IN THE SUPREME COURT OF FLORIDA

MICHAEL BERNARD BELL,

Appellant,

v.

CASE NO. 86,094

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W.C. McLAIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 201170
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

Michael Bernard Bell was indicted in Duval County for two counts of first degree murder for the shooting deaths of Jimmy West and Tamecka Smith. (R 8-9, 28-30) Two indictments were returned. (R 8-9, 28-30) The first one, returned on September 29, 1994, was replaced by the second, returned on December 15, 1994, since the prosecutor was concerned the first did not sufficiently allege venue. (R 8, 28-30, Tr 21-23) The court ordered a psychiatric examination to determine Bell's competency to stand trial. (R 31) Dr. Ernest C. Miller submitted a report to the court dated December 30, 1995, concluding that Bell was competent to stand trial and was not in need of hospitalization. (R 39-41) Bell pleaded not guilty and proceeded to a jury trial which started on March 6, 1995. (Tr 62) The jury found Bell guilty of both counts as charged on March 9, 1995. (R 76-77, Tr 634-635) On March 17, 1995, the penalty phase of the trial was conducted and the jury recommended a death sentence for each murder conviction. (Tr 639, 720-721) (R 89, 91)

Circuit Judge R. Hudson Olliff adjudged Bell guilty and sentenced him to death on each murder. (R 94-116) In a single sentencing order covering both homicides, the court found three aggravating circumstances and one mitigating circumstance. (R 100-116) In aggravation, the court found: (1) Bell had a previous conviction for a violent felony; (2) Bell knowingly created a great risk of death to many persons; and (3) the homicides were committed in a

cold, calculated and premeditated manner. (R 108-110) In mitigation, the court found that Bell suffered from an extreme mental or emotional disturbance. (R **111, 113)**

Bell filed notice of appeal to this Court on June 29, **1995. (R 122)**

Pretrial Complaints About Defense Counsel

On two separate occasions before trial, Bell complained about the performance of his trial lawyer. (R 48-50, Tr **27-50, 103-109)** First, pursuant **to** a letter Bell wrote alleging incompetence of counsel, the court held a hearing on January 4, **1995.** (Tr **27-50)** (excerpts from the record containing this hearing are attached as Appendix A). Bell alleged that his lawyer had not adequately communicated with him about the case and that he failed to properly investigate since he did not obtain the list of witnesses Bell had available. (Tr 27-30) After inquiring of Bell about these allegations, the court asked for counsel's response. (Tr 30-35) Defense counsel explained the preparation he had done in the case and said he first learned of Bell's list of witnesses the previous day. (Tr **30-33)** Bell stated **that** the previous day was the first time counsel had informed him of the substance of the State's case, and Bell said he advised counsel of the existence of his witnesses in November. (Tr 33-35) Bell also asked to appear as co-counsel in his **case.** (Tr **29/39)** The court advised Bell that he did not permit defendants to act as co-counsel. (Tr 39) However, the court asked Bell about his age, his educational level and previous experience in court proceedings. (Tr 39-40) He advised Bell of some problems

he might experience if he represented himself. (Tr 40-44) Finally, the judge asked Bell about his knowledge of criminal procedure. (Tr 44-46) At the end of the inquiry, the court announced that Bell was not competent to act as co-counsel because he lacked sufficient knowledge of criminal procedure. (Tr 46) The judge then explained to Bell that he had two options: (1) continue with his appointed lawyer, or (2) represent himself. (Tr 46) Immediately, the court eliminated the second option stating,

> ...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.

(Tr 46). At the conclusion of the hearing, the court granted a continuance and authorized the defense attorney to hire an investigator to help interview witnesses. (Tr 47-50)

On March 6, 1995, the day jury selection began, Bell filed a written pro se motion to discharge his lawyer. (R 48-49) Bell alleged that his lawyer breached the confidential nature of attorney-client communications and was not representing him in an effective manner. (R 48-49) Specifically, Bell charged that his lawyer discussed his case while the brother of a state witness was sitting beside Bell in the holding cell. (R 48-49) The court conducted a hearing on the motion on the same day. (Tr 103-109) (excerpts from the record containing this hearing are attached as Appendix B).

At the hearing on his motion, Bell further explained his complaints. (Tr 103-108) He said that when his lawyer discussed his case, Bruce Dixon was in the holding cell with him and heard what was said. (Tr 103-105, 108) Bell, at that time, did not realize that Bruce Dixon was the brother of a potential State witness, Marvin Dixon. (Tr 103-104) After the conversation, Bruce Dixon said he intended to tell his brother what he heard. (Tr 108) Defense counsel stated that the information he related was from depositions which are public record. (Tr 106-107) He also gave Bell his opinion about the likely outcome of the trial. (Tr 106-107) Bell challenged this characterization of the information and discussion. (Tr 108) Bell also claimed the he had only two conferences with the defense investigator and certain investigative matters were not completed. (Tr 108) Counsel stated that the investigator completed the needed work. (Tr 106-107) At the conclusion of the hearing, the court merely denied the motion. (Tr 109)

Facts Of The Offense

In 1989, a feud developed between Theodore Wright and Michael Bell. (Tr 394-396). Theodore's half-brother, Jimmy West, and Michael's brother, Lamar Bell, also became involved in the feud. (Tr 395-396). The men had known each other most of their lives and had grown up together in Jacksonville. (Tr 394-396). The feud also expanded to confrontations with other family members. (Tr 496-499, 509-510, 516-517). The feud involved threats from Theodore and his brother, Jimmy West, who was also called "Killer" toward Michael.

(Tr 516). Killer had made it openly known that he would kill Michael Bell if he could find him. (Tr 516).

Theodore Wright shot and killed Lamar "PeeWee" Bell on June 19, 1993. (Tr 396-399). Theodore was inside the Silver Moon Lounge. (Tr 396). A man told him that Michael and his brother, Peewee, were outside waiting on him. (Tr 396). The man handed Theodore a pistol. (Tr 396). Theodore stuck the gun in his waist-band and walked out the door. (Tr 397). He saw Michael standing to his right. (Tr 397). He saw Peewee standing two car lengths away. (Tr 397). Peewee pulled a black revolver from his waist band. (Tr 397). Theodore pulled his pistol and shot Peewee. (Tr 397). Michael ran and Theodore chased him. (Tr 398). The two men exchanged two gunshots. (Tr 398). Theodore did not see Michael again. (Tr 398). Peewee died from the gunshot wound. (Tr 398). Theodore's shooting of Peewee was ruled self-defense, and he was not prosecuted. (Tr 398).

Michael became obsessed with avenging the killing of his brother. (Tr 402-403, 468). After the shooting, Michael constantly talked to his girlfriend, Erika Williams, about evening the score against Theodore Wright. (Tr 402). She told him that his quest for revenge might get innocent people hurt, and he responded, "Sometimes the good have to suffer with the bad." (Tr 402). Michael was also concerned about Theodore's and Killer's death threats toward him. (Tr 516-517). On December 8, 1993, Michael had his girlfriend purchase an AK-47 assault rifle at the Gun Gallery on Beach Boulevard. (Tr 403-407, 418-424). Michael was present with Erika at the

transaction. (Tr 403-404, 420). In addition to the rifle, Erika purchased ammunition, a 30-round banana-shaped clip, and a 75-round drum magazine. (Tr 422). Michael told Erika they needed a gun for their own protection. (Tr 403).

Between 10:00 and 10:30 p.m., on December 9, 1993, Michael approached his close friend of ten years, Dale George, and another friend, Ned Pryor, and told them to follow him. (Tr 465-466). Dale got in the front passenger seat of Michael's car and Ned and followed in his own automobile. (Tr 465-466). Michael drove a black Oldsmobile Omega. (Tr 467). They drove to a lounge, Moncrief Liquors. (Tr 467). Michael pointed out a yellowish colored Plymouth parked in the parking lot. (Tr 467). Dale recognized the car as belonging to Theodore Wright. (Tr 468). Dale encouraged Michael to leave. (Tr 468). He knew that Michael had a grudge against Theodore because of the killing of his brother. (Tr 468). Dale said he knew in his mind that Michael was going to kill Theodore. (Tr 468-469). Michael parked his car in the parking lot, and waited. (Tr 469). Dale said that Michael had a knit cap, which can be pulled down over your face. (Tr 469). Michael used the cigarette lighter to burn two eye holes in the cap. (Tr 469). A short time later, Michael said, "Here they come," and he got out of the car. (Tr 470). He pulled the ski mask down on his face, opened the back door of the car and pulled out the AK-47. He walked toward the yellow Plymouth. (Tr 470, 439-443, 308-309).

On the evening of December 9, 1993, Jimmy 'Killer" West drove to Moncrief Lounge in the yellow 1969 Plymouth he had purchased

from his brother in November. (Tr 398-399, 287-288, 324-325). West went inside, purchased a six-pack of Heineken beer and began talking to acquaintances in the bar. (Tr 285-287, 326-327). Laura Hampton was in the bar with 18-year-old Tamecka Smith. They were waiting for Tamecka's mother, Janice Smith. (Tr 283-284). West was talking to the two women and after awhile, he agreed to take Tamecka to her apartment to pick up her mother. (Tr 286-287). Laura accompanied them. (Tr 287, 326-328). West's friend, Mark Richardson, also left the bar within seconds after West and the two women. (Tr 326-328). West, Tamecka and Laura went to West's car in the parking lot. Tamecka entered the front passenger seat, Laura was intending to get into the back seat when the door could be unlocked. West was sitting in the driver's seat, reaching toward the back to unlock the rear passenger door, when Michael approached from the driver's side, wearing the ski mask and carrying the AK-47. (Tr 287-291, 309-310, 328-329, 443-444, 470-471). Michael later told his aunt, Paula Eoins, that he was expetting Theodore Wright to be in the car. (Tr 506-507, 509). When West turned around, Michael realized it was Theodore's brother, Killer. (Tr 509-510). Michael knew that West had threatened to kill him. (Tr 509-510). West began reaching for something, which Michael thought was a weapon. (Tr 508). Michael knew that Killer carried a firearm, but he also knew Killer would not have had one on his person coming out of the bar since all patrons are searched with a metal detector prior to entering. (Tr 506-508). Michael fired into the car at West. (Tr 290, 309, 329, 470-471). West was hit 12 times,

two of the gunshot wounds were fatal, including a shot to the head which would have caused immediate death. (Tr 372-389). Tamecka Smith was accidentally shot in the process; she received four gunshot wounds, causing her death. (Tr 390-393). Laura Hampton had not yet entered the car at the time of the shooting. She ducked behind the car and fled unharmed. (Tr 291-292). As Michael fled, he fired shots around the parking lot and the front of the building where the security guard and others were standing. (Tr 329-330). There were marks on the building and bullet holes in the vehicles in the parking lot caused by the gunshots. (Tr 355-359). Thirty expended cartridges, which had been fired by an AK-47, were recovered from the parking lot. (Tr 352-353, 426-433). After the shooting, Dale George moved from the passenger seat to the driver's seat of Michael's automobile, drove by, picked up Bell, and they fled the scene. (Tr 470-472).

Michael Bell went to his aunt's house after the shooting, arriving about 2:00 a.m. (Tr 500-502). His aunt, Paula Goins, said Michael was excited when he arrived and told her, "I got that motherfucker." (Tr 502). She asked who, and he said Theodore's brother, Killer West. (Tr 502). Michael explained that he was driving when he saw Theodore's car go by, and he later spotted it parked at Moncrief Liquors. (Tr 503-504). Michael said he waited for Theodore to come out of the bar. (Tr 506-507). He knew he would be unarmed since they check all patrons for weapons before entering the lounge. (Tr 507). Michael said when the guy left the bar and entered the car, he approached him, and at that time, he

realized it was Killer rather than his brother Theodore. (Tr 508-509). Killer reached under the seat, and Michael was afraid he was re-arming himself since he knew he carried a firearm. (Tr 508-509). According to Ms. Goins, Michael said that he hit the jackpot when it was Killer, rather than Theodore, because he was more afraid of Killer's threats against him than Theodore's. (Tr 510). He also said he and Theodore were even since he killed Theodore's brother like Theodore killed his brother. (Tr 512). Michael said he did not intend to hurt the girl and that shooting her was an accident. (Tr 511). He told his aunt that Ned was also involved in the incident. (Tr 518-520). Michael called his girlfriend, Erika. She came over and talked for a while and left. (Tr 410-412, 513-514). Michael told her that he had killed Theo's brother. (Tr 412). He said he had evened the score, since he had killed Theo's brother. (Tr 412). He also said that an innocent girl got hurt. (Tr 412). Michael later called Erika about the AK-47 and said she should report it stolen. Erika reported the gun stolen to the police. (Tr 414-416). Ms. Goins told Michael he had to leave her home, and upon her return from work the next day at 6:00 p.m., Michael was gone. (Tr 514).

Around the middle of December, a few days later, an acquaintance of Michael's, Charles Jones, saw him on Yulee Street. (Tr 487-488). Michael was trying to sell an AK-47 for $400. (Tr 488). Jones said that Michael seemed real anxious to sell it, but no one was buying it. (Tr 488). Michael dropped the price to $300 but still got no buyer. (Tr 488). At that time, Jones knew that the

price of AK-47s on the street was $500 - $600. (Tr 488). In late January of 1994, Jones saw Michael again at Moncrief Liquors.(Tr 488-489). Jones asked him why he had killed Jimmy West. (Tr 489). Michael said that since Theodore killed his brother, the closest thing to him, he killed Theodore's brother. (Tr 489). When asked about the girl in the car also being killed, Michael told Jones that "bullets don't know nobody. She was in the wrong place at the wrong time." (Tr 489-490). Jones admitted that he had quarrels and problems with Michael Bell in the past. (Tr 492).

Facts -- Penalty Phase

The State presented one witness at the penalty phase of the trial. John Lipsey was the security guard at Moncrief Liquors on the night of the shooting. (Tr 649) His job was to scan patrons for weapons with a metal detector before they entered the bar. (Tr 649-650) At the time the shooting began, Lipsey said there were seven or eight people standing along the front of the building waiting to be scanned before entering. (Tr 656) He said bullets struck the front of the building and a nearby house. (Tr 656-659) Lipsey said he and the people standing at the building were in the line of fire, and they ducked or ran for cover when the shooting started. (Tr 656-658)

Margo Bell, Michael's mother, testified for the defense. (Tr 663) She testified about the feud between Michael and Theodore Wright and his brother, Jimmy West. (Tr 664) Jimmy West and Theodore Wright made numerous threats to kill Michael. (Tr 664-665) Theodore also threatened to kill her, telling her that he could get

to Michael through her. (Tr 664) Ms. Bell moved from her house because of the threats. (Tr 664-665) She was afraid to walk down the street. (Tr 664-666)

Ms. Bell also testified about Michael. (Tr 675-676) He grew up in the church and served as an altar boy. (Tr 676) She was not aware of his being treated for mental problems. (Tr 675) In her opinion, Michael was demonstrating more responsibility and maturity after his release from prison. (Tr 675-676) She felt that Michael's shooting unarmed people was out of character. (Tr 676)

SUMMARY OF THE ARGUMENT

1. Two times before trial, Bell complained about the competency and effectiveness of his trial counsel. Bell's second complaint included a written pro se motion to discharge his lawyer. Although the court inquired into the complaints, the judge failed to make the necessary findings and failed to afford Bell the option of substitute counsel or representing himself as required. Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1974).

2. The trial court should not have found as an aggravating circumstance that both the murders of Jimmy West and Tamecka Smith were committed in a cold, calculated and premeditated manner. The evidence demonstrates that neither homicide was calculated or preplanned, or without pretense of moral or legal justification.

3. The trial court improperly instructed the jury on the cold, calculated and premeditated aggravating circumstance. As given, the instruction was a combination of the one this Court suggested in Jackson v. State, 648 So.2d 85, 95 n8 (Fla. 1994), and an instruction the State requested concerning transferred intent. This instruction was improper for two reasons. First, the instruction on 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. Second, the instruction this Court suggested in Jackson is unconstitutional. This instruction fails to adequately apprise the jury of the legal limitations of the CCP

circumstance, specifically concerning the element of heightened premeditation.

4. The trial court found as a statutory mitigating circumstance that Bell suffered from an extreme mental or emotional disturbance at the time of the crime. However, the court improperly minimized the weight of the circumstance relying on a psychiatric report which was never aimed at an evaluation of existence of the circumstance. The sole issue of the report was competency to stand trial and sanity at the time of the offense. Additionally, the court rejected as a nonstatutory mitigating circumstance the emotional impact Bell suffered as the result of the killing of his brother.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO MAKE AN ADEQUATE INQUIRY INTO BELL'S PRETRIAL COMPLAINTS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS REQUEST FOR APPOINTMENT OF SUBSTITUTE COUNSEL.

When a defendant seeks to discharge his lawyer and a ground is an allegation of incompetency of counsel, the trial court is required to make a series of inquiries and to give the defendant certain advice. This procedure was established in Nelson v. State, 274 So.2d 256, 258-259 (Fla. 4th DCA 1974), and this Court later adopted the "Nelson inquiry" in Hardwick v. State, 521 So.2d 1071, 1074-1075 (Fla.), cert. denied, 488 U.S. 871 (Fla. 1988):

> 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. Nelson v. State, 274 So.2d 256, 258-59 (Fla. 4th DCA 1973) (citation omitted).

Hardwick, 521 So.2d at 1074-75, quoting Nelson.

As Nelson outlined, the trial judge must inquire into the complaints about counsel's performance. If the complaints are well

founded, and the court has reasonable cause to believe that counsel is rendering ineffective assistance, the court must discharge counsel and appoint substitute counsel. If the complaints are not well founded, the court then must explain to the defendant that he is not entitled to new appointed counsel and he has two options -- proceed with current counsel or if he still wishes to discharge counsel, represent himself. When a defendant persists in seeking to discharge counsel, such action is deemed a request to represent himself. Hardwick, at 521. If the defendant chooses self-representation, the court must conduct an inquiry of the defendant to insure a knowing and intelligent waiver of the right to counsel in accord with Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Hardwick; Nelson; see, also, Bodiford v. State, 665 So.2d 315 (Fla. 1st DCA 1995) (reversal required where court failed to apprise defendant of right to represent himself); Jones v. State, 658 So.2d 122 (Fla. 2d DCA 1995).

Bell complained about the performance of his trial lawyer two times before trial and requested that his lawyer be discharged. (R 48-50, Tr 27-50, 103-109). The court held hearings on the complaints, one on January 4, 1995, (Tr 27-50) (Appendix A), and the second on the day of jury selection, March 6, 1995. (Tr 103-109) (Appendix B). During the January 4th hearing, the court partially complied with Nelson. At the second, hearing, the court simply heard the complaints and denied Bell's request to discharge counsel, failing to satisfy either of the two prongs of Nelson.

The January hearing was conducted pursuant to a letter Bell wrote alleging incompetence of counsel. (Tr 27-50) Bell said that his lawyer had not adequately communicated with him about the case and that he failed to properly investigate since he did not obtain the list of witnesses Bell had available. (Tr 27-30) After inquiring of Bell about these allegations, the court asked for counsel's response. (Tr 30-35) Defense counsel explained the preparation he had done in the case and said he first learned of Bell's list of witnesses the previous day. (Tr 30-33) Bell stated that the previous day was the first time counsel had informed him of the substance of the State's case, and Bell said he advised counsel of the existence of his witnesses in November, (Tr 33-35) Bell also asked to appear as co-counsel in his case. (Tr 29,39) The court advised Bell that he did not permit defendants to act as co-counsel. (Tr 39) However, the court asked Bell about his age, his educational level and previous experience in court proceedings. (Tr 39-40) He advised Bell of some problems he might experience if he represented himself. (Tr 40-44) Finally, the judge asked Bell about his knowledge of criminal procedure. (Tr 44-46) At the end of the inquiry, the court announced that Bell was not competent to act as co-counsel because he lacked sufficient knowledge of criminal procedure. (Tr 46) The judge then explained to Bell that he had two options -- continue with his appointed lawyer or represent himself, (Tr 46) Immediately, the court eliminated the second option stating,

> ...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.

(Tr 46). At the conclusion of the hearing, the court **granted a** continuance and authorized the defense attorney to hire an investigator to help interview witnesses. (Tr 47-50)

The day jury selection began, Bell filed a written pro se motion to discharge his lawyer which prompted the March 6th hearing. (R 48-49, Tr 103-109) Bell alleged that his lawyer breached the confidential nature of attorney-client communications and was not representing him in an effective manner. (R 48-49) Specifically, Bell charged that his lawyer discussed his case while the brother of a State witness was sitting beside Bell in the holding cell. (R 48-49)

At the hearing on his motion, Bell further explained his complaints. (Tr 103-108) He said that when his lawyer discussed his case, Bruce Dixon was in the holding cell with him and heard what was said. (Tr 103-105, 108) Bell, at that time, did not realize that Bruce Dixon was the brother of a potential State witness, Marvin Dixon. (Tr 103-104) After the conversation, Bruce Dixon said he intended to tell his brother what he heard. (Tr 108) Defense counsel stated that the information he related was from depositions which were public record. (Tr 106-107) He also advised Bell of his evaluation of the case including his assessment of the likely outcome of the trial. (Tr 107-108) Bell challenged this

characterization of the information and discussion. (Tr 108) Bell said specific information was discussed including discrepancies in witnesses' statements. (Tr 108) Bell also claimed the he had only two conferences with the defense investigator and certain investigative matters were not completed. (Tr 108) Counsel stated that the investigator completed the needed work. (Tr 106-107) At the conclusion of the hearing, the court merely denied the motion. (Tr 109).

The trial judge failed to adequately follow the Nelson inquiry in this case. Although the court recognized the issue and conducted a partial Nelson inquiry on January 4th, the hearing on March 6th, failed to even approximate the needed inquiry. Bell's motion to replace counsel on the March date was simply denied without findings regarding the claims of effectiveness and without apprising Bell of his counsel options if the court deemed existing counsel effective, i.e., proceed with appointed counsel or self-representation. While the court did ask both the defendant and counsel for information about the ineffective counsel claims as Nelson requires, the court made no findings concerning those claims. The inquiry alone is insufficient; findings on the claims are also needed.

The fact that a finding that counsel was not ineffective may have been made in the January 4th hearing does not cure this omission in the March 6th hearing. Bell's March motion to discharge counsel was based on new grounds. He claimed counsel continued to inadequately investigate. Additionally, Bell claimed that

his lawyer violated attorney-client confidences. This continued assertion of a desire for a substitute lawyer because of ineffective assistance counsel necessitated a complete Nelson hearing including findings.

Assuming for argument that the trial court made findings that counsel was not ineffective at the March hearing, the court still did not touch on the second necessary part of a Nelson hearing -- advising Bell he could proceed with his appointed lawyer or represent himself. Again, the fact that some information about his options was given to Bell in the January 4th hearing does not excuse the failure to give it in the March 6th hearing. This is particularly true because the court did not properly advise Bell of these rights in the January proceeding. In the January hearing, the court never gave Bell the option of representing himself. Although the judge *said* self-representation was an option, he immediately withdrew any such option. The court stated that Bell was not capable of representing himself and would not be allowed to do so. (Tr 46)

The conclusion that Bell could not represent himself was based on a judicial inquiry of Bell concerning his January request to appear as *co-counsel.* The judge denied the request to be co-counsel as he had discretion to do. State v. Tait, 387 So.2d 338 (Fla. 1980). However, the court also improperly concluded that Bell was not able to represent himself. The court's inquiry and actions did not satisfy the commands of Faretta v. California. The court's main focus was on Bell's familiarity with criminal

procedure, (Tr 39-46)(Appendix A) In fact, this was the court's stated basis for denying the request to be co-counsel and for denying Bell the right to waive counsel and represent himself. (Tr 46) While this lack of legal knowledge could certainly suffice for not allowing a defendant to serve as co-counsel, since the court has complete discretion on that issue, Tait, it is insufficient to conclude that a defendant could not properly waive his right to counsel and to exercise his constitutional right to represent himself. The United States Supreme Court in Faretta specifically held that a defendant's lack of legal knowledge or skill is irrelevant to his ability to knowingly waive counsel and represent himself; competency to adequately represent oneself is not the test for a waiver of counsel. Faretta, 422 U.S. at 835-836; Codinez v. Moran. 509 U.S. ___, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

In conclusion, the trial court's failure to properly consider Bell's motion to discharge his trial lawyer on the grounds of ineffective assistance and in failing to apprise Bell of his option of self-representation violated Bell's rights to counsel, to represent himself, to due process and a fair trial in this capital case. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Bell urges this Court to reverse his convictions and remand his case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The trial court found that both homicides were committed in a cold, calculated and premeditated manner. (R 109-110) In the sentencing order, the judge made the following findings:

> 3. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
>
> FACT:
>
> Over a 5-month period following the death of his brother and up until he night he committed these murders, the defendant repeatedly told friends and relatives that he was going to kill Theodore Wright. His aunt and friends all tried to talk him out of doing murder but he turned a deaf ear to their repeated pleas.
>
> The day before the murder the defendant, through the help of a girlfriend, bought an AK-47 assault rifle with a 30-round magazine and 160 bullets. In making this purchase of a rapid fire assault rifle rather than a pistol, the defendant premeditatedly calculated a slaughter of Jimmy West and anyone else who might be in the path of bullets.
>
> * * * *
>
> [statement of legal principles deleted]
>
> FACT:
>
> On the night of the murder the defendant spotted the victim's car -- then left the area, got his AK-47 and two friends, and went to the lounge and walk to his car. While waiting, he improvised a ski mask to hide his face. He talked to his two friends who pleaded with him

not to go through with the murder, but he rejected their entreaties and restated his determination to murder.

FACT:

At an earlier time he had dismissed a girlfriend's admonition that an innocent person might be killed if he persisted with this plan to murder Theodore Wright -- by saying, 'Sometimes the good have to suffer with the bad." It was in this frame of mind that he watched Jimmy West and Tamecka Smith leave the lounge and get in West's car.

As he approached and fired his AK-47, he knew that it would not only kill West but also probably kill Tamecka Smith and others in close proximity. This premeditated mindset to kill West and an innocent bystander, if necessary, existed months before the murders.

These murders were cold and calculated and with heightened premeditation.

CONCLUSION

This is an aggravating circumstance.

(R 109-110). Finding the CCP circumstance applicable to both homicides was error. The sentencing process has been constitutionally tainted and Bell's death sentences must be reversed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

A. THE CCP CIRCUMSTANCE IMPROPERLY FOUND FOR THE HOMICIDE OF JIMMY WEST.

In imposing a death sentence for the homicide of Jimmy West, the court improperly found the crime to be cold, calculated and premeditated. Two of the four essential elements for this circumstance were not proven beyond a reasonable doubt. The crime was not preplanned and calculated as required. See, Jackson v. State, 648 So.2d 85 (Fla. 1994); Rogers v. State, 511 So.2d 526 (Fla.

1987). Additionally, even if calculated, Bell had a pretense of moral or legal justification for the shooting. See, Banda v. State, 536 So.2d 221 (Fla. 1988).

The State prosecuted Bell for the homicide of West on two theories as the prosecutor explained in his closing argument. (Tr 570-574) Under one, Bell was guilty of first degree murder under a transferred intent principle. Bell saw Theodore Wright's car and went to the lounge planning to kill Wright. However, Wright's brother, West, was in the car instead, and Bell shot West. Under the second, Bell was guilty of first degree murder because he recognized West just before the shooting and, at that point, formulated a specific intent to kill West. Only the first State theory, based on transferred intent, supports a finding of the CCP aggravating circumstance because evidence of a prearranged plan to kill Wright can be transferred to the killing of West by mistake. See, Sweet v. State, 624 So.2d 1138 (Fla. 1993); Provenzano v. State, 497 So.2d 1177 (Fla. 1986). The State's second theory of the case does not support a CCP finding because the intent to kill West was formulated at the moment of the shooting, not calculated and preplanned as the aggravating circumstance requires. Since 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. E.g., Geralds v. State, 601 So.2d 1157 (Fla. 1992) (circumstantial evidence rule applied to negate CCP where

reasonable hypothesis from evidence did not support proof of factor).

Even assuming the homicide was calculated and preplanned, CCP does not apply since there was a pretense of a moral or legal justification for Bell's actions. In his statement to his aunt, Paula Goins, Bell said he realized when he got to the car, that West was inside, not Wright. (Tr 506-507, 509) Bell also knew that West had threatened to kill him and that West was usually armed. (Tr 509-510) He also knew that West would not have a gun on his person because of the search procedure at the lounge. (Tr 506-508) Consequently, when West reached for something in the car, Bell feared the item was a weapon. (Tr 508) This prompted Bell to shoot West to defend himself. While the jury rejected Bell's self-defense claim as a complete justification preventing conviction (Tr 606, 615-616, 620-623), the explanation for shooting West did establish a pretense of a moral or legal justification negating the CCP circumstance. Christian v. State, 550 So.2d 450 (Fla. 1989)(victim previously attacked defendant and made death threats toward defendant for weeks prior to homicide); Banda v. State, 536 So.2d 221 (Fla. 1988) (defendant said, "the guy threatened to kill me so I figured I better get him first"); Cannady v. State, 427 So.2d 723 (Fla. 1983) (defendant said robbery victim jumped at him before he shot him).

B. TI-IE CCP CIRCUMSTANCE IMPROPERLY FOUND FOR THE HOMICIDE OF TAMECKA SMITH.

The prosecution's theory for the homicide of Tamecka Smith is grounded in the principle of transferred intent. (Tr 570-574) There was no dispute that Tamecka Smith was killed accidentally during the shooting of West. Therefore, the factual basis for the crime against West, affects the characterization of the crime against Smith. The reasons why the CCP circumstance was improperly found for the West homicide apply with equal force for the Smith homicide. Bell incorporates those arguments from subsection A, supra., by reference here.

An additional argument against a CCP finding is available in the Smith homicide concerning the transferred intent theory. While the transferred intent theory supports the first degree murder conviction for the homicide of Smith, it does not suffice to transfer the planning, calculation, and heightened premeditation necessary to apply the CCP aggravating circumstance. Even if this Court approves the CCP finding for the West homicide under a transferred intent theory, the CCP finding for the Smith homicide must, nevertheless, fail. This Court has approved the CCP circumstance under transferred intent where the defendant planned to murder person "A" but through mistake or newly formed intent, ***deliberately*** murdered person "B". Sweet v. State, 624 So.2d 1138 (Fla. 1993)(defendant planned to shoot a witness against him in her home, he shoots witness and three others present in the house, killing one of the three); Provenzano v. State, 497 So.2d 117 (Fla. 1986)(defendant

planned to kill officers who arrested him when he went to court, but he shot three bailiffs who tried to stop and search him, killing one). In this case, however, Tamecka Smith was not deliberately killed. She was accidentally killed during the shooting of West. Although under Sweet and Provenzano, the planning to kill Wright could be sufficient to apply CCP to the killing of West, that heightened premeditation cannot be 'double transferred" to Smith as well since the killing of Smith was not deliberate.

ISSUE III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COLD, CALCULATED AND PREMEDITATED.

The trial court improperly instructed the jury on the cold, calculated and premeditated aggravating circumstance. Section 921.141(5)(I), Fla. Stat. (Tr 713-714) As given, the instruction was a combination of the one this Court suggested in Jackson v. State 648 So.2d 85, 95 n8 (Fla. 1994), and an instruction the State requested concerning transferred intent:

> 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 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 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 rebuts the otherwise cold and calculating nature of the homicide.

(Tr 713-714).

This instruction was improper for two reasons. First, the instruction on 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. See, Issue II B, supra. Since the jury was not given an instruction which apprised them accurately on the applicable law, it is impossible to determine if the jury illegally found CCP for the Smith homicide which was not factually supported. See, Sochor v. Florida, 504 U.S. ____, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). The second reason is that the instruction this Court suggested in Jackson is unconstitutional. This instruction fails to adequately apprise the jury of the legal limitations of the CCP circumstance, specifically concerning the element of heightened premeditation. Art. I, Secs. 2,9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

The judge gave the CCP instruction suggested in Jackson v. State, 648 So. 2d 85, 95 n.8 (Fla. 1994). (Tr 714) The entire instruction was unconstitutionally vague, particularly the portion defining the heightened premeditation element. The judge instructed:

> Premeditated means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder.

(Tr 714). This definition is meaningless and gives the jury no guidance. what does "a higher degree of premeditation" mean? This Court has held that a defendant must have intended the murder before the crime ever began. E.g. Porter v. State, 564 So.2d 1060,

1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 106 (1991). Jackson and the standard instruction defined "calculated" to be a careful plan or prearranged design to commit the murder. The 'premeditated" element cannot mean the same thing as the "calculated" element because each part of the statute has to have independent meaning and significance. The revised instruction approved by this Court in Standard Jury Instructions in Criminal Cases, 20 Fla. Law Weekly S589 (Fla. Dec. 7, 1995), recognizes that problem and attempts to cure it.[1] But, the attempted cure was not in place in this trial, and the resulting instruction was inadequate both as a matter of statutory construction and constitutional requirements of due process and cruel or unusual punishment, Art. I Secs. 2, 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Bell is entitled to a new penalty phase trial with a new, properly instructed jury.

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[1] Standard Jury Instructions in Criminal Cases, 20 FLW S589 (Fla. Dec. 7, 1995), defined heightened premeditation as:

> [As I have previously defined for you] a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated into to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

Id. (underscoring omitted).

ISSUE **IV**

THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER AND FIND MITIGATING CIRCUMSTANCES.

A. THE TRIAL COURT DIMINISHED THE WEIGHT OF THE STATUTORY MITIGATING CIRCUMSTANCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE ON THE BASIS OF LEGALLY IMPROPER CONSIDERATIONS.

The trial court found as a statutory mitigating circumstance that Bell suffered from an extreme mental or emotional disturbance at the time of the crime. (R 111) However, the court improperly minimized the weight of the circumstance and concluded, "This is a marginal mitigating circumstance." (R 111) In reaching this conclusion about the weight to be given the circumstance, the court erroneously relied on a psychiatric report finding Bell competent to stand trial and sane a the time of the offense. (R 111) The court's findings are as follows:

> 1. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.
>
> FACT:
>
> Prior to trial the defendant was examined by a psychiatrist and psychologist who reported that Defendant had an adjustment disorder with depressed and anxious mood. They found he was not insane at the time of the murders. They did not find that he had been under the influence of extreme mental or emotional disturbance at the time of the crime, nor was any evidence presented at trial or subsequent proceedings **that he was under the influence of such** emotions.

FACT:

The defendant's brother had been killed some 5 ½ months before Defendant committed these two murders and Defendant had sworn to kill the person who shot his brother. In the interim the defendant had lived a normal (for him) life.

Had Defendant violently acted out at the time of, or shortly after, his brother's death, then it might have indicated he was under the influence of extreme mental or emotional disturbance. However, these murders were committed 5 ½ months after his brother's death and were more from an attitude of hatred and revenge than extreme mental or emotional disturbance.

CONCLUSION

This is a marginal mitigating circumstance.

(R 111).

Although this Court has held that a trial judge has discretion to assign weight to mitigating circumstances found to exist, the exercise of that discretion must be reasonable and based on legally valid factors. See, Ferrell v. State, 653 So.2d 367 (Fla. 1995) ; Daily v.State, 594 So.2d 254 (Fla. 1991); Rogers v. State, 511 So.2d 526 (Fla. 1986). Here, the trial court improperly relied on a psychiatric evaluation which was focused solely on the issue of Bell's competency to stand trial and sanity at the time of the offense. (R 39-41) Competency and sanity are not the standard to be applied when evaluating the statutory mitigating circumstance. Ferguson v. State, 417 So.2d 631 (Fla. 1982); Mines v. State, 390 So.2d 332, 337 (Fla. 1980). See, also, Campbell v. State, 571 So.2d 415 (Fla. 1990); Eddings v. Oklahoma, 455 U.S. 104 (1982)

(error to consider as mitigating evidence only that which would tend to excuse criminal liability); Knowles v. State, 632 So.2d 62 (Fla. 1993)(rejection of insanity and voluntary intoxication defenses does not preclude finding this mitigator). Nothing in the order appointing the expert asked for an evaluation concerning the mental mitigating circumstances. (R 25-27, 31-33) Consequently, the court's conclusion that the experts,

> ...did not find that [Bell] had been under the influence of extreme mental or emotional disturbance at the time of the crime...

(R 111), is simply not founded in the existing facts. The psychiatric evaluation was not aimed at these issues and nothing in the report stated any conclusions on this subject. It is impossible to determine how much this erroneous reliance on this psychiatric report affected the court's assignment of weight to this mitigating circumstance. The reliability of sentencing process has been impaired in violation of Bell's constitutional rights. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV U.S. Const. A resentencing is required.

B. THE TRIAL COURT IMPROPERLY REJECTED NONSTATUTORY MITIGATING CIRCUMSTANCES.

The trial court found no nonstatutory mitigating circumstances. In his findings, the judge wrote:

> 3. ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD AND ANY OTHER CIRCUMSTANCES OF THE OFFENSE.
>
> FACT:
>
> There was no evidence presented at trial in the advisory sentence proceeding, or at

> sentence hearing to show that Defendant was physically or mentally ill or impaired at the time of the murders.
>
> Evidence was that he was angry at the loss of his brother -- but there was no evidence of all-consuming grief which affected his emotional or mental stability. In fact, he carried on his normal lifestyle until he committed the murders.
>
> Nor was there any evidence that from childhood through teenage he suffered any physical or emotional abuse or that he was subject to home, familial, social, cultural or material privation.
>
> CONCLUSION
>
> This is not a mitigating circumstance.

(R 112).

The court erred in not finding any nonstatutory mitigating circumstances. Initially, the court's determination that the death of Michael's brother had not impacted him emotionally is contradicted in the court's earlier finding that Michael suffered from an extreme mental or emotional disturbance at the time of the crime. Second, the court also overlooked the evidence of a long-standing feud and the death threats toward Michael and his mother by the victim, Jimmy West, and his brother, Theodore Wright. The testimony established that Michael and his mother lived in fear because of these threats. This fact contradicts the court's conclusion that after the death of Michael's brother, ". . . he carried on his normal lifestyle until he committed the murders." (R 111) The court erred in rejecting as a mitigating circumstance the emotional impact caused by the death of Michael's brother. Bell's death

sentence has been unreliably imposed in violation of the Florida and United States Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV U.S. Const.

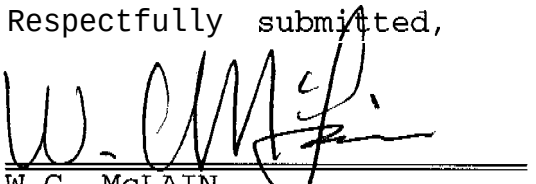
CONCLUSION

For the reasons presented in this brief, Michael Bernard Bell asks this Court to reverse his convictions and remand his case for a new trial, Alternatively, Bell asks this Court to reverse his death sentences with directions to impose a life sentence, or at least, give him a new penalty phase before a new jury.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Richard B. Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Michael Bernard Bell, on this 29th day of April, 1996.

Respectfully submitted,



W.C. McLAIN
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 201170

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

IN THE SUPREME COURT OF FLORIDA

MICHAEL BERNARD BELL,

Appellant,

v. : CASE NO. 86,094

STATE OF FLORIDA,

Appellee.

APPENDIX

TO

INITIAL BRIEF OF APPELLANT