICTIM OF THE CAPITAL FELONY WAS A LAW ENFORCEMENT OFFICER ENGAGED IN THE PERFORMANCE OF HIS OFFICIAL DUTIES, BECAUSE APPELLANT DID NOT KNOWINGLY KILL A LAW ENFORCEMENT OFFICER.

The trial court erred in finding that the aggravating circumstance that the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties was applicable in this case because the facts did not establish that Appellant knowinqlv killed a law enforcement officer. The trial erred in ruling the knowledge was of no significance with respect to this aggravator. (R1101)

Factually, it is clear that Appellant did not intentionally and knowingly kill a law enforcement officer. In it's sentencing order the trial court specifically found that the intended victim was Tammie Bailey. (R1098) Tammie Bailey is not a law enforcement officer. The sentencing order specifically found that the law enforcement officer who was killed was an unintended victim.

Whether or not knowledge by the defendant that the victim is a law enforcement officer is a pre-requisite to the establishment of this aggravator appears to present a question of first impression. Counsel has been unable to find any case which specifically addresses this question. A review of other possibly analogous cases which deal with the law enforcement officer in special circumstances reveals that the courts of this State are grappling with the issue of the defendant's knowledge and review of such a case is pending before this Court.

Recently this Court granted review in Thompson v. State, 667 So.2d 470, review granted, 675 So.2d 931 (Fla. 1996), (Case No. 87,505), a First District Court of Appeal case in which that lower court held that a conviction for attempted murder of a law

enforcement officer does not require proof that the defendant knew the victim was a police officer. In resolving this issue and related issues this Court should hold that knowledge that the victim was a law enforcement officer is required.

An examination the legislative intent behind the laws designed to protect law enforcement officers supports Appellant's position. See, Fla. Stat. §§ 775.0823 and 784.07 (1995) In State v. Iaconvone, 660 So.2d 1371 (Fla. 1995), this Court noted that the legislature unquestionably intends to give law enforcement officers the greatest possible protection and has done this by passing statutes with the purpose of discouraging lethal attacks against them. In order for these statutes to accomplish this desired deterrent effect it is necessary that the perpetrator must know the victim is a law enforcement officer. The possible exposure to harsher penalties by committing the crime are meaningless unless the defendant's has knowledge that his victim is a law enforcement.

The position that knowledge should be a requirement to this aggravator can be best understood by examining an analogous situation which arose in the First District. In that instance, as in this case, the law enforcement officer was not the intended victim, rather, the intended victim was a lay person. As here, the State relied on the doctrine of transferred intent to establish an offense.

The First District held in Mordica v State, 618 So.2d 301 (Fla. 1st DCA 1993), that while the doctrine of transferred intent applied as proof of guilt in a simple battery, it could not be used

to establish a battery on a law enforcement officer. In Mordica the defendant tried to kick a fellow inmate. Instead, inadvertently and unintentionally, he kicked a corrections officer. The First District held that the state could not apply the doctrine of transferred intent to enhance the severity of the crime from simple battery to battery of law enforcement officer without specifically proving the defendant knowingly committed a battery against a law enforcement officer. The logic in Mordica should also apply in this case. Since the State did not prove that Appellant had knowledge that the victim was a law enforcement officer, this aggravator should not apply.

Constitutional principles regarding mental intent also dictate that knowledge should be required in order for the aggravator to apply. A basic constitutional principle is that common law crimes, which are deemed mala in se, contain an inherent intent element. This is true even in situations where a statute codifying the offense fails to specify an intent element. See, State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982). Applying this basic principle to this aggravator, it should first be noted that capital homicide is a common law crime, thus it contains an inherent intent element. Since a capital homicide under our current statute requires the proof of an aggravating factor or factors in order to render it "capital", these aggravating factors can be viewed as necessary "elements" of a capital homicide. Logic would require that if intent is required for proof of the crime itself (homicide), then intent should also be required for the elements, which, when

combined together, give rise to the elevated level of the same general offense. i.e., capital homicide.

Appellant's position, is then, that in order for the aggravator of a law enforcement victim to apply, the defendant must have some knowledge that the individual is an officer. Because there was absolutely no proof that Appellant intended to kill a police officer, or even planned for one to come into contact with the package, this aggravator must be stricken. Appellant must be resentenced.

ISSUE IX

THE DEATH PENALTY IS NOT PROPORTIONATE IN THIS CASE

This Court has always adhered to the proposition that a sentence of death is reserved for only the most aggravated and least mitigated of first degree murders. In State v. Dixon, 283 So.2d 1,7 (Fla. 1973), this Court stated that because death is a unique punishment in its finality and total rejection of the possibility of rehabilitation, it is proper that the legislature has "chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." This Court has not wavered from this principle. Terry v. State, 668 So.2d 954 (Fla. 1996); Kramer v. State, 619 So.2d 274 (Fla. 1993); DeAngelo v. State, 616 So.2d 440 (Fla. 1993). In this case a death sentence is not warranted. The instant does not fall within those most aggravated and least mitigated Dixon refers to.

Initially it should be noted that although the trial court in this case found five aggravating circumstances, (R1098-1101), the trial court committed demonstrable error in finding and evaluating these aggravators. The trial court also failed to correctly identify, consider, and evaluate the mitigating circumstances in this case. These failures are thoroughly addressed in Issue III. Because of these errors, this Court should not accept the trial court's findings as a basis for proportionality review. See, Henry v. State, 456 So.2d 466 (Fla. 1984),

As argued previously in this brief, there are not any valid aggravating circumstances when the law is correctly applied to the facts contained in the record. A death sentence is not appropriate under any circumstances where there is a complete lack of aggravating circumstances.

Even if this Court should disagree with Appellant and find that one aggravating circumstance does apply, the significant mitigation presented on Appellant's behalf would render a death sentence disproportionate. See, Sinclair v. State, 657 So.2d 1138 (Fla. 1995); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Lloyd v. State, 524 So.2d 396 (Fla. 1988); Terry v. State, 668 So.2d 954 (Fla. 1996); and Proffitt v. State, 510 So.2d 896 (Fla. 1987). As noted by this Court in DeAngelo, supra at 443, quoting Songer v. State at 544 So.2d 1011, "This Court has affirmed death sentences supported by just one aggravating circumstance "only in cases involving either nothing OK very little in mitigation."" In DeAngelo this Court found that the murder was cold, calculated, and

Premeditated, but that the substantial mitigation rendered a death sentence disproportionate.

Even if this Court should conclude that two or three aggravating circumstances exist, it would not make the death penalty proportionate in this case. In Kramer v. State, 619 So.2d 274 (Fla. 1993), this Court rejected the idea that proportionality review is nothing but a tally or mere tabulation of mitigating and aggravating factors. Instead, proportionality review requires that the nature and quality of those factors are to be compared with other death penalty cases. This principle was reaffirmed in Terry v. State, 668 So.2d 954 (Fla. 1996).

In Terry, this Court found that two aggravators existed. n finding that the death penalty was not proportionate, this Court concluded that "although there is not a great deal of mitigation in this case, the aggravation is also not extensive given the totality of the underlying circumstances." ID, at 965. This Court reached similar conclusions in Sinclair v. State, 657 So.2d 1138 (Fla. 1995), where one aggravating circumstance was insufficient to support a death sentence, even though there was only minimal non-statutory mitigation and no statutory mitigation, and Thompson v. State, 647 So.2d 824 (Fla. 1994), where one aggravating circumstance was insufficient to support a death sentence in light of significant non-statutory mitigating circumstances.

An analysis of any possible aggravating factors in this case demonstrates that, if found, their weight is less significant than in most cases. For example, even though Trooper Fulford was a law

enforcement officer, the facts show that there was not a specific intent to kill him because of that capacity. This differs from situations where a person knowingly and intentionally kills a law enforcement officer, such as during a chase, a shootout, or in situations where detection is being avoided.

An analysis of the weight and quality of the mitigating evidence in this case, however, shows that it is significant. It includes the very important statutory mitigating circumstances of lack of significant criminal history, and extreme mental or emotional disturbance. There are numerous non-statutory mitigating circumstances as well. One critical non-statutory mitigating circumstance in this case is the disparate treatment of equally or more culpable co-defendants.

Intra-case proportionality is something which must be considered as part of the proportionality analysis in this case, In Slater v. State, 316 So.2d 539, 542 (Fla. 1975), this Court addressed the principal of equal punishment for equal culpability in capital cases as follows:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

Since Slater, this Court has on numerous occasions reversed death sentences where an equally culpable codefendant received lesser punishment. E.g., Pentecost v. State, 545 So.2d 861,863

(Fla. 1989); Spivey v. State, 529 So.2d 1088,1095 (Fla.1988); Harmon v. State, 527 So.2d 182,189 (Fla. 1988); Cailler v. State, 523 So.2d 158 (Fla. 1988).

The principals expressed in Slater are also consistent with the requirements of the United States Constitution. The Eighth and Fourteenth Amendments require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the roles played by his cohorts. See, Edmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

In this case two other named co-defendants, Patrick Howell and Lester Watson did not receive death sentences. Patrick Howell received a life sentence with a twenty five year minimum mandatory sentence. (R1105-1106) Watson pled to Second Degree Murder for a 40 year sentence. (R1105) The facts, however, indicate that these two were equally or more culpable than Appellant.

Special Agent Bobby Kinsey testified that during his investigation information surfaced that Patrick Howell ordered Appellant to prepare the bomb and send it to Tammie Bailey. Patrick Howell wanted this done to prevent her from giving information which would lead to his arrest in another homicide he committed.(R3225) The State certainly considered this information reliable enough to charge Patrick Howell with first degree murder, and reliable and sufficient enough to obtain a life sentence based up on it.(R3231) They should not now be allowed to question its reliability and sufficiency. (R1133)

The evidence with respect to Lester Watson is that he drove the car with the bomb in it with the purpose of delivering the bomb to the intended victim. (R1105). As trial counsel pointed out there is compelling evidence that Watson helped buy parts for the bomb, helped assemble it, knew where and why it was being sent, and that he failed to alert Trooper Fulford to the presence of the bomb when he was arrested. (R1115-1119,3255-3259) Despite Watson's extensive involvement in this case, and although Watson had the ability to prevent the homicide and failed to do so, he was able to enter into a plea bargain with the State that avoided a death penalty. Appellant's death sentence should not be based upon who entered into plea bargains and offered to turn State's evidence first. The co-operation a codefendant gives to law enforcement officers and the state is not relevant to a proportionality analysis. What must be considered is what role each played in the crime. The trial court incorrectly analyzed this factor as potential mitigation and as a reason not to impose the death penalty. This Court cannot ignore it in conducting a proportionality review.

This Court very recently examined a case which is comparable to Appellant's. In Curtis v. State, 21 F.L.W. 5443 (Fla. Oct. 10, 1996), this Court reversed a death sentence, finding that it was disproportionate. This Court found that two aggravating factors, that the murder was committed during a robbery and that Curtis had a prior violent felony conviction, were outweighed by substantial mitigation. Curtis was 17 at the time of the crime, he was

remorseful, had been helpful to schoolmates and inmates, and had adjusted well to prison life. Curtis was not the actual killer, however he had fired a gun at the victim, but his bullet had struck the victim's foot. The actual killer was sentenced to life.

The mitigation in Appellant's case far outweighs that in Curtis and includes two statutory mitigators as well as numerous non-statutory mitigators. Like Curtis, the co-defendants received life or lesser sentences even though they share equal responsibility in the killing. If it is appropriate that the defendant in Curtis received a life sentence, it is also appropriate that Appellant receive a sentence other than death.

This Court must examine very carefully in this case "the propriety of disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all the participants in committing the crime.[Citation omitted]" Scott v. Dugger, 604 So.2d 465, 468 (Fla. 1992).

Appellant submits that under the dictates of Slater and Dixon, his death sentence must be reversed. When all the underlying factors in this case are considered it is clear that a death sentence is inappropriate.

CONCLUSION

Based upon the foregoing facts, law and argument, Appellant requests this Honorable Court to grant the following relief:

As to Issues I, a new trial;

As to Issues II and IV through VIII, a new sentencing hearing with a jury;

As to Issues III a new sentencing hearing by the trial court;

As to Issue IX, a remand to the trial court for the imposition of a sentence of life imprisonment without the possibility of parole for 25 years.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Richard Martell, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32399-1050; and Paul Howell, DOC #123792, P. 0. Box 221, Union Correctional Institution, Raiford, Florida, 32083, on this 3rd day of December, 1996.

Respectfully submitted,

ROBERT A. NORGARD
Attorney at Law
P. 0. Box 811
Bartow, FL 33831
(941) 533-8556
Fla. Bar No. 322059