IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PETER L NILES, JR.,

Respondent.
_____/

Case No. 81,145
[TFB Case No. 92-31,975 (07C)]

THE FLORIDA BAR'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF CROSS-PETITION FOR REVIEW

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The transcript of the final hearing held on December 28, 1993, shall be referred to as "T", followed by the cited page number.

The Report of Referee dated January 6, 1994, will be referred to as "ROR", followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____)

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

Please note that the "A Current Affair" reporter, Mr. Watkiss, was erroneously referred to as Mr. Watkins in certain documents, T-77.

STATEMENT OF THE CASE

On December 3, 1992, the Seventh Judicial Circuit Grievance Committee "C" found probable cause that the respondent had engaged in violations of the Rules Regulating The Florida Bar in regard to the above referenced case. The bar filed a complaint with the Supreme Court of Florida on January 26, 1993. The Honorable Robert M. Foster, Circuit Judge, Fourth Judicial Circuit, Florida, was assigned as the referee in the case and a final hearing was held on December 28, 1993. It should be noted that at or about the same time period, the bar filed a complaint with the Supreme Court of Florida in a contemporaneous case against the respondent, Case Number 81,060, The Florida Bar Case Number 93-30,115 (07C), involving the complaint of Clarence Driggers. The bar chose not to proceed in Case Number 81,060 and the Report of Referee reflects this, ROR-A-1. Therefore, the present brief concerns only Case Number 81,145, The Florida Bar Case Number 93-31,975 (07C).

On January 6, 1994, the referee rendered his report to the Supreme Court of Florida and to counsel for complainant and respondent. The referee found that the respondent had violated the rules as charged in each count of the bar's complaint, and further recommended that the respondent be suspended from the practice of law for one year, with proof of rehabilitation required prior to reinstatement, and that he be taxed with The Florida Bar's costs, ROR-A-8. The respondent filed his Petition For Review in this Court on March 7, 1994, and The Florida Bar

filed its Cross-Petition For Review on March 18, 1994. This matter is now before this Court for review pursuant to R. Regulating Fla. Bar 3-7.7.

STATEMENT OF THE FACTS

COUNT I

Ms. Deidre Hunt was charged in 1989 with two counts of first degree murder and related charges in Volusia County, Florida. The respondent was appointed as a special public defender to represent her in the highly publicized case. Ms. Hunt pled guilty to two counts of first degree murder and she received the death sentence, Hunt v. State, 613 So. 2d 893 (Fla. 1992), Bar Ex. 7. On September 13, 1990, Ms. Hunt was placed in the Broward Correctional Institution to begin her sentence, T-29.

Pursuant to Florida Administrative Code Ch. 33-5, Bar Ex. 10, prison access to Ms. Hunt was strictly limited. She could not give press interviews or have any contact with outsiders, other than her attorney, until she had been processed and had undergone a period of orientation of approximately two to five weeks, T-30-31, 50-52. On September 21, 1990, the respondent contacted Correctional Superintendent Marta Villacorta of Broward Correctional Institution and requested permission for his access to Ms. Hunt. He advised her, as Ms. Hunt's counsel, that he had made arrangements with the prosecutor and the judge to videotape Ms. Hunt at Broward Correctional Institution regarding testimony concerning her co-defendant. The respondent indicated he would bring a law clerk and a cameraman to assist with the videotaping. Superintendent Villacorta approved the respondent's request in reliance upon the respondent's representation that a permissible attorney-client visit would occur on September 26, 1990, while

Ms. Hunt was still undergoing processing, T-50-56, Bar Exs. 11-13.

On September 26, 1990, the respondent arrived at Broward Correctional Institution with Mr. Watkiss, a television reporter for the entertainment/news program "A Current Affair" as well as a cameraman. Superintendent Villacorta was not present at Broward Correctional Institution at that time, Bar Exs. 13-15, T-56-62. Prior to the interview Deidre Hunt had no knowledge that a media interview was planned. Ms. Hunt had not authorized such an interview, Bar Ex. 1. Broward Correctional Institution rules require that all inmates must execute a waiver before undergoing a media interview. No such waiver was obtained from Ms. Hunt since no media interview was contemplated by Superintendent Villacorta, T-63-64. The "A Current Affair" interview conducted on September 26, 1990 was entitled "Deadly Deidre". The interview includes admissions from Deidre Hunt and excerpts from a videotape which showed her shooting and killing a man, Bar Ex. 9. The "A Current Affair" interview was potentially damaging evidence to Deidre Hunt, particularly since a request for appellate review of her death sentence had been made in Ms. Hunt's case, Bar Ex. 7, ROR-A-5-6. The respondent's actions caused a breach of security at the prison, T-64, ROR-A-5-6.

The respondent received a $5,000.00 fee from "A Current Affair" as a result of the videotaped interview, T-93. The respondent misrepresented to a news reporter, Kathy Kelly of the Daytona News Journal, that he had not received any fees for

assisting in the "A Current Affair" interview and that his purpose in securing the interview was to force Ms. Hunt into testifying against her co-defendant, T-89, Bar Ex. 16. The Daytona News Journal reporter had attempted to interview Ms. Hunt during the orientation period and had been prohibited due to the rules, T-88. The respondent further misrepresented to Deidre Hunt and her mother, Carol Hunt, that he had not received any fees from the "A Current Affair" interview, T-30,42.

The respondent entered into the deal with "A Current Affair" several months prior to his client's plea to two counts of capitol murder, T-112. He never advised her that he had entered into a business arrangement with the tabloid media through which he could profit if her interview was aired. Ms. Hunt relied on the respondent's legal guidance in choosing to waive her right to a trial, a penalty-phase jury, and to face the electric chair, Bar Ex. 7.

Prior to Ms. Hunt's sentencing, the respondent had sought to assist the London Times in gaining an interview of his client while she was still in the jail in Volusia County. Ms. Hunt's mother was aware of this because her daughter had expressed her concerns that the respondent was seeking her participation in a sensationalist tabloid type news report, T-26-28. Ultimately, no interview with the London Times took place because the jail in Volusia County denied access to the media, T-28.

Subsequent to the broadcast of the Deidre Hunt interview from Broward Correctional Institution by "A Current Affair",

questions arose among Volusia County officials as to whether the respondent, as a special public defender appointed by the state, was entitled to privately profit from the matter by keeping the $5,000.00 fee he had received from "A Current Affair". As a result, on December 14, 1990, the respondent issued a $5,000.00 check from his attorney-at-law account to the County of Volusia, Bar Ex. 2. He forwarded the check to the assistant state attorney in Volusia County for disposition. The respondent's check was deposited approximately three months later on or about March 26, 1991, and was thereafter returned by the bank for insufficient funds. The respondent subsequently issued a cashier's check in the amount of $5,000.00 payable to the County of Volusia, Bar Exs. 3, 4, 5, 6, 7 and 8, ROR-A-7-8.

SUMMARY OF THE ARGUMENT

A referee's findings of fact in a bar disciplinary case must be upheld unless clearly erroneous or without evidentiary support. The respondent has failed to prove that the referee's findings of fact are clearly erroneous or lacking in evidence. Accordingly, the referee's findings and guilty recommendations must be upheld.

The evidence establishes that the respondent engaged in a fraudulent course of conduct in connection with misrepresentations to prison officials, his client, and that he did so with purely selfish motives. Further, the respondent caused a check drawn on his attorney office account to be returned to the county of Volusia due to insufficient funds in his account when an official inquiry took place as to the above conduct. The referee followed the bar's recommendation and recommended to this court that the respondent be suspended for one year based upon this egregious conduct.

While the respondent now seeks to overturn the referee's findings of fact and recommendations as to discipline, the bar now also seeks review. Pursuant to the respondent's actions in seeking review of the referee's findings, the Board of Governors of The Florida Bar reviewed the bar's position in this case. The board voted to seek the enhanced discipline of disbarment based upon the respondent's egregious conduct in this case.

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION THAT THE RESPONDENT BE FOUND GUILTY OF MISCONDUCT IN THIS CASE ARE FULLY SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND THEREFORE SHOULD BE UPHELD.

The respondent argues that none of the referee's findings as to the respondent's rule violations are supported by the record and should therefore be overturned upon review. In fact, the bar's case has been proven by clear and convincing evidence which was cited by the referee in his report. The respondent's egregious actions in misrepresenting the purpose of his visit to a correctional institution resulting in a breach of prison security, and an unauthorized sensationalist tabloid type interview in order to exploit his client for his own financial gain, warrant these guilty findings.

The evidence indicates that the respondent acted as a state appointed special public defender in representing Deidre Hunt, a woman charged with two counts of first degree murder and related charges. The respondent's representation of Ms. Hunt led to her plea to two counts of first degree murder, two counts of attempted first degree murder, two counts of solicitation to commit first degree murder, one count of conspiracy to commit first degree murder, and one count of burglary of a dwelling while armed. Additionally, Ms. Hunt waived her right to a penalty-phase jury despite the fact that the death penalty sentence was an acknowledged option to the court, Hunt v. State,

613 So. 2d 893 (Fla. 1992), at 894-896, Bar Ex. 7.

Prior to Ms. Hunt's sentencing, the respondent sought to assist the London Times in gaining an interview of his client while she was still in the jail in Volusia County. Ms. Hunt's mother was aware of this because her daughter had expressed her concerns that the respondent was seeking her participation in a sensationalist tabloid type news report, T-26-28. Ultimately, no interview with the London Times took place because the jail in Volusia County denied access to the media, T-28.

After being sentenced to death, Ms. Hunt was remanded to Broward Correctional Institution (hereinafter BCI). Pursuant to Florida Administrative Code Ch. 33-5 as well as written BCI operating procedures, new inmates on death commitments are treated pursuant to strict security procedures. Specifically, they have no contact with outsiders for two to five weeks, T-51, Bar Exs. 10,11. Their attorney is the only exception to this rule presumably since restriction on the attorney-client relationship is prohibited by constitutional mandates, T-51, ROR-A-4.

Obviously, the respondent was aware that access to Ms. Hunt at BCI was regulated because he had telephone discussions with Marta Villacorta, the Correctional Superintendent, and highest ranking BCI officer, during the period of Ms. Hunt's orientation in regard to his access to his client, T-54, ROR-A-4-5. As a result of his conversation with the Superintendent, the respondent requested and was granted special access for himself,

his law clerk, and a cameraman in order to prepare a video statement of his client for the prosecutor and judge, T-56. As a result of the respondent's representations in this regard, the Superintendent prepared a memo on September 25, 1990, which authorized the prison to give access to the respondent and his associates on September 26, 1990, Bar Ex. 13.

On September 26, 1990, the respondent entered BCI based upon the authorization of the Superintendent's September 25, 1990 memo along with William Watkiss (Watkins) and Dennis Dillon. On the "A Current Affair" interview, Mike Watkiss is identified as the television show's reporter, Bar Ex. 9. The Superintendent was not present at BCI on September 26, 1990. The respondent failed to clarify that these individuals were not the ones authorized by the Superintendent. The log to the prison failed to identify any of these individuals as being with the media and no authorization allowing a media interview is evident, ROR-A-5. Security procedures of BCI were breached by the respondent's trickery since only the minimal security required for attorney-client consultations was present during the media interview, T-64. Further, Ms. Hunt had not signed a media waiver required by BCI prior to allowing a media interview, T-63. The Superintendent had turned down between 20 to 40 other requests for interviews of Ms. Hunt by other media during this orientation time period, T-62. Only the Superintendent could authorize media interviews, T-84.

Ms. Hunt, the respondent's own client, was also subjected to

the respondent's misrepresentation in regard to the media interview. Although Ms. Hunt had been previously advised to expect her statement to be taken for the court, she was advised at the beginning of the interview on September 26, 1990 that she was being taped for "A Current Affair". She had no previous discussions in this regard with the respondent and gave no authorizations for the interview. Further, the respondent told her that he had not received any money from "A Current Affair" and that she could expect no payment because they did not pay for interviews, Bar Ex. 1.

The respondent also made misrepresentations to the public, via an interview with Daytona News reporter Kathy Kelly, in this regard. Ms. Kelly testified, as reflected in her article of December 7, 1990, Bar Ex. 16, the respondent denied receiving payment for arranging the "A Current Affair" interview. Ms. Kelly's article further reflects that an "A Current Affair" reporter told Ms. Kelly: "I just never talk about the way I get interviews...We worked to get that interview for a full year. We made contacts with anyone we could get.", Bar Ex. 16.

The article also reflects that, "He [respondent] said the interview was intended to force Miss Hunt to make good on her promise to testify against Kesta Fotopoulos...", an alleged co-conspirator with Ms. Hunt.

As the referee found, "It further remains that Mr. Niles helped "A Current Affair" gain a media interview to sensationalize "Deadly Deidre", whether or not he

contemporaneously conducted an attorney-client interview for legitimate judicial purpose.", ROR-A-7.

Ultimately, the respondent admitted receiving $5,000.00 from "A Current Affair", payment of which had been contingent upon the airing of the interview, T-93. Thus, the respondent had a motive directly adverse to his client - he would receive the $5,000.00 payment from "A Current Affair" only if his client's situation was truly sensational enough to warrant airing by this tabloid type television program. The respondent was aware of this contingency some five to six months prior to that interview, T-112, well prior to his client's sentencing to death for two counts of first degree murder. His client was unaware of the situation. The conflict presented by this scenario is chilling.

The referee has made his findings of facts in his report of referee. His findings are clear and are based upon a multitude of evidence in the record. He made these findings based upon his assessment of the evidence. As this Court held in The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992), "If findings of the referee are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee." at 459.

In his defense, the respondent blames BCI for failing to identify the media access. The respondent fails to clarify how the low level BCI correctional officers present can be responsible when he had deliberately set the stage for the entrance of a video camera and a reporter, identified as his "law

clerk", and someone to run the camera for his video of his client for the "court" by obtaining a memo from the Superintendent.

The respondent's statement that he was not paid directly for the interview, but rather for a "consulting fee" contingent upon the airing of the interview, is without any reasonable basis. But for the respondent's assistance, the "A Current Affair" interview would have never been obtained so hastily and resulted in such a "scoop". The respondent fails to even begin to recognize the conflict inherent in the situation involving his client. Although the respondent asserts that his client desired such interviews, no evidence supports his contention. Ms. Hunt and her mother state otherwise.

The respondent also asserts that the referee erred in finding him guilty of rule violations in regard to count II, in connection with tendering a check for $5,000.00 to the county as a vague "restitution" for his improper actions in accepting other compensation while a specially appointed public defender as well as in response to the propriety of his actions under the "Son of Sam" statute, F.S. 944.512, Bar Exs. 2, 3, 4, 5, and 6.

It is proven that the respondent's check on his office (nontrust) attorney account was returned by the financial institution for insufficient funds. Although the respondent complains that the check was somehow symbolic only and was not to be cashed without prior notice, the check itself contains no such caveat, Bar Ex. 6, nor does any of the correspondence between the assistant state attorney and the respondent indicate such an

important agreement, Bar Exs. 2, 3, 4, and 5. Even the respondent's letter enclosing the check does not contain such an agreement. Further, such a condition would be of questionable value in view of Uniform Commercial Code requirements.

The respondent's attempt to distinguish this case from precedence is an insufficient basis for a not guilty finding. The fact remains that the respondent handled the state's funds improperly by personally pocketing the "A Current Affair" fee rather than placing the funds properly belonging to the state in his trust account. Due to the respondent's status as a specially appointed public defender, all funds received by him in connection with the representation properly belonged to the state. Thus, the referee's finding that the respondent violated R. Regulating Fla. Bar 4-1.15 as well as R. Regulating Fla. Bar 4-8.4(b) by his actions are fully supported by the record.

ARGUMENT

POINT II

THE RESPONDENT'S CONDUCT WARRANTS DISBARMENT WHERE THE RESPONDENT HAS A SIGNIFICANT DISCIPLINE HISTORY, FAILS TO COMPREHEND THE NATURE OF HIS WRONGDOING AND ENGAGES IN EGREGIOUS BEHAVIOR TOWARDS HIS CLIENT AND THE JUSTICE SYSTEM.

In the closing argument before the referee, the bar argued that nothing less than a one year suspension from The Florida Bar will satisfy the goals of attorney discipline. Upon full review by the Board of Governors of The Florida Bar, the bar now argues that disbarment is the appropriate discipline.

It is noted that this Court has acknowledged that such action by the Board of Governors of The Florida Bar is appropriate.

> ...the Board was fully authorized to recommend the substitution of the penalty of disbarment for suspension. The rule on the subject is quite clear. The referee is charged with determining the fact of misconduct, but his idea of the appropriate punishment is but a recommendation, as indeed is the Board's thought on that feature of the proceedings. Under the rule the responsibility and power ultimately to fix the penalty to be imposed are lodged in this Court. The Florida Bar v. Glover, 60 So. 2d 17 (Fla. 1952) (State ex. rel. Florida Bar).

Under the Florida Standards For Imposing Lawyer Sanctions, Standard 7.1 states, "Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." This

standard is appropriate here. The respondent accepted $5,000.00 for his own private gain in contravention of his duties as a specially appointed public defender. He represented his client while she pled guilty to two counts of first degree murder, waiving her right to a penalty-phase jury. Before the Supreme Court of Florida, who reviewed the sentence imposed against his client, the respondent stated that "his dominant personality may have persuaded Hunt to plead guilty", Hunt v. State, 613 So. 2d 893 (Fla. 1992), at 896. The respondent admitted that he made a deal with "A Current Affair" in March or April of 1990, T-112. Ms. Hunt pled guilty after May of 1990, when the State announced it was ready for trial, supra at 895. The deal was that the respondent was to be paid $5,000.00 only if the interview was aired. This is not a "consultation" fee. This was a deal to get "A Current Affair" access for their interview where access at the Volusia County jail was prevented. A scoop, allowing "A Current Affair" access to Ms. Hunt prior to any other interviews being obtained, added assurance to the respondent that "A Current Affair" would indeed air the interview and that he would be paid, T-110-111.

The respondent's client was unaware of the deal, Bar Ex. 1. The respondent's client was certainly unaware that her attorney, upon whose advice she relied in entering guilty pleas to two counts of capitol murder and foregoing her right to a trial or a penalty-phase jury, had made any deals with the tabloid media involving her case. Such a conflict is addressed by Standard

4.31: "Disbarment is appropriate when a lawyer, without the informed consent of the client(s):

> a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client..."

The State of Florida certainly did not authorize the respondent, as a specially appointed public defender, to accept compensation in this case from the tabloid media. Standard 5.21 provides that disbarment is appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for the lawyer or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

The respondent's conduct was unconscionable. To this day he fails to acknowledge or perceive the slightest ethical problem with his conduct.

The respondent's conduct adversely affected the public perception of lawyers. His conduct was widely reported in the media. His conduct caused the security at a death row institution to be breached.

The respondent's discipline history is egregious. Since his admission to The Florida Bar in 1965, he has received a public reprimand for technical trust account violations, The Florida Bar v. Niles, 542 So. 2d 990 (Fla. 1989); The Florida Bar Case Number 89-31,028 (07A) in which he received a private reprimand in

August, 1989, for improper fees; and a 1992 public reprimand for making improper financial advances to clients, The Florida Bar v. Niles, 598 So. 2d 79 (Fla. 1992). It is well settled that prior disciplinary offenses serve as an aggravating factor in imposing discipline, The Florida Bar v. Adler, 589 So. 2d 899 (Fla. 1991), Florida Standards, 9.22(a). In further aggravation, the respondent had a dishonest or selfish motive of financial greed for his actions, Florida Standards 9.22(b). Rather than an isolated instance of wrongdoing, the respondent's conduct in engaging in this conflict of interest with his client, the state, and using fraud to gain access to the prison demonstrates a pattern of misconduct. This is additional aggravation, 9.22(c). To date, the respondent has failed to acknowledge the wrongful nature of his conduct, further aggravation under 9.22(g). Although the respondent's client is a death row inmate who was charged and pled guilty to heinous crimes, she was in a very vulnerable position of reliance upon her defense counsel. He has violated that trust by engaging in a deal with the tabloid media without her consent and in a manner which placed his interests adverse to her own. Thus, 9.22(h) vulnerability of victim, is further aggravation. Finally, the respondent has substantial experience in the practice of law, an aggravating factor under 9.22(i). The respondent's "restitution" of the $5,000.00 to the state was compelled restitution since this precluded any further inquiry or prosecution of his conduct and thus is not a mitigating factor under 9.4(a).

This Court has disbarred attorneys for engaging in misrepresentations and conflicts of interest. In The Florida Bar v. Crabtree, 595 So. 2d 935 (Fla. 1992), this court disbarred an attorney where he engaged in a conflict of interest by representing separate parties in the same transaction and having a personal interest in the deal without advising them of the conflict. Further, fraudulent letters were written designed to mislead anyone who looked into the transactions. That respondent had a discipline history of a private reprimand. The case at hand involves the same type of conduct.

This Court has noted the serious nature of conduct, such as the one at hand, involving misrepresentation:

> We find it troubling when a member of the Bar is guilty of misrepresentation or dishonesty, both of which are synonymous for lying. Honesty and candor in dealing with others is part of the foundation upon which respect for the profession is based. The theme of honest dealing and truthfulness runs throughout the Rules Regulating The Florida Bar and The Florida Bar's Ideals and Goals of Professionalism. The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992).

Pursuant to long standing opinions of this court, the purposes of attorney discipline are three-fold: The judgment must be fair to society, just to the attorney, and must sufficiently deter other attorneys from similar misconduct, The Florida Bar v. Carswell, 624 So. 2d 259 (Fla. 1993), The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983), The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

These purposes would best be served by the respondent's disbarment from The Florida Bar. While a one year suspension was

initially recommended to the referee, The Board of Governors of The Florida Bar, pursuant to their duties of reviewing discipline cases to ensure consistent and appropriate discipline, urges this court to impose disbarment consistent with the Florida Standards For Imposing Lawyer Sanctions. The respondent's long disciplinary record indicates that he has been given sufficient opportunities to reform. The respondent's conduct in the case at hand evidences a threat to the public and the judicial system. The respondent should not be given further opportunity to violate the public trust. The Florida Bar further requests that the respondent be ordered to pay The Florida Bar's costs in prosecuting this matter.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Honorable Court uphold the referee's findings of facts and recommendation of guilt, impose the discipline of disbarment, and order the respondent to pay The Florida Bar's costs, currently totalling $3,052.97.

Respectfully submitted,

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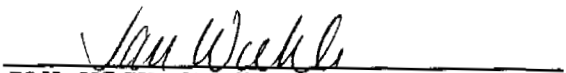
By: 

JAN WICHROWSKI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing answer brief and initial brief in support of cross-petition for review and appendix have been furnished by regular U. S. mail to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to Mr. William J. Sheppard, counsel for respondent, at 215 Washington Street, Jacksonville, Florida 32202-2808; and a copy of the foregoing has been furnished by regular U. S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 12th day of May, 1994.

JAN WICHROWSKI
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PETER L. NILES, JR.,

Respondent.
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[TFB Case No. 92-31,975 (07C)]

APPENDIX TO COMPLAINANT'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF CROSS-PETITION FOR REVIEW

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IN THE SUPREME COURT OF FLORIDA
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THE FLORIDA BAR,

Complainant,

Case Nos. 81,060 & 81,145
[TFB Case Nos. 92-31,975 (07C); and 93-30,115 (07C)]

v.

PETER L. NILES, JR.

Respondent.
_____/

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on December 28, 1993. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record of this case. The Florida Bar did not proceed in the Supreme Court of Florida Case No. 81,060, each party to bear its own costs.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Jan Wichrowski

For the Respondent: William J. Sheppard

II. Rule Violations Found:

COUNT I

Rule of Discipline 3-4.3 Misconduct And Minor Misconduct - Respondent has engaged in conduct contrary to honesty and justice by lying to the prison officials and his client regarding the nature of the September 26, 1990, interview. He has lied to Kathy Kelly, Daytona News Journal, Carol Hunt, and his client, by denying his receipt of a $5,000.00 fee from "A Current Affair".

Rule of Professional Conduct 4-1.2(a) Scope Of Representation - Respondent failed to abide by his client's decisions concerning the representations and/or consult with his client as to the means by which such objectives would be pursued. Respondent failed to advise his client of the planned "Deadly Deidre" interview or of its implications to her case. He has stated that he did it to "force" his client to testify against her co-defendant; "He said the interview was intended to force Ms. Hunt to make good on her promise to testify against Kosta

Fotopoulos, later convicted and condemned to death in the bizarre plot that began as a plan to kill his wife for insurance money." (Bar Ex. 16). It is clearly beyond Mr. Niles' scope of ethical representation to "force" his client to do anything, especially testify against a co-defendant by his deceit and trickery. The appellate court has found it "clear" from the record that Deidre Hunt's testimony against Fotopoulos was never guaranteed or promised as a way for her to gain more lenient sentencing.

Rule of Professional Conduct 4-1.4 Communication - Mr. Niles clearly failed to explain a matter (the media interview) to his client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation where the client was unaware of the media interview until it was underway.

Rule of Professional Conduct 4-1.5 Fees For Legal Services - (a) prevents illegal or prohibited fees and fees (a)(2) secured by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to entitlement to, the fee.

Mr. Niles, as a special public defender, was compensated by the court. He failed to advise the court that he had received $5,000.00 independently from "A Current Affair" in connection with this case. Only after negotiations with the assistant state attorney on this issue did Mr. Niles deliver the $5,000.00 to the county (Bar Exs. 2, 4, 5, and 6). The subsequent return of the money pursuant to the ASA investigation does not negate this violation.

Rule of Professional Conduct 4-1.6 (a) Confidentiality Of Information - Mr. Niles revealed client information without his client's consent by obtaining her interview without her waiver, authorization, or permission (Bar Ex. 1).

Rule of Professional Conduct 4-1.7(b) Conflict Of Interest; General Rule - Mr. Niles' exercise of independent professional judgment in the representation of Deidre Hunt was materially limited by his own motives in participating in the "A Current Affair" interview.

Rule of Professional Conduct 4-1.8(b) Conflict Of Interest; Prohibited Transactions - Mr. Niles used information relating to the representation of Deidre Hunt to her disadvantage without her consent. Mr. Niles obtained the interview without her informed consent. In the interview, Deidre Hunt made damaging admissions and was cast in a exploitative and negative manner by this entertainment/news show.

Rule of Professional Conduct 4-1.8(d) Conflict Of Interest; Prohibited Transactions - Prior to his conclusion of Deidre

providing "A Current Affair" with information relating to the case.

Rule of Professional Conduct 4-1.8(i) Conflict Of Interest; Prohibited Transactions - Respondent acquired a proprietary interest in Ms. Hunt's cause of action by contracting with "A Current Affair" to receive $5,000.00 if her interview was aired.

Rule of Professional Conduct 4-1.9(b) Conflict Of Interest; Former Client - is not further alleged by The Florida Bar since Ms. Hunt was clearly the respondent's present client, not former client. (Bar Ex. 17 - he had a motion pending).

Rule of Professional Conduct 4-2.1 Adviser - Mr. Niles failed to exercise independent professional judgment and render candid advice to his client because he was interested in pursuing his own pecuniary motives through the airing of "Deadly Deidre".

Rule of Professional Conduct 4-4.1(a) Truthfulness In Statements To Others - In the course of his representation of Deidre Hunt, Mr. Niles made false statements of material fact to Superintendent Villacorta, his client, Kathy Kelly and Carol Hunt.

Rule of Professional Conduct 4-4.4 Respect For Rights Of Third Persons - Mr. Niles failed to respect the rights of Superintendent Villacorta, Kathy Kelly and Carol Hunt when he lied to them concerning the "Deadly Deidre" interview.

Rule of Professional Conduct 4-8.4(c) Misconduct - Mr. Niles engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in arranging the interview at BCI, arranging the interview with his client, and in his response to questions regarding the $5,000.00 payment he received from "A Current Affair".

Rule of Professional Conduct 4-8.4(d) Misconduct - Mr. Niles engaged in conduct that prejudiced the administration of justice by his misrepresentations to a prison official, by the subsequent breach of prison security, and by his misrepresentations to his client about to the "A Current Affair" interview. He further prejudiced the administration of justice by accepting $5,000.00 in connection with his appointment as a special public defender and by failing to initially disclose this payment to the court.

COUNT II

Rule of Professional Conduct 4-1.15 Safekeeping Property: Since Mr. Niles was not entitled to the $5,000.00 from "A Current Affair" because of his status as a court appointed special public defender, his ethical obligation was to safeguard these funds,

which properly belonged to the state, in his trust account. Mr. Niles failed to hold these funds in trust, as evidenced by his reimbursement to the state for his worthless check.

Rule of Professional Conduct 4-8.4(b) Misconduct - Mr. Niles committed a criminal act by passing a worthless check. See, Florida Statute 832.05 (1991). This conduct reflects adversely on his honesty, trustworthiness, and fitness as a lawyer.

III. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged:

In regard to Case No. 81,145, The Florida Bar has presented clear and convincing evidence that the respondent, a member of The Florida Bar since 1965, has engaged in serious violations of the Rules Regulating The Florida Bar.

Respondent, Peter L. Niles, Jr., was appointed by the court as a special public defender to represent defendant Deidre Hunt in a first degree murder case in 1990.

COUNT I

On September 13, 1993, Ms. Hunt was placed in Broward Correctional Institution (BCI) pursuant to her guilty plea to first degree murder, for which she received the death penalty.

Pursuant to State of Florida Department of Corrections rules, media interviews of such inmates are disallowed during their initial orientation, a two to three week period. See, Bar Ex. 10, Standard Operating Procedures at BCI; Ex. 11, Florida Administrative Code Ch. 33-5.

On September 26, 1993, the date of the "Deadly Deidre" interview by Mike Watkins of "A Current Affair", Ms. Hunt was still undergoing orientation at BCI and media interviews were not allowed.

Marta Villacorta, the superintendent and highest ranking officer in BCI at this time, was required to personally approve all such media interviews pursuant to Florida Administration Code Ch. 33-5 and BCI's SOP (Bar Ex. 10, 11).

Respondent Peter Niles represented to Superintendent Marta Villacorta that he intended to conduct an attorney-client visit with Deidre Hunt on September 26, 1993 (Bar Ex. 12). As a result of Mr. Niles' representation, Superintendent Villacorta believed an attorney-client visit would occur where a videotape of Ms. Hunt would be produced for judicial purposes and used by the court. Only Superintendent Villacorta could have authorized a

media interview. Ms. Villacorta did not know or contemplate that any type of media interview would occur as a result of respondent's representations. According to her testimony, and as mandated by BCI's SOP and Florida Administration Code Ch. 33-5, she would not have allowed such a media interview to occur during Ms. Hunt's processing period. Further, BCI rules required that all inmates must execute a waiver before undergoing a media interview (Bar Ex. 10, 11). No such waiver was obtained from Ms. Hunt since no media interview was contemplated by Superintendent Villacorta.

Superintendent Villacorta had received many requests for media interviews of Deidre Hunt during Ms. Hunt's orientation period, but had rejected all requests, as required.

In reliance upon Mr. Niles' representation that an attorney-client visit would occur on September 26, 1990, Superintendent Villacorta, under an authorization memo directed to BCI subordinates, allowed Mr. Niles, his law clerk and his camera operator access to Ms. Hunt (Bar Ex. 13).

On September 26, 1990, respondent arrived at BCI with Mike Watkins, a television reporter for the entertainment/news program "A Current Affair", and with a cameraman. On the BCI control room log, reflecting their entry, at 2:50 p.m., Watkins and the cameraman were not identified as being associated with "A Current Affair" or the media. Superintendent Villacorta was not present at BCI. The officers on duty complied with Superintendent Villacorta's earlier authorization memo and allowed Niles, Watkins, and the cameraman access to Ms. Hunt. Additionally, security at the prison was breached since only the minimal security required for attorney-client interviews was present and this was actually a media interview. A media interview of inmate Deidre Hunt subsequently took place on September 26, 1990, as a result of the Mr. Niles' misrepresentation to Superintendent Villacorta that an attorney-client interview, not a media interview, was planned for the meeting.

Further, the affidavit of Deidre Hunt states that she was also misled by Mr. Niles (Bar Ex. 1). Mr. Niles advised Ms. Hunt on or about September 13, 1990, upon her incarceration at BCI, that he planned to take a videotaped deposition of her for the court. However, the court deposition she expected did not occur. Only upon being escorted into the September 26, 1990 visit, did she learn that she was being interviewed by "A Current Affair". She had no prior knowledge and had not authorized such an interview. As Deidre Hunt's mother, Carol Hunt, testified, Deidre was concerned about giving interviews to "tabloid" types of media. Later, Carol Hunt asked Mr. Niles whether he had received any money from "A Current Affair". Mr. Niles denied receiving any money.

Additionally, Carol Hunt testified that Mr. Niles exhibited little concern for Deidre, his client. She further testified that Mr. Niles advised her that he was not paid for the "A Current Affair" interview. Even Deidre's mother was aware of the BCI orientation policy restricting inmate interviews. Further evidence that Mr. Niles was aware of BCI media interview restrictions was presented by Carol Hunt's testimony concerning an interview attempt by the London Times. According to Carol Hunt, Mr. Niles knew that the Volusia County Jail had denied interview access to the London Times well prior to the BCI interview by "A Current Affair".

The "A Current Affair" interview is entitled "Deadly Deidre" (Bar Ex. 9). The interview includes admissions from Deidre Hunt and excerpts from a videotape which showed Deidre Hunt shooting and killing Kevin Ramsey. The "A Current Affair" interview is potentially damaging evidence to Deidre Hunt. Clearly, appeals are a routine in all first degree murder convictions and requests for appellate review had already been made in Ms. Hunt's case (Bar Ex. 17). With little or no regard for his client's welfare, Mr. Niles, after months of planning with "A Current Affair", lied to Superintendent Villacorta and his client, Deidre Hunt, for his own pecuniary gain. Mr. Niles received a $5,000.00 fee from "A Current Affair".

Upon questioning by Kathy Kelly, a journalist with a Daytona Beach newspaper, Mr. Niles denied receiving a fee from "A Current Affair". In a subsequent newspaper article, Ms. Kelly states: "Niles said Thursday he wasn't paid for arranging the interview for 'A Current Affair', and did it only to assure Ms. Hunt's testimony in the upcoming Fotopoulos trial." Ms. Kelly testified that Mr. Niles told her he had not been paid. Ms. Kelly had previously unsuccessfully attempted to interview Deidre Hung at BCI during Ms. Hunt's inmate orientation and was, therefore, shocked when she viewed "Deadly Deidre" on national television. When Ms. Kelly telephoned Superintendent Villacorta to inquire about the "A Current Affair" interview, Superintendent Villacorta expressed her initial belief that no such interview had occurred because she had not authorized it.

Mr. Niles testified that he received $5,000.00 from "A Current Affair" solely based on negotiations occurring five to six months before the taping of "Deadly Deidre". The negotiations resulted in an agreement that Mr. Niles would receive the fee if the interview was aired. Thus, Mr. Niles was clearly motivated to provide a sensationalist type interview for "A Current Affair". Mr. Niles' denials that the fee was for the airing of "Deadly Deidre" are patent misrepresentations to The Florida Bar and to this court. Mr. Niles has also attempted to confuse the clear ethical issue of his lying to prison officials and others with legalistic arguments about the reliability of

witness testimony and documentary evidence.

In response to initial inquiries from The Florida Bar, Mr. Niles admitted that Deidre Hunt was his client at the time of the "Deadly Deidre" interview (Bar Ex. 17: "I had a pending motion in front of Judge Foxman"). He admitted that he has represented between fifteen (15) and twenty (20) first degree murder defendants, thus suggesting an expected familiarity with restrictions on death row inmate media interviews. Mr. Niles' call to Superintendent Villacorta further suggests that he knew official permission was required to gain interview access. In none of his statements to The Florida Bar or to the News Journal before the final hearing did Mr. Niles ever mention any last minute switch in plans; nor in such prior statements did he mention his intent to provide copies of the interview to the trial judge and the assistant state attorney. As Superintendent Villacorta testified, she personally asked the Assistant State Attorney, David Damore, if Mr. Niles had given Mr. Damore the interview tape. Mr. Damore stated that he never received the tape.

Mr. Niles stated under oath that he had provided copies of the videotape to the assistant state attorney and the judge. Even if this could be verified, Mr. Niles' earlier misrepresentations to Superintendent Villacorta remain. It further remains that Mr. Niles helped "A Current Affair" gain a media interview to sensationalize "Deadly Deidre", whether or not he contemporaneously conducted an attorney-client interview for legitimate judicial purpose.

Mr. Niles is the only party with any matter at stake in the outcome of this proceeding. The testifying witnesses and supporting affidavits and documents reflect true and correct statements from disinterested witnesses.

COUNT II

As a consequence of the investigation into Mr. Niles' receipt of $5,000.00 fee from "A Current Affair", respondent gave a $5,000.00 check to the County of Volusia on December 14, 1990 (Bar Exs. 2, 3, 4, 5, and 6). The check was deposited on or about March 26, 1991, and was thereafter returned by the depository bank for insufficient funds. The check (Bar Ex. 6) does not state a condition that Mr. Niles must be notified before the check is negotiated, nor does any of the correspondence between the ASA and respondent so indicate (Bar Exs. 2, 3, 4, and 5). Mr. Niles' letter enclosing the check does not indicate that deposit is conditional upon prior notice. Further, such a condition would be of questionable value in view of UCC requirements for negotiable instruments such as drafts and checks.

It is well settled that attorneys can be subject to disciplinary violations for writing worthless checks even on non-trust accounts; The Florida Bar v. Brennan, 411 So. 2d 176 (Fla. 1982), The Florida Bar v. Dingle, 235 So. 2d 479 (Fla. 1970), The Florida Bar v. Harris, 436 So. 2d 88 (Fla. 1983), all attached.

Mr. Niles' later replacement of the insufficient funds check with a cashier's check should only be considered for disciplinary mitigation.

IV. Recommendations as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the complaint I find the respondent guilty as charged.

V. Recommendation as to Disciplinary Measures to be Applied:

Mr. Niles has engaged in serious violations of the Rules Regulating The Florida Bar. His lies and misrepresentations to Superintendent Villacorta, Deidre Hunt, Carol Hunt, Kathy Kelly of the Daytona News Journal, and to the public via dissemination of Ms. Kelly's news article have resulted in harm to BCI through a security breach, to Deidre Hunt, whose case was pending review, through a sensationalist and derogatory media interview and to the legal profession through damage done to the reputation of all attorneys.

I recommend that the respondent be suspended for one year, with proof of rehabilitation required prior to reinstatement.

VI. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 57
Date admitted to bar: October 15, 1965
Prior disciplinary convictions and disciplinary measures imposed therein:

1. Supreme Court No. 72,554 - Gagnon - complainants. Public reprimand by supreme court order dated March 9, 1989 for technical trust account violations. Published at 542 So. 2d 990 (Fla. 1989).

2. The Florida Bar Case No. 89-31,028 (07C) - Grievance committee private reprimand issued August, 1989.

3. The Florida Bar Case No. 91-31,029 (07C) - Douglas - complainants.
Public reprimand for making financial advances to clients.

VII. Statement of costs and manner in which costs should be taxed: I find the following costs were reasonably incurred by The Florida Bar in Case No. 81,145.

A.	Grievance Committee Level Costs:	
	1. Transcript Costs	$ N/A
	2. Bar Counsel Travel Costs	$ 25.94
B.	Referee Level Costs	
	1. Transcript Costs	$651.40
	2. Bar Counsel Travel Costs	$125.53
C.	Administrative Costs	$500.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	$629.10
	2. Witness Fees	$967.50
	3. Copy of Video Tape "A Current Affair"	$117.00
	4. Airborne Express mail	$ 36.50
	TOTAL ITEMIZED COSTS:	$3,052.97

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this _____ day of _____, 1994.

ORDER ENTERED

JAN - 6 1994

/S/ ROBERT M. FOSTER
Robert M. Foster, Referee

Original to Supreme Court with Referee's original file.

Original to Supreme Court with Referee's original file.

Copies of the Report of Referee only to:

Ms. Jan K. Wichrowski, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801

Mr. William J. Sheppard, Counsel for Respondent, 215 Washington Street, Jacksonville, Florida 32202-2808

Mr. John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300

Deidre Michelle HUNT, Appellant,

v.

STATE of Florida, Appellee.

No. 76692.

Supreme Court of Florida.

Oct. 15, 1992.

Clarification Denied March 18, 1993.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J., of murder and was sentenced to death, and she appealed. The Supreme Court held that: (1) plea agreement was breached when defendant was sentenced without benefit of evidence presented at trial of codefendant; (2) breach of portion of plea agreement did not render entire agreement void; and (3) specific performance of unfulfilled promise in plea agreement was adequate remedy.

Ordered accordingly.

1. Criminal Law ⇐274(2)

It is within sound discretion of trial court whether to allow withdrawal of guilty plea.

2. Criminal Law ⇐274(3, 4)

Refusal to allow defendant to withdraw guilty plea before imposition of sentence was not abuse of discretion in prosecution for first-degree murder; alleged newly discovered evidence was known to defendant prior to entry of plea, and there was no evidence that defense counsel's "dominant personality" persuaded defendant to plead guilty. West's F.S.A. RCrP Rule 3.170(f).

3. Criminal Law ⇐274(3)

Guilty plea may be voided where judge or prosecutor actually promised defendant lesser sentence than was in fact received.

4. Criminal Law ⇐274(4)

Voiding of guilty plea is warranted where defendant had reasonable basis for relying on attorney's mistaken advice that judge would be lenient.

5. Criminal Law ⇐273.1(2)

When entering into plea agreement, state must make sure that specific terms of agreement are made part of plea agreement and record.

6. Criminal Law ⇐273.1(2)

Constant factor insuring basic fairness in plea bargaining process is requirement that when plea rests in any significant degree on promise or agreement of prosecutor, so that it can be said to be part of inducement or consideration, such promise must be fulfilled.

7. Criminal Law ⇐980(1)

In light of terms of plea agreement, it was error for court to sentence defendant without benefit of evidence presented in codefendant's trial, even though defendant refused to cooperate in prosecution of codefendant; state had made it clear that plea bargain was not contingent on defendant's cooperation, and defense counsel planned to rely on evidence presented in codefendant's case to establish that defendant was under extreme emotional distress and substantial domination of codefendant at time of murders in question.

8. Criminal Law ⇐273.1(2)

Breach of plea agreement occurring when trial court sentenced defendant without benefit of evidence presented in codefendant's trial did not render entire plea agreement null and void; specific performance of unfulfilled promise was adequate remedy.

9. Criminal Law ⇐273.1(2), 274(3)

When agreement with defendant has not been fulfilled, defendant is entitled to specific performance of unfulfilled promise or to withdrawal of her guilty plea.

10. Criminal Law ⇐273.1(2)

Fact that no formal motion to enforce plea agreement was filed did not preclude Supreme Court from granting relief to defendant for breach of plea agreement; once trial court erroneously determined that it was defendant who had breached agreement, formal motion to enforce

state's agreement and further argument on that subject would have been futile.

Gerard F. Keating, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen. and Kellie A. Nielan, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Deidre Michelle Hunt, a prisoner under two sentences of death, appeals her numerous convictions and sentences. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions but vacate the death sentences and remand for resentencing.

Hunt pled guilty to two counts of first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to commit first degree-murder, one count of conspiracy to commit first-degree murder, and one count of burglary of a dwelling while armed. At the time of her plea, Hunt waived a penalty-phase jury.

The following is a brief summary of the facts developed during the sentencing hearing before the trial court. On October 20, 1989, Hunt, her lover, Konstantino Fotopoulos, and Kevin Ramsey drove out to an isolated wooded rifle range. Upon arrival, Ramsey, who had been led to believe he was being initiated into the "hunter and killer club," was tied to a tree. While Fotopoulos videotaped, Hunt shot Ramsey three times in the chest and once, at point blank range, in the head with a .22. The videotaping stopped and Fotopoulos shot Ramsey once in the head with an AK-47. According to Hunt's confession, each member of the "hunter and killer club" would be videotaped killing someone; the members then would exchange tapes. The tapes were considered "insurance policies." They served to insure that the members of the "club" would not report each other's activities to the police. According to testimony, one of the reasons that Ramsey was chosen as the victim was because he was blackmailing Fotopoulos concerning Fotopoulos' alleged counterfeiting activities and his affair with Hunt. The videotape of the Ramsey murder, which was recovered from Fotopoulos' residence pursuant to a search warrant, was shown to the trial court during the sentencing phase.

After the Ramsey murder, at Fotopoulos' request Hunt began soliciting acquaintances to kill Fotopoulos' wife, Lisa. The videotape of the Ramsey murder was used by Fotopoulos to insure Hunt's participation in his plan to murder his wife. Hunt told friends that by killing Ramsey, she had proven that she could have Lisa killed. Prior to enlisting Bryan Chase to do the job, Hunt offered three different individuals $10,000 to murder Lisa. For various reasons, either the plans never materialized or the assassins were unsuccessful in their attempts. Hunt eventually got Chase to agree to do the job. After several botched attempts to murder Lisa, Chase managed to enter the Fotopoulos residence on November 4, 1989. He shot Lisa once in the head; the shot was not fatal. After Chase shot Lisa, in accord with Fotopoulos' and Hunt's plan to get rid of the assassin and to make Lisa's murder appear to have occurred during a robbery, Fotopoulos fatally shot Chase. Hunt and Fotopoulos were eventually indicted for the murders of Ramsey and Chase, as well as the other offenses for which Hunt was convicted.

After the sentencing hearing, the trial court found four aggravating factors in connection with the Ramsey murder: 1) Hunt was previously convicted of a violent felony; 2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; 3) the murder was committed for pecuniary gain; and 4) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. As to the Chase murder, the trial court found five aggravating factors: 1) prior conviction of a violent felony; 2) the murder was committed while Hunt was an accomplice to a burglary; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; 4) the murder was committed for pecuniary gain; and 5) the murder was committed in a cold, calculated and

premeditated manner without any pretense of moral or legal justification. In mitigation as to both murders, the court found 1) Hunt was physically, emotionally, and sexually abused as a child, she entered into physically and emotionally abusive relationships with men and was a prostitute for a while; 2) Hunt is a sociopath, is somewhat unstable and has a history of alcohol and drug abuse; and 3) the plea is a minor mitigating factor in view of the overwhelming evidence against Hunt. The trial court rejected Hunt's contention that she acted under extreme duress and the substantial domination of Fotopoulos, who masterminded the murder plots. The court imposed the death penalty as to both murders.

Hunt raises the following six claims on appeal: 1) Hunt's plea agreement was a contract and, under various and alternative contract theories, she is entitled to a trial on the merits or the specific performance of a life sentence; 2) the trial court erred in denying Hunt's motion to vacate and set aside her guilty plea; 3) the trial court erred in denying defense counsel's motions to withdraw and Hunt's pro se motions to discharge counsel; 4) the trial court erred in failing to find statutory and nonstatutory mitigating factors; 5) there was no voluntary waiver of a penalty phase jury; and 6) the trial court erred in denying Hunt's motion to continue the sentencing hearing.

The facts pertinent to Hunt's first and second claims concerning her guilty plea are as follows. On May 7, 1990, the State announced it was ready for trial and that Hunt wished to withdraw her previously entered plea of not guilty and enter a guilty plea. Hunt's attorney agreed that Hunt wanted to enter a guilty plea and stated that she wanted to testify at the Fotopoulos trial. Both parties waived a penalty-phase jury and agreed to leave sentencing entirely within the trial court's discretion. It was also agreed that Hunt's sentencing would be deferred until after the Fotopoulos trial so that any information coming to light during the Fotopoulos trial could be considered in Hunt's sentencing. Hunt stipulated as to the factual allegations setting up a prima facie case for the entry of the plea. Hunt's attorney stated that it had been explained to Hunt that, notwithstanding her plea and future cooperation, it was still a possibility that the death penalty would be imposed. The prosecutor reiterated that the State was in no way waiving its intent to seek the death penalty, that there had been no backroom negotiations and no understanding that the State would not seek the death penalty. Hunt's attorney explained that he had discussed the plea at length with Hunt and that they both agreed that "this plea and her offer to testify and cooperate in view of the facts and circumstances is really the only sensible and logical choice under this scenario." The prosecutor further stated that the State had not agreed that it, in fact, would call Hunt as a witness at the Fotopoulos trial.

In formally accepting her guilty plea, the trial judge outlined the plea agreement to Hunt as follows:

> You would plead guilty as charged to all of the counts in the Information and the Indictment.
>
> The sentencing phase in your case would be postponed until the Fotopoulos matter was tried and disposed of, and, ma'am, I am not sure if that is going to be one trial, two trials.... Those are things that have yet to be decided.
>
> We would postpone the sentencing phase of your case until after the Fotopoulos trial.
>
> There would be a sentencing phase or sentencing trial in your case. The State is going to seek the death penalty whether or not you cooperate in the trials of Mr. Fotopoulos.
>
> My understanding is both the State of Florida and you are going to waive an advisory opinion as to life or death. You are going to try that second phase without the Jury, with Judge alone, with myself alone and it will be up to me to decide an appropriate opinion, which essentially will be either life in prison or the death penalty.
>
> That is my understanding of what is happening.
>
> Is that your basic understanding?

To this Hunt responded, "Yes, it is." Later in explaining the significance of the plea to Hunt the court stated:

> I think one of the other important things is that whatever evidence is presented in the Fotopoulos trials and my understanding from what the attorneys are saying here, you are going to testify at the Fotopoulos trials. I am going to consider your testimony and anything else that I hear in the Fotopoulos cases as part of the evidence in your sentencing hearing. I am going to take those into consideration and we definitely will have a sentencing hearing in your case.
>
> You need to know that the State is still going to seek the death penalty and when you enter the plea, you need to be aware that certainly at this point and I think you should consider from now on, they are going to seek the death penalty no matter what you do.
>
> Ultimately the sentencing decision will be up to me.

After thoroughly explaining to Hunt all the implications of entering the plea, ensuring that her plea was knowingly, intelligently and voluntarily made, and finding that there was a factual basis to sustain the plea, the court accepted Hunt's plea of guilty.

Prior to the Fotopoulos trial, Hunt refused to appear at a scheduled deposition. The State then requested that a sentencing date be set because it did not appear that Hunt would testify against Fotopoulos. Hunt moved to set aside the guilty plea and asked for a trial on all issues.[1] The motion was based on what the defense characterized as "newly discovered evidence" and several rather vague suggestions that the plea may not have been knowingly and voluntarily made. The defense believed that a supplemental State witness would be able to demonstrate that Ramsey had been shot with an AK–47 after he was shot by Hunt. This evidence would corroborate Hunt's contention that during the shooting of Ramsey, Fotopoulos had an AK–47, placing her in fear for her life. Finding that the "so-called new evidence" did not change Hunt's "culpability one bit," and that she "knew what she was doing when she entered that plea," the trial court denied the motion to withdraw the plea. Concluding that Hunt had refused to abide by the terms of her plea agreement the court set her sentencing, which at the prosecution's request was later rescheduled and held prior to Fotopoulos' trial. Prior to sentencing, Hunt filed a pro se motion to postpone or continue her sentencing, Hunt filed a pro se motion to postpone or continue her sentencing; however, the State's agreement that her sentencing would be postponed until after Fotopoulos' trial was not urged as a ground for postponement.

[1, 2] First, we find no merit to Hunt's claim that the trial court erred in denying her motion to vacate the guilty plea. It is within the sound discretion of the trial court whether to allow the withdrawal of a guilty plea. *Porter v. State*, 564 So.2d 1060, 1063 (Fla.1990), *cert. denied*, — U.S. —, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); *Lopez v. State*, 536 So.2d 226, 229 (Fla.1988); *Adams v. State*, 83 So.2d 273 (Fla.1955). Hunt has failed to demonstrate an abuse of discretion in this regard. It is apparent from the record that no good cause was demonstrated to the trial court sufficient to warrant the withdrawal of Hunt's plea prior to imposition of sentence. Fla.R.Crim.P. 3.170(f); *Adler v. State*, 382 So.2d 1298 (Fla. 3rd DCA 1980). The fact that Ramsey had been shot with an AK–47 was known to Hunt prior to entry of her plea. Moreover, there was no evidence presented to support defense counsel's vague assertion that his "dominant personality" may have persuaded Hunt to plead guilty.[2]

Hunt raises numerous arguments in support of her claim that she is entitled to either a full-blown trial on guilt and sentencing or specific performance of a life sentence. On this record, neither option

1. A second motion to withdraw plea and set for trial was filed prior to sentencing. However, that motion was treated as withdrawn.

2. Hunt alleges numerous additional grounds for withdrawal of her plea which are not cognizable in this proceeding because they were not presented to the trial court.

urged is warranted. However, based on the terms of the plea agreement as recited by the trial court during the plea colloquy, we find that Hunt is entitled to a new sentencing by the trial court at which the Fotopoulos proceedings shall be considered.

[3, 4] A guilty plea may be voided where a judge or prosecutor actually promised a defendant a lesser sentence than was in fact received. *Costello v. State*, 260 So.2d 198, 201 (Fla.1972). Voiding of the plea is also warranted where "a defendant has a reasonable basis for relying upon his attorney's mistaken advice that the judge will be lenient." *Id.* However, this Court has made clear that

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

Id. In this case, there is nothing in the record to support Hunt's allegations[3] that her plea was induced by promises of a life sentence or a mistaken belief that the judge would be lenient. In fact, during the hearing at which her plea was accepted, Hunt was repeatedly reminded by the trial court, the State and her attorney that the State would seek the death penalty and that the final decision on sentencing would be in the trial court's hands.

[5] As we recently stated in *McCoy v. State*, 599 So.2d 645, 649 (Fla.1992), "when entering into a plea agreement, the State must make sure that the specific terms of the agreement are made a part of the plea agreement and the record." There was no written plea agreement in this case. The terms of the agreement were set forth by the trial court during the plea colloquy. According to the trial court's recitation of the agreement, which is quoted above, 1) Hunt would plead guilty to all charges, 2) her sentencing would be deferred until after Fotopoulos' trial so that all matters revealed during that trial could be considered during her sentencing, 3) the state would seek the death penalty whether or not Hunt cooperated in the Fotopoulos case and 4) both parties would waive an advisory jury.

[6, 7] Although it appears that Hunt had originally wished to testify against Fotopoulos so that her testimony and cooperation with the State could be considered as a mitigating factor at sentencing, it is clear from the record that the State's agreement that Hunt's sentencing would be postponed until after Fotopoulos' trial was not contingent upon Hunt's cooperation and testimony in that case. In fact, in addressing Hunt's subsequent motion to withdraw her plea, the prosecutor stated that "This was not a plea conditioned upon Deidre Hunt's cooperation." Thus, Hunt's refusal to cooperate at the deposition did not amount to a breach of the terms of her plea agreement as set forth by the trial court. *Cf. Brown v. State*, 367 So.2d 616 (Fla.1979) (defendant cannot be allowed to arrange a plea bargain, back out of his part of bargain, and insist the state uphold its end of the agreement); *Lopez*, 536 So.2d 226 (when defendant refused to testify against accomplices, he breached his plea agreement which included agreement to testify against them in exchange for life sentences.)

A "constant factor" insuring basic fairness in the plea bargaining process is the requirement that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). It appears that defense counsel planned to rely on much of the evidence presented by the State in the Fotopoulos case to estab-

3. Affidavits in support of these allegations filed for the first time with this Court have been stricken.

lish that Hunt was under extreme emotional distress and the substantial domination of Fotopoulos at the time of the murders. Thus, it was to the defense's advantage for Hunt's sentencing judge to consider all the evidence presented in Fotopoulos' trial whether or not Hunt testified in that case. Because Hunt was entitled to the benefit of her bargain, which the State made clear was not contingent on her cooperation, it was error for the court to sentence her without the benefit of the evidence presented in the Fotopoulos trial.

[8–10] We reject Hunt's claim that the entire plea agreement was rendered null and void when her sentencing was held prior to Fotopoulos' trial. Unlike *Hoffman v. State*, 474 So.2d 1178, 1182 (Fla.1985), it is not necessary to treat the plea agreement "as if it never existed" to do justice in this case. In *Hoffman*, in exchange for the State's promise to recommend a life sentence, the defendant agreed to plead guilty to two counts of first-degree murder and to testify against his codefendant. However, when Hoffman reneged on the agreement to testify, the State withdrew from the bargain and proceeded to prosecute him and seek the death penalty. This Court concluded that the agreement should be treated as null and void because "a defendant cannot be allowed to arrange a plea bargain, back out of his part of the bargain, yet insist the prosecutor uphold his end of the agreement." 474 So.2d at 1182. In this case, Hunt's testifying against Fotopoulos was not a term of the agreement as set forth by the trial court during the plea colloquy. Therefore, Hunt's failure to testify did not entitle the state to proceed to sentencing prior to Fotopoulos' trial. *Cf. Lopez*, 536 So.2d at 229 (state was entitled to seek death penalty when defendant who had received three life sentences in return for his agreement to testify against accomplices later refused to testify).

When an agreement with the defendant has not been fulfilled, the defendant is entitled to specific performance of the unfulfilled promise or to withdrawal of her guilty plea. *Santobello*, 404 U.S. at 263, 92 S.Ct. at 499. In this case, we believe that specific performance is an adequate remedy.[4] Fotopoulos' trial, at which Hunt in fact testified, has been completed. In that trial, the State took a position concerning Fotopoulos' influence over and domination of Hunt contrary to that taken at Hunt's earlier sentencing hearing.[5] At the sentencing hearing, the State maintained that Hunt was in no way acting under extreme duress or under Fotopoulos' substantial domination. However, during Fotopoulos' trial, Hunt was portrayed by the State as being abused and terrorized by and otherwise under the total domination of Fotopoulos.[6]

4. The fact that no formal motion to enforce the plea agreement was filed does not preclude us from granting relief. Once the trial court erroneously determined that it was Hunt who had breached the agreement, a formal motion to enforce the State's agreement to postpone her sentencing until after Fotopoulos' trial and further argument on that subject would have been futile. Such futile efforts are not required to preserve matters for appeal. *Thomas v. State*, 419 So.2d 634, 636 (Fla.1982); *Spurlock v. State*, 420 So.2d 875, 876 (Fla.1982); *Brown v. State*, 206 So.2d 377, 384 (Fla.1968).

5. We granted Hunt's motion to take judicial notice of the record in *Fotopoulos v. State*, 608 So.2d 784 (Fla.1992). §§ 90.202(6), .203, Fla. Stat. (1991); *Kelley v. Kelley*, 75 So.2d 191 (Fla. 1954). However, we do not reach the merits of Hunt's contention, which was made in a notice of supplemental authority to her motion for judicial notice, that the State's portrayal of Hunt as a victim in the Fotopoulos trial must be treated as "judicial admissions by a party opponent." *See United States v. Salerno*, 937 F.2d 797, 811 (2nd Cir.), *modified*, 952 F.2d 623 (2nd Cir.1991), *reversed on other grounds*, — U.S. —, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992); *United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 2310, 119 L.Ed.2d 230 (1992); *United States v. GAF Corp.*, 928 F.2d 1253, 1259–62 (2d Cir.1991); *United States v. McKeon*, 738 F.2d 26 (2d Cir.1984).

6. For example, while urging the admission of testimony concerning Fotopoulos pointing guns at Hunt and burning her breast with a cigarette, the prosecutor stated:

> Your Honor, the testimony will reveal a significant beginning of a pattern of intimidation and terror inflicted upon the witness to terrorize her and break down her will ultimately and obtain complete control of her, ultimately resulting in her carrying out the

We find no merit to Hunt's claim that the trial court erred in denying her numerous motions to discharge counsel. We have stated that

> [w]here a defendant seeks to discharge court-appointed counsel due to alleged incompetency, it is incumbent upon the trial court to make a sufficient inquiry of the defendant and counsel to determine wither there is reasonable cause to believe that counsel is not rendering effective assistance.

Watts v. State, 593 So.2d 198, 203 (Fla.), *cert. denied*, — U.S. ——, 112 S.Ct. 3006, 120 L.Ed.2d 881 (1992); *see also Hardwick v. State*, 521 So.2d 1071, 1073 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). However, our review of the record reveals that the trial court made adequate inquiry into each of Hunt's repeated claims of ineffective assistance of counsel. Moreover, Hunt was not entitled to an inquiry on self-representation under *Faretta*[7] because she made no unequivocal request for self-representation. *Watts*, 593 So.2d at 203; *Hardwick*, 521 So.2d at 1074. Numerous times during the hearings on her motions, Hunt stated that she did not want to represent herself and agreed to continued representation by court appointed counsel. At one point Hunt expressly agreed to continued representation even after the trial judge informed her that he would probably appoint new counsel if that was her desire.

Finally, we find no merit to Hunt's claim that she did not voluntarily waive a penalty-phase jury. Her position appears to be that although her waiver of an advisory jury clearly was voluntarily made at the time she entered her plea, the waiver was not effective because the plea agreement was rendered void when she was sentenced prior to Fotopoulos' trial. During the plea colloquy, it was thoroughly explained to Hunt that she was giving up her right to an advisory jury as part of the agreement. The trial court's finding at the time of accepting the plea that Hunt's decision to waive an advisory jury was made knowingly and voluntarily is supported by the record. We have previously rejected Hunt's underlying premise that the entire agreement was rendered void.

Accordingly, we affirm Hunt's convictions and lesser sentences but vacate the death sentences and remand for resentencing by the trial court after consideration of the record in the Fotopoulos case.[8] On

various crimes with which she had pled guilty.

> Even though it does mention other criminal conduct of the defendant, it is not offered for that purpose. It is offered for the purpose to show a clear pattern of physical assault, abuse, intimidation and coercion an—and the direct and primary cause of Deidre Hunt's criminal activity.

Later in the proceedings, in urging the admission of other evidence the prosecutor stated:

> We're not offering them for the truth of the statements at all ... but only for the fact, one, that they were made, and number two, that they had an impact on [Hunt], in effect, paralyzed her, stopped her from feeling she could go to anyone or talk to anyone or escape from the circumstances, and that she had a growing paranoia that [Fotopoulos] had utter control of her life and she could not escape.

After being asked by the court if Hunt's state of mind was relevant, the prosecutor maintained:

> That—[Hunt's] ultimate explanation as to why she participated in the first murder of Kevin Ramsey will be, we believe, Your Honor, that it was primarily if not exclusively out of terror for her own life and safety, and that the second murder was levered basically into her life through the first murder and the videotape and the continuing threats of imminent peril and death.
>
> ....
>
> And I think this goes to the total—the totality will show that she in her own mind is a virtual prisoner, a hostage.

In arguing for the admission of Hunt's testimony concerning Fotopoulos' threatening her with a "billy club" like object that could shoot knives out one end, the prosecutor stated:

> If Your Honor please, it is becoming part of a continuing pattern of domination, threat and intimidation which ultimately deprived Deidre Hunt of the ability to even resist let alone disobey. And it's—it was fired in one of the dwellings in which she was residing near her by Kosta Fotopoulos before the Ramsey killing. And it goes towards her mounting fear that this man was going to kill her if she didn't do his every bit—

7. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

8. Because we vacate the death sentences and remand for resentencing, we need not address Hunt's claims that the trial court erred by not finding certain mitigating factors and by failing

remand, both the defendant and the State shall be allowed to present evidence and argument on any mitigation touched on in the Fotopoulos record.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

In re PETITION FOR APPROVAL OF FORMS PURSUANT TO RULE 10–1.1(b) OF THE RULES REGULATING THE FLORIDA BAR—STEPPARENT ADOPTION FORMS.

No. 80074.

Supreme Court of Florida.

Dec. 24, 1992.

Original Proceeding—Rules Regulating The Florida Bar.

Alan T. Dimond, President, Miami, John F. Harkness, Jr., Executive Director, and Mary Ellen Bateman, UPL Counsel, Tallahassee, Robert M. Sondak, Chairman, Board Committee on Access to the Legal System, Miami, and Wayne L. Helsby, Chairman, Standing Committee on Simplified Forms, Orlando, for petitioner, The Florida Bar.

Daniel T. Carpenter of Carpenter & Brown, P.A., Fort Lauderdale, and Peter B. Dolinger, pro se, Palm Harbor, responding.

PER CURIAM.

The Board of Governors of The Florida Bar petitions us for approval of forms under Rule Regulating The Florida Bar 10–1.1(b). We have jurisdiction. Art. V, § 2(a), Fla. Const. The forms deal with stepparent adoptions and we approve them.

Rule 10–1.1(b) permits "nonlawyers to engage in limited oral communications to assist a person in the completion of a legal form approved by the Supreme Court of Florida." Under the rule, oral communications between the nonlawyer and the individual being assisted are restricted to "those communications reasonably necessary to elicit factual information to complete the form and inform the person how to file the form." Rule 10–1.1(b) fosters access to the courts while protecting the public from advice from unqualified persons. The Florida Bar, in furtherance of these goals, is defining areas amenable to forms practice and developing simplified forms. The forms are the fill-in-the-blank type and merely require the insertion of factual information into the appropriate blank.

In addition to the proposed forms, the bar has prepared information about the use of the forms, titled "Appendix 5," and specific instructions for each of the six forms. While we authorize the publication of the information and instructions, we do not express an opinion on the legal correctness of either. Because local procedures may vary from circuit to circuit, the chief judge of each circuit is authorized to prepare supplemental directions for the use of the approved forms. Supplemental directions shall be filed with the clerk of the court in the respective circuit and with the clerk of this Court.

An objection to the forms was filed by Daniel T. Carpenter, Esquire, who practices in the area of family law. Mr. Carpenter writes:

> A lawyer is needed to explain that the adoptive parent may be liable for child support in the event of a later divorce, could be liable in litigation for the actions of the child and that the child will inherit from him.
>
> In addition, the child's other biological parent will be excused from a child support obligation and the child will not inherit from the biological father's family any longer.

4.3 Failure to Avoid Conflicts of Interest

4.31 Disbarment is appropriate when a lawyer, without the informed consent of the client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client

5.2 Failure to Maintain the Public Trust

5.21 Disbarment is appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

7.0 Violations of Other Duties Owed as a Professional

7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public or the legal system.

9.22 Aggravating Factors

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) pattern of misconduct;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law.

9.4 Factors Which Are Neither Aggravating Nor Mitigating

(a) forced or compelled restitution.