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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904)252-3367

ATTORNEY FOR APPELLANT

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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 I, SECTIONS 9, 16, 17 AND 22 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The State asserts that the trial judge was not privy to the agreement that Elam would receive the death penalty in return for a plea of guilty. (AB[1] at 26). The undersigned disagrees and does not contend that Judge Hutcheson expressly stated at the time the guilty pleas were first accepted that Elam would receive the death penalty in return for his guilty pleas. Rather, it is here submitted that the court's promise that Elam would receive the death penalty was at first implied[2] by, and necessarily contained in, the court's conduct of allowing Elam to waive all opposition to a death sentence and in the court's refusal to thereafter allow defense counsel to withdraw the pleas when Elam stated that he wished to maintain the guilty plea **only** if he received the death penalty.

Specifically, the record shows that, after accepting the guilty pleas, Judge Hutcheson became uncomfortable with what was happening. When faced with defense counsel's motions to withdraw, Elam's waiver of a jury recommendation, waiver of Elam's presence

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[1] (AB) refers to the Answer Brief of the Appellee.

[2] As a practical matter, by allowing Elam to waive opposition of the death penalty and forego presentation of any mitigation, it was virtually guaranteed that the statutory aggravating factors would outweigh the mitigating factors.

at the penalty phase hearing, and Elam's instruction that appointed counsel do nothing to oppose imposition of a death sentence, it was very apparent that imposition of a death sentence was going to be required. Apparently, Judge Hutcheson sensed the impropriety of impositing a wholly unopposed death sentence, for he suggested, "Why don't we just chuck the whole thing." (R394).

An express agreement that Elam was to receive the death penalty was necessarily contained in the denial of counsel's motion to withdraw Elam's guilty pleas. When Elam revealed that he had pled guilty and asked for the death penalty, not because he was guilty but instead to stop the harassment to his family by the state attorney's office and to benefit Ms. Dawson in her case, Elam's counsel immediately moved to move to withdraw the guilty pleas because they were the involuntary product of coercion and emotional duress:

> Defense Counsel: If I understand what he's saying, he's saying that he was induced into the plea. And if that's the case, we would respectfully move to withdraw the whole plea.

(R255). Significantly, even when faced with Elam's explanation which was fully corroborated by the record, the trial court did not conduct any inquiry into whether the pleas were voluntary or the product of duress, but instead simply asked Elam, "Do you wish to do that, just to get it on the record one way or the other? I don't know if you actually do wish to withdraw your pleas?" (R257). Elam replied, "No, I don't. If the sentence is the chair, no, I don't, Your Honor -- I'll condition that." (R258).

At that time, the coercive influence still existed, in that Elam's family was still subject to harassment by the state attorney's office and Ms. Dawson charges were yet pending. It did not matter whether actual harassment was occurring and/or whether promises for lenient treatment to Ms. Dawson were actually. Instead the focus should be on whether Elam reasonably believed that his family was being harassed by the state attorney and/or whether he believed that, by entering a guilty plea, he would help his family. The trial judge should have contemporaneously determined whether those compelling considerations produced the guilty pleas.

In this regard, the record conclusively shows that Elam was present during proceedings where the prosecutor attempted to have a high bond placed on Ms. Dawson, apparently to retaliate against her for notifying the court, in Elam's presence, that the prosecutor was harassing her. (R263-283; 441-443; Appendix A & B). The harassment included being evicted from her home and seizure of her possessions, seizure of her passport and her son's passport, denial of a work permit, and threats by the prosecutor that she must give a "truthful" statement or face a $100,000 bond and the placement of her 18 month old son into state care. (R441-442).

The State makes much of the fact that there were no "promises" made to Elam, but that is not to say that inferences were not made that Ms. Dawson would be treated leniently if Elam pled guilty. Certainly, the record strongly suggests that Elam truly perceived that Ms. Dawson would receive lenient treatment - there is no other comprehensible reason for Elam to suddenly enter

a guilty plea and ask for the death penalty immediately after Ms. Dawson was arrested. The court's failure to specifically delve into the motivation for the plea and request for the death penalty when Elam disclosed that the pleas were entered to end the harassment to his family and to benefit Ms. Dawson's case was a significant omission which affects the integrity of these guilty pleas and renders them invalid under Article I, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Commenting on the importance of a full inquiry by the court concerning the circumstances surrounding a guilty plea, the United States Supreme Court has stated:

> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. (citation omitted).

Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (footnote omitted). Here, the potential that Elam was being coerced to enter his pleas due to Ms. Dawson's predicament was so patent that the prosecutor of his own accord felt compelled to place on the record that no "promises" had been extended that Ms. Dawson would receive lenient treatment in return for a guilty plea. Defense counsel agreed that no such promises had been made.

However, when Elam discussed his reasons for entering the plea prior to being sentenced and revealed that the pleas were due to Ms. Dawson's predicament and an unfounded belief that Ms. Dawson would receive lenient treatment in return for guilty pleas, the judge conducted no inquiry whatsoever concerning the duress Elam was experiencing over his family's predicament and the motivation that had on his actions. In that regard, there is no inquiry by the court and no express finding that the pleas were voluntary after Elam informed counsel and the court of the reason the pleas had been entered - there is instead only a denial of counsel's motion to withdraw the pleas because, "It's noted Mr. Elam, of course, does not join in that, he doesn't want his pleas withdrawn, so they are denied." (R258).

Elam's belief that Ms. Dawson would receive leniency from the State if he pled guilty and asked for the death penalty was based on his perception of the prosecutor's actions, not on express promises. The pertinent judicial inquiry was not solely whether such promises had in fact been made, but instead on whether Ms. Dawson's predicament was so compelling that it denied Elam free and voluntary choice. This was an area that, once revealed to the judge, required investigation to assure that the guilty pleas were being voluntarily entered, with a full understanding of the consequences.

The absence of an inquiry by the court into the duress and coercion that attended Elam's plea deprived the trial court and this Court of any evidentiary basis to confidently conclude that

the plea was voluntary and not the product of coercion and/or duress. In that regard, it has long been the law in Florida that, if the evidence is conflicting and there is a legitimate question concerning the voluntariness of a plea in a capital case, as here, the better practice is to permit the guilty plea to be withdrawn and to proceed to a trial on the merits:

> In [**Pope v. State**, 56 Fla. 81, 47 So. 487 (1908)], we said in substance that the law favors trials on the merits and that a plea of guilty to a serious criminal charge would be freely and voluntarily made and entered by the accused without fear or duress of any kind. It is possible that the plea of guilty in this case was entered freely and voluntarily and without a semblance of coercion, but, when such a plea is entered as here by an ignorant young man charged with a capital offense and the evidence on that point is in hopeless conflict, it raises a very strong suspicion that some undue influence contributed to the plea. When such a case is duly presented, the better practice is to permit the plea of guilty to be withdrawn and proceed to trial on a proper plea.

Casey v. State, 116 Fla. 3, 156 So. 282, 283 (1934).

In order for an appellate court to conclude that a plea was voluntarily entered, a full and complete inquiry must have been conducted by the trial court. See ***Porter v. State***, 564 So.2d 1060, 1063 (Fla. 1990); ***Lopez v. State***, 536 So.2d 226, 228 (Fla. 1988); ***Lines v. State***, 594 So.2d 322, 324 (Fla. 1st DCA 1992). Here, there was no inquiry, and the evidence of coercion and duress is not found solely in Elam's explanation of why the pleas were entered, but more importantly shown by the statements occurring in

open court on February 24 (App. A & B), by the rapid progression of events following the arrest of Elam's fiancee for conspiracy, and by a request for the death penalty. See ***Brady v. United States***, 397 U.S. 742 (1970) (determination of voluntariness of guilty plea in order to **avoid** imposition of death penalty).

Though unsworn, Elam's simple explanation of why he pled guilty and requested the death penalty is irrefutably corroborated by the record. See ***Blackledge v. Allison***, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."). Certainly, good cause exists for withdrawal of this plea. Rule 3.170(f), Fla. R. Crim. P.; ***Casey***, supra. It seems anomalous to encourage defendants to discuss his or her plea so that coercive influences can be detected and expediently addressed by a trial court, Rule 3.171(a), Fla.R.Crim.P.[3], only to disregard the defendant's revelation that the pleas were entered out of duress to benefit a third party because he once stated he had been "promised" nothing.

It is evident that Elam and the trial court expressly predicated the guilty pleas on imposition of the death penalty when

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[3] In this regard, the committee note states:

> . . . There has also been criticism of the practice of requiring a defendant, upon a negotiated guilty plea, to give a negative reply to the court's inquiry concerning any "promise" made to the defendant. This is designed to avoid the foregoing pitfalls and criticisms by having the negotiations made of record and permitting some control of them.

In re: Amendment to Fla.R.Crim.P., 606 So.2d 227, 262 (Fla. 1992).

defense counsel's motion to withdraw the guilty pleas was rejected. 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 fact that the condition was recognized by the judge is evident, for the judge specifically alluded to Elam's desire for the death penalty when denying the motion to withdraw the pleas:

> Judge Hutcheson: - As far as the public defender, Ray Cass' motion to withdraw the plea, the pleas entered on May 11, '92, that is denied. **It's noted Mr. Elam, of course, does not join in that, he doesn't want his pleas withdrawn,** ***so they are denied.***

(R258) (emphasis added).

Another consideration impacts upon the validity of these pleas, in that they are not only the product of coercion, the pleas are also expressly conditioned upon the requirement that Elam receive the death penalty. This is an illegal condition that attached when the trial court asked Elam whether he wished to join in defense counsel's motion to withdraw the coerced pleas. (R258). The State asserts that the interests of justice require that Elam's guilty pleas be binding. (AB at 30). The undersigned disagrees and submits that the interests of justice demand that the guilty pleas be categorically rejected because they are suspect and otherwise premised on an illegal and immoral condition - that Elam will receive the death penalty irrespective of the legal basis for that sanction and/or the validity of the procedure by which it was imposed. The record conclusively shows that the guilty pleas were

conditioned upon a death sentence irrespective of whether Elam committed first-degree murder, whether there were valid statutory aggravating factors and/or whether there are in fact valid mitigating considerations which render imposition of the death penalty disproportionate as a matter of law. Such a plea is illegal.

The reasoning contained in ***Forbert v. State***, 437 So.2d 1079, 1081 (Fla. 1983) is instructive. There, this Court stated, "It is a well-established principle of law that a defendant should be allowed to withdraw a plea of guilty where the plea was based upon a misunderstanding or misapprehension of facts[4] considered by the defendant in making the plea." Elam's guilty pleas must be rejected because they likewise are based on Elam's understanding that he will receive the death penalty irrespective of valid mitigation or the fact that he claims to be innocent of first-degree murder. ***Costello v. State***, 260 So.2d 198, 201 (Fla. 1972); ***Thompson v. State***, 351 So.2d 701 (Fla. 1977); ***Surace v. State***, 351 So.2d 702 (Fla. 1977).

The undersigned submits that the particular circumstances of this case require rejection of the guilty pleas. The record shows that the pleas were entered immediately after Elam's fiancee was arrested on conspiracy to commit first-degree murder charges. Elam's sudden, impetuous request for a **death** sentence occurred simultaneously with his counsel's announcement of the terms of the

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[4] The misunderstanding of fact in ***Forbert*** was that an illegal sentence would be imposed.

negotiated plea whereby Elam was to have received a **life** sentence. Elam's belated explanation of why the guilty pleas were entered and why he requested imposition of the death penalty constitute good cause to reject the plea. Surely, these undisputed facts generate doubt as to whether Elam "intelligently" and voluntarily entered the guilty pleas in return for a death sentence following full advice of counsel.

The focus should not be myopically focused on whether Elam's explanation was under oath, but instead on the undisputed circumstances that surround the pleas, as amply demonstrated by the record. These guilty pleas were negotiated whereby Elam would receive a life sentence. When the pleas were tendered and Elam surprisingly asked for the death penalty, the prosecutor realized that Elam's devotion to Ms. Dawson and his child were probably influencing Elam's actions. (R328). Consider the prosecutor's statements:

> (Prosecutor): . . . I cannot tell the Court the defendant's reasoning for this negotiation. I can only tell the Court that Mr. Elam **did express a concern to me for a lady named Susan Dawson, who is the mother of his child.** In my discussion with Mr. Elam, I advised him that Miss Dawson's predicament and case should not be anything that he takes into account. I have made him no promises as to how her case will be handled. I have told him that if he wishes to enter a plea in this case that the only way the State of Florida would, in good faith, recommend this plea to the Court would be that he come before the Court and acknowledge his guilt as to the offenses for which he is charged. And that Miss Dawson would have to suffer whatever penalties the Court saw fit should she enter a plea or be

> convicted of the charges now pending against her.
>
> What I have been trying to do, Judge, is make sure Mr. Elam understands that he is under no threat, that there are no promises made on his behalf, that there is no coercion towards him or Miss Dawson or his infant child in any way by the State of Florida. I would like it to be very clear for the record that Mr. Elam understands that by entering his plea here that will have no effect on the State's decision making process as to what we will do in proceeding against Miss Dawson for any crimes we feel she has committed against the State of Florida.

(R327-328).

It blinks reality to find that such statements foreclose the possibility that Elam truly believed that the prosecutor had implied, though of course not "promised," that Ms. Dawson would benefit if Elam pleaded guilty. If anything, the prosecutor's statements establish that Elam was under great duress when the pleas were entered. It is important to remember that Elam was present when this same prosecutor retaliated against Ms. Dawson for informing the trial judge that she was being harassed by this very prosecutor. (Appendices A & B). The logical conclusion to be drawn from what occurred at the hearing set forth in Appendix A was that, if you play along with this prosecutor, you get a break. If you brace him, he will retaliate. Certainly, the prosecutor's avowed concern for the welfare of Ms. Dawson and the child ring hollow when his statement (R268), is juxtaposed against his actions of asking for a bond immediately after Ms. Dawson complained of his threats and actions.

Seeing that, Elam understandably would not contradict the prosecutor's statements that no "promises" existed because to do so would cause more retaliation by this same prosecutor against Ms. Dawson and the child. Further, the duress Elam was feeling was not based on direct promises, but instead on subtle inferences made by the prosecutor that Ms. Dawson's situation could only be helped by Elam pleading guilty:

> (Elam): I heard part of the conversation, and I heard him say that Mr. Cass promised. I never said when I read that that Mr. Damore promised anything. In regards to Mr. Damore saying about Susan Dawson, my plea regarding Susan Dawson.
>
> (Court): Yes.
>
> (Elam): I didn't say Mr. Damore promised. I said he implied that if I pled guilty, such and such would happen. He never promised. He made no promises at all. Mr. Cass agreed that there were no promises made, just as before. But the imply (sic) was there, as far as I was concerned.

(R252).

When the pleas were accepted, only a perfunctory inquiry was made by the court as to whether Mr. Elam believed that the only way his family could benefit in their situation was if he pled guilty to first degree murder. (R346). Later, when Elam revealed that, based on the inferences made by the prosecutor, the only way Elam's family could be helped was if he pled guilty, the court conducted no inquiry whatsoever as to whether the pleas were the result of duress for his family. The duress was so evident that defense counsel moved to withdraw the pleas. The duress was still

there when the court asked Elam if he wished to join in the motion to withdraw the pleas.

It is respectfully submitted that the reasoning set forth in ***United States v. Marquez***, 909 F.2d 738 (2nd Cir. 1990) is instructive. There, the court reviewed federal decisions dealing with guilty pleas that were entered based on promises of leniency to a third party and concluded, "the inclusion of a third-party beneficiary in a plea bargain is simply one factor for a district court of weigh in making the overall determination whether the plea is voluntarily entered." ***Marquez***, 909 F.2d at 742. In this case, the trial court failed to consider the import of the inferences perceived by Elam, whether they existed or not, that Ms. Dawson would receive lenient treatment if he immediately pled guilty to first degree murder.

In ***United States v. Daniels***, 821 F.2d 76 (1st Cir. 1987), a defendant was allowed to withdraw a guilty plea because the trial judge was unaware when determining whether the plea was "voluntary" that the defendant believed that his brother and brother-in-law would receive lenient treatment if he pled guilty. The government argued on appeal that no "promise" had been made to the defendant, and the court explained that whether a "promise" was made or not is irrelevant - the defendant's belief that leniency would result if he pleads is a material factor that must be considered by the trial court in determining the voluntariness of the plea. The court noted that a belated hearing to determine the voluntariness of a plea is wholly unsatisfactory. ***Daniels***, 821 F.2d at 80-81.

The fact that there were no **"promises"** that Ms. Dawson would receive more lenient treatment if Elam pled guilty does not diminish the fact that Elam was unduly and unfairly motivated by that consideration. When the motivation for entering the plea was announced and the court entertained defense counsel's motion to withdraw the plea, made immediately when Elam revealed that he was entering the plea based on his belief that it would satisfy the prosecutor's unspoken and disavowed demand that he do so or the harassment of Ms. Dawson would continue, it is clear that Elam was being influenced to enter the pleas out of hope that he could help Ms. Dawson and his child. See ***Bordenkircher v. Hayes***, 434 U.S. 357, 364, n. 8 (1978) (prosecutor's offer of leniency to a third party "might pose a greater danger of inducing a false guilty plea" than offer of leniency to defendant); ***United States v. Tursi***, 576 F.2d 396, 398 (1st Cir.1978) (seeing in an offer of leniency to a third party a greater danger of coercion that requires the district court to take "special care . . . to ascertain the voluntariness of the guilty plea").

When these guilty pleas were first accepted by the trial court, only a perfunctory inquiry into this area was undertaken. The fact that no affirmative promises were made is not dispositive of whether Elam believed, based on what had transpired in court and in the discussions he had with the prosecutor and defense attorney, that Ms. Dawson would benefit if he pled guilty and asked for the death penalty. When, before sentencing, Elam notified defense counsel and the court of that belief, the court should immediately

have conducted a thorough inquiry to satisfy itself as to the voluntariness of the guilty plea based on that factor. Instead, the trial judge summarily disregarded the duress under which Elam was acting and expressly conditioned the guilty plea upon reception of the death penalty.

The integrity of these guilty pleas is specious. Since the state made no promised, it cannot be prejudiced by allowing the pleas to be withdrawn and having a trial on the merits, which is favored anyway. See ***Riddle v. State***, 212 So.2d 122, 124 (Fla. 2d DCA 1968) ("We are again affirming the proposition that the law inclines definitely to trial on the merits and that the ends of justice will be subserved by allowing a plea of not guilty to be entered in the place of a guilty plea."). Because the pleas are conditioned on an unlawful premise and because a reasonable basis exists to show that Elam's pleas are otherwise involuntary and the product of misunderstanding, duress and coercion, the pleas should be rejected and a trial on the merits required.

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 State contends that the holdings of ***Koon v. Dugger***, 18 FLW S201 (Fla. March 25, 1993) and ***Durocher v. State***, 604 So.2d 810 (Fla. 1992) are to be applied prospectively only. (AB at 42). The undersigned respectfully disagrees. The law is very clear that the same result that occurred in ***Koon*** and ***Durocher*** must occur here because the same requests to proffer mitigation were incorrectly refused by the sentencer. **See** ***State v. Safford***, 484 So.2d 1244, 1245 (Fla. 1986) ("pipeline" cases require same ruling on same objections, **even where decision states holding *not* to be applied retroactively**); ***Cantor v. Davis***, 489 So.2d 18 (Fla. 1986); ***State v. Castillo***, 486 So.2d 565 (Fla. 1986); ***Wheeler v. State***, 344 So.2d 244 (Fla. 1977).

By sustaining State objections and refusing to permit Elam's defense counsel to proffer the mitigating evidence that had already been discovered and which would have been presented had the continuance been granted, the trial judge denied due process and prevented meaningful appellate review in violation of Article I, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Further, by denying Elam's counsel the ability to place in the record mitigating considerations which were discovered to exist and which could have been presented had the continuance been provided,

this death sentence was arbitrarily skewed in favor of imposition of the death penalty through distortion of the weighing process contrary to the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. **See** ***Stringer v. Black***, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

In ***State v. Dixon***, 283 So.2d 1, 9, (Fla. 1973), this Court guaranteed that the death penalty would no longer be imposed arbitrarily as a result of inflamed passions/emotions. It is as arbitrary to allow a defendant's inflamed emotions to cause imposition of the death penalty as it is for the inflamed passions of a juror or sentencer to cause imposition of a death penalty. The penalty phase that occurred here, where only aggravation was presented and the death penalty was not only unopposed but asked for by Elam, is tantamount to State assisted suicide and a departure from the premise that strict procedural safeguards attend imposition of death penalty to assure its fairness.

Elam's death sentence must be reversed and the matter remanded for a new penalty phase with presentation of all relevant areas of mitigation. ***Preston v. State***, 607 So.2d 404, 407-08 (Fla. 1992). Upon remand, Elam should be permitted to withdraw his guilty pleas pursuant to the argument set forth in Point I.

POINT III

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

The State asserts that Elam should have repeatedly objected every time hearsay testimony was presented, (AB at 45-46), but does not contend that the trial court's rulings would have been any different if he had. Instead, it is patent that every hearsay objection would have been overruled by the court based on the overriding premise, advanced by the State, that hearsay testimony is admissible during the penalty phase. Defense counsel timely but unsuccessfully objected when hearsay testimony concerning the theft of money from Easyriders' account was presented by officer Youill. (R106-107). Counsel again timely but unsuccessfully objected when officer Ewanik related hearsay testimony concerning what he overheard Susan Dawson allegedly stating to the police. (R142). Those were classic instances of pure hearsay testimony, yet the objections were overruled based on the State's assertions that the statute permitted hearsay testimony in penalty phase proceedings. Had other objections been made, it is certain that they would have suffered the same incorrect disposition.

The State urges this Court to find that Elam had a fair opportunity to confront the hearsay testimony that was presented against him because **two** of the alleged declarants (Frank Fell and Susan Dawson) were present somewhere in the courthouse and could have been called as witnesses and questioned by Elam as part of his case. (AB at 47). It is respectfully submitted that, because timely

hearsay objections were made concerning the hearsay statements of these witnesses who the State contends were in fact present at the time, the hearsay objections should have been sustained and the State compelled to present these declarants rather than having police officers testify as to their perception of what Frank Fell and Susan Dawson allegedly stated. Significantly, the State advances no reason why it could not call these people as witnesses, and instead places the burden on Elam to call them as his witnesses for impeachment. Elam respectfully maintains that use of such testimony violates the rights to confrontation of witnesses and due process contained in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution.

Insofar as the sentencer's use of material contained in the court file to impose the death sentence, the State claims that the defendant cannot be surprised by the use of such material because, "Appellant had access to the court file at any time." (AB at 47). While that is true, Appellant had neither notice that the sentencer would refer to the material nor an opportunity to address its use. The absence of such notice violated Article I, Section 9, 16, and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The matter must be remanded. Upon remand, Elam should be permitted to withdraw his guilty pleas pursuant to the argument set forth in Point I.

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.

The State and the defense agree that the trial court had promised to grant a continuance if one was requested by defense counsel, but a basic disagreement exists as to whether that promise was predicated upon Elam's position changing and whether, if the promise was so predicated, Elam's position in fact changed after the promise was made. The State argues that, "Defense counsel **merely** decided to ignore his client, who was not present to enforce his wishes." (AB at 51) (emphasis added). The record shows that counsel did not merely disregard Elam's wishes, but instead sought mightily to fully represent a client who was equivocal on whether he wished to be represented.

The matter presented an ethical paradox, where the client was saying that he wished to be represented by an appointed defense attorney, but did not want any representation to occur. Elam's statement that he had "no idea" whether he wished to be represented by the public defender (R51) was his last statement on the matter and it is antagonistic to the conclusion that a knowing, voluntary and intelligent waiver of meaningful and adequate representation by counsel was being made.

Notwithstanding Elam's vacillation, the State claims that valid waivers were made the day of the penalty phase, and therefore the trial court properly denied defense counsel's request for a

continuance. (AB at 51). The State fails to appreciate the basic functioning between attorney and client and otherwise overlooks that, if Elam wished representation by counsel and the court was requiring counsel to "represent" Elam, Elam was bound by counsel's procedural decision as to whether a continuance was necessary to provide Elam with the meaningful assistance of counsel to which he was constitutionally entitled and which counsel was ethically obligated to provide. See ***Dickey v. McNeal***, 445 So.2d 692, 695-96 (Fla. 5th DCA 1984).

Since Elam insisted on being represented by counsel, he was required to abide with counsel's decision as to whether a continuance was necessary to provide effective assistance of counsel, **even though Elam did not want the matter continued.** **See** ***Jackson v. State***, 448 So.2d 577 (Fla. 5th DCA 1984). Contrary to the State's assertion, that decision was not the client's to make. It is clear that counsel's motion for continuance was legitimate, made necessary by the unusual progression of the case, where advice was given Elam to enter a plea of guilty to first-degree murder in order to avoid a death sentence, only to have the client suddenly ask for a death sentence and thereby rejuvenate constitutional and factual issues that were otherwise obviated by imposition of a life sentence. **See**, ***State v. Kaufman***, 421 So.2d 776, 777-78 (Fla. 5th DCA 1982) (actions showing preparedness for trial speak louder than words). Simply said, it was an abuse of discretion for the trial judge to promise a continuance and then renege when a continuance was requested.

In light of everything that transpired and the court's unwillingness to relieve counsel of his duty to fully represent the client, counsel decided that Elam's best interests demanded full and fair representation, and that the promise for a continuance would have to be called upon. Meaningful representation by an attorney is not accomplished where the attorney simply sits in a chair and does nothing in opposition of a death sentence. It is respectfully pointed out that neither the State, the trial court nor this Court are privy to the conversations between defense counsel and the defendant. The client's sudden, emotional and unexpected request for a death sentence and accompanying waivers of everything in sight were not necessarily the product of intelligent choice, notwithstanding the inquiries made by the trial judge, and until satisfied that a rational and voluntary decision was being made by his client and that the decision would not be regretted upon due reflection, counsel was obligated to postpone the proceedings and/or fully represent his client as his professional judgment and training dictated.

The statements and requests made in open court following Elam's guilty plea are not the complete story - but that is all the State wants considered. Defense counsel was in the best position to determine whether his client's waivers were being freely and voluntarily made and whether his ethical responsibility to protect the rights and best interests of his client required that he seek a continuance and/or do his absolute best with what was available, even if that appeared to be at odds with orders from his client.

Here, the court should have either allowed counsel to withdraw, ordered counsel to do nothing but sit at the table since he was not there as an attorney representing a client but instead as a token presence to pave the way for imposition of a valid death sentence, or granted the promised continuance and allowed counsel to represent his client to the best of his ability.

Certainly, granting or denying a continuance is a matter committed to the sound discretion of a trial judge. It is an abuse of discretion for a trial judge to promise that a continuance will be granted if asked for and to then deny that request when it is legitimately made. Based on the foregoing argument and authority, the death sentence must be vacated and the matter remanded for a new penalty phase. Upon remand, Elam should be permitted to withdraw his guilty pleas pursuant to the argument set forth in Point I.

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 State contends that, because it is "readily apparent from the order" that the trial court found Section 921.141(5)(h) to apply, (AB at 52), Elam exalts form over substance by objecting to the sentencer's failure to either specifically refer to that aggravating factor or to expressly state that Beard's murder was **especially** heinous, atrocious or cruel. What is "readily apparent" to the undersigned is that the written order of the sentencer omits the crucial modifier that distinguishes when Section 921.141(5)(h), Florida Statutes is to be applied under the facts of a particular first-degree murder and otherwise fails to refer with particularity to any statutory aggravating factor(s).

Supposedly, the statutorily mandated written findings convey what was considered by the sentencer when the determination was made to impose the death sentence. Presumably, the language setting forth those findings and considerations is the very best evidence of what was considered by the sentencer. Hopefully, what is stated can be relied upon as being complete and accurate. ***See State v. Dixon***, 283 So.2d 1, 8 (Fla. 1973) ("Discrimination and capriciousness cannot stand where reason is required, and [the statutory requirement of written findings] is an important element added for the protection of the defendant."). Periodically, this Court stresses the importance of clear, precise and accurate

sentencing orders in the context of imposition of the death penalty so that meaningful and intelligent appellate review can be made with confidence in the validity of the proceedings:

> 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); ***See Mann v. State***, 420 So.2d 625, 628 (Fla. 1982) ("The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what was found. . . .").

Facially, the instant sentencing order does not establish that the sentencer applied the "HAC" factor set forth in Section 921.141(5)(h) in a constitutionally permissible manner. Under the "it's obvious" approach advanced by the State, generic language that repeats various portions of any of the factors set forth in Section 921.141(5) would be sufficient for this Court to rule, with confidence, that the sentencer appropriately and/or legally applied that statutory aggravating factor under the facts of a given case. The "close enough" approach provides the reviewing court with, at times, convenient latitude in any given case, but that very latitude compromises the constitutional integrity of the entire death penalty scheme, especially with this pesky factor.

As argued in Point XI, the factor set forth as Section 921.141(5)(h), Florida Statutes is unconstitutionally vague, in that it violates the Eighth and Fourteenth Amendments by enabling the death penalty to be imposed arbitrarily and capriciously, without sufficient guidance to the juries that issue the sentencing recommendation and/or the judge who imposes sentence. Application of this factor has been expressly approved and expressly rejected by this Court based on identical considerations. **Compare** ***Simmons v. State***, 419 So.2d 316, 318-19 (Fla. 1982) (finding that victim was murdered in his own home "offers no support" for HAC finding) with ***Troedel v. State***, 462 So.2d 392 (Fla. 1985) (HAC factor properly applied because fact that victim was in his home when shot sets the murder apart from the norm).

Recently, the initial, court-supplied definition of this factor has been disapproved by the United States Supreme Court, **See** ***Espinosa v. Florida***, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1993), and this Court has only recently clarified that this factor is properly applied only when a murder was "*both* conscienceless or pitiless ***and*** unnecessarily torturous to the victim." ***Richardson v. State***, 604 So.2d 1107, 1109 (Fla. 1992). As written, the reasoning of this sentencer fails to demonstrate that the HAC factor was properly applied. The death sentence must be vacated and the matter remanded. Upon remand, Elam should be permitted to withdraw his guilty pleas pursuant to the argument set forth in Point I.

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.

As below, the State here argues that a sentencer cannot consider as mitigation the absence or extent of premeditation following a conviction for first-degree murder because to do so runs afoul of decisions holding that "lingering doubt" of guilt is not a proper mitigating consideration. (AB at 56-57). The State misunderstands. Worse, the State convinced the sentencer not to consider evidence and/or argument that Beard's first-degree murder was not the product of extended premeditation. The death penalty was thus imposed in an arbitrary and capricious manner in violation of rights due process and effective assistance of counsel. Article I, Section 9, 16, 17 & 22, Florida Constitution; United States Constitution, Amend. V, VI, VIII, XIV.

The law is clear. "[T]he state does not have to charge felony murder in the indictment but may prosecute the charge of first-degree murder under a theory of felony murder when the indictment charges premeditated murder." ***O'Callaghen v. State***, 429 So.2d 691, 695 (Fla. 1983). Elam's guilty plea to "first-degree murder" did not necessarily foreclose guilt of first-degree **felony** murder. Thus, ignoring evidence and precluding argument that Beard may have been killed in the absence of any premeditation was an arbitrary and unconstitutional restriction because the absence and/or duration of premeditation involved in a first-degree murder

has expressly been recognized as having mitigating worth. **See**, ***Rembert v. State***, 445 So.2d 337, 340 (Fla. 1984) ("This is a classic example of felony murder and very little, if any, evidence of premeditation exists.").

A sentencer may not refuse to consider valid mitigating evidence or a consideration that has, in the past, been recognized as having mitigating worth. **See**, ***Campbell v. State***, 571 So.2d 415, 419 (Fla. 1990) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . ."), quoting ***Eddings v. Oklahoma***, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982). The refusal of the sentencer to consider the fact that Beard's murder may not have been premeditated violated this mandate. Accordingly, because the error cannot be said beyond a reasonable doubt not to have affected the sentencer's determination to impose the death sentence, the sentence must be vacated and the matter remanded for a new penalty phase. Upon remand, Elam should be permitted to withdraw his guilty pleas pursuant to the argument set forth in Point I.

POINT VII

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

Elam's cell-mate, Jeff Ford, did **not** testify at the penalty phase hearing. Instead, "Big Mike," the undercover state attorney investigator, testified as follows:

> Q: (Prosecutor) Did Mr. Ford tell you what he had been told by Mr. Elam with regard to why Carl Beard was killed?
>
> A: (Investigator Best) Yes, sir.
>
> Q: What was that?
>
> A: He indicated that Mr. Elam had told him that on Monday the 16th when he was approached by Mr. Beard and that he had been found out, he knew at that point in time that Mr. Beard had to be done away with to avoid his being found out.
>
> Q: He indicated that he killed Carl Beard so he could not be arrested for the theft of the money?
>
> A: That's correct.

(R135).

The State argues that this statutory aggravating factor was proved because, "Appellant told his cell-mate that he 'knew at that point in time that Mr. Beard had to be done away with to avoid being fount out." (AB at 59). In reply, Elam maintains that the State is relying on hearsay that otherwise fails to establish beyond a reasonable doubt that Elam murdered Beard primarily or solely to eliminate him as a witness and not as a result of a heated confrontation based on false accusations.

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 State asserts that, because Elam did not object to use of the "conspiracy" convictions as being valid convictions for application of the Section 921.141(5)(e) aggravating factor, the impropriety of their use in sentencing Elam has been waived. (AB at 61). In reply, Elam submits the error is a matter of law and of such fundamental proportions that it can properly be raised on appeal in the absence of objection below. See *State v. Whitfield*, 487 So.2d 1045 (Fla. 1986).

The State relies solely on *Johnston v. State*, 497 So.2d 863, 871 (Fla. 1986) to argue that application of this factor is proper based on the offense of solicitation. (AB at 62). There, this Court held that a Kansas offense of "terroristic threat" is a felony "involving the use or threat of violence to the person." *Johnston*, 497 So.2d at 871. That application is consistent with the decisions of this Court which unequivocally hold that Section 921.141(5)(b), Florida Statutes applies only "to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." *Lewis v. State*, 398 So.2d 432, 438 (Fla. 1981) (emphasis added); **See also**, *Ford v. State*, 374 So.2d 496 (Fla. 1979), cert. denied, 445 U.S. 972 (1980). The *Johnston* decision does not reflect the facts underlying the "terroristic threat" conviction, but implicit in the very charge is the notion that a threat was communicated to someone who thus became a human victim.

There was no human victim whatsoever involved in the instant solicitation convictions, especially where an undercover state investigator was the person "solicited" and there never was any contact between the defendant or one of his accomplices and the intended human victim(s). There was never a threat to Frank Fell or Mary Maibauer, the supposed victims of the solicitation, because the communication was made to a state agent who had absolutely no intention of doing anything other than obtain enough evidence to arrest Elam and Susan Dawson on solicitation charges.

Use of this statutory aggravating factor in this manner is inconsistent with the prior application approved by this Court, and applying it to these facts constitutes arbitrary and capricious application of a vague statutory aggravating factor which fails to adequately channel the discretion of the sentencer in imposition of a death sentence and/or this Court is reviewing the imposition of death sentences in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Because Section 921.141(5)(b), Florida Statutes was erroneously weighed in favor of imposition of the death sentence and reasonably affected the sentencer's decision to impose a death sentence, that sentence must be vacated and the matter remanded for a new penalty phase. Further, pursuant to the argument set forth in Point I, the trial court should be instructed to permit Elam to withdraw his pleas.

POINT IX

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

Appellant relies on the argument and authority contained in the Initial Brief of Appellant in reference to this Point on appeal, except to point out that the bulk of factual assertions made by the State are entirely hearsay.

POINT X

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

The State contends that the death penalty is proportionate here because, "The four aggravating factors found in this case are supported by competent substantial evidence and far outweigh the nonstatutory mitigating evidence *presented*." (AB at 69) (emphasis added). In reply, if he could, Elam would and apparently otherwise must[5] draw this Court's attention to all of the proper mitigating considerations that exist and attempt to demonstrate why imposition of the death penalty is unwarranted in this particular case. The undersigned, however, has been denied that ability by the trial judge who sustained the State's objections and forbade proffer(s) of those considerations from being placed in the record. This death penalty should be vacated and the matter remanded with directions that the Court allow Elam to withdraw his pleas in accordance with the argument set forth in Point I.

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[5] **See**, *Klokoc v. State*, 589 So.2d 219, 221-222 (Fla. 1992) ("counsel for appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence.")

POINT XI

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

Elam relies on the argument and authority set forth in the Initial Brief on Appeal in reference to this Point.

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
Florida Bar # 0353973
112-A Orange Avenue
Daytona Beach, FL 32114
(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 5th day of May, 1993.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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

APPENDIX A

TRANSCRIPT, HEARING OF FEBRUARY 24, 1992
(R263-283)