IN THE SUPREME COURT OF FLORIDA

MICHAEL BERNARD BELL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case'No. 86,094

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DWAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MICHAEL BERNARD BELL, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Appellant was indicted on September 29, 1994, for the first-degree murders of Jimmy West and Tamecka Smith, allegedly committed on December 9, **1993.** (R **8-9, 28-29).** In December **1994,** Dr. Earnest Miller and Beth Shadden were appointed by the court to conduct **a** psychiatric exam regarding Appellant's sanity and competency. (R **25-27,** 31-33). In a consolidated report dated December 30, 1994, both mental health experts concluded that Appellant was sane and competent. (R **39-41).**

On January **4,** 1995, five days before the scheduled trial, the trial court noted at a pretrial conference that Appellant had written the court a letter requesting a different attorney. The court inquired of both Appellant and defense counsel, then conducted a Faretta hearing, and ultimately determined that Appellant was not competent to represent himself, and that it was not going to discharge defense counsel. (T **24-46),** The trial, however, was reset to March 6, 1995, so that defense counsel could hire an investigator to investigate potential defense witnesses suggested by Appellant.

Following the lunch recess during jury selection on March 6, defense counsel noted that Appellant had given him several motions

which he did not want to adopt. One motion, however, was to discharge counsel. (T 103-04). Once again, the trial court inquired of Appellant and defense counsel. (T 104-08). Satisfied that the motion was legally insufficient, the trial court denied it. (T 109). Thereafter, the jury was selected. (T 233).

The following day, the State gave its opening statement (T 246-78), the defense waived its opening statement (T 280-81), and the State presented its case. The State's first witness was Lora Hampton. Ms. Hampton testified that she was currently serving eight years in prison for a violation of probation. She had originally pled guilty in August 1993 and was sentenced to nine months in the county jail and five years of probation. (T **282).** She had no agreements with the State regarding her testimony. (T 283). She further testified that she had been good friends with Tamecka Smith for approximately five years. (T **283).** Tamecka was 18 years old at the time of her death. (T 283-84). Ms. Hampton lived with Tamecka and Tamecka's mother at the time. (T 284).

On December 9, 1993, she and Tamecka and a girl named Daneta went to Moncrief Liquors and Lounge around 9:00 p.m. (T 284-85). Tamecka's mother was supposed to meet them there when she got off work around 10:00 p.m. (T 284). They had to pass through a metal detector before entering. (T 285). While inside, Jimmy West came

over to their table and began talking to Tamecka. He later left the bar and returned with a six-pack of Heineken. T 285-86). When Tamecka's mother had not shown up by 10:45 p.m., Jimmy West offered to drive them to get her. (T 286). She, Tamecka, and Jimmy West left the bar and walked to a gold-colored Plymouth. West got in the driver's seat and left the door open. He unlocked the front passenger's door, and Tamecka got in, leaving her door open. (T 287-89). While West was leaning over trying to unlock the rear passenger's door, Ms. Hampton saw a man wearing a mask and holding a machine gun walk from the rear of the car to the driver's door and begin shooting at West. (T 289-90). She dropped to the ground and ran to the woods next door to the lounge. When the shooting stopped, she heard a car speed off. (T **290-91).** She described the lone gunman as being 6' tall with **a** medium build. He was a "bright skinned black male." (T 300). In comparison, Appellant's features were "[a]bout the same," but she could not identify him as the gunman. **(T 301-02).**

The State's next witness was Henry Edwards, who testified that he was an eight-time convicted felon, and was currently serving a four-year prison sentence for burglary and dealing in stolen property. (T 304-05). He was sentenced on November 6, **1990,** paroled on April 30, 1993, violated on April 20, 1994, and sent

back to prison. (T 305). He had no agreement with the State regarding his testimony. (T 305). Mr. Edwards further testified that he had known Appellant for approximately six months prior to the murders. He met him through Gloria Mitchell, who ran a salon and pool hall. (T 305-06). He and a lady were standing outside of Moncrief Liquors at approximately 10:45 p.m. on December 9, 1993, when he saw Appellant looking toward him over the top of his car. (T 307-08). He saw Appellant open the back door of his car, put on a ski mask, then retrieve something out of the back seat. When Appellant walked to the front of his car, Mr. Edwards saw that he had a gun. (T 308). Appellant walked to "a yellow cream-looking car" and started shooting at the driver. (T 309). He and the girl ran around back, then he left because he was on parole. (T 309-10). Eleven days later, he was arrested for the burglary, but the charges were dropped because of insufficient evidence. (T 313).

The State's next witness was Mark Richardson, who had been good friends with Jimmy West for approximately ten years. (T 322-23). West had a brother named Theodore Wright, whom Mr. Richardson had also known for ten years. (T 323-24). He identified a yellow/beige, four-door, 1969 Plymouth Mercury as belonging to Theodore Wright, but testified that Wright let Jimmy West use it. (T 324). On the night of the murders, he saw the car at Moncrief

Liquors and went inside to talk to Wright. He did not see Wright, but did see his brother, West, talking to Tamecka Smith. (T 326-27). West told Mr. Richardson that he was leaving for awhile, but would be back. West then left with Tamecka and another female. (T 327). Mr. Richardson followed them outside. He saw West open the passenger door from the driver's seat, and then he saw a man wearing a ski mask open fire on West with a machine gun. (T 328-29). Mr. Richardson yelled to West, and the gunman turned and fired at him, He then saw the gunman get into a black car and speed off. (T 329). He described the gunman as a light-skinned black man, 6' tall, with a medium build. (T 342). He thought Appellant had the same characteristics as the gunman. (T 343).

Next, the State called Officer Burton, an evidence technician with the Jacksonville Sheriff's Office. Officer Burton testified that when he arrived at the scene Jimmy West was dead, lying across the seat in the car. (T 349). He recovered 30 shell casings at the scene. (T 352). He found bullet holes in four other cars and in the building. (T 352, 359). He found no weapons in West's car. (T 361).

The State's next witness was Dr. Floro, the medical examiner. Dr. Floro testified that Jimmy West sustained the following injuries: a bullet wound to the left side of the head which exited

the right side, which would have been immediately fatal; grazing bullet wounds to the chest, upper abdomen, and midsection, from left to right; two bullet wounds to the left side, penetrating the diaphragm and lung, and exiting the top left shoulder, which would have been fatal; a bullet wound to the upper left arm which split the bone, shattered, then entered the chest; a bullet wound to the back of the left shoulder which stopped in the neck; a bullet wound to the front of the forearm which exited the back of the forearm; three bullet wounds to the left thigh and buttocks, two of which shattered the thigh bone. (T 373-85). In all, Jimmy West had been shot twelve times, three of which were fatal. (T 386).

Tamecka Smith sustained the following injuries: a bullet wound to the left side at the waistline which exited at the groin and reentered the right thigh; a bullet wound to the left buttocks which exited the inner left thigh; a bullet wound to the left thigh; and a bullet wound to the right knee. (T 390-92). There were also shrapnel wounds to the lower extremities. Bullet and bone fragments from the shot to West's head punctured the skin on her face. (T 388-89, 392).

The State's next witness was Theodore Wright, who testified that he was 28 years old and had been convicted of one felony. (T 394-95). He was the older brother of Jimmy West. (T 395). He and

West lived down the street from Appellant, but they were not friends. (T 395). In fact, a feud developed in 1989 between Wright (and his family) and Appellant (and his family). (T 396). On June 19, 1993, at approximately 3:00 a.m., someone came inside the Silver Moon Lounge and warned Wright that Appellant and his brother, Lamar Bell, were outside. That person handed Wright a gun, and Wright went outside. (T 396-97). When he did, Appellant hollered, "There go that fucking nigger." (T 397). Wright then saw Lamar Bell, who was about two car lengths away, pull a gun from his waistband, so Wright shot him. (T 397). Appellant ran, and Wright chased him. When he heard gunshots, however, he hit the ground, and Appellant got away. (T 398). Lamar Bell died from the gunshot, but the shooting was later ruled self-defense. (T 398). Wright sold his car to his brother in November 1993. (T 399).

Next, the State called Erica Williams as a witness. Ms. Williams testified that she had been convicted of shoplifting in 1993. (T 400). She further testified that she had been Appellant's girlfriend for approximately four years, and that Appellant lived with her from June 1993 to March 1994. (T 400-01). Appellant said constantly that he would "[e]ven the score" with Appellant. (T 402). When she mentioned that innocent people might get hurt, Appellant responded, "Sometimes the good have to suffer

with the bad." (T 402). In December 1993, Appellant told her that they needed a gun for their protection and convinced her to buy one in her name. On December 8, 1993, they went shopping for an AK-47 and bought one in her name. (T 403-04). They also bought a 75-round drum, a 30-round magazine, and eight boxes of bullets for $472.23. (T 407). Appellant paid in cash, and took the guns and ammunition after the purchase. (T 407).

She also testified that Dale George came to her house the following day between 11:00 p.m. and 1:00 a.m. He was excited and said, "Michael got Theodore." (T 408-09). She went with George to Moncrief Liquors, saw the police there, then returned to her house. (T 410). At some point, Appellant called and asked George to bring some of Appellant's clothes to the home of his aunt, Paula Goins. (T 411). George refused, so Ms. Williams did it. (T 411). Appellant told her "[t]hat Theo killed his brother so he killed his, but an innocent girl got hurt so now the score is even." (T 412). Appellant further told her that he was planning to hide out at his aunt's house for 72 hours until the gunpowder on his hands wore off. (T 413). She did not report Appellant to the police because she was afraid of him. (T 414).

On March 14, 1994, Appellant called her and told her to report the gun stolen, which she did. (T 414). When the police came to

talk to her on May 6, 1994, after Appellant had already been arrested, she told them everything she knew. (T 415-16).

The State's next witness was Scott Johnson, who was the manager of the Gun Gallery. (T 418). Mr. Johnson testified that he sold a Norinco MAC 90, with a 75-round drum, a 30-round magazine, and eight boxes (160 rounds) of ammunition to Erica Williams on December 8, 1993. The black male who was with her specified the optional drum and magazine. (T 419-23).

Thomas Pulley, a firearms examiner with the Florida Department of Law Enforcement, testified that markings on the shell casings recovered from the scene were consistent with being fired from an AK-47 type of firearm. (T 430). A MAC 90 is a semiautomatic version of the AK-47. (T 431).

The State's next witness was Vanesse "Ned" Pryor, who testified that he had been convicted of possession of crack cocaine and resisting arrest without violence. (T 434). On October 10, 1994, he was arrested for criminal mischief for throwing a brick through his girlfriend's window. He pled guilty the next day and was sentenced to six months of probation. (T 435-36). He violated his probation and was sentenced to 20 days in the county jail and six months of probation on December 6, 1994. (T 436). He was also arrested in connection with this case on December 11, 1994, and was

set to go to trial on April 10, 1995, but had no agreement with the State regarding his testimony. (T 434-35).

He further testified that he had known Appellant for approximately five years. (T 437). On December 9, 1993, at approximately 10:30 p.m., he was driving down the street and met Appellant. They pulled over, and Appellant told Mr. Pryor to follow him. (T 437-38). Appellant was driving a black Omega with white interior. (T 438-39). Dale George was a passenger in Appellant's car. (T 439). Mr. Pryor followed Appellant to Moncrief Liquors, where Appellant pointed out Theodore Wright's car. (T 440). Appellant had told him that Wright had killed his brother, and that Appellant wanted to get back at him. (T 441). Mr. Pryor tried to get Appellant to leave by saying that it was early, and the Appellant would not be likely to come out so early, but Appellant responded that he would wait. (T 441-42). Instead of parking in the parking lot as Appellant directed, Mr. Pryor parked down the street and waited in his car. (T 443). About five minutes later, Mr. Pryor saw Appellant get out of his car and walk to Wright's car with a gun. (T 443). He had no doubt that it was Appellant. (T 460). He left after he heard shooting. (T 444).

Two days later, Mr. Pryor was in a car with Appellant when Appellant said that 'he got back at Theodore Wright , , . [b]y

killing 'Jimmy West." (T 447). Appellant also stated that he had killed a girl. (T 447). Appellant told him to keep quiet about it, which he did because he was scared of Appellant. (T 447-48). He later told the police everything he knew when the police questioned him while he was in jail for the criminal mischief. (T 448).

Next, the State called Dale George as a witness. Mr. George testified that he was 25 years old and had been convicted of three felonies. (T 461-62). He had pled guilty on December 12, 1994, to being an accessory after the fact in these murders, and was currently in jail awaiting sentencing. (T 462). In exchange for his truthful testimony, the State agreed to a sentence of five years in prison without habitualization. (T 463).

Mr. George further testified that he had known Appellant for approximately ten years. (T 464). On December 9, 1993, he was at a game room which Appellant operated when he and Appellant ran into Ned Pryor. Appellant told Pryor to follow them, and they drove to Moncrief Liquors, where Appellant pointed out Theodore Wright's car. (T 465-67). Appellant had a grudge against Wright and said that he was going to get even, to kill him. (T 468). Mr. George tried to get Appellant to leave, but Appellant wanted to wait for Wright to come out. (T 468-69). While they waited, Appellant

pulled out a knit cap and burned two eye holes with a cigarette lighter, then put the cap on his head. (T 469-70). After awhile, Appellant said, "[H]ere they come," then got out of the car, pulled the mask over his face, got an AK-47 out of the back seat, and walked toward Wright's car. (T 470). Mr. George moved to the driver's seat and started the car. He heard "a lot of gunshots," then Appellant jumped in the car, and Mr. George drove away. (T 470-71). As Appellant ran to the car, he was "[s]hooting at the building, anything in sight." (T 471). They drove back to the game room, where Mr. George got out, and Appellant drove away. (T 471).

Sometime later, his beeper went off with Erica William's number, so he went to her house and told her what happened. She did not believe him so they drove to Moncrief Liquors. (T 472-73). After they got back to William's house, Appellant called and wanted Mr. George to bring some clothes to Appellant's aunt's house, but he refused and went home. (T 473). He did not report Appellant to the police, and he later lied to the police, because he was afraid of Appellant, but he eventually told the truth. (T 474).

The State's next witness was Charles Jones, who testified that he previously had been convicted of three felonies. He was currently in jail on a federal robbery charge, to which he pled

guilty on August 18, 1994, and was set to be sentenced on March 30, 1995. His sentencing range was 15 to 19 years in prison. (T 485-86). He had no agreement with the State, but hoped the federal judge would consider his testimony during his sentencing. (T 486).

Mr. Jones further testified that he had known Appellant for approximately ten years, but did not like him. (T 487, 492). He was friends, however, with Appellant's brother, Lamar. (T 487). In mid-December 1993, Appellant was trying to sell an AK-47 on the street for $400. He was anxious to sell it, so he dropped the price to $300, but no one bought it. (T 488). AK-47's normally sold on the street for $500-$600. (T 488). In late January 1994, Mr. Jones saw Appellant at his game room and asked him why he killed Jimmy West. Appellant said that Wright killed Appellant's brother, so he killed Wright's brother. (T 488-89). When asked why he shot Tamecka Smith, Appellant responded, "[B]ullets don't know nobody, she was at the wrong place at the wrong time." (T 490).

The State's final witness was Appellant's aunt, Paula Goins, who testified that she was a court clerk for United States District Court Magistrate John Steal. (T 496) . Appellant had told her that Theodore Wright killed his brother, Lamar. (T 498). When Ms. Goins encouraged Appellant to report what he saw to the police,

Appellant responded that jail was too good for Wright, that he deserved the morgue. (T 499). Appellant called her around 2:00 a.m. on December 10, 1993, and said he was coming over. (T 500). He was excited. (T 500). He told her, "I got that motherfucker." (T 502). When she asked to whom he was referring, Appellant said, "Killer, Theodore's brother." (T 502). Appellant told her that he saw Wright's car at Moncrief Liquors and waited by himself for Wright to come out. He knew Wright would not be armed because the lounge checked everybody for weapons. (T 504-07). Appellant walked to Wright's car and thought Wright was reaching for a gun under the seat. (T 508). One of the girls left, and the other girl said to West, "Killer, do you know him?" and pointed to Appellant. (T 509) . West looked at Appellant, and Appellant knew it was West. He told Ms. Goins that he was relieved that it was West because West had been trying to kill Appellant too, so Appellant shot him. (T 510). He also stated to her that he "hit the jackpot" when he saw that it was West. (T 510). Appellant told her that he shot at other cars and the building to get away. (T 510-11). He did not mean to shoot Tamecka Smith, and he could not understand why she did not run when she saw him walk up. He was happy, however, because he and Wright were even. (T 511-12). Appellant called Erica Williams to get some clothes, which she

brought over, but Ms. Goins told Appellant to leave in the morning, and he was gone when she got home from work. (T 512-13). She did not tell the police what she knew because she loved Appellant. (T 514).

On cross-examination, Ms. Goins testified that she knew about the feud between Appellant and Wright, and knew that Wright and West were going to kill Appellant if they got the chance. (T 516). She also testified that she thought Appellant told her that Ned Pryor was with him, and that Ned had a mask and was shooting too. (T 519) .

Thereafter, the State rested its case, and the defense made a motion for judgment of acquittal, which was denied. (T 522). Appellant waived his right to testify, and the defense rested. (T 527-28). The trial court held a charge conference at the end of that day, and at the beginning of the next. (T 531-66). After the parties gave their opening statements (T 567-93, 595-608), and the trial court charged the jury (T 609-30), the jury returned verdicts of guilty on both counts as charged in 27 minutes (T 632-36).

The trial court reconvened on March 17, 1995, for the penalty phase. Appellant indicated that he wanted to testify regarding the events leading up to the murders, but only if the trial court would

limit cross-examination regarding his prior convictions. The trial court ruled that it would not limit the State's cross-examination, but that it had no way to force Appellant to answer the questions. (T 639-42). At that point, the State reminded the trial court that the parties had discussed the State's special instruction relating to the CCP instruction, and that the trial court had agreed to give it without objection by defense counsel. (T 643-46).

The State's only witness was John Lipsey, who **was** working as a security guard at Moncrief Liquors on the night of the murders. He testified that he was stationed outside the front door of the lounge, had no gun, and was screening all of the patrons for weapons. (T 649-50). There were seven or eight patrons in front of the building when shots were fired. (T 656). Bullets struck the building around the front door, and everyone was in the line of fire. (T 657-58). The owner of Moncrief Liquors lived in a house next door with his three children. Four or five bullets struck the house. (T 658-59).

Following Mr. Lipsey's testimony, the State introduced without objection a copy of the information, and judgment and sentence, relating to Appellant's conviction for armed robbery entered on May 7, 1990, for which he was sentenced to 6½ years in prison. (T

661). Thereafter, the State rested, and Appellant presented the testimony of his mother, Margo Bell. Ms. Bell testified that she knew there was a feud between Appellant and Theodore Wright. (T 664). Wright had "sent word through several people" that he might kill her to get to Appellant. (T 664). Appellant told her to watch out for Wright and Jimmy West because they might kill her and/or him. (T 665). In fact, she felt so threatened that she moved out of the neighborhood. (T 664). She was afraid Wright would kill her with Appellant gone. (T 667). Someone had tried to kill Appellant before, but shot a girl standing next to him. (T 667). Appellant had been out of prison only three weeks when Lamar was killed. (T 665).

On cross-examination, Ms. Bell admitted that she had been convicted of one felony. (T 668). She also could not identify anyone in particular who had threatened her, and she admitted that she had not reported the threats to the police. (T 669, 671). She further testified that Appellant **was** born in November 1970, and she believed that he has been a victim of circumstances. (T 675). He has not been treated for mental or emotional problems. (T 675). Appellant is well-mannered, he grew up in the church, he was an alter boy, and he played football. (T 676). Although she has

heard the evidence against him, she cannot believe that Appellant committed the murders. (T 677).

Following his mother's testimony, Appellant waived his right to testify or to call two other witnesses in his behalf. (T 679-80). At which point, the defense rested. (T 680). After closing arguments (T 681-703, 705-12), and jury instructions (T 712-19),[1] the jury recommended a sentence of death for each victim by a vote of twelve to zero after one hour and twenty minutes of deliberation (T 719-24).

On May 5, 1995, the trial court had scheduled an allocution hearing, but Appellant's family members left the courthouse before the hearing, so the trial court reset it for May 10. On May 10, none of Appellant's family members appeared in court. (T 735). Defense counsel indicated that Appellant was satisfied with the presentation and did not want to speak or call other witnesses on his behalf. (T 735-36).

On June 2, 1995, the trial court rendered its sentences. As to both victims it found the existence of the three aggravating factors instructed upon: "prior violent felony," based on the

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[1] The trial court instructed the jury on the aggravating factors of "prior violent felony," "great risk of death," and CCP, and on the mitigating factors of "extreme mental/emotional disturbance," age, and the catchall.

contemporaneous murder and the prior armed robbery; "great risk of death," and CCP. (R 108-10). In mitigation, it found the existence of "extreme mental or emotional disturbance," but gave it 'marginal" weight. (R 111). In conclusion, it found that "the three aggravating circumstances in the aggregate outweigh the one mitigating circumstance and that each aggravating circumstance itself and apart from the other aggravating circumstances outweigh the mitigating circumstance." (R 113). Therefore, it imposed a sentence of death for each of the two murders. (R 114). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - The trial court conducted adequate Nelson inquiries prior to and during the trial, and properly denied Appellant's requests to discharge his attorney. Appellant's complaints indicated nothing more than a general loss of trust and confidence in counsel and did not relate to counsel's competence. Even were the inquiries inadequate, any error was harmless.

Issue II - The record supports the trial court's finding of the "cold, calculated and premeditated" aggravating factor as to both victims. The manner in which the murders were committed evinced calm and cool reflection, a careful plan or prearranged design, heightened premeditation, and a lack of any pretense of moral or legal justification, irrespective that the victims were not the intended target. Even were this aggravator not supported by the evidence, however, there is no reasonable possibility that the jury's recommendation or the trial court's ultimate sentence would have been different.

Issue III - Appellant stipulated to the CCP instruction given in his case; thus, he has waived any challenge to its validity or use. Regardless, it was a correct statement of the law, and was not unconstitutionally vague.

Issue IV - The weight to be accorded a mitigating factor is solely within the discretion of the trial court. Here, the trial court generously found the existence of the "extreme mental or emotional disturbance" mitigating factor and gave it marginal weight. The record supports this finding. Appellant did not detail the particular circumstances he wanted the trial court to consider as nonstatutory mitigation. Thus, to the extent that the trial court failed to consider as a nonstatutory mitigating factor the feud between Appellant and Theodore Wright/Jimmy West, and Wright's and West's alleged threats to kill Appellant, this was not error. Regardless, such evidence was used to support the 'extreme mental or emotional disturbance" mitigator. Appellant was not entitled to double consideration of the same facts,

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT MADE ADEQUATE NELSON INQUIRIES BEFORE TRIAL AND DURING JURY SELECTION (Restated).

On January 4, 1995, five days before the scheduled trial date, the trial court noted at a pretrial conference that Appellant had written the court a letter requesting a different attorney. Although the letter was not made a part of the record on appeal, the trial court discussed the letter as follows:

> Mr. Bell has written a letter to me saying that -- he's asking that I appoint him a new attorney. "The reason I'm asking for counsel is ineffective counsel. My attorney has not come to visit me, not contacted me by telephone. I do not know what is going on in my case." On December the 9th, he stated he thinks a few matters were going on in the case. "Your Honor, I'm faced with a very serious charge. I need someone who is going to fight for me. I'm also requesting the Court to issue an order to give me daily access to the jail law library on my pretrial date coming up on January the 3rd."

(T 27-28). At that point, the trial court asked Appellant what he thought his attorney was not doing that he should be doing. Appellant complained that defense counsel had not "[e]xplain[ed] that facts to [him] on the case." (T 28). Appellant also complained that defense counsel had not come to see him, and that

he (Appellant) **was** in isolation with no phone privileges, so he could not call counsel. Appellant reiterated his request to act as co-counsel. (T 28). The trial court then stated, "Now, as I understand, you've got some witnesses, but you would not give them to Mr. Nichols [defense counsel]." (T 28). Appellant responded that defense counsel never asked about any defense witnesses. Appellant had told defense counsel that he knew of potential defense witnesses awhile ago, but counsel never asked about them, and Appellant could not contact counsel by telephone. (T 29-30).

At that point, the following colloquy occurred:

> THE COURT: All right. Now, other than the fact that he hadn't communicated with you, you say he hadn't communicated with you **at** the jail or by phone, you don't have phone privileges, and that he never **came** to get your witnesses, do you know what he's doing? Do you have any idea what he's doing and what he's done?
>
> THE DEFENDANT: No, sir. All the times that I have talked to him, he have been in the court [chute] and that's just been for **a few** minutes and he just have a pencil and paper basically asking me questions and he didn't have no evidence, no anything concerning the case but what he think and that's no kind of way that I can prepare myself for a defense if he just thinks.

(T 30). The trial court then **asked defense** counsel to respond to Appellant's complaints. Mr. Nichols explained that, within one to

two days of his appointment, he met with the prosecutor for approximately an hour and a half, and the prosecutor summarized the substance of each material witness' testimony. (T 31). Within the next two or three days, he met with Appellant either in the chute or the conference room and summarized the state's case and the witnesses' testimony to him. (T 31). Appellant's response led him to believe that a background check of the state's witnesses would be "an academic exercise," so he did not bother to request an investigator. However, he had deposed each material witness and had again summarized their testimony to Appellant. Until the day before, Appellant had not indicated that he knew of potential defense witnesses. (T 31-32).

Appellant responded that the day before was the first day that he was aware "that the State had any witnesses against [him] except for what he thought." (T 33). Appellant also complained that he had several motions he wanted defense counsel to file, but every time he had a court date scheduled, defense counsel waived his presence, and he was not brought to court. (T 34). Appellant maintained that he had told defense counsel about his defense witnesses during a two-minute conference in November. (T 34). When the trial court mentioned that defense counsel had taken the depositions of the state's witnesses, Appellant responded that, if

he had been there to help him, to explain what the witnesses were talking about, counsel could have done a better job at questioning them. (T 35).

When asked if he had any other complaints, Appellant responded that defense counsel had told him several times that the jury was going to find him guilty, and that he should not go to trial. Nor did they ever prepare a defense. (T 36). The trial court explained that a competent attorney should assess the evidence and counsel the client on the likely outcome of the case. (T 37-38). In light of Appellant's claim that he knew of several defense witnesses, the trial court decided to continue the case to another trial date and authorized the appointment of a private investigator for the defense. (T 38-39).

Regarding Appellant's request to act as co-counsel, the trial court conducted a Faretta inquiry. Appellant responded that he was 24 years old, had a ninth-grade education, and had obtained his GED in prison. (T 39-40). The trial court noted the findings of the competency/sanity examination. (T 40). Appellant further responded that he has not studied the law, but has read statutes; he has never represented himself in another proceeding; and he has had very little experience with lawyers. (T 41). The trial court explained that if Appellant were acting as co-counsel he would be

representing himself in that capacity and would be on his own. (T 41). He could not seek assistance from the trial court. (T 41). Appellant said he understood, and then asked if he could be appointed as stand-by counsel. (T 42). Appellant acknowledged that he might not recognize all of the defenses he may have in his case, and that his defense might be hampered by his lack of knowledge of the law. (T 42-43). Appellant admitted that he had never been through a trial before. (T 44). He claimed that he had read the Florida Rules of Criminal Procedure, but did not know how many peremptory challenges each side was accorded, or the meaning of a challenge for cause. (T 44-45). He also claimed that he had read the rules of evidence in the statutes. (T 46).

At that point, the trial court made the following comments:

> All right. I find that he is not competent to be co-counsel in anything. He doesn't know enough about the rules of procedure to take part as co-counsel.
>
> You have only two options, that is, have Mr. Nichols represent you or represent yourself and I find that you are not competent to represent yourself. You may want to and you may think that you know how, but from asking these questions and the answers you gave, it's apparent to me that you are not able to adequately represent yourself as counsel or co-counsel.

(T 46). When the trial court offered again to continue the trial, Appellant agreed to do so. (T 47-48). Appellant then complained that defense counsel was not following the rules of professional conduct because he had not "[i]nform[ed] [him] of the status of representation." (T 48). When the trial court asked him what he meant, Appellant explained that he would like to participate in the case more and explain more to counsel. (T 49). The trial court responded that that did not have anything to do with counsel not conforming to the rules of professional conduct, and thereafter passed the case to a later date to reset the trial. (T 49-50).

Two months later, during a recess in jury selection, defense counsel indicated that Appellant had given him several motions which he refused to adopt. One motion, however, was to discharge counsel. (T 102-03). The motion alleged that defense counsel had discussed "vital facts" of the case with Appellant in the presence of the brother of a state witness, who told Appellant that he would relate the information to his brother. (T 103-04). Upon inquiry, Appellant admitted that he did not know that the person in the chute with him was the brother of a state witness. (T 104). He did know that the person was an inmate at the jail, because Appellant had seen him twice in the past six months. (T 104-05). Appellant had also complained in the motion that defense counsel

"show[ed] no interest in properly representing [Appellant] and [he was] not rendering effective assistance." (T 105). When asked to explain this statement, Appellant complained that defense counsel would not do anything he asked him to do, and terminated the investigator's work on his case. (T 105).

Upon inquiry by the trial court, defense counsel responded that he was explaining the state's case to Appellant in the chute, and that they discussed nothing confidential. He gave Appellant his opinion regarding the jury's verdict and recommendation, but Appellant said nothing privileged to him. (T 106). Regarding his interest in the case, defense counsel explained that he had deposed all of the state's witnesses, and had provided Appellant with a copy of the depositions and any sworn statements. (T 106). He had hired an investigator after the last hearing, and the investigator had interviewed Appellant several times and had investigated Appellant's potential witnesses:

> A number of them have refused to cooperate with him. We have done everything -- I have on a number of occasions both directly and through Don Marks asked Mr. Bell to tell us what he thinks he wants done. I have evaluated that from the stand point of whether or not there's any likelihood of anything productive coming from it, and whether or not the suggestions that he's made would either bring forth relevant testimony. And we have [followed] every one of those to those

> conclusion. There's nothing he suggested that is likely to lead to relevant discoverable admissible evidence.

(T 107). Appellant maintained that the information related by defense counsel in the chute would alter the State's case. (T 108). As for the investigator, Appellant admitted that he came to see him twice and wrote down all of the information that Appellant had to give, 'but he never said anything else about it." (T 108). At that point, the trial court denied the motion: 'Okay. Well, I deny the motion. I feel as though explanation has been sufficiently made and I deny the motion." (T 109).

In this appeal, Appellant claims that the trial court failed to conduct an adequate inquiry pursuant to Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), thereby depriving him of effective assistance of counsel. (Initial brief at 14-20). In approving Nelson, this Court adopted the following procedure outlined therein:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be

> allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988). The State submits that the trial court made proper inquiries and determined that Appellant had presented no reasonable bases for a finding of ineffective assistance of counsel such as to warrant the dismissal of counsel.

At the January hearing, Appellant's initial complaints were that counsel (1) had not explained the case to him, (2) had not been to see him in jail, and (3) had not asked him about any potential defense witnesses even though Appellant had mentioned to counsel in November that he had a list of people. (T 28-30). In keeping with Nelson, the trial court inquired of defense counsel, who responded that he had met with the prosecutor, that he had explained the case to Appellant, that he had deposed all of the material witnesses, and that he was unaware of any potential defense witnesses until the previous day. (T 31-32). Appellant merely disagreed with counsel, and additionally complained that counsel had expressed his belief several times that the jury would find him guilty, and that he should plead guilty. (T 33-36).

Appellant's complaints were no more than generalized grievances, and despite questioning by the trial court, Appellant could cite no specific acts of alleged incompetence. As this Court has stated previously, "[g]eneral loss of confidence or trust standing alone will not support withdrawal of counsel." Johnston v. State, 497 So. 2d 863, 867 (Fla. 1986). Rather, Appellant must "voice[] a ***seemingly substantial complaint*** about counsel" before an inquiry is warranted. Wilder v. State, 587 So. 2d 543, 545 (Fla. 1st DCA 1991) (emphasis in original). Here, as in Wilder, Appellant voiced only general allegations, which indicated a lack of trust rather than proof of ineffectiveness. "Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel." Capehart v. State, 583 So. 2d 1009, 1014 (Fla. 1991). Thus, the trial court properly denied Appellant's request in January to dismiss his court-appointed counsel. See Lowe v. State, 650 So. 2d 969, 975 (Fla. 1994) (finding Nelson inquiry sufficient where defendant expressed only generalized complaint that counsel "was not doing his best"); Watts v. State, 593 So. 2d 198, 202-03 (Fla. 1992) (finding Nelson inquiry sufficient where defendant alleged only that counsel had not been to see him in the jail); Kenney v. State, 611 So. 2d 575 (Fla. 1st DCA 1992) (same); cf. Lee

v. State, 641 So. 2d 164, 165 (Fla. 1st DCA 1994) (finding Nelson inquiry unnecessary where defendant alleged only inadequate communication with counsel).

To the extent Appellant makes a procedural argument that the trial court failed to expressly state on the record that it found no reasonable basis to discharge counsel, Appellant has cited no authority to support automatic reversal for such an omission. It is clear from the record that the trial court knew the correct standard to apply. After it questioned both Appellant and counsel, its actions implied its finding. It agreed to continue the case and to appoint an investigator to investigate Appellant's potential defense witnesses, It also made a Faretta inquiry to determine whether Appellant was qualified to represent himself. Its failure to expressly state what it implicitly found does not warrant *per se* reversal.

Similarly, to the extent Appellant asserts error in the trial court's explanation of Appellant's choices, he has failed to show reversible error. Implicit in the trial court's Faretta inquiry was its decision to deny the motion for discharge. Once denied, the next step was to advise Appellant of his choices to accept counsel or represent himself. The latter choice would have been meaningless, however, if Appellant were not competent to represent

himself, so the trial court conducted a Faretta inquiry even though Appellant never requested, either equivocally or unequivocally, to represent himself.[2] Perhaps the trial court put the cart before the horse, but the bottom line was that Appellant had no choice to make, because he was not competent to represent himself. Cf. Hardwick, 521 So. 2d at 1073-75. Were his inquiry inadequate or his decision erroneous, however, such error was harmless given that Appellant only sought to act as co-counsel with Mr. Nichols. See Cason v. State, 652 So. 2d 1191, 1192 (Fla. 3d DCA 1995) (finding that Faretta hearing was never triggered because defendant requested only to act as co-counsel).

At the trial in March, Appellant complained that defense counsel (1) discussed "vital facts" with him in the presence of the brother of a state witness, and (2) showed no interest in properly

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[2] Although the trial court referenced Appellant's request to act as 'co-counsel" before conducting the Faretta inquiry, it explained very clearly that it was attempting to determine whether Appellant was competent to represent himself:

> THE COURT: Do you realize that if you were appointed co-counssel [sic] that you would be representing yourself in that capacity as co-counsel and that you would be on your own? I could not advise you as to how to ask a question or make an objection or how to frame a question. Do you understand that?

(T 41) (emphasis added).

representing him. (T 103-05). When pressed for details, Appellant could only say that counsel "don't try to do nothing I ask him to do," and that counsel had terminated the investigator's work. (T 105). Again, these are general grievances and do not establish a reasonable basis for discharging counsel. Cf. Johnston, 497 So. 2d at 867-68; Watts, 593 So. 2d at 202-03; Lowe, 650 So. 2d at 975. Nevertheless, defense counsel explained that nothing confidential was discussed in anyone else's presence, that he had investigated Appellant's case, and that he and his investigator investigated every avenue suggested by Appellant. (T 107). When Appellant conceded that he had spoken with the investigator on several occasions and had relayed everything to him, the trial court denied Appellant's motion to discharge counsel.

Again, Appellant complains that the trial court did not make a specific finding on the record that it found no reasonable basis to discharge counsel. However, Appellant does not explain why the trial court's statement, "I feel as though explanation has been sufficiently made and I deny the motion," is not a sufficient finding that Appellant's motion had no merit. Similarly, to the extent the trial court did not advise Appellant of his choices, or lack thereof, it had already done so at the January hearing. Under the circumstances, repetition was unnecessary, or at most harmless

error. Cf. Morris v. State, 667 So. 2d 982, 986 (Fla. 4th DCA 1996) (finding that, although trial court did not meet the requirements under Faretta on each of four occasions, it met them in the aggregate); Weems v. State, 645 So. 2d 1098, 1099 (Fla. 4th DCA 1994) (on reh'g) (finding no reason to reverse where the trial court denied the motion to discharge counsel, and the failure to advise Appellant was patently harmless), rev. denied, 654 So. 2d 920 (Fla. 1995); Capehart v. State, 583 So. 2d 1009, 1014 (Fla. 1991) ("While the better course would have been for the trial court to inform Capehart of the option of representing himself, we do not find it erred in denying Capehart's request for new counsel."), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992).

Were this Court to find, however, that the trial court's Nelson inquiries were inadequate, such error was harmless beyond a reasonable doubt. As the First District has held:

> [T]he trial court's failure to make a thorough inquiry and thereafter deny the motion for substitution of counsel is . , . not in and of itself a Sixth Amendment violation. In determining whether an abuse of discretion warranting reversal has occurred, an appellate court must consider several factors, in addition to the adequacy of the trial court's inquiry regarding the defendant's complaint, including as well whether the motion was timely made, and if the conflict was so great as to result in a total lack of communication preventing an adequate defense.

> In the present case, the record reflects that defendant's motion to dismiss counsel was timely filed before trial, Although the trial court's inquiry as to the grounds stated for discharge was not extensive, the court acknowledged receipt of the motion and gave defendant an opportunity to argue the motion further. When the appellant did not respond, the motion was denied. The most important circumstance militating in favor of affirmance, however, is the fact that the appellant proceeded to trial with his court-appointed counsel, and made no additional attempt to dismiss counsel or request self-representation. Similarly, there is no evidence in the record of any conflict or lack of communication during the trial between appellant and his attorney that would support a finding that the appellant did not receive an adequate defense. Thus, based on the record at bar, we conclude that the trial court's failure to conduct a more extensive inquiry regarding the merits of the motion to discharge did not violate the appellant's Sixth Amendment right to effective assistance of counsel, and was at most harmless only.

Kott v. State, 518 So. 2d 957, 958 (Fla. 1st DCA 1988) (citations omitted).

Here, Appellant's first attempt to discharge counsel was made five days before the scheduled trial date. His second attempt was made on the day of jury selection. Moreover, his reasons alleged for discharge did not present a conflict "so great as to result in a total lack of communication preventing an adequate defense." Id. There is no evidence in the record whatsoever that Appellant and

Mr. Nichols had such a conflict or lack of communication that Mr. Nichols could not present an adequate defense. In fact, the record reveals that Mr. Nichols presented as good a defense as was possible given the overwhelming evidence of guilt, which included three eyewitness identifications and numerous inculpatory statements to lay witnesses. Consequently, Appellant's conviction should be affirmed since there is no reasonable possibility that the verdict would have been different even if the trial court's DiGuilio inquiries had been more extensive. See State v. [illegible], 491 So. 2d 1129 (Fla. 1986); Sweet v. State, 624 So. 2d 1138, 1141 (Fla. 1993) (finding inadequate Faretta hearing harmless where defendant accepted counsel and later professed satisfaction with him); Boynton v. State, 577 So. 2d 692 (Fla. 3d DCA 1991) (finding inadequate Nelson inquiry harmless where defendant made no other complaint throughout several-day trial, counsel mounted vigorous and partially successful defense, and defendant later professed satisfaction with counsel); Parker v. State, 570 So. 2d 1053, 1055 (Fla. 1st DCA 1990) ("In light of the overwhelming evidence of guilt, the legal insufficiency of the motion, the defendant's failure to pursue the motion although having the opportunity to do so, and a record which reveals no evidence of incompetence, we find

that the failure to conduct an inquiry was harmless error."), rev. denied, 581 So. 2d 1309 (Fla. 1991).

ISSUE II

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE COLD, CALCULATED, AND PREMEDITATED MURDER AGGRAVATING FACTOR (Restated).

In this appeal, Appellant claims that the record does not support the trial court's finding of the CCP aggravating factor as to either victim. With respect to Jimmy West, Appellant claims that the State's guilt-phase case was premised on two alternative theories--one based on transferred intent, and the other based on a quickly-formed, premeditated decision to kill West. Appellant concedes that the first theory would support the finding of CCP, but contends that the second theory would not because the murder was not calculated or preplanned. (Initial brief at 22-24). Thus, Appellant claims that, "[s]ince the State's evidence supports two hypotheses, one supporting CCP and the other not supporting the aggravating circumstance, Bell is entitled to the view of the facts which favors his position that proof of CCP is insufficient." (Id. at 23-24).

To support his position, Appellant cites to Geralds v. State, 601 So. 2d 1157 (Fla. 1992). In Geralds, the victim was found beaten and stabbed to death on her kitchen floor. Several items were missing from the victim's house, including her car. Although

the evidence against Geralds was circumstantial, this Court nevertheless affirmed Gerald's convictions for first-degree murder, armed robbery, burglary, and auto theft. Id. at 1159. However, noting that the evidence against Geralds was "entirely circumstantial," this Court ultimately struck the CCP factor. It ruled that, while one hypothesis could support heightened premeditation, another reasonable hypothesis could not support premeditation at all, but rather only a blind-rage killing. Thus, because "the evidence regarding premeditation in this case [was] susceptible to these divergent interpretations," the aggravating factor was not proven beyond a reasonable doubt. Id. at 1164.

Geralds is inapposite for two reasons. First, as noted by this Court, the evidence in Geralds was entirely circumstantial, and the state had no way to rebut any reasonable hypothesis the defendant asserted. Here, on the other hand, there was overwhelming direct evidence to prove Appellant's calm and cool reflection, his careful plan and prearranged design, and his heightened premeditation. Likewise, there was overwhelming evidence to disprove any pretense of moral or legal justification.

Second, in Geralds, although the State's theory showed heightened premeditation to kill, Gerald's theory showed only an intent to rob. Thus, since the CCP factor requires an intent to

kill, the lack of intent negated the factor. Here, however, Appellant intended to kill someone. That his preconceived target was Theodore Wright, but his ultimate target was Jimmy West, is of no moment because "[i]t is the manner of the killing, not the target, which is the focus of this aggravatox." Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993).

For several months, Appellant calmly and coolly reflected on his decision to kill Theodore Wright. In fact, he expressed to numerous people not only his intention to kill Wright, but also his total disregard for any innocent people who might die as a result. In furtherance of his plan, he got his girlfriend to buy fox him an AK-47 with an optional 30-round magazine. The following day, he spotted Wright's car at Moncrief Liquor, left the scene, and then returned with two friends. He burned two eye holes in a ski mask to conceal his identity. Then he lay in wait for his victim. When he saw three people (not just Wright) getting into Wright's car, he opened fire, killing the driver and a passenger. Then he fled. Regardless of who he killed, his actions establish that he killed two people after calm and cool reflection, based on a careful plan or prearranged design, and with heightened premeditation. Whether he killed Theodore Wright, or Jimmy West and Tamecka Smith, or two total strangers, his actions show that he committed the murders in

a "cold, calculated and premeditated manner." See Sweet, 624 So. 2d at 1142 (upholding CCP factor where defendant planned to kill one victim, pushed open apartment door, shot intended victim, then shot other three people, killing one); Provenzano v. State, 497 so. 2d 1177 (Fla. 1986) (upholding CCP factor where defendant planned to kill two officers who arrested him, but instead killed or wounded officers at the courthouse who tried to frisk him for weapons), cert. denied, 481 U.S. 1024 (Fla. 1987).

Alternatively, regarding Jimmy West, Appellant claims that "[he] had a pretense of moral or legal justification for the shooting," namely, self-defense. (Initial brief at 24). His theory during the guilt phase was that West had previously threatened to kill him, that West usually carried a weapon, that he knew West did not have a weapon on his person after leaving the lounge because the lounge frisked everyone with a metal detector, but that he saw West reaching for something when Appellant approached the car and thought West was reaching for a gun under the seat. (T 595-608). The jury rejected this theory of defense. Regardless, Appellant did not renew this argument at any time during the penalty phase or at the allocution hearing to rebut the CCP aggravating factor. (T 705-12, 735-37).

To support this argument on appeal, Appellant cites to ristian v. State, 550 So. 2d 450 (Fla. 1989), Banda v. State, 536 so. 2d 221 (Fla. 1988), and Cannadv v. State, 427 So. 2d 723 (Fla. 1983). In Christian, the victim, a prison inmate, had repeatedly threatened to kill Christian, also an inmate, and had made an attempt to do so. While recuperating in the infirmary, Christian ran up to the victim, who was being escorted in handcuffs down the corridor, pushed the guards out of the way, stabbed the victim repeatedly, then pushed him over the railing. Citing to Banda and Cannady, this Court struck the CCP factor, finding that Christian had at least a "pretense" of moral or legal justification based on the victim's threats of violence and his apparent inclination to fulfill them.[3]

The distinction between those cases and the present case, however, is the motivation for the murders. In Christian, as in Banda and Cannady, this Court found a "colorable claim that the murder 'was motivated out of self-defense,' although in a form

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[3] In Banda, this Court found a "pretense" of moral or legal justification based on the victim's history of violence and his recent threat to kill Banda. 536 So. 2d at 224-25. Similarly, in Cannady, this Court found a 'pretense" of moral or legal justification based on the defendant's claim, which could not be disproved, that he killed the victim only after the victim jumped at him. 427 So. 2d at 730-31.

legally insufficient to serve as a defense to the crime." 550 So. 2d at 452 (quoting Banda, 536 So. 2d at 225); see also Cannady, 427 So. 2d at 730. Here, however, Appellant did not act out of self-defense, nor were his actions premised on a preemptive strike. Rather, Appellant decided to kill Theodore Wright because Wright killed his brother, Lamar. Thus, Appellant's motive was one of retribution. In fact, Appellant's girlfriend, Erica Williams, testified that Appellant repeatedly stated that he would "[e]ven the score" with Wright. (T 402). And when Appellant called Williams after the shooting, he told her that "Theo killed his brother so he killed his . . . so now the score is even." (T 412). Appellant also told Ned Pryor and Dale George that he wanted to get even with Wright by killing him. (T 441, 468). When Charles Jones asked Appellant after the shootings why he killed West, Appellant responded that Wright killed his brother, so he killed Wright's brother. As for Tamecka Smith, Appellant remarked that 'bullets don't know nobody, she was at the wrong place at the wrong time." (T 489-90). Finally, Appellant told his aunt, Paula Goins, who knew about the feud between Appellant and Wright, that he saw Wright's car at the lounge and waited there for Wright to come out. (T 504-06). He knew Wright would not be armed because the lounge frisked everyone for weapons. (T 507). When Appellant

walked up to the driver's door, he thought West was reaching for a gun under the seat. (T 508). One of the girls said to West, "Killer, do you know him?" and pointed to Appellant. (T 509). Appellant said he "hit the jackpot" when he realized it was West instead of Wright, because West was trying to kill him too. (T 510). Ms. Goins described Appellant as "happy" because he and Wright were "even." (T 511-12).

As for Appellant's statement to Paula Goins that he thought West was reaching under the seat for a gun, the testimony and evidence belie that statement. First, Lora Hampton, who was waiting to get in the back seat when Appellant walked up, testified that West was reaching across the seat to the passenger's rear door, trying to unlock her door, when Appellant walked up. (T 289). Second, Officer Burton testified that he found West lying across the seat. (T 349). He also found no weapons in West's car. (T 361). Third, and most important, the medical examiner testified that the injuries were consistent with West sitting upright in his seat or leaning toward the right side of the car.[4]

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[4] For example, one bullet entered the left side of West's head at the earlobe and exited the right side of his head at the top of his right ear. (T 374-75). Another bullet grazed West's chest just below the collarbone from left to right and slightly downward. (T 376). Two more bullets grazed the chest/abdomen from left to right at an upward angle, which was consistent with West falling

Of the twelve bullets that struck West, none of them were consistent with West reaching under the seat for a gun.

This Court has defined a "pretense of moral or legal justification" as "any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Walls v. State, 641 So. 2d 381, 388 (Fla. 1994) (emphasis added; footnote omitted). See also Wuornos v. State, 644 So. 2d 1000, 1008 (Fla. 1994) (emphasis in original) ('An incomplete claim of self-defense would fall within this definition ***provided*** it is uncontroverted and believable."). Here, given the facts and circumstances of these murders, Appellant's statement that West was reaching for a weapon under the seat is both controverted and unbelievable, as it is directly disputed by testimony and physical evidence. Thus, his

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sideways to his right. (T 376-77). Two more bullets entered West's left side while he was lying on his right side and exited near his shoulder. (T 378-79). Another bullet entered the top of his left arm and existed into his chest as West was falling over to his right. (T 381-82). Another bullet entered the back of the left shoulder, exited, and re-entered the base of the neck. (T 382-83). Another bullet entered the inside of the left forearm and exited the back side of the forearm. (T 383). The position of the arm was consistent with a defensive gesture. (T 383). Three more bullets struck West in the upper left thigh or buttocks as West was either falling to the right or was lying on his right side. (T 384-86).

statement, even when coupled with the testimony that West had threatened to kill Appellant, does not establish a pretense of moral or legal justification for West's murder. See Wuornos, 644 so. 2d at 1008 (finding that facts and evidence rebutted defendant's claim of 'pretense" based on self-defense); cf. Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993) (rejecting defendant's claim of a "pretense of moral justification" based on his belief that the victim was abusing the defendant's aunt, and that the defendant **was** jealous of the victim's relationship with his aunt); Trepal v. State, 621 So. 2d 1361, 1367 (Fla. 1993) (rejecting defendant's claim that he poisoned neighbors, killing one, based on 'pretense" that they were "troublesome neighbors").

In Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988), this Court noted that the CCP factor can be shown by "circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course." As noted, Appellant procured through his girlfriend an AK-47 assault rifle with a 30-round magazine, and laid in wait for Wright to come out of Moncrief Liquors when he knew Wright would not be in possession of a weapon. Without resistance or provocation, Appellant executed West as retribution for the killing of his brother by Wright. Under these facts, the

trial court properly found the existence of the CCP aggravating factor. Cf. Arbelaez v. State, 626 So. 2d 169, 177 (Fla. 1993) (upholding finding that murder of girlfriend's child was committed in "cold, calculated, and premeditated manner," rather than as a result of rage, based on evidence and testimony that defendant killed child to "strike at the child's mother" who had gone out with another man).

Appellant also claims that the record does not support the trial court's finding of the CCP aggravating factor for the murder of Tamecka Smith. In his brief, Appellant actually asserts that "[t]here was no dispute that Tamecka Smith was killed accidentally during the shooting of West." (Initial brief at 25). Based on this conclusory and uncorroborated statement, Appellant concludes that neither the concept of premeditation (much less heightened premeditation), nor the concept of transferred intent apply to her murder. (Initial brief at 25-26).

Appellant's premise, however, is incorrect. Whether Tamecka Smith **was** killed accidentally was very much in dispute. In fact, the State argued that her murder was equally cold, calculated, and premeditated. (T 573-74, 578-79). As noted previously, Appellant instituted his careful plan or prearranged design to kill Theodore Wright after calm and cool reflection. He bought a machine gun

with a normal magazine capacity of five shells, but added an optional 30-round magazine.[5] (T 420-23, 430-31). He spotted what he believed was Theodore Wright's car in the parking lot of Moncrief Liquors. He fashioned a mask to conceal his identity, then waited for his target to appear. He saw not one, but three, people leave the lounge and walk to Wright's car. When he had mentioned previously to his girlfriend, Erica Williams, that he intended to 'even the score" with Wright, and she remarked about innocent people getting hurt, Appellant replied, "Sometimes the good have to die with the bad." Thus, without regard for Tamecka Smith's life, Appellant walked to the driver's side of the car and opened fire on the person sitting in the driver's seat (James West). Though neither West nor Smith were the intended targets, both died pursuant to Appellant's plan.

Under these facts, it cannot be said that Smith's death was an accident. Appellant killed her as deliberately as he killed West. The fact that she was never a specific target of Appellant's murderous plan in no way negates the fact that her murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification. "The aggravating

[5] Thirty expended shell casings were, in fact, recovered from the scene. (T 429).

circumstance of cold, calculated, and premeditated focuses on the manner in which the crime was executed, i.e., the advance procurement of the murder weapon, lack of resistance or provocation, the appearance of a killing carried out as a matter of course." Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994). It does not focus on the target of those actions.

Appellant attempts to convolute his argument further by using those cases directly against him. As argued previously, Sweet; and Provenzano specifically hold that "' [h]eightened premeditation necessary for this circumstance does not have to be directed toward the specific victim.' It is the manner of the killing, not the target, which is the focus of this aggravator. Finally, the key to this factor is the level of preparation, not the success or failure of the plan . . . ." Sweet, 624 So. 2d at 1142 (quoting Provenzano, 497 So. 2d at 1183). Thus, as in Sweet and Provenzano, the record in this case supports the trial court's finding of the CCP aggravator as to both James West and Tamecka Smith.

Were this Court to find, however, that the facts do not support this aggravating factor as to either or both of the victims, Appellant's sentence should nevertheless be affirmed. In Socorro v. Florida, 504 U.S. 527, , 112 S. Ct. 2114, , 119 L. Ed. 2d 326, 340 (1992) (citing Griffin v. United States, 502 U.S.

46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)), the United States Supreme Court reaffirmed that "although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the evidence." Thus, even if the elements of the CCP aggravator were not met, there is no reasonable basis to assume that the jury found it anyway. Although the trial court did, in fact, find the existence of this aggravating factor, it also found that "the three aggravating circumstances in the aggregate outweigh the one mitigating circumstance and that each aggravating circumstance itself and apart from the other aggravating circumstances outweigh the mitigating circumstance." (R 113) (emphasis added).[6] Regardless, there remain two valid, and unchallenged, aggravating factors: The first is the 'prior violent felony" aggravator, which is based on the contemporaneous murder and a prior armed robbery. This Court previously has found this aggravator to be "especially weighty." E.g., Ferrell v. State, 21

[6] This Court has previously considered such findings helpful in analyzing harmless error. See, e.g., Lowe v. State, 650 So. 2d 969, 976 (Fla. 1994) (relating to rejection of mitigation); Maqueira v. State, 588 So. 2d 221, 224 (Fla. 1991) (relating to consideration of invalid aggravator), cert. denied, 112 S. Ct. 1961, 118 L. Ed. 2d 563 (1992); Brown v. State, 565 So. 2d 304, 309 n.10 (Fla.) (relating to consideration of invalid aggravator), cert. denied, 498 U.S. 992 (1990); Young v, State, 579 So. 2d 721, 724 (Fla. 1991) (relating to consideration of invalid aggravator), cert. denied, 112 S. Ct. 1198, 117 L. Ed. 2d 438 (1992) .

Fla. L. Weekly S166, 166 (Fla. April 11, 1996) (finding single aggravator of "prior violent felony" "especially weighty," and thus supporting sentence of death despite existence of "a number of mitigating circumstances"); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994) (finding 'under sentence of imprisonment" and "prior violent felony" factors "strong aggravators"), cert. denied, 131 L. Ed. 2d 227 (1995); Henderson v. Sinaletary, 617 So. 2d 313, 315 (Fla. 1993) (finding "prior violent felony" constituted "weighty aggravating factor"); Parker v. Dugger, 537 So. 2d 969, 972 (Fla. 1988) (same). The second valid aggravator is "great risk of death to many persons." This factor should also be considered "especially weighty," given that many more people could have died by Appellant's actions. In comparison, the trial court found only one mitigating factor--"extreme mental or emotional disturbance"--which it gave "marginal" weight. Since there is no reasonable possibility that the sentence would have been different absent the CCP aggravating factor, this Court should affirm Appellant's sentences of death.[7] See Rogers v. State, 511 So. 2d 526 (Fla.

[7] Although not raised as an issue by Appellant, his sentence is proportionate to others under similar facts. Cf. Trepal, 621 So. 2d 1361 (Fla. 1993); Arbelaez v. State, 626 So. 2d 169 (Fla. 1993); Gunsby v. State, 574 So. 2d 1085 (Fla. 1991), rev'd on other grounds, 670 So. 2d 920 (Fla. 1996).

1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. CT. 955 (1992).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN GIVING THE STATE'S PROPOSED INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR TO WHICH APPELLANT DID NOT OBJECT (Restated).

In this appeal, Appellant claims that the instruction given in his case on the 'cold, calculated and premeditated" aggravating factor was improper for two reasons: (1) the additional language proposed by the State regarding transferred intent "failed to advise the jury that this legal principle was not applicable to the homicide of Tamecka Smith under any theory of the facts," and (2) the standard language taken from Jackson v. State, 648 So. 2d 85 (Fla. 1994), is unconstitutional because it 'fails to adequately apprise the jury of the legal limitations of the CCP circumstance, specifically concerning the element of heightened premeditation." (Initial brief at 28).

The record reveals, however, that not only did defense counsel not object to the instruction, he stipulated that it was appropriate. On the first day of the penalty-phase hearing, the trial court commented that the parties had discussed the jury instructions in chambers the day before. (T 642). The State then

reminded the court that they had discussed the State's proposed instruction on CCP:

> **[THE PROSECUTOR] : Your** Honor, I did submit a requested penalty phase instruction number one that we discussed yesterday in chambers, in the Court's chambers yesterday, the court had granted I believe.
>
> **THE COURT:** What's that?
>
> [THE PROSECUTOR] : The requested instruction that has already been incorporated on heighten [sic].
>
> That dealt with heighten[ed] premeditation and the use of transferred intent issue.
>
> [DEFENSE COUNSEL]: We already agreed to it.
>
> [THE PROSECUTOR] : I understand but I don't think the record reflects that the court has granted that.
>
> * * * *
>
> [THE PROSECUTOR]: . . . And has the court ruled on the record regarding the State's proposed instruction?
>
> THE COURT: Which one?
>
> [THE PROSECUTOR] : The heighten[ed] premeditation,
>
> THE COURT: Oh, yes, this is the one we went over yesterday we discussed it with the attorneys for state and defense, I think it's justified and there was no objection, is that correct, Mr. Nichols?

[DEFENSE COUNSEL]: Yes.

(T 643, 645-46) (emphasis added).

The following instruction was read to the jury:

> And three, that the crimes for which the defendant is to be sentenced were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> In order for you to consider this aggravating factor your [sic] must find that the murder **was** cold, and calculated, and premeditated and that there was no pretense of moral or legal justification. Cold means that the murder was the product of calm and cool reflection. Calculated means that the defendant had a careful plan or prearranged design to commit the murder. Premeditated means that the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. The heightened premeditation necessary for this circumstance does not have to be directed toward the specific person killed. If the murder was committed in **a** manner that was cold and **calculated,** the aggravating circumstance of heighten [sic] premeditation is applicable.
>
> A pretense of moral or legal justification is any claim of justification or excuse that though insufficient to reduce the degree of the homicide nevertheless rebutts [sic] the otherwise cold and calculating **nature of the homicide.**

(T 713-14). Immediately **after the instructions were read to the** jury, the following colloquy also occurred:

THE COURT: State and defense, do both -- do either state or defense take exception or objection to the charges as given by the court?

[DEFENSE COUNSEL]: No, Your Honor.

[THE PROSECUTOR] : No, Your Honor.

THE COURT: Do both state and defense agree and stipulate that those were the charges we went over yesterday, those were the charges I said that I was going to give and those were the ones that both state and defense agreed to?

[DEFENSE COUNSEL]: Yes, sir.

[THE PROSECUTOR]: Yes, sir.

(T 719-20).

As this Court has previously held, "[c]laims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal." Jackson, 648 So. 2d at 90. Accord Walls v. State, 641 So. 2d 381, 387 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995). Given Appellant's stipulation in the trial court to the State's proposed instruction, he has waived any issue on appeal. See Wuornos v. State, 21 Fla. L. Weekly S202, 202-03 (Fla. May 9, 1996).

To the extent Appellant's claims are nevertheless cognizable, they are wholly without merit. Regarding that part of the instruction relating to transferred intent, as discussed previously in Issue II, the legal principal of transferred intent applied to the murder of Tamecka Smith. Thus, Appellant's unpreserved claim that the jury was given an inaccurate statement of the law regarding the Smith murder is unavailing. As for the standard part of the instruction which defined the elements, this language was taken directly from Jackson, 648 So. 2d at 89 n.9. Although this Court has since adopted a somewhat different standard CCP instruction, Standard Jury Instructions in Criminal Cases, 665 So. 2d 212 (Fla. 1995), the trial court's definition of "heightened premeditation" taken from Jackson was not unconstitutionally vague. Therefore, Appellant's claim is without merit, and this Court should affirm his sentences of death.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY CONSIDERED AND FOUND MITIGATING CIRCUMSTANCES (Restated).

In this appeal, Appellant initially claims that the trial court "improperly minimized the weight of the ["extreme mental or emotional disturbance"] circumstance" after erroneously relying on a psychiatric report that only reported on Appellant's competency to stand trial and his sanity at the time of the crime. (Initial brief at 30). In effect, Appellant is challenging the evidence upon which the trial court relied to find the existence of this factor.

Appellant presented no evidence in the guilt phase of the trial. At the penalty-phase, Appellant presented only the testimony of his mother. She testified to the feud between Appellant and Theodore Wright, and the numerous threats she received from persons she associated with Wright but could not name or otherwise identify. (T 664-69). On cross-examination, she further testified that Appellant had been working since his release from prison, that he had never been treated for mental or emotional problems, that he is well-mannered, that he grew up in the church and was an alter boy, and that he played football while in school. (T 674-76). Appellant presented no other witnesses or evidence.

Although the bases for giving them does not appear in the record since the charge conference was not reported, instructions on the mitigating factors of 'extreme mental or emotional disturbance," age, and the catchall were given to the jury. (T 642, 715). Defense counsel, however, made no reference to mitigating factors in his closing argument (T 705-12), presented no sentencing memorandum to the trial court, and made no argument for their application at the allocution hearing (T 735-37). Thus, the trial court had to glean from the record the bases for the "extreme mental or emotional disturbance" mitigator.

In "expressly evaluating in its written order each mitigating circumstance proposed by the defendant," Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), the trial court noted that Appellant had been examined pretrial for competency and sanity, noted the psychiatrists' findings, noted the lack of findings regarding the "extreme mental or emotional disturbance" mitigator, and noted the total lack of evidence presented relating to this circumstance, either at the trial or in subsequent proceedings. It acknowledged the evidence that Appellant's brother had been murdered several months before these murders, but found that Appellant had apparently lived a normal life in the interim, and had not acted out violently at the time of, or shortly after, his brother's

death. In effect, the trial court found nothing in the record to support this mitigating factor, but found it anyway!

Despite the trial court's generous application of this factor, Appellant nevertheless challenges the weight accorded to it, apparently believing that, had the trial court not considered the pretrial psychiatric report, it would have accorded this mitigating circumstance more weight. Frankly, Appellant wants to have his cake and eat it too. Nothing in this record supports this circumstance, and Appellant does not deserve to benefit by its application. Nevertheless, the trial court found it and gave it some weight (marginal, but some).

Despite Appellant's exhortations to the contrary, there is absolutely no evidence or inference that the trial court applied a competency/sanity standard when evaluating this mitigating circumstance. This report was simply the only evidence in the record even remotely relating to this mitigating factor; yet, it provided no basis for finding it. Under the circumstances, the trial court did not err in using it to evaluate this factor. As for the weight accorded to the factor, this Court has repeatedly held, which Appellant concedes, that "[t]he relative weight given each mitigating factor is within the judgment of the sentencing court." Windom v. State, 656 So. 2d 432, 440 (Fla. 1995). See

also Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993) ('It is the assignment of weight that falls within the trial court's discretion in such cases."); Camsbell, 571 So. 2d at 420 ("[T]he relative weight given each mitigating factor is within the province of the sentencing court."); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995) ('Once the factors are established, assigning their weight relative to one another is a question entirely within the discretion of the finder of fact . . . ."). 'Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. St-ate, 587 So. 2d 450, 453 (Fla. 1991). Since "[i]t is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating and mitigating circumstances," Hudson v. State, 538 So. 2d 829, 831 (Fla. 19891, this Court should affirm the trial court's finding.

Appellant also complains that the trial court "erred in not finding any nonstatutory mitigating circumstances." (Initial brief at 33). Specifically, Appellant claims that the trial court failed to find in mitigation "the emotional impact caused by the death of [Appellant's] brother," and "the evidence of a long-standing feud and the death threats toward [Appellant] and his mother by the victim, Jimmy West, and his brother, Theodore Wright." (Id.). As this Court held in Lucas v. State, 568 So. 2d 18, 23-24 (Fla.

1990), "the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Having failed to do so, Appellant cannot fault the trial court for failing to reference them specifically in its sentencing order. Regardless, as Appellant concedes, the trial court considered such evidence pursuant to the statutory mitigating factor of 'extreme mental or emotional disturbance." Appellant simply wants the trial court to give it double consideration--once as a statutory mitigator, and again as a nonstatutory mitigator. To this he is not entitled. As noted previously, the trial court was generous in considering the emotional impact of Lamar's death as a statutory mental mitigator. If anything, it should have been considered as a nonstatutory mitigator. Again, Appellant simply wants to have his cake and eat it too.

Any error in failing to give double consideration to such evidence, however, was harmless beyond a reasonable doubt. This was an execution-style double murder. The trial court found three weighty aggravating factors, and gave only marginal weight to the one statutory mitigating factor. Thus, even if Appellant had specified the feud and the death threats as nonstatutory mitigation, and the trial court had given them some weight, there is no reasonable possibility that the sentence would have been

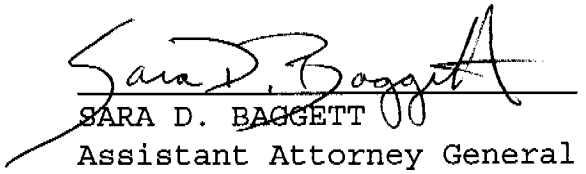
different. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. state, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955 (1992).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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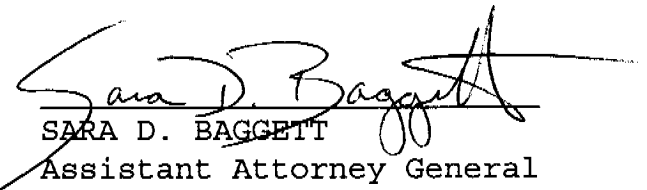
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to W.C. McLain, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of July, 1995.



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