IN THE SUPREME COURT OF FLORIDA

DAVID MUELLER ELAM,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 80,039

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Carl Beard was killed December 17, 1991. His body was discovered five days later in the Withlachoochee River by-pass canal near Englis, Florida. (R416-17).[1] On January 7, 1992, an indictment was returned charging an employee of Beard's, David Elam, with Beard's first-degree murder. (R415). Mr. Elam was arrested on December 17, 1992, and held without bond at the Volusia County Branch Jail Facility. (R416-17).

After Elam's arrest, the State moved on February 14, 1992, to have Elam's fiancee, Susan Dawson, declared a material witness. (R431-32;450-51). The State also moved to perpetuate her testimony based on the affidavit of Assistant State Attorney ("ASA") David Damore, who claimed that Ms. Dawson was a destitute British national, illegally within the United States due to expiration of her visa, and a person who was subject to being deported by the immigration authorities "in the near future." (R435-39).

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[1] (R) refers to the record on appeal in the instant case.

A hearing on the State's motions occurred February 24, 1992. (R263-284). Initially, ASA Damore withdrew his request that a bond be placed on Ms. Dawson because he recognized that the result of any bond would be to separate Ms. Dawson from her infant child. (R268). However, when Ms. Dawson filed a written statement and claimed that ASA Damore was pressuring her to give misleading statements (R441-43), ASA Damore reversed his position and asked for a $10,000 bond to be set. (R274-76).

Elam, who present at this hearing, told the court that he had been the sole source of support for both Ms. Dawson and his young child and that he was very concerned about the actions of the prosecutor. (R274). An argument between ASA Damore and Ms. Dawson ended with ASA Damore stating he no longer wanted to perpetuate her testimony because she had become a hostile witness. (R278). The court found Ms. Dawson to be a material witness but declined to set a bond, instead ordering that Ms. Dawson personally report to the State Attorney's Office three days a week. (R281).

On April 27, 1992, Elam's counsel moved to continue the trial date in order to complete discovery (R444), but the motion was denied because Mr. Elam refused waive a speedy trial. (R310). The case remained on the trial docket for the week of May 18, 1992. (R310). Two additional charges were added on May 11, 1992, when Elam was arrested for trying to hire a person named Mike Best to murder two witnesses in the pending murder case, and in doing so agreed to have Ms. Dawson participate. (R516-17).

On May 11, 1992, the day the information was filed, Elam pled guilty to the pending first-degree murder charge the and two new counts of solicitation to commit first-degree murder. (R324-52). As Elam's defense counsel stated the terms of a negotiated plea of guilty to all charges whereby Elam would receive a life sentence on the first-degree murder conviction, to be followed by concurrent 30 years sentences for the solicitation convictions, Elam told his counsel that he wanted the death penalty and wanted to waive a sentencing recommendation from the jury. (R325). Hearing this, ASA Damore acknowledged that he had negotiated the announced plea with defense counsel but, based on Elam's assertion that he wanted the death penalty, announced that the State would seek the death penalty and agree to Elam's waiver of a jury recommendation. (R326).

ASA Damore indicated that in prior discussions Elam had "express[ed] concern to me for a lady named Susan Dawson, who is the mother of his child." (R328). The court arraigned Elam on the solicitation charges (R329-32), conducted a plea colloquy (R332-47), and found that the guilty pleas were knowingly and voluntarily entered. (R347-48). Elam was permitted to sit because he felt ill (R351-52), a PSI was waived and Elam was adjudicated guilty of the two counts of solicitation to commit first-degree murder (R354) and sentenced to two, thirty year terms of imprisonment, to be served concurrently with each other but consecutively to the sentence that was to be imposed on the conviction for first-degree murder. (R354).

Elam's permitted sentence under the sentencing guidelines was from seven (7) to twenty-two (22) years. (R527). The written reason for the departure from the recommended guideline sentence, found at the bottom of the scoresheet, states, "Defendant agreed to sentence as part of agreement and seriousness of charges." (R527). Elam was adjudicated guilty of first-degree murder. (R368). ASA Damore announced that the State was prepared to immediately begin a penalty phase. (R359). The court questioned Elam about his desire for the death penalty and concluded that Elam was, "in essence, directing defense counsel to sit on his hands and to not make any objections." (R359). When reservations were expressed about whether an appointed defense attorney could ethically just stand by and do nothing during a penalty phase, Elam stated, "Your Honor, can I fire my attorney and represent myself?" (R361). The court did not rule on Elam's request. (R363). Elam gave a handwritten waiver of the right to a jury recommendation and the proceedings concluded. (R364;459).

On May 13, 1992, two days after Elam pled, he was again brought before Judge Hutcheson and asked about his wish to waive his presence at the penalty hearing. Elam confirmed his decision not to be present and, in reference to representation by counsel, stated, "I don't want him to make any comment, no anything in regard to the penalty phase or the rest of this case." (R381). Elam's counsel confirmed that Elam was competent. (R382).

At the State's insistence, the court asked Elam whether he wanted counsel and Elam again stated that he wanted counsel to be present, but to do nothing. (R391-92). The State remained dissatisfied, and Judge Hutcheson asked, "Why don't we just chuck this whole thing?" (R394). Elam's counsel moved to withdraw since he was not to actively represent his client. (R395).

Judge Hutcheson concluded the hearing as follows:

> Court: The bottom line then would be Thursday morning at nine o'clock you will not be transported unless you change your mind between now and a week from tomorrow, let Mr. Cass know or Mr. Jacobson of the Public Defender's Office and we will be more than happy to have you over here. **As of now, unless you change your mind, and you made it crystal clear what your wishes are, I will honor those wishes and you will not have to be present. I will not have the deputy transport you over here a week Thursday at nine o'clock on May 21st, and the following Friday if necessary, if we get into the second day. Mr. Cass would be here, but he, basically, will just be sitting in and not participating either by making an opening statement, cross-examining state witnesses, calling his own only witnesses, presenting any evidence or documents and would not participate in closing arguments.** Is that the way you wish it, Mr. Elam?
>
> (Mr. Elam) Yes, sir.

(R398) (emphasis added). The court confirmed to Elam that "Mr. Cass will be here and not take any part in the trial other than basically physically occupying a chair." (R399). Counsel told the Court that he could not present the mitigating evidence that quickly and was told that, should Mr. Elam's defense posture change, a continuance would be granted if requested. (R401).

THE PENALTY PHASE

The penalty hearing occurred approximately a week later. At the inception of that hearing, the court told defense counsel that Mr. Elam had called and wanted to know why he was not being brought over for the hearing that morning. (R4-5). Defense counsel replied that, when he and Mr. Elam had discussed the matter earlier, they were uncertain as to what, procedurally, would happen. (R6). Judge Hutcheson's understanding was that counsel would not actively represent Mr. Elam, but he would be allowed to address the court after the State's case if he so chose. (R7-8).

Counsel insisted that Elam be brought over from the jail in order to timely ratify his prior waivers and objected to being required by the Court to "represent" the defendant while simultaneously being required to do nothing by the client. Counsel further argued that an adversarial procedure is needed to develop the pertinent facts upon which to impose a death penalty and that he, as counsel, was otherwise mandated by the Sixth Amendment and the Code of Professional Conduct to fully represent a client to the best of his ability, and that sitting in a chair doing nothing does not fulfill those responsibilities. Counsel argued that, if Elam was not waiving his right to counsel and the Public Defender's Office was not being allowed to withdraw, then as counsel he was ethically and constitutionally required to fully represent his client. (R13-15).

Counsel argued that Klokoc v. State, 589 So.2d 219 (Fla.1991) required a truly adversary penalty phase and stated that, unless allowed to withdraw, he felt ethically bound defend his client against the death penalty. (R16-24). The court was reminded that, for Elam to be actively represented, a continuance was needed to get the witnesses from California to testify about existing mitigation. (R25).

Elam arrived and waived the right to attend the penalty phase, "with the exception that I would like to read my statement at such time as the district attorney is done." (R38). Elam also confirmed his desire that his counsel make no objections and present no evidence on his behalf, (R39-40), and counsel renewed his motion to withdraw as follows:

> Mr. Cass: I do renew that motion, Your Honor, because I'm put in a position where I can't meet the duties that's imposed on me by the Sixth Amendment, Constitution of the United States, and our parallel state bill of rights section.
>
> I believe there is mitigation in this case, and I'm not going to be able to put it on. I am not prepared to represent in the penalty phase, as I stated in my motion to continue previously entered with the Court, but I'm being put in a position where I have responsibilities I have to meet. I'm not arguing with Mr. Elam's right to not have a defense if he wants not to defend this. I think he has a right to do that. But I don't think he has the right to ask me to do things which are contrary to the code of professional responsibility under the Constitution of the State of Florida and of the United States. Thank you, Your Honor.

(R42).

Counsel's predicament was discussed (R42-45) and Elam stated, "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." (R45). Counsel explained that his investigation of possible mitigation was incomplete, due in part to defense counsel's representation of four other defendants charged with first-degree murder and because of the finalized plea agreement with the State whereby Elam was to have received a life sentence. (R45;58-59;455-56). The State argued that it was the client's decision to determine how to proceed and suggested that the Public Defender's Office be appointed on a "stand-by" basis. (R45-46). The Public Defender's Motion to Withdraw and request for a continuance were denied. (R57-60;118;119-124).

Elam left the courtroom and the penalty phase began. The Medical Examiner testified that Beard had died as a result of blunt trauma to the head. (R83). His skull had been fractured as a result of six to twelve blows. (R88-90). Beard's arms were bruised (R84) and a finger of his left hand had been fractured. (R86). These were typical "defensive wounds." (R87). Beard was conscious long enough to get his arms in a defensive posture (R91), but may have been unconsciousness within 30 seconds after the altercation began. (R96). In fact, the fight may have lasted only 30 seconds. It was probable that Beard was unconscious at the end of the fight and that he never regained consciousness before dying. (R94).

David Elam had been hired by Beard to manage a store named "Easyriders." (R103). Detective Yuill went to Easyriders and asked Elam about the disappearance of funds. (100-101). Elam told Detective Yuill that he deposited funds for the business and produced records indicating when deposits were made at the First Union Bank. (R101-102). Detective Yuill's investigation showed that $10,130.79 was missing from Easyriders during the period of September 9, 1991, through October 31, 1991. (R102).

Elam could not explain the disappearance of funds and said there had been no burglaries or thefts at the store. (R103). Beard had an appointment at First Union Bank on the day of his murder. (R104). Detective Yuill determined that three checks totalling $15,500 had not been received by Easyriders' parent company, Paisano Publications, in California. (R104-105). Over hearsay objection, Officer Yuill testified that Beard had obtained the day's receipts totalling $4,200 from Elam on December 16, 1991, the day before Beard's death, and that the money was still missing. (R106-107).

After Elam's arrest, a box containing 43 deposit slips and a $5,000 check, with Elam's fingerprint on it, was found in a back room of Easyriders. (R109;132-35). The State used "faxed" copies of Paisano Publications bank statement to show that $10,130.79 was missing from Easyriders' account. (R111-12). On cross-examination, Detective Yuill explained that Elam admitted filling out the 43 deposit slips, but also said that both he (Elam) and Beard made deposits at the bank. (R114-15).

Detective Ewanik determined that the concrete blocks found affixed to Beard's body when it was discovered in the canal were similar to blocks located at the rear of Easyriders. (R125-127). Elam told Detective Ewanik that, on December 16th, he and Carl Beard had spent the entire day going over ledger books and that, the next day, Beard was to have gone to First Union Bank to deposit $4,200 cash and go over the discrepancies found in the deposit records. (R128-29). Ewanik's investigation showed that Frank Fell and Mary Maibauer[2] had, at Elam's request (R133), burned checkbooks and records that Beard possessed on December 16, 1991. (R130-31). Fell and Maibauer gave sworn statements that Elam had asked them to get rid of Beard's body (R136), and they told Ewanik that, on the day Beard had been killed, Elam and Maibauer had driven Beard's Cadillac to the Daytona Beach Regional Airport and left it in the parking lot, and that thereafter they (Fell and Maibauer) retrieved the vehicle and took it to Ocala where it was left in a shopping mall parking lot. (R146).

Detective Ewanik testified that at some unspecified time he heard Elam tell detectives that he had been confronted by Beard on the morning of December 17th and that a fight had ensued. Elam hit Beard in the face with his fist, knocked Beard to the floor, struck him again, obtained a brick and then repeatedly hit Beard in the head with it. (R139-140).

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[2] These are the two individuals that Elam is alleged to have solicited Mike Best to murder.

Detective Ewanik was told by an inmate, Ford, that Elam admitted being confronted by Beard on December 16th about missing funds and knew then that Beard would have to be done away with. (R135). Ewanik heard that Elam was attempting to contact someone from the Outlaw motorcycle gang to have Fell and Maibauer killed to prevent them from testifying. (R135-36;522). On May 5, 1992 a state attorney investigator named Mike Best was placed in the jail and introduced to Elam as a Mafia hitman. (R159). Best asked how he could help and Elam told him he needed something done. (R160). Best was careful to have Elam clarify that he was hiring Best to do away with Fell and Maibauer. (R136-37;160-61). Elam was to inherit a portion of 28 million dollars and would then be able to pay Best's boss, "Louie." (162). Elam gave Best copies of arrest reports for Fell and Maibauer to show where they lived. (R137;162-63). However, Best told Elam that if Susan Dawson did not meet him and hand him a note stating "Big Mike," the deal was be off. (R167-68). Ms. Dawson met Best and reluctantly showed him where Fell and Maibauer lived. (R168-69).

Dawson was arrested and interrogated by Damore. One officer claims that Ms. Dawson said that, on the night Beard was killed, Elam left Easyriders and went home. Two or three minutes later, after Elam and Dawson argued, Elam handed their child to Dawson, left the house and returned to the store. Ms. Dawson followed and allegedly heard Beard say, "Please don't hit me again." (R171-72). She entered and saw Beard lying on the floor, with Elam present. (R173).

Detective Ewanik recalled differently. He testified that at first Dawson denied any knowledge about what had happened to Beard. (R141). However, after being confronted with the plot to have Fell and Maibauer killed, Ms. Dawson indicated that she had seen Beard arrive at Easyriders on December 17 and enter the rear of the store with Elam. After several minutes she went into the store and saw Beard lying on the floor, bleeding profusely from the head. (R142). Detective Ewanik did not remember Ms. Dawson say that she heard Beard say anything. (R142). Ewanik's account comports more closely with the written statement Ms. Dawson provided to the Court. (R441-43).

The State rested (177) and counsel sought to proffer the mitigation that the witnesses in California would present. (R179). The State objected:

> Court: You want to be heard any further on that, Mr. Daly?
>
> Mr. Daly: Yes, Your Honor. I don't see what relevance it has. To the effect that Mr. Cass thinks he could present more, I'm sure we could present more, too. But the determination by this court is to be made upon evidence presented in this courtroom.
>
> Court: I think as far as an appellate tactic, 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 a proffer.

(R182).

Elam presented the testimony of the victim's brother, who had been attending the penalty proceeding. (R 76-77). Mr. Beard testified that his family had agreed not to object to a sentence of life imprisonment if Elam pled guilty to first-degree murder because the family did not want to go through the pain of a trial where they would relive his brother's death. (R183-85). On cross-examination, Mr. Beard stated that he had no qualms about a death sentence now in light of the fact that Elam had tried to solicit murder to cover up his brother's murder. (R184).

Over the State's "lack of disclosure" objection, Elam presented the testimony of Timothy Wise, a friend of Elam's who also just happened to be in the courtroom attending the penalty phase. (R186-191). Wise established that Elam once owned a restaurant located across the street from Wise. In times of need, Wise would go to Elam and receive help. "Dave, from the time I've known him, Dave has, Dave has always been a super fine person. Dave -- because he's helped people very generously in several different ways." (R191). Wise borrowed Elam's car and knew that Elam loaned another friend a substantial amount of money. (R191). Elam had always given Christmas and birthday gifts to Wise's daughter, and had once dressed as a clown and put on a party for the children. (R192).

When Wise's parents came to Florida, Elam gave them groceries for two weeks, as well as snacks for the trip back to West Virginia. (R192). Elam was a good parent who adored his child. (R193). On cross-examination by ASA Damore, Wise

indicated that he did not know that Elam was involved in soliciting the murder of Maibauer or Fell (R194) and indicated that he and Elam previously had a falling out over business so they had not kept in touch. (R195). Wise did not believe that Elam stole money from the Easyriders store. (R195).

Following the testimony of Mr. Wise, defense counsel again sought to proffer the mitigation that his investigation had uncovered. (R198-99). When the State again objected, the court repeated that a proffer of such evidence would not be allowed:

> Court: That much is true. The fact that you're kind of hamstrung here today, Mr. Cass, is mostly -- is all your client's doing. I'm pretty sure I did go ahead and rule earlier when the State objected, but if I didn't, I again sustain the State's objections and not allow you to make that proffer of what you hoped you could have shown had you had your motion to continue to get ready.

(R199-200).

MR. ELAM'S STATEMENT

Defense rested and Elam was brought into the courtroom. He began by asking whether the State was through with prosecuting Susan Dawson. (R203). After being assured that the State could not present her testimony, Elam explained why he had suddenly pled guilty and asked for the death penalty.

Elam began by stating that the proudest moment of his life was when he became a father on August 20, 1990. To provide for his family, he applied for a job at Easyriders and was hired as manager. (R205-206). He was to receive a salary and sales

commission, and would rent the house at back of the store, with utilities included, for $200 a month. (R206). He was to supply the labor to repair the house and Easyriders would supply the materials. (R206).

From March to May, Elam worked twelve hours a day, seven days a week at Easyriders and would then go home and work on the house. (R206). Elam, his son and Susan moved into the house in June. (R206-207). The store did exceptionally well. (R207). The only contact Elam had with the parent company in California was to make orders. (R207). In December, Elam received a call from California regarding missing deposits but was unconcerned because the deposits were Beard's responsibility. (R208). Elam did not go into the events following that phone call and instead concentrated on what had happened after his arrest.

The night Elam was arrested, Susan and Elam's 16 month old son were awakened and expelled from their home at midnight by police. (R208). For months, they kept her from regaining possession of her personal property, furnishings and household goods. (R209). Susan visited Elam in jail and they agreed that she and their son should go to her home in England until the matter was resolved. She and Aaron were staying with friends, and after that conversation at the jail when she returned home she was met by two police officers who told her she was under arrest. (R209). She asked for an attorney and was told she could call one from the police station. (R209).

When she arrived at the station ASA Damore threatened to have her son placed in the custody of HRS if he did not get the information he wanted. (R210). He asked to see Susan's passport and then refused to return it. (R210). She was not incarcerated and she told Elam of her arrest and that ASA Damore wanted him to confess; then Susan and Aaron return to England. (R210).

Elam contacted two police officers who were friends and, after three of four conditions were met, gave his account of what had happened. (R210-11). Susan and his son still were not allowed to leave. (R211). Susan called the British Embassy in Atlanta and was told she was entitled to a work permit if she was not allowed to leave. (R211). The embassy officials were told by ASA Damore that Susan had surrendered her passport, that he was unaware that she had not gotten it back, that the police had it and not him, and that he had arranged adequate accommodations to support Dawson so there was no need for a work permit. (R212). Elam believed that ASA Damore's lies were causing great hardship to Susan and Aaron. (R212).

It was obvious that Elam was extremely distraught over the way Susan Dawson and his son were being mistreated. At the hearing of February 24, 1992, Elam watched ASA Damore try to have a $10,000 bond placed against Susan after she accused Damore of lying and threatening to have Aaron placed in the custody of HRS if she would not cooperate. (R212). Her request for an attorney at that hearing was countered by Damore's representations to

Judge Hutcheson that he had talked to Susan's attorney and sent that attorney notice of the hearing[3]. Yet, after the hearing Elam called that attorney and was told that Damore had been informed that the attorney would not represent Ms. Dawson at the hearing. (R213).

Susan and her child were staying with the Stopplebeins, "a wonderful couple who have helped every way they could." (R213; 280-81). Elam and Susan desperately wanted to help but could contribute nothing toward their support. (R214). Elam then met inmate Jeff Ford. Ford was incarcerated at the Volusia County Branch Jail with Elam and Ford claimed to be a former New York policeman involved in the drug cartel. (R214-15). Ford's attorney, George Pappas, Esq., was supposedly a connection to the cartel and several inmates represented by Pappas had been

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[3] The transcript of the hearing of February 24, 1992 shows the following:

> Mr. Damore: Judge, with all due respect to my learned counsel, the defendant is not entitled to counsel at this time. However, Judge, I have been speaking with an attorney, a Ms. Pasha (phonetic) from the legal aid office, who advised me that she would be representing Ms. Dawson in this matter.
>
> Ms. Dawson: No. She said she would not represent me in this matter.
>
> Mr. Damore: I was advised, Your Honor, that she would represent the witness, and I did sent her notice of this hearing. I don't know whether or not she decided not to represent her. I'm not here to argue with the witness.

(R276)

released on bond in order to drive drug-laden cars to New York. (R215). Ford asked Elam if Susan would like to make $10,000 by driving one of their cars to New York. Elam agreed, but Susan refused. (R216). About three weeks later, Ford asked Elam to see if Susan would do it for $5,000. (R216). Their situation was much more desperate and Elam believed that, by agreeing, he would be represented by Pappas instead of the Public Defender, so he convinced Susan to do it, but that deal fell through. (R216-17). Other attempts also failed but, because she had agreed, Ford told Elam that Pappas had gone to Miami and made arrangements to have her and Aaron cared for and that Pappas would represent him and take care of his witnesses. (R217). When questioned, Ford told Elam that was the way "Louie" wanted it. (R217).

Elam's family in California refused to help. (R218). Ford kept telling Elam not to worry, that an associate would be coming out to help. (R219). Elam thought the associate was an attorney helping Pappas. (R219). Instead, the associate asked, "what do you want done with them?" (R219). Elam said something like, "I don't want them to show up in court." (R220). Ford made a hand gesture of a gun. (R220). In the record at page 220, Elam vaguely recalls saying he did not care if they were killed:

> Elam: I went one step further and further, thinking I knew what this guy wanted, what he did for a living. I said, kill them, shoot them, gator bait them. Whatever I thought would make the deal go through. Am I surprised he even asked about Susan? I told him that Susan and Aaron were my only concern. Mike said okay and left.

Ford always had his way with the guards and brought cocaine and marijuana into the jail after visits with his attorney. (R222). After Elam's conversation with Ford on May 7th, Ford was moved to a different unit. (R222). Later that evening, Elam was brought to the control room at the branch jail and charged with two counts of solicitation to commit first-degree murder. (R222). Elam described the negotiations that accompanied his plea as follows:

> Friday morning I saw that Susan had been arrested. I was in hell, if I hadn't already been. A sense of complete failure. I realized that I'd taken from my son the most important thing -- his mother, and because of my unwillingness to accept the fact that she couldn't stay here like it had always been, I tried to make something happen. [Ford] and Marty were released. To where, I don't know.
>
> The district attorney's end justified the means. Did it happen because I was desperate or did it happen because I'm stupid? I don't really know. I know I was either unable or unwilling to believe that it could jeopardize the most important thing to me, Susan and Aaron's well being. In fact, I ruined it. But there had to be something I could do. I thought if I could change plans and give my life, I would, so I waited for the meeting Monday morning. Mr. Damore, Mr. Cass, and Mr. Jacobson. I admit our reported three and a half hour conversation lasted fifteen to twenty minutes. I asked what I had to do to have Susan released and allow her to go to England.
>
> Mr. Damore stated to me that the State had no reason to harm Miss Damore (sic) or our son. The State did not want to see her incarcerated, but most definitely wanted to see me behind bars

> for the rest of my life. Mr. Damore stated I was in no position to ask for a deal, nor was the State going to promise anything.
>
> Mr. Damore stated that -- I'm sorry, Mr. Damore said that if the State wanted to harm Miss Dawson, they could charge her with contempt of court, perjury, and possibly another charge, but it's the State's position if I was to plead guilty, would be to have her plead guilty to accessory after the fact, be placed on probation, and be released on her own recognizance and be deported, never again to enter this United States.

(R223-24).

Elam stated that he did not plead guilty because he was guilty but instead to end the harassment that was occurring to innocent people. (R229). He stated, "I'm asking for the death penalty not because I physically killed Carl Beard, but because, to me, my crime is much worse. I betrayed the trust of someone that loved me, I betrayed the trust of a father to his son. For some reason, I was unable to realize the danger I was putting my family in. How ashamed I am I ever went as far to agree to allow members of my family to be harmed in order for others to benefit." (R229). Elam apologized to the victim's brother, stating that he was very sorry that it had happened but he did not take part in it and he could not prevent it from happening. (R229). In reference to the solicitation charge, Elam stated that he was guilty of stupidly agreeing to have it done, but that he did not solicit it. (R230). Elam said, "I think what I am is someone who has become so disillusioned with the justice system that it's hard to find the truth." (R230).

Elam concluded with the following entreaty to the court: "I beg of this court to allow me to be executed. I know I can't continue to exist knowing that I have betrayed my son and Susan. From them, I ask that they try to forgive me and know no matter what, know that I love them both so very, very much. Thank you." (R231). With that, Elam left the courtroom. (R231).

The State argued that four statutory aggravating factors had been proved. (R232-39). Prior to presenting his argument, defense counsel unsuccessfully moved to strike the hearsay testimony which had been presented by the State. (R239-40). The Court sustained a State objection when counsel sought to argue that the murder was committed without premeditation or with premeditation of very short duration. (R240-41). Defense counsel argued as mitigating considerations the fact that Elam showed a great deal of remorse for what had transpired, that Elam was a good person and a good father. (R242-44). Sentencing was set for May 22, 1992. (R248).

After Elam was taken into the holding cell, ASA Damore addressed Judge Hutcheson and denied promising anything to Elam. (R249-51). Overhearing this, Elam returned to the courtroom and clarified that he never claimed to have been overtly promised anything by Damore, but that it had been implied to him that Susan would benefit when he pled guilty and that was his only concern, getting Ms. Dawson and his son together. (R252-55). Based on those representations, counsel moved to withdraw Elam's guilty pleas because they were the product of coercion. (R255).

When the State objected and argued that counsel was trying to manipulate the system, counsel replied that he felt it was his ethical duty to seek withdrawal of the guilty pleas that were clearly invalid based on what had just been said by his client. (R257). When asked by Judge Hutcheson whether he wished to withdraw his pleas Elam replied, "No, I don't. **If the sentence is the chair, no, I don't, Your Honor -- I'll condition that**." (R258) (emphasis added). The motion to have the withdraw the guilty pleas was denied. (R258).

SENTENCING

Elam was sentenced for the capital offense on May 27, 1992. (R406-414). Elam's counsel renewed all previously made motions and specifically renewed the public defender's motion to withdraw, the motion for continuance, the motion to proffer the mitigating evidence and the motion to withdraw the pleas on all three offenses based on Mr. Elam's concluding statement to the court. (R409) The motions were denied. (R410).

Judge Hutcheson sentenced Elam to death and entered a written order which set forth the court's findings of law and fact. (R411). The court found that Elam had prior convictions for two violent felonies (the "conspiracy" to commit first-degree murder convictions), that the murder was committed to avoid a lawful arrest, committed for financial gain, and that the murder was wicked, evil, atrocious or cruel. (R505) (Appendix A). The court found as non-statutory mitigation that Elam was a good family man, kind, generous, and compassionate. (R505)

A Notice of Appeal of the conviction for first-degree murder and death sentence was filed June 10, 1992. (R506). A Notice of Appeal of the convictions and sentences for the solicitation charges was filed June 12, 1992. (R528). Upon motion by appellant, the appeal of the solicitation to commit first-degree murder judgments and sentences was transferred from the Fifth District Court of Appeal to this Court because Elam had pled guilty to all offenses as part of a package deal, and the motion to withdraw the guilty pleas pertained to all of the charges to which Elam had pled. This brief follows.

SUMMARY OF ARGUMENTS

POINT I: The guilty pleas are invalid as a matter of state and federal constitutional law. The pleas were involuntarily entered by Elam in order to stop harassment of his family. The pleas were also conditioned on reception of the death penalty, which is an unlawful bargain that, if kept, results in arbitrary and capricious imposition of the death penalty in contradiction of the Eighth and Fourteenth Amendments and Article 1, Section 17 of the Florida Constitution. Further, the factual basis for the guilty pleas is inadequate as a matter of law, in that Elam has professed his innocence and the competent evidence in the record fails to show his guilt. The pleas should be vacated.

POINT II: Recognizing the need for the sentencing determination in a death case to be individualized even where the defendant is asking for the death penalty, defense counsel sought to proffer to the court the substance of pertinent mitigating evidence. The court sustained a State objection and forbade such a proffer. The ruling was error pursuant to Durocher v. State, 17 FLW S542 (Fla. July 23, 1992) and Koon v. Dugger, 17 FLW S337 (Fla. June 4, 1992). The refusal of the court to allow counsel to place in the record those considerations which factually exist and which have been recognized as valid mitigating considerations denies due process and renders the death penalty constitutionally infirm and arbitrary. The death sentence must be reversed and the matter remanded for a new penalty phase.

POINT III: The court allowed the State to present hearsay evidence at the penalty phase hearing. Defense counsel did not object to all of the hearsay, but such an objection would have been meaningless in the face of the court's clear rulings that hearsay testimony was statutorily authorized in penalty phase hearings, as argued by the State whenever hearsay objections were made. The use of hearsay to impose a death sentence denies state and federal constitutional rights to due process, confrontation and cross-examination of witnesses and makes the death sentence unreliable under the Eighth and Fourteenth Amendments.

POINT IV: A week before the penalty phase, defense counsel was told by the judge that a continuance would be granted upon request if it became necessary for counsel to actively represent the defendant. Counsel moved for the promised continuance in order to obtain witnesses from California when Elam stated that counsel should go ahead and represent him at the penalty phase hearing. The requested continuance was denied, thereby denying counsel the physical ability to effectively represent his client. The denial of a continuance under these circumstances was an abuse of discretion and a denial of due process under the Fifth, Sixth and Fourteenth Amendments and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Imposition of the death penalty following such a proceeding is arbitrary under the Eighth and Fourteenth Amendments and Article 1, Section 17 of the Florida Constitution. The death sentence must be reversed and the matter remanded for a new penalty phase.

POINT V: Application of the especially heinous, atrocious or cruel statutory aggravating factor is improper under the facts of this case where the evidence wholly fails to show that Beard's murder was unnecessarily torturous. There is nothing about these facts that separates Beard's murder from the norm of first-degree murders committed during a sudden fight, and the reasons stated by the trial court to apply this factor have been expressly rejected as valid reasons under similar facts. The death sentence must be reversed because the sentencer weighed an improper aggravating factor when imposing this sentence.

POINT VI: The trial judge sustained a State objection and precluded Elam's counsel from arguing that lack of premeditation and/or its short duration was a valid reason here to impose a sentence of life imprisonment rather than the death penalty. The sentencer accepted the State's argument and ruled that, because Elam had pled guilty to first-degree murder, premeditation was necessarily present and Elam's contention was tantamount to an argument involving lingering doubt. The ruling was error. The absence and/or the extent of premeditation that attends the killing of another person has been consistently recognized by this Court as a valid consideration, and the arbitrary failure of this sentencer to consider it as valid mitigation renders imposition of this death sentence under these facts unreliable, arbitrary and capricious in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

POINT VII: The trial judge found that Elam killed Beard to eliminate him as a witness. That finding is not supported by sufficient evidence where an equally plausible explanation exists for Beard's death. A reasonable conclusion to be drawn from the evidence is that Beard was beaten to death for accusing Elam of stealing money. Such an unwarranted accusation would likely provoke a violent response. The killing of Beard at the end of the ensuing fight was the product of inflamed passion, not a desire to eliminate a witness. Because an improper aggravating factor was weighed by the sentencer, the sentence must be vacated.

POINT VIII: The sentencer found that Elam had prior convictions involving the use or threat of violence, to wit: conspiracy to commit first-degree murder. The finding is erroneous as a matter of fact and law. Factually, Elam was previously convicted of solicitation to commit murder, not conspiracy. Legally, a conviction for solicitation to commit a crime is not a crime involving the use or threat of violence such that Section 921.141(5)(e), Florida Statutes (1991) applies. The crime is completed when an agreement is made. No violence occurs. No threat of violence is present. The crime for which Elam was the act of solicitation, not what was being solicited. Because the sentencer improperly applied this factor when imposing the death sentence, the death sentence must be reversed and the matter remanded for a new penalty phase.

POINT IX: The aggravating factor of a murder committed for pecuniary gain does not apply because it is supported only be hearsay testimony which fails to establish that the primary motive for Beard's murder was to achieve financial gain. In that regard, the evidence shows that it is as likely that Beard was killed when he falsely accused Elam of stealing from Easyriders. This factor encompasses the same aspect of the crime as a murder to avoid arrest and it is improper to twice consider the same aspect of the crime in imposing the death penalty. Because the sentencer relied on an improper aggravating factor to impose the death penalty, the sentence must be vacated and the matter remanded for a new penalty phase.

POINT X: Imposition of the death penalty under the facts of this case is unwarranted. Assuming that aggravating factors exist, the mitigation far outweighs any justification for imposing a death sentence, and at that the presentation of the mitigation has been unconstitutionally curtailed as set forth in Points II and III. The mitigating factors that are contained in this record have in the past justified imposition of a life sentence under similar facts and, accordingly, the failure to impose a sentence of life imprisonment here results in arbitrary and capricious imposition of the death penalty contrary to the Eighth and Fourteenth Amendments and Article 1, Section 17 of the Florida Constitution. Accordingly, the death sentence should be reversed and the matter remanded for imposition of a life sentence.

POINT XI: The death penalty is unconstitutional on its face and as applied because this Court rather than the legislature has provided the substance of the terms set forth in Section 921.141, in violation of the separation of powers doctrine. The statutory aggravating factors are too broad to sufficiently narrow the discretion of the jury/sentencer in recommending/imposing the death penalty, and/or of this Court in reviewing the imposition of the death penalty. Additionally, improper considerations are arbitrarily used under the broad umbrella of vague statutory aggravating factors. The lack of notice as to which aggravating factor(s) the State seeks to prove violates the notice and due process requirements of the state and federal constitutions. Finally, the Florida death penalty legislation unconstitutionally places the burden on the defendant to prove that the mitigation outweighs the aggravation and, even when the burden shifting problem is corrected, the "outweigh" standard unduly dilutes the State's constitutional burden to prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted in a particular case. Because Florida's death penalty violates the state and federal constitutions, the death sentence should be vacated and a sentence of life imprisonment with no possibility of parole for twenty-five years imposed.

POINT I

THE TRIAL COURT ERRED IN REFUSING TO PERMIT ELAM'S COUNSEL TO WITHDRAW THE PLEAS BECAUSE ELAM'S PLEA'S OF GUILTY ARE INVALID UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16, 17 AND 22 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The record conclusively shows that, as a matter of state and federal constitutional law, Elam's guilty pleas are invalid. Elam's guilt of the substantive crimes has not been adequately established where he unequivocally stated that he is not guilty and that he entered the guilty pleas solely to stop the harassment of his family. The guilty pleas were entered essentially without the assistance of counsel. Further, the pleas are conditioned on an unconstitutional bargain. A trial court cannot lawfully guarantee that a defendant will receive the death penalty in return for a plea of guilty.

THE FACTS

The material facts are not in dispute. When Elam pled guilty to first-degree murder and the solicitation to commit first-degree murder charges, the prosecutor proffered what he believed the evidence would show. (R336-42). According to that scenario, Elam killed Beard following a confrontation concerning funds missing from the Easyriders store, but the proffer fails to necessarily show that either a premeditated or felony first-degree murder occurred. (R336). The State's case was predicated on hearsay accounts of Ms. Dawson's statement, which itself is suspect as the product of coercion.

Ms. Dawson reportedly has said that she entered Easyriders after hearing a scuffle, saw Beard lying on the floor, asked Elam what had happened and "he, at that time, responded he had lost it." (R337). Accepting that scenario proffered by the State when the guilty pleas were accepted, a viable question remains as to whether Beard's murder was something far less than first-degree murder based on those facts. Elam's conduct after Beard's death does not establish a first-degree murder. After Beard was killed, Elam had friends help dispose of the body. (R337-38).

The proffer concerning the solicitation to commit first-degree murder was that Elam had been recorded offering money and future personal services to an undercover investigator who had stated he would kill two witnesses for Elam. (R340). The proffer did **NOT** include a representation that Elam initiated the agreement with the state's investigator. (R340). At the end of the proffer, Elam denied ever soliciting a member of the Outlaws motorcycle gang to murder anyone but otherwise did not contest the facts contained in the State's proffer. (R342).

Assuming the proffer was sufficient when the pleas were accepted, it lost the force necessary to sustain the pleas when, prior to sentencing, Elam claimed innocence and moved to withdraw his guilty pleas. The competent evidence from which Elam's guilt can be determined fails to lawfully support the conclusion that Elam committed a first-degree murder of Beard and then hired Best to murder other witnesses, and a trial is therefore warranted.

Specifically, during the penalty phase, several State witnesses testified. The medical examiner testified that Beard died quickly in a fight of very short duration:

> . . . Probably the whole attack could have taken place in a very short period of time, could have been less than a minute, maybe even half a minute. At the end of that attack he was probably unconscious. And then at what point we decide he's actually dead, that is a matter of philosophical dispute. But certainly within a few minutes, maybe as much as ten minutes before some people would say he's dead.

(R94)(emphasis added) (see also, R62).

Based primarily on hearsay, Detective Yuill testified that funds were missing from Easyriders' account at the First Union Bank and that Elam could not provide an explanation as to why funds were missing. (R102-103). Elam told the detective that Beard had an appointment at the bank on the day he was killed. (R128-29). Based on hearsay, Detective Ewanik testified that Elam asked friends to help dispose of Beard's body and other evidence. (R136).

Elam told Detective Ewanik the following occurred:

> Detective Ewanik: Mr. Elam indicated that on the morning of the 17th he was confronted by Mr. Beard with the theft of the money. His initial response was to deny any theft. And at that point in time Mr. Beard again said something to him, and at that time Mr. Elam indicated that he struck Mr. Beard in the face with his fist.

(R140). After knocking Beard to the ground, Elam picked up a nearby brick and repeatedly struck Beard in the head. (R140).

While incarcerated, another inmate (Ford) introduced state attorney investigator Best to Elam as "Big Mike." The investigator claimed to be a Mafia hitman sent by "Louie." When "Big Mike" asked what kind of help Elam needed Elam replied that he needed two people not to show up for court. (R159-60). Of significance is the fact that the state's investigator made sure that Elam was asking for two people to be killed (R160-65) and that Susan Dawson's participation was required or the deal would be off. (167-168). In this regard, Best testified, "But the single most important thing is that she had to hand me a note that said Big Mike. If she didn't hand me a note that said Big Mike, the deal was off. That was the instructions before I left." (R168)

It was <u>after</u> this testimony was presented that Elam entered the courtroom and gave his statement. His version of what transpired, if believed, is that he was essentially entrapped on the solicitation to commit first-degree murder charges by inmate (Ford) and the state attorney investigator (Best). (R214-21). Elam asserted: "I know that I agreed to some things that are real sick, but I don't think having a case of great stupidity is the same as solicitation." (R222-23). It is important to bear in mind that Elam's version of what happened substantially comports with the testimony of the State witnesses, even though Elam was absent when the State witnesses testified. Best clearly was a State agent. Under these facts it is reasonable to conclude that Ford was, also.

Elam denied murdering Beard. (R229). The guilty plea is the product of coercion.

> What I've done is I've pled guilty to the charges against me for the purpose of ending all the harassment of innocent individuals. I'm asking for the death penalty, not because I killed Carl Beard, but because, to me, my crime is much worse. I betrayed the trust of someone that loved me, I betrayed the trust of a father to a son. For some reason I was unable to realize the danger I was putting my family in. How ashamed I am I ever went as far to agree to allow members of my family to be harmed in order for others to benefit.

(R229).

Following Elam's statement, Elam's **counsel** moved to withdraw the guilty pleas based on what Elam said. (R257). The court asked Elam whether he wished to withdraw the guilty pleas and Elam replied, "No, I don't. **If the sentence is the chair, no, I don't, Your Honor - - I'll condition that."** (R258). The trial judge denied the motion to withdraw the plea, expressly noting that "Mr. Elam, of course, does not join in that, he doesn't want his pleas withdrawn, **so** they are denied." (R258). The import of the word "so" emphasized above is that, had Elam joined in the motion, the guilty pleas would have been rejected.

Under these circumstances, Elam's guilty pleas were clearly invalid. Counsel was ethically compelled to move to withdraw them and the trial judge was legally required to reject them. Prior to the guilty pleas being entered, appointed counsel had advised Elam to enter guilty pleas **in return for a sentence of life imprisonment.** Even when there is a viable question as to

a defendant's guilt or innocence of a charge of first-degree murder, a guilty plea can legitimately be accepted in order to **avoid** the death penalty. North Carolina v. Alford, 400 U.S. 25 (1970). The life sentence that Elam would have received from his guilty pleas formed a legitimate basis for counsel to advise Elam to plead guilty and the court to accept a guilty plea even where Elam professed innocence.

However, because the justification noted in Alford vanished when Elam asked to receive the death penalty, waived his right to a jury recommendation and waived his right to attend the penalty hearing, there was no lawful basis to accept a guilty plea where the defendant claimed to be innocent. Elam would receive no benefit by entering the guilty pleas in that context, and counsel's advice to plead had been given so that a death penalty could be avoided, not obtained.

Because the court would not permit defense counsel to withdraw from representing Elam after the guilty pleas were entered, (R395;13-15;42;57-60;179;239-240), it must be presumed that the public defender retained full authority to represent Elam's best interests and to move to withdraw Elam's guilty pleas when it became apparent that they were being unlawfully entered. See Rule 4-3.3, Rules of Professional Conduct. When Elam explained that he entered the guilty pleas to protect his family from further harassment and had asked for the death penalty out of anguish for causing his family to suffer, the court should have followed its first impulse and just chucked the whole thing.

LEGAL ANALYSIS

As a matter of law, a defendant cannot plead guilty conditioned on a promise from the court that he or she **will** be executed. It is well-established eighth amendment law that, because imposition of the death penalty is a unique punishment, a high degree of procedural rectitude must attend the proceedings that authorize its imposition. A guarantee of a death penalty in return for a guilty plea irrespective of the true facts of the crime or the true characteristics of the defendant denies due process and constitutes arbitrary and capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16, 17 and 22 of the Florida Constitution.

> Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.

State v. Dixon, 283 So.2d 1, 7 (Fla. 1973); See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

In Dixon, this Court explained that the death penalty could no longer be arbitrarily or capriciously imposed in Florida because, even **after** a defendant has been found guilty of a capital crime, numerous procedural safeguards precede imposition of the death penalty. Dixon, 283 So.2d at 7. For the purpose of determining whether a defendant can lawfully enter a guilty plea on the condition that he or she **will** be executed, only the last

of those five procedural protections identified in Dixon need[4] here be addressed, to wit, the automatic appellate review performed by this Court.

In Dixon, this Court discussed why automatic appellate review prevents arbitrary and capricious imposition of the death penalty, explaining that imposition of the death penalty is "a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present." Dixon, 283 So.2d at 10. This Court continued:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

Dixon, 283 So.2d at 10.

As noted by this Court, the analysis set forth in Dixon helped persuade the United States Supreme Court that the death penalty scheme in Florida is constitutional. Smalley v. State, 546 So.2d 720, 723 (Fla.1989). In Dixon, meaningful appellate

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[4] This is **NOT** a concession that other considerations also do not preclude such plea, and if this Court rejects the following argument, the undersigned counsel respectfully asks for permission to file a supplemental argument addressing the other factors that preclude a court from accepting a guilty plea on the condition that a death sentence will be imposed.

review of imposition of the death penalty was guaranteed. The importance of appellate review of a death sentence was discussed in Gregg v. Georgia, 428 U.S. 153 (1976), where the Court noted:

> As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of death sentences to the State's Supreme Court. That Court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's findings of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

Gregg, 428 U.S. at 198.

A penalty phase that entertains aggravating factors **only** and omits consideration of anything in mitigation will necessarily skew the result of both the penalty proceeding and the appellate review that follows. Specifically, the aggravation will always outweigh the mitigation simply because there will be no mitigation shown, even when it overwhelmingly exists. When mitigation is intentionally excluded, there is no individualized determination as to the propriety of imposition of the death sentence and a violation of Article 1, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution necessarily results. Mills v. Maryland, 486 U.S. 367 (1988); Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(opinion of Stewart, Powell, and Stevens, JJ.).

In Klokoc v. State, 589 So.2d 219 (Fla. 1991), the defendant sought to waive the automatic appeal of his death sentence after pleading guilty to the first-degree murder of his daughter and asking for the death penalty. The trial judge appointed independent counsel to investigate and present evidence concerning mitigation, but imposed a death sentence. This Court refused to dispense with the direct appeal and ordered appellate counsel "to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests." Klokoc, 589 So.2d at 222. On appeal, the death penalty was vacated on proportionality grounds because the mitigation presented below **contrary** to Klokoc's instructions **required** that a life sentence be imposed. If that mitigating evidence had not been introduced, Klokoc's sentence would have been upheld, even though it was in fact disproportionate under the true facts of the crime.

If, as promised in Dixon and demonstrated in Klokoc, a death penalty will only be sustained if it is truly proportional with the aggravation **AND** lack of mitigation in a particular case, how can a trial judge ever promise that a defendant will receive the death penalty in return for a plea of guilty? A defendant's request to be executed, even a defendant who has committed first-degree murder, cannot alone conclusively justify his execution under the Eighth and Fourteenth Amendments and/or Article I, Section 17 of the Florida Constitution. See Stringer v. Black, 503 U.S. ___, 112 S.Ct. ___, 117 L.Ed. 2d 367, 379 (March 9,

1992) ("When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."). The sentencing analysis in a weighing state is as skewed by intentionally not placing proper considerations on one side of the scale as it is by unintentionally placing improper considerations on the other.

Prudence dictates that a bright line rule be announced that a death sentence can never be a bargaining chip for a defendant to enter a guilty plea. There simply are too many constitutional and societal[5] impediments for a guilty plea to ever be conditioned upon reception of a death sentence. For instance, a trial court may not perceive any valid statutory aggravating factor upon which to base a death sentence, or the factors found by the trial judge may later be disapproved by this Court as a result of the mandatory direct appeal. In the presence of such a guilty plea but in the absence of any statutory aggravating factors to authorize its imposition, can the death sentence still be imposed simply because a defendant pled guilty in order to be executed? See Banda v. State, 536 So.2d 221, 225 (Fla.1988) ("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist.").

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[5] Such a procedure can reasonably be viewed as assisting suicide. See §782.08, Florida Statutes (1991)("Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter[.]").

If a trial judge accepts such a negotiated plea and imposes a death sentence at the defendant's request but does not set forth written findings pursuant to § 921.141(3), Florida Statutes (1991), can the death penalty still be imposed if it was so promised when the guilty plea was entered? See Bouie v. State, 559 So.2d 1113, 1116 (Fla.1990) ("A trial judge's justifying a death sentence in writing provides 'the opportunity for meaningful review' in this Court."). It must be recognized that this situation the findings will invariably be unconstitutionally skewed because only evidence of aggravation will have been presented, even when substantial mitigating considerations of overwhelming importance exist.

Appellant respectfully takes issue with the logic and constitutionality of this Court's recent decisions which indicate that a defendant can, with the assistance of counsel, totally waive introduction of all mitigating evidence, and here adopts the argument set forth in Point II of this brief concerning the denial of Elam's proffer of mitigating evidence. Such a waiver eviscerates meaningful appellate review, ignores principles of individualized sentencing, and denies consistent imposition of the death penalty contrary to the Eighth and Fourteenth Amendments. The skew resulting from placing a thumb on one side of the scale pales significantly when compared to complete elimination of the other side of the scale. It is of no utility to require the "adversarial" review of a death sentence when only one side of the argument is there to review.

A guilty plea accompanied by contemporaneous claims of innocence are valid only where the trial court has conducted an adequate inquiry and found that competent evidence establishes that the charged crime has in fact been committed.

> . . . The trial court is free to utilize whatever procedure is best for the particular case before it to ensure that the defendant is entering a plea to the proper offense under the facts of the case. But whatever method is employed the court should indicate for the record the source of the factual information supporting the plea.

Williams v. State, 316 So.2d 267, 273 (Fla.1975).

Similarly, in North Carolina v. Alford, 400 U.S. 25 (1970), the United States Supreme Court explained:

> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea **and the record contains strong evidence of actual guilt. Here, the State had a strong case of first-degree murder against Alford**. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. **Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. . . . When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence** and which further provided a means by which the judge could test whether the plea was being intelligently entered, its validity cannot be seriously questioned.

Alford, 400 U.S. at 171. (emphasis added).

Under these facts, Elam's guilty pleas cannot be considered valid because as a matter of law there is insufficient competent evidence to show that the specific crimes with which Elam was charged were in fact committed by Elam. Specifically, the scenario of what transpired during the killing of Beard, assuming that Elam was the person who killed Beard, is consistent with second-degree murder. See Olds v. State, 44 Fla. 452, 33 So. 296, 299 (1902) (intentional killing may not be murder when done in anger and following sufficient provocation so close in time as to raise presumption of sudden impulse.). Insofar as the solicitation to commit first-degree murder, if inmate Ford and the state attorney's investigator created the crime, as appears to have been the case, Elam was entrapped as a matter of law. See, Jacobson v. United States, 503 U.S. ___ , 112 S.Ct. ____, 118 L.Ed.2d 174 (1992). A trial on the merits is the appropriate way to resolve this dispute.

As a matter of law, the guilty pleas should be rejected and the matter remanded for a trial. The pressure under which these pleas were entered, combined with a motion to withdraw the pleas made prior to the death sentence being imposed, constitutes good cause for allowing Elam to proceed to trial. The interests of justice here require a trial on the merits prior to imposition of a death sentence. See Elias v. State, 531 So.2d 418 (Fla. 4th DCA 1988) (law favors trial on the merits, and where it appears that the interests of justice would be served, defendant should be permitted to withdraw a guilty plea.).

This plea was clearly the product of undue coercion. The test of the voluntariness of a plea is to examine all of the relevant circumstances that surround it. Brady v. United States, 397 U.S. 742, 749 (1970).

> That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so - hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Brady, 397 U.S. at 748.

Brady held that the mere fact that a defendant entered a plea of guilty to avoid a sentence of death did not necessarily establish that the plea was involuntary. The Court was quick to add, "This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial." Brady at 762. Of significance is the sentence received by Brady was something **less** than the death penalty, which requires heightened due process.

It is well settled that, "A guilty plea cannot be challenged in a collateral attack if it was made voluntarily and with the benefit of counsel. United States v. Winfield, 960 F.2d 970, 974, fn. 10 (11th Cir. 1992); See, United States v. Broce, 488 U.S. 563, 570 (1989). Elam's pleas have **not** been made with the benefit of counsel because Elam's counsel moved to withdraw the guilty as being illegal and coerced. The motion to withdraw the pleas was made by counsel and denied by the trial court **prior** to sentencing on the first-degree murder conviction and thus, because the matter was raised and fully litigated below, the ruling is reviewable on direct appeal.

A court commits constitutional error if a guilty plea is accepted from a defendant who maintains he or she did not commit the crime unless the plea is shown to have a sufficient factual basis. See Willett v. State of Georgia, 608 F.2d 538, 540 (11th Cir. 1979) ("In the face of a claim of innocence a judicial finding of some factual basis for defendant's guilt is an essential part of the constitutionally-required finding of a voluntary and intelligent decision to plead guilty."). That same analysis should apply where the court learns prior to sentencing that the defendant claims to be innocent and that guilty pleas had been entered essentially without counsel and as a result of duress.

This record conclusively shows that Elam was concerned about his family when the guilty pleas were entered. The record shows that Elam continued to be concerned the State's ability to

harm Dawson and his child even after he pled. ASA Damore was so conscious of Elam's feelings about his family and the true motivation for the guilty pleas that he went to inordinate lengths for the record to reflect that no promises were made as to how the State would treat Ms. Dawson if Elam pled guilty. (R328). The inquiry into that subject with Elam when the pleas were accepted was cursory at best. (R345-46). Clearly, Elam was at all times extremely conscious of the State's treatment of Ms. Dawson and his child:

> Elam: Thank you. First off, I'd like to know if the State is complete with Ms. Dawson in regards to my case?
>
> Court: I'm sorry, the State?
>
> Elam: Is completed with Ms. Dawson in regards to my case?
>
> Court: I'm not sure what you mean. It ended up she was not called as a witness, though she has been here all day.
>
> Elam: Is the State completely done with her in regards to my case?
>
> Court: All I can say, she has entered a plea --
>
> Elam: That's in her own separate --
>
> Court: You're not talking about the case that she was charged where she's entered a plea and is I think still pending presentence investigation? From what you're saying, I would assume the State is -- all the testimony has been finished and the State chose not to call Miss Dawson, so if you're concerned they would now want to call her after you spoke, no, I would not allow that.

(R203-204).

Elam's explanation on his plea and why he was asking for the death penalty came only after the judge assured him that the State was through. Though the assertion of innocence was made not at the time of the plea, it was articulated prior to sentencing and that assertion of innocence, combined with the coercion under which the plea was entered, constitute good cause to justify withdrawal of the pleas. The interests of justice would best be served here by returning Elam and the State to the same posture before the guilty plea was accepted.

Fla.R.Crim.P. 3.170(f) provides that, "The court may, in its discretion, **and shall upon good cause shown, at any time before a sentence**, permit a plea of guilty to be withdrawn and, if judgment of conviction has been entered thereof, set aside such judgment, and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty." (emphasis added). Good cause was shown and pursuant to the above emphasized language, the trial court erred in denying Elam's motion to withdraw the guilty pleas. See Wenrich v. State, 159 Fla. 492, 32 So.2d 11 (1947) ("The law favors a trial on the merits."). Accordingly, this Court is respectfully asked to vacate the judgments and sentences and to remand with directions that the defendant be permitted to withdraw his guilty pleas and receive a trial on the merits.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO PROFFER THE MITIGATING EVIDENCE THAT EXISTED AND WHICH COULD HAVE BEEN PRESENTED HAD COUNSEL BEEN GIVEN THE REQUESTED CONTINUANCE.

The material facts are undisputed. When Elam pled guilty, he sought to "fire" his appointed defense counsel. The court would not entertain that request because Elam was charged with a capital offense. (R361-64). Two days later, Elam was returned to the courtroom and the court re-addressed the issues. (R373-80). Elam re-affirmed that he did not want to be present during the penalty phase. (R380-81). In reference to being represented by counsel, he stated:

> Mr. Elam: Your Honor, if I may, I think last Monday I also asked if Mr. Cass 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.

(R381).

Elam refused to allow his attorney to answer questions about Mr. Elam's competence. (R386-87). When questioned by Judge Hutcheson, Elam stated it was his wish that he not be present and that his counsel should do nothing to defeat imposition of the death penalty, stating, "Someone has to be here to represent me. Mr. Cass can be. But I want him to make no comments." (R391-92).

The court granted Elam's requests, stating that Elam would not be required to attend the penalty phase hearing and that his appointed defense counsel would be present but would do nothing:

> Court: . . . I will not have the deputy transport you over here a week Thursday at nine o'clock on May 21st, and the following Friday if necessary, if we get into the second day. Mr. Cass would be here, but he, basically, will just be sitting in and not participating either by making an opening statement, cross-examining state witnesses, calling his own witnesses, presenting any evidence or documents and would participate in closing arguments. Is that the way you wish it, Mr. Elam?
>
> Elam: Yes, sir.

(R398)(emphasis added). The court made it clear that, "Mr. Cass will be here and not take any part in the trial other than basically physically occupying a chair." (R399).

Counsel moved to withdraw, arguing that he ethically could not "represent" his client as he felt was ethically required under the state and federal constitutions by just sitting in a chair, occupying space but doing nothing. (R12-23). Counsel stated, "I think that he's going to have to take a position as to if he really wants this kind of a situation, he's going to have to represent himself. It's not a thing that I can do. Because I'm put in -- I'm dragged over the barrel both ways." (R13).

At counsel's insistence, Elam was brought over from the jail and questioned by the court at the inception of the penalty phase to confirm his prior waivers of fundamental rights. After Mr. Elam re-affirmed that he did not want to attend the hearing and did not want counsel opposing imposition of the death penalty (R39-40), counsel renewed the motion to withdraw, stating:

> Mr. Cass: I do renew that motion, Your Honor, because I'm put in a position where I can't meet the duties that's imposed on me by the Sixth Amendment, Constitution of the United States, and our parallel state bill of rights section.
>
> **I believe there is mitigation in this case**, and I'm not going to be able to put it on. I am not prepared to represent in the penalty phase, as I stated in my motion to continue previously entered with the court, but I'm being put in a position where I have responsibilities I have to meet. I'm not arguing with Mr. Elam's right not to have a defense if he wants not to defend this. I think he has a right to do that. But I don't think he has the right to ask me to do things which are contrary to the code of professional responsibility under the Constitution of the State of Florida and of the United States. Thank you, Your Honor.

(R42)(emphasis added).

Defense counsel asked whether he was being ordered to comply with Elam's wishes and to simply sit in the chair as the court had told Elam earlier or whether he was to proceed as he felt he ethically must. (R43-46). The judge refused to order counsel to do nothing even though counsel argued that for him to do nothing was tantamount to a waiver of counsel. (R54). Elam's waiver of counsel was equivocal at best, in that he had vacillated when asked by the court whether he wished to be represented by the Public Defender's Office. (R51).

The trial judge began the penalty phase hearing by allowing Elam to waive his presence and by denying defense counsel's motion to withdraw, refusing to order counsel to do nothing yet at the same time denying counsel's request for a

continuance which the court indicated earlier would be granted upon request. (Point IV, infra).

> Judge Hutcheson: All right, just to go ahead and draw this to end, as far as **the public defender's motion to withdraw, that's denied**, since Mr. Elam has not specifically indicated he wants the public defender's office fired. **So I'm going to require the public defender to continue to represent you**. I will go ahead and honor your request which I think you clearly expressed last week and again clearly expressed again that you not be present during the calling of witnesses and the state's argument. So I'll honor that request, too.
>
> I'll require Mr. Cass, with or without the other attorneys, he remain here. **I will not order you one way or the other**. I think your position is pretty well clear, Mr. Cass. 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. Yes, sir, Mr. Cass?
>
> Defense counsel: May it please Your Honor. That brings me back to my motion for a continuance on the basis that I was not prepared for trial, which I filed two days before the last pretrial. I'm not really prepared to present an argument or to cross-examine or to present mitigators in the matter for the very reason that I put in my motion for a continuance.
>
> * * *
>
> Court: Mr. Cass's motion to continue is denied.

(R58).

Thereafter, defense counsel did all he could to defend Elam. An opening statement was given. (R71-72) State witnesses were cross-examined. (R92-95;113-117;148-154;174-176) Defense counsel subpoenaed two witnesses who just happened to be in the courtroom attending the penalty phase hearing (R76-78;186-88) and presented their testimony. (R183-84;190-93). Counsel also sought to proffer the mitigation that had been discovered during preparation for trial, preparation which had ceased due to Elam's decision to plead guilty in return for a life sentence which obviated the need for a penalty phase.

Counsel sought to proffer that mitigating evidence which would have been presented had he been granted the promised[6] continuance, but was repeatedly prevented from doing so by sustained State objections:

> Court: Any further matters from the defense?
>
> Defense counsel: Yes, Your Honor. I didn't hear a ruling on it, but I have a proffer that I would like to make as to what I was working on while I was preparing for trial and before I could announce ready for trial, I respectfully suggest to the Court that I would have shown the following things --
>
> Court: I thought I had actually denied your request for a proffer.[7]

---

[6] At the close of the proceedings of May 13, 1992, Judge Hutcheson stated, "I'm saying if you move to continue I would grant it, but I don't know what else to say. That's the best I can do." (R401)

[7] The first request to make a proffer was denied at R179-182.

> Defense counsel: Oh, I'm sorry.
>
> Court: I thought I did that on the record. I know the State objected to the proffer, and I thought I went ahead and denied your request.
>
> Defense counsel: Just to clarify, Your Honor, did you rule on it?
>
> Court: I thought I had. I see the State standing.
>
> Prosecutor: Your Honor, we just want to note on the record the objection the State has to the defense attempting to create some issue that they haven't adequately represented their client when their client has clearly limited their representation of him. I recognize that they want to do everything they can to avoid Mr. Elam's execution, but I also think the Court recognizes and I want the record to reflect that their limitations in the presentation of evidence on behalf of Mr. Elam are the result of Mr. Elam's actions, the result of Mr. Elam's choices.
>
> Court: That much is true. the fact that you're kind of hamstrung here today, Mr. Cass, is mostly -- is all of your client's own doing.
>
> I'm pretty sure I did go ahead and rule earlier when the State objected, but if I didn't, **I again will sustain the State's objections and not allow you to make that proffer of what you hoped you could have shown had your motion to continue to get ready**.

(R199-201)(emphasis added); see (R179-82)(previous ruling).

It is respectfully submitted that the trial court committed reversible error in sustaining the State's objections to defense counsel's proffer of the evidence of mitigation that had been obtained prior to entry of Mr. Elam's guilty plea and sudden announcement that he wanted the death penalty. The ruling

denies due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9 and 16 of the Florida Constitution. Omission of such information results in arbitrary and capricious imposition of the death penalty, defeats truly meaningful appellate review, denies individualized sentencing in the context of imposition of the death penalty, and otherwise taints imposition of the death penalty under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution.

In Durocher v. State, 17 FLW S542 (Fla. July 23, 1992), which was decided after Elam's penalty phase, this Court reviewed three death sentences imposed in accordance with a unanimous jury recommendation following a defendant's plea of guilty to three first-degree murders and a penalty phase hearing where defense counsel, at the defendant's request, did not present mitigating evidence. In Durocher, defense counsel proffered what would have been presented had he been so permitted by his client. The information contained in the proffer was used substantively by both the trial judge when the death sentences were imposed and by this Court when the sentences were reviewed. Defense counsel's proffer evidently was an important factor in the affirmance of the death sentences, for this Court expressly stated: "The trial judge carefully considered and weighed all of the evidence about Durocher that could be gleaned from his statements, from the reports of the mental health experts who examined Durocher prior

to trial and prior to his change of plea, and from counsel's statement in court." Durocher, 17 FLW at S543.

Also apt is Koon v. Dugger, 17 FLW S337 (Fla. June 4, 1992), where this Court announced how defense counsel who are faced with a client's waiver of the right to present mitigating evidence should proceed in a capital penalty phase hearing:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel 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. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Koon, 17 FLW at S338.

Elam's counsel did not have the benefit of the Koon holding because Elam's penalty phase hearing occurred on May 21, 1992, approximately two weeks before the Koon decision which was rendered on June 4, 1992. The rule announced in Koon **mandates** that counsel proffer to the trial court the mitigating evidence that could be presented but for a client's orders that such evidence not be introduced. Here, even before being compelled to do so by this Court, defense counsel recognized the necessity for this procedure and was attempting to apprise the trial court of the extensive mitigation that existed, evidence which was not being introduced due to Elam's actions.

Counsel's repeated efforts to proffer into the record precisely what mitigating considerations exist were met by objections from State. By sustaining those objections and by not allowing counsel to proffer what mitigating considerations exist, the trial judge denied due process and divested this Court of the ability to meaningfully review the proportionality of the death sentence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 17 of the Florida Constitution. Even if the judge was unwilling to accept or consider the proffered evidence in making his sentencing determination, it was essential that the proffer be made a part of the record to provide this Court with information required for meaningful appellate review of the death sentence as well as the denial of the proffer itself.

A party must be freely permitted to make a proffer of evidence as an essential, fundamental component of a fair trial and due process. The inability of a party to timely insert relevant information into the record to perfect the record below denies the right to meaningful appellate review. See Piccirrillo v. State, 329 So.2d 46, 47 (Fla. 1st DCA 1976) ("A trial court should not refuse to allow a proffer of testimony. This is necessary to ensure full and effective appellate review."). Without a proffer of the basic substance of what has been excluded from consideration below, an appellate court cannot even begin to conduct an informed harmless error analysis of the trial court's ruling which excluded the evidence:

> Appellee further suggests that any error in the trial court's disallowance of the proffer is harmless. * * * Since this court has no way of knowing what the proffered testimony would have been, we cannot say that the error is harmless beyond a reasonable doubt.

Pender v. State, 432 So.2d 800, 802 (Fla. 1st DCA 1983).

A trial court must allow a party to proffer into the record what information he contends requires consideration by the finder of fact because, without that information, an appellate court cannot determine whether the information was improperly excluded and/or whether the ruling that prevented introduction of that testimony was, beyond a reasonable doubt, harmless error. See Jenkins v. State, 547 So.2d 1017, 1022 (Fla. 1st DCA 1989) ("In general, a trial court commits error if it denies a request to proffer testimony which is reasonably related to issues at trial."); Kembro v. State, 346 So.2d 1083 (Fla. 1st DCA 1977); Piccirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976).

> Ordinarily, where the court refuses to allow a proffer, it prevents a determination of the propriety of the trial court's ruling by the reviewing court and is prejudicial to the party making the proffer and generally is reversible error. Davis v. Pfund, 479 So.2d 230 (Fla. 3d DCA 1985); Cason v. Smith, 365 So.2d 1042 (Fla. 3d DCA 1978); Musachia v. Terry, 140 So.2d 605 (Fla. 3d DCA 1962).

Thunderbird Drive-In Theatre v. Reed, 571 So.2d 1341, 1345 (Fla. 4th DCA 1990).

Here, defense counsel sought to proffer the substance of the mitigation he had developed prior to stopping work on Mr.

Elam's case after negotiations with the prosecutor had been finalized whereby Elam was to receive a life sentence in return for a guilty plea. The relevance of that proffer cannot be seriously questioned in the context of a death penalty case:

> It is a bedrock principle of our capital jurisprudence that, in deciding whether to impose a sentence of death, a sentencer must consider not only the nature of the offense but also the "character and propensities of the offender." (citations omitted) Without question, our commitment to individualized sentencing in capital proceedings provides some hope that we can avoid administering the death penalty "discriminatorily, wantonly and freakishly." (citation omitted) The insistence in our law that the sentencer know and consider the defendant as a human being before deciding whether to impose the ultimate sanction operates as a shield against arbitrary execution and enforces our abiding judgment that an offender's circumstances, apart from his crime, are relevant to his appropriate punishment.

Boyde v. California, 494 U.S. 370, 386-387 (1991) (Marshall, Brennan, Blackmun and Stevens, JJ., dissenting).

The circumstances of this case are such that the denial of the proffer results in arbitrary and capricious imposition of the death penalty and constitutes reversible error. Accordingly, this Court is asked to vacate the death sentence and to remand for a new penalty phase.

POINT III

THE STATE'S USE OF HEARSAY TESTIMONY VIOLATED THE CONSTITUTIONAL RIGHTS TO DUE PROCESS, CONFRONTATION AND CROSS-EXAMINATION OF ADVERSE WITNESSES.

The first witnesses presented during the penalty phase hearing was the medical examiner, who testified about the autopsy he had performed and his expert conclusions and findings. During the testimony of the next witness, Officer Yuill, Elam's counsel objected to the introduction of hearsay testimony as follows:

> Q: (Prosecutor) (Damore) During the course of your investigation, did you determine whether or not there were other funds allegedly missing from the Easyrider store which had been in the possession of Carl Beard on or about the time of his murder?
>
> A: (Officer Yuill) I do not have personal knowledge, but I understand from other investigators that --
>
> Defense counsel: Objection, Your Honor, as to what he heard from some other investigators.
>
> Court: Be sustained.
>
> Prosecutor (Damore): Your Honor, at a penalty phase hearing, I would respectfully submit that hearsay is admissible.
>
> Defense attorney: I don't think so.
>
> Prosecutor (Daly): The statute specifically provides that it is.
>
> Court: I think you're right, now. I'll recede from that ruling and overrule the objection.
>
> Q: Prosecutor (Damore): You can answer the question, sir.
>
> A: From other investigators involved in

> the investigation of Mr. Beard's death approximately $4,200 was apparently picked up by the deceased from the defendant on or about December 16, 1991, and was unaccounted for.

(R106-07).

Another hearsay objection was overruled when the State, through officer Ewanik, presented testimony concerning what Ms. Dawson was claimed to have told police:

> Defense counsel: Excuse me, just a moment. Your Honor, we're going to interpose an objection to hearsay. Now I think you ruled on a similar kind of testimony, and I know that Mr. Damore said he was going to produce witnesses for it, but I don't know -- at this juncture I haven't heard the witness that is being described as having said these things. So for that reason, I interpose an objection.
>
> Prosecutor: your Honor, in these proceedings the statute specifically allows for the introduction of hearsay testimony.
>
> Court: Objection will be overruled.

(R142-142).

The State's evidence during the penalty phase was almost entirely hearsay. Miss Dawson did not testify, yet several statements attributed to her were related by police witnesses. (R139-141). Neither Frank Fell nor Mary Maibauer testified, yet police witnesses recounted at the penalty phase hearing how Fell and Maibauer confessed to disposing of Beard's property about the time of Beard's death, allegedly at Elam's request. (R130-31; 136). Similarly, Jeff Ford, the inmate who was incarcerated with Elam and who introduced the state attorney investigator to Elam

as a mafia hitman, did not testify. However, the investigator testified that, according to Ford, Elam stated that Beard was killed so Elam would not be arrested for theft of funds from the store. (R134-35). This testimony was clearly hearsay.

The undersigned acknowledges that, when the first hearsay objection was overruled, defense counsel did not renew the hearsay objection during most of the hearsay testimony that followed. It is very clear, however, that the judge had plainly ruled in overruling the first hearsay objection that, pursuant to the statute and argument of the prosecutors, hearsay testimony would be allowed in this penalty phase proceeding. The ruling on every hearsay objection would have been the same, (R141-142), and continued objections would have been useless. The law does not require an attorney to repeatedly lodge futile objections where it is clear that the trial court has been apprised of the putative error and rejected the argument. See, Thomas v. State, 419 So.2d 634 (Fla.1982) (there is no requirement to do a useless act); Brown v. State, 206 So.2d 377, 384 (Fla.1968); Birge v. State, 92 So.2d 819, 822 (Fla.1957) ("It is certainly unnecessary that an accused undertake to accomplish an obviously useless thing in the face of a positive adverse ruling by the trial judge.").

The reasoning set forth in Chao v. State, 453 So.2d 878 (Fla. 3d DCA 1984), affirmed, 478 So.2d 30 (Fla.1985), also applies here. In Chao, a defendant objected on the basis of hearsay to the testimony of an officer concerning statements the

defendant had made to that officer through an interpreter. The court found that such statements are not hearsay, but in doing so addressed the State's contention that the lone hearsay objection at the beginning of that testimony did not preserve the matter for appellate review. The court reasoned that the objection went to the admissibility of such testimony in its entirety, and thus further hearsay objections would have been futile. 453 So.2d at 879, fn 2. This Court expressly noted its agreement with that conclusion. Chao, 478 So.2d at 31, fn 1.

It is respectfully submitted that the introduction of the hearsay testimony here constitutes reversible error, in that it was a prejudicial denial of Elam's rights to confrontation of witnesses and due process under Article 1, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Further, because imposition of the death penalty rests on facts established solely by hearsay, the death sentence is unreliable under the Eighth and Fourteenth Amendments and Article 1, Section 17 of the Florida Constitution.

The language of Section 921.141(1), Florida Statutes (1991) notwithstanding, it is clear that a defendant has the right to cross-examine and to confront witnesses during the penalty phase of a capital trial. It goes without saying that a statute cannot divest a citizen of constitutional rights. In Engle v. State, 438 So.2d 803 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984), this Court clarified

any doubt as to whether the Sixth Amendment applies to the penalty phase of a capital trial:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge. Although defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of trial of the criminal proceeding.

Engle, 438 So.2d at 813-814.

Contrary to the State's argument below and the trial court's ruling, it is clear that Section 921.141(1), Florida Statutes (1991) does not provide carte blanche authority for the State to present hearsay testimony from police officers in a manner that totally defeats the state and federal constitutional rights to confrontation and meaningful cross-examination. See Walton v. State, 481 So.2d 1197, 1200 (Fla.1986) ("The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is applicable not only in the guilt phase, but in the penalty and sentencing phases as well.").

The introduction of the hearsay cannot be said to be harmless error in this case. The trial court's sentencing order recites facts that are supported solely by hearsay. The portion of the sentencing order that explains the disposal of Beard's body and the missing funds from Easyriders could only have come from the hearsay testimony of Officers Yuill and Ewanik. The findings state:

> The defendant then solicited and received help from his girlfriend, Ms. Dawson, and others to clean up the business area of signs of the murder and to dispose of the body.
>
> The defendant and another male took the body to another county and weighted down with cinderblocks and disposed of the victim's body in water where it was subsequently found.
>
> The evidence further indicates the defendant was engaged in an ongoing grand theft embezzlement from the business and stole approximately Fifteen Thousand ($15,000.00) Dollars at the time he was confronted by the victim.

(R503). These findings find support in the hearsay testimony of Officer Ewanik (R129-36) and Officer Yuill (R106-07;110-111).

Elam is compelled to take issue with the prefatory language of the sentencing order which states, "Based on the court file, testimony, evidence, and arguments made by the attorneys at the penalty phase, the Court makes the following findings of fact . . . ." (R502). It is respectfully submitted that the trial court's sua sponte and ex parte review and extraction of facts from unknown sources within the court file in the absence of prior notice and/or input from the parties denies the rights to due process and confrontation of witnesses under Article 1, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (denial of due process when death sentence imposed based in part on information defendant had no opportunity to deny or explain.).

The introduction and use of hearsay testimony over Elam's objection gives pause concerning the reliability of the facts upon which imposition of the death sentence has been imposed. The conclusion of the trial judge that hearsay testimony was, by statute, freely admissible for use at the penalty phase hearing fails to instill any confidence that the trial judge, in reviewing the court file, would refrain from accepting as true and reliable unsworn information which Elam otherwise had no meaningful opportunity to explain or deny. Because the death penalty hearing was rendered constitutionally infirm by the introduction of hearsay testimony over objection, the death sentence must be vacated and the matter remanded for a new penalty phase.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION FOR CONTINUANCE WHERE THE COURT HAD STATED PREVIOUSLY THAT A CONTINUANCE WOULD BE GRANTED IF REQUESTED BY DEFENSE COUNSEL.

At the "status hearing" conducted prior to the penalty phase, Judge Hutcheson indicated that defense counsel was to abide by the client's wishes and simply sit in a chair and do nothing. (R398-99). At the conclusion of that hearing on May 13, 1992, defense counsel informed the Judge Hutcheson that he was unprepared to present evidence in a penalty phase due to the way in which the matter had progressed and that, if his client was to be effectively represented, a continuance was necessary. (R399).

Based on counsel's explanation, the court unequivocally stated that the penalty phase would be continued if Elam changed his position and withdrew his request for the death penalty and/or his waiver of defense counsel:

> Judge Hutcheson: I don't think I have the authority to order Mr. Cass to -- you know, to tell him how to prepare his case. You know, I don't know what else to do on that, really. 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 9:00 o'clock. I'm saying if you move to continue I would grant it, but I don't know what else to say. That's the best I can do.

(R401)(emphasis added).

At the beginning of the penalty phase, the trial judge again discussed the waivers with Elam and confirmed that he did not want to be present. However, the waiver of the right to

counsel was equivocal. Elam stated he had no idea whether he wanted to be represented by counsel. (R51). Judge Hutcheson accepted the waiver of Elam's presence but would neither allow appointed defense counsel to withdraw nor order counsel to do nothing. (R57). In the absence of such an order, counsel was forced to move for the promised continuance, stating, "Your Honor, that brings me back to my motion for a continuance on the basis that I was not prepared for trial, which I filed two days before the last pretrial. I'm not really prepared to present an argument or to cross-examine or to present mitigators in the matter for the very reason that I put in my motion for continuance." (R58) The continuance was denied. (R58).

That 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. Counsel's inability to be prepared was not due to any fault of his own, but instead arose as a result of the unique progression of this case. If Elam's waiver of counsel was valid, counsel should have been permitted to withdraw. If Elam's waiver of counsel was invalid, then the trial judge was obligated to afford defense counsel with the promised continuance so that his client could be fully and fairly represented.

It was an abuse of discretion for Judge Hutcheson to find that Elam's waiver of counsel was invalid yet deny counsel a continuance which was beyond doubt necessary to afford Elam

effective assistance of counsel in a situation where the death penalty was a possibility:

> We recognize that a decision to grant or deny a motion for continuance is within the discretion of the trial court and that, when such a motion is denied, it may be reversed on appeal only when there has been a showing that the trial judge abused his discretion. (citations omitted). The law is also clear, however, that when the unrefuted facts establish that the physical condition of a trial attorney prevents the attorney from adequately representing his client, the failure to grant a continuance is reversible error.

Jackson v. State, 464 So.2d 1181, 1182 (Fla. 1985).

As in Jackson, the unrefuted material facts here show that defense counsel was physically not capable of effectively representing his client. The witnesses who were necessary to show mitigation were in California, and the judge knew it. It seems that, as with the exclusion of the proffer, the judge was adhering to his belief that the omission of such evidence was of no real consequence because Elam was asking for the death penalty anyway. However, if the court was not going to relieve defense counsel of the responsibility of representing the defendant to the best of his ability, neither could the court fairly relieve defense counsel of the ability to perform that responsibility.

The trial judge would not allow defense counsel to withdraw. Notwithstanding Elam's directions that counsel do nothing, the decision made by counsel was that he was ethically and constitutionally required to represent Elam in a truly adversarial manner, even though the trial judge denied the

requested continuance. See Blanco v. Singletary, 943 F.2d 1477, 1503 (11th Cir. 1991) (improper for defense counsel to "latch onto" a request that evidence not be presented during penalty phase).

> Because these rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States. The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice - through the calling and interrogation of witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Faretta v. California, 422 U.S. 806, 818 (1975) (emphasis added) (footnote omitted).

The Sixth Amendment to the United States Constitution provides that, in all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel "for his defence." A defendant is not entitled to an appointed attorney just so that attorney can sit in a chair, occupy space and do nothing. Such conduct is not supplying a "defence" for the client, and if that was all that was to be done here, defense counsel should have been allowed to withdraw because four other clients were facing death penalties, and they wanted the services of counsel.

Counsel could not refuse to attend this trial simply because he feels the motion to withdraw should have been granted.

See Rubin v. The Florida Bar, 549 So.2d 1000 (Fla. 1989) (unethical for attorney to refuse to go to trial after judge denies motion to withdraw). When the trial court refused to allow the public defender to withdraw, clarified that he was **NOT** ordering counsel to do nothing (R57), and where Elam's waiver of counsel was equivocal (R51), appointed counsel had no real choice but to move for the promised continuance (R58-59) and, when that was denied, defend his client to the very best of his ability.

Since Elam refused to unequivocally waive his right to counsel, he necessarily was bound by the tactical decisions made by counsel, including the need for a continuance. See Jackson v. State, 448 So.2d 577, 577-78 (Fla. 5th DCA 1984) (defense counsel can move for continuance and client's demand for speedy trial over objection of the client); See also, Jones v. Barnes, 463 U.S. 745 (1983) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court.").

If an appointed attorney cannot in good faith advance an argument in behalf of his client's position, he must move to withdraw. Anders v. California, 386 U.S. 738 (1967) (an appointed attorney must advocate his client's cause vigorously and may not withdraw from a non-frivolous appeal). Sitting in a chair and doing nothing is simply not advocating the client's position vigorously. In those cases dealing with a client's desire to receive the death penalty, is defense counsel to unite with the prosecutor and actively assist in presenting aggravating evidence

to which defense counsel may be privy? If the client requires that counsel do nothing, then he or she is waiving counsel, and upon request appointed counsel should be permitted to withdraw if the trial judge determines that the waiver of counsel is unequivocal.

If the waiver of counsel is equivocal, as it was here, appointed counsel is ethically and constitutionally charged with the duty of presenting a lawful, adversarial defense. The trial judge abused his discretion in denying counsel the ability to present such a defense. The denial of the promised continuance denied due process, the right to a fair trial and effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Further, the ruling makes imposition of this death penalty unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution. Accordingly, the death sentence must be vacated and the matter remanded for a new penalty phase.

POINT V

THE TRIAL COURT'S FINDING THAT THE MURDER WAS "WICKED, EVIL, ATROCIOUS AND CRUEL" IS NOT A VALID STATUTORY AGGRAVATING FACTOR AND THE EVIDENCE FAILS TO SUPPORT A FINDING OF SECTION 921.141(5)(h), FLORIDA STATUTES (1991).

The sentencer is required by statute and precedent to make written findings of fact with "unmistakable clarity" to afford meaningful appellate review of the decision to impose the death penalty. Mann v. State, 420 So.2d 578, 581 (Fla.1982). See State v. Dixon, 283 So.2d 1, 8 (Fla.1973) ("Discrimination and capriciousness cannot stand where reason is required, and [the requirement of written findings] is an important element added for the protection of the defendant.").

> A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it. Without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6) and in Tedder v. State, 322 So.2d 908 (Fla.1975).

Van Royal v. State, 497 So.2d 625, 628 (Fla.1986).

Section 921.141(5), Florida Statutes (1991) expressly limits the consideration in a capital case to those aggravating factors contained in Section 921.141(5). Here, the written findings prepared by the trial judge do not contain any citation to identify which statutory aggravating factor was being found to exist. (Appendix A) The court's determination that the murder was "wicked, evil, atrocious, or cruel" differs materially from

what is required to find the statutory aggravating factor set forth as Section 921.141(5)(h), Florida Statutes (1991), in that "no capital crime might appear to be less than heinous[.]" State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

Specifically, the court's written finding reflects only that the following was found:

> 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 that 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.

(R504).

In order for this Court to conclude that the trial judge was applying Section 921.141(5)(h), Florida Statutes (1991), critical language must be added to the court's finding, in that Section 921.141(5)(h) provides that it is an aggravating consideration where, "The capital felony was **especially** heinous, atrocious, or cruel." (emphasis added). The modifier missing from the trial court's finding is **THE** critical feature that distinguishes when this statutory aggravating factor is properly found or rejected. Such a substantive omission should not be attributed to mere scrivener's error, neglect, carelessness or oversight, especially where the written order fails to contain any specific citation(s) whatsoever to the factors set forth in Section 921.141(5), Florida Statutes.

Assuming that the court rejects the foregoing argument, as a matter of law the evidence otherwise fails to support the trial court's conclusion that, beyond a reasonable doubt, Beard's murder was especially heinous atrocious or cruel. The judge found Beard's murder to be evil, wicked, atrocious or cruel because "the physical evidence and medical evidence indicates that 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." (R504) These considerations do not show beyond a reasonable doubt that Beard's murder was unnecessarily torturous or that it was in any way materially distinguishable from any other murder. See Halliwell v. State, 323 So.2d 557, 561 (Fla.1975)(circumstances did not show heinous murder even where person beaten to death with 19 inch breaker bar).

In Clark v. State, 17 FLW S655 (Fla. Oct. 22, 1992), the victim was shot in the chest from a distance of ten feet with a single-shot, sawed-off shotgun. Clark reloaded the weapon, walked to the victim and killed him with a shot to the head. This Court rejected the trial court's improper application of the HAC factor, explaining that simply because the victim was aware of his impending death and remained conscious for some period of time before being killed does not make the murder unnecessarily torturous to the victim. Clark, 17 FLW at S655. The same basis for application of the HAC factor here is likewise erroneous.

Though this factor has been approved in diverse factual situations, a consistent thread has been that the victim was **intentionally** made to suffer prior to being killed. See Omelus v. State, 584 So.2d 563, 566 (Fla.1991) ("we find that the heinous, atrocious or cruel aggravating factor cannot be applied vicariously."); Teffeteller v. State, 439 So.2d 843 (Fla.1983) ("The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies."; See also, Amoros v. State, 531 So.2d 1256, 1260-61 (Fla.1988). In Porter v. State, 564 So.2d 1060, 1063 (Fla.1990), this Court rejected the trial court's application of the HAC factor where the evidence was "consistent with the hypothesis that Porter's was **a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful.**" (Emphasis in original). The facts here are comparable.

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). There is no logical reason to apply a statutory aggravating factor in "strict liability" fashion simply because it occurred as an unintended consequence. If it can be shown that a particular person intended that a victim suffer, a rational basis exists for application of the HAC factor. See

Cochran v. State, 547 So.2d 928, 931 (Fla.1989)("Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstances does not apply.").

There is no proof that Elam intended that Beard suffer unnecessarily, especially where the evidence shows that Beard was killed with a brick already at the scene and grabbed during the fight with Beard, a fight provoked by an accusation from Beard that Elam was stealing from Easyriders. Elam gave the following account of what happened:

> Detective Ewanik: Mr. Elam indicated that on the morning of the 17th he was confronted by Mr. Beard with the theft of the money. His initial response was to deny any theft. And at that point in time Mr. Beard again said something to him, and at that time Mr. Elam indicated that he struck Mr. Beard in the face with his fist.

(R140). After knocking Beard to the ground, Elam picked up a nearby brick that had been used as a doorstop and repeatedly struck Beard in the head. (R140). This scenario is consistent with the testimony of the medical examiner:

> . . . Probably the whole attack could have taken place in a very short period of time, could have been less than a minute, maybe even half a minute. At the end of that attack he was probably unconscious. And then at what point we decide he's actually dead, that is a matter of philosophical dispute. But certainly within a few minutes, maybe as much as ten minutes before some people would say he's dead.

(R94).

Assuming without conceding that such facts may be sufficient to support the conclusion that Beard's death was premeditated, they are woefully short of establishing beyond a reasonable doubt that Beard's murder was intended to be unnecessarily torturous, that is, that it was especially heinous, atrocious or cruel as that statutory aggravating factor has been consistently applied by this Court. Because the judge based the death penalty on this improper consideration, that sentence must be vacated.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO ARGUE AND IN REFUSING TO CONSIDER AS MITIGATION THAT ANY PREMEDITATION ON ELAM'S PART WAS NON-EXISTENT OR OF SHORT DURATION.

Defense counsel was precluded from arguing that there was no premeditation here and that, assuming premeditation, it would necessarily have been of very short duration:

> Mr. Cass: And I would respectfully submit to you, Your Honor, that a very strong mitigator is that there is absolutely no evidence of premeditation, or another factor which he can pull out of his case books, and that is or even short premeditation.
>
> Mr. Daly: Your Honor --
>
> Mr. Cass: Excuse me?
>
> Mr. Daly: I'm sorry, I don't mean to object, but this is an irrelevant line of argument. The individual has pled and been convicted of first-degree murder. If this is a residual doubt argument, the Florida Supreme Court has made it clear that that is not a proper consideration for a court at the sentencing phase of a first-degree case.
>
> Trial court: I'm going to sustain the objection. That's my understanding, too. He did, in fact, go ahead and plead as charged to first-degree murder, so I'm not going to allow you to argue lack of mitigation or lack of premeditation.
>
> Mr. Cass: Or a short premeditation?
>
> Trial court: Or a short premeditation.
>
> Mr. Cass: All right, Your Honor. I'd enter an objection to that.

(R241).

It is firmly established in Florida jurisprudence that the existence and/or extent of premeditation is a valid consideration in deciding whether imposition of the death penalty is appropriate. Where premeditation is heightened beyond that necessary to support a conviction for first-degree murder, such premeditation becomes a statutory reason supporting imposition of the death penalty. See Rogers v. State, 511 So.2d 523 (Fla.1987), cert denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); Section 921.141(5)(i), Florida Statutes (1991). On the other hand, the absence[8] of premeditation, premeditation of short[9] duration, or premeditation that can be morally explained[10] has consistently been cited as a mitigating consideration that supports imposition of a life sentence.

A sentencer cannot be precluded from considering valid mitigation, Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978), nor can a sentencer simply refuse to

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[8] See, Norris v. State, 429 So.2d 688, 690 (Fla.1983) (State presented no evidence that Norris intended to kill the ninety-seven year old woman he beat to death during burglary); Smalley v. State, 546 So.2d 720, 723 (Fla.1989) ("It is unlikely that Smalley intended to kill the child."); Rembert v. State, 445 So.2d 337, 340 (Fla.1984) ("This is a classic example of a felony murder and very little, if any, evidence of premeditation exists.").

[9] See Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) ("We also find significant . . . the finding of the trial court that the 'evidence presented by the prosecution supports the conclusion that the [appellant's] commission of the death act was probably upon reflection of not long duration.'").

[10] See Amazon v. State, 487 So.2d 1, 13 (Fla.1986) (mental illness); Irrizarry v. State, 496 So.2d 822, 825 (Fla.1986) (premeditated murder "resulted from passionate obsession."); accord, Cheshire v. State, 568 So.2d 908, 911 (Fla.1990).

consider valid mitigation. Eddings v. Oklahoma, 455 U.S. 104, 115-15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Here, Judge Hutcheson plainly ruled that the existence and/or extent of premeditation was not a sentencing consideration because Elam pleaded guilty to first-degree murder. However, the law is very, very clear that even an indictment charging only first-degree premeditated murder also necessarily charges first-degree felony murder. O'Callaghen v. State, 429 So.2d 691 (Fla.1983); Adams v. State, 412 So.2d 850 (Fla. 1982); Knight v. State, 338 So.2d 201 (Fla.1976). Thus, Elam's guilty plea to first-degree murder cannot be fairly said to totally preclude an argument that the first-degree murder was not necessarily premeditated or that any premeditation that existed was of very short duration.

In approving the death penalty statute, this Court "guaranteed" consistency in the consideration of aggravation and mitigation. See State v. Dixon, 283 So.2d 1, 10 (Fla.1973) ("Review by this Court guarantees that the reasons present in one case will reach a similar result . . . in another case."). The cases set forth in the foregoing footnotes each recognize that the extent of premeditation that attends the killing of another is a valid sentencing consideration. Thus, it is respectfully submitted that the arbitrary limitation by this sentencer in refusing to even consider as valid mitigation the fact that Beard's death may not have been the product of a premeditated design or, if in fact premeditated, it was a very quick decision on Elam's part that followed Beard's confrontation of Elam

concerning the theft of funds, renders imposition of a death sentence wholly unreliable, arbitrary and capricious under Article 1, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Because the sentencer improperly refused to consider valid mitigation, this death sentence must be vacated and, if this Court finds that the death penalty may properly be imposed, the matter must be remanded for a new penalty proceeding.

POINT VII

THE FINDING THAT THE MURDER WAS COMMITTED TO AVOID A LAWFUL ARREST IS UNSUPPORTED BY THE EVIDENCE.

The trial judge found that Elam murdered Beard to avoid a lawful arrest as follows:

> 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.

(R504). It is respectfully submitted that, as a matter of law, the evidence here is insufficient to support application of this statutory aggravating factor.

A special rule applies when this factor is to be applied for the murder of a person who was not a law enforcement officer. Unless it is shown beyond a reasonable doubt that a pre-existing determination was made to murder a person solely or primarily to eliminate that person as a witness, the statutory aggravating factor set forth in Section 921.141(5)(e), Florida Statutes (1989) is inapplicable. Garron v. State, 528 So.2d 353, 360 (Fla.1988); Bates v. State, 465 So.2d 490 (Fla.1985); Rembert v. State, 445 So.2d 337 (Fla.1984). See White v. State, 403 So.2d 331, 338 (Fla.1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed. 2d 1412 (1983) (elimination of witness must be "dominant motive" behind murder where victim is not a police officer.). The victim here was not a police officer, so the above stated rule applies.

The evidence fails to support as the only reasonable conclusion that Beard was killed primarily to eliminate him as a witness. Even assuming that Beard was killed after he confronted Elam about funds missing from Easyriders' account, the evidence supports other reasonable conclusions as to why Beard was killed following such an accusation. Elam was working twelve hours a day, seven days a week at Easyriders, and the business was flourishing. (R 206-07). A good friend of Elam's, after hearing the State's evidence, still did not believe that Elam had stolen funds from Easyriders. (R 195) The State's evidence shows that a fight occurred. (R 171-72). It is not unreasonable to conclude that Elam became angry when Beard accused him of being a thief and that Beard was killed in an act of rage. It is axiomatic that being called a thief is apt to provoke a violent response.

The evidence simply fails to show that the sole or dominant for Beard to be killed was to eliminate him as a witness to a crime which Elam was never charged with committing and never proved to have committed. The statutory aggravating factor set forth in Section 921.141(5)(e), Florida Statutes (1991) was improperly found and weighed here when the death sentence was imposed. Accordingly, the death sentence must be reversed and the matter remanded for a new penalty phase.

POINT VIII

THE FINDING THAT ELAM WAS PREVIOUSLY CONVICTED OF CONSPIRACY TO COMMIT FIRST-DEGREE MURDER IS UNSUPPORTED BY THE RECORD AND SECTION 921.141(5)(e) OTHERWISE DOES NOT APPLY HERE AS A MATTER OF LAW.

The trial court found that Elam was previously convicted of a crime involving the use or threat of violence as follows:

> 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.

(R504) (emphasis added). The record is absolutely devoid of any evidence whatsoever that Elam was ever convicted of the crime of "conspiracy" to commit first-degree murder. In fact, Elam was convicted of two counts of solicitation to commit first-degree murder. (R479-80). There are significant distinctions between the offense of conspiracy and the offense of solicitation, not the least of which is the fact that no conspiracy can exist where the conspiracy is made up of only two people, one of whom happens to be a policeman who is setting up the defendant. See Section 777.04, Florida Statutes (1991).

That aside, it is respectfully submitted that a conviction for solicitation under Section 777.04(2), Florida Statutes (1991) as a matter of law is **NOT** a crime involving use or threat of violence such that the statutory aggravating factor set forth in Section 921.141(5)(e), Florida Statutes (1991) can

be lawfully applied. This is a question of law. See Preston v. State, 531 So.2d 154, 159-160 (Fla.1988).

Section 777.04(2), Florida Statutes (1991) provides:

> Whoever solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires or requests another person to engage in specific conduct which would constitute such offense or attempt to commit such offense commits the offense of criminal solicitation and shall, when no express provision is made by law for the punishment of such solicitation, be punished as provided in subsection (4).

This crime does not involve violence or threat of violence, and like conspiracy, it is complete upon the act of solicitation[11]

The crime of solicitation does not require that the crime solicited actually be perpetrated or that an attempt be made to perpetrate the crime. State v. Waskin, 481 So.2d 492, 493 (Fla. 3d DCA 1985), review denied, 488 So.2d 69 (Fla.1986). The crime is complete upon the act of solicitation. Here, the crime was complete upon Elam's agreement with the state attorney's investigator that Fell and Maibauer be done away with.

In Mann v. State, 420 So.2d 578 (Fla.1982), this Court was faced with the question of whether a judgment showing a conviction for burglary could support the application of this factor, and held "that a prior conviction of a felony involving violence must be limited to one in which the judgment of

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[11] There is no crime of attempted solicitation to commit a crime, just as there is no crime of attempted conspiracy. See Brown v. State, 550 So.2d 142 (Fla. 1st DCA 1989); Hutchinson v. State, 315 So.2d 546 (Fla. 2d DCA 1975).

conviction discloses that it involved violence." The factor was upheld following the new penalty phase, where the State presented Mann's indictment, conviction, and the victim's testimony to establish that the prior burglary committed by Mann was done with the intent to commit, and the actual commission of, the crime of unnatural carnal intercourse. Mann v. State, 453 So.2d 784, 786 (Fla.1984). Significantly, in Mann, the crime that was committed by Mann involved violence and/or threat of violence.

Here, Elam's crime did not involve violence or threat of violence, and no violence occurred. Thus, the aggravating factor set forth in Section 921.141(5)(e), Florida Statutes (1991) does not apply. Accordingly, the sentencer erred in considering this aggravating factor when sentencing Elam to the death penalty. The death sentence must be vacated and the matter remanded for resentencing.

POINT IX

THE FINDING THAT THE MURDER WAS COMMITTED FOR FINANCIAL GAIN IS UNSUPPORTED BY THE EVIDENCE.

The trial judge found that Elam murdered Beard for financial gain as follows:

> That beyond all reasonable doubt, the murder 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 the victim worked, and had embezzled up to that point approximately Fifteen Thousand ($15,000) Dollars when confronted by the victim regarding same.

(R504). It is respectfully submitted that, as a matter of law, the evidence here is insufficient to support application of this statutory aggravating factor. Further, under the facts of this case this factor addresses primarily the same considerations encompassed by the witness elimination factor also found by the court. Finding both factors constitutes impermissible doubling under the rationale set forth in Provence v. State, 337 So.2d 783 (Fla. 1976) and White v. State, 403 So.2d 331 (Fla. 1981).

It was improper to apply this factor because the evidence fails to show that Beard was killed for financial gain. A statutory factor must be proved to apply beyond a reasonable doubt. Here, the the court's finding is based mostly on hearsay testimony which does not constitute competent proof to support this factor. Even at that, the evidence does not show that Beard was killed for financial gain. As with the witness elimination factor, the evidence can as reasonably be viewed as showing that

Beard was killed during a fight caused by Beard falsely accusing Elam of stealing from Easyriders. There has been no competent evidence whatsoever presented to show that Elam embezzled anything from Easyriders or the Paisano Publication Company and certainly there was no pecuniary motivation for Beard's death. See Simmons v. State, 419 So.2d 316, 318 (Fla.1982) (evidence must show a pecuniary motivation for the murder itself); Hill v. State, 549 So.2d 179, 183 (Fla.1989) ("inadequate evidence to show that the murder was committed *for* pecuniary gain.").

Because the sentencer improperly weighed this aggravating factor in imposing the death penalty, the sentence must be vacated and the matter remanded for a new penalty phase.

POINT X

THE DEATH SENTENCE IS DISPROPORTIONATE UNDER THE FACTS OF THIS CASE.

The sentencer found four aggravating factors. As set forth in the preceding points, none of the factors are valid and imposition of a life sentence is required because no valid statutory aggravating factor exists. Banda v. State, 536 So.2d 221, 225 (Fla.1988). Assuming the existence of at least one valid factor, a death sentence is still improper where the sentencer erroneously rejected and/or failed to properly weigh the aggravating and mitigating considerations presented by this record. Campbell v. State, 571 So.2d 415 (Fla.1990). There is no jury recommendation to influence this sentence.

It is respectfully submitted that any valid statutory aggravating factors that exist here have little weight when the consideration is placed in the context in which it occurred. For instance, the prior conviction of a violent felony, if valid, based on crimes that were essentially created by the State and committed while Elam was under extreme emotional pressure to do something to help his family. Those crimes were undeniably the product of maneuvering by the State and are not indicative of Elam's true character. Even assuming this factor applies, it remains that the gravity Elam's conduct pales when it is compared to the conduct of others where this factor has been applied. See Pardo v. State, 563 So.2d 7 (Fla.1990), cert. denied, 111 S.Ct. 2043 (1991) (nine murders in five separate episodes). This factor should be afforded little weight, if any.

The HAC factor should not be applied because Beard's death was not intended as a torturous murder but instead it was a consequence of a sudden fight brought on by confrontation and false accusation by the victim. Again, assuming that this factor applies, any weight afforded it in aggravation should not be the same as the weight assessed to address an intentionally heinous and atrocious murder. See Mendyk v. State, 545 So.2d 846 (Fla. 1989) (prior to murder, defendant kidnapped, repeatedly abused, sexually molested, bound and gagged victim, and toyed with her by stretching her over sawhorse and wiring her between two trees.). If the same weight is assessed, imposition of the death penalty is truly arbitrary and capricious.

Similarly, the financial gain factor and the witness elimination factor are a consequence of the fight between Elam and Beard, and the entire scenario must be viewed and placed in context when determining what the appropriate weight of such factors should be. Elam respectfully maintains, however, that the State has failed to prove the existence of these factors beyond a reasonable doubt. See Jackson v. State, 498 So.2d 406 (Fla.1986) (improper doubling to find witness elimination and murder to hinder law enforcement.). Interestingly, the trial court's sentencing order states that any one of the aggravating factors outweighs the mitigation here. (R505). The reliability of that finding and the sentencer's entire weighing process is suspect, where in the sentencer's view any one of these weak, marginal factors warrants a death sentence.

Assuming that valid aggravation exists, as a matter of law it is far outweighed by the uncontroverted mitigation considerations contained in the record. Elam has no significant history of prior criminal activity. The trial court rejected this factor "based upon the certified copies of the Federal conviction and the two (2) State convictions for Conspiracy (sic) to Commit First Degree Murder." (R505, Appendix A). The federal conviction was for obtaining an unauthorized loan for less than $100 in violation of Title 18, United States Code Section 657. (R175). The "Conspiracy" convictions were the two convictions for solicitation which Elam pled guilty to at the same time he pled guilty to the first-degree murder, pleas which were shown to be coerced and involuntary as a matter of law. See Point I, supra. As a matter of law, these crimes do not justify finding a **significant** history of prior criminal activity. Scull v. State, 533 So.2d 1137 (Fla.1988), cert. denied, 490 U.S. 1037 (1989); Bello v. State, 547 So.2d 914, 917-18 (Fla.1989).

The sentencer considered as non-statutory mitigating considerations evidence "that the defendant was a good family man, kind, generous, and compassionate." (R505, Appendix A). However, this sentencer failed to consider other uncontroverted evidence contained in the record which is mitigating in nature. For instance, at one point the State of Florida agreed that a life sentence was a viable penalty under these facts, but reneged on its agreement when Elam expressed his desire to be sentenced to death. (R325-26). The fact that the State backed out of its

agreement does not extinguish the fact that at one point, based on these same facts, the State believed that imposition of a life sentence would be an adequate sentence.

Similarly, the victim's family previously agreed to imposition of a life sentence, and this is mitigating in nature:

> Q: (Defense counsel) I only have a very small series of questions, maybe one. I know that you were contacted by the State as to what your position was as to whether they ought to seek the death penalty or not.
>
> A: (Mr. Beard) That's true.
>
> Q: And do I understand correctly that you contacted members of the family and got a consensus as to what the family felt?
>
> A: That's true.
>
> Q: Could you tell us what that was, sir?
>
> (Damore) Objection, irrelevant, immaterial.
>
> (Defense counsel) This is -- this is one of those things that come in the unwritten mitigators, Your Honor, any facts. I think it is relevant to the matter.
>
> Court: I'm going to overrule the objection and allow Mr. Beard to state that. Go ahead, Mr. Beard.
>
> (Defense counsel) Thank you, sir.
>
> A: Originally we decided that we would not seek the death penalty. But in light of the fact that Mr. Elam has gone ahead and tried to solicit murder to cover up a murder, I have no qualms with going for the death penalty at this time.

(R183-84).

David Elam expressed concern for the feelings of the victim's family while explaining that he did not participate in what happened to Carl Beard and that he could not have prevented it:

> Elam: Number two, the murder of Carl Beard. To Dick Beard, whom I've talked to numerous times, I'm very, very sorry that it happened. I could not have prevented it nor did I take part in it.

(R229). Elam's genuine concern for the feelings of others is not rebutted by any evidence, and it shows that a great potential for rehabilitation exists, as does the fact that Elam worked twelve hours a day, seven days a week to support his family. See Holsworth v. State, 522 So.2d 348, 354 (Fla.1988) ("The jury also may have considered in mitigation appellant's employment history and positive character traits as showing potential for rehabilitation and productivity within the prison system."); Fead v. State, 512 So.2d 176 (Fla.1987); McCampbell v. State, 421 So.2d 1072 (Fla.1982).

The death penalty is reserved for the most aggravated and least mitigated of first-degree murders. As quoted by this Court in Fitzpatrick v. State, 527 So.2d 809 (Fla.1988):

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Fitzpatrick, 527 So.2d at 811.

The death penalty is intended "for the most aggravated, the most indefensible of crimes." Fitzpatrick, 527 So.2d at 811. This is not such a case. There has been no consensus by a jury to sway the balancing process, but it is evident that had a jury heard the evidence and issued a recommendation of life, the trial judge would have been required to impose a life sentence. There exists even more mitigation than can be articulated here, in that the trial court denied defense counsel the promised continuance to present it (Point IV) and otherwise refused to allow a proffer of the substance of that evidence so that it could be reviewed by this Court (Point II).

It is respectfully submitted that a death sentence under these facts is disproportionate. This is not the most aggravated and least mitigated of first-degree murders. Thus, the death sentence should be reversed and the matter remanded for imposition of a life sentence.

POINT XI

FLORIDA'S DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by defining the operative terms of the statutory aggravating factors set forth in Section 921.141, Florida Statutes, this Court is promulgating substantive law in violation of the separation of powers under Article II, Section 3 of the Florida Constitution. The Florida Legislature is charged with the responsibility of passing substantive laws. Article III, Florida Constitution (1976). Legislative power, the authority to make laws, is expressly vested in the Florida Legislature.

In an exercise of that power, the Florida Legislature passed Section 921.141, Florida Statutes (1975), which purportedly established the substantive criteria required for authorization of imposition of the death penalty. However, the statutory aggravating factors as written are unconstitutionally vague and overbroad. See Shell v. Mississippi, 498 U.S. __, 111 S.Ct. 313, 112 L.Ed. 2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). In actuality, the substantive legislation was authored in State v. Dixon, 283 So.2d 1 (Fla.1973), where this Court provided the working definitions of the statutory aggravating factors that were ostensibly already promulgated by the Florida Legislature. A court is not empowered to enact laws, either directly or indirectly, yet that has occurred with

Florida's death penalty.

As set forth in the statute and as passed by the Legislature, Florida's especially heinous, atrocious and cruel statutory aggravating factor is unconstitutionally vague. See, Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926 (1992). It is neither the function nor duty of this Court to salvage a vague statute by supplying its own perception of what is or is not an especially heinous, atrocious or cruel murder, and to do so this Court must indulge in creating substantive law rather than applying it.

Similarly, the statutory aggravating factor which subjects a defendant to the death penalty if the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification fails to provide sufficient guidance under the Eighth and Fourteenth Amendments to the United States Constitution. See Hodges v. State, 595 So.2d 929, 934 (Fla.1992), cert. granted, vacated, Hodges v. Florida, ___ U.S. ___, 61 USLW 3254, 52 Cr.L. 3015 (October 5, 1992). It is most respectfully submitted that the death penalty in this case has been based in whole or in part on unconstitutionally vague statutory aggravating factors, and accordingly the death sentence must be vacated.

It is respectfully submitted that this Court does not constitutionally have the power to provide the substantive definition of these and other statutory aggravating factors, yet time and again the definitions of the statutory aggravating

factors have been provided by this Court in violation of the separation of powers doctrine. See Peek v. State, 395 So.2d 492, 499 (Fla.1980) (parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla.1981) (more than three people required to find a great risk of death or injury to many persons)[12]; Banda v. State, 536 So.2d 221, 225 (Fla.1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.").

The vacillation that has occurred with this Court's approval of many of these factors amply demonstrates that the factors are not sufficiently clear and that this Court should not endeavor to substantively construe them. The passage of such broad legislation for it to be refined, defined, re-defined in the face of emotionally compelling facts and otherwise given is tantamount to a delegation of legislative power and a violation

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[12] Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King v. State, 514 So.2d 354, 360 (Fla. 1987) ("this case is a far cry from one where this factor could properly be found.") If King is a "far cry" from the proper case to find the "great risk to many persons" factor, how did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

of the separation of powers doctrine of state and federal constitutions. In that regard, candid application of the law concerning the separation of powers doctrine, as discussed by this Court in Chiles v. Children A, B, C, D, E, and F, etc., 589 So.2d 260 (Fla.1991), requires that the Section 921.141, Florida Statutes (1989) be declared unconstitutionally vague as an impermissible delegation of authority (and responsibility) to this Court to substantively define the operative terms of the statute.

FAILURE OF AGGRAVATING FACTORS TO ADEQUATELY CHANNEL THE SENTENCER'S DISCRETION TO IMPOSE THE DEATH PENALTY.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Supposedly, the things that may be considered as "aggravation" by a sentencer in Florida are limited to those statutory aggravating factors expressly listed in Section 921.141(5), Florida Statutes (1989). See Brown v. State, 381 So.2d 690 (Fla.1980); Elledge v. State, 346 So.2d 998 (Fla.1977); Purdy v. State, 343 So.2d 4, 6 (Fla.1977). It is respectfully submitted, however, that these "factors" are but open windows through which virtually unfairly influential facts are placed before the sentencer, thereby providing unfettered discretion to recommend/impose a death penalty in violation of equal protection and due process under the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and

the holding of Furman v. Georgia, 408 U.S. 238 (1972).

For instance, this Court has held that the State is permitted to establish the full details of a defendant's prior conviction for a violent felony in order to allow the juror and/or sentencer a basis whereby "weight" can be meaningfully attributed to the Section 921.141(5)(b) factor. See Francois v. State, 407 So.2d 885 (Fla.1981); Elledge v. State, 346 So.2d 998 (Fla.1977). However, this Court has at the same time recognized that such testimony is presumptively prejudicial. See Castro v. State, 547 So.2d 111, 115 (Fla.1989) (improper admission of irrelevant collateral crimes evidence is presumptively harmful). Allowing such prejudicial testimony to come before the sentencer under the general heading of a statutory aggravating factor permits the use of constitutionally improper considerations to impose the death penalty.

This rationale applies to other statutory aggravating factors, which are in essence but categories through which unfairly prejudicial evidence is put before the jury/sentencer. Because the statutory aggravating factors fail to adequately channel the jury's and/or sentencer's discretion in recommending/ imposing the death penalty, the factors are unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

LACK OF NOTICE

The failure of the State to disclose which aggravating factors were being relied upon in seeking the death penalty denies due process, prior notice, and a meaningful opportunity to confront the evidence. It is respectfully submitted that the failure of the State to provide adequate notice prior to the penalty phase as to which factors the State would attempt to prove denies due process and violates the notice requirement of the state and federal constitutions. Here, the state at the penalty phase relied primarily on hearsay evidence to carry its burden of proving the existence of statutory aggravating factors beyond a reasonable doubt. Thus, the denial of notice prior to trial as to which aggravating factors the state was seeking to prove was especially prejudicial because could have no way of effectively countering factual allegations coming from sources not present at the hearing.

This was a denial of due process of law guaranteed under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (citations omitted). It is equally fundamental that the right to notice and an opportunity to be heard "Must be granted at a meaningful time and in a meaningful manner." (citation omitted).

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

Adequate notice provides a significant constitutional protection. See Mays v. State, 519 So.2d 618, 619 (Fla.1988) ("We agree that due process requires notice and an opportunity to be heard prior to an assessment of costs under Section 27.3455."); See also, Jenkins v. State, 444 So.2d 947 (Fla.1984). As the United States Supreme Court noted in Fuentes, "It has long been recognized that 'fairness can rarely be obtained by secret, one sided determination of facts decisive of rights. And [n]o better instrument has been devised for arriving at truth than to give a person in jeopardy OF a serious loss notice of the case against him and the opportunity to meet it.' (citation omitted)." Fuentes, 407 U.S. at 81.

Procedural due process is not a static concept. The minimum procedural requirements necessary to satisfy due process requirements depend on circumstances and interests of the parties involved. See Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

The sentencing considerations set forth in Section 921.141(5) are both substantive and procedural statutory factors which, when proven by evidence, authorize imposition of the death penalty. See Banda v. State, 536 So.2d 221 (Fla.1988) (imposition

of the death penalty not authorized if no statutory aggravating factors exist.) Unless the defendant is provided notice prior to a penalty phase as to which statutory aggravating factors the State intends to prove and/or rely on to seek the death penalty, a defendant is denied the ability to meaningfully confront the state's witnesses and to rebut the evidence presented in connection with those statutory aggravating factors.

Belated notice that the State is seeking a particular statutory aggravating factor works a denial of due process under the Fifth, Sixth and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution. The Sixth Amendment right "to be informed of the nature and cause of the accusation" is applicable to the state's through the due process clause of the Fourteenth Amendment. In re: Oliver, 333 U.S. 257, 273-74 (1948). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused." Cole v. Arkansas, 333 U.S. 196, 201 (1948) (emphasis added).

In Cole, Petitioners were convicted at trial of one offense but the convictions and sentences were affirmed on appeal based on evidence on the record indicating that a different, uncharged offense had been committed. A unanimous United States Supreme Court reversed, finding a denial of procedural due process:

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law, Petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court.

Cole v. Arkansas, 333 U.S. at 201-2 (emphasis added). The same reasoning applies here, where issues concerning imposition of the death penalty were litigated without prior notice and/or a meaningful opportunity to be heard at the time the hearsay testimony was presented. See Presnell v. Georgia, 439 U.S. 14, 16 (1978) (footnote 3) ("in the present case, when the Supreme Court of Georgia ruled on Petitioner's motion for rehearing it recognized that, prior to its opinion in the case, Petitioner had no notice, either in the indictment, in the instructions to the jury or elsewhere, that the State was relying on the rape to establish the bodily injury component of aggravated kidnapping.").

Relying on Spinkellink v. Wainwright, 578 F.2d 582, 609-10 (5th Cir. 1978), this Court has previously rejected a Sixth Amendment "lack of notice" challenge. See Preston v. State, 444 So.2d 939, 945 (Fla.1984); Sireci v. State, 399 So.2d 964, 970 (Fla.1981); Menendez v. State, 368 So.2d 1278, 1282 (Fla.1979) (footnote 21). Careful review shows that the Fifth Circuit in Spinkellink decided the lack of notice issue on lack of preservation grounds. "A review of the record indicates that

neither Spenkellink (sic) nor his attorney objected at trial to the indictment, which Fla.R.Crim.P. 3.190(c) requires in order for the alleged defect to be preserved for appellate review. Accordingly, the defect, if any, was waived." Spinkellink, 578 F.2d at 609-10 (emphasis added). Any further discussion by the Fifth Circuit was dicta. Further, the instant challenge is not only being brought under the Sixth Amendment, but also as part of procedural due process required under the Fifth Amendment, and Article I, Sections 9 and 16 of the Florida Constitution.

It cannot reasonably be claimed that the interests of fairness do not require a defendant to know when evidence is being presented what statutory aggravating circumstances the State is attempting to prove. To say that the aggravating factors are limited to those specified in statutes does not satisfy the notice requirement. All crimes are contained in statutes. It is incumbent on the state, as the prosecuting party, to notify the defendant which statutes apply. It is incumbent on the court, as the neutral enforcer of Constitutional rights, to require proper notice. For the aforesaid reasons, the death penalty in Florida is unconstitutional on its face and as applied. Accordingly, Sections 921.141, 782.04 and 775.082 Florida Statutes, (1991) should be declared unconstitutional and Elam's death sentence vacated.

CONCLUSION

Based on the argument and authority set forth in Point I, Elam should be allowed to withdraw his guilty pleas and proceed to trial on the merits. This Court is otherwise asked to vacate the death sentence and to remand for a new penalty phase hearing unless this Court finds, as set forth in Point X, that the death penalty is disproportionate, in which case a sentence of life imprisonment must be imposed.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
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112-A Orange Avenue
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(904) 252-3367

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, Department of Legal Affairs, PL01, The Capitol, Tallahassee, FL 32301, and to Mr. David M. Elam, #622818, P.O. Box 221, Raiford, FL 32083, this 28th day of December, 1992.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DAVID MUELLER ELAM,	)	
	)	
Defendant/Appellant,	)	
	)	
vs.	)	CASE NO. 80,039
	)	
STATE OF FLORIDA,	)	
	)	
Plaintiff/Appellee.	)	
	)	

A P P E N D I X

Court's Findings of Fact in Support of the Death Penalty (R 500-505)

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 91-7067CFAES

STATE OF FLORIDA,

vs

DAVID MUELLER ELAM,

Defendant.
_____/

COURT'S FINDINGS OF FACT
IN SUPPORT OF THE DEATH PENALTY

THE DEFENDANT, DAVID MUELLER ELAM, in the above-captioned case was indicted on January 7, 1992, with a single count of First Degree Murder.

Subsequently, the defendant, in case number 92-32051, was charged by Information with two (2) counts of Solicitation to Commit First Degree Murder, first degree felonies. The defendant was alleged to have solicited an undercover investigator to murder witnesses in the above-captioned First Degree Murder case.

On Monday, May 11, 1992, one (1) week before the scheduled start of the trial in the First Degree Murder case, the defendant in this murder case entered a plea of Guilty as charged, to First Degree Murder, a capital felony.

The defendant also, in writing, waived his right to a jury trial on the penalty phase requesting a penalty trial just before the Court and also waived his presence at the penalty phase other than being given the opportunity to address the Court at the conclusion of the penalty phase, which was done.

Also, at the time the plea was entered on May 11, 1992, the defendant insisted that he wanted to be executed and wanted the State to seek the death penalty at the penalty phase, even though the State was agreeable to a stipulated sentence of life imprisonment under the First Degree Murder plea.

Also, on May 11, 1992, in case number 92-32051, the defendant also plead Guilty as charged to Count I and Count II in said Information charging him with Solicitation to Commit First Degree Murder, first degree felonies, and upon stipulation, waived a pre-sentence investigation and was adjudicated guilty on the same day and on both counts in that Information was sentenced to thirty (30) years State Prison with the counts to run

concurrent to one another, but consecutive to any sentence imposed in the First Degree Murder case.

The following Wednesday, May 13, 1992, a status conference was held with the defendant present and his attorneys and the Assistant State Attorneys, again to confirm the defendant wanted to proceed to a penalty phase without a jury and still wanted to be excused from attendance at the penalty phase and still was requesting that the State seek the death penalty. The defendant again on the record confirmed all of this.

The penalty phase was set, non-jury, on Thursday, May 21, 1992, and again the defendant was brought into the courtroom to reaffirm on the record that he still wished to proceed non-jury on the penalty phase and also still did not wish to be present during the penalty phase, other than to address the Court at the conclusion of the penalty phase.

Again, the defendant asserted this was his position and the defendant was then held in the holding cell on the first floor of the courthouse while the penalty phase proceeded. Present during the penalty phase were three (3) Assistant Public Defenders from the capital division representing said defendant and the State was represented by two (2) Assistant State Attorneys.

The penalty phase was held without the defendant being present, pursuant to his recorded request, and opening statements were made by both sides, witnesses called by both sides, and subjected to direct and cross examination.

At the close of taking of testimony at the penalty phase, the defendant was brought up from the holding cell at his request and he addressed the Court for approximately thirty-seven (37) minutes and still requested that the death penalty be imposed on him though he did vaguely indicate that he did not murder the victim, which is a position inconsistent with what he told the Court when his plea was entered earlier where he admitted to the murder and inconsistent with the evidence in the case and the defendant's prior confessions.

Whereupon, the defendant, at his request, again was excused and closing arguments were held by the attorneys from both sides and this Court set the matter for sentencing on Wednesday, May 27, 1992.

At the non-jury penalty phase, the State argued that it has proven four (4) aggravating circumstances that outweigh any mitigating circumstances.

The State argued that the four (4) aggravating

circumstances were that the defendant had previously been convicted of felonies involving the use or threat of use of violence to some person; that the murder was committed for the purpose of avoiding or preventing a lawful arrest; that the murder was committed for financial gain; and the murder was especially wicked, evil, atrocious, or cruel.

The defense attorneys argued under mitigating circumstances that the defendant had no significant history of prior criminal activity; that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; and any other aspects of the defendant's character or record citing that he was a family man and was well respected and liked by his peers.

No other evidence was offered or arguments made as to any of the other statutory mitigating circumstances.

Based on the court file, testimony, evidence, and arguments made by the attorneys at the penalty phase, the Court makes the following findings of fact.

The defendant is a thirty-nine (39) year old white male with a twenty (20) month old son by Susan Dawson, who ended up being charged in a separate felony Information with Accessory After the Fact to this First Degree Murder and who previously had plead to that charge and is awaiting sentencing.

The victim in this murder case, Carl Beard, had confronted the defendant at a place of business where they both were employed and accused him of embezzling some approximately Fifteen Thousand ($15,000.00) Dollars from the business whereupon the defendant struck the victim with his fist knocking him to the ground and then proceeded to beat him with a nearby brick that was used as a doorstop.

The victim received defensive wounds consisting of bruises and abrasions to both arms and bruises and abrasions on his hands, with a broken finger on his left hand.

The victim also received severe face and scalp lacerations and numerous skull fractures and resulting brain injuries and two (2) black eyes.

The victim was conscious during the early stages of the fatal beating as evidenced by the defensive wounds and by the medical testimony.

The medical testimony indicated that because of the massive head and brain injuries, the victim would have died within a few minutes, with ten (10) minutes probably being the

maximum prior to death, and after receiving the severe head injuries, probably would have been rendered unconscious within one and one-half (1 1/2) minutes or less from receipt of the head injuries.

The defendant then solicited and received help from his girlfriend, Ms. Dawson, and others to help clean up the business area of signs of the murder and to dispose of the body.

The defendant and another male took the body to another county and weighted down with cinderblocks and disposed of the victim's body in water where it was subsequently found.

The evidence further indicates the defendant was engaged in an ongoing grand theft embezzlement from the business and stole approximately Fifteen Thousand ($15,000.00) Dollars at the time he was confronted by the victim.

As to prior violent felonies, the State introduced certified copies of the Judgment and Sentence in case number 92-32051, wherein this Court on May 11, 1992, based upon the defendant's pleas of Guilty as charged on the same date to Count I and Count II, both being Solicitation to Commit First Degree Murder, first degree felonies, and based on the stipulation between the defendant, his attorneys, and the State, he waived his right to a pre-sentence investigation, was adjudicated guilty of both counts of first degree felonies, and sentenced in both counts to thirty (30) years State Prison.

In anticipation of a defense argument, the State also introduced a certified copy showing that the defendant, on May 22, 1986, was convicted and adjudicated guilty in Federal Court to an offense of Initiating and Negotiating an Unauthorized Loan in the amount of less than One Hundred ($100.00) Dollars and keeping said proceeds for his personal benefit and enrichment, in violation of U.S.C.A. Title 18, [657]. On the same date, the defendant was placed on five (5) years probation with special conditions of restitution and alcohol treatment.

As to mitigating circumstances, the defense attorneys called one (1) witness who had been a friend of Mr. Elam for the last eight (8) years, who testified Mr. Elam was a good family man, a generous man, and a kind and compassionate man.

The defense attorneys also argued that the defendant had no significant history of prior criminal activity, arguing that the Federal Court conviction in 1986 was for a non-violent theft type of crime and that the most recent convictions for conspiracy to commit First Degree Murder related to the facts surrounding this case and Mr. Elam's attempt to solicit someone to murder witnesses involved in this murder case.

The defense attorneys also argued that the defendant, at the time he committed the crime, was under the influence of extreme mental or emotional disturbance, but introduced no evidence regarding this matter and just relied on the defendant's alleged emotional state where he did address the Court at the conclusion of the penalty phase and read a statement into the record and was very emotional regarding what he felt was how he wronged his girlfriend and child because of his actions in this case.

As stated earlier, no further evidence or arguments were made regarding any other statutory mitigating circumstances.

Based on the foregoing, this Court finds that the State has proved beyond all reasonable doubt the four (4) aggravating circumstances cited by the State.

This Court also finds that beyond all reasonable doubt that sufficient aggravating circumstances do exist and that there are insufficient mitigating circumstances to outweigh any or all of the four (4) aggravating circumstances.

Specifically, this Court finds as follows.

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.

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.

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.

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.

The Court further finds that the defense has failed to show mitigating circumstances to outweigh the above aggravating circumstances in that there is evidence that the defendant had significant prior criminal activity based upon the certified copies of the Federal conviction and the two (2) State convictions for Conspiracy to Commit First Degree Murder.

That there was no evidence whatsoever that at the time of the murder, the defendant was under the influence of extreme mental or emotional disturbance.

Further, that the defense evidence that the defendant was a good family man, kind, generous, and compassionate, does not outweigh the aggravating circumstances found above.

In conclusion, this Court finds that there are four (4) aggravating circumstances listed above, which have been proved beyond and to the exclusion of a reasonable doubt and that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances. Any 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.

This Court has had the opportunity to thoroughly reflect on the matter for the last six (6) days between the penalty phase and this sentencing hearing and based on the matters presented to the Court at the penalty phase and all testimony and evidence, this Court has reached its own independent conclusion that death is the appropriate sentence to be imposed.

This Court further certifies that this written Findings of Fact was done and filed in Open Court contemporaneous with the death penalty sentence imposed on the same day and that copies of same were furnished to the defendant and attorneys.

DONE AND ORDERED in Open Court at Daytona Beach, Volusia County, this 27th day of May, A.D., 1992.

R. Michael Hutcheson

R. MICHAEL HUTCHESON
Circuit Court Judge

cc: Hon. David Damore, ASA
Hon. Ray Cass, Jr., APD
Defendant