SUPREME COURT OF FLORIDA



DEIDRE MICHELLE HUNT

Appellant

CASE NO. 76,692

-vs-

THE STATE OF FLORIDA

Appellee

_____/

APPEAL FROM THE CIRCUIT COURT,
VOLUSIA COUNTY, FLORIDA

# APPELLANT'S INITIAL BRIEF

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## STATEMENT OF THE CASE AND FACTS

This is an appeal from a Final Judgment of the Circuit Court sentencing Hunt to death after her plea to two (2) counts of first degree murder. (R 1665, 1899-1917) On December 6, 1989 the State of Florida filed a first degree murder indictment against Hunt and co-defendant, Fotopoulos. On December 9, 1989 Hunt's court appointed attorney Niles filed his Notice of Appearance, Plea of Not Guilty and Notice of Discovery. (R 1669-1670) On February 26, 1990 the court entered an order to sever Hunt's case from Fotopoulos. (R 1717) The court entered its order denying State's Motion for Joinder on March 21, 1990. (R 1765)

Hunt signed and filed at least six (6) pro se motions or letters to discharge her court appointed attorney Niles or to let her act as co-counsel. (R 1803 - 1887, 1858, 1865, 1871, 1875, 1878) She orally requested to dismiss her attorney at least once more. (R 1811) Niles filed at least three (3) separate motions to withdraw. (R 1815, 1878) The record reflects numerous serious ethical and moral accusations by Hunt against Niles, (R 1873-1879, 1875) all of which Niles vehemently denied. (R 1383-1384) The court denied all motions to dismiss Niles and for Niles to withdraw. (R 1885)

On May 7, 1990 Hunt entered her plea of guilty as charged with express conditions. (R 1466-1497) Between May 7, 1990 and July 24, 1990 Hunt met with the State Attorney and his investigators to cooperate in the plea condition to provide testimony against Fotapoulos. (R 1508) On July 24,

1990 Hunt repudiated her agreement to testify against Fotopoulos on the grounds of newly discovered exculpatory evidence in her case. (R 1498-1531) Hunt declared she wanted to go to trial on her charges and she wanted to testify in her defense. (R 1500-1501, 1509) Hunt stated she wanted to withdraw her plea of guilty. (R 1511) and to to jury trial on both guilt or innocence and penalty phase. (R 1521) The court denied the motion without prejudice to reconsider it later and set her sentencing for October 29, 1990. (R 1530-1531 and 1836)

On August 3, 1990 Niles filed a motion to withdraw plea and net for trial which were denied (R 1838 - 1839) and on September 3, 1990 Hunt filed a pra se motion to change of plea. (R 1927-1933) The court reset Hunt's sentencing for October 1, 1998 (R 1849) then advanced it up to September 4, 1990. (R 1853)

Hunt's pro se motions to dismiss insufficient counsel and to postpone and/or continue were denied in hearings on August 31, 1990 and September 4, 1990. (R 1871-1884, 1885) (R 2-9) The non jury sentencing trial was from September 4, 1990 through September 13, 1990. Hunt was sentenced to death on Counts I and II. (R 1899-1912, R 1913-1926)

In October of 1990 Hunt testified for three days in the Fotopoulos trial. Hunt Motion to Supplement Record (R 1961-1962) to provide this court with transcript of her testimony and cooperation was denied. (R 1963 - 1964)

## SUMMARY OF ARGUMENT

A criminal plea agreement is a contract under Civil Contract Law. Hunt is entitled to a jury trial on all issues under theories of cancellation and rescission or breach of the plea by the state. In the alternative, Hunt fully performed her end af the bargain by testifying against Fotopaulos and she is entitled to the benefit of the bargain, a life sentence. In the alternative, no contract was ever formed because there was no mutual assent. There was no consideration flowing from the state and Hunt's attorney misrepresented the plea to Hunt and exerted undue influence over Hunt, causing her mistake. Under Equitable Theories of Contract Law, Hunt has established promissory and equitable estoppel, implied and quasi contract, unjust enrichment and quantum meriut.

The trial court committed constitutional reversible error in denying Hunt's Motion to Vacate or set aside plea based on newly discovered evidence.

The trial court erred in failing to provide new counsel, or let Hunt represent herself or act as co-counsel when the attorney client relationship deteriorated and became rotten.

The court should have found both statutory and non-statutory mitigating factors. Hunt did not voluntarily waive a jury in the penalty phase. The court should have granted Hunt's pro se motion to continue.

This court should reverse and remand for a jury trial an guilt or innocence and sentencing.

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When Hunt declared four months in advance that she would not testify against co-defendant pursuant to her plea agreement, she effectively cancelled and rescinded the plea agreement which was thereafter null and void. Hunt was entitled to be restored to the status quo ante, i.e. to have a plea of not guilty entered and a jury trial set.

On May 7, 1990 Hunt entered her plea as charged to the indictment. (R 1467-1496) On July 24, 1990 Hunt announced her motion to set aside and vacate plea. (R 1501-1503, 1838) Her time for performance to testify against Co-defendant Fotopoulos was not until October, 1990. (R 1470)

In Brown v. State of Florida, 367 So.2d 616 (Fla. 1979) the court stated at page 622, "Bargained guilty pleas, then,

are in large part similar to a contract between society and an accused, entered into on the basis of a perceived 'mutuality of advantage.'" Citing Brady v. United States, 397 U.S. 742, 752, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

"A plea bargain is contractual in nature and when the prosecution breaches the agreement, the entire legal basis for the plea fails." Geisser v. U.S. 554 F.2d 698 (5th Cir 1977) Appeal After Remand 627 F.2d 745 (5th Cir 1980).

In Lopez v. State 536 So.2d 226 (Fla. 1988) the Supreme Court said bargains for guilty pleas are similar to "a contract between society and an accused, entered into on the basis of a perceived 'mutuality of advantage.'" Citing Brown supra. Lopez at 229 the court states, "In a similar situation a defendant bargained for two life sentences in return for his testimony. After striking that bargain, but before the court accepted hin plea, the defendant refused to testify. The state then withdrew the agreement and went to trial. On appeal this Court stated: Hoffman had the choice of abiding by the plea agreement or not. When he refused to go along, the agreement became null and void as if it had never existed." Hoffman v. State, 474 So.2d 1178, 1182 (Fla.1985).

The reasoning of Hoffman applies to this case. Once Deidre Hunt refused to testify, the State was obligated to withdraw the agreement and go to trial. When Deidre Hunt refused to go along the agreement became null and void as if it had never existed. The trial court and the State erred in proceeding directly to sentencing without giving Deidre Hunt

the opportunity for the trial once the plea bargain was null and void.

In Offord v. State, 544 So.2d 308 (Fla. 4 DCA 1989) the court stated: "A plea bargain is a contract. A meeting of the minds of the parties is a prerequisite to the existence of an enforceable contract. Where it appears the parties are continuing to negotiate as to essential terms of an agreement there can be no meeting of the minds."

"Where it appears any party is mistaken, confused or misunderstands such essential terms there can be no meeting of the minds," Scott v. State, 499 So.2d 29 (Fla. 2d DCA 1986).

In Offord the court held that the defendant and the prosecutor never entered an enforceable plea bargain where, "substantial assistance to be provided by the defendant apparently was subject of continuing negotiations, and where the defendant did not know and understand the essential terms of a plea bargain." In the instant case there was no meeting of the minds and no assent because the testimony of Deidre Hunt against Fotopoulos to be provided was apparently subject of continuing negotiations and because the defendant Deldre Hunt did not know and understand the essential terms of the plea bargain. She understood that if she testified against Fotopoloun she would get life. The State takes a contrary position. Deidre Hunt was mistaken, confused or misunderstood that essential term. (See Appendix)

In Tillman v. State, 522 So.2d 14 (Fla. 1988) the court

stated: "Any breach of the plea agreement by the State renders the plea involuntary." The State and the trial court agreed that the Appellant's sentencing hearing would be set after she testified in the co-defendant's trial. (R 1475) The State and the court breached that plea agreement by sentencing her in September of 1990 rather then after the Fotopaulos trial occurred in October of 1990. That breach of agreement by the State rendered Deidre Hunt's plea involuntary which requires reversal. The court in Tillman stated at page 16: "A defendant agrees to plead guilty based specifically on the agreement he or she has made with the state. Any breach of the agreement by the state renders the plea involuntary, as the plea is based on an agreement that was not fulfilled." (underline added)

The action of the trial court in prematurely sentencing Hunt in violation of the plea contract was a prohibited law which Impaired the obligation of the contract. U.S. Constitution and Florida constitution, Article I Section 10.

At the time of the entry of this plea Hunt was 20 years old and had a tenth grade education. (R-1480) She has had psychological counseling since the second grade. R-1481) She has had psychological and emotional problems practically all of her life. (R-1482)

The sentencing hearing of Deidre Hunt is replete with the three way (Judge, State and Defendant) mutual understanding that Hunt's plea was conditioned on her testimony against co-defendant Fotopoulos and Chat her sentencing

hearing would be delayed until the Fotopoulos trial was completed so that she would have the benefit of her cooperation as a mitigating factor in her sentencing. (R 1466 through R 1497)

After Deidre Hunt entered her plea in May, 1990 she voluntarily gave statements to the State Attorney and to the State Attorney's Investigator regarding her testimony in the case. (R 1508) During those conversations she was advised by the Assistant State Attorney that she would receive a life sentence in return for her cooperation against the co-defendant. (Appendix) Said statements of the State, although made after entry of the plea are made in the performance of the agreement and therefore are relevant or admissible to show the existence of a contract being executed.

In Brown v. State, 367 So.2d 616 (Fla. 1979) Brown entered an negotiated plea of guilty to second degree murder which was accepted by the trial judge. A condition of the plea was that Brown aid the State in the prosecution of co-defendant Benyard. Brown submitted to a polygraph test and went before the Grand Jury. He later refused to testify at Benyard's trial, as a consequence of which the negotiated plea was vacated and a plea of not guilty was entered by the trial judge when Brown stood mute. In the Instant case the trial court should have vacated the negotiated plea when Hunt failed to testify against Fotopoulos and entered a plea of not guilty for Hunt. Brown was brought to trial in front

of a jury for the charge. Hunt should have been brought to jury trial for her charge. The trial court sentenced Brown to death after the jury trial. In the Brown case the State was very prejudiced by Brown's failure to testify against Benyard because Benyard, due to the speedy trial period, became immune from criminal prosecution thereafter. In the instant case the State can show no prejudice in the Fotopoulos case because Hunt did in fact testify and Fotopoulos was convicted and sentenced to death. Hunt requests this Court take judicial notice of the pending Fotopoulos Appeal before this court in case number 77016.

The Supreme Court in Brown at Footnote 4 page 620, recognized that implied conditions of pleas do exist. The Court at footnote 4 states "the fact does not support Brown's contention that he in fact complied with the express terms of his bargain, Although testifying against Benyard was not expressly stated to be one of the conditions, the agreement was so understood by all involved." An implied condition of Deidre Hunt's plea was that in exchange for her testimony against Fotopoulos she would receive life sentence and not death.

The Brown case also analyzes the consideration requirement for all pleas and all contracts. In Brown at page 622 the court talks about the defendant's relinquishment of his constitutional rights in exchange for a lesser penalty.

The exchange language in Brown clearly indicates

consideration. The State's express consideration was to delay Hunt's sentencing. The State's implied consideration in exchange for the defendant's plea was that the public would be unable to get the death penalty against Hunt but could only get a life sentence. The state failed to give consideration. Hunt's consideration was to give her cooperation which resulted in the successful prosecution of other defendant engaged in equally serious criminal conduct i.e. Fotopoulos.

In Hoffman v. State, 474 So.2d 1178 (Fla. 1985) the Court stated at page 1182: "Before trial in exchange far a promise of a recommendation of life sentences, he (Hoffman) agreed to plead guilty to two first degree murder charges and testify against Mazzara. When he later reneged on the agreement to testify, the state withdrew from the bargain and proceeded to prosecute him on the charges. The state then had a jury trial for guilt or innocence and a sentencing phase." Hunt never had a jury trial on guilt or innocence or on the sentencing phase. Hoffman at page 1182, "Hoffman had the choice of abiding by the plea agreement or not. When he refused to go along, the agreement became null and void as if it had never existed." Hunt refused to go along in July, 1990 and testify against the co-defendant. (R 1500, 1501, 1511) The Court and State should have declared the agreement null and void as if it never existed and set the case for jury trial on a not guilty plea. The Court did not and that was a constitutional harmful error. State v. Disuilio, 491

So.2d 1129 (Fla. 1986

"A contract which is not mutually enforceable is an illusory contract. Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under a contract, there is no valid contract and neither side may be bound." Pan Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984). In the instant case the plea contract was illusory and was not mutually enforceable because, the State ultimately gave Hunt nothing although Hunt appellant believed that the State was giving her a life sentence.

"Failure of consideration is the neglect, refusal or failure of one of the parties to perform or furnish the agreed consideration." Freitag v. Lakes of Carriage Hills, Inc., 467 So.2d 708 (Fla. 4 DCA 1985). State of Florida neglected, refused or failed to perform or furnish the following two agreed considerations: (1) that it would defer sentencing of Hunt until after she testified in the Fotopoulos case and (2) that in exchange for her testimany she would receive a life sentence and not the death penalty.

Hunt made a unilateral mistake in believing that the State had recommended a sentence of life for her. "A contract may be set aside on the basis of unilateral mistake unless the mistake is the result of excusable lack of due care or the other party has so changed its position in reliance on the contract that rescission would be unconscionable." BMW of North America, Inc. v. Krathen, 471

So.2d 585 (Fla. 4 DCA 1985). Hunt's plea contract should be rescinded on the basis of unilateral mistake because her mistake was not the result of her inexcusable lack of due care. She relied on the statements of her attorney and the representations of the state attorney that she would receive a sentence of life in exchange for her plea. (Appendix) The State of Florida has not changed its position in reliance on the plea contract to it's detriment and rescission would not be unconscionable as to the State of Florida. The State of Florida's position after a rescission is to take Hunt to a jury trial on guilt or innocence and sentencing. Indeed, the State received Hunt's full performance in her testimony against the co-defendant Fotopoulos so the State cannot claim that it has suffered any detriment by Hunt's pre-performance statements that she would not testify against Fotopoulos.

Hunt has alleged that there was a misrepresentation to her by her court appointed attorney that she would receive a life sentence in exchange for her testimony. (Appendix) "Where a misrepresentation of a character of essential terms of a proposed contract occurs, the assent to the contract is imposnible and there is no contract at all." Cancanon v. Smith Birney Harris Upham & Co., 805 Fed 2d 998 (11 Cir. 1986).

"Misrepresentations of material facts even though innocently made, acted upon by the other party to his detriment, will constitute a sufficient ground for contract rescission and cancellation in equity. The proper inquiry

is not whether the party making the reprenentation knew it to be false but whether the other party believed it to be true and was misled by it in entering into the contract so that whether misrepresentation was innocently or knowingly made, the legal effect is the same." Yost v. Rieve Enterprises, Inc., 461 So.2d 178 (Fla.1 DCA 1985). Although on or before May 7, 1990 Hunt cannot say that there was any misrepresentation made by the State Attorney as to the life sentence, her court appointed attorney would be considered another party for the purposes of Hunt's innocent reliance. Therefore, if her attorney innocently misrepresented to her the essential fact that she would receive a life sentence in exchange for her plea and testimony that constitutes a sufficient ground for the plea contract to be rescinded and a cancellation to apply. Hunt alleges that she believed Niles representations to be true that she would get life and that she was misled by those representations in entering into the plea contract. (Appendix)

In reviewing the plea contract the Court may look into circumstances surrounding the contract. Magnum Marine Corp. N.V. v. Great American Ins. Co., 640 F.Supp. 1142 (S.D. Fla. 1986) The circumstances surrounding this plea contract shows that there was an ongoing battle between Deidre Hunt and a court appointed attorney, Mr. Niles, which resulted in her filing six (6) motions to have a new attorney and him filing three (3) motions to withdraw as attorney, all of which were denied. The Court may also look into circumstances which

were implied or could have been inferred by Hunt, such as the off the record representations made to her (1) by her attorney and (2) after May 7, 1990 by the State Attorney that she would receive a life sentence in exchange for her testimony. Therefore, the Supreme Court can look at extrinsic circumstances regarding the entry of the plea such as off the record plea negotiations and statements. (See Appendix)

Hunt alleges that after the entry of her plea on May 7, 1990 that in her interviews and testimony in front of the State Attorney that she was promised at that time that in exchange for her testimony against co-defendant Fotopoulos she would receive a life sentence. (Appendix) If it is the State's position that the plea agreement in its entirety was set forth in the May 7, 1990 plea hearing, then the said plea contract can be altered or modified by the performance of the parties, i.e.: oral agreement and substantial performance of defendant and the State at these post May 7, 1990 interviews. The parol modification was accepted by Hunt and acted upon by her in ultimately testifying against Fotopoulos. It would work a fraud on Hunt to refuse to enforce the oral modification as to a life sentence. The modification of the record plea of May 7, 1990 under such circumstances is permissible in the public interest and to thwart an otherwise unconscionable plea contract of adhesion, even though customarily such modifications are prohibited. King Partitions & Drywall Inc. v. Donner Enterprises, Inc., 464

So.2d 715. (Fla 4 DCA 1985)

Hunt repudiated the contract in July, 1990 in anticipation of her October, 1990 performance to testify against co-defendant. As a matter of law she effectuated a rescission or cancellation of the agreement. She was entitled to be restored to her former status i.e. not guilty and ready for trial. The State of Florida was not prejudiced by her rescission because it still had the opportunity to obtain her conviction and sentence of death after jury trial.

"Generally a contract will not be rescinded even for fraud, if it is not possible for the opposing party to be put back into his pre-agreement status quo condition. Royal v. Parado, 462 So.2d 849 (Fla. 1 DCA 1985). In the instant case it was entirely possible for each of the parties to be put back into their status quo ante positions.

"The effect of a rescission is to render the contract abrogated and of no force and effect from the beginning." Borck v. Holewinski, 459 So.2d 405 (Fla. 4 DCA 1984).

If the contract was rescinded by Hunt in July, 1990 or by the Court or State Attorney in failing to delay Hunt's sentencing until after the Fotopoulos trial, then the plea contract was abrogated and the Court had no recourse but to enter the defendant's plea of not guilty and set the case for jury trial.

When the State of Florida prematurely set Deidre Hunt's sentencing for trial before the Fotopoulos case, the State of Florida breached the contract and made Deidre Hunt's

subsequent performance impossible. "When one contracting party prevents performance or acts of the other party required to be performed or prevents discharge of contractual duty, such actions are generally considered breach of contract, even though not specified in a written instrument." Gulf America Land Corp. v. Wain, 166 So.2d 763 (Fla 3 DCA 1964).

"In a bilateral contract the promise of one party constitutes the sole consideration for the promise of the other, and if one party has the unrestricted right to terminate the contract at any time, that party makes no promise at all and there is not sufficient consideration for the other's promise." ~~Pick Kwik Food~~ Stores, Inc. v. Tenser, 407 So.2d 216 (Fla. 2 DCA 1981). In the instant case the State of Florida through its State Attorney's office had the unrestricted right: 1) to terminate the contract at any time and in fact it did so by prematurely setting the sentencing hearing for Hunt in September, 1990; and 2) to retain sole discretion to determine whether Hunt's testimony constituted full cooperation (R-1475) Therefore the State of Florida made no promise at all and there was not sufficient consideration from the State of Florida for Hunt's promise. In Pick Kwik the Court held that contracts require a mutuality of obligation with respect to contracts to be performed in the future.

The State gave no consideration for the plea agreement. "There can be no indebtedness without legal consideration and

a mere gratuitous promise of future gift, lacking consideration is unenforceable as nudum pactum." Kaufman v. Harder, 354 So.2d 109 (Fla. 3 DCA 1978).

One could say that the plea agreement expired when Hunt repudiated it in July, 1990 and in September, 1990 when the State of Florida prematurely sentenced her. However the State of Florida ultimately used Hunt's testimony against co-defendant Fotopoulos in gaining his conviction. An implied contract arose that when Hunt was being allowed to testify for the State that she would be entitled to a life sentence.

"Where an agreement expires by its terms and without more the parties continued to perform as before, an implication arises that the parties have mutually consented to a new contract containing the same provisions as the old, and the existence of such contract is determined by whether a reasonable man would think the parties intended to make such a new binding agreement." Rothman v. Gold Master Corp., 287 So.2d 735 (Fla.3 DCA 1974) appeal after remand 323 So.2d 586 (Fla. 3 DCA 1975). A reasonable man in the instant case would think that the State of Florida and that Deidre Hunt intended that she would get a life sentence in exchange for her testimony. The reasonable person standard applies in implied contracts.

"By accepting benefits one may be estopped from questioning the validity and effect. of a contract." Scocozzo v. General Development Corp., 191 So.2d 572 (Fla. 4 DCA 1966). When the State of Florida accepted the benefits

of Deidre Hunt's testimony in the trial of a co-defendant, the State of Florida is thereafter estopped from questioning the validity and effect of the plea contract which entitled her to be sentenced after the Fotopoulos trial and implicitly granted her a sentence of life.

"The party who contracts for another to do a certain thing impliedly promises that he will himself do nothing which will hinder or obstruct the other in doing the agreed thing."' Casale v. Carrigan & Boland, Inc., 288 So.2d 299 (Fla.4 DCA 1974) The State did hinder or obstruct Deidre Hunt in providing her testimony against Fotopoulos by breaching the plea agreement and sentencing her in September, 1990, one month before her testimony.

The Fotopoulos trial was set for October, 1990. In July, 1990 Deidre Hunt indicated she did not want to testify against the co-defendant. (R 1500-1508) Both her apparent repudiation and the State of Florida's rush to sentencing were premature. Time was not of essence in this contract. Deidre Hunt did not have to perform after she made her promise until October, 1990.

"In equity, time is not ordinarily regarded as of essence in the absence of an express stipulation, but each case must be judged by its own circumstances. National Exhibition Co. v. Ball, 139 So.2d 489 (Fla.2 DCA 1962) Nevertheless, Deidre Hunt's alleged refusal to perform by testifying against the co-defendant was not so distinct, unequivocal and absolute that the contract needed to be

cancelled then, before her time of performance. "A mere suggestion that performance of the contract should be delayed to a future time is not a repudiation of its obligations nor grounds for rescission," Savage v. Horn, 31 So.2d 477, (Fla. 1947). Deidre Hunt's mere suggestion in July that her performance wasn't due until October is not necessarily a repudiation and the State of Florida erred by sentencing her in September, 1990.

The Restatement of The Law Second Contracts 2d (American Law Institute 1981) states theories and remedies which support Hunt's position. Section 177, "When Undue Influence Makes a Contract Voidable" applies because Hunt alleges that ahe only pled guilty because of the undue influence and persuasion of Niles. Under Section 173 Hunt alleges that Niles abused the fiduciary relation making the contract voidable. (Appendix)

Hunt asserts that Niles told her at the time she entered the plea that under Florida law there was no requirement to state on the record that she would receive a life sentence. (Appendix) Under Section 170 she had the right to rely on his assertions as to matters of law. Even if Niles only gave Hunt his opinion that she would receive a life sentence, Hunt was justified in relying on his assertion of opinion. Section 167. Niles alleged misrepresentation to Hunt substantially contributed to her decision to assent to the plea agreement for life sentence and made the plea contract voidable. Sections 164,163. Under section 153, Hunt's

mistake makes the plea contract voidable and the enforcement of the plea unconscionable.

In the event this Court finds that Hunt cannot establish the terms of the plea as she understands it, i.e. life sentence, because that was not mentioned an the record, then under theories of equitable estoppel, promissory estoppel, implied contract and quasi contract, unjust enrichment and Quantum Meruit, Hunt is entitled to equitable relief. "Traditional elements for estoppel claim, which are designed to balance equities of a case, are promise or misrepresentation of fact, reasonable reliance on misrepresentation or promise, and reasonableness of such reliance. Organized Fishermen of Florida v. Hodel, 775 F.2d 1544, (11th Clr. 1985). In Hunt's affidavit she meets the elements for equitable relief. Hunt alleges (Appendix) that the State of Florida, including Peter Niles her court appointed attorney, the Assistant State Attorney, David Damore through words, acts, conduct caused her to believe that she would receive a life sentence in exchange for her plea; that said individuals willfully and negligently represented those facts to her; that by her conduct in entering the plea and in testifying against Fotopoulos she detrimentally relied upon the state of things so indicated. She alleges that she was reasonable in relying on them on these misrepresentations or promises. Likewise, the State's actions in permitting Deidre Hunt to testify in the co-defendant case and in procuring her presence at that trial

acts as a waiver to them seeking the death penalty in violation of the plea. Miami Dolphins Ltd. v. Genden & Bach, P.A. 545 So.2d 294 (Fla. 3 DCA 1989). Since the State of Florida accepted the benefits of the plea bargain by accepting the testimony of Deidre Hunt in the trial of the co-defendant they are estopped to deny the promise of life sentence made off the record.

In conclusion the trial court erred in not applying contract principles to the plea agreement. For the foregoing reasons the trial court erred and should have cancelled the plea agreement, set the case back for trial or in the alternative given Hunt a life sentence.

## ISSUE II

### TRIAL COURT ERRED IN DENYING HUNT'S MOTION TO VACATE AND SET ASIDE PLEA OF GUILTY

On May 7, 1990 Hunt entered pleas of guilty as charged. (R 1466 through 1497) On July 24, 1990 Hunt made an oral motion to withdraw plea. (R 1500-1509)

On August 3, 1990 Hunt's court appointed attorney Niles filed a motion to withdraw plea and set for trial and on September 3, immediately before the sentencing hearing Hunt filed her pro se motion for change of plea. (R 1838 and R 1927). In Niles motion to withdraw plea and set for trial (R-1838) he advised that against his advice Hunt wants to withdraw her plea and go to trial. He alleges newly discovered evidence to support his defenses which was discovered subsequent to entering the plea and that no prejudice would accrue to the state; that Hunt is

willing to go to trial on September 4, 1990 with the co-defendant and that Hunt has a meritorious defense. The record further states that Hunt intended to testify at her trial (R-1839)

Under certificate dated September 3, 1990 Hunt filed her own pro se motion for change of plea. (R 1927-1933) She alleges as grounds newly discovered evidence which was first discovered after the entry of her plea. Specifically she states that an expert anthropologist discovered an additional bullet exit wound on the right side of the victim's skull, which was caused by a high powered weapon. Hunt alleges that a co-defendant, Kosta Fotopoulos used the high powered weapon AK 47 rifle, to shoot the victim and cause his death and to threaten Hunt's death. Her motion charges that this information was apparently available to her attorney on or after November 16, 1989 based on a photograph entered into evidence but that she was never told of this evidence on or before the date of her plea. Hunt alleges in her motion (R-1928) that according to the medical testimony of the medical examiner either of the two bullet wounds from the different guns could have caused the victim's death. (R-1928 through 1932)

The defendant's motion to vacate or set aside plea was among the motions heard on August 31, 1990 which were denied. (R 1637-1638) The trial court erred in denying Hunt's motion to set aside plea.

Hunt also alleges that the only reason she entered

the plea in the first place was because her court appointed attorney, Mr. Niles promised her that in return for her plea as charged and for testimony against the co-defendant she would receive a life sentence instead of death. (Appendix) In her affidavit (Appendix) Hunt states that her attorney told her right before the plea that at the plea hearing there would be no mention of the life sentence because that was the proper procedure under Florida law.

In the case of Costello v. State, 260 So.2d 198 (Fla. 1972) the Supreme Court reversed a death sentence where the defendant's court appointed attorney advised defendant that if he entered a guilty plea to the murder charge the Judge would not impose the death sentence and the defendant had a reasonable basis to believe that the Judge would be lenient. The court stated that the defendant was entitled to withdraw his guilty plea when it became clear that the death sentence would be imposed; alternatively, the court could accept the plea in the context of which it was submitted and sentence the defendant to life imprisonment. Both the defendant and the trial attorney submitted affidavits in support of their reasonable basis for their impression that a promise of lesser penalty had been made by the prosecutor. The court in Costello states at page 201, "Guilty pleas are voided where judges or prosecutors actually promise defendants they will be given lesser sentences than they in fact receive... We do not believe the results should be different when a defendant has a reasonable basis for relying upon his attorney's

mistake and advice that the judge will be lenient... The effect upon the defendant is the same; in each case he exchanges his constitutional right to a jury trial for a promise of leniency...A clear-cut statement by defense counsel that the District Attorney has made a promise, or an ambiguous remark to which the defendant gives the same meaning, has much the same psychological effect on the defendant as a promise by the District attorney. The effect may be greater since the defendant is likely to place more trust in his own attorney than in a member of the prosecutor's staff... And when the attorney has been appointed by the court, the defendant is especially justified in believing his promises of judicial leniency; such a lawyer is unquestionably a vital arm of the court, and the defendant has every right to believe him when he says he is speaking for the judge." The court in Costello concluded that "under the particular facts of that case the defendant did not freely enter his guilty plea. It was entered because he placed his trust in a court appointed attorney who apparently led him to believe the trial judge would not impose a death sentence if he pleaded guilty." In Costello the court reversed and remanded to the trial court and ordered a new trial or sentence of life imprisonment as the trial judge deemed appropriate. Costello was a 19 year old male who had graduated from high school and had attended college for one year. Deidre Hunt is a 21 year old female with a ninth grade education. The affidavit of Costello is

especially important, page 200 Footnote 2. In Costello the attorney only gave his expressions of opinion as to sentence. The court appointed attorney in Costello stated in his affidavit that the court never made any promises or guarantees to lead the defense attorney to form the opinion as to sentencing. Costello is directly on point as precedent for this Honorable Court to reverse Deidre Hunt's sentence of death.

"Guilty pleas to charges of first degree murder, involuntary sexual battery and kidnapping could be withdrawn where the defendant showed that such a plea was entered as a result of failure of communication or honest misunderstanding as to the commitment supposedly made by a trial judge and communicated to the defendant by his court appointed counsel." Thompson v. State, 351 So.2d 701 (Fla. 1977). (Appendix) Hunt has alleged such a failure of communication or honest misunderstanding in communications between her and her attorney Mr. Niles.

In Brown v. State, 245 So.2d 41 (Fla 1971) defendant was allowed to withdraw his plea and stand trial on the charge where he was led to change his plea from not guilty to guilty due to an honest misunderstanding and mutual mistake as to his expected sentence, resulting to a large extent from statements made at a conference in chambers between defense counsel, prosecutor and the judge. Likewise, in Deidre Hunt's case she was led to change her plea based on her honest misunderstanding and mutual mistake as to perceived

off the record statements made between the defense counsel and the prosecutor. (Appendix)

In Johnson v. State, 547 So.2d 238 (Fla 1st DCA 1989) the court stated: "When a negotiated plea cannot be honored by the trial judge, defendant may withdraw his plea and the trial judge has an affirmative duty to do so." See Goldberg v. State, 536 So.2d 364 (Fla. 2 DCA 1988). In the instant case the negotiated plea was not honored by the trial judge when he prematurely sentenced the defendant on September 3, 1990 as opposed to sentencing the defendant after her testimony at the co-defendant's trial as originally pronounced in the plea agreement. (R 1488) In Johnson at page 239 the court looks beyond the record to support a defendant's motion about his specific sentence. "In this case the record is susceptible of the reasonable inference that Johnson was promised a sentence of community control in exchange for his plea."' Likewise, a reasonable inference can be made from the record in Hunt's case that she was promised a sentence of life in exchange for her plea and testimony against her co-defendant. But that inference could not be made express by the state because it would impair the credibility and value of Hunt as a witness in the Fotopoulos case.

In Elias v. State, 531 So.2d 418 (Fla. 4 DCA 1988) the court stated, "Law favors trial on the merits. Where it appears that the interest of justice would be served, the defendant should be permitted to withdraw his plea."' In the

instant ease the interest of justice would be served if Hunt were granted a trial on the merits. In Elias v. State the State took the position that the defendant reneged on his agreement and failed to complete substantial assistance regarding other crimes. The court stated, however, at 420 "Since the defendant misunderstood the nature and scope of substantial assistance agreement as well as the length of the sentence, his guilty plea was not voluntarily made. Thus the trial court erred in denying the defendant's motion to withdraw the plea of guilty." Hunt's case also involved testimony against a co-defendant which she ultimately provided.

In Santobella v. New York, 404 U.S. 257, 30 L.Ed 2d 427, 92 S.Ct. 495 (U.S. 1971) the court stated that when a guilty plea rested in a significant degree on a promise of the prosecutor, so that it could be said to be part of the inducement, such promise must be fulfilled, and that the State's court affirmance of the conviction was improper. In the instant case Hunt's guilty plea rested in significant degree on the promise of a prosecutor to defer her sentencing until after she had the opportunity to testify in the trial of co-defendant Fotopoulos. The court in Santobello states that there must be fairness in securing an agreement between the accused and the prosecutor. In Santabello at page 433 the court states: "We emphasize that this is in no sense to question the fairness of the Sentencing judge: the fault here rests on the prosecutor not on the sentencing judge."

Likewise in the instant case the sentencing judge, when the plea bargain appeared to be falling apart on July 24, 1990, entered an order setting the sentencing for October 29, 1990. (R 1835, 1836) He set the sentencing at the request of the State. His initial order setting the sentencing for October 29, 1990 was proper because it would have provided for Hunt's Sentencing after the Fotopoulos trial. The sentencing date of Hunt was further advanced at the request of the State who stated that the matter was ready and the State is ready to proceed. (R 1835) It was this insistence by the prosecutor that the sentencing occur prematurely which caused the trial judge to make reversible error. The State also filed a motion in the co-defendant's case to reset the co-defendant Fotopoulos trial until after the Hunt sentencing. (R 1849) This was in clear violation of the plea agreement (R 1487). On August 14, 1990 the court entered its order granting the State's motion to set the sentencing phase for September 4, 1991 (R 1853). The defendant filed her own pro se motion to postpone and/or continue the September 4, 1990 sentencing. (R 1862). This was denied and the Sentencing hearing was held on September 4, 1990.

In Nacker v. State, 500 So.2d 256 (Fla. 3 DCA 1986) the court stated: "A prosecutor is held to meticulous standards of both promise and performance in plea agreements. This is because when a defendant pleads guilty he waives his fundamental rights to confront his accusers, to present witnesses in his defense, to remain silent and to be

convicted by proof of guilt beyond all reasonable doubt. (Citing to Santobello v. New York Id,) Thus the State's breach of the plea agreement removes the legal basis for the plea and entitled Macker to relief. See petition of Geisser 554 F. 2d 698, 704 (5th Cir 1977)." "The withdrawal of a plea ought to be allowed where justice and fairness are required..," The United States Supreme Court has recommended that when the State has breached a plea agreement, the trial court should either order specific performance of the agreement or allow the defendant to withdraw his plea. Santobello Id.

In the instant case the court should have put the parties in the position status quo ante before the plea and permited Hunt to stand trial. The court in Macker states. "This case should therefore serve as a reminder to State Attorneys." "That when a plea rested in significant degree on a promise of the prosecutor, so that it can be said to be part of the inducement, such promise must be fulfilled." "We caution state attorneys that they bear the ultimate responsibility of insuring compliance with the plea agreements that their offices enter into and to that end they should seek to train and educate their assistants so that unfortunate incidents such as this do not recur."

In Elias v. State, 531 So.2d 418 (Fla. 4 DCA 1988) the court provided a list of the proper grounds for a motion to vacate and set aside plea. "The court should allow the defendant to withdraw his plea when he files a proper motion

and proves that the plea was made under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights." The appellant has filed a proper motion and has sufficient grounds for the vacating and setting aside her plea. (Appendix).

In Heaton v. State, 543 So.2d 290 (Fla. 4 DCA 1989) the trial court abused its discretion in denying a defendant in cocaine trafficking and possession case, a continuance so as to have more time to furnish substantial services to the police, as he was required to do under a plea bargain agreement or to withdraw his plea and proceed to trial. The judge had originally allowed only 37 days in which defendant could provide such services while it was customary to provide 90. In the instant case the appellant filed her own pro se motion to continue the trial (Record 1862-1867) On August 31, 1990 she filed a motion to withdraw the plea and set for trial (R 1838-1839 & R 1927-1933) In the Heaton case as in the Hunt case, the State prematurely sentenced Hunt without giving her the opportunity to perform her end of the agreement to testify against the co-defendant. The trial court should have either continued the sentencing until after the Fotopoulon trial or in the alternative granted her motion to vacate plea and allow her to go to trial.

In Graham v. State, 514 So.417 (1 DCA 1987) the court stated, "Since a trial court should be liberal in exercising its discretion to permit withdrawal, especially where it is shown that a plea was based on a failure of communication or

misunderstanding by the defendant concerning the consequences of his plea, we reverse and remand for an evidentiary hearing to permit the court to receive further evidence." This case provides a third alternative remedy for this Court to (1) grant the motion to vacate plea and set for a new trial; (2) specifically enforce a life imprisonment sentence; or (3) remand for a new evidentiary hearing regarding Hunt's understanding of the consequences of the plea.

On July 24, 1990 when the state indicated that it would not honor that portion of the plea which required the trial judge to sentence Hunt after her testimony in the co-defendant Fotopoulos trial, (R 1498-1501) Hunt was entitled to withdraw her plea and the trial court had an affirmative duty to so advise her. The court neither advised her nor granted her request to withdraw her plea.

"Guilty plea induced by a promise of defense counsel that is not kept is involuntary." Loneraan v. State, 495 So.2d 196 (Fla. 2 DCA 1986).

Coercion by counsel may render a guilty plea involuntary. Simmons v. State, 485 So.2d 475 (Fla. 2 DCA 1986). The appellant has alleged grounds which arise to the level of coercion. (Appendix)

"A defendant's statement at the time of his guilty plea hearing that his plea is intelligent and voluntary is not dispositive, although it gives rise to a presumption that the plea is constitutionally adequate. Any presumption of constitutional adequacy of a guilty plea which arose from the

defendant's statement at his plea hearing that his plea was voluntary and that he was satisfied with his counsel's representation was overcome, where at the time the statement was made the defendant had no way of knowing that his lawyer had inadequately informed him that he would not be deported if he pled guilty." Downs-Morgan v. U.S., 765 F.2d 1534 (11 Cir. 1985). In the instant case any presumption as to the constitutional adequacy of Deidre Hunt's guilty plea was overcome because at the time the appellant entered the plea she had no way of knowing that her lawyer, Mr. Niles, had inaccurately informed her: 1) that she would receive a life sentence and not death in exchange for her plea and testimony against the co-defendant and 2) that there was no evidence of bullets from the machine gun of Fotopoulos.

The trial court failed to make clear to Hunt that if she did not testify against the co-defendant Fotopoulos what the consequences of her plea would be, Coon v. State, 495 So.2d 884 (Fla. 2 DCA 1986).

When a plea agreement is not honored either by mistake, inadvertence or subsequent change and the trial judge concurs with the plea bargain, the defendant should have the opportunity to withdraw his plea. Stranisan v. State, 457 So.2d 546 (Fla. 2 DCA 1984).

In Tobey v. State, 458 So.2d 90 (Fla. 2 DCA 1984) the court stated: "When defendant moves to withdraw his plea of guilty, court should be liberal in exercising its discretion to permit withdrawal, especially where it is shown that plea

was based on failure of communication or misunderstanding of facts; such situation may arise where attorney for defendant misrepresents to him consequences of his plea."

"Where defendant has a reasonable basis to believe that the promise of a lesser penalty has been made by the judge or prosecutor than the penalty he assents to, he is entitled to withdraw his plea." Thomas v. State, 458 So.2d 883 (Fla.5 DCA 1984). In the instant case whether or not the prosecutor actually made the promise as long as Hunt has a reasonable basis to believe that the promise of a life sentence was made, then she is entitled to withdraw her guilty plea.

Hunt has alleged that her attorney did not properly inform her of the consequences of her plea. She has made other allegations about the representation of her attorney. (R 1596-1638) "If the quality of counsel's representation in connection with the guilty plea falls below a certain minimum level, the client's plea will not be deemed to have been entered knowingly and voluntarily." Neal v. Wainwright, 512 F.Supp. 92 (M.D. Fla. 1981)

"Even a slight undue motivation will invalidate a plea of guilty, and such plea must be without semblance of such influence." Bartz v. State, 221 So.2d 7 (Fla. 2 DCA 1969). No guilty plea which haa been induced by an unkept plea bargain can be permitted to stand. U.S. v. Ammirato, 670 F.2d 552 (5th Cir.1982). "If a defendant is induced to plead guilty by a promise of performance by the prosecution, defendant has a constitutional right to specific performance

of the bargain and such right adheres regardless of whether the admission by the State is inadvertent or appears to be harmless." Acosta v. Turner, 666 F.2d 949 (5th Cir.1982) Government must adhere strictly to terms and conditions of plea agreements it negotiates with defendants. U.S. v. Avery, 621 F.2d 214 (5th Cir.1980).

A guilty plea induced by a promise of defense counsel that is not kept is involuntary. Haushton v. State, 454 So.2d 725 (Fla. 1 DCA 1984).

"There should be no substantial surprises in plea agreements." Gladon v. State, 406 So.2d 1219 (Fla.4 DCA 1981). In the instant case it was surely a surprise when the State proceeded to sentence Deidre Hunt before she had the opportunity to testify against co-defendant Fotopoulos and when the State failed to giver her a life sentence.

The rule allowing a defendant, upon leave of court, to withdraw a plea of guilty before sentence is imposed should be construed liberally in favor of the accused. U.S. v. Kline, 560 F.2d 1236 (5th Cir.1977)

Even if the defendant's plea is based on her reasonable reliance on her attorney's advice based on an attorney's mistake or misunderstanding, the defendant should be allowed to withdraw her plea. Folske v. State, 430 So.2d 574 (Fla.5 DCA 1983).

For the foregoing reasons the Honorable Trial Court made a constitutional harmful error and abused its discretion in failing to grant defendant's motions to set aside and

vacate plea and allow her to go to trial.

## ISSUE III

**THE TRIAL COURT ERRED IN DENYING HUNT'S ATTORNEYS NUMEROUS MOTIONS TO WITHDRAW AND HUNT'S PRO SE MOTIONS TO DISCHARGE COUNSEL.**

Hunt's attorney/client relationship with her court appointed attorney was turbulent. On April 24, 1990 the defendant filed a hand written pleading prepared by jail house lawyer, G. Bradley, essentially asking that Mr. Niles be removed from the case and that Appellant be permitted to represent herself with the assistance of a jail house lawyer. (R 1803- R-1807) The motion alleges Niles ineffective assistance of counsel in violation of Hunt's sixth amendment constitutional right. Hunt specifically requested to "handle her own case cause she ain't getting proper representation". (R 1805)

On April 24, 1990 Niles filed a motion far reconsideration of his previous motion to withdraw. (R 1815-1816) Niles states, "There exists open hostility between the undersigned and the defendant, and the defendant has accused the undersigned of being ineffective in his defense and lying to the defendant - all of which has been hotly contested by the undersigned." (R 1815) "The undersigned has reason to believe that the open hostility and lack of cooperation will continue even into the trial itself." (R 1815) That was a correct prediction and attorney/client relationship deteriorated to such an extent that there was no trial on guilt or innocence at all. In the hearing on April 24, 1990

Niles indicates that on two previous occasions Hunt demanded that Niles be removed. (R 1374) Hunt has made a 180 degree reversal in trial tactics against Niles' recommendation. (R 1376) Niles states that Appellant made personal, professional attacks against him. (R 1383) Niles states that Appellant has the right to be her own attorney. (R 1384). The court states, "It looks like I am at the point now where the relationship between you and Mr. Niles is not salvageable." (R 1389)

In objecting to the motions of Niles and Hunt, the State Attorney on April 24, 1990 referred to our "understanding and agreement." (R 1393 - 1398) This indicates that the state and the defense had some off the record agreements well before the May 7, 1990 plea. Hunt changed her mind and allowed Peter Niles to represent her. (R 1401) However, at that hearing the court did not make any inquiry regarding Hunt's right of self representation. "We recognize that when one such as Appellant attempts to dismiss his court appointed counsel, it is presumed that he is exercising his right to self representation." Hardwick v. State, 521 So.2d 1071, 1074 (Fla. 1988) Therefore, the trial court improperly refused to let Appellant represent herself in violation of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L Ed 2d 562 (1975). The 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. Hunt filed her own pro se motion to dismiss insufficient counsel. (R 1858) Hunt filed her own motion to postpone and/or continue the trial at the sentencing hearing of September 4, 1990. (R 1862). Hunt alleges ethical improprieties in terms of bar grievances against her attorney. Hunt filed said motion with the Supreme Court. (R 1862) Hunt filed her own pro se motions to become co-counsel in March, 1990 and April, 1990. (R 1865) (R 1871-1876) As early as January 25, 1990 Hunt was complaining to the Judge about the attorney/client relationship and the conduct of her lawyer. (R 1871) Hunt states, "I'd like to represent myself in this matter." (R 1871) Hunt made serious ethical charges to the Judge about Niles' reputation and conduct. (R 1873) In fairness to Niles, he always hotly contested Hunt's assertions. Nevertheless, this bickering is an indication of the erosion of the attorney/client relationship and served to deny Hunt effective assistance of counsel. (R 1880-1881)

Hunt filed her own pro se Writ of Error and/or Notice of Appeal to the Fifth District Court of Appeal alleging that the Order Denying the Motion to Postpone or Continue was harmful error. (R 1894) Her grounds were that she was not provided discovery by her attorney. (R 1895).

In a July 24, 1990 hearing Niles states that he is "concerned because I do have a dominant personality maybe I persuaded her to enter this plea." (R 1511) During that same hearing Niles stated that he and appellant stand together on

a request for a jury trial on guilt or innocence and the death penalty. (R 1521) Therefore, when the sentencing proceeding was actually conducted non-jury, there was no adequate waiver of the jury on the record.

In Taylor v. State, 15 FLWd 437 (Fla. 1st DCA 2/13/90) Taylor argued that the trial court erred in failing to inform Taylor of his right to represent himself after Taylor moved to discharge his court appointed attorney. The court stated that "where defendant makes it appear to the trial judge before trial that he desires to discharge his court appointed counsel, the court is to inquire into the reason for the defendant's request and if such reason is incompetency, the trial judge is to make a sufficient inquiry to determine whether there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." If no reasonable baeis appears for the finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the state may not thereafter be required to appoint a substitute." Taylor at D 439. The trial court below did not make a sufficient inquiry nor advise defendant accordingly. "However, a determination of competency of counsel does not fully satisfy the duties imposed on the trial court. The trial judge erred in failing to advise Taylor that his attorney could be discharged but the state would not be required to appoint substitute counsel and that Taylor has a right to represent himself. Faretta v.

California, supra. The court found that to be harmful error citing State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The U.S. Supreme Court in Faretta states, "The Sixth Amendment does not provide merely that an defense shall be made for the accused, but rather it grants to the accused personally the right to make the defense." "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant, not an organ of the state Interposed between an unwilling defendant and his right to defend himself personally." "The allocation of power to counsel to make binding decisions in regard to many aspects of trial strategy can only be justified by the defendant's consent, at the outset, to accept counsel as his representative." "Since the right to defend is personal and since the defendant, and not his lawyer or the state, will bear the personal consequences of a conviction, it is the defendant who must be free personally to decide whether in his particular case counsel is to his advantage." "A state may, even over an objection, by the accused, appoint a standby counsel to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation in necessary."

In the instant case the defendant clearly and unequivocally declared to the trial court that she wanted to represent herself and did not want counsel. The record

affirmatively showed that Appellant was literate, competent and understanding and that she was voluntarily exercising her informed free will. However, the trial judge failed to warn the accused that she could have a trial without an attorney and that the accused would be required to follow all ground rules of trial procedure.

"The question is whether a state may constitutionally hail a person into its criminal courts and there force a lawyer upon him even when he insists he wants to conduct his own defense." Faretta at 807.

"To force a lawyer on a defendant can only lead him to believe that the law contrives against him." "Moreover it is not inconceivable that in some rare circumstances, the defendant might in fact present his case more effectively by conducting his own defense." Faretta at 834. Hunt did in fact believe that the law contrived against her and accused Niles of "setting her up". (R 1879) The U.S. Supreme Court held, "In forcing Faretta under these circumstances, to accept against his will a state appointed public defender, the California court deprived him of his constitutional right to conduct his own defense." Faretta at 836.

In the case of Stano v. Dugger, 889 F.2d 962 (U.S.11th Cir. 1989), Stano'n court appointed attorney advised that he had not yet received discovery from the state and thus not knowing what sort of evidence the state had, could not advise Stano on how to plead. In the instant case Hunt alleges that she did not have discovery up until a few days before trial.

(R 1601) The Stano case raises the questions of ineffective assistance of counsel and of waiver of counsel. The court in Stano held that in accepting Stano's guilty plea, the trial judge clearly denied Stano's Sixth Amendment right to assistance of counsel. Like Stano, Appellant in fact, although not in appearance, proceeded pro se. Contrary to Stano, who never actually requested to proceed pro se, the record reflects that Hunt did in fact on several occasions request to be her own lawyer or co-counsel. (R1805, 1865, 1612, 1871) As in Stano, in the instant case the trial judge failed entirely to inform Hunt that she was entitled to assistance of counsel or to insure that she understood that she was without counsel. Stano cites United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed 2d 657 (1984) Cronic looks to "the circumstances surrounding the representation". If under those circumstances, "the likelihood that counsel could have performed as an effective adversary are so remote as to have made the trial inherently unfair", then ineffectiveness of counsel can be presumed, "without inquiry into counsel's actual performance at trial." Stano at page 967. Rather than an analysis of particular aspects of Mr. Niles performance, Cronic calls for an inquiry into "the circumstances surrounding the representation". Stano at page 967 footnote 4.

In Strickland v. Washinston, 466 U.S. 668, 88 L.Ed 2d 674 (1984), 184 S.Ct. 2052, the U.S. Supreme Court stated that defendant must first show counsel's performance was

deficient. It is clear that his performance was deficient in failing not to file a motion to compel the state's specific performance of the plea agreement before the sentencing of Hunt, There is a reasonable probability that if the sentencing hearing had occurred after the Fotopoulos trial and conviction and Hunt's cooperation therein that the death sentence would have been different and she would have gotten life. There can be no confidence in the outcome of this sentencing hearing which was done in violation of a solemn plea agreement.

Where the defendant and the counsel disagree about trial strategy, the defendant makes the final decision. Cain v. State, 565 So.2d 875 (Fla. 5 DCA 1990).

To properly invoke the right to self representation, the defendant must do no more than state his request, either orally or in writing, in an unambiguous fashion so that no reasonable person can say that the request was not made. Dormon v. Wainright, 798 F.2d 1358 (U.S. 11th Cir.Ct.App. 1986). Deidre Hunt has stated her request in writing in an unambiguous fashion. (R 1871).

A defendant's unreasonable refusal to accept court appointed counsel is equivalent to a request for self representation. McCall v. State, 481 So.2d 1231 (Fla.1st DCA 1985).

Where a personal conflict between the accused and the court appointed counsel produces or results in a lack of such counsel's effectiveness, a different attorney should be

appointed. Donald v. State, 166 So.2d 453 (Fla. 2 DCA 1964).

## ISSUE IV

### IN THE SENTENCING PHASE THE COURT ERRED IN NOT FINDING STATUTORY AND NON-STATUTORY MITIGATING FACTORS

The Court found no statutory mitigating factors to have been reasonably established by the evidence but did find that non-statutory mitigating factors were established. (R-1901, R-1908) The court erred in failing to find that the following statutory mitigating factors were present. (F.S. 921.141 (6)(b) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, F.S. 921.141 (6)(e) the defendant acted under extreme duress with a substantial domination of another, F.S. 921.141 (6)(f). The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, F.S. 921.141 (6)(g). The age of the defendant at the time of the crime.

Under Campbell v. State, 16 FLW S1 (Fla. 12/13/90) the court must find as a mitigating factor each proposed factor that is mitigating in nature and that has been reasonably established by the greater weight of the evidence, The court found there was some minimal evidence of emotional disturbance (R-1901), that co-defendant Fotopoulos was a scary individual carrying a firearm and other weapons and was trained to kill, that the defendant had a history of abusive relationships with men and was physically and mentally abused

by Fotopaulos. Hunt claimed that she shot Ramsey because Fotopoulos aimed an AK 47 machine gun at her. "Dr. Levin, the defense expert, testified this mitigating factor was established," (R 1902) regarding extreme duress or substantial domination of another. Hunt claimed physical and emotional abuse. (R 1903).

The defense did establish non-statutory mitigating factors. The first category is abused or deprived childhood. (R 1903). There was ample proof that defendant was physically and emotionally abused as a child, including sexual assault. Regarding the category of emotional or mental state, the court found that the defendant is somewhat: unstable, her childhood was definitely unstable. (R 1904). The court found that Hunt's deprived childhood was significant. (R 1904). The court found that Hunt's plea confession and cooperation was a minor mitigating factor. (R 1904). Of course, the trial court did not consider the full cooperation of Hunt's three days of trial testimony against Fotopoulos, which occurred approximately one month later in October, 1990. This is in violation of the plea agreement.

The court erred in failing to find statutory and non-statutory mitigating circumstances that were supported by uncontroverted evidence and in failing to assign any weight to the one mitigating factor the court found to be present.

The Florida Supreme Court has recently implicitly recognized that the Florida Statutory scheme for determining

whether death is appropriate is capable of being applied in an arbitrary manner. Campbell v. State, supra. and Nibert v. State, 516 FLW S3(Fla.12/13/90). Cheshire v. State, 15 FLW S 504 (Fla.9/27/90).

In Nibert v. State, supra the court held: "When reasonable uncontroverted evidence of mitigating circumstances presented, the trial court must find that the mitigating circumstance has been proved." In the instant case the statutory and non-statutory factors alleged above have been presented through the testimony of Dr. Levin (R 657-763), Carol Hunt (R 923-955). In Nibert the court concluded that the death sentence was disproportionate, even though it approved the trial court's finding that the murder was heinous, atrocious or cruel as an aggravating circumstance.

A less than extreme emotional disturbance or a less than substantially impaired capacity are clearly valid non-statutory mitigating circumstances. Lockett v. Ohio, 438 U.S. 586, 57 LEd 2d 973, 985 Ct. 2954 (1978) and Cheshire v. State, supra. The court's failure to find and weigh those non-statutory mitigating circumstances which were reasonably established by the evidence since they were supported by reasonable quantum of competent proof was clearly error under Campbell supra and Nibert supra.

The court found mental mitigation to be present, but because it did not find the same to rise to the level required for the statutory mental mitigating factors, it failed to include them in the weighing process.

The death penalty is disproportionate where two aggravating factors are outweighed by a deprived and abusive childhood, youth (17), inexperience, immaturity and marginal intellectual functioning. Livinuston v. State, 565 So.2d 1288 (Fla. 1990).

For the foregoing reasons this Honorable Court should reverse and remand for a new sentencing hearing.

## ISSUE V

### THERE WAS NO VOLUNTARY WAIVER OF THE JURY FOR THE PENALTY PHASE

When Hunt's plea was rescinded in July, 1990, so were all its conditions.

The express conditions of the May 7, 19990 plea were:

1) Hunt would testify against the Co-Defendant.

2) The court would delay her sentencing until after her testimony.

3) She would waive her right to a jury in the penalty phase.

Using the argument set forth in Issue I, once the plea contract was voided the conditional waiver of right to trial by jury in the penalty phase was voided. Thereafter, it was incumbent on the trial court to give defendant a jury or obtain a new and separate waiver on the record. No such waiver was made. On the contrary, subsequent to her anticipatory repudiation of the plea contract, Hunt specifically claimed her innocence and invoked her right to trial by jury by demanding it.(R 1612, 1508-1509, 1521). "The right of trial by jury shall be secure to all and remain inviolate". Fla. Const. Art.I $22, U.S. Const. 6th Amendment.

Any valid waiver at the plea hearing was vitiated by the parties respective later breaches or cancellation. Because of Hunt's emotional state including her inability to use rational judgment when under stress (R 679), Hunt was unable to intelligently waive her right to a jury.

After the plea collapsed, the logic for a non-jury hearing collapsed. After all, the reason Niles sought a non-jury hearing was to benefit from Hunt's expected testimony and gain mitigation in the eyes of the judge who heard both cases.

When the plea collapsed, everyone was frustrated, Niles, the State Attorney, the Judge, Hunt. Then the Judge had to act as an impartial fact finder without an advisory opinion. In a capital case it is especially necessary for a jury to act as fact finder in an advisory capacity as to life or death.

The advisory opinion becomes the declaration of the public, and in effect creates a presumption of correctness which can only be overcome by clear and convincing facts, Neary v. State. 384 So2d 881 (Fla. 1980).

## ISSUE VI

### THE COURT ERRED IN DENYING HUNT'S MOTION TO CONTINUE SENTENCING HEARING

On August 31, 1990 after Hunt's Motion to Vacate and Set Aside Plea and Motion to Dismiss Insufficient Counsel was denied, Hunt filed a pro se motion to postpone and/or to continue. (R 1862-1867) Said motion was denied. Hunt was

prejudiced by the denial of the motion for continuance. If Hunt had been afforded a continuance the following would have been done differently: Hunt could have reconsidered her earlier position not to testify against Fotopoulos and agreed to testify against Fotopoulos which she ultimately did thereby reinstating the plea agreement. Hunt could have had sufficient time to review discovery, to prepare her for trial. In addition, if the continuance had been granted the Appellant would have sufficient time to get another hearing on her pro se motion to set aside plea filed on August 31, 1990. If the continuance had been granted Hunt would have uncovered new and different evidence from discovery which she had received belatedly only five days before the trial. (R 1601) Aldridge v. State, 425 So.2d 1132 (Fla. 1982).

Hunt's pro se Motion to Continue was the procedural equivalent of a Motion to Compel Enforcement of plea agreement. This was necessary to delay the rush to judgment in violation of the May 7, 1990 plea and to allow Hunt to be sentenced after Fotopoulos. Using the argument in Issue I, any sentencing hearing for Hunt before Fotopoulos would be a breach of plea contract, so the postponement needed to be granted to protect the integrity of the terms of the plea.

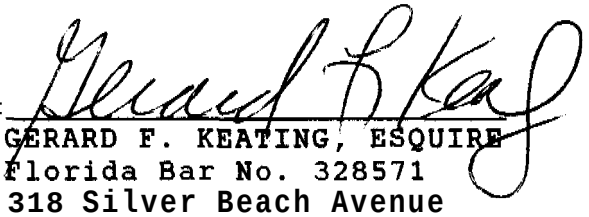
## CONCLUSION

For the foregoing reason this Court should reverse and remand for a jury trial on guilt or innocence and sentencing.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Appellant's Initial Brief has been furnished by hand delivery to Kelly Nielen, Esquire, Assistant Attorney General 210 North Palmetto Avenue, Suite 447, Daytona Beach, FL 32114 and the original and seven (7) copies filed with the Office of the Clerk, 500 S. Duval Street, Tallahassee, FL 32399 this 25th day of March, 1991.

GERARD F. KEATING, P.A.

By: 

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