IN THE SUPREME COURT OF FLORIDA

DAVID MUELLER ELAM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,039

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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PRELIMINARY STATEMENT

Appellant, David Mueller Elam, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." The record is consecutively paginated except for the penalty phase proceedings which are paginated separately. Consequently, references to the pleadings will be by the symbol "R," references to the hearings held before the penalty phase proceedings will be by the symbol "T," and references to the penalty phase proceedings will be by the symbol "PT" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Because the State cannot accept Appellant's incomplete statement of the case and facts, it will present its own version as follows:

On January 7, 1992, Appellant was indicted for the first-degree murder of Carl Beard, which was allegedly committed on December 16, 1991. (R 415). The following day, defense counsel moved for the appointment of a confidential mental health expert, Robert Davis, M.D., and the trial court granted the motion on January 14, 1992. (R 425-26, 427-28).

On February 13, 1992, the State moved to declare Appellant's girlfriend, Susan Dawson, a material witness and moved to perpetuate her testimony for trial, since the State believed that she intended to return to England or would be deported to England because her visa had expired and she could no longer work legally in the United States. (R 431-32, 435-36). At the hearing on the motions, on February 24, 1992, Ms. Dawson submitted an unsworn supplemental statement, alleging that the prosecutor and police had coerced her to make false statements regarding the murder without the benefit of counsel, and that the State had confiscated her passport and made false statements to the British Consulate in Atlanta regarding her status. In addition, Ms. Dawson attempted to recant some of the statements that she had apparently made to the police about her and Appellant's involvement in the murder of Mr. Beard. (R 441-43; T 265-81). The trial court ultimately granted the State's motion to perpetuate her testimony and found Ms. Dawson to be a material

witness. However, the trial court denied the State's request that Ms. Dawson be held on bond, and, instead, ordered that she report to the state attorney's office three times per week. (R 447-49, 450-51; T 281). Immediately thereafter, defense counsel moved to continue an upcoming pretrial hearing because discovery had not yet been completed. Because he would not waive speedy trial, however, the trial court denied the motion and left the trial set for March 16, 1992.[1] (T 281-83).

On April 27, 1992, Appellant again moved to continue the trial, alleging that (1) he had not completed discovery because the results of some lab analyses had not been furnished by the State and some depositions had not been taken, (2) a private investigative agency hired pro bono had not completed its investigation for penalty phase purposes, and (3) defense counsel was involved in four other capital cases. (R 454-56). At the hearing on the motion, the State objected to the continuance, and the trial court denied the motion, but indicated that it would reconsider it if the lab reports were not disclosed within sufficient time or if some other problem developed. (R 457; T 290-310).

Also at this hearing, the State argued its motion to compel discovery.[2] Specifically, the State wanted to depose Dr. Davis, the mental health expert who originally examined Appellant.

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[1] Although the appellate record is not clear, the trial date was at some point rescheduled to May 18, 1992.

[2] For some reason, this motion was not made a part of the appellate record.

Although Appellant had listed him as a witness,[3] he withdrew the doctor from his witness list and objected to the State's motion to compel. Since Dr. Davis was no longer listed as a witness, the trial court made no ruling on the State's motion. (T 301-02, 310-20).

On May 11, 1992, a week before the scheduled trial date, the State filed an information charging Appellant with two counts of Solicitation to Commit Murder, which had allegedly been committed on May 5, 1992. (R 515). On the day that the information was filed, Appellant appeared in court to enter a plea to both cases. At the hearing, defense counsel indicated that an agreement had initially been reached whereby Appellant would plead guilty to one count of first-degree murder and to two counts of solicitation to commit murder in exchange for a sentence of life imprisonment on the murder charge and a sentence of thirty years on each of the solicitation charges to run concurrently to each other, but consecutively to the life sentence. However, defense counsel indicated that, at the last minute, Appellant indicated that he wanted to be sentenced to death instead of to life imprisonment, and the State agreed to pursue it. In addition, Appellant indicated that he did not want a penalty phase jury and did not want to appear at the penalty phase proceeding. (T 325). The State confirmed that it had rescinded its agreement to recommend life on the murder charge based on Appellant's desire to be sentenced to death, noted that the thirty-year sentences for solicitation were departures from the guidelines, but

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[3] This witness list also does not appear in the appellate record.

emphasized that its plea agreement remained conditioned on Appellant admitting his guilt to the offenses. (T 326-29).

At that point, the trial court called Appellant forward, and Appellant confirmed that he wanted to plead guilty to all charges. (T 330-32). Consequently, the trial court engaged in a lengthy plea colloquy with Appellant, who was placed under oath. (T 332-46). During this colloquy, the trial court elicited a factual basis for the pleas from the State. (T 336-42). Following the State's recitation of its factual basis, Appellant admitted, with one exception, that the State's recitation of the facts was accurate. (T 342). In addition, Appellant confirmed that his motivation to plead guilty was not based on any promise or threat made by the State regarding Appellant's girlfriend, Susan Dawson, who had charges pending resulting from the murder. (T 345-46).

As a result of the plea colloquy, the trial court found that Appellant was entering these pleas voluntarily, knowingly, and intelligently. It thereafter adjudicated Appellant guilty of two counts of solicitation to commit murder and sentenced him pursuant to the plea agreement to thirty years in prison on each count to run concurrently to each other but consecutively to the forthcoming sentence on the murder charge. (T 349-54). Regarding the penalty phase on the murder charge, Appellant orally waived his presence at the proceeding, then filed a written waiver. (R 459; T 355-56, 364-65). In addition, Appellant indicated that he did not want defense counsel to participate to any degree at the penalty phase proceeding, i.e., no opening statement, no cross-examination of state witnesses, no

presentation of mitigating evidence, no closing statement. (T 359-64).

After being prompted by the State, defense counsel indicated that Dr. Davis had found Appellant sane at the time of the offense and competent to stand trial; thus, he would not be called as a witness in mitigation. Appellant personally affirmed that the doctor had found him competent to stand trial. (T 358-58). Ultimately, the trial court adjudicated Appellant guilty of first-degree murder and set the penalty phase proceeding for May 21, 1992. (T 367-68).

On May 13, 1992, a status hearing was held, at which time Appellant reaffirmed his desire not to appear at the trial and explicitly stated, "I don't want [defense counsel] to make any comment, no anything in regard to the penalty phase or the rest of this case." (T 380-81). Again, defense counsel indicated that Dr. Davis had found Appellant competent, and Appellant agreed. Moreover, defense counsel indicated that Appellant knew what he was doing and that they had discussed the ramifications of Appellant's decisions. (T 382-90). Defense counsel moved to withdraw, however, because Appellant was not going to let him do anything. Defense counsel was also concerned that Appellant would change his mind, and then he would be unprepared to present a defense. (T 395-400). The trial court assured counsel that, if Appellant changed his mind, it would grant any motion for continuance. (T 401).

On May 21, 1992, at Appellant's penalty phase trial, defense counsel expressed concern that his client could order him to remain silent while the State presented unrebutted evidence of

aggravating circumstances. Since defense counsel believed that his ethical obligations as an attorney prohibited him from following his client's directives, he again moved to withdraw. In the alternative, defense moved the trial court for a continuance in order for him to further investigate mitigating evidence. (PT 12-36). At that point, Appellant was brought before the court and again reiterated that he did not want to be present and did not want his attorney to present any evidence or argument on his behalf. Appellant wanted the opportunity, however, to read a statement to the court after the State's case. (PT 36-41). Based on Appellant's assertions, defense counsel again moved to withdraw. Convinced that Appellant did not want to represent himself, the trial court denied defense counsel's motion to withdraw, but indicated that it would not order defense counsel not to present argument or evidence on Appellant's behalf. It would give him an opportunity, but he would have to decide for himself whether to present it or not. As a result, defense counsel moved for a continuance in order to further investigate mitigating evidence. This motion was denied. (PT 42-61). Appellant was then removed from the courtroom pursuant to his request.

Thereafter, both the State and defense counsel presented an opening statement. On Appellant's behalf, defense counsel argued that Appellant, at most, committed second-degree murder, and that his simultaneous convictions for solicitation to commit murder should not be used in aggravation. (PT 71-73).

The State's first witness was Dr. William Hamilton, the medical examiner who performed the autopsy on the victim, Carl

Beard. Dr. Hamilton testified that the cause of death was "multiple blunt traumatic head injuries." (PT 83). He found a total of 15 lacerations to all sides of the victim's head, which were made by 6 to 12 separate blows. The victim's skull was fractured and the brain was torn. (PT 88-89). Dr. Hamilton also found bruises on the victim's right elbow and left forearm which were likely caused by being struck with a blunt object, and he found that the fifth finger of the victim's left hand was fractured. In his opinion, these were all defensive wounds. (PT 84-87). Dr. Hamilton opined that these defensive wounds indicated that the victim was probably conscious during part of the attack, and he believed that the pain was likely intense. (PT 90-91). During defense counsel's cross-examination, Dr. Hamilton stated his belief that the victim was likely conscious between a minute to a minute and a half and that death occurred within ten minutes at the most. (PT 93-94).

The State's next witness was Detective Douglas Yuill, one of the investigators on Appellant's case. Detective Yuill testified that he received some documents from Paisano Publication Company, the parent company of Easyrider's, the store Appellant was managing at the time of the murder of his employer, Carl Beard. These documents indicated discrepancies between the money allegedly taken in by Easyrider's and the money actually deposited into the bank. As a result, Detective Yuill went to Easyrider's and went through the store's accounting books with Appellant to determine the source of the discrepancies. They found that money collected by the business from September 9, 1991, through October 31, 1991, had not been deposited into the

bank although they appeared as deposits on the store's books. In all, 43 deposits totalling $10,130.79 had not been deposited. Yet, Appellant could not explain why they had not been deposited. (PT 98-103). Forty-three deposit slips prepared for those days' deposits were later found secreted in a box in a storage room at Easyrider's. (PT 108-09). Detective Yuill also learned from another detective that the victim had arranged a meeting regarding the discrepancies with the store's bank for December 17, 1992, the day after the victim's murder. (PT 104).

In addition to the deposits, Detective Yuill found three checks unaccounted for totalling $15,500, which had been written by the victim. (PT 104-05). One of these checks was found in an envelope in a storage room at Easyrider's and had Appellant's fingerprints on it. (PT 105-06, 114). When Detective Yuill indicated that he had heard from another detective that more money was missing from Easyrider's, defense counsel objected on hearsay grounds, but the trial court overruled the objection. Thereafter, Detective Yuill testified that $4,200 in cash was missing from the store according to this other detective. (PT 106-07). Based on these discoveries, Appellant was arrested on December 27, 1992, for grand theft.[4]

On cross-examination by defense counsel, Detective Yuill testified that Appellant told him that he had made some of the 43 questioned deposits and the victim had made some. (PT 115). Detective Yuill also indicated that Paisano Publication Company

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[4] As part of Appellant's later plea agreement, the State agreed not to file an information on the grand theft. (T 325, 355).

had not recovered two of the three missing checks totalling $15,500. (PT 116-17).

Following Detective Yuill's testimony, defense counsel again moved to withdraw, or, in the alternative, moved for a continuance, both of which were denied. (PT 118, 119-23). Thereafter, the State presented the testimony of Detective Nils Ewanik, an officer with the Daytona Beach Police Department, who investigated Mr. Beard's murder. Detective Ewanik testified that he and others were dispatched to Easyrider's after the victim's body had been discovered weighted down with cinder blocks in a canal in Englis, Florida. Apparently, there were cinder blocks behind Easyrider's that might have had similar paint deposits on them. (PT 125-27).

During his investigation of the murder, Appellant told Detective Ewanik that he and the victim had been at Easyrider's on December 16, 1992, until 6:00 p.m., at which point the victim left, taking the store's checkbook, deposit slips, and $4,200 in cash proceeds from that day's sales for a meeting with the bank the next day. (PT 128-29). Detective Ewanik found the burned remains of the checkbook behind the fence surrounding Easyrider's where Frank Fell and Mary Maibaurer disposed of it after burning the contents of Carl Beard's briefcase in a grill at Appellant's request.[5] (PT 130-33, 149, 153-54). The new manager at Easyrider's had also found an envelope containing a $5,000 check, two deposit receipt books, several blank deposit slips, and 43

[5] Fell and Maibaurer were enlisted by Appellant to help dispose of the body and evidence of the murder. They then became the subjects of Appellant's solication charges.

prepared deposit slips in a box underneath a motorcycle helmet in a storeroom at Easyrider's. (PT 132-33). Both the envelope and the $5,000 check contained Appellant's fingerprint. (PT 135, 150).

During his investigation, Detective Ewanik discovered that Appellant had purchased two pounds of marijuana with some of the stolen money, but had used the marijuana, and thus could not resell it to replace the money stolen. (PT 134-35). Detective Ewanik also learned from Jeff Ford, Appellant's cellmate while awaiting trial, that Appellant told Ford that on December 16 when the victim confronted Appellant with the theft of the money, Appellant "knew at that point in time that Mr. Beard had to be done away with to avoid his being found out." (PT 135).

While in jail, Appellant also talked to Jeff Ford about hiring someone to kill Frank Fell and Mary Maibaurer. As a result, Mike Best, an investigator with the state attorney's office was sent in undercover to pose as a hitman. Detective Ewanik overheard Appellant tell Mike Best that he wanted Fell and Maibaurer killed. To help Mr. Best find them, Appellant gave him investigative complaint affidavits indicating Fell and Maibaurer's addresses. For payment, Appellant's girlfriend, Susan Dawson, would courier drugs from Florida to New York for Mike Best's alleged "boss." Appellant also indicated that he was a beneficiary in a will bequeathing $17 million and that, if Mr. Best would kill his four other relatives named in the will, he would give Best $1 million. (PT 136-38).

At some point during the investigation, Appellant confessed to murdering Carl Beard. Appellant indicated to Detective Ewanik

that, when the victim confronted him about the thefts, he initially denied it, and when the victim persisted, Appellant struck the victim in the face with his fist, knocking him to the floor and then hit him again. With a nearby brick used to prop open the back door of Easyrider's, Appellant struck the victim numerous times in the head. (PT 139-40). Blood splatters were found on two walls in the rear of Easyrider's. (PT 139).

Initially, Appellant's girlfriend, Susan Dawson, claimed that she knew nothing about the murder, but when she was confronted with the statements of Frank Fell and Mary Maibaurer, she changed her story. She claimed that Appellant and the victim went into the rear of Easyrider's. After several minutes, she went inside and saw the victim lying face up on the floor just inside the door bleeding profusely from the head. She later drove the victim's car to the airport with Frank Fell and left it in the parking lot. (PT 141-42, 146). Fell and Maibaurer were given money by Appellant for helping him dispose of the body and clean up the crime scene. (PT 154-55). Appellant also gave $200 to some unknown person for letting him borrow the person's truck in order to take the victim's body to Englis. (PT 155).

Following Detective Ewanik's testimony, the State called Mike Best as a witness. Mr. Best testified that he went to the jail posing as a hitman from Miami named "Big Mike" to meet with Appellant. Appellant told him that he wanted two people killed so that they would not testify against him. Appellant remarked that he hoped Best had better luck than he did, since his "came floating up." Appellant also told Best that he was named in a will worth $28 million and talked about killing the other

beneficiaries. To pay for the hits on Fell and Maibaurer, his girlfriend would run drugs for him and his boss. Then, she needed to be secreted, though not killed, so that she could not testify. (PT 158-65).

Mike Best met with Appellant again two days later. Appellant told him that when he got out, he would show Best where his relatives were so that they could be killed and he could inherit all of the money. Appellant also offered the services of his girlfriend again as a drug courier. Appellant and Best arranged for Susan Dawson to meet Best at the jail and hand him a note that said, "Big Mike." She did so and then showed him where Fell and Maibaurer lived. (PT 165-71).

At a second meeting with Dawson, she told Best that, on the day of the murder, she saw Appellant and the victim go inside Easyrider's through the back door. After a few minutes, Appellant came out, went in his house behind Easyrider's, came out, picked up their baby, handed him to Dawson, and went back into Easyrider's. When the baby walked to the back door of Easyrider's, Dawson followed him over there and heard a scuffle and heard the victim say something to the effect of, "Please, don't hit me." She opened the door, and Appellant pulled her in. (PT 171-73).

Following Mr. Best's testimony, the State offered certified copies of judgments and sentences for the two counts of solicitation to commit murder and one from federal court indicating a conviction for fraud. (PT 175). Defense counsel objected to the fraud conviction on the ground that it was not a violent felony, and objected to the solicitation convictions on

the grounds that they were not yet final, in that the thirty days for appeal had not yet run. (PT 176-77). Thereafter, the State rested its case. (PT 177).

Defense counsel renewed his motion to withdraw and his alternative motion for a continuance, and also moved to strike all of the testimony based on hearsay to which he had objected. The trial court denied the motions. At that point, defense counsel indicated that he would be calling two witnesses on Appellant's behalf and that he wanted to proffer the evidence that he had not had time to obtain for trial. The State objected to the proffer, and the trial court sustained the objection. (PT 178-82).

Thereafter, Appellant presented the testimony of Richard Beard, the victim's brother, who testified that the family had originally decided not to push for the death penalty, until it learned that Appellant had tried to hire someone to kill two of the witnesses against him. (PT 184). Over the State's objection, defense counsel then offered the testimony of Timothy Wise,[6] who testified that Appellant was a "super fine person" and a great father to his son. (PT 190-93). Mr. Wise admitted on cross-examination, however, that he and Appellant had had a falling out eight or nine months before and that Appellant had changed. (PT 193-98).

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[6] The State objected because the witness had been sitting in the courtroom recording other witnesses' testimony even though the rule of sequestration had been invoked, and because his name had not been disclosed by defense counsel as part of discovery. The trial court found no prejudice, however, and overruled the State's objections. (PT 186-89).

Following Mr. Wise's testimony, defense counsel moved to proffer other evidence, which was denied. (PT 198-200). Regarding the prior testimony based on hearsay, the State indicated that Susan Dawson and Frank Fell were available to testify if defense counsel wanted to examine them about their hearsay statements. (PT 200-01). Defense counsel rested his case. (PT 201).

At that point, Appellant was brought before the court to give an unsworn statement. Appellant stated that he and Ms. Dawson had a child and that he then obtained employment at Easyrider's. His agreement with Carl Beard was that he would get a salary plus a percentage of the profits plus $100 for medical insurance plus the option to rent the house behind Easyrider's for $200 per month. Appellant would fix up the house, using materials supplied by Beard. From March to May of 1991, Appellant worked twelve hours per day seven days per week and would spend any spare time making repairs to the house. Easyrider's was profitable until December 1991 when the parent company, Paisano Publications, complained that it was not receiving its share of the profits. (PT 204-08).

Skipping to his arrest, Appellant complained that his wife and child had been evicted from their home and not allowed to obtain any personal belongings for two months. In addition, Appellant complained that the State threatened to take custody of their child if she did not cooperate and confiscated her passport, even though it told the British Embassy in Atlanta that the passport had been returned. Appellant stated that, prior to his confession, the police promised him that Dawson and his son

would be safe and that the State would return her passport. (PT 208-14).

Appellant claimed that, out of desperation, he talked to Jeff Ford, his cellmate and a former police officer from New York, about his girlfriend running drugs from Florida to New York for his boss, in exchange for the services of Mr. Ford's private attorney. Appellant talked Dawson into doing it, but it always fell through for one reason or another. Appellant claimed that during their conversations, Ford mentioned taking care of Dawson financially and killing the witnesses against Appellant. To see if attorney's fees could be obtained from the proceeds of his grandparents' will, Appellant gave a copy of the will to Mr. Ford's attorney. Later, Appellant met with "Big Mike," who allegedly worked with Ford for a man named "Louie" in Miami. "Big Mike" asked Appellant what he wanted done with the witnesses, and Appellant told him to kill them. Appellant also told "Big Mike" that he did not care if "Big Mike" killed his relatives named in the will. The next thing he knew, he was being arrested for solicitation to commit murder. Appellant struck an agreement with the State, however, to spare Dawson so that she could return to England with their son. Denying that he killed the victim, Appellant claimed that he pled guilty to end the harassment. (PT 214-31).

At the end of his statement, Appellant left the courtroom, and the State proceeded with closing argument, claiming that four aggravating factors applied: prior violent felony convictions, avoid arrest, pecuniary gain, and HAC. (PT 231-38). After renewing all prior motions, which were denied, defense counsel

attempted to argue in mitigation that Appellant did not premeditate, or that the premeditation was of short duration, but the State objected to any "residual doubt" argument, which was sustained by the trial court. (PT 240-41). Thereafter, defense counsel argued that the pecuniary gain and avoid arrest aggravators could not be doubled, that pecuniary gain and HAC had not been proven beyond a reasonable doubt, and that the prior violent felony convictions could not be used because they were not yet final. (PT 244-45). Thus, of the four aggravators sought by the State, only avoid arrest was applicable. (PT 246).

Following argument, the State asked defense counsel to state on the record, based on his presence at the plea negotiations, that no promises were made to Appellant regarding the disposition of Dawson's case. (PT 248-51). Defense counsel indicated that he was aware of no promises. (PT 251). Having overheard the conversation in court, Appellant returned to the courtroom and agreed that no promises had been made, but that the implication was apparent. Absent these legitimate inferences, Appellant claimed that he would not have pled guilty. (PT 252-55).

Based on these statements by Appellant, defense counsel moved to withdraw Appellant's plea. (PT 255). Appellant stated, however, that he did not want to withdraw the plea, so defense counsel's motion was denied. (PT 258). At the later sentencing hearing, defense counsel renewed all previous motions, including the motion to withdraw the plea, which were denied, and the trial court sentenced Appellant to death. (T 408-12). In its sentencing order filed contemporaneously with the hearing, the trial court recited a factual basis for its decision, found the

existence of the four aggravating factors argued by the State, found the existence of no statutory mitigating factors, but found that Appellant was "a good family man, kind, generous, and compassionate." However, this mitigating evidence did not outweigh the aggravating circumstances found. Moreover, the trial court indicated that "[a]ny one of the statutory aggravating factors proven beyond a reasonable doubt in this case is itself clearly more than sufficient to outweigh the negligible mitigation evidence presented." (R 500-05).

SUMMARY OF ARGUMENT

Issue I - Appellant's plea was not unconstitutionally conditioned on a promise from the trial court that it would impose a sentence of death. Moreover, the factual bases for the pleas were sufficient to convince the trial court that Appellant premeditated the murder and initiated the solicitation to commit murder. Finally, Appellant's unsworn claims after the State had rested its case that he was coerced into entering the pleas did not constitute "good cause;" thus, the trial court did not abuse its discretion in denying defense counsel's motion to withdraw the pleas, which Appellant did not join.

Issue II - Appellant voluntarily, knowingly, and intelligently waived his right to present evidence in mitigation and was competent to do so. Thus, the trial court did not err in refusing to allow defense counsel to proffer evidence in mitigation, notwithstanding recent case law issued after Appellant's sentence was rendered which requires counsel to do so.

Issue III - Assuming that Appellant preserved this issue for appeal, his right to confront witnesses against him was not violated by the State's use of hearsay testimony at the penalty phase proceeding in light of the fact that the statute permits it and Appellant had a fair opportunity to rebut it.

IV - Because Appellant validly waived his right to present evidence in mitigation, the trial court did not abuse its discretion in denying defense counsel's motion to continue, so that he could further investigate mitigating evidence.

V - The record supports the trial court's finding that Carl Beard's murder was especially heinous, atrocious, or cruel.

VI - The trial court did not abuse its discretion in prohibiting defense counsel from arguing, and in refusing to consider in mitigation, that Appellant did not premeditate the murder, or, if he did, that it was of short duration. This Court has long condemned such "lingering doubt" arguments.

VII - The record supports the trial court's finding that Appellant's dominant motive for killing Carl Beard was to avoid or prevent his lawful arrest for embezzling funds from Easyrider's.

VIII - Solicitation to commit murder is a felony involving the use or threat of violence. Therefore, the record supports the trial court's finding that Appellant was previously convicted of felonies involving the use or threat of violence.

IX - The record supports the trial court's finding that Appellant murdered Carl Beard for pecuniary gain in that Appellant had embezzled several thousand dollars from Easyrider's.

X - Appellant's sentence is proportionate to the sentences of other defendants based on similar facts.

XI - Appellant failed to make any of his constitutional arguments in the trial court; thus, they have not been preserved for appeal. Regardless, they have previously been rejected by this Court.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW THE PLEAS (Restated).

In this appeal, Appellant claims that his pleas of guilty to one count of first-degree murder and to two counts of solicitation to commit murder are invalid. Initially, Appellant claims that his guilty plea was unconstitutionally conditioned on a promise from the trial court that it would impose a sentence of death. In addition, Appellant claims that the factual basis for the pleas recited by the State were insufficient to show first-degree murder or solicitation to commit murder, in that the State failed to recite evidence proving premeditation and disproving entrapment. Finally, Appellant claims that he was coerced into pleading guilty and that, when he professed his innocence to the murder, the trial court should have granted his motion to withdraw his pleas. **Brief of Appellant** at 30-47. The State disagrees.

On the day the State filed an information charging Appellant with two counts of solicitation to commit murder, Appellant agreed to plead guilty to the solicitation charges as well as to the outstanding first-degree murder charge.[7] At the plea hearing, the trial court engaged in a lengthy plea colloquy with Appellant. It read the allegations in the indictment and

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[7] Originally, Appellant had agreed to plead guilty to the murder charge in exchange for a life sentence. Apparently just prior to the plea, Appellant changed his mind and indicated that he would plead guilty to the murder, but wanted the death penalty instead of life imprisonment. (T 325).

information, determined Appellant's educational and mental health background, and informed Appellant of all of the rights he was waiving by entering the pleas. (T 329-36). Upon request, the State recited a detailed factual basis upon which the charges were based. (T 336-42). Following the State's recitation, the trial court asked Appellant, "[D]o you admit that is what you did?" (T 342). With the exception of a minor detail, Appellant responded, "Yes, sir."[8] Thereafter, the trial court informed Appellant of the maximum penalties for the offenses and specifically asked Appellant if he had been assured or led to believe he would be rewarded for entering these pleas. It also asked Appellant if his pleas were "in any way based on [his] hopes or [his] thoughts that the state would do something different on Miss Dawson's case," i.e., "treat her lightly because [he is] entering this plea." Appellant responded, "No, sir." (T 343-46). Appellant also stated that no one had used threats, force, pressure, or intimidation to make him enter these pleas. (T 346).

After assuring itself that Appellant had fully discussed the pleas with counsel and was satisfied with counsel's representation, the trial court found that Appellant's guilty pleas were voluntarily, knowingly, and intelligently made, adjudicated him guilty of all offenses, and sentenced him on the solicitation charges. (T 346-49, 354, 368). Regarding the penalty phase on the murder charge, Appellant waived a jury and

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[8] Appellant contested the fact that he originally solicited a member of the Outlaws motorcycle gang to kill Frank Fell and Mary Maibaurer, the victims of his solicitation charges.

his presence at the proceeding and specifically directed defense counsel not to participate in any way in the proceeding. (T 355-65). During this discussion, the State indicated that Appellant had been examined by a mental health expert and found to be competent for trial and sane at the time of the offense. Appellant confirmed that this was true. (T 357-58).

At the later penalty phase proceeding, the State presented evidence relating to both the murder and Appellant's attempt to have Fell and Maibaurer killed so that they would not testify against him. Included in this was evidence that Appellant embezzled money from the victim's business; that the victim confronted Appellant with the thefts; that Appellant's girlfriend heard Appellant and the victim scuffling and heard the victim beg Appellant not to hit him and then walked in and saw the victim lying on the floor bleeding profusely from the head; that Appellant hired two people (Fell and Maibaurer) to help him dispose of the body and evidence of the murder; that Appellant had confessed to the murder; that Appellant told his cellmate that when the victim confronted him about the thefts Appellant "knew at that point in time that Mr. Beard had to be done away with to avoid his being found out;" and that Appellant initiated conversations with his cellmate, who later informed the police, regarding killing Fell and Maibaurer so that they would not testify against him.

After all of the evidence was presented, however, Appellant addressed the trial court "not to change [his] plea, but [to] try and explain why . . . ." (PT 204). In this unsworn statement to the court, Appellant claimed that the State implied that his

girlfriend would be treated favorably and would be allowed to return home to England if Appellant pled guilty. (PT 223-27). Appellant also claimed, regarding the murder of Carl Beard, that he "could not have prevented it nor did [he] take part in it." (PT 229). Regarding the solicitation to commit murder, Appellant claimed that he was initially approached by his cellmate, Jeff Ford, and then by "Big Mike," a friend of Mr. Ford's, and ultimately agreed to let them kill Fell and Maibaurer. (PT 217-20).

After closing arguments, the State asked defense counsel to state on the record, based on his presence at the plea negotiations, that no promises were made to Appellant regarding the disposition of Susan Dawson's case. (PT 248-51). Defense counsel indicated that he was aware of no promises. (PT 251). Having overheard the conversation in court, Appellant returned to the courtroom and agreed that no promises had been made, but that the implication was apparent. Absent these legitimate inferences, Appellant claimed that he would not have pled guilty. (PT 252-55).

Based on these representations by Appellant, defense counsel moved to withdraw the pleas: "If I understand what he's saying, he's saying that he was induced into the plea. And if that's the case, we would respectfully move to withdraw the whole plea." (PT 255). After the State objected to the motion, defense counsel stated, "All I know is what my client is saying he feels. And on the basis of the way he feels it happens -- I'm not saying that's the way it happens, I think that there's a question as to whether or not the plea should be withdrawn, and that's why I

made a motion to withdraw it. I'm ethically bound to protect it." (PT 257). Thereafter, the trial court asked Appellant if, in fact, he wanted to withdraw his pleas. Appellant responded, "No, I don't. If the sentence is the chair, no, I don't Your Honor -- I'll condition that." (PT 258). Finding that Appellant did not want to withdraw the pleas, the trial court denied defense counsel's motion to withdraw them. (PT 258).

As the record reveals, the trial court satisfied itself, pursuant to the dictates of Florida Rule of Criminal Procedure 3.172, that Appellant understood (1) the nature of the charges and the maximum penalties possible, (2) the rights he was waiving by entering his pleas, including the right to appeal matters relating to the judgment, (3) the fact that he could be prosecuted for perjury based on his sworn testimony at the hearing, (4) the complete terms of the plea agreement, and (5) the fact that he could be deported if not a United States citizen. In addition, the trial court satisfied itself that there was a sufficient factual basis to support the charges. Moreover, Appellant specifically admitted his guilt. As a result, the trial court found that Appellant was entering his guilty pleas voluntarily, knowingly, and intelligently. "The intense and exhaustive care with which the trial court advised defendant of his rights, and determined that defendant understood the effect of his plea of guilty, was clearly established." Holmes v. State, 374 So.2d 944, 946 (Fla. 1979), cert. denied, 446 U.S. 913 (1980).

Appellant claims, however, without any citation to the record, that his plea is invalid because it was

unconstitutionally conditioned on a promise from the trial court that it would impose a sentence of death. **Brief of Appellant** at 36-41. As the record reveals, no such promise was ever made. Appellant initially bargained with the State for a life sentence in exchange for a guilty plea to first-degree murder, but then changed his mind and requested that the State seek the death penalty. Since the State believed in good faith that the death penalty was sustainable in this case, it agreed to go forward and seek the death penalty. At no time, however, did the trial court indicate that it would automatically impose such a sentence merely because that was what Appellant wanted. In fact, during the plea colloquy, the trial court specifically told Appellant:

> Let me explain to you the maximum sentence that would be imposed in the first degree murder case, 91-7067, a single count grand jury indictment for first degree murder, a capital felony. There are only two possible penalties that could be imposed in that case. One would be the imposition of the death penalty, or, if I do not impose the death penalty, then the other would be life imprisonment without any possibility of parole for at lease [sic] 25 years.

(T 343) (emphasis added). In addition, before sentencing Appellant on the solicitation charges, the trial court sought to ensure that Appellant understood that the agreed upon sentences were upward departures from the guidelines and "consecutive to whatever sentence I impose in the capital case." (T 353) (emphasis added).

The agreement was between Appellant and the State. In exchange for the guilty plea to first-degree murder, the State would seek the death penalty. The trial court was not a party to

the agreement and made no promises, either explicitly or implicitly, regarding its intended sentencing disposition. In effect, Appellant tendered an "open plea" of guilty to the trial court. (T 326). The trial court's sentencing order confirms that it performed its weighing function and did not sentence Appellant to death merely because he wanted it to. (R 500-505).

Next, Appellant claims that the factual basis for the pleas recited by the State were insufficient to show first-degree murder and solicitation to commit murder. The State submits, however, that Appellant has failed to preserve this argument for review. Contrary to his assertion, at the time that the pleas were accepted, Appellant was being fully represented by counsel. Defense counsel had not yet moved to withdraw, nor had Appellant restricted his actions. If, as Appellant alleges, "there [was] insufficient competent evidence to show the specific crimes with which Elam was charged were in fact committed by Elam," the time to challenge them was at the time they were rendered, not for the first time on appeal, so that the trial court had an opportunity to cure the error, if any. Moreover, defense counsel's unilateral motion to withdraw the pleas was not even based on Appellant's new-found claims of innocence and entrapment. Rather, they were based on Appellant's allegations of coercion by the State. In other words, not only did defense counsel fail to make a contemporaneous objection at the time the factual basis was given, but he also failed to challenge the factual basis later as a ground for the motion to withdraw the pleas. As a result, Appellant should be precluded from challenging the

factual basis on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Regardless, Appellant's complaint is without merit. "The inquiry which the court should conduct in order to determine that there is a factual basis for the plea of guilty need not be a 'mini-trial', and the plea may be accepted in spite of the defendant's protestation of innocence or his denial of an essential element of the crime, if there is otherwise in the record matters from which the court may determine that there exists a factual basis for the plea." Monroe v. State, 318 So.2d 571, 573 (Fla. 4th DCA 1975). Moreover, "[t]he defendant does not necessarily need to be told the nature of the offense and elements of the crime at the actual plea proceedings; a knowing and intelligent guilty plea may be entered on the basis of the receipt of this information, generally from defense counsel, before the plea proceedings." Stano v. Dugger, 921 F.2d 1125, 1142 (11th Cir. 1991). As the record reveals, the State's factual basis amply supports the trial court's findings that Appellant premeditated the murder of Carl Beard and initiated the solicitation to commit murder. Regarding the murder, the State alleged that, after being confronted with his theft of the store's proceeds, "Mr. Elam, using a blunt instrument, struck Mr. Beard numerous times to his body and to his head. . . . [An] autopsy revealed that he suffered no less than eight head wounds . . . . The force of the blows were such that his brains were exposed." (T 336-37). See Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). Regarding the

solicitation offenses, the State alleged that "while Mr. Elam was incarcerated in the Volusia County Branch Jail, . . . he was attempting to solicit members of the Outlaw motorcycle gang and other individuals unknown to the state of Florida to murder Frank Fell and Mary Maibaurer." (T 339). From this, the trial court properly found sufficient evidence that Appellant premeditated the murder and initiated the solicitation to commit murder. Moreover, the evidence presented by the State during the penalty phase proceeding not only bolstered the trial court's finding, but also sufficiently contradicted Appellant's later claims of innocence and entrapment. Thus, Appellant's claim of prejudice is unavailing.

Regarding Appellant's claims of undue coercion by the State, Florida Rule of Criminal Procedure 3.170(f) provides that "[t]he trial court may, in its discretion, and shall upon good cause, at any time before a sentence, permit a plea of guilty to be withdrawn . . . ." During the plea colloquy, Appellant specifically stated under oath that he was not entering the pleas based on any hopes or thoughts that the State would treat his girlfriend lightly or in any way reward him for doing so. He also testified that he was not threatened, forced, pressured, or intimidated to plead guilty. (T 343-36). Defense counsel confirmed that no promises were made regarding the disposition of Ms. Dawson's case. (PT 251). Nevertheless, defense counsel moved to withdraw the pleas based on Appellant's unsworn statement after the penalty phase that the State implied that it would treat her lightly, which induced him to enter the pleas. (PT 255).

When making a motion to withdraw a plea, the burden is on the defendant to establish good cause, and the decision to grant or deny the motion is within the trial court's discretion. Brown v. State, 428 So.2d 369, 371 (Fla. 5th DCA 1983).[9] Appellant's unsworn statements during the penalty phase, made ten days after his plea was entered and accepted, did not constitute good cause for withdrawal of the plea, nor did they support a withdrawal in the interest of justice. "[M]ere naked allegations contained in a motion to withdraw, unsupported by any proof, can never constitute a basis for the withdrawal of a plea." Id. at 371. See also State v. Braverman, 348 So.2d 1183 (Fla. 3d DCA 1977), cert. denied, 358 So.2d 128 (Fla. 1978); Osterman v. State, 183 So.2d 873 (Fla. 2d DCA 1966). Moreover, "[a] defendant who deliberately pleads guilty to a criminal charge should not be allowed to withdraw his plea merely because he changes his mind." Baker v. State, 408 So.2d 686, 687 (Fla. 2d DCA 1982). For withdrawal to be granted, a defendant must "file[] a proper motion and prove[] that the plea was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights." Id. Here, no written motion to withdraw was ever filed, and no proof, other than Appellant's self-serving statements, was ever offered to support the oral motion. In fact, when asked by the trial court,

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[9] In this appeal, Appellant claims that his "assertion of innocence, combined with the coercion under which the plea was entered, constitute good cause to justify withdrawal of the pleas." **Brief of Appellant** at 47. Since Appellant did not base his motion below on both the assertion of innocence and the undue coercion, however, he may not rely on both to assert that the trial court erred. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Appellant did not want to withdraw his pleas.[10] Consequently, the trial court did not abuse its discretion in denying defense counsel's motion to withdraw the pleas.[11]

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[10] Appellate counsel cites to the trial court's ruling--"Mr. Elam, of course, does not join in that, he doesn't want his pleas withdrawn, so they are denied"--and asserts that had Appellant joined in defense counsel's motion, the trial court would have withdrawn the pleas. **Brief of Appellant** at 34. Appellate counsel's conclusion, however, does not necessarily follow. Had Appellant joined in defense counsel's motion to withdraw the pleas, the trial court might have withdrawn the pleas of it found that good cause had been shown. On the other hand, it might not have withdrawn them. Here, it was obvious to the trial court that Appellant did not want to withdraw his pleas.

[11] To the extent Appellant seeks this Court to vacate his plea post-sentence, the State would submit that Appellant has failed to show prejudice or manifest injustice. Although potential prejudice is apparent when a claim of innocence or the possibility of a defense to the guilty plea is raised, State v. Kendrick, 336 So.2d 353, 355 (Fla. 1976), the record in this case sufficiently refutes Appellant's claims that he was innocent of the murder and entrapped in the solicitation to commit murder. Where, as here, the record is so clear, Appellant's convictions should be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW DEFENSE COUNSEL TO PROFFER EVIDENCE IN MITIGATION OVER APPELLANT'S EXPRESS DESIRE NOT TO HAVE EVIDENCE IN MITIGATION PRESENTED (Restated).

Appellate counsel's assertion that "[t]he material facts are undisputed," **Brief of Appellant** at 48, is true, but his recitation of the "facts" is incomplete and misleading. Because the context in which this issue arose is ever important, a complete version of the facts is imperative. Thus, the State offers the following:

After the trial court accepted Appellant's guilty pleas, and Appellant waived a penalty phase jury, the parties discussed the practical aspects of the penalty phase proceeding, i.e., how much time it would take, etc. At that point, the trial court questioned Appellant about his intentions, and Appellant indicated that he did not want his attorney to do anything during the proceeding. Moreover, Appellant did not want to be present at the proceeding. (T 359-60). In response, both the State and the trial court expressed concern about Appellant's ability to waive his presence and order his attorney to stand silent. At one point, Appellant asked, "Your Honor, can I fire my attorney and represent myself?" The trial court responded, "Well, in a capital case, I don't know if I could ever make the finding that you have the ability to represent yourself." (T 361). Concerned that issues were arising that needed reflection, the State suggested that they recess and return after researching the law. (T 362-63). After the trial court decided to reserve ruling,

Appellant volunteered, "The reason I offered to fire my attorney is because you brought up the objection of a conflict in him not talking. If I fire him, I have the right to say anything if I want to or not and I refuse to say anything." (T 364). The trial court scheduled a status conference for two days later.

At the status conference, the State expressed its concerns to the trial court, and the trial court expressed its concerns to Appellant regarding his waiver of a jury, waiver of his presence, and waiver of evidence. Nevertheless, Appellant persisted in his decision not to be present at the penalty phase proceeding and not to have evidence presented on his behalf. (T 380). In response to the State's concerns, defense counsel confirmed that a mental health expert had evaluated Appellant prior to the plea and had found Appellant both sane at the time of the offense and competent to stand trial. Appellant agreed to that representation. (T 382-83). The trial court also commented on Appellant's apparent competence:

> Again, for the record, everything Mr. Elam has done, both today and this past Monday and my prior contacts with him, he certainly seems to be intelligent and competent and knows what he is doing and certainly seems to realize the consequences of his actions, and he knows that he has a right to be present for the penalty hearing. He also has a right to have an attorney actively participate in the case. Mr. Elam has made it crystal clear, knowing that he has those rights, that he does not want to be present during the penalty hearings a week Thursday. And also does not, again, knowingly and voluntarily, does not want his attorney to actively participate. If no one else has anything else, I think I will honor those wishes. I can't see any reason to think Mr. Elam is anything less than competent to make those decisions. There is nothing he has done or said, visually, orally, that makes me feel that he is anything less than competent and full well knows what he's doing.

(T 387-88). Defense counsel agreed that Appellant knew what he was doing and indicated that they had fully discussed the ramifications of his decisions. (T 389-90).

Regarding representation by counsel, the following discussion was had:

> THE DEFENDANT: Your Honor, if I may, I think last Monday I also asked if [defense counsel] could be relieved. I don't want him to make any comment, no anything in regard to the penalty phase or the rest of this case.
>
> THE COURT: I think, if I understood what you said last Monday, you indicated if that's what it took to make sure no one tried to dissuade me from imposing the death penalty or oppose the state's attempt to seek the death penalty, then you would address [it] if necessary. I'm going to address you in a few minutes with that and maybe we can get back to that. But I do recollect, if I understood correctly, that you indicated if that's what it took to relieve [defense counsel] of any possible ethical obligation, you would be willing to fire him.

(T 381-82).

When the issue was revisited, the following comments were made:

> THE COURT: Mr. Elam, if I understood what you said Monday, you had talked about firing [defense counsel] only if that's what it took to make sure there was no defense. I got the impression that you would prefer [defense counsel] to stay on representing you, but you're specifically requesting him not to try to defeat the state's attempt to persuade me to impose the death penalty. Is that [sic] still your wishes?
>
> THE DEFENDANT: That is what I wish, without me being present. Then, some comment was made that I have to be [present] if I fire him or whatever.
>
> THE COURT: So, as long as you don't have to be present you understand that [defense counsel] will be here even though he will

probably not be actively trying to defeat what the state is doing, either raising objections or vigorously trying to --

THE DEFENDANT: Someone has to be here to represent me. [Defense counsel] can be. But I want him to make no comments.

THE COURT: To me it is crystal clear what Mr. Elam's request is, that [defense counsel] stay on representing him, but not to actively participate in opposition to the state's case.

(T 391-92). The State, however, wanted Appellant to specify exactly what defense counsel was allowed or not allowed to do. (T 392-93). As a result, the following comments were made:

THE COURT: What do you want [defense counsel] to do, if anything, come a week Thursday morning?

THE DEFENDANT: Is it required that I be here or that someone be present here?

THE COURT: I would want someone -- if you're not going to be here, I'd certainly want an attorney. Frankly, if I allow you to fire [defense counsel], my inclination would be to force you to be here.

THE DEFENDANT: If I had to come, would I have to say anything?

THE COURT: You wouldn't have to.

THE DEFENDANT: Then [defense counsel] can represent me and not say anything.

THE COURT: So your instruction to [defense counsel], if I understand, is for him to be here, but not to call witnesses or not to cross-examine the state's witnesses or make any objections?

[DEFENSE COUNSEL]: Or any closing statements.

THE COURT: In essence, kind of sit there in a chair, but figuratively sit on his hands and not say anything or in anyway participate in the procedure other than just being an observer and let you know what has gone on, is that [sic] your wishes?

THE DEFENDANT: Yes, sir.

THE COURT: I think that is pretty crystal clear.

(T 393-94). At that point, defense counsel moved to withdraw: "I would prefer to be allowed to withdraw as counsel under these circumstances because I'm not going to be doing anything. I'm taking part, I'm representing him in part. I have a client that's doing something that I believe he has a right to do --" (T 395).

When the State asked Appellant if he understood he did not have to be present if he did not want to be, Appellant refused to answer any more questions. (T 396). So, the court pursued the issue:

> THE COURT: Are you concerned that if I go ahead and fire [defense counsel] or if you wish to fire [defense counsel] and represent yourself that then you would be forced to be present?
>
> THE DEFENDANT: You stated that if [defense counsel] were not representing me, you would prefer me to be here. So in that case, yes, I do not want to be here. I'd like [defense counsel] to be here, but not participate and answering [sic] any questions or comment.
>
> THE COURT: To me it's clear what his wishes are. He does not want to be here, but he would still like to have [defense counsel] here, but he does not want [defense counsel] to participate in any way. I think that is crystal clear that is his preference. Does the state still have some concern?
>
> [PROSECUTOR]: Your Honor, if it's crystal clear to the Court and crystal clear to the defendant, the state has no further concerns.

(T 397). As a result, the trial court granted Appellant's request not to be present and indicated that defense counsel would be present, but would not be participating. (T 398-99).

The trial court then asked defense counsel to maintain contact with Appellant in case Appellant changed his mind. (T 399-400). After the State expressed concern that Appellant might change his mind at the eleventh hour, thereby forcing a continuance of the proceeding, the trial court stated, "I guess there is always the possibility that Mr. Elam might change his mind between Wednesday afternoon, May 13 and Thursday morning, May 21st at nine o'clock. I'm saying if you [defense counsel] move to continue I would grant it, but I don't know what else to say. That's the best I can do." (T 401).

On the day of the penalty phase proceeding, defense counsel expressed concern that he could not fulfill his ethical obligations as an attorney by following his client's wishes that he do nothing on Appellant's behalf. As a result, defense counsel moved to withdraw, or, in the alternative, moved for a continuance so that he could continue to investigate evidence in mitigation. (PT 12-36). Appellant was brought before the court and reaffirmed that he did not want to be present during the proceeding, except to make a statement to the court after the State had rested its case, and that he did not want his attorney to participate in any way. (PT 36-41). At that point, defense counsel renewed his motion to withdraw. (PT 42). Defense counsel also asked the trial court whether, if the motion was denied, it would order him not to participate in the proceeding. The trial court indicated that it would offer counsel the opportunity to make arguments and objections and to present evidence in mitigation, but that it would not order him either way. (PT 43-44). During this discussion, Appellant volunteered,

"Your Honor, all I want to do is get this over with. If it's quicker for him to say something, let him say something. Just let me go so we can get it over with, please." (PT 45). The trial court informed Appellant that his suggestion led to a problem because defense counsel was not prepared to go forward. (PT 45). After a lengthy discussion among the parties, the trial court asked Appellant whether he wanted the trial court to discharge his attorney. Appellant responded, "I have no idea." (PT 45-51). Defense counsel immediately interjected with case law supporting his argument that Appellant could not have partial representation. (PT 51-55). The State responded, however, that, until Appellant made an unequivocal request to represent himself, no Faretta[12] inquiry was necessary. (PT 55). At that point, the trial court denied defense counsel's motion to withdraw and stated:

> I will not order you one way or the other. I think your position is pretty well clear, [defense counsel.] You're being required to sit here. I'm not going to order you not to participate[;] in fact, I'll offer you the opportunity. But if you feel bound by your client's request, you can certainly indicate that's the reason why you're not raising objections, why you're not cross-examining witnesses, why you're not calling your own witnesses, and why you're not giving any closing arguments.

(PT 57-58). In response, defense counsel moved for a continuance to further investigate mitigating evidence, which was denied, and the penalty phase was begun. (PT 58). Contrary to Appellant's wishes, defense counsel made an opening statement (PT 71-73), cross-examined the State's witnesses (PT 92-95, 96, 113-17, 148-

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[12] Faretta v. California, 422 U.S. 806 (1975).

54, 174-75), periodically renewed his motions to withdraw and to continue (PT 118, 119-23, 178-82, 239-40), presented witnesses on Appellant's behalf (PT 183-84, 190-93), and made a closing statement (PT 240-46).

After the State had rested its case, defense counsel indicated that it would call two witness and wanted to proffer what other evidence it would have presented if allowed more time to investigate. (PT 179). The State objected to the proffer (PT 179, 181-82), and the trial court sustained the objection: "I think as far as any appellate tactics, it's going to have to stand on the motions I've already ruled on. I think you've done the best to protect the record, that you wanted more time, you mentioned about bringing a California witness in here, so I would not allow the proffer." (PT 182). Defense counsel raised the issue again after he had called his witnesses. Again, the trial court denied the motion. (PT 198-200).

Appellant now claims that the trial court abused its discretion in denying his motion to proffer.[13] **Brief of Appellant** at 52. Based on the facts of this case, however, the trial court did not err.

Initially, the trial court had to decide whether to grant defense counsel's motion to withdraw and thereby deny Appellant's

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[13] One basis for Appellant's complaint is the trial court's refusal to grant a continuance after it promised that it would do so. **Brief of Appellant** at 50-52. The record reveals, however, that the trial court did not promise defense counsel a continuance at the status conference. Rather, the trial court indicated that it would grant a continuance if Appellant changed his mind and wanted defense counsel to present evidence in mitigation. (T 401). Since Appellant never changed his mind, however, a continuance was never warranted. See Issue IV, infra.

request to be absent from the proceedings.[14] Since it was "crystal clear" that Appellant did not want to be present, and since he never made an unequivocal request to represent himself,[15] the trial court decided that Appellant's right to absent himself from the proceeding prevailed over defense counsel's desire to withdraw.

Once it decided that Appellant could leave and that defense counsel would stay, it then had to decide what authority it had to prohibit defense counsel's presentation of a defense. Ultimately, the trial court decided that it did not have the authority to question defense counsel's strategy in performing his function as Appellant's attorney. Thus, without Appellant in the courtroom to ensure that defense counsel remained silent, the trial court had no ability to enforce Appellant's wishes without violating Appellant's right to counsel. Once defense counsel decided to ignore his client's wishes, the trial court then became bound to consider the evidence presented in mitigation. See Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) ("The court must find as a mitigating circumstance each proposed factor that

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[14] Correctly, the trial court decided that someone had to be present on Appellant's behalf. As this Court stated in Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988), courts may not administer the death penalty by default. Even though a defendant may choose to limit or preclude evidence or argument in mitigation, the rights, responsibilities, and procedures set forth in our constitution and statutes must be protected and preserved. Id. Thus, either a defendant found competent to represent himself or an attorney must be present at the proceeding.

[15] As the record reveals, appellate counsel's assertion of "fact" that Appellant "sought to 'fire' his appointed defense counsel," **Brief of Appellant** at 48, is misleading. Appellant never expressed a clear and unequivocal request to represent himself as required by Faretta v. California, 422 U.S. 806 (1975).

is mitigating in nature and has been reasonably established by the greater weight of the evidence." (footnotes omitted)); Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) ("Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved.").

After defense counsel presented all of the evidence that he had available, the trial court decided that defense counsel had done all that he could do under the circumstances. Appellant had voluntarily, knowingly, and intelligently waived his right to present evidence in mitigation and was competent to make such a decision. As this Court stated in Hamblen, "all competent defendants have a right to control their own destinies." 527 So.2d at 804. Faced with a valid waiver from a competent defendant, the trial court decided to prohibit defense counsel's proffer of evidence which he might be forced to consider and which the State would not be prepared to rebut. Under the circumstances, the trial court did not err.

In his argument to the contrary, Appellant cites to two cases recently decided by this Court wherein it held that, in cases such as this where the defendant chooses to waive the presentation of mitigating evidence, "[c]ounsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be." Koon v. Dugger, 17 F.L.W. S337, 338 (Fla. June 4, 1992). See also Durocher v. State, 604 So.2d 810, 812 n.3 (Fla. 1992). However, this Court specifically stated in Koon that this new rule was prospective only. 17 F.L.W. at 338.

Based on this Court's rationale in Gilliam v. State, 582 So.2d 610 (Fla. 1991), this Court should reaffirm that Koon's evolutionary refinement of the law does not apply to this case where Appellant's sentence was entered before Koon or Durocher became final.[16]

Similarly, all of the other cases cited to by Appellant, for the proposition that a trial court's failure to allow a proffer of evidence is generally reversible error, are inapplicable. In none of these cases is the defendant actively seeking to prevent his attorney from presenting such evidence to the court. Moreover, none of these cases provide a per se rule of reversible. Rather, the decision to allow or prohibit a proffer is within the trial court's discretion. Preclusions of a proffer have been affirmed on appeal, though, again, under vastly different circumstances. See, e.g., Jenkins v. State, 547 So.2d 1017 (Fla. 1st DCA 1989).

In summary, this case is not controlled by Koon and Durocher, since those cases are prospective only. Regardless, the trial court made a thoughtful analysis of the facts and the evidence, including the evidence in mitigation presented against Appellant's wishes, in reaching its decision. See Hamblen, 527 So.2d at 804. Under the circumstances of this case, the trial court did not err in refusing defense counsel the opportunity to proffer evidence which he could have presented had he had more

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[16] Appellant's sentence was entered on May 27, 1992. Koon is still pending rehearing and thus not final. Durocher became final on September 30, 1992.

time. Therefore, this Court should affirm Appellant's sentence of death.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO PRESENT EVIDENCE AT THE PENALTY PHASE THAT WAS BASED ON HEARSAY (Restated).

After Appellant pled guilty and waived a penalty phase jury, the State called several witnesses for sentencing purposes, including two detectives and the investigator from the state attorney's office who was solicited by Appellant to murder Frank Fell and Mary Maibaurer. During the testimony of Detective Yuill regarding his investigation of the alleged thefts from Easyrider's, defense counsel objected on hearsay grounds when the officer testified that, based on information from other detectives, an additional $4,200 in cash was missing from the store. After the State asserted that hearsay was admissible in penalty phase proceedings pursuant to statute, the trial court overruled defense counsel's objection. (PT 106-07). Later, the State asked Detective Ewanik whether Susan Dawson, Appellant's girlfriend, had overheard anything between Appellant and the victim before she walked in and found Appellant standing over the victim who was lying on the floor bleeding profusely from the head. The detective testified that she did not relate anything at that time. At that point, defense counsel raised another hearsay objection, which was overruled. (PT 142-43).

Appellant made no other hearsay objections during the State's case. After the State rested, however, defense counsel moved to strike all of the testimony to which he had objected based on hearsay grounds. The trial court denied the motion. (PT 178-82). Later, during Appellant's case, the State indicated

that Susan Dawson and Frank Fell were present in the courthouse and available for cross-examination regarding the hearsay testimony presented through the State's witnesses. (PT 200-01). Defense counsel did not call them.

Now, on appeal, Appellant claims that the State's introduction of hearsay testimony constitutes reversible error because it violated his rights to confront witnesses and to due process. In addition, Appellant claims that "because the imposition of the death penalty rests on facts established solely by hearsay, the death sentence is unreliable." **Brief of Appellant** at 62. Appellant challenges, however, not only the two statements to which he objected, but all other testimony based on hearsay. He excuses his failure to object to this other testimony based on the fact that other objections would have been futile. Id. at 61-62.

Appellant's reliance upon Chao v. State, 453 So.2d 878 (Fla. 3d DCA 1984), aff'd, 478 So.2d 30 (Fla. 1985), which this Court affirmed, is misplaced. In Chao, the defendant, who spoke only Spanish, enlisted his uncle, who spoke both Spanish and English, to help him turn himself in on a murder charge. The arresting officer, who spoke no Spanish, had the uncle translate between him and the defendant. At trial, the State sought to elicit from the officer what Appellant said through the translator. At the beginning of the officer's testimony, the defendant objected on the ground that everything the translator said was hearsay, but he did not object during the testimony. Both the district court

and this Court held that the defendant had sufficiently preserved the issue with the single objection.[17]

In the present case, however, the State presented four witnesses during the penalty phase, three of whom testified in part based on hearsay. Appellant objected once during the testimony of the two detectives, but not at all during the testimony of the state attorney's office investigator. Thus, at the very least, Appellant should have objected during the testimony of each witness. Moreover, unlike in Chao, the testimony of each witness was not based entirely on hearsay. Thus, a blanket objection, which in Chao sufficiently covered all of the hearsay statements of the translator, was not sufficient to preserve the multiple hearsay statements of several declarants which were introduced through each of the three witnesses.

Even if Appellant's two objections did, in fact, preserve his complaints regarding all of the hearsay testimony, his complaints are without merit. Florida Statutes § 921.141(1) specifically provides: "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Conspicuously absent from Appellant's brief is any citation to Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992), wherein this Court held that "hearsay testimony is admissible, provided that the defendant has a fair opportunity to rebut it." In Waterhouse, this Court noted that defense counsel

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[17] Both courts also found that the translator's statements were adoptive admissions.

was afforded the opportunity to cross-examine the detective testifying, and thus it found no error in the admission of this testimony. Id. Nor does Appellant acknowledge Hodges v. State, wherein this Court stated:

> Although we have held that [the hearsay statements of the victim introduced through two detectives and the victim's sister] should not have been admitted during the guilt phase, '[b]oth the state and the defendant can present evidence at the penalty phase that might have been barred at trial because a "narrow interpretation of the rules of evidence is not to be enforced."'

595 So.2d 929, 933 (Fla. 1992) (quoted sources omitted).

Not only did Appellant have the opportunity, which he used, to cross-examine the State's witnesses who were presenting the hearsay statements, but he had the opportunity to rebut the hearsay by calling other witnesses. In fact, Appellant had the opportunity to call Susan Dawson and Frank Fell, two of the hearsay declarants, who were in the courthouse available for questioning. Under the circumstances, Appellant's rights to confront the witnesses against him and to due process were preserved. As a result, his death sentence was not unreliable.

As an aside, Appellant makes passing reference to the trial court's reliance in part on the court file in determining the appropriate sentence, and claims that he was thereby deprived of his rights to due process and to confront the evidence against him. **Brief of Appellant** at 64. First, Appellant had access to the court file at any time. Thus, he cannot claim surprise. More importantly, he makes no particular complaint as to any specific material in the court file, nor does he show how he was prejudiced by the court's review of the file. Regardless, the

trial court makes no reference to any information in the file. Thus, it cannot be presumed that the trial court's decision was influenced by any information in the file, especially in light of the abundance of aggravating evidence and the dearth of mitigating evidence. Consequently, Appellant's sentence should be affirmed.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTIONS FOR CONTINUANCE MADE PRIOR TO AND DURING THE PENALTY PHASE (Restated).

After Appellant entered his guilty pleas and waived a sentencing jury, the trial court held a status conference before the scheduled penalty phase proceeding. At the status conference, the trial court went to great lengths to assure itself that Appellant was knowingly and intelligently waiving not only his presence at the penalty phase proceeding, but also the presentation of mitigating evidence. At no time did Appellant specifically and unequivocally seek to represent himself. Ultimately, the trial court was convinced that Appellant wanted to absent himself, but wanted his attorney to appear at the proceeding, though not present any evidence or make any arguments. (T 373-97). As a result, the trial court granted Appellant's request not to be present and indicated that defense counsel would be present, but would not be participating. (T 398-99). The trial court then asked defense counsel to maintain contact with Appellant in case Appellant changed his mind. (T 399-400). After the State expressed concern that Appellant might change his mind at the eleventh hour, thereby forcing a continuance of the proceeding, the trial court stated, "I guess there is always the possibility that Mr. Elam might change his mind between Wednesday afternoon, May 13 and Thursday morning, May 21st at nine o'clock. I'm saying if you [defense counsel] move to continue I would grant it, but I don't know what else to say. That's the best I can do." (T 401).

On the day of the penalty phase proceeding, defense counsel expressed concern that he could not fulfill his ethical obligations as an attorney by following his client's wishes that he do nothing on Appellant's behalf. As a result, defense counsel moved to withdraw, or, in the alternative, moved for a continuance so that he could continue to investigate evidence in mitigation. (PT 12-36). Appellant was brought before the court and reaffirmed that he did not want to be present during the proceeding, except to make a statement to the court after the State had rested its case, and that he did not want his attorney to participate in any way. (PT 36-41). At that point, defense counsel renewed his motion to withdraw. (PT 42). Defense counsel also asked the trial court whether, if the motion was denied, it would order him not to participate in the proceeding. The trial court indicated that it would offer counsel the opportunity to make arguments and objections and to present evidence in mitigation, but that it would not order him either way. (PT 43-44). After lengthy discussion, the trial court denied defense counsel's motion to withdraw and stated:

> I will not order you one way or the other. I think your position is pretty well clear, [defense counsel.] You're being required to sit here. I'm not going to order you not to participate[;] in fact, I'll offer you the opportunity. But if you feel bound by your client's request, you can certainly indicate that's the reason why you're not raising objections, why you're not cross-examining witnesses, why you're not calling your own witnesses, and why you're not giving any closing arguments.

(PT 57-58). In response, defense counsel again moved for a continuance to further investigate mitigating evidence, which was denied, and the penalty phase was begun. (PT 58).

In this appeal, Appellant claims that the trial court's ruling was "an abuse of discretion where Judge Hutcheson had previously, expressly informed counsel that a continuance would be granted if it became necessary for counsel to actively represent Elam." **Brief of Appellant** at 67. Since Appellant never changed his mind regarding his desire not to have mitigating evidence or argument presented on his behalf, however, it never became necessary for counsel to actively represent Appellant. Defense counsel merely decided to ignore his client, who was not present to enforce his wishes. This decision, however, did not require the trial court to accommodate defense counsel. Faced with a voluntary, knowing, and intelligent waiver from a competent defendant the day of the penalty phase proceeding, the trial court properly decided that a continuance was not warranted.[18] Under these circumstances, its decision was not an abuse of discretion. Consequently, this Court should affirm Appellant's sentence.

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[18] Appellate counsel makes much ado about Appellant's equivocal response when the trial court asked him whether he wanted the court to discharge his attorney. However, because the right to counsel automatically attaches, the right to self-representation must be clearly and unequivocally asserted. Stano v. Dugger, 921 F.2d 1125, 1143 (11th Cir. 1991) (citing to Faretta v. California, 422 U.S. 806 (1975)). Here, Appellant's equivocal comment, when viewed in context of the trial court's exhaustive inquiry, did not satisfy the requirements of Faretta.

ISSUE V

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS, OR CRUEL (Restated).

In its written sentencing order, the trial court made the following findings regarding the heinous, atrocious, or cruel aggravating factor:

> That beyond all reasonable doubt, the murder which the defendant committed was wicked, evil, atrocious, or cruel in that the physical evidence and medical evidence indicates the victim did suffer and knew what was happening to him as there was indication of defensive wounds and that he was severely beaten about the face and head and would have remained conscious for some significant period of time during this beating.

(R 504). Initially, Appellant complains that the trial court's written order is reversibly deficient because the trial court (1) did not specify by statutory subsection which aggravating factor it was finding, (2) used the words "wicked, evil, atrocious, or cruel," instead of "heinous, atrocious, or cruel," and (3) did not specifically find that Carl Beard's murder was "especially heinous, atrocious, or cruel." **Brief of Appellant** at 72-73.

Appellant seeks to exalt form over substance. It is readily apparent from the order that the trial court found the HAC aggravating factor applicable to this case, regardless of the words it used to reference it or its failure to specify the exact statutory subsection. As long as the evidence supports the finding, no "magical words" should be required. See Cherry v. State, 544 So.2d 184, 187 n.5 (Fla. 1989) (trial court's findings

that the murders were "especially wicked, evil, atrocious or cruel" substantially conformed to § 921.141(5)(h)), cert. denied, 110 S.Ct 1835 (1990); Melendez v. State, 498 So.2d 1258, 1261 n.2 (Fla. 1986) (instruction which substituted "wicked, evil" for "heinous" not reversible error).

Appellant claims, however, that the evidence does not support the finding of HAC in this case, especially since "[t]here is no proof that Elam intended that Beard suffer unnecessarily." **Brief of Appellant** at 74-77. The State disagrees. As adduced at the penalty phase proceeding, the evidence established that the victim was Appellant's boss. On the day of his murder, the victim confronted Appellant at the business about some missing money. Appellant struck the victim in the face with his fist, knocking him to the floor, struck him a second time with his fist, then picked up a nearby brick which was being used as a doorstop and struck the victim repeatedly in the head, crushing his skull. (PT 139-42). Appellant's girlfriend, who was standing outside during the murder, heard a scuffle and then heard the victim beg Appellant not to hit him again. (PT 171-73).

The medical examiner testified that he found bruises on the victim's right elbow and left forearm, and a fracture of the victim's fifth finger on his left hand, all of which were indicative of defensive wounds. (PT 84-87). He also testified that he found a total of 15 lacerations to all sides of the victim's head, which resulted from six to twelve separate blows by a blunt instrument. The skull was fractured and the brain was

torn. (PT 88-89). In his opinion, the victim suffered intense pain during the minute or so that he remained conscious and probably remained alive ten minutes at the most. (PT 90-94).

As this Court has stated, the fact that the defendant "might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. . . . Fear and emotional strain can contribute to the heinousness of a killing." Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990) (citations omitted). Based on the facts of this case, the trial court properly found that Carl Beard's murder was heinous, atrocious, or cruel. See Penn v. State, 574 So.2d 1079 (Fla. 1991) (victim sustained 31 separate wounds, mostly to head, had defensive wounds on hands, and could have taken up to 45 minutes to die); Bruno v. State, 574 So.2d 76 (Fla. 1991) (victim beaten in head at least ten times with crowbar while attempting to fend off attack and begging for help from defendant's son), cert. denied, 116 L.Ed.2d 81 (1992); Cherry v. State, 544 So.2d 184 (Fla. 1989) (victim struck at least five times in head with fist, hand, or blunt object), cert. denied, 110 S.Ct 1835 (1990); Lamb v. State, 532 So.2d 1051 (Fla. 1988) (victim struck six times in head with claw hammer, had defensive wounds, and did not die immediately); Roberts v. State, 510 So.2d 885 (Fla. 1987) (victim killed by rapid series of blows to back of head which he tried to fend off as evidenced by defensive wounds to hands), cert. denied, 485 U.S. 943 (1988);

Wilson v. State, 493 So.2d 1019 (Fla. 1986) (victim beaten while fending off blows before being shot in head); Heiney v. State, 447 So.2d 210 (Fla.) (victim died from seven severe blows to head from hammer and suffered defensive wounds to hands), cert. denied, 469 U.S. 920 (1984). This Court should affirm Appellant's sentence of death.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING DEFENSE COUNSEL FROM ARGUING, AND IN REFUSING TO CONSIDER, THAT APPELLANT DID NOT PREMEDITATE OR, IF HE DID, THAT IT WAS OF SHORT DURATION (Restated).

During his closing statement at the penalty phase proceeding, defense counsel attempted to argue in mitigation that the victim's murder was not premeditated or that, if it was, it was of short duration. The State objected, arguing that defense counsel was presenting a residual, or lingering, doubt argument, which has been held improper. The trial court sustained the State's objection on that basis. (PT 240-41). Appellant now claims that the trial court erred in prohibiting defense counsel's argument and erred in failing to consider such argument. **Brief of Appellant** at 78-81. The State disagrees.

This Court has steadfastly maintained that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance. Waterhouse v. State, 596 So.2d 1008, 1011 (Fla. 1992); King v. State, 514 So.2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988); and cases cited therein. It is also a well-established rule of law that "premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act." Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1984). Appellant's claim that he did not premeditate or that his premeditation was of short duration was a direct attack on his guilty plea to first-degree murder, which was clearly improper. Therefore, the trial court properly prohibited defense counsel's

argument and properly rejected such argument as mitigating evidence. Consequently, this Court should affirm Appellant's sentence.

ISSUE VII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED TO AVOID A LAWFUL ARREST (Restated).

With respect to this aggravating factor, the trial court made the following findings in its written sentencing order:

> That beyond all reasonable doubt, the murder was committed by the defendant for the purpose of avoiding or preventing a lawful arrest in that the defendant murdered the victim when the victim confronted him about embezzling from their employer.

(R 504). Appellant claims that the evidence does not support this aggravating factor, because Mr. Beard's elimination as a witness was not Appellant's "dominant motive" for killing him. Rather, Appellant speculates that he could have killed the victim in a fit of rage after being falsely accused of stealing funds from the store. **Brief of Appellant** at 82-83. The record refutes such a claim.

According to Detective Yuill, Appellant had stolen $10,130.79 in proceeds from Easyrider's, which he managed for the victim. Three checks written by the victim totalling $15,500 were also missing, although one of the checks, which contained Appellant's fingerprint, was found secreted in a storeroom at Easyrider's after the victim's death. Another $4,200 in cash, which constituted the store's proceeds for the day the victim was murdered, was also missing. (PT 98-109).[19]

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[19] Appellant was arrested on December 27, 1991, for grand theft. (PT 109). However, as part of the plea agreement, the State agreed not to file an information charging the grand theft and,

Based on Appellant's confession, Detective Ewanik testified that the victim confronted Appellant about the missing funds. Appellant initially denied the thefts, but, when the victim persisted, Appellant struck him in the face, knocking him to the ground, hit him again, then struck him multiple times in the head with a nearby brick being used as a doorstop, fracturing his skull and exposing his brain. (PT 140). Appellant told his cellmate that he "knew at that point in time that Mr. Beard had to be done away with to avoid his being found out." (PT 135). After the murder, Appellant enlisted the aid of Frank Fell and Mary Maibaurer to help dispose of the body and burn the contents of the victim's briefcase, which contained evidence of the thefts. (PT 130-31, 133, 154-55). The police discovered that the victim was going to meet with bank officials regarding the missing funds the day after his murder. (PT 104, 128-29).

As this Court has recently reaffirmed, "[a] motive to eliminate a potential witness to an antecedent crime . . . can provide the basis for this aggravating factor. An arrest need not be imminent at the time of the murder. Such a motive can be inferred from the evidence presented in th[e] case." Fotopoulos v. State, 18 F.L.W. S18, 21 (Fla. Dec. 24, 1992) (citation omitted). Based on the facts of this case, the trial court properly found that Appellant's dominant motive for killing Carl Beard was to eliminate him as a witness to the theft of the funds from the store. See Hitchcock v. State, 578 So.2d 685 (Fla.

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in fact, announced a no information at the plea hearing. (T 325, 355).

1990) (where defendant admitted that he killed the victim to keep her from telling her mother about sexual battery); Lopez v. State, 536 So.2d 226 (Fla. 1988) (where the defendant shot his robbery victims in head with handgun equipped with a silencer then remarked to accomplice that he had to shoot them because they could not afford to leave any witnesses behind); Remeta v. State, 522 So.2d 825 (Fla. 1988) (where defendant's remarks, plus physical and circumstantial evidence, proved aggravating factor), cert. denied, 488 U.S. 871 (1989); Wright v. State, 473 So.2d 1277 (Fla. 1985) (where defendant admitted that he killed victim because she recognized him and he did not want to return to prison), cert. denied, 474 U.S. 1094 (1986); Johnson v. State, 465 So.2d 499 (Fla. 1985) (where the defendant admitted killing the victim because she knew he was wanted for robbery and she had threatened to report him to the police), cert. denied, 474 U.S 865 (1986). Appellant's sentence should be affirmed.

ISSUE VIII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT APPELLANT WAS PREVIOUSLY CONVICTED OF FELONIES INVOLVING THE USE OR THREAT OF VIOLENCE (Restated).

In its written sentencing order, the trial court made the following finding regarding the "prior violent felony conviction" aggravating factor:

> That beyond all reasonable doubt, the defendant was previously convicted of the two (2) felonies involving the use or threat of violence to some person in that he was convicted, adjudicated, and sentenced to two (2) counts of Conspiracy to Commit First Degree Murder, first degree felonies.

(R 504). Initially, Appellant complains that he was not convicted of conspiracy to commit murder, but rather was convicted of solicitation to commit murder. **Brief of Appellant** at 84. While this is true, a complete reading of the trial court's written order reveals that the trial court's description of the prior convictions as "conspiracy" rather than "solicitation" is merely a scrivener's error. Three times during its recitation of the facts, the trial court referred to the prior convictions correctly as "solicitation." (R 500, 503). Thus, its erroneous reference to the offenses as "conspiracy" in its findings is harmless at worst.

Next, Appellant complains that his solicitation to commit murder convictions do not qualify under this aggravating factor because solicitation to commit murder is not a crime involving use or threat of violence. **Brief of Appellant** at 84-86. The State submits, however, that Appellant has failed to preserve this argument for appeal, since he never raised such an objection

in the trial court. His only comments or objections below regarding these prior convictions related to their alleged nonfinal status:

> [T]hese judgments aren't final because they won't be final for thirty days after the date that these are laid in the record, which I read '92 May 15 at 1:47 p.m. And I would say that for thirty days from that date, not counting the first day but counting the last day, those things would not be eligible to be used as aggravators.

(PT 244). See also (PT 176-77). Thus, because Appellant failed to make the argument below that he makes here, it is not a proper subject for review. See Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). See also Preston v. State, 531 So.2d 154, 159 (Fla. 1988) (defendant failed to object to instruction regarding prior conviction).

Regardless, Appellant's argument is wholly without merit. Florida Statutes § 921.141(5)(b) authorizes the use of this aggravating factor if the defendant has been "previously convicted of . . . a felony involving the use or threat of violence to the person. (Emphasis added). Whether any harm is ever visited upon the intended victim is of no consequence. Johnston v. State, 497 So.2d 863, 871 (Fla. 1986). Here,

Appellant solicited an undercover investigator to murder two witnesses against him. Such an act clearly constitutes a "threat of violence." See id. ("terroristic threat" is felony involving use or threat of violence to person). Thus, this aggravating factor is valid. Even if it is not, however, there are three other valid aggravating factors and minimal evidence in mitigation. Thus, this Court should affirm Appellant's sentence. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE IX

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN (Restated).

In its written sentencing order, the trial court made the following finding regarding the "pecuniary gain" aggravating factor:

> That beyond all reasonable doubt, the murder which the defendant committed was committed for financial gain in that at the time of the murder, the defendant was still engaged in an embezzlement from his employer, for whom both the defendant and victim worked, and had embezzled up to that point approximately Fifteen Thousand ($15,000.00) Dollars when confronted by the victim regarding same.

(R 504). Appellant claims that the facts do not support this aggravating factor. Appellant also claims that the trial court improperly doubled the pecuniary gain and avoid arrest aggravating factors. **Brief of Appellant** at 87-88. The State disagrees.

During the sentencing phase proceeding, Detective Yuill testified that Paisano Publication Company, the owner of Easyrider's, sent him some documents which indicated possible embezzlement of funds from the store. Detective Yuill went to Easyrider's and went through the store's records with Appellant. He found that deposits totalling $10,130.79 had not been credited to the store for the period from September 9, 1991, to October 31, 1991, although Appellant claimed that both he and the victim had made the deposits for those days. Detective Yuill could also not account for three checks written by the victim totalling $15,500. In addition, the store's cash proceeds for December 16,

1991, the day of Carl Beard's murder, which totalled $4,200, were also missing. Appellant was arrested that day for grand theft.

A few days later, 43 deposits slips made out for those missing days' funds, plus one of the unaccounted-for checks, was found hidden in a storage room at Easyrider's. (PT 98-109). Appellant told the police that he murdered Carl Beard when the victim confronted him about the theft of the money. (PT 140). Appellant also told his cellmate that he knew that the victim "had to be done away with to avoid his being found out." (PT 135). Based on these facts, the trial court did not err in finding this aggravating factor. See Zeigler v. State, 580 So.2d 127 (Fla. 1991) (murder of second victim was committed in furtherance of plot to kill wife for insurance money), cert. denied, 112 S.Ct. 390 (1992).

Regarding Appellant's claim that the trial court improperly doubled the pecuniary gain and avoid arrest aggravating factors, the State would again submit that Appellant failed to preserve this issue for review, since he failed to raise it in the trial court. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Regardless, Appellant's claim has no merit. As the record reveals, Carl Beard's murder "was the culmination of a series of interrelated events stemming from the act of taking money from [Easyrider's]." Card v. State, 453 So.2d 17, 24 (Fla. 1984), cert. denied, 469 U.S. 989 (1985). Not only had Appellant stolen money on more than one previous occasion, he stole the cash proceeds from the store that the victim had collected to take to the bank the next day. In addition to the thefts, however, a dominant motive for

Carl Beard's murder was to avoid arrest for the theft of the money. The victim knew Appellant, had evidence and a belief that Appellant had stolen the money, and was going to meet with bank officials the following day to discuss the missing money. Appellant believed that Mr. Beard would ultimately report his suspicions to the police, so Appellant killed him. See Issue VII, supra. Based on Card, the facts of this case support singular consideration of both aggravating factors. Even if they should have been considered as one, however, there is no reasonable possibility that the sentence would have been different in light of the substantial aggravation and the minimal mitigation in this case. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE X

WHETHER APPELLANT'S SENTENCE IS DISPROPORTIONATE (Restated).

Using his position as the manager of Easyrider's, Appellant embezzled a substantial sum of money to buy marijuana, which he used, instead of selling, and thus could not recoup the money before it was discovered missing. When confronted by his boss, Appellant decided that he "had to be done away with to avoid his being found out." (PT 135). Consequently, he struck the victim in the face with his fist, knocking him down, struck him again with his fist, then picked up a nearby brick and struck him between 6 and 12 times in the head, crushing his skull. After killing Mr. Beard, Appellant enlisted the aid of his girlfriend, and Frank Fell and Mary Maibaurer, to clean up the mess and to dispose of the body, which they weighted down with bricks and threw in a canal some distance away. Appellant then solicited a cellmate and an undercover investigator to kill Fell and Maibaurer so that they would not testify against him.

In light of these facts, Appellant pled guilty to first-degree murder and to two counts of solicitation to commit murder. He also validly waived a sentencing jury and the presentation of mitigating evidence, although his attorney ignored his commands and presented some evidence in mitigation. Ultimately, the record supports the existence of four aggravating factors: 1) that Appellant had previously been convicted of felonies involving the use or threat of violence--the two counts of solicitation to commit murder, 2) that Appellant had committed

the murder to avoid his lawful arrest, 3) that Appellant had committed the murder for pecuniary gain, and 4) that the murder was especially heinous, atrocious, or cruel. (R 504). Balanced against these substantial aggravating factors is evidence that Appellant "was a good family man, kind, generous, and compassionate" (R 505), although, needless to say, Appellant was neither kind, generous, nor compassionate to the victim in this case.

Appellant attempts to minimize the weight to be accorded to each of the aggravating factors and challenges the trial court's rejection of several statutory and nonstatutory mitigating factors.[20] **Brief of Appellant** at 89-90. However, this Court's function is not to reweigh the facts or the aggravating and

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[20] Appellant challenges each of the aggravating factors as separate issues in this appeal. To the extent that he seeks to challenge within this issue the trial court's rejection of mitigating factors, the State submits that their rejection was justified. For example, Appellant's convictions for two counts of solicitation to commit murder, which were committed after the murder but rendered before sentencing for the murder, constituted subtantial competent evidence upon which the trial court could reject Appellant's argument that he had no significant history of prior criminal activity. See Francis v. State, 473 So.2d 672, 677 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986); Ruffin v. State, 397 So.2d 277, 283 (Fla.), cert. denied, 454 U.S. 882 (1981). Similarly, the fact that the State originally agreed to accept a plea to life is not a mitigating factor. The State was just as willing to seek the death penalty in exchange for a guilty plea. Likewise, although the victim's family initially decided not to push for the death penalty, it changed its mind after Appellant attempted to have two of the witnesses killed. (PT 183-84). Since this was the subject of testimony at the penalty phase proceeding, the trial court obviously considered it, but properly gave it no weight. See Floyd v. State, 497 So.2d 1211, 1213 (Fla. 1986). Finally, the fact that Appellant expressed concern for the victim's family and worked hard to support his family was considered by the trial court when it found that Appellant was "a good family man, kind, generous, and compassionate." (R 505).

mitigating circumstances. Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991), cert. denied, 116 L.Ed.2d 102 (1992); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). Rather, as the basis for proportionality review, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court. State v. Henry, 456 So.2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). The four aggravating factors found in this case are supported by competent substantial evidence and far outweigh the nonstatutory mitigating evidence presented. Moreover, the trial court conscientiously weighed the aggravating circumstances against the mitigating evidence and concluded that death was warrant. Contrary to Appellant's assertion, his sentence is not disproportionate to other defendants' sentences for similar murders. See Henry v. State, 586 So.2d 1033 (Fla. 1991); Zeigler v. State, 580 So.2d 127 (Fla. 1991), cert. denied, 116 L.Ed.2d 340 (1992); Bruno v. State, 574 So.2d 76 (Fla. 1991); Reed v. State, 560 So.2d 203 (Fla. 1990); Cherry v. State, 544 So.2d 184 (Fla. 1989); Roberts v. State, 510 So.2d 885 (Fla. 1987); Rose v. State, 472 So.2d 1155 (Fla. 1985); Heiney v. State, 447 So.2d 210 (Fla.), cert. denied, 469 U.S. 920 (1984). Consequently, this Court should affirm Appellant's sentence of death.

ISSUE XI

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED (Restated).

In this appeal, Appellant claims that Florida's death penalty statute is unconstitutional on its face or as applied. Specifically, Appellant claims that (1) this Court violates the doctrine of separation of powers when it defines the operative terms of the aggravating factors, (2) the aggravating factors, especially HAC and CCP, are vague and overbroad, (3) the aggravating factors do not adequately channel the sentencer's discretion because they allow consideration of evidence otherwise inadmissible (for example, the facts underlying previous convictions for felonies involving the use or threat of violence), and (4) the failure to require the State to specify before trial the aggravating factors upon which it will rely violates procedural due process in that insufficient notice is accorded the defendant. **Brief of Appellant** at 95-104. None of these arguments, however, was made in the trial court below. Thus, they have not been preserved for review. Johnson v. Singletary, 18 F.L.W. S90 (Fla. Jan. 29, 1993); Fotopoulos v. State, 18 F.L.W. S18 (Fla. Dec. 24, 1992); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, 120 L.Ed.2d 931 (1992).

Even if they had been properly preserved, they are wholly without merit. This Court has previously rejected Appellant's separation of powers argument in Sireci v. State, 587 So.2d 450, 454-55 (Fla. 1991); his vagueness and overbreadth arguments in Hall v. State, 18 F.L.W. S63, 65 (Fla. Jan. 14, 1993), and

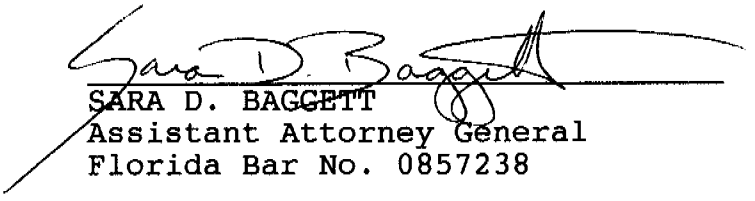
Fotopoulos, 18 F.L.W. at S22 & n.7; his channeling of discretion argument in Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977); and his procedural due process argument in Johnson v. State, 438 So.2d 774, 779 (Fla. 1983), rev'd on other grounds, 498 So.2d 938 (Fla. 1986). Therefore, his sentence of death should be affirmed.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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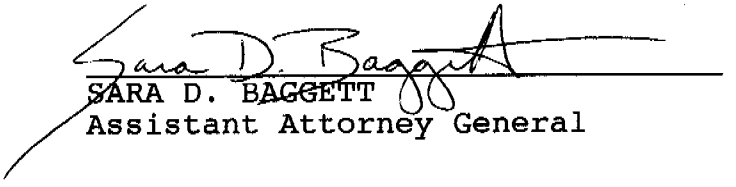
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 2d day of March, 1993.



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