IN THE SUPREME COURT OF FLORIDA

PAUL AUGUSTUS HOWELL,

Appellant,

vs.

Case No. SC03-103
(L. C. No. 92-022-CF)

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

ON DIRECT APPEAL FROM A FINAL ORDER OF THE SECOND JUDICIAL CIRCUIT IN AND FOR JEFFERSON COUNTY, FLORIDA, DENYING APPELLANT'S FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES, INCLUDING A DEATH SENTENCE, AFTER AN EVIDENTIARY HEARING.

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PRELIMINARY STATEMENT

Appellant Paul Augustus Howell was the defendant in the lower tribunal. He will be referred to as "Howell" or the "defendant." Appellee, the State of Florida, was the plaintiff in the lower tribunal. It will be referred to as "the state."

The record on appeal is in three volumes. Volume I contains the pleadings filed in the Florida Rule of Criminal Procedure 3.850 proceeding in the lower tribunal. Reference thereto will be by the letter "R" followed by a page number provided by the clerk of circuit court and appearing in the middle at the bottom of each page. Volume II contains the transcript of the November 27, 2002 evidentiary hearing on the 3.850 motion. References thereto will be by the letters "EH" (for evidentiary hearing) followed by a page number appearing in the lower right hand corner of each page as provided by the court reporter. Volume III contains defendant's Exhibit 1 introduced in evidence during the post conviction 3.850 proceeding, a Florida Highway Patrol Policy Manual. It will be referred to as the "FHP Manual" followed by the appropriate numbered paragraph of the manual.

Reference to the original record on appeal will be by the letters "OR" followed by a page number.

STATEMENT OF THE CASE AND THE FACTS

A. Nature of the Case:

This is a direct appeal to the Supreme Court of Florida of a January 2, 2003 final order (R. 181-86) rendered by the trial court denying Howell's Florida Rule of Criminal Procedure motion to vacate and set aside his convictions and sentences, including a death sentence, filed per the provisions of Florida Rules of Criminal Procedure 3.850 and 3.851.

B. Course of the Proceedings:

On February 19, 1992, Howell was indicted by a Jefferson County, Florida grand jury and charged with, among other offenses, first degree murder (Count I) and making, possessing, placing or discharging a destructive device resulting in the death of another person (Count II). (OR. 1086-90) On October 18, 1994, after a guilt phase jury trial, Howell was found guilty as charged on both counts. (OR. 975-78) A penalty phase jury trial was then held. On October 21, 1994, the jury returned a death recommendation by a vote of 10-2. (OR. 1022-24) The trial court, Hon. F. E. Steinmeyer, III, Circuit Judge, sentenced Howell to death on Count I. The trial court declined to impose a sentence as to Count II because this conviction and the murder conviction both arose from a single underlying offense. Written findings in support of the imposition of the death sentence were filed on January 10, 1995 (OR. 1097-106) and February 13, 1995 (OR. 1152-61) respectively.

Howell took a direct appeal to this Court. (R. 141) As to the guilt phase of the trial, Howell claimed that he was entitled to a new trial since his counsel, Frank Sheffield, Esq., had a conflict of interest due to a pretrial death threat he (Sheffield) said was made against him supposedly on Howell's behalf. Howell also challenged several[1] of the statutory aggravators that were applied under Section 921.141(5), Florida Statutes (1993) by the trial court in sentencing him to death.

On February 12, 1998, Howell's convictions, judgments and death sentence, were affirmed by this Court. *Howell v. State*, 707 So. 2d 674 (Fla. 1998). On June 26, 1998, the Supreme Court of the United States denied Howell's petition for writ of certiorari. (R. 141-42.)

After being afforded until August 30, 1999 by this Court within which to do

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[1] Howell claimed it was error for the trial court to determine that he had knowingly created great risk of death or serious injury to many people, that he committed the homicide to avoid arrest, that the trooper was a law enforcement officer engaged in the performance of his official duties and that the CCP factor applied. He also asserted that his death sentence was not proportional to the sentences imposed against his co-defendants. *Howell*, 707 So. 2d at 680-82.

so (R. 6), Howell sought collateral post conviction relief in the trial court. On August 30, 1999, Howell filed a Motion to Vacate Judgments and Sentences with a special request to amend per the provisions of Florida Rule of Criminal Procedure 3.850. (R. 1-108) On October 15, 2002, Howell filed a First Amended Motion to Vacate Judgments of Conviction and Sentence. (R. 115-22) On November 7, 2002, the state filed a Reply to Defendant's Motion to Vacate Judgments of Conviction and Sentence with request for leave to amend. (R. 123-39)

On November 22, 2002, the trial court presided over an evidentiary hearing on certain issues raised in Howell's 3.850 motions. (EH 1-60) On December 12, 2002, Howell filed a written final argument in support of the relief sought. (R. 140-80)

C. Disposition in Lower Tribunal:

On January 2, 2003, the trial court rendered an Order denying Howell's motion for post conviction relief. (R. 181-86)

On January 8, 2003, Howell filed a notice of appeal to this Court along with directions to the clerk and designations to the court reporter. (R. 187-89, 191-93) On January 9, 2003, Howell filed a statement of judicial acts to be reviewed. (R. 190-190B)

D. Statement on Jurisdiction:

This Court has jurisdiction to review the lower tribunal's denial of Howell's Florida Rule of Criminal Procedure 3.850 motion to vacate and set aside his judgments of conviction and sentences, including a death sentence, per the provisions of Article V, Section 3(b)(1), Florida Constitution, and Florida Rule of Criminal Procedure 3.850(g).

E. Standard of Appellate Review:

This is a post conviction capital case involving mixed questions of law and fact. As such, the circuit court final Order (R. 181-86) denying Howell's Florida Rule of Criminal Procedure 3.850 motions appealed from is subject to plenary, *de novo* review except that deference is given to the trial court's findings of fact so long as there is competent and substantial evidence to support same. *Johnson v. Moore*, 789 So. 2d 262 (Fla. 2001); *Porter v. State*, 788 So. 2d 917 (Fla. 2001) *Rose v. State*, 675 So. 2d 567 (Fla. 1996).

F. Statement of the Facts:

The basic facts of the homicide are found in this Court's opinion in *Howell v. State*, 707 So. 2d 674 (Fla. 1989) and the record. Howell provides a synopsis of same below in order to put the case in perspective.

In January of 1992, Howell, who had been involved in drug activity based out of the Ft. Lauderdale area, supposedly constructed a bomb for the purpose of killing Tammie Bailey, a drug associate, who lived in Marianna, Florida. (R. 123; *Howell v. State*, 707 So. 2d at 676.) Bailey apparently posed a danger to Howell

since she was a witness to a prior crime that he allegedly committed. *Id.* The bomb was placed in a microwave oven that was gift-wrapped. *Id.* Lester Watson, who testified that he thought that the package contained drugs, was assigned to drive it to Marianna in a vehicle that Howell rented for that purpose. *Id.*

While traveling to Marianna, Watson and a passenger were stopped on Interstate 10 in Jefferson County by Florida Highway Patrol Trooper Jimmy Fulford. (R. 124; *Howell v. State*, 707 So. 2d at 676.) Two Jefferson County deputy sheriffs arrived to assist the trooper, and Watson gave them permission to search the car (but not necessarily the wrapped package). *Id.* Watson gave the officers a false name because he did not have a driver's license. *Id.* Watson was arrested for lack of a valid driver's license and taken by the deputies to the Jefferson County Jail near Monticello leaving only Trooper Fulford at the scene. *Id.*

According to state forensic experts, Fulford thereafter must have removed the gift-wrapped package from the vehicle, unwrapped it, opened the box and taken the microwave out of the box. *Id.* When he opened the microwave door, it exploded, killing him instantly. *Id.*

At the conclusion of the penalty phase, the trial court determined that the state had proven five statutory aggravating factors within the context of Section 921.141(5), Florida Statutes (1993): Howell knowingly created a great risk of death to many people; the homicide was committed during the commission of another designated felony; the murder was committed to avoid prosecution or arrest; the victim was a law enforcement officer killed in the course of his official duties; and the crime was committed in an especially cold, calculated and premeditated manner (the "heightened premeditation" or "CCP" aggravating factor). (R. 125; *Howell v. State*, 707 So. 2d at 677.) The trial court determined that Howell had established two statutory mitigating circumstances per the provisions of Section 921.141(6), Florida Statutes (1993): He lacked a significant prior criminal history and at the time of the homicide, he was under the influence of extreme emotional or mental disturbance. *Id.*

The testimony and documentary evidence presented during the November 22, 2002 evidentiary hearing on Howell's 3.850 motion are summarized below.

William Pfeiffer, Esq. represented Howell in the multi-count, multi-defendant federal racketeering and conspiracy trial that emanated from many of the same facts and circumstances in the case at bar. (EH 6-7) Pfeiffer assumed the representation from Frank Sheffield, Esq. on very short notice after jury selection had been completed. *Id.* Sheffield had just been granted permission to withdraw due to a conflict of interest asserted by Sheffield himself.[2] (EH 6) Pfeiffer moved for a

[2] Sheffield contended that he had received a death threat and he believed that it

continuance of the trial but the motion was denied. (EH 7)

In the process of preparing for trial, Pfeiffer reviewed a Florida Highway Patrol Policy Manual (Vol. II of the record on appeal here, Defense Ex. 1 in evidence during the evidentiary hearing) including Section 11.04 thereof. (EH 7-8)

This section provided that troopers were not permitted to open locked or securely wrapped luggage, packages and containers seized in traffic stops unless otherwise provided for by law or consented to. *Id.* He did not recall discussing this matter with Sheffield. (EH 11) Pfeiffer filed a motion to suppress all of the evidence seized from the search of the vehicle on that basis but the federal judge denied the motion for lack of standing. (EH 8) After the federal trial was completed, Howell wrote to Pfeiffer asking him to represent him in the state murder trial as well, but this request was denied. (EH 9)

Frank Sheffield, Esq., Howell's state court trial counsel, was the next witness during the evidentiary hearing. He was at the time of the trial an experienced criminal trial lawyer. He had handled between 15 and 20 capital murder cases during his career. (EH 17) He confirmed that the state trial related to the homicide of Trooper Fulford while the federal trial related to drug conspiracy and racketeering. (EH 18, 19)

Sheffield was questioned about the defenses he offered during the trial both at the guilt and penalty phases. (EH 16-74) He indicated that his investigation of the facts caused him to conclude that the evidence of Howell's guilt was overwhelming. (EH 46) He pointed out that Howell had ruled out attempting an insanity defense. *Id.* His strategy during the innocence/guilt phase was to argue that Howell did not actually make the bomb and, therefore, he was not guilty of first-degree premeditated murder. (EH 19) Sheffield argued that ownership of the package containing the bomb should be attributed to Patrick Howell, the defendant's brother. (EH 32) Sheffield insisted that Patrick Howell was the leader of the drug conspiracy and the one who ordered that the bomb be delivered to Marianna. (EH 32) Sheffield also attempted to shift blame for the trooper's death to Lester Watson, the driver of the vehicle. Sheffield testified in this regard at EH 55:

> Based upon what I knew in this case from my discovery in this case and conversations with witnesses, I always felt that Lester Watson was the most guilty because he knew exactly what was in that package, and he was the one that was staring Trooper Fulford directly in the eye, and he didn't say anything.

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came from those associated with Howell. *Howell v. State*, 707 So. 2d at 677.

However, Sheffield acknowledged that Howell was contacted by the dispatcher (prior to the explosion) because the car was rented in his name (EH 38) and confirmed that Howell told the dispatcher that Watson had his permission to drive it. (EH 38)

Sheffield vaguely recalled that there was testimony that Howell had been stopped in a rental car about a year earlier in Marianna and was warned by the Chief of Police that if stopped again in that town, his car would be searched. (EH 37-8)

Sheffield agreed that defense attorneys are often faced with a situation where they have very little to work with in the way of defenses, and have to resort to whatever is available, even though that might be unpopular in the community where the case is being tried. (EH 45) He believed that a culpable negligence defense on the part of the trooper was not viable in this case. (EH 45) He did concede, however, that since the driver and passenger were arrested and taken to jail and the vehicle was to be impounded, there was no reason for Trooper Fulford to open the package. (EH 30)

Sheffield explored the defense of intervening cause and effect (relating to whether Trooper Fulford had the authority to open the subject wrapped package) and whether his client actually intended to kill Trooper Fulford. **(**EH 19) He acknowledged that the trooper's search of the package was in violation of FHP policy but decided not to argue that issue after discussing it with Howell. (EH 26, 28-9) He stated that his reasons for not presenting this kind of defense included the fact that the case was a very emotional one in the Jefferson County community, especially among representatives of law enforcement since it involved the death of a popular state trooper. (EH 21) He felt that if he blamed Trooper Fulford for his own death, it would backfire and hurt Howell's chances for an acquittal. (EH 21)
He added that because items relating to child care were found in the trunk of the rented car, there was an impression that Trooper Fulford might have felt duty-bound to open the package because he was concerned about a child's welfare. (EH 34) Sheffield noted:

> [b]ecause the way the package came about is that Tammy Bailey - and I believe she was the one in Marianna - had just had a baby, and there was an attempt to get her to come back down to Broward County. Bus money had been sent down to her and she had spent the money. And, finally, the third or fourth call to her the comment was made, "We just want to give you something for the baby." She said, "Well, send me a microwave to use to heat up the bottles." (EH 39)

Sheffield maintained his position that an intervening cause defense would be

harmful to the client even though the trial was moved to Escambia County. (EH 22) He did not think that this defense would support the opportunity for a conviction of a lesser-included offense. (EH 23) During the penalty phase hearing, he again declined to present the issue (the violation of FHP protocol by the trooper) as a non-statutory mitigator because he believed there to be a very pro-prosecution mind set in the Escambia County jurors, who would be inflamed were the trooper blamed for his own death.[3] (EH 24) However, Sheffield believed and was in concurrence with Dean Morphonios, Esq., (counsel for one of Howell's co-defendants) that there was obviously a violation of the FHP policy manual by the trooper in opening the wrapped package. (EH 29, 30)

The only defense he presented was a challenge to the reliability of the state's witness, Lester Watson, who cut a deal with the state for a lesser sentence. Sheffield said that he tried to show that Watson was the only person claiming to have seen Howell make the bomb and his testimony could not be trusted. (EH 46 - 7) When he was reminded that several other witnesses besides Watson testified that Howell made the bomb, talked about a bomb in a microwave and otherwise implicated himself in the crime, Sheffield admitted:

> There were. But I have never tried a murder case at any time that I can recall that there weren't witnesses that directly pointed and said, “this

[3] As argued below, Sheffield seriously underestimated the ability of the jury in this case to follow the law even if it involved acquitting the defendant based upon a defense that might not be popular in some circles.

> guy is the one that did it." And many, many times you use credibility of witnesses to attack the witnesses that say that, and I have many people walking the street right now that were acquitted because of it. (EH 47)

Sheffield admitted that at the time of the federal trial he was fearful of his client, and withdrew because he had received a threat and because of the intimidating degree of security that resulted from it. (EH 50-1) However, by the time of the state trial in Jefferson County, the security was much more relaxed and he was not as frightened. (EH 51) When asked whether his earlier fear of his client might have caused him to be less than totally committed to defending him in the state trial, Sheffield replied that he was committed and that he stayed on the case because Pfeiffer lacked his experience in capital cases as well as his personal knowledge of the facts based upon the preparation he (Sheffield) had already done. (EH 52)

It was pointed out that the penalty phase ended in the finding of two key statutory mitigators[4] and that two of the jurors did not vote for death. He was then asked why he did not put Howell on the stand to say that he did not intend to kill the trooper. (EH 53, 54) Sheffield responded:

> I didn't think in this case that I ever had the opportunity to get a recommendation other than death when I realistically looked at the facts in this case. I thought to put Mr. Howell on the witness stand

[4] That Howell did not have an extensive prior criminal record and that, at the time of the homicide, he was under the influence of extreme mental or emotional disturbance.

based upon his prior conduct in court would be disastrous. (EH 54)

Regarding the issue of a possible search and seizure violation, Sheffield was asked about the extent to which consent was obtained to open the package containing the bomb. (EH 25) He answered that Watson gave consent to search the car and the trunk, but he did not recall whether Watson gave specific consent to open the package. (EH 25) He reiterated that Howell's motion to suppress the search of the vehicle was denied for lack of standing in the federal case, and that this ruling was adopted by the trial court in the state case. (EH 35) Sheffield said that the state's position was that when Watson consented to the search of the vehicle, by definition that authorized the search of all packages located therein. (EH 37) According to Sheffield, whether the trooper was authorized to open the package was not relevant because:

> My understanding is that those packages were going to be opened by law at some point. Just depended upon whether it happened on the side of the road or at an impound lot. (EH 37)

Sheffield confirmed that Trooper Fulford did not call for back up or for a dog to sniff for drugs or explosives. (EH 32) Had there been no bomb, the security of the contents would have been subject to challenge, according to this witness. (EH 32)

Sheffield stated that, during the penalty phase he resisted the issue of transferred intent, arguing as a mitigating factor that there was no intent to harm Trooper Fulford. (EH 33, 40) However, he could not get around the issue of

foreseeability claimed by the state, in that, given the size and other circumstances of the bomb, Howell had to know that someone was going to be killed. (EH 40, 41) As noted above, Sheffield had been advised that this was not the first experience Howell had with making a bomb. (EH 41)

Sheffield conceded that non-statutory mitigation is a flexible area and it can be as creative as the judge will allow. (EH 41) He conceded that for non-statutory mitigation, issues of intervening cause and effect and transferred intent could be raised. (EH 41) He also acknowledged that the issue of contributory or comparative negligence could be raised during the penalty phase as well. (EH 41, 42)

Sheffield confirmed that he had the opportunity to read the witness statements and police reports and to take depositions prior to trial. (EH 42)
None of that information revealed that Howell was asked about the package or that he was asked for consent to search anything related to the vehicle when the authorities first contacted him. (EH 42-3)

SUMMARY OF THE ARGUMENT

In Issue I Howell contends that his trial lawyer rendered constitutionally ineffective assistance of counsel during the innocence/guilt and penalty phases of his trial for first-degree murder for failure to raise and pursue a valid defense.

It is undisputed that the trooper opened the gift-wrapped and boxed microwave oven in direct violation of FHP policy. Had he not done so, he would not have been killed. The trooper's violation of his agency's own rules was a legally intervening act that broke Howell's link to the tragic chain of events that

resulted in the trooper's death. As a result, Howell was not guilty of first-degree murder as a matter of law. Had counsel forcefully presented this defense to the jury (it was the only viable defense Howell had) during the innocence/guilt phase of the trial, there is a distinct likelihood and reasonable probability that the outcome would have been different in that it would have resulted in an outright acquittal on the first-degree murder count or, at the very least, a conviction of a lesser-included non-capital offense. The defense would also have served as a powerful argument during the penalty phase as a non-statutory mitigating factor. The trial court therefore erred in denying Howell's ineffective claim in this regard.

The state's response will be that Howell intended to kill Tammie Bailey and that intent was transferred to the trooper under the circumstances. While this legal theory might be applicable in some situations, it fails in the case at bar.

The state charged Howell in Count I of the Indictment with the premeditated murder of the trooper himself, not Tammie Bailey, under Section 782.04(1), Florida Statutes (1992). It proceeded to attempt to prove its case under that "premeditated design" statute and Section 782.04(1)(a)2j, Florida Statutes (1992), the felony murder statute that makes it a capital felony to cause the death of another while perpetrating or attempting to perpetrate the underlying felony of " . . . throwing, placing, or discharging of a destructive device or bomb." Howell

certainly did not intend to kill the trooper. Howell did not throw or discharge the bomb. Nor did he "place" it at the location where it discharged. While it is true that the bomb was being transported to the location (Tammy Bailey's residence) in which it was to be placed or discharged, it was well over 100 miles from its planned destination. Accordingly, Howell's conduct only established that he made and possessed the bomb. Thus, the elements of premeditated design to kill the trooper himself and the felony murder statute (throwing, placing or discharging the bomb) were not satisfied.

In Issue Two, Howell argues that Florida's death penalty scheme is unconstitutional on its face and as applied to him because it (a) does not require the jury to find the existence of each aggravating circumstances beyond a reasonable doubt, (b) does not require the jury to find beyond a reasonable doubt that the mitigating circumstances are insufficient to the extent that they do not outweigh the aggravating circumstances that were established, (c) provides that the jury's verdict is only advisory and not binding, and (d) only requires a bare majority of the jurors to make a death recommendation to the court. The above referenced constitutional violations are predicated upon the principles established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and applied to death penalty proceedings in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). For these reasons, the death penalty imposed upon Howell was, and is, unconstitutional and must be vacated.

ARGUMENT

Issue I. The trial court erred in not finding that trial counsel was ineffective for failing to present an intervening cause defense based upon the undisputed fact that the trooper opened the microwave oven containing the bomb in violation of FHP policy and procedures.

A. Howell was Denied Constitutionally Effective Assistance of Counsel at his State Court Trial.

Howell asserts that the record shows that he was denied constitutionally effective assistance of counsel at trial as guaranteed by the Sixth and Fourteenth

Amendments of the United Stales Constitution, and Article I, Declaration of Rights, Sections 2, 9 and 16, Florida Constitution, and within the meaning of ineffective assistance of counsel in capital and other criminal cases as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995), *Roberts v. State*, 568 So. 2d 1225 (Fla. l990), among others. Howell contends that the omissions of his trial counsel as described in his post conviction motions and herein were more than negligent acts. Instead, these acts, omissions, errors and deficiencies were so serious and significant that defense counsel was not functioning as "counsel" as guaranteed by the Sixth Amendment to the United States Constitution as applied to the states by virtue of the due process clause of the Fourteenth Amendment. These deficiencies, errors, acts and omissions were instead well outside and significantly and measurably below the broad range of reasonable professional standards of competence for attorneys in the Second Circuit, this state and the United States of America. Furthermore, the deficient performance of trial counsel was prejudicial and so affected the fairness and reliability of the proceedings that confidence in the outcome was seriously undermined and eroded. *See Williams v. State*, 673 So. 2d 960 (Fla. 1st DCA 1996) and *Strickland v. Washington*, 466 U.S. 668 (1984). The specific acts and/or omissions which evince constitutionally ineffective assistance of trial counsel (none of which can be justified as strategic) were fully explained with citations to

the record in Howell's motions for post conviction relief.[5] In addition, Howell refers this Court to the threat that Mr. Sheffield thought his client made against him prior to the commencement of the state court trial[6] — and the effect that threat seemed to have had on the presentation of a viable defense in both the guilt/innocence and penalty phases of the trial.[7]

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[5] Howell raised several Ch. 119, Fla. Stat, public records concerns in his post conviction pleadings but these claims were later declared moot and abandoned by the defendant during the post conviction proceedings in the lower court.

[6] It is undisputed that prior to the commencement of the state court trial, Sheffield reported to law enforcement and others that his wife had received a telephonic threat to the effect that "if Paul Howell goes down, Mr. Sheffield is going down too." (R. 366-67) Sheffield was very upset, noting that he was "absolutely just going crazy about it . . ." and that he believed that whoever made the threat could actually carry it out. (R. 372-77) Sheffield seemed to agree with the state that Howell was behind the threat. (R. 369-70, 375-76) The alleged threat was the basis for Sheffield's second request to the presiding judge in Howell's federal court trial to be allowed to withdraw from representing the defendant (his first request having been denied). The prosecutor in the state trial, Assistant State Attorney Michael Schneider, was so concerned about it that he twice sought Sheffield's removal. The conflict took on a bizarre twist when, after investigating Sheffield's claim, law enforcement determined that the telephone call might not ever have been made in the first place. *Howell v. State*, 707 So. 2d at 677-80. Whether the threat was real or imagined, it must be acknowledged as forming the basis of a chilling environment of distrust and animosity between client and attorney that may explain the omissions referenced herein.

[7] This matter was raised in Howell's post conviction 3.850 motions on the basis of a conflict of interest. Howell conceded that because this issue was raised in Howell's direct appeal, the lower court could not revisit the conflict issue solely on the basis of whether, as a matter of law, a conflict existed to the extent that Sheffield should not have represented Howell at trial. However, the facts and circumstances surrounding that matter form a real-world basis for reconsidering them in the context of Howell's other ineffective assistance claims. That is, Howell's core ineffective claim is that Sheffield did not offer any viable defense for him at trial even though a defense (explained herein) was available. The tension that existed between counsel and client as a result of the threat may explain Sheffield's failure to do so — and was fair game

B. Ineffectiveness During the Guilt Phase

Howell was charged by indictment with first-degree murder and with making, possession, placing or discharging a destructive device or bomb that resulted in a death. (OR 14-5) The jury found Howell guilty as charged. The jury found that the first-degree murder charge was proven based upon the state's theories of premeditation and felony murder. The convictions and death sentence cannot be sustained as a matter of law.

i. Trooper Fulford's actions in opening the wrapped package in violation of FHP policy amounted to an intervening cause or a break in the chain of circumstances such that his death was too attenuated to sustain a conviction for first-degree murder against Howell.

As hard as the fact might be to accept, Trooper Fulford should not have opened the wrapped package containing the bomb. Doing so was in direct contradiction of FHP policy. *See* Volume III of the record on appeal, Defense Ex. 1, Section 11.04 thereof, providing that absent circumstances that did not exist in this case, FHP troopers are not to open wrapped packages in vehicles that have been stopped for traffic-related matters. It served no law enforcement purpose. It may well have constituted a Fourth Amendment violation inasmuch as consent to open it was not given by the driver of the rented vehicle, Lester Watson. It was careless and unnecessary; there was no urgent need to bypass established protocol

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in the post conviction proceedings in the lower court.

and open it right away.[8] It is obvious that the purpose of the FHP policy was to recognize and attempt to prevent the danger to its troopers that might well result from opening wrapped packages located in suspicious vehicles stopped on federal highways such as Interstate 10, recognized as one of the nation's main drug corridors. Drug dealers and their couriers are known for their viciousness and disregard for human life. Their vehicles are expected, as a practical matter, to possibly contain weapons of all kinds. Nevertheless and tragically, the trooper opened the microwave oven. But for the trooper's unauthorized actions, he would not have been killed. Again, that is difficult to acknowledge, but it is the cold, hard truth. Opening the microwave was a legally intervening cause that created a significant degree of separation between Howell and the first-degree murder conviction he received. It was imperative that his counsel raise and present this defense to the jury and the judge. It was legitimate and the only one he had.

In Florida, direct causation is a critical element of every criminal case. The state must prove beyond a reasonable doubt that but for the defendant's conduct, the harm would not have occurred. *Eversley v. State*, 748 So.2d 963, 967 (Fla. 1999). This is especially true where specific intent is an element of the offense. In the case at bar, the fact is that but for the trooper's violation of his own agency's

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[8] As noted above, Sheffield indicated during the evidentiary hearing that there might have been some exigent circumstance that necessitated opening the package at the scene of the stop. There does not appear to be any factual basis for this contention.

written rules, the harm would not have occurred. In other words, what caused the trooper's death was a chain of intervening events that Howell could not have possibly foreseen – whereby the trooper would not simply inventory and safeguard the wrapped package as the FHP manual stipulated – but would (a) personally examine it, (b) unwrap it, (c) open the box the oven was in, (d) take the microwave oven out of its package and (e) open the oven door.

In *Velazquez v. State*, 561 So.2d 347 (Fla. 3d DCA 1990), the state attempted to prosecute one of two drag racers when the other crashed and died as a result of his injuries. In reversing, the district court reasoned that, while Velazquez's participation in the illegal car race might have been a but-for cause of the other driver's death, it could not be deemed the proximate cause since the deceased intervened in the process and caused his own demise in a material way. Likewise, Trooper Fulford intervened in a process that should have, had proper procedures been observed, resulted in no one being hurt. He then violated the very rules of the FHP designed to protect the trooper himself [9] by personally opening the seized property.

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[9] It must be emphasized the FHP rule prohibiting troopers from opening seized packages was not just for the protection of the rights of the person to whom the package belonged. On the contrary, the most important reason for the rule is to protect the trooper. Adhering to the rule shields the officer from claims that the officer converted the item to his/her own use – and far more importantly – from possible physical harm.

Sheffield's failure to present an intervening cause defense was prejudicial to his client. Had he presented this defense to the jury, he would have been entitled to a jury instruction on the issue of intervening, proximate causation. There is a reasonable probability that the defense would have resulted in an acquittal. But even if it did not, the defense most certainly afforded Howell a chance at the lesser-included-offense conviction of second-degree murder, second-degree felony murder, or even manslaughter. Sheffield was clearly ineffective in this regard.

The prejudice that resulted from Sheffield's ineffectiveness becomes more apparent when considering the evidence and theories the state used to establish first-degree murder. At trial, the state argued that Howell was guilty of first-degree murder because Trooper Fulford was killed from a premeditated design or because he was killed while Howell was engaged in the perpetration or attempt to perpetrate a crime listed in the felony murder statute. In this case, the underlying felony was the "unlawful throwing, placing, or discharging of a destructive device or bomb." *See* Section 782.04(1)(a)2j, Florida Statutes (1992). The state's theories of premeditation and felony murder were weak, at best.

As to premeditation, it is undisputed that Howell certainly did not intend to kill the trooper. The state's response to this claim is that Howell is ignoring the doctrine of transferred intent. According to the state, it does not matter who was killed since, by all accounts, Howell's purpose in making the bomb was to kill

Tammie Bailey – and under Florida law, that intent can be transferred to the trooper for the purpose of a first degree murder conviction regardless of whether or not Howell intended to kill Fulford (which, clearly, he did not). *See Provanzano v. State*, 497 So. 2d 1177 (Fla. 1986). The state is wrong.

The state is overlooking the fact that there is one critical element about the case at bar that distinguishes it from cases where the doctrine of transferred intent is appropriately applied. Here, the trooper did not just contribute to his demise. In not following the rules specified in FHP policy, his actions fulfill the stipulations of a "but-for" definition of causation. Stated differently, this is not a situation where an innocent bystander (an unintended victim) is killed in a drive-by shooting where someone else is the intended victim. The trooper's death would have fit within the doctrine had he been operating in the line of duty. But in violating FHP policy, he was not. He was clearly not supposed to open the package or the contents of the package – but he did so anyway. That became an intervening cause that resulted in his death. Sheffield's failure to present this defense constitutes ineffectiveness and entitles Howell to a new guilt/innocence trial.

As to felony murder, at first glance it appears that the state's theory was well grounded in that Trooper Fulford was killed by a bomb that, according to the state, Howell made for the purpose of killing Tammie Bailey. However, upon examining the language of Sections 782.04(1)(a)2j (the felony murder statute with the

underlying felony relating to the bomb) and 790.161, Florida Statutes (1992) (the statute to which the underlying felony murder offense refers), it is clear that Howell's conduct falls substantially short of satisfying the felony murder statute.

Section 782.04(1)(a)2j, Florida Statutes (1992) provides that a person is guilty of first-degree felony murder when someone is killed by another who is "engaged in the perpetration of, or in the attempt to perpetrate" the "unlawful throwing, placing, or discharging of a destructive device or bomb." In contrast, Section 790.161, Florida Statutes (1992), not only makes it a crime to throw, place, or discharge a destructive devise or bomb, but also other (less dangerous) acts such as possessing or making a bomb. In this regard, Howell did not throw or discharge the bomb. Nor did he "place" it at the location where it discharged. While it is true that the bomb was being transported to the location (Tammy Bailey's residence) in which it was to be placed or discharged, it was well over 100 miles from its planned destination. Accordingly, Howell's conduct only established that he made and possessed the bomb. Thus, the elements of the felony murder statute (throwing, placing or discharging the bomb) were not proven and satisfied.[10]

[10] If Howell's interpretation of the felony murder statute is not precise, he remains entitled to relief pursuant to the rule of lenity, codified at section 775.021(1), Florida Statutes (1992), which provides, "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused. Application of this rule means that if the language of the felony murder statute is susceptible to a reasonable construction that is favorable to the accused, a court must employ that construction." *See also State v. Williams*, 776 So.2d 1066, 1070 (Fla. 4th DCA 2001) (holding that the elements of the felony murder statute were not satisfied

ii. Trial counsel cannot shield his ineffectiveness by labeling his actions or omissions as trial tactics or strategy.

The state will also, more than likely, contend that Sheffield's decision as to which defense to pursue was a tactical one not subject to judicial review. That is incorrect. As Judge Shevin noted in his dissent in *Lanier v. State*, 709 So.2d 112, 120 (Fla. 3d DCA 1998), "(w)hile an attorney's tactical and strategic decisions are entitled to deference, these decisions must originate from a basis of information, not ignorance." Sheffield should have understood the intervening cause defense and asserted it on behalf of his client rather than rely on a defense (that there was insufficient proof that Howell made the bomb) that had little if any persuasive value.

C. The Causation Issue at the Penalty Phase

Sheffield indicated that he might have argued the trooper's negligence during the penalty phase of the trial. We have read the transcript and that argument does not appear to have been made. It should have been. Two statutory mitigators were proven during the penalty phase but neither was directed at the actual facts of the case. Nevertheless, two jurors recommended life. Had the evidence indicating the trooper's violation of FHP rules (as outlined above) been forcefully presented

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because there was "a break in the chain of circumstances" between the killing and the underlying felony and noting that, if there was any ambiguity in the statute, the rule of lenity required the court the accept the defendant's interpretation of it).

to the jury, it would have been hard to ignore. It must be remembered that the penalty phase of a death case inevitably comes down to affording the jury and judge the information they need to weigh the factors that suggest death against those suggesting life. The judge and jury must balance these factors against each other to arrive at a just conclusion. The fact that Howell had no significant criminal history and that, according to Dr. McClaren, he was under mental duress at the time of the crime were powerful indicators that his life should have been spared. But what about the admittedly egregious, grisly facts of the case that got before the jury? None of them mitigated against a death recommendation – and instead, according to Judge Steinmeyer's sentencing order, caused the mitigators to pale in comparison. This was Sheffield's fault. He should have put the stark reality of the trooper's own negligence and violation of FHP policy squarely before the judge and jury, no matter how unpopular he thought it would be. Had he done so, this evidence would have been very difficult to ignore. It clearly could have caused four jurors to vote for life. And if that had happened, it is difficult to believe that Judge Steinmeyer could have overridden a tie vote that, under Florida law, results in a life recommendation. The failure to present this evidence during the penalty phase constituted ineffectiveness and entitles Howell to a new penalty phase trial.

Issue II. The Florida death penalty statute as applied to Howell violates the Sixth and Fourteenth Amendments to the United States

> Constitution and the corresponding provisions of the Florida Constitution per the principals announced by the United States Supreme Court in *Ring v. Arizona* and *Apprendi v. New Jersey*. The trial court erred in ruling that Howell was not entitled to relief on this issue.

Howell alleged in his supplemental motion for post conviction relief (R. 116-17) that his death sentence must be set aside and vacated because Florida's death penalty statute, Section 921.141, Florida Statutes (1993), is unconstitutional under the principles announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) as applied to certain death penalty cases in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). The trial court denied Howell's claim. (R. 183) This was reversible error. Florida's death penalty statute is not constitutional because it (a) does not require the jury to find the existence of each aggravating circumstances beyond a reasonable doubt, (b) does not require the jury to find beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the aggravating circumstances that were established, (c) provides that the jury's verdict is only advisory and not binding,[11] and (d) only requires a bare majority of the jurors (a non-

[11] This relates to what is commonly referred to as a "jury override," meaning that if the jury recommends that the defendant should be sentenced to life in prison, the trial judge has the authority to override the jury's recommendation and impose death. Of course a jury override could also occur where the jury recommends death but the judge imposes a life sentence. However, the latter type of jury override does not have constitutional implications as it is generally recognized that a life sentence is less severe than a sentence of death. *See Bottoson v. Moore*, 833 So. 2d 693, 728 (Fla. 2002) (Lewis, J., concurring in result only) (noting that it is "within constitutional parameters" for a trial judge to adjust a defendant's sentence downward from death to life).

unanimous jury verdict) to make a death recommendation to the court.

The U.S. Supreme Court in *Ring* declared Arizona's death penalty statute unconstitutional because it violated the Sixth Amendment's guarantee of a trial by jury. Under Arizona law the trial judge rather than the jury made the necessary findings of fact on aggravating factors required to subject the defendant to the death penalty.[12] Because Florida trial judges make the same factual findings aided by only non-binding, advisory recommendations of non-unanimous juries, Florida's death penalty statute must be struck down as unconstitutional as well.

A. The *Ring* issue is properly before the Court and is not procedurally barred.

As a rule of thumb, the attorney general takes the position that this claim is procedurally barred. As noted above, however, the trial court denied Howell's *Apprendi/Ring* claim on the merits and did not find that it was procedurally barred. (R. 183) *Apprendi* and *Ring* were not decided until after Howell was sentenced to death. Justice Shaw responded to a similar argument in *Bottoson v. Moore*, in which he said,

> The State contends that Bottoson cannot obtain relief under Ring because he failed to raise this issue at trial. I find this contention disingenuous in light of the fact that Bottoson was tried nearly twenty years before Apprendi was decided and thus had no basis for arguing that a "death qualifying" aggravator must be treated as an element of the offense. In point of fact, there is no indication that either the Arizona Supreme Court [footnote omitted] or the United States Supreme Court [footnote omitted] required that Ring himself raise the issue at trial, and yet both courts reviewed his claim and the United States Supreme Court granted relief.

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[12] Subsequent to the *Ring* decision, this Court decided *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002). These cases are discussed herein.

Bottoson, 833 So. 2d at 718 (Fla. 2002) (Shaw, J., concurring in result only). Thus, it is clear that in the case bar, Howell's claim is not procedurally barred.

Furthermore, the state frequently claims that even if Florida's death penalty statute is unconstitutional under *Apprendi/Ring*, such a claim cannot be raised in post conviction proceedings because *Apprendi/Ring* do not have retroactive application. In this regard, it is noted that the majority decisions in both *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) fail to analyze the issue of whether *Ring* has retroactive application to Florida's death penalty statute. Presumably this was because this Court was able to deny relief as to both prisoners on the basis that each had prior violent felony convictions used as aggravating factors and in King's trial the jury also unanimously recommended death. Subsequent to *Bottoson*, this Court has reviewed numerous cases in which Florida's death penalty statute was challenged as unconstitutional under the principles of law established in *Apprendi/Ring*. In most of these cases, this Court essentially denied relief by simply citing to the *Bottoson* and *King* opinions, with little explanation as to which fact the Court was basing its decision; i.e., whether it was because the defendant had a prior felony conviction, or the jury's advisory verdict recommending death was unanimous. A thorough review of all the post-Bottoson cases reveals that in each case the defendant either had an aggravating factor for a prior violent felony conviction,[13] the jury unanimously recommended that the defendant be sentenced to death,[14] or in some cases both.[15] In the instant case, however, Howell has neither. Thus, it appears that this is the first post-conviction challenge to Florida's death penalty scheme pursuant to *Apprendi* and *Ring* in which the prisoner has neither a prior conviction aggravator nor a unanimous jury verdict recommending death.[16] Thus,

[13] See, e.g., *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002); *Lawrence v. State*, 28 Fla. L. Weekly S241 (Fla. March 20, 2003); *Banks v. State*, 842 So.2d 788 (Fla. 2003); *Kormondy v. State*, 28 Fla. L. Weekly S135, (Fla. Feb. 13, 2003); *Doorbal v. State*, 837 So.2d 940 (Fla.2003); *Anderson v. State*, 841 So.2d 390(Fla. 2003); *Spencer v. State*, 842 So.2d 52 (Fla. 2003); *Lucas v. State*, 841 So.2d 380 (Fla. 2003).

[14] See, e.g., *Conahan v. State*, 28 Fla. L. Weekly S366 (Fla. Jan. 16, 2003); *Porter v. Crosby*, 840 So.2d 981 (Fla. 2003).

[15] See, e.g., *King v. Moore*, 831 So.2d 143 (Fla. 2002); *Grim v. State*, 841 So.2d 455 (Fla. 2003); *Lugo v. State*, 28 Fla. L. Weekly S160 (Fla. Feb. 20, 2003); *Jones v. State*, 28 Fla. L. Weekly S140 (Fla. Feb. 13, 2003); *Cole v. State*, 841 So.2d 409 (Fla. 2003).

[16] Recently, in *Butler v. State*, 842 So.2d 817 (Fla. 2003), this court denied a Ring-challenge to Florida's death penalty statute on direct appeal by holding that:

if the rule for applying a new rule of law retroactively is satisfied, relief is warranted.

In *Witt v. State*, 387 So.2d 922 (Fla. 1980), this Court set forth the test to determine whether a new rule of law must be given retroactive application in post-conviction proceedings and held,

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Id. at 931. Thus, *Witt* makes it crystal clear that *Apprendi/Ring* must be given retroactive application because those cases originated from the United States Supreme Court, the claims were predicated upon and the Court's decisions were based on the Sixth Amendment to the U.S. Constitution, and the change in law was, by far, a development of fundamental significance.

B. Florida's death penalty statute violates the Sixth Amendment, as

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> On rehearing, Butler asserts that Florida's capital sentencing scheme violates the United States Constitution under the holding in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We recently denied a similar claim in *Bottoson v. Moore*, 833 So.2d 693 (Fla.), *cert. denied*, --- U.S. ----, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So.2d 143 (Fla.), *cert. denied*, --- U.S. ----, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). We likewise deny relief in this case.

Id. at 834. Justice Pariente disagreed with the majority and stated that Butler's death sentence should be reversed because he did not have a prior violent felony aggravator, the jury's verdict recommending death was not unanimous and the challenge was made on direct appeal. *Id.* at 835 (Anstead, C.J. and Shaw, S.J. agreed that Butler's death sentence should have been reversed). Justice Pariente further pointed out that, "The issue of the application of *Ring* to cases that are already final (i.e., in the postconviction stage) is not before us today, and therefore I would not address the extension of a unanimity requirement to such cases." *Id.*

interpreted by the U.S. Supreme Court in *Ring v. Arizona*.

In order to fully assert Howell's claim that Florida's death penalty statute violates *Ring*, it is necessary to first explain the U.S. Supreme Court decisions in *Walton v. Arizona*, 497 U.S. 639 (1990), *Jones v. United States*, 526 U.S 227 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In 1990, the U.S. Supreme Court was asked in *Walton v. Arizona*, 497 U.S. 639 (1990) to determine whether Arizona's death penalty statute violated the Sixth Amendment because in Arizona the penalty phase portion of the trial was conducted by the trial judge without a jury and the judge alone determined which aggravating factors were proven beyond a reasonable doubt. Because the Supreme Court in *Hildwin v. Florida*, 490 U.S. 638 (1989) had previously held that such sentencing factors did not have to be made by a jury, Walton attempted to distinguish Arizona's death penalty scheme from Florida's. Walton pointed out that Arizona's statute was different because, unlike Florida's, the trial judge is not assisted by a jury at all in determining which aggravating factors existed, nor is the trial judge provided with an advisory verdict as to the ultimate sentence to be imposed. The U.S. Supreme Court disagreed and held:

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton, 497 U.S. at 648.

Furthermore, Walton contended that in Arizona, aggravating factors were "elements of the offense," while in Florida such factors were merely, "sentencing 'considerations.'" *Id.* Again the U.S. Supreme Court disagreed and held that aggravating factors were not "elements of the offense," but were instead "sentencing considerations" used to assist the trial court in determining whether to impose a sentence of life or death. *Id.* Accordingly, the U.S Supreme Court concluded, "the Sixth Amendment does not require that the specific findings

authorizing the imposition of the sentence of death be made by the jury." *Id.* Justice Stevens disagreed with the majority in *Walton,* and said that the Sixth Amendment requires "a jury determination of facts that must be established before the death penalty may be imposed." *Id.* at 709 (Stevens, J., dissenting).[17]

In *Jones v. United States*, 526 U.S 227 (1999), the Court considered whether the federal car-jacking statute, which contained three possible punishments (i.e., life imprisonment if death resulted, a maximum of 25 years imprisonment if serious bodily injury resulted, or otherwise 15 years imprisonment), "defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them (death or serious bodily injury) dependent on sentencing factors exempt from the requirements of charge and jury verdict." *Id.* at 229. The Court held that in order to avoid a potential violation of the Sixth Amendment (because a judge rather than a jury would be finding the facts necessary to raise the punishment beyond a 15-year prison sentence), the statute established three separate offenses and thus required the jury to decide beyond a reasonable doubt whether serious bodily injury or death resulted. *Id*. at 251-52. The court in *Jones* distinguished *Walton* by pointing out that *Walton* "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a

[17] In this regard, Justice Stevens pointed out that aggravating circumstances "operate as statutory 'elements' of capital murder under Arizona law, because in their absence, [the death] sentence is unavailable." *Id.* at 709, n. 1.

greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." *Id.* at 251.[18]

In 2000, one year after *Jones*, the Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The defendant in *Apprendi* was convicted of second-degree possession of a firearm punishable by up to ten years in prison. *Id.* at 469-70. However, the trial judge found that Apprendi's crime was racially motivated, which under New Jersey's "hate crime enhancement" statute authorized the judge to increase the penalty up to 20 years. On the authority of that statute, the trial judge sentenced Apprendi to 12 years in prison, exceeding the maximum allowed under the firearm offense by two years. The United States Supreme Court held that the New Jersey statute violated his Sixth Amendment right to "a jury determination that (he) is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 477. The crime for which Apprendi was charged included both the firearm offense and the hate crime aggravating circumstance. This is so, the court reasoned, because "(m)erely using the label 'sentence enhancement' to describe the (second act) surely does not provide a principled

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[18] In *Jones*, Justice Kennedy disagreed with the majority's account of the *Walton* decision. He reasoned that the two cases could not be reconciled because "[i]f it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for car-jacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death. In fact, *Walton* would appear to have been a better candidate for the Court's new approach than is the instant case." *Id.* at 272 (Kennedy, J., dissenting).

basis for treating (the two acts) differently." *Id.* at 476. The Court observed that the dispositive question "is one not of form, but of effect." *Id.* at 494. Thus, the Court concluded "(o)ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. (The Court also held that a defendant cannot be "expose(d) . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 483.

In *Apprendi*, the issue again arose as to how the principles enunciated therein could be reconciled with *Walton*. The *Apprendi* Court reasoned that the two cases did not conflict because in *Walton* the death sentence was not an enhanced sentence but was merely the maximum sentence that could be imposed for first-degree murder.[19] *Id.* at 407. Justice O'Connor dissented, stating that the distinction was "baffling" because a "defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life

[19] Moreover, the Court held, "Once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." *Id.* at 407 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257, n. 2 (Scalia, J., dissenting)).)

imprisonment, and not the death penalty." *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting). The *Apprendi* majority disagreed and specifically held that *Apprendi* did not apply to death penalty cases. *Id.* at 497.

This set the stage for the U.S. Supreme Court's decision in *Ring*. In *Ring*, the U.S. Supreme Court considered whether the Court's previous holdings in *Jones* and *Apprendi* extended to Arizona's death penalty statute. The Court concluded, notwithstanding its earlier attempts in *Jones* and *Apprendi* to distinguish capital cases, that "*Apprendi's* reasoning is irreconcilable with *Walton's* holding" and that (c)apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 122 S.Ct. at 2432.

In assessing the continued viability of *Walton* in light of *Apprendi*, the Court in *Ring* noted that the *Walton* Court had rejected the Arizona petitioner's attempt to distinguish the Florida death penalty statute, holding instead that neither state's statute implicated the Sixth Amendment because the aggravating factors were not elements of the crime, but rather were "sentencing considerations guiding the choice between life and death." *Ring*, 122 S.Ct. at 2437 (quoting *Walton*, 497 U.S. at 648). The *Apprendi* Court, however, rejected this analysis, where it held that "the relevant inquiry is not one of form, but of effect." *Apprendi*, 530 U.S. at 494. The effect of Arizona's statute, according to Ring, was that the defendant was only

exposed to the death penalty if the trial court and not the jury made the required finding of at least one aggravating factor. *Id.* at 2440-41. Concluding that *Walton* could not survive *Apprendi*, the Court struck down the Arizona death penalty statute as violating of the Sixth Amendment. *Id.* at 2443.

In his concurrence in *Ring*, Justice Scalia sought to clarify the Court's holding by explaining,

> Today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of aggravating factors in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 122 S.Ct. 2428, 2445 (Scalia, J., concurring). Although reaffirming his belief that the Eighth Amendment does not actually require the finding of aggravating factors, Justice Scalia nevertheless approved the outcome of *Apprendi* and *Ring* because of the "perilous decline" of the right to trial by jury. *Id.* Simply put, Justice Scalia determined that:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt.

Id. at 2444.

Florida's death penalty statute is no different than the Arizona procedure found infirm in *Ring*. Under Arizona law, a defendant cannot be sentenced to death unless additional findings are made. Arizona's death penalty scheme requires the judge who presided at trial to "conduct a separate sentencing hearing to

determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed." *Ring*, 122 S.Ct at 2434 (quoting Ariz.Rev.Stat. Ann. § 13-703(C) (West Supp. 2001). In addition, the Arizona statute provided that "(t)he court alone shall make all factual determinations required by this section or the constitution of the United States or this state." *Id.* After the sentencing hearing, the judge determines which aggravating and mitigating circumstances, if any, were found to exist. The judge can only sentence a defendant to death "if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id.* (quoting Ariz.Rev.Stat. Ann. § 13-703(F) (West Supp. 2001)).

Under Florida law, the trial judge, not the jury, determines whether the aggravating factors necessary to authorize a death sentence have been "sufficiently proven"[20] and whether those aggravating factors outweigh mitigating factors presented in the defendant's behalf. *See* Sec. 921.141(3), Fla. Stat. (1993). In addition, the trial judge makes the ultimate determination regarding whether the defendant is sentenced to death, not the jury. The jury's function is only to

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[20] Although Section 921.141(3), Florida Statutes, provides that the aggravating factors only have to be "sufficiently proven," the cases make it clear that this requires said factors to be proven beyond a reasonable doubt." *See State v. Dixon*, 238 So.2d 1 (Fla. 1978) and *Johnson v. State*, 660 So.2d 637 (Fla. 1995).

provide the trial court with an "advisory" recommendation regarding what sentence should be imposed related to the murder conviction. *See* Sec. 921.141(3), Fla. Stat. (1993). The jury is only required to make its recommendation based on a mere majority vote. Sec. 921.141(3), Fla. Stat. (1993); *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990) (a jury's advisory recommendation in a penalty phase death penalty proceeding does not have to be unanimous; a simple majority is all that the constitution requires). The trial judge is then required to evaluate the evidence, determine which aggravating factors were proven beyond a reasonable doubt and enter written findings in support of the sentence to be imposed. If the judge determines that the aggravating factors were proven beyond a reasonable doubt and that the mitigating factors were insufficiently proven to outweigh the aggravating factors, then the judge may impose a sentence of death. As the statute provides, and as this court has made clear, in Florida "the (trial) court is the final decision-maker and the sentencer -- not the jury." *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988). Thus, it is clear that there is no difference in principle between the death

makes the final determination of the existence of aggravating circumstances penalty statutes of Arizona and Florida on the central issue of whether a jury sufficient to support the imposition of the death penalty. Accordingly, Florida's death penalty statute cannot overcome the principles announced in *Apprendi* and *Ring*, and must be declared unconstitutional.

C. The Florida Supreme Court's Interpretation of *Ring v. Arizona*

This Court first addressed the applicability of the *Ring* issue to Florida's death penalty statute in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002). In *Bottoson*, this Court held that the petitioner was not entitled to relief under *Ring* because, had the U.S. Supreme Court intended to extend the *Ring* decision to Florida's death penalty scheme, it would have either granted Bottoson's petition for writ of certiorari or directed the Florida Supreme Court to reconsider *Bottoson* in light of *Ring*. *Bottoson*, 833 So. 2d at 695. Furthermore, this Court determined that the petitioner was not entitled to relief because *Ring* did not expressly overrule its prior decisions[21] upholding Florida's death penalty statute. *Id.* However, although all of the justices concurred that Bottoson was not entitled to relief under *Ring*, only a plurality of the justices believed Florida's death penalty scheme remained unaffected by *Ring*.[22] In this regard, a majority of this Court, as set forth in the separately filed opinions, stated

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[21] *See, e.g.*, *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Proffitt v. Florida*, 428 U.S. 242 (1976).

[22] In *Bottoson*, Senior Justice Harding and Justices Wells and Quince concurred with the per curiam opinion, believing that Florida's death penalty statute was not unconstitutional under *Ring*. However, Chief Justice Anstead and Justices Shaw, Pariente, and Lewis only concurred in the result while, although supporting the denial of relief to Bottoson, believed that the constitutionality of Florida's death penalty statute has been called into question by *Ring*.

that Florida's death penalty scheme was inconsistent with (or at least affected by) *Ring* and concurred in the result only, namely because one of Bottoson's aggravating factors was for a prior violent felony conviction, which was considered by this Court as a factor not requiring a jury determination.

Howell respectfully contends that this Court misapplied the principles announced in *Ring* -- in that, although it is true that *Ring* did not explicitly overrule its earlier decisions upholding Florida's death penalty scheme, by virtue of the *Ring* decision itself, any earlier decision that does not comport with or cannot be reconciled with the legal principles annunciated in *Ring* are implicitly overruled. Simply because the U.S. Supreme Court did not expressly overrule *Hildwin*, *Spaziano* and *Proffitt* in *Ring* is irrelevant. In *Ring*, the Court had no reason to overrule those decisions for the simple reason that the Court was applying its *Apprendi* decision to Arizona's statute, not Florida's.

In addition, the argument that Florida's death penalty statute should survive scrutiny because the U.S. Supreme Court did not grant certiorari in the *Bottoson* and *King* cases in light of *Apprendi* should be rejected, or at the very least should not have any bearing on Howell's claim (in that, Bottoson had a prior violent felony conviction as an aggravating factor, while Howell did not). The U.S. Supreme Court has repeatedly cautioned that no significance whatsoever should be given to a denial of certiorari because that Court regularly denies certiorari for

reasons completely unrelated to the merits of a particular case. *See, e.g., Knight v. Florida*, 528 U.S. 990, 990 (1999) (opinion of Stevens, J., respecting denial of petitions for writs of certiorari) (noting that "it seems appropriate to emphasize that the denial of these petitions for certiorari does not constitute a ruling on the merits").

Moreover, when this Court stated that *Bottoson* was not entitled to relief because one of his aggravating factors was based on a prior conviction, which *Apprendi* seemed to exclude from its jury trial requirement,[23] this Court failed to appreciate the context in which that limitation was made. At the time *Apprendi* was decided, the U.S. Supreme Court was announcing what the Sixth Amendment required as to a non-capital offense. *Apprendi's* language was proper because it would be unnecessary and futile to require a jury to determine the existence of a prior conviction as to a non-capital offense. This is so because virtually all the non-capital statutes that utilize the defendant's prior convictions to trigger the enhancement statute do so automatically and no other additional findings are required. For example, if a particular non-capital state statute (i.e., an habitual offender statute) provides for increased penalties for repeat offenders, a trial judge

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[23] The *Apprendi* language was "other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" *Apprendi*, 530 U.S. at 490. (Emphasis supplied.)

is permitted to determine the existence of the prior convictions under *Apprendi*. But when prior convictions are used as aggravating factors in a death penalty proceeding, the same analysis fails. That is, the existence of a prior conviction (which is an aggravating factor in Florida) is not all that is required to subject a defendant to the death penalty. In Florida, in addition to the requirement that there be at least one aggravating factor proven, there must also be a finding that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* Sec. 921.141(3)(b), Fla. Stat. Thus, under the logic of the *Bottoson* decision, if a defendant had a prior violent felony conviction, it would automatically subject him to the death penalty notwithstanding the statute's additional requirement that there are insufficient mitigating factors to outweigh the aggravating factors. This result surely is not what *Apprendi* intended. Thus, because Florida's death penalty statute requires the existence of at least one aggravating factor that must outweigh the existence of any mitigating factors, when a prior conviction is used as an aggravating factor it must be proven beyond a reasonable doubt by a jury.[24] Notwithstanding Howell's belief that this Court misapplied *Ring* in the *Bottoson* case, under the rationale of the separately filed opinions, relief

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[24] In *Ring*, the Court held that "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." *Ring*, 122 S.Ct. at 2439 (citing *Apprendi*, 530 U.S. at 482-83).

is warranted because in his case, Howell did not have a prior violent felony as an aggravating factor. Thus, the "exception" *Apprendi* established for prior convictions, regardless of whether it was intended to apply to capital penalty phase proceedings, does not apply to Howell's claim.

In addition, Howell is entitled to relief because the jury's advisory verdict was far from unanimous. The jury recommended that Howell be sentenced to death by a vote of 10-2. As succinctly put by Chief Justice Anstead, "*Apprendi* and *Ring* also stand for the proposition that under the Sixth Amendment, a determination of the existence of aggravating sentencing factors, just like elements of a crime, must be found by a unanimous jury vote." *Bottoson*, 833 So. 2d at 709 (Anstead, C.J., concurring in result only). Justice Shaw also believes *Ring* and *Apprendi* require the jury's verdict to be unanimous. *Id.* at 711 (Shaw, J., concurring in result only) (stating that an aggravating factor "must be treated like any other element of the charged offense and, under longstanding Florida law, must be found unanimously by a jury"). Although the U.S. Supreme Court has approved non-unanimous jury verdicts in non-capital cases, it has never approved such verdicts of less than 9-3. *See Johnson v. Louisana*, 406 U.S. 356 (1972); *see also, Burch v. Louisiana*, 441 U.S. 130 (1979); *Apodaco v. Oregon*, 406 U.S. 404 (1972). Moreover, the U.S. Supreme Court has never approved of a state's scheme that permitted non-unanimous jury verdicts as to a death penalty case.

D. A State-by-State Analysis

While it is acknowledged that each state is certainly free to develop its own laws and procedures in a manner it deems appropriate, it is certainly insightful to consider how other states impose the death penalty. Comparing Florida's death penalty statute to those in other states, it becomes clear that Florida's process is different from every other death penalty scheme in the country. *Ring* noted that of the 38 states that allow for capital punishment, "29 generally commit sentencing decisions [entirely] to juries."[25] *Ring*, 122 S.Ct. at 2442, n. 6. Five states, Arizona, Colorado, Idaho, Montana, and Nebraska, have death penalty laws that require the judge, not the jury, to decide the existence of the facts needed to subject a defendant to the death penalty.[26] *Id.* Four states, Alabama, Delaware, Florida and Indiana, use a "hybrid system,"[27] in which the jury renders an advisory recommendation but the trial judge ultimately decides whether to accept or reject the jury's recommendation.[28] Categorizing the states in this manner illustrates that Florida's death penalty scheme is only shared by a minority of the states. But upon further examination, Florida's scheme is shared by none. Some of the specific differences are discussed below.

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[25] The 29 states are: Arkansas, California, Connecticut, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

[26] This was the very procedure declared unconstitutional in *Ring*. As to the other states, because they too do not use a jury at all in the penalty phase portion of the trial, under *Ring* they must fail.

[27] States that utilize "hybrid systems" are frequently referred to as states allowing for "jury overrides," in that, the judge can "override" the jury verdict and impose a different sentence.

[28] It is noted that after *Ring* was decided, Delaware and Indiana amended their death penalty laws and now require a jury to find the existence of aggravating factors.

Alabama

Alabama's death penalty scheme is very similar to Florida's, but differs in a few significant ways. At the conclusion of the penalty phase trial, the jury is instructed to determine whether any aggravating circumstances exist. The aggravating circumstances must be proven beyond a reasonable doubt.[29] If the jury finds that at least one or more aggravating circumstances exist, it must determine whether the aggravating circumstances outweigh the mitigating circumstances. If it does, it must recommend death. However, the jury can only recommend death if at least ten of the twelve jurors vote for death.[30] The jury's recommended sentence is to be considered but is not binding upon the court. If the jury is unable to reach an advisory verdict, the court may declare a mistrial, requiring a new penalty phase trial. If the jury returns an advisory verdict, the court considers a pre-sentence report and allows counsel for both parties to present argument concerning the existence or non-existence of aggravating and mitigating factors and the proper sentence to be imposed. Thereafter, the court is to "enter specific written findings" concerning the existence or nonexistence of each aggravating circumstance and each mitigating circumstance. In determining the proper sentence to impose, the court shall determine "whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist."[31]

Delaware

On July 22, 2002, the Delaware Legislature amended its death penalty laws in an effort to conform them to the *Ring* decision. In this regard, Delaware now requires that in order to sentence a defendant to death, the jury must unanimously find that the existence of at least one aggravating circumstance beyond a reasonable doubt. If the jury is unable to reach a unanimous decision as to the existence of an aggravating circumstance, it is required to report the same to the judge, identifying the number of affirmative and negative votes as to each circumstance. If the jury is able to reach a unanimous decision as to the existence of an aggravating circumstance, it then decides whether to recommend life in prison or death. In making its recommendation the jury must "report to the court

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[29] ALA. CODE § 13A-5-45(e) (2001). The statute also provides that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing."

[30] ALA. CODE § 13A-5-46(f) (2001). However, the jury can recommend life in prison with a majority vote.

[31] ALA. CODE § 13A-5-46(f) (2001).

by the number of affirmative and negative votes its recommendation on the question as to whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist."[32] However, the jury's recommended sentence does not have to be based on a unanimous vote. Once the jury renders its recommended verdict, the ultimate decision as to whether to impose a life or death sentence is left to the court. In this regard, if the jury finds that at least one aggravating circumstance has been established beyond a reasonable doubt and the trial court finds by a preponderance of the evidence that aggravating circumstances outweigh the mitigating circumstances, the court "shall impose a sentence of death."[33]

Indiana

Like Delaware, subsequent to the *Ring* decision, on June 30, 2002, the Indiana Legislature amended its death penalty laws. Under the amended statute, a defendant who has been found guilty of (or pled guilty to) first-degree murder can only be sentenced to death if a penalty phase jury finds that the state has established at least one aggravating factor beyond a reasonable doubt and that "any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances."[34] In addition, the statute requires the jury to use a "special verdict form" identifying which aggravating factors were established. The

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[32] DEL. CODE ANN. tit. 11 § 4209(c)(3)b.1 (2002). (It is emphasized that the statute only requires that the weighing process be established by a preponderance of the evidence, not beyond a reasonable doubt.

[33] DEL. CODE ANN. titl. 11 § 4209(d)(1) (2002).

[34] IND. CODE § 35-50-2-9(k) (2002). However, the statute does not require the weighing proviso to be established beyond a reasonable doubt.

jury's verdict must be unanimous. The jury's recommendation is binding on the court and the defendant is to be sentenced according to the jury's recommendation. However, if the jury is unable to agree on a sentence recommendation, the court "shall discharge the jury and proceed as if the hearing had been to the court alone."

Florida

Comparing Florida's scheme to those referenced above, a few distinctions can be ascertained. First, and most importantly, Florida is the only state in the country that allows the jury to recommend death by a simple majority. Every other state requires the jury's recommendation to be either unanimous or a substantial majority. Florida's procedure in this regard does not violate *Ring* in and of itself. This is so because *Ring* does not require jury sentencing at all. *Ring* only requires that the facts necessary to expose a defendant to the death penalty, that is the existence of aggravating factors, be submitted to and decided to be beyond a reasonable doubt by a jury. Although the jury in Florida sits through the penalty phase portion of the trial, considers the evidence presented therein and renders an advisory verdict, it is not required to unanimously agree on which aggravating factors were found beyond a reasonable doubt. The constitutional concern this procedure raises is exemplified by considering that a Florida jury could hear evidence tending to support the existence of twelve aggravating factors. Then during deliberations, each juror could find the existence of a different aggravating

factor (while rejecting the remaining 11). Once the jury recommends death, the trial judge is to determine which aggravating factors were established. In this hypothetical case, the judge could find that all twelve aggravating factors were proven beyond a reasonable doubt while the jury as a whole (that is, unanimously) did not find any of the factors beyond a reasonable doubt.

The second distinction is that in Florida a jury's recommendation is not binding. A jury can recommend life and the judge has the authority, albeit limited,[35] to disregard the recommendation and impose death. Florida and Alabama are the only states in the country that allow for a jury override.

For the foregoing reasons, Florida's death penalty statute must be declared unconstitutional under the Sixth Amendment and the principles announced in *Apprendi* and *Ring*, and Howell's death sentence, which was based on a jury's recommendation of death by a vote of 10-2, and was not based upon an aggravating factor for a previous violent felony conviction, must be vacated.

CONCLUSION

For the reasons set forth above, the Court is requested to:

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[35] *See Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1976) (ruling that Florida's jury override is constitutional, but will only be upheld if "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ").

1. Reverse the January 2, 2003 Order of the trial court denying Howell's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief.

2. Remand the cause to the trial court.

3. Order the trial court to grant Howell's 3.850 motion and set aside his judgments of conviction and sentences, including the death sentence.

4. Hold that Howell's death sentence was unconstitutional under the United States Supreme Court's decision in *Ring v. Arizona*.

5. Grant Howell a new trial and such other relief as deemed appropriate in the premises.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of appellant has been provided Hon. Carolyn Snurkowski, Senior Deputy Attorney General and Chief of the Capital Appeals Division, Florida Department of Legal Affairs, the Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050, by United States mail delivery, this _____ day of June, 2003.

CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant has been prepared using a Times New Roman 14 point font not proportionally spaced in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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Clyde M. Taylor, Jr., Esq.