IN THE SUPREME COURT OF FLORIDA

DEIDRE M. HUNT,

Appellant,

v. CASE NO. 76,692

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The record of the proceedings in the instant case is over 2000 pages long, and Hunt's statement of the case and facts is limited to two pages (IB 1-2).[1] First, appellee disagrees with several of the limited facts set forth by Hunt.[2] Further, proper resolution of the issues before this court requires a much broader factual basis than that set forth by Hunt. Due to its disagreements with the facts set forth by Hunt and the need for additional facts, appellee has set forth the following statement of the case and facts upon which it rely in responding to Hunt's claims.

On December 6, 1989, Hunt was indicted, along with Konstantinos Fotopoulos, Teja James, and Yvonne Lori Henderson, on two counts of first degree murder (Bryan Chase and Kevin Ramsey), one count af conspiracy to commit first degree murder (Lisa Fotopoulos), one count of attempted first degree murder (Lisa Fotopoulos on November 1, 1989), and one count of solicitation to commit first degree murder (James to murder Lisa

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[1] (IB __) refers to Hunt's Initial Brief and (R __) refers to the record on appeal.

[2] Hunt states that she filed at least six motions or letters to discharge counsel (Niles) and that Niles filed at least three separate motions to withdraw. As will be shown, Hunt wrote three letters, filed one motion to dismiss counsel and one motion to become co-counsel. Niles filed one motion to withdraw and a motion to reconsider it. The state disagrees that Hunt's plea was entered with express conditions. Hunt did not repudiate her agreement on the basis of newly discovered exculpatory evidence, but as will be shown, she decided that she wanted a better deal. Hunt's August 3, 1990 motion to withdraw plea was not denied but was withdrawn. Hunt's *pro se* motion to withdraw plea reflects a service date of September 3, 1990, but a filing date of January 27, 1991.

Fotopoulos) (R 1665-68). After the Office of the Public Defender was permitted to withdraw, Peter Niles was appointed by the court and entered a notice of appearance as counsel for Hunt on December 8, 1989 **(R 1669).**

Shortly after Niles began to represent Hunt, Hunt wrote a letter to Judge Foxman, the trial court judge, requesting a new lawyer, naming the person she preferred and stating that she did not feel Niles was doing anything on her behalf (R **1871).** **A** hearing was held January **26, 1990,** at which **Niles** stated that he was in David Damore's (the prosecutor) office awaiting discovery materials when he heard about Hunt's complaints,[3] and that he wanted to make a motion to withdraw (R **1216).** Niles further stated that he **had** visited Hunt at least six times and had been in contact with the prosecutor, but there was not much to discuss with Hunt at that point since he had not yet received discovery (R 1217-18). Hunt stated that Niles had visited her in jail, that she did not disagree with anything he had done, **and** that her main complaint was that Niles had not communicated enough (R 1225). Judge Foxman found that there was no legal basis for withdrawal (R **1234).**

On February 21, 1990, Niles filed a motion to sever Hunt's case from those pending against Fotopoulos and Henderson,[4] and requested that all charges pending against Hunt be tried simultaneously as was scheduled for April 30, 1990 (R **1715-16).**

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[3] An article had appeared in the local newspaper concerning Hunt's dissatisfaction, along with what Niles termed a "sleazy attack" an him personally (R 1219-20).

James had pled by this time.

The motion was heard at the case management conference held February 26, 1990 (R 1247-68). The state did not object to the severance, but also stated that if circumstances changed so would its position (R 1250). Hunt also agreed to waive speedy trial if the state would be ready for trial April 30, 1990, and the parties also agreed to attempt to pick a jury in Volusia County (R 1259). Niles discussed all of this with Hunt on the record, and also discussed the reasons for a mental examination (R 1257, 1261-65). Judge Foxman granted the motion (R 1265, 1717).

Dr. Robert Davis, M.D. and Dr. Umesh Mhatre, M.D. were appointed to examine Hunt (R 1742-44, 1749-51). Niles filed a motion for the appointment of an expert to assist the defense (R 1731-34). Dr. Cliff Levin, Ph.D. was appointed (R 1786-88).

On March 12, 1990, the state filed a three count information against Hunt and Fotopoulos, charging them with one count of armed burglary, one count of attempted first degree murder (Lisa Fotopoulos on November 4, 1989), and one count of solicitation to commit first degree murder (Chase to murder Lisa Fotopoulos) (R 1735-36). Pursuant to motion by the state, all charges against Hunt were consolidated on March 21, 1999 (R 1764). The parties stated they were ready for the April 30th trial (R 1315).

Hunt wrote two more letters to Judge Foxman, on March 26, 1990 and April 12, 1990, again complaining about Niles (R 1873-76). Niles filed a motion to withdraw on April 19, 1990, and a hearing was held April 20, 1990 (R 1321-70). Niles outlined all of the disagreements he had had with Hunt, concluding with the

fact that she had refused to see him or the appointed expert when they went to the jail the previous weekend (R 1322-30). Hunt was still refusing to speak with or look at Niles at the hearing (R 1330). Niles stated that he had been to see Hunt 22 times in the four and one-half months he had represented her, including five visits in the past two weeks; that the case had been put on the fast track since Hunt had refused at all stages to a continuance; that he could do no preparation without her cooperation; that he could think of no way to suppress the videotape of the Ramsey murder so would need her to take the stand; and would need mental health evidence to rebut the videotape (R 1331-34).

Hunt stated that she wanted Niles to ask for contempt charges against Damore and Lieutenant Evans, on the basis of quotes that had appeared in a New Hampshire paper, and that she did not like the way Niles had treated her mother when she went to see him (R 1336-39). Hunt complained that Niles was a liar, since he had told her that the state did not need her, and she wanted the state to need her (R 1340). Hunt stated that she had been to the law library and found two laws to throw her confession out, that the depositions of Henderson and James were too short, and that she had sought advice from four lawyers and two prosecutors in different districts, and a prosecutor had told her to get away from Niles (R 1341-43). Hunt apparently had also found something in the law library to throw the videotape out (R 1344). Hunt stated that duress could be used to show temporary insanity, but Niles had told her they could not use that because she was not insane (R 1345).

Niles stated that he was ready to perform or withdraw, and had filed the motion because of the conflict, hostility, and lack of cooperation (R 1351). Niles stated that he did not move for contempt charges because he was not disposed to further damage Hunt's case by putting in front of the local media something from New Hampshire that they did not have (R 1352). Niles also stated that he considered attacks on the videotape for hours and hours, and explored duress and domination and got an expert in that area (R 1353). Damore noted for the record that Hunt's perception that she was needed for the Fotopoulos trial was very much mistaken (R 1359). Judge Foxman told Hunt that she could represent herself, and at first she said she wanted to, but later stated that she did not want to represent herself but she did not want to be represented by a liar (R 1361-65). The motion was denied, and Judge Foxman advised Hunt that she had better start cooperating (R 1369).

Niles met with Hunt over the weekend and she also saw Dr. Levin, and on April 24, 1990, Niles asked the court to reconsider his motion to withdraw (R 1372-73, 1815-16). Niles recapped all prior differences, and stated that while he thought all decisions had been made, Hunt demanded a complete change in the trial strategy (R 1374-76). Hunt wanted Niles to move for a continuance, file a notice of temporary insanity, move for a change of venue, and move to suppress all statements and the videotape, which Niles did (R 1380, 1808-14).

Hunt stated that she had not demanded anything and that if Niles wanted to withdraw he could withdraw (R 1386). She stated

that Judge Foxman had already said Niles could not withdraw and that was fine with her and she was going to cooperate (R 1386). Judge Foxman stated that the relationship between Niles and Hunt probably was not salvageable, and that if it was Hunt's desire he would probably appoint her another attorney (R 1389, 1401). Hunt stated that she understood a lot after her discussion with Niles the previous Saturday, and she wanted him to continue to represent her (R 1400-01).

Judge Foxman noted that he was bending over backwards for Hunt, and she stated she was ready to *go* forward with Niles and agreed to withdrawing the motions he had filed (the motion to suppress was not withdrawn) (R 1405-10). The motion to withdraw was orally denied, and on May 2, 1990 Judge Foxman entered an order on the same, finding that Niles was proceeding diligently and competently on behalf of his client, and that Hunt had advised the court that she wanted to be represented by Niles and did not wish the court to appoint new counsel (R 1818-19). The order also stated that all pretrial motions would be heard May 4 and trial would begin May 7, 1990 (R 1819).

A hearing was held on the motion to suppress May 4, 1990 (R 1415-65). Niles stated that he needed the confession for trial strategy, and that Hunt had no standing to challenge the videotape (R 1416-17). Damore stated that the state had numerous statements from Hunt, and that there was no legal basis to suppress the videotape, since Hunt had no standing and the owner of the property from which it was seized had consented to the search (R 1421, 1427).

On May 7, 1990, the state announced it was ready for trial, and that Hunt wished to withdraw her previously entered plea of not guilty and enter a plea of guilty (R 1467-68). Niles stated that Hunt did want to enter a guilty plea, and that she wanted to testify at the Fotopoulos trial (R 1469). Niles stated it was Hunt's intent to throw herself on the mercy of the court and to testify truthfully and cooperate in the Fotopoulos trial (R 1469). Both parties agreed to waive a penalty phase jury and to leave the sentencing entirely within the sound discretion of the trial court (R 1470). The parties agreed that any information coming to light during the Fotopoulos trial could be considered in Hunt's sentencing (R 1470). Niles stated that it had been explained to Hunt that the court would have sole discretion whether or not to impose the death penalty, and that it was still a possibility that, notwithstanding the plea and future cooperation, the death penalty was still a possibility (R 1471). The parties stipulated to the admission of the reports of Drs. Davis and Mhatre, which indicated that Hunt was competent to proceed (R 1473-74).

Damore stated that the state was in no way waiving its intent to seek the death penalty for Hunt (R 1474). Damore stated there had been no back room negotiations and no understanding that the state would not seek the death penalty even if Hunt cooperated fully (R 1475). Damore further stated that the state had not even agreed that it would call Hunt as a witness at the Fotopoulos trial, and that the defense had never been advised that the state did not intend to seek the death

penalty (R 1476). Niles noted that in the event that Fotopoulos pled or the state did not utilize Hunt's testimony, the state had agreed to make known to the court her offer to cooperate (R 1477). Niles stated that he had discussed the plea at length with Hunt, and that they felt it was a best interest plea in view of the circumstances, including a videotape of the one murder and the offer of testimony from two indicted coconspirators (R 1478-79).

Judge Foxman set forth his Understanding of the arrangement to be that there was no deal as to final disposition of the case, no back room deals and nothing hidden, and stated that he did not know what his ultimate decision as to sentence would be (R 1479). Damore agreed that was the state's understanding, and Niles stated "absolutely" (R 1479). Judge Foxman outlined the arrangement for Hunt as follows: she would plead guilty to all counts in the indictment and information; the sentencing would be postponed until after the Fotopoulos matter was disposed of; there would be a sentencing phase and the state would seek the death penalty whether or not she cooperated in the Fotopoulos matter; both parties waived an advisory recommendation as to sentence, and it would be left up to the judge whether to sentence her to life imprisonment or the death penalty (R 1483). Hunt agreed that was her understanding of what was happening (R 1483). Judge Foxman told Hunt that she did not have to do any of that if she did nat want to and that she could go to trial (R 1484) Hunt stated she understood and did not have any questions (R 1484).

Judge Foxman next explained what Hunt was giving up by entering a guilty plea, the possible penalties, and again stated that the state was going to seek the death penalty no matter what she did (R **1485-87).** Judge Foxman stated that the ultimate sentencing decision was up to him, he did not have any idea what he was going to do, he had no predisposition as to either life or death, that he did not want to mislead Hunt, that he had imposed a number of death sentences in the past, that there were no back room deals with him, and that he was going to watch and listen carefully and do what he thought was appropriate (R 1487-88). As Judge Foxman stated, "Bottom line is no deals"; he would be the one making the final decision (R 1488). Judge Foxman further informed Hunt that if she had an advisory jury and it recommended life he would be pretty much bound by that, and Hunt stated she understood (R **1489).** Hunt had no questions, agreed that she had fully discussed it with Niles, that nobody was forcing her to do it, and that this was the way she was choosing to do it **(R 1489).**

Judge Foxman asked, "Any agreements, any side agreements here that are not on the record?" and Hunt replied no (R 1489). Hunt acknowledged that her relationship with Niles had gotten better and that she was satisfied with his representation (R 1493). Again Judge Foxman stated that the ultimate question of sentence was not being resolved there, that the state would still seek the death penalty, and that he did not know what he would do (R **1494).** Hunt acknowledged she understood, and that that was how she wanted to proceed (R **1494).** The plea was accepted (R **1495).**

On July 24, 1990, the state filed a motion to set sentencing for Hunt. Hunt had been set for deposition in the Fotopoulos matter that morning, and refused to appear or cooperate, even after the state offered her use immunity (R 1499-1500, 1527). Niles stated that Hunt had requested that he move to withdraw her guilty plea, based on several grounds (R 1501). Niles first stated that since the time Hunt had entered her plea, the state had listed as a supplemental witness an anthropologist which could lead to the discovery of new evidence that the medical examiner who had performed the autopsy on Ramsey had made a mistake (R 1503-04). The defense believed that the new evidence would demonstrate that Ramsey had been shot with an AK-47 after the shots fired by Hunt, and this would demonstrate to the jury that Fotopoulos was there and armed with an AK-47 which he had pointed at Hunt and that she was in fear for her life when she shot Ramsey (R 1504-05). Niles also noted that perhaps Hunt was out of touch with reality and incapable of making her own decisions, and that maybe it was his dominant personality which had persuaded her to plead, even though Niles still believed that was the best course of action (R 1509-11). Hunt agreed that she wanted to withdraw her plea, that she had refused to cooperate in the Fotopoulos matter, and that she was feeling fine (R 1511).

Damore pointed out that Hunt had since acknowledged that there was no AK-47 pointed at her when she shot Ramsey, and this was never an issue, and that there was no new evidence that Hunt did not know what she was doing when she entered her plea (R 1517). Damore also noted that this had not been a plea

conditioned upon Hunt's cooperation and that there had been no negotiations (R 1525-26). Judge Foxman noted that the Fotopoulos trial was set to begin in roughly ten days, and that all parties had been proceeding on the assumption that Hunt would be testifying (R 1528). Judge Foxman stated that Hunt knew what she was doing when she entered her plea, that she asked the court to accept the plea that would enable her to assist the state so she would be able to present additional mitigation on her own behalf at sentencing, that she did so freely, knowingly, intelligently and voluntarily, and that she now wanted to unilaterally repudiate it (R 1529). Judge Foxman found that the so-called newly discovered evidence did not change Hunt's culpability and was not a valid basis far withdrawing the plea, and that he would not allow Hunt to stand up and change her mind ten days before the codefendant's trial (R 1530). Judge Foxman denied the motion to withdraw and set sentencing for October 29, 1990, stating that if Hunt chooses not to testify that will be her choice (R 1530, 1836).

On August 3, 1990, Niles filed on behalf of Hunt a motion to withdraw plea and set for trial (R 1838-39). As grounds for withdrawal of the plea, the motion states that there have been new developments in the case in the nature of newly discovered evidence that the defendant believes would support her position and provide her with defenses (R 1838). The motion was heard August 10, 1990 (R 1533-94). Niles first advised the court that Hunt had advised him that she was extremely ill and unable to proceed (R 1534). Hunt had further advised Niles that because of

advice she received on her awn research she wanted to make additions ok deletions and she needed time to do so and was not ready to proceed on her motion to withdraw (R 1534-35). Hunt wanted the proceedings continued and be allowed to reinstate her motion to withdraw at a later time (R 1535). Damore noted that the Fotopoulos trial was scheduled to begin September 4, 1990, and the state would be prejudiced if Hunt was not tried with Fotopoulos (R 1536). Judge Foxman stated unless Hunt was too ill he would have to hear the motion then, as the Fotopoulos trial was quickly approaching, and the state had requested a joinder if the motion to withdraw was granted (R 1536). He requested that Niles discuss the matter with Hunt, and if there was good reason to reconsider Hunt withdrawing her plea he needed to know then (R 1536-37).

Niles reported back that Hunt was too ill to proceed, did not want the motion heard, and would be unable to proceed to make an intelligent decision to withdraw her plea (R 1537-38). Judge Foxman noted that he had had no report that Hunt was ill, and that she looked fine to him (R 1539). Hunt stated that she had been attempting since six o'clock that morning to contact her attorney, and was in no state of mind to be making decisions (R 1539-40). Judge Foxman received information from the jail facility that Hunt was treated the previous evening for a mild cold and nothing else, and noted that from his visual observation it appeared Hunt could go forward, and instructed Niles that if he or Hunt wanted to argue the motion to do it then (R 1543). Judge Foxman denied Niles' oral motion for continuance, and told

him to argue the motion or withdraw it (R 1544). Niles asked Hunt if she wanted to withdraw the motion, and she replied that if that was what the judge was going to force her to do she would (R 1545). Judge Foxman found that the motion was withdrawn (R 1545).

The next motion heard was a motion by Fotopoulos' counsel to exclude Hunt as a witness at that trial (R 1550). Carmen Corrente, Fotopoulos' attorney, stated that he needed to know whether or not Hunt was going to testify, as it would affect how he approached his case and his strategy (R 1551). Niles stated that Hunt's position was that she was still willing to testify under certain conditions she had given Damore (R 1552, 1554). Hunt advised Niles that she did not want to place those conditions on the record, but if Damore wanted to set forth those conditions, possibly it would be better if it was done at a bench conference (R 1554). Judge Foxman stated he wanted it out in the open, and Damore recalled Hunt's conditions as follows:

> My recollection of her request or demands, which she advised were non-negotiable; that she be allowed to withdraw her plea and further, subsequent to her testifying in the Fotopoulos case that she would plead to an unspecified lesser offense of one of the charges; that she would receive time served and be released from jail; that she would receive a withholding of adjudication, without any adjudication of the guilt and the State move the court to seal her records. She sought the witness protection plan and also her name would be changed.

Damore advised that none of those conditions would be met by the state, and that the state had never negotiated with Hunt for her testimony (R 1556).

Niles stated that Hunt said those were indeed her demands based upon legal advice that she had been given (R **1556-57).** Niles assured **the** court that he had not advised Hunt in this matter (R **1557).** Judge Foxman asked Hunt if she had received legal advice other than from Niles, and she replied that **she** had, but was not at liberty to say from whom she had received such advice (R 1557). Hunt stated that she had a Fifth Amendment right and would not speak (R 1558). Judge Foxman indicated that he was inclined to grant the motion to exclude Hunt, and the state responded that it was premature at that point (R **1558-62).** Judge Foxman indicated he would take the matter under advisement (R 1562-63).

Next the state renewed its motion to set Hunt for sentencing (R 1569). After argument from all parties, Judge Foxman set Hunt's sentencing for September 10, **1990**, and moved the Fotopoulos trial to October **1**, 1990 (R **1589).**

On August 20, 1990, Judge Foxman received from Hunt a *pro se* motion to dismiss insufficient counsel (R 1884). **A** hearing was held August **31, 1990** (R **1595-1639).** Hunt first made a motion to become cocounsel on her own behalf, then addressed her motion to dismiss Niles (R 1596). Hunt first stated that Niles had told her that Judge Foxman had already made **up** his mind not to appoint her new counsel, but she did not know if that was true because Niles had manipulated, coerced, and lied to her in the past (R **1597).** She stated **that** she originally had an open mind about Niles, but as time went on she began to realize he was not acting in her best interest (R 1597).

Hunt proceeded to show the court a "major piece of evidence" that revealed her lawyer's incompetence (R 1597). This consisted of Ramsey's dental report, which apparently had something to do with a picture of Ramsey's skull, which apparently had something to do with an exit wound (R 1598). Hunt's next example of Niles' alleged incompetence was that the first verbal motion made by Niles to change her plea was made without her consent (even though at that hearing she had agreed she wanted to withdraw her plea) (R 1598). The third example, which Hunt found shocking, was that Niles had filed a written motion to change her plea (R 1599). It was actually Hunt's desire that Niles merely postpone the hearing so she could receive mare facts upon which to base her motion (R 1600). Hunt believed that if Niles had not filed that written motion she would not be facing sentencing on September 4 (R 1600).

Hunt next stated that Niles refused to motion a Writ of Error to the Fifth District County Court (R 1600). Hunt believed this showed a procedural default that even a layman could see (R 1601). Hunt's fifth example was that on June 19th, she had motioned the court for full discovery, and a month later she found out that the state was ignoring her motion (R 1601). The sixth example was that for sixty percent of the hearings she had not received 24 hour notice from Niles, and this affected her making vital decisions (R 1601). Example seven was that after the plea had been entered Niles had let Damore and state attorney investigator Joe Gallagher see her without him being present (R 1602).

The next example had something to do with the presence of the odontoid process between the first and second cervical vertebrae and how it is humanly impossible without trauma for any vertebrae in the spinal column to be disarticulated, and Niles failure to pursue this questionable evidence (R **1603-04).** Hunt next pointed out "obvious facts regarding the projectiles" recovered from Ramsey's body, noting that there was an "inconsistent, highly questionable reference to the x-rays of Mark Kevin Ramsey," and that this shows her attorney failed to pursue an avenue of defense (R 1605-06). Example nine had something to do with decomposition of the body, bullet wounds, and bullet holes in Ramsey's shirt (R 1606). Niles next alleged deficiency concerned Ramsey's cause of death as was revealed by Dr. Botting in his deposition (R **1607-11).**

Niles noted several things Hunt had requested him to do, such as filing a motion in the Florida Supreme Court alleging that her Sixteenth Amendment rights had been violated (R **1613).** Niles **stated** that between twenty **and** thirty discovery depositions had been taken, with attorneys for all of the defendants present, and Niles had assumed the role of lead counsel, though all of the other attorneys had an opportunity to ask questions as well (R **1614-15).** Niles did **not** know the significance of the dental report (R **1615).** Niles noted that while Hunt complained that he did not point out to the medical examiner that there could have been three bullet wounds to the chest, it was quite apparent from the videotape **(R 1615-16).** Niles did **not** understand what Hunt was referring to in terms of a missing vertebra, but noted that

Ramsey's body had been left in the woods about a month, the head was found removed from the body and separated from the lower mandible, and while in a healthy person a vertebra could not become disjointed except for surgery, where a dead body has been untied and left in an awkward position in the woods for over a month there are a variety of reasons for it, including animal activity (R 1616).

Niles further stated that he was specifically instructed by Hunt to move to withdraw her plea (R 1617). As to his letting Damore and Gallagher see Hunt without him being present, he noted that she had agreed to fully cooperate and to a point had done so with him being present, and further nated that even prior to that Hunt had given numerous statements ta the police, Damore, and the media, and that Damore had only a few questions to ask her so he had no objection since they had seen her before (R 1618). Niles stated he had never filed motions without Hunt's consent (R 1618).

As to discovery, Niles stated that Bunt had been given all depositions, all statements, and all things he physically had in his possession; he noted that Hunt had insisted that he ask the court to enter an order requiring the people from the crime lab take the physical evidence to the jail so she could observe it (R 1621). As to the fact that an additional exit wound had been found in Ramsey's skull, Niles noted that it could support Hunt's story as to threats and intimidation in terms of mitigation, but in light of the videotape showing Hunt shooting Ramsey three times in the chest, walking up to him and grabbing him by the

hair and firing another shot into his head, as well as all the statements Hunt had given, the case would be tried against his recommendation (R 1624).

Judge Foxman observed that Hunt had told him twice that she did not want to represent herself (R 1630), and that this was the fourth hearing on Hunt's motion to dismiss Niles (R 1634). He reviewed Hunt's previous letters as well as her testimony that she wanted to keep Niles (R 1634-37). Judge Foxman then stated that he could not find a valid complaint against Niles nor were there grounds for removing him (R 1637). He observed that Hunt had not only changed her mind on the issue of counsel, but also on other matters, such as she wanted a trial then on the eve of trial she decided to plead, she agreed to cooperate with the state and then decided not to (R 1637-38). The motion to remove Niles was denied (R 1638, 1885).

Hunt's sentencing began September 4, 1990. Hunt had filed a motion to postpone or continue' and a motion to become cocounsel (R 2-3). Judge Foxman first instructed Hunt not to file motions since she was represented by counsel, then denied the motion for continuance (R 3). Judge Foxman denied the motion for cocounsel status, but stated that Hunt should fully participate (R 7). He instructed Niles to fully discuss each witness' testimony with Hunt and determine if there was anything else she wanted to ask (R 7). Niles waived reliance on the mitigating factor of no significant prior criminal history (R

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[5] Hunt's basis for the motion was that she had heard there were pending Florida Bar complaints against the prosecutor and her attorney.

22). Since Hunt had entered a plea, the state presented evidence and witnesses to testify as to the facts surrounding the two murders.

The videotape begins and the viewer sees a beam of light illuminating Mark Kevin Ramsey, who is tied to a tree. The camera pans over, and Hunt tells the cameraman, Kosta Fotopoulos, not to shine "that shit" in her eyes. Hunt asks Fotopoulos if he is ready. She turns and fires three shots into Ramsey's chest. Ramsey moans what appears to be "Oh God". Hunt walks up to his slumped body, grabs his hair, lifts his head and fires another shot into his head. The videotape ends (State's Exhibit #9).

Hunt's friend Lori Henderson testified that Hunt had told her Ramsey was going to be killed (R 454). Fotopoulos wanted to know if Hunt could kill somebody, because if she could, she would be able to take responsibility for getting Fotopoulos' wife Lisa killed (R 454-55). Ramsey was selected because he was "expendable" (R 457, 583). Hunt was thinking about shooting Ramsey in the car because he was whining about getting something to eat (R 586).

On a Thursday night late in October of 1989, Hunt approached Matthew Chumbly (Mike Cox) and offered him $10,000 to kill somebody, maybe a woman (R 179-82). Hunt told him the plan, including Fotopoulos' involvement, and Cox figured out it was supposed to occur at Joyland (Lisa's place of business) (R 184). Cox agreed to it, but was arrested the next day and spent the next week in jail (R 191). Hunt also asked Cox if he would like to see her videotape (R 186).

Newman Taylor (J.R.) had been Hunt's boyfriend and had a relationship with her on and off until the time of her arrest (R 357). J.R. continued to see Hunt while she was having an affair with Fotopoulos, even though Fotopoulos had threatened him (R 361-62). Hunt told J.R. that it feels good to grab someone by the hair and blow their brains out (R 364). Hunt first offered J.R. $100,000 to kill Lisa, then $10,000 (R 380-81). J.R. saw no evidence of torture or abuse on Hunt's body (R 366).

Hunt next approached James to kill Lisa, and the original plan was to *go* to Joyland, scare her with a toy Uzi and stab her (R 588-90). This plan was called off, and the next plan was to stab Lisa at a bar on Halloween night (R 590). After this plan was called off, a gun was obtained and James was to go to Joyland and shoot Lisa, and make it look like a robbery (R 594-96). James went to Lisa's office with the gun, but she was able to escape (R 596-97).

Lisa had to be killed that day because James had failed, so Hunt went to Bryan Chase's home to look for S.R. (R 463). J.R. was not there, but Chase agreed to kill Lisa for $10,000 (R 464). Chase was to follow Lisa home from Joyland, hit her car from behind, get out and act like he was going to give Lisa his insurance card or something, then shoot her (R 462-63). Fotopoulos, who would have been driving the car in front of Lisa's car, would have kept driving and then returned and shot Chase (R 463). That night Chase showed up at Krystal's, a restaurant where Hunt hung out, and told Hunt that he thought Fotopoulos was supposed to drive off, and he was waiting for

Fotopoulos to drive off and Lisa was able to make it all the way home (R 464).

Hunt and Chase called Fotopoulos, and he instructed Chase to come in a certain window at the house (R 465). Chase was unable to break the window and returned to Krystal's (R 465). Hunt decided she would have to get Chase some type of glass cutter, so she gave him an X acto knife (R 469). The next night Chase tried to cut the window with the knife, but was unable to and returned to Krystal's (R 469). Hunt was starting to get upset because Chase was supposed to be getting killed and he kept showing back up again (R 469).

The next night, which would have been Friday, Chase went to the house with a glass cutter Hunt had given him, and Hunt went to Krystal's (R 470). It got to be early in the morning and Chase did not show up like he had usually done, so Hunt and Henderson drove by the house, and there were police cars in the yard (R 471). Hunt and Henderson went over to James' apartment, and Hunt walked in laughing, saying "the bitch is dead" (R 600-01). They found out the next morning that Lisa was not dead when Fotopoulos called Hunt's beeper (R 486).

On November 4, 1989, Lieutenant Evans of the Daytona Beach Police Department was called to the Paspalakis home, which is where Fotopoulos and his wife Lisa lived (R 67). Evans saw Chase's body on the floor on the far side of the bed where there was no exit (the bedroom was on the third floor) (R 86). It was determined that the point of entry had been through a broken window in the dining room, and nothing else appeared to be

disturbed (R 85). Chase was found with two glass cutters and a mini-mag flashlight, and his gun appeared to be jammed (R 131).

That evening, a white male called the 911 number, and asked who he could speak to regarding a death (R 90). He related that he had been offered $10,000 to do the same thing (R 91). The 911 system reveals the location of the caller, and Evans and Greg Smith went to that location and came in contact with J.R., who gave a statement (R 92). The next day Evans went to Hunt's, and found her to be a cocky, confident individual (R 98). Hunt first denied any knowledge, but was apparently reading Smith's notes upside down and stated that she knew Bryan was dead (R 98). Henderson, who was there sleeping, joined the interview but Hunt would not let her answer any questions (R 100). The officers asked if they could look around and Hunt agreed to one officer whom she would accompany (R 100). Hunt said James was in New York, and denied having any relationship with Fotopoulos other than employer-employee (R 102). Henderson said she had more information she would give at the police station (R 104).

On November 7, 1989, Cox was arrested for prastitution, and indicated that he had information about Fotopoulos (R 107). He stated that he too had been offered $10,000 by Hunt to kill somebody, but he had been unable to do it because he got arrested (R 107). Cox verified essentially the same factors J.R. had given (R 109). Around 7:00 p.m., Henderson was approached by Evans as she accompanied Hunt to return a rental vehicle (R 112). Henderson was asked to *go* to the station, Hunt grabbed her and forbid her to *go,* but Henderson said she would go (R 112). Hunt drove herself to the station (R 113).

Hunt stated that she bet they did not know about the boy missing from the boardwalk, and also told where James was (R 114). James was taken into custody on attempted armed robbery, but did not want to cooperate until he found out how much the police knew (R 115). James was told that they knew about the boy on the boardwalk, and he gave them Ramsey's name and agreed to tell them what he knew (R 116). He discussed his dealings with Hunt and the attempted murder of Lisa (R 116). James' scenario about killing Lisa was almost identical to those given by J.R. and Cox (R 117).

Hunt requested that someone from the State Attorney's Office be there before she would be interviewed (R 120). Hunt gave a statement that lasted approximately two hours (State's Exhibit 10). Hunt laid out all the details of how the plans had been worked out (R 120). She told about the Ramsey murder and how it had been videotaped (R 120). She told about the Chase homicide, and how she had attempted to get J.R., Cox, and James to kill Lisa (R 121-22). Chase became involved because he struck Hunt as an individual who would do anything for money (R 122). The Paspalakis home was searched November 22, 1989, and the videotape of the Ramsey murder was found in the garage (R 123-24).

Joe Gallagher became involved when Hunt was giving her original statement (R 238). Hunt was in control and relaxed, and when Damore introduced himself she said she wanted immunity (R 239-40). Gallagher spoke with Hunt again in June, 1990, regarding inconsistencies in her statements, and she admitted

that Fotopoulos did not have an AK-47 pointed at her when she shot Ramsey, but had lied because the truth could prove premeditation (R 325).

Hunt presented the testimony of ten witnesses at the penalty phase: Dr. Cliff Levin, a psychologist, her aunt (mother's sister) Emily Johnson and her husband Howard Johnson and their daughter Kathryn Johnson; her aunt (mother's sister) Shirley Miller and her husband Allen Miller; her aunt (mother's sister) Susan Carlin; her mother Carol Hunt; and friends Carrie Almeida and Susan Winslow. In rebuttal the state presented State Attorney's Investigators Robert Wheeler and Joe Gallagher; Holly Ayscue; Officer Michael Gilman; and psychiatrists Robert Davis and Umesh Mhatre.

Dr. Levin interviewed Hunt for four hours and conducted a mental status exam, reviewed her social history and background, and administered psychological tests (R 659-70). He reviewed police reports, depositions, the reports done by Drs. Davis and Mhatre, and the videotapes of the Ramsey murder and Hunt's statement (R 670). He also had two interviews with Hunt's mother (R 671). Dr. Levin testified that Hunt's mother had mood swings and hit Hunt with inconsistency, and went from cautious and demanding to very permissive with Hunt (R 673-74). Hunt abused alcohol and drugs and got into abusive relationships with men; there was a lack of security in the home and she wanted a father figure so she would attach herself to males without much knowledge of them (R 674-75). Hunt suffered physical and emotional abuse from her mother and from men (R 676).

Dr. Levin further testified that Fotopoulos had charge over and intimidated Hunt, as evidenced by his hitting and burning and cutting her; she had a fear of as well a strong attachment to him (R 677-78). Hunt's MMPI revealed she is a severely emotionally damaged individual, and Dr. Levin believes she has a borderline personality disorder (R 678-79). Hunt has sociopathic tendencies, but there is no evidence of psychosis or psychotic disorders and no organic brain impairment or brain damage (R 679-80, 867, 689). Hunt is susceptible to manipulation, as she tries to get a complete picture of herself through the identity of others (R 681). Hunt has the ability to appreciate her actions in terms of mental and intellectual ability, but ignores it because of her underlying personality problem (R 690).

Dr. Levin did not believe everything Hunt said because some of those things were not borne out by other witnesses (R 695). Dr. Levin found that Hunt was not acting under an extreme mental or emotional disturbance at the time of either murder, but he did believe she was acting under the substantial domination of another (R 700-01). However, this dominance theory was severely compromised after Dr. Levin learned about a previous shooting in which Hunt had been involved (R 703, 2014-15). Dr. Levin found no other evidence that Hunt had been beaten or threatened by Fotopoulos (R 719).

Emily Johnson, Carol Hunt's oldest sister, testified that Carol had been unstable her entire life and Hunt has a history of mental problems and abuse (R 772). Carol would reject Hunt and Hunt's father would not acknowledge her (R 773-75). Howard

Johnson also testified that Carol had a lot of problems, Hunt had an unstable environment with rejection from both mother and father, and that Hunt was easily manipulated by men (R 789, 793-94). However, Hunt had lived with the Johnsons and she refused to abide by their rules, they had no control over her, and they could not manipulate her (R 803-04). Kathryn Johnson testified that Hunt was submissive to men, gravitated toward people who would dominate her, and was looking for someone who would take care of her and would do whatever they wanted (R 904, 909). Kathryn never saw Carol strike Hunt (R 917).

Carrie Almeida has known Hunt about five years and found her impressionable and easily manipulated and controlled by others (R 805-06). Hunt was physically, emotionally, and sexually abused by men (R 807). Susan Winslow has known Hunt about a year and one-half, and testified that Hunt's previous boyfriend beat Hunt (R 823). Hunt would say things to him to hurt him (R 826).

Shirley Miller described the dysfunctional home Carol grew up in, and stated that Carol was very erratic with her children (R 829, 833). Ms. Miller never saw Hunt physically abused but stated that Hunt was rejected by her mother and father (R 833). Carol tried to inflict her will and judgement on Hunt and Hunt rejected it all the way (R 838-39). The Hunts lived with the Millers for about a year and Carol could not make Hunt do what she wanted her to do (R 842). Allen Miller testified that Hunt is easily manipulated (R 857).

Susan Carlin testified that Hunt's mother slapped Hunt and they would have to be separated (R 869). Hunt was totally rejected by her father (R 871). Carol Hunt testified that she was abusive to Hunt (R 934). She took Hunt to counseling but when it got to the point that it was coming back on her she pulled her out (R 935). Hunt could not do anything right in Carol's eyes and everything she did was insignificant; Carol's son was smart and Hunt was nothing (R 938).

Michael Gilman, an officer with the Manchester, New Hampshire Police Department, met Hunt in 1986 and encountered her numerous times on Elm Street, which was the local strip (R 1018-20). He found Hunt to be very manipulative of both older and younger men (R 1020). He stated that Hunt knew her way around and was the leader of the rough kids (R 1022).

Dr. Davis testified that Hunt is a sociopath and has no mind disease, no extreme mental or emotional disturbance, and could not be unduly coerced into anything (R 1038, 1040). Hunt knew exactly what she was doing and knew it was wrong; she seemed determined to carry out the plot against Lisa despite several setbacks, and was driven by money and power (R 1043). Dr. Davis found no borderline personality defect (R 1061).

Dr. Mhatre testified that Hunt was under no duress or stress or domination during the Ramsey shooting and appreciated the criminality of her conduct (R 1076). Dr. Mhatre would disagree that Hunt has a borderline personality disorder (R 1083). Hunt did not impress Dr. Mhatre as an individual who is easily swayed, and he found her to be anything but a quiet,

passive individual (R 1078, 1103). Dr. Mhatre stated that the videotape of the Ramsey murder reflects no dominance or anxiety on Hunt's part (R 1104). He also noted that within two days Hunt was singing her song, and he would expect her to take a lot longer to overcome her fear of Fotopoulos (R 1105-06).

On September 13, 1990, Judge Foxman sentenced Hunt to death for the murders of Mark Kevin Ramsey and Bryan Chase (R 1899-1912). No statutory mitigating factors were found in either case. Hunt had waived reliance on no significant criminal history (R 1901, 1908). While there was some minimal evidence of emotional disturbance, the court concluded that Hunt was not acting under *extreme* mental or emotional disturbance (R 1901, 1908). The court found that neither victim was a participant in the defendant's conduct or consented to the act, and found that Hunt had not argued or established that her participation was relatively minor (R 1902, 1908-09). The trial court rejected Hunt's claim that she was acting under extreme duress or the substantial domination of Fotopoulos based on the expert's testimony, other testimony, and the videotape of the Ramsey murder (R 1902-03, 1909-10).

As to the Ramsey murder, the court found four aggravating factors: prior violent felony conviction; for the purpose of avoiding or preventing a lawful arrest; pecuniary gain; and cold, calculated and premeditated (R 1900-01). In mitigation, the court found that Hunt was physically and emotionally abused as a child and that Hunt is somewhat unstable and definitely had an unstable childhood. The court noted that the defense had asked

it to consider Hunt's plea, confession and cooperation in mitigation, but found that it was of little weight in view of the overwhelming evidence and Hunt's motivation to put herself in a more advantageous position (R 1904). The trial court found that two of the aggravating factors, cold, calculated and premeditated and prior violent felony conviction, were enough to outweigh the mitigation, and when added to the other aggravating factors the mitigating factors were overwhelmed (R 1904).

As to the Chase murder, the trial court found five aggravating factors: prior violent felony conviction; for the purpose of avoiding or preventing a lawful arrest; pecuniary gain; cold, calculated and premeditated; and during the commission of a burglary (R 1907-08). The same mitigation as in the Ramsey case was found. Also as in the Ramsey murder, the trial court found that the two factors of cold, calculated and premeditated and prior violent felony were sufficient to outweigh the mitigation and when added to the other aggravating factors the mitigation was overwhelmed (R 1911).

SUMMARY OF ARGUMENTS

POINT 1: Hunt's claim that the trial court erred in not applying contract principles to her plea agreement is not cognizable on direct appeal from a guilty plea, particularly since the trial court was never asked to apply such principles. The entry and withdrawal of guilty pleas is governed by the Florida Rules of Criminal Procedure and not the Uniform Commercial Code, and it would serve no valid purpose and is not constitutionally required to revisit an accepted plea, determine

whether a contract was formed, and permit the parties to raise contract defenses. The state did not bargain for Hunt's guilty plea; rather, it was her intention to throw herself on the mercy of the court and cooperate and testify truthfully in the Fotopoulos matter. Hunt's change of mind is not a sufficient basis to invalidate her plea, which was entered into freely and voluntarily with full knowledge of the consequences.

POINT 2: None of the grounds presented in the instant appeal were presented to the trial court so it certainly cannot be said that the trial court abused its discretion in refusing to permit Hunt to withdraw her guilty plea on these grounds. The record demonstrates that Hunt's plea was freely and voluntarily entered, it was not induced by promises, threats or coercion, and Hunt was well aware of the consequences. There is nothing in the record to demonstrate mental weakness, mistake, surprise, misapprehension, misunderstanding, fear, or the promise of a life sentence.

POINT 3: The trial court properly denied Hunt's motions to discharge counsel. The record refutes Hunt's allegations that she wanted to represent herself, and demonstrates that the trial court made all of the requisite inquiries and findings and in fact went beyond what is constitutionally required.

POINT 4: The record contains competent, substantial evidence to support the trial court's rejection of statutory mitigating circumstances. Hunt has pointed to nothing in the record that evidences a failure to consider any evidence in mitigation.

POINT 5: The record contains an express waiver of an advisory jury by Hunt, an affirmation of it by her attorney, and a later acknowledgment of it by the trial court. Hunt could have at any time instructed her attorney or the trial court of her desire to have a jury impaneled for the sentencing portion of her case, and having failed to do so she should not be heard to complain on appeal.

POINT 6: Hunt was represented by counsel when she filed her *pro se* motion to continue sentencing, and since counsel did not move to adopt it, it should be treated as a nullity. Even if it could be considered a proper pleading, the grounds alleged in the motion are different from those asserted on appeal, so the claim is not cognizable and Hunt has not even remotely demonstrated that a continuance should have been granted on such grounds.

POINT 1

HUNT'S CONTRACT DEFENSES ARE NOT COGNIZABLE, ARE INAPPLICABLE, AND WITHOUT MERIT.

Hunt claims that the trial court erred in not applying contract principles to her plea agreement. This claim is not cognizable, particularly in light of the fact that the trial court was never asked to apply the now-argued principles, so certainly cannot be faulted for failing to do so. Direct appeal is not a substitute for a motion to withdraw guilty plea and only issues occurring contemporaneously with entry of the plea may be the subject of an appeal, specifically, subject matter jurisdiction, illegality of sentence, the failure of the government ta abide by the plea agreement, and the voluntary and

intelligent character of the plea. *Robinson v. State,* 373 So.2d 898, 902 (Fla. 1979). While this court has also held that pursuant to section 921.141(4), Florida Statutes, a defendant who pleads is entitled to review of a first degree murder conviction, it appears from that case that appellate review is still limited to arguments pertaining to the validity of guilty pleas and the correctness of the trial court's action in accepting them. *Trawick v. State,* 473 So.2d 1235 (Fla. 1985). Hunt filed a motion to withdraw her guilty plea and never presented the instant argument to the trial court, so she should not be given a second bite out of the apple. To the extent this court may construe Hunt's allegations as a claim that the state breached the plea agreement and determines that such claim is cognizable, appellee will alternatively demonstrate the lack of merit to such claim, but does not waive its procedural bar as to any issue raised.[6]

Appellee would also point out that the entry of pleas and any agreements pertaining thereto are governed by the Florida Rules of Criminal Procedure and not the Uniform Commercial Code. Likewise, there is a well developed body of case law covering these areas as well as issues concerning withdrawal of pleas or breach of plea agreements. Comparing a criminal defendant to a merchant in the marketplace is an inappropriate and imperfect

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[6] Hunt's claims of mistake, confusion, misunderstanding, off the record promises and representations, implied conditions, implications of a life sentence, misrepresentation, her attorney's abuse of the fiduciary relationship, and equitable principles are not cognizable as they are based on allegations contained in an affidavit which has been stricken by this court, and will not be addressed in this point (IB 7, 9, 10, 11, 12, 13, 14, 15, 20, 21).

analogy. *Innes v. Dalsheim, 864* F.2d 974 **(2d Cir. *1988); United States v. Partida-Parra,*** 859 F.2d 629 (9th Cir. **1988).** The ***Partida-Parra*** court specifically declined to extend "common law" powers used to deal with breached agreements to cases where some "contract defense" other than breach is at issue. *Id.* at 634. As the ***Innes*** court stated,

> Plea agreements are more properly viewed as agreements between the state and the defendant; when the parties arrive at an agreement constitutionally and in conformity with state sentencing procedures, each party may insist on adherence to the bargain struck.

***Id.* at 978.**

As stated, **this** court has already limited the class of issues which can be raised on direct appeal from a guilty plea, and Hunt has set forth no reason far expanding this **class** of issues. Precedent already embodies contract principles in determining whether a party has breached **its** agreement. ***See, e.g., Lopez v. State, 536*** So.2d ***226*** (Fla. **1988);** *Hoffman* ***v. State,*** 474 So.2d **1178** (Fla. **1985).** Likewise, review **of** the voluntary and intelligent character of the plea covers the "formation" stage. It would serve no valid purpose and certainly is not constitutionally required to revisit an **accepted** plea, determine whether a contract was formed, and permit the parties to raise contract defenses,

In any event, Hunt has convoluted the facts and obfuscated the issue. The fact of the matter is that the state did not bargain for Hunt's guilty plea; rather, it was Hunt's intention to throw herself on the mercy of the court and cooperate and

testify truthfully in the Fotopoulos matter (R 1469). The record clearly demonstrates that Hunt was never promised a life sentence in exchange for her plea, nor does it provide a seasonable basis for the expectation of a life sentence. The trial court, no doubt in anticipation of the instant claim, received assurances from the prosecutor and defense counsel that there were no "back room deals" and nothing hidden (R 1479). He told Hunt twice that there were no deals with him (R 1487-88). He specifically asked Hunt if there were any agreements or side deals that were not on the record and she replied no (R 1489). It was mentioned at least five times during the plea hearing that the state was going to seek the death penalty even if Hunt cooperated (R 1471, 1475, 1483, 1487, 1494), and Niles specifically stated that he had discussed this with Hunt (R 1471).

In terms of an agreement with the state, the prosecutor stated:

> The only agreement that the State has entered into in the sentencing of Ms. Hunt with the addition that it would seek the death penalty before this Court is that the State would agree if the Court saw fit to defer the sentencing of Deidre Hunt until Deidre Hunt was given an opportunity to testify in the Kosta Fotopoulos case, whether it be separated, severed or a change of venue might be ordered by this Court. That is within the sound discretion of this Court.

(R 1475-76). In outlining the agreement for Hunt, the trial court stated:

> There would be a sentencing phase or sentencing trial in your case. The state is going to seek the death penalty

whether or not you cooperate in the trials of Mr. Fotopoulos.

(R 1483). He also told Hunt:

You also need to know that the State is still going to seek the death penalty and when you enter your plea, you need to be aware that certainly at this point and I think you should consider from now on, they are going to seek the death penalty no matter what you do.

* * *

I will give you ample opportunity to talk at the hearing before I **make** a decision, plus you will have other opportunities if you want to testify in the other case. That is your decision.

* * *

Ms. Hunt, it's a big decision for you. If you have any questions that you want to ask of us right now you sure can.

(R 1487, 1488, 1492). Finally, the following exchange occurred:

THE COURT: Ms. Hunt, you understand that the choice that you are making now, you are actually making really a tactical decision here of pleading guilty when the question of ultimate sentence is not resolved her; the State is still seeking the death penalty and I am not sure what I am going to do. Do you understand that?

A. Yes.

Q. Is this the way that you want to proceed, ma'am?

A. Yes.

Q. Do you have any questions of us?

A. No.

(R 1494). Thus, the only thing the state agreed to was to postpone Hunt's sentencing until after the Fotopoulos trial so

that Hunt could have the opportunity to present additional mitigation on her own behalf at sentencing **(R 1469-70, 1477, 1483).**

The state never breached any agreement with Hunt. Rather, Hunt flat out repudiated it, and even went as far as to counteroffer with her own nonnegotiable terms,[7] and then expected to be able to withdraw her **plea** when the state did not agree to her new terms. This is not a case where a plea was induced by a promise of a prosecutor that was not fulfilled. ***See,*** *Santobello v.* ***New York,*** **404 U.S. 257, 92** S.Ct. 495, 30 **L.Ed.2d 427** (1971). Hunt's plea was induced by, if anything, her own desire to obtain additional mitigation. Hunt knew the state would seek the death penalty whether she cooperated or not, and she was deprived of nothing and was in no way prejudiced when her sentencing occurred before the Fotopoulos trial as she had flat out rejected the opportunity to obtain additional mitigation. Hunt's plea was in no sense the product of government deception, rested on no unfulfilled promises, and fully satisfied the test for voluntariness and intelligence. ***See,*** *Mabry v.* ***Johnson,*** **467 U.S. 504,** 510, 104 S.Ct. 2543, **2548, 81 L.Ed.2d 437 (1984).** Hunt, **like** Johnson, was fully aware of the likely consequences when she pleaded guilty, and it is not unfair to expect her to live with those consequences now, 104 S.Ct. at **2548.**

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[7] These consisted of withdrawal of her plea and and a new plea to an unspecified lesser offense of one of the charges, time served and immediate release, a withhold of adjudication and sealed records, and a name change and the witness protection program.

Thus, the issue is simply whether Hunt's change of mind is an adequate basis to invalidate her plea. Appellee contends it is not. Even in cases where there has been a negotiated plea agreement, this court has found that a defendant's change of mind is not sufficient reason for his refusal to uphold his part of the agreement. ***See,*** *e.g.,* ***Lopez,*** *supra.* Hunt had the choice of abiding by her agreement with the state or not. ***See,*** *Hoffman,* ***supra.*** A defendant cannot be allowed to arrange a bargain, back out of his part, yet insist the prosecutor uphold his end of the agreement. *Id.* at 1182. When Hunt refused to cooperate, the only thing that became null and void was the agreement to postpone sentencing until after the Fotopoulos trial, and not the plea itself, as Hunt would lead this court to rule, as it was entered freely and voluntarily with full knowledge of the consequences of not cooperating in the Fotopoulos matter. Just as a defendant who enters a **plea** and promises to cooperate in exchange for a life sentence and later refuses to cooperate is no longer entitled to a life sentence, when Hunt entered a plea and promised to cooperate in exchange for postponement of her sentencing, she was no longer entitled to that postponement as there was no reason for it. A holding to the contrary would make a **sham** of the plea process, permit defendants to control it, and give Hunt exactly what she was manipulating for in the first place-the opportunity to enter a plea or *go* to trial after the Fotopoulos case was disposed of, only this time with the benefit of 20/20 hindsight.

Likewise, there is no merit to Hunt's claims that the state made her subsequent performance impossible or that her "refusal to perform by testifying against the codefendant was not so distinct, unequivocal and absolute that the contract needed to be cancelled then, before the time of her performance" (IB 19-20). Hunt entered her plea early in May. While she alleges that her "mere suggestion" in July was not a repudiation, the record demonstrates that Hunt went beyond mere suggestion, and specifically stated that she refused to cooperate in the Fotopoulos matter (R 1511). Hunt was also informed at that time that her plea had not been negotiated and was not conditioned upon her cooperation, and the trial court observed that Hunt had freely, knowingly, voluntarily and intelligently entered her plea so she would be able to present additional mitigation on her behalf at sentencing and was attempting to unilaterally repudiate her agreement (R 1529). Seventeen days later, Hunt, as opposed to agreeing to cooperate, announced her nonnegotiable counteroffer. Hunt never objected to or moved to continue her sentencing on the basis that she wanted the opportunity to cooperate in the Fotopoulos trial after all. Likewise, Hunt never gave a valid reason for her refusal to cooperate, but simply wanted a better deal. Hunt's sentencing was moved into the time slot set for the Fotopoulos trial, and she still never said she wanted to cooperate. Hunt had ample time and opportunity to cooperate, refused to do so, and that refusal relieved the state of its reciprocal obligation to postpone the sentencing. There is no requirement that the state endlessly

prolong proceedings in order to satisfy the whims of a particular defendant, particularly where, as here, the state is trying to prepare for the trial of the codefendant.

Hunt would lead this court to believe that the state received some great benefit from the entry of the plea, while she was taken advantage of and somehow left holding an empty bag. It must be remembered that Hunt originally pushed for a speedy trial, and pursuant to her demands and conditions the state was ready for trial the day she decided to enter her plea. The state had a very strong case against Hunt, including a videotape of one of the murders which Hunt had no standing to challenge, a clearly voluntary two hour statement concerning all of the crimes, the testimony of two much less culpable codefendants, and the reports of two experts which were not favorable to Hunt. To counter this, the defense had a potential domination defense, but even its own expert later expressed doubt about the viability of that theory in light of Hunt's participation in a prior felony (R 2014-15). Hunt, with the advice of counsel and reasonably so in light of these circumstances, decided her best chance would be to enter a plea, cooperate in the Fotopoulos trial, and thus have the opportunity to present additional mitigation in hopes of life sentences. The state agreed to this. There is no doubt that Hunt's decision to plead guilty, after consultation with counsel, was a tactical decision, as the trial court had stated (R 1494). *See, Long v. State,* **529** So.2d 286, 292 (Fla. 1988).

Further, there is no absolute right to have a guilty plea accepted. *See, Lynch v. Overholser,* **369 U.S.** 705, 791, 82 S.Ct. 1063,

1072, 8 L.Ed.2d 211 (1962). Nor is there a constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. *Weatherford v. Bursey,* 429 U.S. 545, 561 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). The trial court in the instant case took great pains to assure that Hunt was aware of the consequences and that her plea was the result of her own free will, and the state, which was ready for trial, agreed to the entry of the plea. Hunt's unilateral action in changing her mind certainly did not require that her plea be withdrawn and all parties put back to square one.

The fact that Hunt later testified at the Fotopoulos trial has no bearing on the events as they unfolded at the trial court in the instant case, particularly where at that time Hunt's machinations were impacting on the state's and defense's ability to prepare for that trial. It is important to remember, in addition to the fact that the state was ready for trial the day Hunt entered her plea, that the day she refused to cooperate was ten days before the Fotopoulos trial was to begin, and both parties had been proceeding under the assumption that she would be testifying (R 1528-23). The trial court set Hunt's sentencing, but it was still to occur after the Fotopoulos trial, and Hunt was told that she could cooperate or not. (R 1530). The Fotopoulos trial was reset, and Hunt next moved to withdraw her plea less than one month before the new trial date, but proclaimed that she was too ill to proceed and wanted a continuance so she could refile later (R 1535, 1537-38, 1545). The prosecutor stated that he wanted to try Hunt with Fotopoulos

if Hunt was permitted to withdraw her plea (R 1536). Hunt's terms for testifying were then made known, and it was not until that time, when she had clearly refused to cooperate unless the state met her new nonnegotiable terms, that the trial court moved her sentencing ahead of the Fotopoulos trial (R 1589). Hunt never did "refile" a motion to withdraw, but did file another motion to dismiss counsel (R 1884). As stated, Hunt also filed a motion to continue her sentencing, and did not complain that it was being held before the Fotopoulos trial, but simply noted that she had become aware that bar complaints had been filed against Niles and Damore (R 1862).

The state and the trial court cannot be held to a standard of foreseeing that a defendant will once again change her mind, at a time when she clearly has nothing to lose and everything to gain in terms of asserting previous error and anticipating future clemency proceedings. While death is a severe penalty, the fact that a defendant commits crimes which carry it as a possible penalty should not provide a basis for that defendant to manipulate the system to her advantage and then escape the consequences of her voluntary actions. This court has consistently held, in a variety of contexts, that a defendant may not inject error into the proceedings below and then be heard to complain on appeal. *Armstrong v. State*, 16 F.L.W. S308 (Fla. May 9, 1991); *Pope v. State*, 441 So.2d 1073 (Fla. 1983); *McCrae v. State*, 395 So.2d 1145 (Fla. 1981). This is what Hunt attempted to do below and continues to attempt to do by placing the blame for her actions on the trial court, the state, and her own attorney. The

state did not force Hunt to commit these crimes, and owed her nothing but a fair trial. Hunt decided not to go to trial but to instead enter a plea of guilty and cooperate so that she would have additional mitigation, at which time the state owed her nothing but that opportunity. Hunt rejected that opportunity, and the state awed her nothing.

One must not lose sight of the fact that Hunt cold bloodedly murdered one young man, cold bloodedly led another to his death, and cold bloodedly planned the murder of a third person, who but for a malfunctioning gun would most likely be dead as well. For some reason, though, Hunt seems to feel that she is entitled to special consideration for this. It must also be remembered that Hunt is no stranger to the criminal justice system, had previously arranged a sweet deal for herself, and was definitely not shy about expressing her demands and opinions. While Hunt wanted the state to need her (R 1340), it just did not need her as badly as she hoped for, as she was told before she entered her plea (R 1359). The people of the State are entitled to justice as well, and Hunt's change of mind simply is not a sufficient basis to invalidate her plea, which was entered into freely and voluntarily with full knowledge of the consequences.

POINT 2

HUNT HAS **FAILED** TO DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW WITHDRAWAL OF HER GUILTY PLEA, PARTICULARLY **WHERE** THE INSTANT **GROUNDS** WERE NEVER PRESENTED TO **THE** TRIAL COURT; HUNT'S GUILTY PLEA WAS ENTERED FREELY AND VOLUNTARILY WITH FULL KNOWLEDGE OF THE CONSEQUENCES AND WAS NOT **INDUCED** BY **PROMISES, THREATS,** OR **COERCION.**

Appellee disputes the initial facts set forth by Hunt, and will first set the record straight. The record demonstrates that on July 24, 1990, after Hunt refused to appear in or cooperate in the Fotopoulos case, the state filed a motion to set sentencing for Hunt. Niles, on behalf of Hunt, orally moved to withdraw Hunt's plea, on the basis of newly discovered evidence, and also added that maybe it was his dominant personality which had persuaded Hunt to plead guilty. Hunt agreed that she wanted to withdraw the plea and that she refused to cooperate in the Fotopoulos matter. The trial court found the so-called newly discovered evidence did not change Hunt's culpability and was not a valid basis for withdrawing the plea, and that Hunt knew what she was doing when she entered the plea, that she had asked the court to accept it so she could assist the state and be able to present additional mitigation on her own behalf at sentencing, and that she did so freely, knowingly, intelligently and voluntarily (R 1529). The trial court denied the motion, stating that there was no valid basis for Hunt to stand up and change her mind ten days before the Fotopoulos trial, and set Hunt's sentencing for October 29, 1990, stating that if Hunt chooses to testify that will be her choice (R 1530).

Hunt states that on August 3, 1990, Niles filed a motion to withdraw plea, that on September 3, 1990, she filed a pro se motion for change of plea, and that the defendant's motion to vacate or set aside plea was among the motions heard August 31, 1990 which were denied (IB 22, 23). The record does demonstrate that Niles filed a motion August 3rd, but it was heard August

10th and subsequently withdrawn as oppased to denied.[8] The record also contains a *pro se* motion from Hunt with a service date of September 3rd, but it also reflects a filing date of January 17, 1991. Hunt's argument also contains a number of allegations based on affidavits attached as an appendix, but that appendix has been stricken by the court. Further factual disagreements will be set forth as they arise in the argument.

Allowing the withdrawal of a guilty plea is not a matter of right, but is in the trial court's discretion. ***Porter** v. **State,*** 564 So.2d 1060 (Fla. 1990). The burden of proving that a trial court abused its discretion in refusing to allow withdrawal of a guilty plea is on the defendant. *Id.* at 1063; ***Lopez,*** *supra;* ***Holmes** v. **State,*** **374 So.2d 944 (Fla.** 1979). In her brief, Hunt presents a number of allegations and a variety of claims which essentially fit into five categories: (1) mistake, misunderstanding, etc.; (2) coercion and misrepresentation by her own attorney; (3) violation of the plea agreement by the prosecutor; (4) trial court error; and, (5) the interests of justice. However, while Hunt claims that she filed a proper motion and has sufficient grounds for vacating her plea, the motion she filed contained none of the grounds now alleged. The only motion the trial court ruled upon was limited to newly discovered evidence and dominating personality of attorney as grounds for withdrawal, and these are not being argued now and must be considered waived. Likewise, none of the instant grounds were ever presented to the trial

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[8] This was the hearing where Hunt set forth her new non-negotiable terms for her testimony.

court judge, so it certainly cannot be said that he abused his discretion in failing to permit Hunt to withdraw her plea on these grounds, and Hunt should be barred from raising these claims in this court.

As stated in Point 1, direct appeal is not a substitute for a motion to withdraw plea and only subject matter jurisdiction, illegality of sentence, the failure of the government to abide by the plea agreement, and the voluntary and intelligent character of the plea may be the subject of an appeal, *Robinson, **supra,*** though a defendant is entitled to review of a first degree murder conviction. ***Trawick,*** *supra.* As stated, the trial court in the instant case cannot be faulted for not ruling on issues not presented to it, but to the extent that this court might construe Hunt's claims as going to the validity of the plea, and finds them cognizable, each will be addressed. As in Point 1, appellee does not waive the previous procedural arguments.

The first category of Hunt's claims contains allegations that there was a failure of communication or honest misunderstanding in communications between Hunt and her attorney*[9] (IB 26); that Hunt was led to change her plea based on her honest misunderstanding and mutual mistake as to perceived off the record statements made between defense counsel and the prosecutor* (IB 26-27); and that a proper motion was filed and Hunt has sufficient grounds for vacating and setting aside the plea, on the basis of mental weakness, mistake, surprise, misapprehension, fear, or promise* (IB 30-31). Hunt claims that

[9] Allegations followed by a * come from the stricken appendix.

since a trial court should be liberal in exercising its discretion to permit withdrawal where there was a failure of communication or misunderstanding by the defendant concerning the consequences of his plea this court should remand for an evidentiary hearing regarding Hunt's understanding of the consequences of her plea (IB 31-32); that when a plea agreement is not honored by either mistake, inadvertence or subsequent change the defendant should have the opportunity to withdraw the plea (IB 33); that Hunt is entitled to withdraw her plea whether or not the prosecutor actually made the promise as long as Hunt had a reasonable basis to believe that the promise of a life sentence was made (IB 34); and that the defendant should be allowed to withdraw a plea if it is based on her reasonable reliance on her attorney's advice based on an attorney's mistake or misunderstanding (IB 35). Hunt also claims that there should be no surprises in plea agreements, and it was certainly a surprise when the state proceeded to sentence her before the Fotopoulos trial and failed to give her a life sentence (IB 35).

The next category of claims is closely related to the first, but Hunt alleges flat out coercion and misrepresentation by her own attorney as opposed to honest mistakes and misunderstanding. Hunt alleges that her attorney promised her that in return for her plea as charged and for testimony against Fotopoulos she would receive a life sentence instead of death and that her attorney told her right before the plea at the plea hearing there would be no mention of the life sentence because that was not the proper procedure in Florida* (IB 24); that there

was coercion by her attorney* (IB 32); that at the time she entered her plea she had no way of knowing that her attorney had inaccurately informed her that she would receive life and that there was no evidence of the bullets from Fotopoulos' machine gun (IB 33); and that her attorney did not properly inform her of the consequences of her plea* (IB 34). On the basis of these allegations, Hunt claims that her guilty plea is involuntary since it was induced by the coercion of, misrepresentations by, and unkept promise of defense counsel (IB 26, 32, 33-34, 35), and counsel's ineffective representation renders the plea not knowing and voluntary (IB 34).

The next two categories of claims involve allegations that the prosecutor violated the plea agreement in insisting on the "premature sentencing" of Hunt, and that the trial court erred in this same respect, although the trial court is not specifically to blame since this was done at the prosecutor's urging (IB 27, 29). Hunt alleges that a reasonable inference can be made from the record that she was promised a life sentence but the inference could not be made express by the state because it would impair her credibility as a future witness (IB 27); that Hunt's guilty plea rested to a significant degree on the promise of the prosecutor to defer her sentencing until after she had the opportunity to testify in the Fotopoulos case (IB 28); that the insistence of the prosecutor that sentencing occur prematurely caused the trial court to commit reversible error, and was in clear violation of the plea agreement (R 29); that Hunt had filed a pro se motion to continue (IB 29); that the state prematurely

sentenced Hunt without giving her the opportunity to testify (IB 31); and that the trial court did not make clear to Hunt what the consequences of her failure to testify would be (IB 33). On the basis of these allegations, Hunt claims that the trial court should have put the parties in the position status quo ante before the plea and permitted Hunt to stand trial (IB 30); that the trial court should have either continued Hunt's sentencing until after the Fotopoulos trial or granted her motion to vacate plea and allowed her to *go* to trial (IB 31); and that Hunt was entitled to withdraw her plea and the trial court had an affirmative duty to so advise her (IB 32).

As to the final category, Hunt claims that the interests of justice would be served if Hunt was granted a trial on the merits (IB 28).

The law is that a **plea** of guilty must be voluntarily made by one who is competent to know the consequences of that plea and must not be induced by promises, threats or coercion. *Mikenas v.* ***State,*** 460 So.2d 359 (Fla. 1984); ***Porter, supra; Lopez,*** *supra.* Hunt has pointed to nothing in the record nor does it contain anything to demonstrate mental weakness, mistake, surprise, misapprehension, misunderstanding, **fear,** or the promise of a life sentence. The record and plea colloquy reflect that the trial court made a conscientious and detailed inquiry, and took great pains to assure that the guilty pleas **were** the result of Hunt's free will. ***See, e.g., Porter,*** *supra.* Indeed, the best evidence that Hunt understood and voluntarily entered the plea came from her own lips. ***See, Holmes,*** *supra.* In this respect, appellee would point

out that the record demonstrates that Hunt never had any reservations about speaking out an the record as to her demands, opinions, or understanding of matters.

Prior to the colloquy, Niles stated that it had been explained to Bunt that the death penalty was a possibility notwithstanding the plea and future cooperation (R **1471).** Damore stated that there were no back room negotiations and no understanding that the state would not seek the death penalty even if Hunt fully cooperated, and that the state had not even agreed that it would call Hunt as a witness at the Fotopoulos trial **(R 1475-76)** Niles stated that he had discussed the plea at length with Hunt (R 1478).

Judge Foxman outlined the agreement for Hunt as follows: she would plead guilty to all counts, the sentencing would be postponed until after the Fotopoulos matter was disposed of, the state would seek the death penalty whether or not she cooperated, and it would be up to him whether to sentence her to life or death (R 1483). Hunt was told she did not have to do any of that and could go to trial (R **1484).** Hunt stated she understood and did not have any questions (R **1484).** Judge Foxman then explained to Hunt what she was giving up by pleading, the possible penalties, and again told her the state would seek the death penalty (R **1485-87).** He told Hunt there were no back room deals with him, specifically stating "[b]ottom line is no deals" (R **1487-88).** Hunt **had no** questions, agreed that she had fully discussed it with Niles, that nobody was forcing her to do it, and that this was the way she was choosing to do it (R **1489).**

Judge Foxman specifically asked her if there were any side agreements not on the record and she replied no (R 1489). Once again Judge Foxman told Hunt the state would seek the death penalty and she acknowledged she understood and that was how she wanted to proceed (R 1494). Only then was the plea accepted (R 1495). This colloquy meets the standards set forth in *Mikenas, supra.*

Likewise, as the foregoing demonstrates, there is nothing in the record to support Hunt's second category of allegations, that her attorney lied to her, or misunderstood or misrepresented her possible sentence.[10] Hunt's reliance on *Costello v. State,* 260 So.2d 198 (Fla. 1972) is misplaced, as that case involved a post conviction hearing at the trial court level where the attorney submitted an affidavit admitting he had advised the defendant that he would receive a life sentence if he entered a plea. While the court in that case found that the plea was not freely entered, it warned other disgruntled defendants:

> ...ordinarily we will not void a guilty plea entered into by one who swears it is voluntarily made. Defendants who plead guilty and are given a stiffer sentence than they anticipated cannot automatically expect to receive another try at a lighter sentence. It is not enough for a defendant to argue that he was under an impression that a promise of a lesser penalty had been made by the judge or prosecutor. A reasonable basis for such an impression must be shown.

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[10] The record demonstrates that Hunt was not shy about calling her attorney a liar (R 1597, 1340).

Id. at 201. These is no reasonable basis for Hunt's alleged impression in the instant case. The trial court, no doubt in anticipation of the instant claim, first received assurances from the prosecutor and defense counsel that there were no "back room deals" and nothing hidden (R 1479). He then told Hunt twice that there were no deals with him (R 1487-88). He then asked Hunt if there were any agreements or side deals that were not on the record and she replied no (R 1489). As previously demonstrated, it was mentioned at least five times during the plea hearing that the state was going to seek the **death** penalty even if Hunt cooperated. Finally, it must be remembered that Hunt refused to cooperate, and certainly could not reasonably expect a life sentence simply because she had entered a plea.

Regarding the next two categories of claims, as Point 1 demonstrates, Hunt was never promised a life sentence nor does the record provide a basis for the expectation of one; the plea did not rest on an unfulfilled promise of the prosecutor; Hunt was fully aware of the consequences of her plea; there was no error in sentencing Hunt before the Fotopoulos trial since by her own actions, and not the state's, there was no reason to wait after she refused to cooperate unless the state would meet her new nonnegotiable terms; Hunt was provided ample time to cooperate and never asked for a continuance of her sentencing on the basis that she wanted to cooperate; and Hunt was not entitled to withdraw her plea simply because she had changed her mind. Hunt has set forth nothing additional that would entitle her to any of her requested relief.

Finally, the interests of justice do not require that Hunt receive a trial on the merits. The state was ready for a trial on the merits when Hunt entered her plea, and by entering her plea Hunt waived that right. As previously stated, the people are entitled to justice as well, and Hunt's change of mind, for no valid reason other than wanting a better deal, is not a sufficient basis to invalidate a **plea** that was entered into freely and voluntarily with full knowledge of the consequences.

POINT 3

THE TRIAL COURT PROPERLY DENIED HUNT'S MOTIONS TO DISCHARGE COUNSEL.

Hunt claims that the trial court refused to let her represent herself in violation of *Faretta v. California*, 422 **U.S. 806, 95** S.Ct. 2525, 45 L.Ed.2d 562 (1975). In support of her claim, Hunt alleges that she "clearly and unequivocally declared to the trial court that she wanted to represent herself and did not want counsel" (IB 40). Hunt further alleges that "[t]he court never conducted a hearing on the issue of self representation, never made the required disclosures to the defendant about self representation and never made any finding about whether Hunt was competent to represent herself" (IB 37-38). Hunt is not entitled to appeal any court rulings made prior to the entry of her plea, so any claims relating to matters prior to that time are not cognizable. *Trawick, supra; Robinson, supra; Long, supra;* ***see*** *also Tollett v. Henderson,* **411 U.S.** ***258***, 93 S.Ct. **1602, 36** L.Ed.2d 235 **(1973).** In any event, the record refutes Hunt's allegations, demonstrates that the trial court made all of the requisite inquiries and

findings, in fact went beyond what is constitutionally required, and properly denied Hunt's motions to dismiss counsel.

Four hearings were held on Hunt's motions. The first was conducted January 26, 1990, pursuant to a letter Hunt had written Judge Foxman requesting another, specific attorney. Hunt's main complaint was that Niles had not communicated enough, but she also stated that she did not disagree with anything he had done. The second was held April 20, 1990, pursuant to two more letters Hunt had written to Judge Foxman and Nile's motion to withdraw. Judge Foxman informed Hunt that she could represent herself, and after further inquiry Hunt stated that she did not want to represent herself. Judge Foxman again denied the motion. The next was held April 24, 1990, after Niles asked the court to reconsider his motion to withdraw. Judge Foxman advised Hunt that if it was her desire, he would probably appoint her another attorney. Hunt stated that she wanted Niles to continue to represent her. Judge Foxman entered an order finding that Niles was proceeding diligently and competently on behalf of Hunt, and Hunt had advised that she wanted to be represented by Niles and did not want the court to appoint new counsel.

The final hearing was held August 20, 1990, pursuant to Hunt's motion to dismiss insufficient counsel. Judge Foxman permitted Hunt to state all of her reasons for her claim. Judge Foxman observed that Hunt had told him twice that she did not want to represent herself, and stated that he could not find a valid complaint against Niles nor were there grounds for removing him. Judge Foxman noted Hunt's penchant for changing her mind,

and denied the motion. Hunt also filed a motion to become co-counsel at the commencement of her sentencing hearing. Judge Foxman denied the motion, but stated that Hunt should fully participate and instructed Niles to fully discuss everything with Hunt.

Thus, the record demonstrates that the trial court did inquire of Hunt if she wanted to represent herself, and she specifically stated that she did not. Hunt states that at the April 24th hearing the trial court did not make any inquiry regarding her right of self representation (IB 37), and while this is true, it must also be remembered that at the hearing four days prior, which was the hearing on Hunt's motion, she specifically declined self-representation. The April 24th hearing concerned reconsideration of Nile's motion to withdraw, so the trial court had no duty to again inquire of Hunt whether she wanted to represent herself.[11] Hunt also states that in her letter to Judge Foxman written prior to the January hearing she states "I'd like to represent myself in this matter" (IB 38), and claims that this was an unambiguous request for self-representation, but a review of that letter demonstrates that the "matter" to which she was referring was the matter of her being

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[11] Hunt also states that at that hearing the state attorney referred to "our understanding and agreement", and claims that this indicates the state and the defense had some off the record agreement well before the May 7, 1990 plea. A review of that exchange demonstrates that the agreement referred to related to the severance of Hunt's case from the Fotopoulos case, which is all set forth on the record.

in protective custody, and that she still wanted counsel (R 1871).

An indigent defendant has an absolute right to counsel, but he does not have a right to have a particular lawyer represent him. *Koon v. State,* **513 So.2d 1253** (Fla. 1987), *citing Morris v. Slappy,* **461 U.S. 1 (1983).** A defendant also has a constitutional right to waive counsel, *Koon,* at 1255, *citing Faretta, supra,* but courts have long held that a request for self-representation must be **made** unequivocally. *Hardwick v. State,* **521 So.2d 1071** (Fla. 1988), *citing Chapman v. United States,* **553** F.2d *886,* **892 (5th Cir. 1977).** Hunt, like **Koon** and Hardwick, expressly declared that she had no desire to represent herself. As in those **cases,** the record demonstrates that the trial court made the proper inquiry and gave Hunt every benefit of the doubt, and did not err in refusing to dismiss court-appointed counsel.

It must be remembered that at the April 24th hearing Hunt specifically acquiesced to her continued representation by Niles. *See, Scull v. State,* **533 So.2d 1137, 1141** (Fla. **1988);** *Aldridge v. State,* **425 So.2d 1132, 1135** (Fla. **1982).** Significantly, this was done *after* Judge Foxman informed Hunt that he would probably appoint new counsel if that was her desire. Counsel cannot withdraw from a case merely because his client fails to follow his advice, because to hold otherwise would open the floodgates and substitution of counsel would be warranted in untold number of cases. *Johnston v. State,* 497 So.2d **863** (Fla. 1986).

Hunt relies on *Stano v. Dugger,* 889 F.2d 962 (11th Cir. **1989),** but that opinion was **vacated,** *Stano v. Dugger,* **897 F.2d 1067** (11th

Cir. 1990), and the en banc panel of the circuit court found that there had been no Sixth Amendment violation. *Stano v.* ***Dugger,*** 5 F.L.W. Fed. C88 (11th Cir. January 2, 1991). As that court stated, "[t]here is simply no precedent in this circuit for proceeding pro se by constructive notice without an obvious assertion of the right to self-representation." ***Id.*** at C93. That circuit requires a clear and unequivocal assertion of the desire for self-representation, to prevent "shrewd litigants" from exploiting this difficult constitutional area by making ambiguous self-representation claims to inject error into the record. ***Cross v.*** United ***States,*** **893** F.2d 1287, 1290 (11th Cir. 1990).

Hunt also claims that Niles' performance was deficient in failing to file a motion to compel the state's specific performance of the plea agreement **before** her sentencing, and claims that there is a reasonable probability that if sentencing had occurred after the Fotopoulos trial Hunt would have received a life sentence (IB **43**). Hunt has failed to explain how any agreement could have been enforced when it was grounded on her cooperation, and she refused to cooperate. "**A** defendant must not be allowed to refuse to cooperate with his attorney and then attempt to create an issue of ineffective counsel on the basis of his refusal to cooperate." *Thomas v.* ***State,*** 421 So.2d 160, 164 (Fla. 1982). This is precisely what Hunt attempted to do below and is continuing in those efforts on appeal.

As demonstrated in Points 1 and 2, this was not a plea agreement based on Hunt's cooperation. Further, after Niles moved to withdraw Hunt's plea, Hunt said that this was done

without her consent (R 1598-1600). Most significantly, Hunt flat out refused to testify against Fotopoulos, unless of course the state would allow her withdraw her plea and allow her to plead to an unspecified lesser offense of one of the charges, she would receive time served and be released, there would be a withhold of adjudication, her records would be sealed, her name changed and she would be placed in the witness protection program (R 1556).

In sum, the record in this case demonstrates that the trial court did not err in refusing to allow Hunt to represent herself where there was no clear and unequivocal assertion of such right, and in fact Hunt clearly stated that she did not want to and acquiesced to the continued representation by Niles. The trial court made all of the appropriate inquiries, allowed Hunt to state all of the reasons for her claims, and specifically found that Hunt did not want to represent herself and that defense counsel was competent and Hunt's reasons were insufficient. ***Hardwick, supra;*** *Koon, supra; Johnston,* ***supra.*** Hunt has failed to demonstrate any error in the trial court's rulings, and her claims should be rejected.

POINT 4

THE TRIAL COURT'S FINDINGS ON MITIGATION ARE SUPPORTED BY THE RECORD.

Hunt first claims that the trial court erred in failing to find the statutory mitigating factors of extreme mental or emotional disturbance, extreme duress or under the substantial domination of another, impaired capacity, and age. §921.141 (6) (b), (e), (f) and (g). A trial court may reject a defendant's

claim that a mitigating circumstance has been proved provided the record contains competent, substantial evidence to support the trial court's rejection of those mitigating circumstances. *Nibert v. State,* 574 So.2d 1059, 1062 (Fla. 1991). When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and must then find as a mitigating circumstance each proposed factor that is mitigating in nature and had been reasonably established by a greater weight of the evidence. *Campbell v. State,* 571 So.2d 415, 419 (Fla. 1990). The resolution of factual conflicts is solely the responsibility and duty of the trial judge, and as the appellate court this court has no authority to reweigh that evidence. *Gunsby u. State,* **574** So.2d 1085, 1090 (Fla. 1991). The trial court followed all of these principles in the instant case and the record clearly supports its rejection of these statutory mitigating factors.

As to extreme mental or emotional disturbance, the court's findings in both the Ramsey and Chase murders are as follows:

> The court finds that this factor was not reasonably established by the evidence. There was no evidence that the Defendant was under extreme mental or emotional disturbance, There was evidence that the Defendant was a sociopath. After one scheme to kill Lisa Fotopoulos failed she lay hysterical on the floor. She also seemed nervous and strange after the attempt. Yet none of the experts, including the defense psychologist (Dr. Levin) found her to be under extreme mental or emotional disturbance. Despite some minimal evidence of emotional disturbance the

> court firmly concludes she was not acting under extreme mental or emotional disturbance.

(R 1901, 1908). As to Hunt's capacity to appreciate the criminality of her conduct or to conform it to the requirements of the law, the court found in both murders:

> This factor was not established. It is true the Defendant is a sociopath, had a troubled background, and had a history of drug and alcohol abuse. While the Defendant may not have had the average person's ability to appreciate her conduct or conform it to the requirements of the law, there was no substantial impairment. None of the three mental health experts found this factor to be established. Even Dr. Levin, the defense psychologist, did not find this factor to be present. There was no evidence of alcohol or drug use at the time of the offenses. The Court concludes there was no substantial impairment.

(R 1903, 1910).

These findings are supported by the record. *Nibert, supra.* Dr. Levin did indeed testify that Hunt has the ability to appreciate her actions and that she was acting under an extreme mental or emotional disturbance at the time of either murder (R 690, 700-01). Dr. Davis testified that Hunt has no extreme mental or emotional disturbance and knew exactly what she was doing and knew it was wrong (R 1038, 1040, 1043). Dr. Mhatre testified that Hunt was under no duress or stress at the time of the Ramsey shooting, and appreciated the criminality of her conduct (R 1076). Thus, the record contains positive evidence that Hunt's mental capacity was not severely diminished. *Cook v. State,* **542** So.2d 964 (Fla. 1989). The evidence was such that the

trial judge was well within his authority to deny application of these mitigating factors. *Sanchez-Velasco v. State*, **570** So.2d **908** (Fla. 1990).

Regarding age, the trial court found as to both murders:

> This factor was not established. The Defendant was 20 at the time of the offenses (DOB **2-9-69).** There was no evidence the **defendant's** age or maturity was a factor in the murders.

(R 1903, 1910). "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation." *Peek v.* ***State,*** **395** So.2d **492, 498** (Fla. **1980).** **See** *also,* ***Cooper v. State,*** **492** So.2d **1058 (Fla.** 1986). Every murderer has an age, and the fact that that age is twenty, without more, is not significant. ***Garcia v. State,*** **492 So.2d 360, 367** (Fla. **1986).** Hunt has failed to demonstrate that the trial court abused its discretion in failing to find that her age, with nothing more, was a mitigating factor. ***Id.; see also, Kokal v. State,*** **492** So.2d **1317** (Fla. **1986);** ***Echols v. State,*** **484** So.2d **568, 575** (Fla. **1985).**

The trial court was even more specific in addressing and rejecting extreme duress or substantial domination, as this issue was hotly debated and there was conflicting evidence on that factor. The trial court first summarized the evidence and arguments of both parties, and specifically noted that the experts were divided on the question, although the defense **expert** had changed his position on it **at** least once **(R 1902-03,** 1909-10). The trial court noted that perhaps the strongest argument for rejecting this factor centered around the circumstances surrounding the Ramsey shooting, where Hunt had initially claimed

she acted under duress, but the evidence and Hunt's own statements refuted such (R 1903, 1910). The trial court further found that the videotape of that murder refuted Hunt's claim as it shows her acting independently and decisively (R 1903, 1910). Finally, the trial court noted that Hunt continued to see and have relationships with other men while she was seeing Fotopoulos, and while Hunt claimed physical and emotional abuse, nobody else witnessed this alleged abuse (R 1903, 1910). The trial court found there was ample evidence that Hunt herself is a dominant personality who would not be easily dominated by another (R 1903, 1910).

Again, the trial court's findings are supported by the record. *Nibert, supra.* A review of the videotape of the Ramsey murder clearly indicates that Hunt was not under duress or domination when she fired three shots into Ramsey's chest, walked up to his slumped body and grabbed his hair and fired a final shot into his head. In addition, there was testimony that the Ramsey murder was planned, and Hunt had wanted to shoot him in the car because he was whining about being hungry (R 454, 586). Although Dr. Levin testified that he believed Hunt was under Fotopoulos' domination, as the trial court noted, his position had changed, which was a result of information he had received on the prior incident Hunt had been involved in in New Hampshire (R 2014-15). Further, although not noted by the trial court, appellee would also point out Dr. Mhatre's testimony that Hunt was singing her song in two days, and he would expect her to take a lot longer to overcome her alleged fear of Fotopoulos (R 1105-

06). In addition, Dr. Davis testified that Hunt could not be unduly coerced into anything, and Hunt impressed Dr. Mhatre as an individual who could not be easily swayed and was anything but a quiet, passive individual (R 1040, 1078, 1103). Also, Officer Michael Gilman of the Manchester, New Hampshire Police Department, who was familiar with Hunt's activities up there, testified that Hunt was manipulative and a leader (R 1020, 1022).

As stated, the resolution of factual conflicts is solely the responsibility of the trial judge. *Gunsby, supra.* The trial judge resolved the conflicts among the mental health experts, and to a large extent rejected Dr. Levin's testimony that Hunt was under duress or substantial domination. *Id.* at 1090. Further, Dr. Levin's testimony was not without reservation and equivocation, and the evidence was such that the judge was well within his authority in denying the application of this mitigating factor. *Sanchez-Velasco, supra,* at 916. Viewing the doctor's testimony as a whole the trial court had the discretion to discount much of his opinion, particularly where the judge had the testimony of two other experts, and also had the opportunity to see Hunt commit one of the murders and give a detailed, articulate explanation of all of the events, thus indicating her mental state. *See, Bruno v. State,* **574 So.2d 76, 82-83** (Fla. 1991). In sum, the evidence supports the trial court's reasoned analysis that this statutory mitigating factor did not exist. *Thompson v. State,* 553 So.2d **153** (Fla. **1989**); *Rivera v. State,* 561 So.2d **536, 540** (Fla. 1990); *Nibert, supra; Campbell, supra.*

Hunt also claims that the trial court erred in failing to assign any weight to the one mitigating factor it found to be present (IB 45). Appellee would first point out that the trial court did not find just one mitigating factor. The trial court specifically acknowledged this court's holding in *Campbell,* ***supra,*** and addressed all of the mitigating circumstances offered by Hunt. The trial court concluded that nonstatutory mitigating circumstances were established, but that the aggravating circumstances strongly justify imposition of the death penalty, and are not sufficiently mitigated by the nonstatutory factors (R **1903-04, 1910-11).**

This court has repeatedly stated that the weight to be given the aggravating and mitigating circumstances is for the trial court to decide, and it is not the role of the appellate court to reweigh the evidence. *Cook, supra; Hudson v. State, 538* So.2d 829, 831 (Fla. 1989); *Bryan v.* ***State,*** **533 So.2d 744 (Fla. 1988);** *Lopez v.* ***State,*** *536* **So.2d 226, 231 (Fla. 1988);** *Stano v. State,* 460 So.2d 890 (Fla. 1984). All of the proffered mitigation was weighed, and this court should refrain from reweighing. ***See,*** *Gunsby, supra. So* long as all of the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. ***See,*** *Hill v.* ***State,*** **549** So.2d **179, 183 (Fla.** 1989), and cases cited therein; *Smith v. State,* **515** So.2d **182** (Fla. **1987). A** review of the record and the sentencing order demonstrates the trial court properly considered the evidence and conducted the appropriate balance, concluding that "[t]he aggravating factors strongly justify imposition of the

death penalty, and are not sufficiently mitigated by the non-statutory factors" (R 1904, 1911). *See, Downs v. State,* 572 So.2d *895* (Fla. 1990). Hunt has not pointed to anything in the record that evidences a failure to consider any evidence in mitigation. *Carter v. State, 576* So.2d 1291 (Fla. 1989).

POINT 5

HUNT VOLUNTARILY WAIVED A PENALTY PHASE JURY.

Hunt claims that when her plea was rescinded in July, 1990, so were all of its conditions, including the waiver of a penalty phase jury. As demonstrated in Points 1 and 2, this was not a conditional plea, nor was it ever "rescinded". Hunt voluntarily waived a penalty phase jury, and although she later moved to withdraw her plea, moved to dismiss her court appointed counsel, and moved to act as cocounsel, she never requested a penalty phase jury. Thus, her waiver is valid, and she should not be permitted to raise as error on appeal a procedure to which she never objected.

One who has been convicted of a capital crime may waive his right to a jury recommendation as long as the waiver is voluntary and intelligent. *State v. Carr, 336* So.2d 358 **(Fla. 1976);** *Lamadline v. State, 303* So.2d **17 (Fla. 1974);** *Palmes v. State,* 397 So.2d 648 (Fla. 1981); Mines *v. State,* 390 So.2d 332 (Fla. 1980); *Holmes v. State,* 374 So.2d 944 (Fla. 1979). Hunt waived a penalty phase jury when she entered her plea. At the August 10th hearing, Hunt's attorney asked the trial court if Hunt would have to face a sentencing jury since she had breached her agreement to

testify, and the trial court replied that as far as he was concerned, she had previously waived the jury (R 1573-74). The only thing Hunt's attorney requested if the sentencing was to occur before the Fotopoulos trial was a continuance (R 1582). Hunt uncharacteristically remained silent. The issue was not raised again.

The record contains an express waiver by Hunt, an affirmation of it by her attorney, and a later acknowledgment of it by the trial court. Appellee contends this was sufficient. *Holmes, supra.* Hunt could have at any time instructed her attorney or the court of her desire to have a jury impaneled for the sentencing portion of her case, and it does not appear from the record that any instruction was ever given. *Id.* at 949. Indeed, the record in this case clearly demonstrates that Hunt was never reluctant to express her wishes, opinions, or changes of mind. "The waiver was voluntarily offered by defendant, was proper, and was within the dictates of Section 921.141(1), Florida Statutes." *Id.*

POINT 6

THE TRIAL COURT PROPERLY DENIED HUNT'S *PRO SE* MOTION TO CONTINUE SENTENCING HEARING.

Hunt complains that the trial court erred in denying her *pro se* motion to postpone and/or continue, Hunt was represented by counsel when she filed the motion. As the First District has stated:

> The defendant had no right to act as co-counsel with his attorney. *Goode v. State,* 365 So.2d 381 (Fla. 1978), cert.

> denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979), including the right to file separate motions and pleadings, *Sheppard v. State, 391* So.2d 346 (Fla. 5th DCA 1980). There is no reason why our system must tolerate' dual pleadings filed by both the defendant's attorney *and* the defendant himself. Unless counsel moves to "adopt" his client's pleadings or motions, e.g. *Perry v.* ***State,*** 436 So.2d 426 (Fla. 1st DCA 1983), such filings should be treated **as** nullities.

Smith v. ***State,*** **444** So.2d 542, 547 (Fla. 1st DCA 1984). ***See*** *also,* ***Whitfield v. State,*** *517* So.2d *23* (Fla. 1st DCA 1987). Such reasoning is applicable in the instant case and Hunt's ***pro*** *se* pleading should be considered a nullity.

Even if Hunt's motion could be considered a proper pleading, there certainly was no basis for granting it. Hunt alleges that the motion was the procedural equivalent of a motion to compel enforcement of the plea agreement, and had it been granted she could have reconsidered her earlier position not to testify, could have had sufficient time to review discovery to prepare for her trial, could have gotten another hearing on her motion to set aside plea, and would have uncovered new and different evidence.[12] However, none of this was mentioned in the motion, so the instant claim is not cognizable. Hunt simply asserted as grounds for a continuance that she had been notified that complaints had been filed with the Florida Bar against her

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[12] Appellee would first point out that all of these actions **are** inconsistent with one another. Further, Hunt had well over a month to reconsider her position on testifying, and obviously gave the matter a great deal of thought as is evidenced by the terms she set forth in return for her testimony. Finally, Hunt is the one who originally pushed for an April 30th trial date, and four months had passed since that time.

attorney and the prosecutor. Hunt has not even remotely demonstrated that a continuance should have been granted on this basis, so relief is not warranted.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence af the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and carrect copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Gerard F. Keating, 318 Silver Beach Avenue, Daytona Beach, FL 32118, this 31st day of May, 1991.

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Of Counsel