IN THE SUPREME COURT OF FLORIDA

JEFFREY A. MUEHLEMAN,

Appellant,

v. CASE NO. SC05-353

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Prior Proceedings

Muehleman was convicted of murder in the first degree pursuant to a plea of guilty. Following a penalty phase proceeding, the trial court imposed a sentence of death. This Court affirmed the judgment and sentence in a decision authored by Justice Adkins. Muehleman v. State, 503 So. 2d 310 (Fla.), cert. denied, 484 U.S. 882 (1987).

Thereafter, this Court entered its order remanding for a new penalty phase proceeding. (R, Sup. Vol. 1, p. 24).

Appellant Muehleman filed a pro se Motion seeking to have the chief judge assign the original presiding judge to the case (R1, 1-10). The State filed its Response, denying that the case had been "hijacked" or transferred. Rather, the prosecution of Muehleman for the first degree murder of Edward Baughman had been assigned to Criminal Division C since the indictment in 1983. Judge Farnell rotated out of Division C to a civil division years ago. Judge Downey was assigned by Chief Judge Demers to take over Division C when he completed his term as Criminal Administrative Judge in January, 2003 and thus inherited all cases pending in Division C. The State further argued that Appellant's argument citing Florida Rule of Judicial Administration 2.050(b)(4) (2003)[1] was meritless.

[1] Florida Rule of Judicial Administration 2.050 has been renumbered to Florida Rule of Judicial Administration 2.215.

(R1, 21-23).

On February 6, 2003 Chief Judge Demers denied Muehleman's Motion and articulated his findings and conclusions. The court concluded there was no requirement or reason to depart from the procedure for assignment in the instant case. (R1, 25-28). Muehleman filed a Motion for Rehearing (R1, 30-42), the State filed a Response to Defendant's Motion for Rehearing (R1, 43-45) and on March 12, 2003 Judge Demers entered an Order Denying Defendant's Motion for Rehearing (R1, 60-61).

Muehleman then filed an Emergency Petition for Writ of Mandamus and/or Writ of Prohibition with Request for Injunctive Relief. This Court treated it as a Petition for Mandamus and transferred it to the Second District Court of Appeal on June 18, 2003. (R1, 63). The Second District Court of Appeal ordered the State to respond and denied Muehleman's Motion to transfer jurisdiction back to the Florida Supreme Court on July 18, 2003. (R1, 69). On August 4, 2003, the Second District Court of Appeal granted Muehleman's Notice of Voluntary Dismissal with prejudice. Muehleman v. State, 853 So. 2d 420 (Fla. 2d DCA 2003)(Table). A copy of that order is attached as Exhibit 1.

The lower court conducted a Faretta[2] hearing on May 19, 2003. (R2, 136-179). As this Court is well aware, Muehleman represented himself in the prior postconviction litigation and he chose to

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

continue self-representation. The trial court noted that it would have to proceed with a Faretta inquiry and Muehleman inquired what would happen if he declined to answer. (R2, 138-140). Muehleman understood his right to appointed counsel. (R2, 140-141).

Muehleman understood the penalties included death or life imprisonment with a minimum mandatory of twenty-five years. He admitted he was thirty-eight years old, with the ability to read and write. (R2, 143) Muehleman then declined to answer a number of questions, explaining, "We are back to not answering because this is a Faretta line of inquiry again." (R2, 143). The questions included how much schooling he had received, whether Appellant had been diagnosed or treated for any type of mental illness, whether anyone had told him not to use an attorney, whether anyone had threatened him to get him not to hire an attorney, whether he understood an attorney would be appointed by the court free of charge, whether he had ever represented himself in trial, whether he had any questions about having an attorney appointed to defend him, whether-having been apprised of the advantages of having an attorney and the disadvantages and dangers of proceeding without counsel, the nature of the charge and possible consequences-Appellant was certain he did not want the appointment of counsel. (R2, 144).

Muehleman apparently viewed that after his Faretta rights had been granted, any further attempt to question him amounted to

forcing counsel on him and violated Faretta. (R2, 147). The court then declined to appoint standby counsel. (R2, 147). The court found that Muehleman was competent to represent himself, that he understood the significance of his actions, and that pursuant to Faretta he was entitled to proceed with self-representation. (R2, 148). Muehleman waived his right to a jury and its recommendation. (R2, 148-149). The prosecutor insisted that a defense waiver of jury recommendation be in writing. (R2, 157). The trial court indicated it would wait to inquire on waiver of jury since Appellant might change his mind. (R2, 177). Appellant again insisted he wouldn't go through another Faretta inquiry. (R2, 178).

In earlier hearings Appellant repeatedly indicated his determination to represent himself and not be represented by counsel in the resentencing proceeding. At a hearing on December 12, 2002, Muehleman told the court he was not going to have an attorney but would represent himself. (R2, 122-123). At a hearing on February 12, 2003, Muehleman indicated that he was going to file a motion for rehearing and reconsideration of Judge Demers' order (denying Muehleman's request that Judge Farnell preside at the resentencing), that it was still his desire to represent himself. (R2, 217, 219). When the court indicated it would have standby defense counsel, Muehleman expressed the view that it was a waste of their time and money and didn't want their presence "forced upon me." (R2, 224-226). Muehleman announced he did not wish to

participate in second phase discovery. (R2, 229). At a hearing on May 16, 2003, Muehleman told the court that he was "the expert" and that he didn't want counsel. (R2, 253). At a hearing on December 12, 2002, Muehleman announced he wanted to represent himself and was contemplating waiving the jury recommendation as well. (R2, 123-124).

At the next hearing on May 23, 2003, Muehleman indicated that he was exploring obtaining appellate counsel for an interlocutory appeal of Judge Demers' ruling and that the court could reset the penalty phase for whenever it wanted. He had no problem with a June 23rd date. (R2, 192-194).

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Following jury selection on June 23, 2003 (R, 455-592), the State called investigator Scott Hopkins as a predicate for reading prior testimony. (R, 593-611). Hopkins testified that following this Court's remand order, he investigated to determine the availability of three witnesses from earlier proceedings: Virginia Peterson, Virginia Battle and Ronald Rewis. (R, 594). Ms. Peterson died on April 2, 1996 at age 102. (R, 594). Virginia Battle, the daughter of the victim, died March 26, 1999 at age 81. (R, 595-596). Harmon described his efforts to locate Rewis and concluded he's never been found. His sister hadn't seen him since 1991 and NCIC shows no activity since 1991. (R, 597-598). The court found that Rewis was unavailable to testify and allowed his prior

testimony for this penalty phase. (R, 613).

The jury was informed that Appellant had been found guilty of first degree murder and that the appellate court had ordered a new sentencing proceeding. (R, 614). The prosecutor gave an opening statement and Appellant declined the opportunity to do so. (R, 615-627). The court took judicial notice of the judgment of guilt of June 8, 1984. (R, 631).

Brian Daniels, currently an assistant state attorney, was employed as a Pinellas County deputy sheriff in May of 1983 and became involved in the disappearance of ninety-seven-year-old Earl Baughman. (R, 633). Muehleman had answered a newspaper ad by Baughman and became a live-in assistant. He gave a false name (Jeff Williamson) and the day before the missing persons report Appellant went to the bank with Baughman in his 1961 Cadillac that Baughman did not drive. Baughman withdrew a little over five hundred dollars and shortly afterwards Baughman's daughter reported her father missing. Muehleman and the car had disappeared and the piece of paper with the name Jeff Williamson was torn off the note pad and missing. (R, 634).

After providing information to local television stations, officers received information that Appellant was renting a garage-type apartment from Jeff Woodward. Woodward reported that his tenant, Jeff, had gotten a job working as a chauffeur for an older man and he had seen Muehleman driving Baughman's 1961 Cadillac. (R,

636-637). They received an anonymous phone call that a person matching the description was leaving the area of the garage where Muehleman was staying. Appellant tried to flee and hid his face from Deputy Wright and Deputy Lyons, and Woodward identified Muehleman as the one who had the Cadillac. (R, 638-639). Appellant gave a false name-Edward Buchanan-when approached by the deputies. Appellant was in possession of a cigarette lighter with the initials "ECB" (The victim was Earl Clifford Baughman). (R, 639). Daniels talked to Appellant and read him his Miranda rights. Appellant admitted his name was Jeffery Muehleman, admitted to the employment by Baughman, the withdrawal of money from the bank, and that he took the cigarette lighter without permission. (R, 640-642).

Appellant stated that he was planning on leaving the state of Florida when deputies stopped him. (R, 642). Daniels learned that Baughman, born in 1886, had a silver dollar minted in 1886 that he carried as a good luck piece and during the investigation he also learned that Muehleman had given such a silver dollar in trade to Marie Woodward for a package of cigarettes. Muehleman denied any knowledge of Baughman's disappearance. (R, 643). Appellant was nervous, shaking, and avoided eye contact. About ten days after the disappearance, the victim's car was located in the city limits of St. Petersburg. (R, 644). Daniels could smell what he believed was a decomposing body. The car was totally locked up and they had

to get a locksmith to open the car. The body was inside the trunk in an advanced stage of decomposition. (R, 645-646). A dark plastic garbage bag was around the head and a knot tied around the throat. A clear plastic newspaper bag had been stuffed down Baughman's throat. (R, 646).

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Assistant State Attorney Kristen Howatt next read the prior testimony of deceased witness Virginia Peterson. (R, 653-671). Peterson knew Earl Baughman for thirty-five years and had worked for him as a secretary for ten years. (R, 654). She maintained a routine of taking him to dinner on Wednesdays and Sundays after she retired. (R, 655). Baughman lost his driving permit at age ninety because he couldn't see and she would drive him to dinners. (R, 656). On May 2, 1983, Baughman phoned her in the evening and said he had employed a young man who would help her get groceries on Tuesday. (R, 657). She and the boy went for the groceries and on Wednesday they went to the bank. Baughman had his $476 Social Security check and an additional $100 personal check. (R, 660). The boy, Jeffrey, was sitting in the waiting area when Baughman got his money. (R, 661). She left earlier that day because Baughman had the boy assisting him. (R, 662).

Later, Baughman phoned her and asked her to pick up an envelope; he wanted to open a safe deposit box for money and papers because he couldn't see well enough for his safe. He didn't call

on Thursday and she couldn't reach him. (R, 663). A friend went over and the car was gone. (R, 664). She identified the cigarette lighter with "ECB" embossed on it and was aware he often carried a silver dollar. (R, 667). She was not certain that the boy was present in court. (R, 668).

Dawn Hoffman read the testimony of Virginia Battle, now deceased. (R, 671-682). Battle was the daughter of the victim Earl Baughman. He was ninety-seven years old. (R, 672). She saw him about 7:30 or 8:00 p.m. on Wednesday, May 4, 1983. Jeffery was there. (R, 673). Her father had him write his name on a piece of paper and he wrote down Jeff Williams. (R, 675). On the following day, others indicated to her a concern that Baughman was missing. She went to the residence and the page in the book containing the name was torn out. (R, 678). She notified deputies promptly. (R, 679). The victim always wore a gold diamond ring and a silver dollar. (R, 680-682). She identified Appellant in court. (R, 682).

Marie Woodward testified that she was introduced to Appellant by her cousin, Richard Wesley, in April. (R, 685). Muehleman slept on the couch in the garage. He told her he found a job as a companion for an older man. When he came back to pick up his belongings Muehleman was driving an older Cadillac. (R, 685-687). Two days later, she saw him walking out of the garage and he said he was going on vacation. She traded some of her husband's cigarettes for an old silver coin dollar he had. (R, 688). When

the news reported an old man missing and it was believed a companion had been hired a few days earlier, she awakened her husband and he told her to call the sheriff's department the next morning. She did, told them where Jeff was and they picked him up on the street. (R, 689). Muehleman gave written permission to search and they found money. (R, 690). Appellant had joked about pill bottles in the glove box to drug an old man during the month and bringing him around on the first of the month to get his check cashed. (R, 691).

John Russell Thogmortin, successor medical examiner to Dr. Joan Wood, testified that an autopsy was performed on Baughman on May 15, 1983. (R, 696). The body was found in the trunk of a car in a moderate state of decomposition. (R, 702). He described the body and testified there were two plastic bags in his mouth, extending down into the larynx and trachea. The hyoid bone in the neck was fractured. (R, 703-704). The witness discussed the mechanism of strangulation. (R, 706-709). The cause of death was asphyxiation. (R, 713).

Deputy Lohman Miller, formerly a crime scene technician, retrieved as evidence the date book and torn page. (R, 717). The torn page was crumpled up on an ashtray on the coffee table. (R, 718). When searching the garage where Appellant had been living, money was discovered in the loft. A pair of brown, zippered shoes were also taken at that time. (R, 719). Frying pans were also

removed from the victim's residence. (R, 722).

Prosecutor James Hellickson was called to read the prior testimony of Ronald Eugene Rewis. (R, 727-748). Rewis, while incarcerated, came into contact with Muehleman. (R, 728). Appellant told him he went to work for the old man, went to the bank to have a check cashed, and while waiting in the car when the man went into a lady's house, he decided to rob and kill him. (R, 731). When an accomplice didn't show up, Muehleman said he hit Baughman on the head with a frying pan, tried to strangle him, and stuck a plastic newspaper wrapper down his throat. (R, 732). Muehleman claimed he put him in the trunk of the car, but could only find $150 of the $500 obtained at the bank. (R, 734-735). He wiped his fingerprints off. (R, 736). He put the money in his garage apartment. (R, 737). Rewis agreed to have a taped conversation with Appellant. Appellant said the old man was nasty, would never clean himself up. (R, 740). Muehleman said the killing didn't bother him and laughed about it. (R, 742). Appellant indicated that he was exploring an insanity defense. (R, 743). Muehleman waived reading of Rewis' cross-examination. (R, 744-748). Former CST Beich collected the plastic bags at the autopsy. (R, 753).

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Richard Wesley found Appellant a place to live in his cousin's garage. About a week later, Appellant told him about the job he

had living with and caring for an old man. Muehleman said he wanted to kill him by drugs and beating and asked Wesley to help. (R, 766-767). Eventually, Wesley agreed but after sobering up he didn't want to assist. (R, 768). Wesley went to Nebraska to get away from the situation and because his father was ill, and later told detectives what he now testified about. (R, 769-770).

Former homicide detective John Halliday worked with Ron Beymer on the investigation into the homicide of Earl Baughman. (R, 772). Appellant was taken into custody on May 6, 1983 and Halliday interviewed him five times over a period of time after Miranda warnings. The initial three interviews were not recorded, which was the defendant's preference. (R, 773). A portion of the fourth interview and all of the fifth interview was taped. (R, 774).

In the first interview, Muehleman stated that on Wednesday he got fed up with taking care of Baughman who was grumpy and unclean. Appellant hated the old man and he terminated his employment with him. He admitted writing down the name Jeffery Williamson as who he purported to be and that he tore the page from the notebook. (R, 774-775). Halliday learned during the investigation that items were missing from the victim's home: hat, shoes, toiletry items, cigarette lighter and an 1886 silver dollar. Pursuant to a consent search on May 6th at the defendant's place, a number of those items were retrieved, but no money at that time. Muehleman denied any knowledge of what happened to Baughman. (R, 776). Halliday re-

interviewed Appellant on May 17 after the car and body were located on the 13th. (R, 777). Muehleman still denied any knowledge of Baughman's disappearance and said something about beating any charges. (R, 779). Halliday talked to him alone on May 18; Muehleman didn't want Detective Beymer there. (R, 780). Appellant continued denying knowledge of the murder. (R, 781).

Halliday became aware that Appellant was making admissions to inmate Rewis who passed the information on to police. Rewis was giving detailed and accurate information regarding the facts of the crime, e.g., the location of money under a bucket in the loft of the garage which was found exactly where Rewis said it would be. (R, 781-782). Halliday fully reviewed the taped interview with Rewis. (R, 783). Other information from Rewis was confirmed. (R, 784-785). Rewis provided information that had not been made public. (R, 785). Halliday had listened to Rewis' "wired" conversation with Muehleman at the county jail. The tape is difficult to hear because of background noise. The witness confirmed Rewis' account of defendant laughing about the crime. (R, 786). Appellant wanted to speak to Halliday again and the interview occurred on June 8, 1983. (R, 787-788). Subsequently, Muehleman changed his statement. He stated that he first intended to put the blame on Wesley but knew it wouldn't work, that he would plead insanity but he knew that wouldn't work because he wasn't insane. He went into detail as to what happened. (R, 788).

Muehleman had planned just to rob Baughman and use the money to fly back to Illinois. Appellant thought about it for a couple of hours that night, then grabbed a frying pan and went into the bedroom and hit him in the head six times. (R, 789). Muehleman was in a daze for a moment, began to try and choke him. That didn't work and so he stuffed plastic bags down his throat. (R, 790). Appellant accepted the invitation to tape record his statements. (R, 793). Muehleman specifically mentioned one of the motives for the murder was fear the victim would identify him and also the humane thing to do was kill him. (R, 794). The tape was played to the jury. (R, 798-832). Appellant thereafter called a newspaper reporter and confessed to him and then called Halliday for another interview, which occurred on June 10. (R, 833). The tape was played to the jury. (R, 836-847). Halliday also identified the undercover tape that was done on a micro-cassette; portions were difficult to hear but the part where defendant laughed about the crime was audible. (R, 848-849).

Joanne Wood, the victim's granddaughter, provided some personal history about the victim. He had a very close relationship with his daughters and granddaughters and was very strong-willed. (R, 854-857). His health was remarkable for his age. (R, 858). He was independent in choosing who would take care of him. His death was very much a loss to the community and family. (R, 859). Granddaughter Jessie Battle also provided a

personal history of the victim, the close relationship of the family, his reputation in the business community and his general good health and independence. (R, 861-864). The State rested and Appellant did not present any evidence. (R, 864-868).[3]

The jury recommended death by a vote of ten to two. (R 74). Thereafter, on September 5, 2003, the prosecutor filed a sentencing memorandum urging the imposition of a sentence of death. (Supp. Vol 1, pp. 76-95). The court conducted a Spencer[4] hearing at that time. (Supp. Vol 2, R 261-273).

After the penalty phase at the Spencer hearing in September, 2003, again Muehleman related that he did not want representation by counsel. (R2, 263). Muehleman stated that he had no evidence to present and understood that if the Florida Supreme Court ruled that his position was not correct that he would be waiving his right to present evidence. (R2, 266). Muehleman announced that he was withdrawing one of his prior standing objections at the June 23 jury selection; further legal research persuaded him that the prosecutor was correct and that judicial notice of the judgment on June 8, 1984 should stand. (R2, 267-268).

On October 10, 2003, the trial court filed its Sentencing Order (Supp. Vol. 1, pp. 101-113). The court found in aggravation:

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[3] Volume 4, Fourth Supplemental, consisting of pages 291-454 appears to be a duplicate of Volume 7, Fourth Supplemental, pages 763-925.

[4] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

1. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OR ATTEMPT TO COMMIT A ROBBERY.

The evidence presented at the penalty phase was the same as was presented in the first penalty phase and the facts of the crime are as they were outlined in the Supreme Court's review of the first sentence as found at *503 So.2d 310 (Fla. 1987)*. The 97 year-old infirmed victim was beaten, strangled and suffocated by the Defendant in order that he might steal the victim's money. While the much younger Defendant could have simply over-powered the frail victim and taken the money by force, he went much further and persisted in choking the victim after he hit him with a frying pan with sufficient force to knock out his dentures, and then, when the victim did not die from the choking, the Defendant shoved a plastic newspaper bag down his throat until he suffocated and finally, mercifully, died. Certainly the money admittedly taken by the Defendant was taken by force sufficient to overcome the victim's resistance, feeble as it must have been due to his advanced age and infirmity. In addition to the money, the Defendant stole the victim's hat, shoes, a monogrammed lighter and a silver dollar minted in the victim's birth year (1886).

Therefore, this aggravating factor has been proved beyond a reasonable doubt.

2. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR FINANCIAL GAIN.

This factor can only co-exist with the preceding factor if some other crime or evidence of a crime was shown to have been committed independent from the robbery. A robbery and a kidnapping can be separate aggravating factors; one for the kidnapping, the other for financial gain and not be deemed to be impermissible doubling. In this case, however, the evidence showed that the victim died in his home, before he was transported by the Defendant in the trunk of the victim's car. Therefore since the victim was not alive during the movement in the trunk, there is no kidnapping. While there can be no doubt that the murder was committed for financial gain, this factor must be merged with the robbery and to give it any weight at all would be impermissible doubling.

Therefore this aggravating factor is merged with the

preceding factor and given no independent weight by this Court.

3. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

This factor can apply when the elimination of the victim as a witness is a dominant motive for the murder. Certainly it was not necessary to kill the elderly victim in order to steal his money and other personal possessions. The Defendant could have subdued the victim and easily over-powered him and tied him up, taken the money and other property and fled back to Illinois, as was his plan. But the victim could identify the Defendant, even though the Defendant gave him a false name when he applied for the job of 'house-boy' three days earlier. So, while the purpose of the attack might have been to commit the robbery, the purpose and "dominant motive" for the murder was to eliminate the victim as a witness to the robbery. There are many things in this case which suggest this was indeed the Defendant's motive:

A. The day before the murder the Defendant sought the assistance of a friend in committing the crime and disposing of the body. While this 'friend' failed to show to aid the Defendant, it turned out that help was not needed. The frail old victim could not resist after the Defendant hit him with the frying pan and after the victim finally died the Defendant was able to carry the victim to the car by himself.

B. The Defendant took precautions after the killing to avoid discovery by the police. He tried to conceal the blood-stained mattress; he burned the victim's bloody clothes and wallet in a barrel in the back yard; he cleaned the floor to hide his fingerprints and the victim's spilled blood; he set the table to make it seem as if he and the victim had eaten breakfast; he backed the car into the carport to conceal the loading of the body into the trunk; he waited till daylight to move the body during the morning traffic so as not to arouse suspicion; he parked the car with the victim in the trunk on a busy roadway where other cars are normally parked in front of an apartment complex to avoid suspicion

(the car was not located for 10 days after the murder).

C. Most telling, the Defendant admitted to the police during one of his confessions that he killed the victim because the victim could identify him. All of these facts, admitted by the Defendant to either law enforcement, to his 'jailhouse confidant', Ron Rewis, or both, go to prove that this Defendant killed Mr. Baughman for one reason: to eliminate him as a witness. This factor has been proved beyond all reasonable doubt.

4. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Was this murder a conscienceless or pitiless crime and unnecessarily torturous to the victim? Did the victim experience mental anguish and fear prior to loosing conscienceless? If so, it surely meets the legal and constitutional standards as established by the Courts. Strangulation of a conscious victim involves, among other things, a foreknowledge of death, extreme anxiety and fear. This method of killing is one of the factors of heinousness. By this Defendant's own admission, he repeatedly hit the victim with a cast iron frying pan in the head, knocking out his dentures, splattering blood on the wall and floor, but the victim did not die from this beating. Defendant next attempted to end the victim's life by strangling the victim, using enough force to fracture the victim's hyoid bone in his neck. When this attempt did not work due to the flexibility of the victim's neck, this Defendant forcefully shoved a clear plastic newspaper bag down the victim's throat, depriving his lungs of air and eventually oxygen to his brain, rendering him unconscious, but not yet dead. The Defendant's confession to others that the victim continued to breathe and suck for air even with his windpipe clogged with the bag for several more minutes is especially telling of just how this frail old man suffered. The victim was still conscious after the beating, as is evidenced by his plea for mercy when he said, "Jeff, oh Jeff," begging the Defendant to stop attacking him. He was undoubtedly still aware after the strangulation of what was happening because the Defendant admitted this did not kill him and it was not until after the bag was in his throat for many minutes that he finally, mercifully, expired.

I cannot imagine the horror this poor man must have been going through after being hit, then strangled and finally asphyxiated, before finally losing consciousness. According to the medical examiner, a great deal of force must have been used to overcome the victim's gag reflex and to insert the Defendant's hand down the victim's throat into his windpipe to push the plastic bag far enough to cause death. The Defendant's own statements to Inmate Rewis were to the effect that the victim was still struggling and moving around as the bag was being pushed down his throat.

The extreme pain, fear and anxiety, and knowledge of impending death experienced by this infirmed and helpless victim and the realization that he was being murdered more than satisfy the legal and constitutional requirements of this factor. This factor has been established beyond a reasonable doubt.

5. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER AND WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In order for this factor to be established the evidence must show that the killing was a product of cool and calm reflection rather than an act of an emotional frenzy, panic or a fit of rage; further, it must be shown that the Defendant carefully planned or prearranged to commit the crime; and it must be shown that the Defendant exhibited heightened premeditation and further had no pretense of moral or legal justification. This Court is of the opinion that all these requirements were proved by the evidence presented during the penalty phase. The Defendant stated in his confession that he took the job working for the victim in order to steal his money so he could return to Illinois. He tried to enlist the help of a friend to commit the crime and dispose of the body. The defendant exhibited great determination in his efforts to kill the victim. The Defendant stated that he thought about killing the victim for several hours waiting for the victim to fall asleep before he hit the victim with the frying pan. He then hit the victim several more times, knowing with each swing exactly what he was doing. When the victim did not die from the beating, he next choked the victim with his hands, but again the victim did not die. He next took a plastic bag and shoved it down the victim's throat, again with the sole thought of killing the victim. He then watched as

> the victim slowly, and with great agony took his last few sucking breaths and finally expired. These admitted actions by this Defendant clearly show that the crime was not only committed in a premeditated state, it was committed in a cold and very calculated manner. This Court is in no way persuaded by the Defendant's statement to the police and to the other witnesses that he completed the killing because he did not want the victim to continue life in a vegetative state or in a damaged condition. This Court rejects this self-serving explanation as being totally disproved by the evidence. This factor has been established beyond a reasonable doubt.
>
> None of the other aggravating factors enumerated in the law are applicable to this case and were not considered by this Court.
>
> Nothing except as indicated in Paragraphs 1-5 was considered in aggravation. The Court received no letters or other communication relating to the sentencing in this case. One letter was received from a friend of the Defendant and was placed in the court file, with copies given to the Defendant and the State, but not read by the Court.

(Supp. Vol 1, pp. 102-109).

Additionally, the trial court found as the only mitigator, Appellant's age of 18 years and five months at the time he murdered 97-year-old Edward Baughman (pp. 109-112). The court noted Muehleman "carefully planned the crime, tried to enlist help and even when the friend backed out, he carried out his plan." (pp. 112-113). The court agreed with the jury recommendation and imposed death. This appeal ensues.

SUMMARY OF THE ARGUMENT

I. Appellant's claim that the trial court flagrantly disobeyed this Court's admonition to advise Muehleman of his right to counsel is meritless if not frivolous. Such a claim is procedurally barred here since not preserved for appellate review by complaint below; it does not constitute fundamental error. Appellant repeatedly at several hearings below insisted on his right of self-representation and during the court's efforts to conduct a Faretta hearing, Muehleman lectured the trial court that any attempt to conduct an inquiry was identical to the attempt to force counsel on him, and impermissible.

II. The lower court did not abuse its discretion in rejecting Appellant's demand that the original presiding judge be compelled to preside at the new penalty phase.

III. Appellant's claim that the Faretta inquiry was a sham is frivolous. The court conducted the appropriate inquiry on May 19, 2003. Appellant knowingly and with eyes wide open opted for self-representation before, during and after that hearing.

IV. The contention that the prosecutor impermissibly used prosecutorial employees to serve as readers of prior testimony of unavailable witnesses is procedurally barred for the failure to object below as a predicate for appellate review. Additionally, the contention is meritless. Performing such a function is a mere administrative matter and Appellant has failed to show an abuse of

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT FLAGRANTLY DISOBEYED THIS COURT'S ADMONITION TO ADVISE APPELLANT OF HIS RIGHT TO COUNSEL AND WHETHER SUCH ALLEGED ERROR PREVENTED A PROPER RECORD OF PROCEEDINGS.

Appellant first complains that the trial court failed to promptly follow this Court's admonition to advise Muehleman of his right to counsel. The claim of flagrant disobedience of this Court's order is frivolous and relief must be denied since the claim is both procedurally barred for the failure to present it below (a necessary predicate for appellate review) and because it is so lacking in merit.

Appellant's failure to object in the court below contemporaneously to preserve the issue for appellate review results in a procedural bar precluding initial consideration in the appellate court. See Rogers v. State, 783 So. 2d 980, 1002 (Fla. 2001); Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990); Chandler v. State, 702 So. 2d 186, 195 (Fla. 1997); Zack v. State, 753 So. 2d 9, 22 (Fla. 2000); Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999). Appellant contends that the alleged error herein constitutes fundamental error. The record shows from the first hearing onward through the Spencer hearing Muehleman's continuous insistence on his right of self-representation with knowledge of the

consequences. Since Appellant only wanted to enforce his demand that Judge Farnell be named presiding judge, it did not matter when the trial judge first discussed the right of counsel. See Issue III, *infra*.

While Appellant seeks to cast the blame on the trial court for not having conducted a full Faretta inquiry until May 19, 2003, the record shows that at the very first hearing-on December 12, 2002-Muehleman told the court he would not have an attorney and wanted to represent himself (Supp. Vol. 2, 122-123). He followed that desire throughout, on February 12, 2003 (Supp. Vol. 2, 217-218); in May when the court conducted its attempted inquiry and, lastly, on September 15, 2003 (Supp. Vol. 2, 263). The allegation that the trial court's failure to act more promptly might have changed everything is, frankly, silly. There was no flagrant disobedience and any resulting delay did not result in any prejudice to Appellant who made his choices, knowing the consequences to follow.

The complaint regarding jail clothing is equally insubstantial. The record reflects that at the May 16, 2003 hearing, the court inquired whether Muehleman had made arrangements for clothes to be brought to him and he apparently declined the court's invitation to assist in obtaining other than jail clothing (R. Supp. Vol. 2, 249). Prior to jury selection on June 23, 2003, the court again inquired whether it was Muehleman's desire to proceed wearing jail clothes and Appellant noted that the court had

asked that question on May 16th and yes that was his desire (R. Supp. Vol. 5, 460).

Appellant has failed to show that the trial court abused its discretion. Trease v. State, 768 So. 2d 1050 (Fla. 2000). Relief must be denied.

ISSUE II

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN DENYING APPELLANT'S MOTION TO RESTORE ASSIGNMENT TO THE ORIGINAL PRESIDING JUDGE.

Chief Judge David A. Demers denied Appellant's motion seeking to have Judge Crockett Farnell preside over the case in an order dated February 6, 2003. The order recited the following findings and conclusions (R1, 25-27):

> 1. This case is currently assigned to Section C in the criminal division, which was the section to which it was originally assigned.
> 2. There was no guilt phase or capital trial in this cause because the Defendant pled guilty to the charge of First Degree murder.
> 3. Judge Crockett Farnell was the judge assigned to Section C at the time, and he presided over the original sentencing proceeding before a jury.
> 4. Judge Crockett Farnell has since rotated out of the criminal division to the civil division.
> 5. Judge Brandt Downey is currently assigned to Section C.
> 6. The Supreme Court has remanded this case for a new sentencing proceeding.
> 7. The Defendant's Motion seeks to have Judge Crockett Farnell specially assigned to preside over the new sentencing proceeding, rather than have Judge Brandt Downey, the judge currently assigned to Division C, preside over the new sentencing proceeding.
> 8. The undersigned has determined that both judges are fully qualified to preside over the matter.
> 9. The Defendant has failed to allege any legal basis that mandates that Judge Crockett Farnell preside over the new sentencing proceeding.
> 10. This is not a post-conviction matter; rather, it is a new sentencing proceeding.
> 11. The only rule that might apply is Rule 3.700(c) Florida Rules of Criminal Procedure. Subsection (1) of that rule applies only to noncapital cases. It has been construed as permitting a judge other than the one who tried the original case or took a plea, to preside over a

resentencing only if there is a necessity for the reassignment. See *Persaud v. State*, 821 So.2d 411 (Fla. 2d DCA 2002); *Clemons v. State*, 816 So.2d 1180 (Fla. 2d DCA 2002).

12. Subsection (2) of Rule 3.700(c) applies only to capital cases. In contrast to subsection (1), subsection (2) only requires a showing of necessity prior to reassignment to a successor judge where the original judge presided over the "capital trial." It does not require a showing of necessity prior to reassignment to a successor judge for sentencing, where the Defendant pled guilty. That is precisely the situation in the case at bar. Accordingly, there clearly is no requirement that there be a necessity for assignment of Judge Brandt Downey, who is currently in the criminal division, rather that Judge Crockett Farnell, who is currently in the civil division.

13. The undersigned judge observes that there is a logical basis for treating noncapital cases where the Defendant pleads guilty, differently from capital cases where the Defendant pleads guilty. In noncapital cases there are a variety of options that might be part of the plea, including plea bargains that the original trial judge may have agreed to; the jury plays no role in sentencing; and there is a wide range of sentencing options. In contrast, in capital cases where the Defendant pleads guilty, if there is going to be a sentencing phase there can be no plea bargain; the jury plays a critical role; and the only two options are life or death. Thus, the considerations that require that there be a necessity for the appointment of a successor judge in a noncapital resentencing where the defendant pleads guilty, do not apply to a capital resentencing where the defendant pleads guilty.

14. The assignment of this case is solely within the discretion of the Chief Judge.

15. This circuit has an established procedure for assigning cases and unless there is some reason for departing from that procedure it should be followed. To take any other approach would be unnecessarily corrosive of the process of assignment of judges and cases, resulting in judges bouncing unnecessarily from current assignments to other assignments.

16. There is no requirement or reason for departing from the procedure for assignment in this case.

ACCORDINGLY, it is hereby,

ORDERED AND ADJUDGED that

A. The Defendant's motion is **DENIED.**

B. This case will remain in Section C and will remain assigned to the Judge presiding in Section C.

On March 12, 2003, Judge Demers entered his Order Denying Defendant's Motion for Rehearing, reciting:

> PROCEDURAL HISTORY
>
> On November 18, 2002, the clerk of court received the Florida Supreme Court's mandate remanding the above-styled case for a new penalty phase. Subsequently, the case was assigned to Division C, the Honorable Brandt C. Downey III presiding. This is the division to which the case was initially assigned in 1983. On January 21, 2003, the defendant filed several motions seeking to have the original judge, the Honorable Crockett Farnell, reassigned to hear the new penalty phase. By written order dated filed February 7, 2003, the undersigned judge denied the defendant's motion. The instant motion for rehearing follows.
>
> ANALYSIS
>
> First, as previously noted, the defendant's reliance on Fla. R. Jud. Admin. 2.050(b)(4) is misplaced. That subsection provides, in pertinent part, that the chief judge shall assign a qualified judge to hear "any type of postconviction or collateral relief proceeding brought by a defendant who has been sentenced to death." That subsection does not apply here because this is not a postconviction or collateral relief proceeding. Rather, it is a new penalty phase. In addition, the defendant's sentence of death has been vacated by virtue of the new penalty phase. Moreover, regardless of the procedural posture of this case, Judge Downey is qualified to hear capital cases pursuant to Fla. R. Jud. Admin. 2.050(b)(10).
>
> Second, the defendant's reliance on section 921.141, Florida Statutes, is also misplaced. The defendant maintains that the third sentence of subsection (1) requires that Judge Farnell be reassigned to this case. That sentence reads: "The proceeding [penalty phase] shall be conducted by the trial judge before the trial jury as soon as practicable." Contrary to the defendant's assertions, nothing in section 921.141 instructs the undersigned judge to reassign Judge Farnell to the new penalty phase under the circumstances here. Again, there was no trial in this case, and there was no trial jury. On May 1, 1984, the defendant entered a

guilty plea to the charge of murder in the first-degree.

Finally, for the record, the defendant's allegation that Judge Downey reassigned or transferred this case to himself is erroneous. On or about November 18, 2002, after the clerk of court received the mandate, court administration reassigned this case to the division to which it has previously been assigned, Division C.

In light of the fact that Judge Farnell has been reassigned to the civil division of this circuit, in light of the fact that Division C was the division to which this case was initially assigned, and in light of the fact that the current judge assigned to Division C, the Honorable Brandt C. Downey III, is duly qualified to preside over capital cases, it is

ORDERED AND ADJUDGED that the defendant's Motion for Rehearing is hereby **DENIED**.

(R1, 60-61).

The lower court correctly rejected Appellant's claim that he was entitled to his request for relief by his reliance on Florida Rule of Judicial Administration 2.050(b)(4) and Florida Rule of Criminal Procedure 3.700(c). The pertinent section of Rule 2.050(b)(4) recites:

> When assigning a judge to hear any type of postconviction or collateral relief proceeding brought by a defendant who has been sentenced to death, the chief judge shall assign to such cases a judge qualified to conduct such proceedings under subdivision (b)(10) of this rule. (emphasis supplied).

By its terms that rule is inapplicable herein since the resentencing proceeding ordered by this Court is not a "postconviction or collateral relief proceeding." Rather, it is a new penalty phase. Muehleman's previous sentence of death had been vacated by this Court's order granting a new penalty phase.

Appellant argues that his request for reassignment of the

original trial judge should have been granted since he was familiar with the evidence presented in the case and in a better position to evaluate the aggravating and mitigating factors at issue since he had done it before. (Brief, p. 13). This rationale is unavailable here. Muehleman entered a plea of guilty so there was no guilt phase evidence and a new penalty phase operates under the "clean slate" doctrine, i.e., a resentencing is a totally new proceeding and the judge is not bound by the original court's findings. See Preston v. State, 607 So. 2d 404, 409 (Fla. 1992); Hall v. State, 614 So. 2d 473, 477 (Fla. 1993).

This Court's policy rationale advanced in Rule 3.700(c)(2) was articulated in Corbett v. State, 602 So. 2d 1240, 1244 (Fla. 1992):

> We find that a judge who is substituted before the initial trial on the merits is completed and who does not hear the evidence presented during the penalty phase of the trial, must conduct a new sentencing proceeding before a jury to assure that both the judge and jury hear the same evidence that will be determinative of whether a defendant lives or dies. To rule otherwise would make it difficult for a substitute judge to overrule a jury that has heard the testimony and the evidence, particularly one that has recommended the death sentence, because the judge may only rely on a cold record in making his or her evaluation. We conclude that fairness in this difficult area of death penalty proceedings dictates that the judge imposing the sentence should be the same judge who presided over the penalty phase proceeding.

Accord Craig v. State, 620 So. 2d 174 (Fla. 1993). Since Muehleman had been awarded a new sentencing proceeding by this Court's prior order, the new proceeding is a clean slate unencumbered by the

previous sentencing proceeding. See Preston v. State, *supra*; Hall, *supra*. Consequently, prior Judge Farnell has no additional benefit to accord Muehleman in this resentencing proceeding.

Muehleman also contends that the word "necessary" has the same meaning in Rule 3.700(c)(2) as in 3.700 (c)(1). Judge Demers in his Order of February 6, 2003, concluded that Rule 3.700(c)(2)-the capital case subsection-did not require a showing of necessity prior to reassignment to a successor judge for sentencing where a defendant plead guilty. Judge Demers explained there are good reasons to distinguish noncapital cases where a defendant pleads guilty from capital cases involving a defendant pleading guilty: in the noncapital case a variety of options that might be part of the plea including plea bargains that the original judge might have agreed to; the jury plays no role in the sentencing process, and there is a wide range of sentencing options. In contrast in a capital case where the defendant pleads guilty, if there is going to be a sentencing phase there can be no plea bargain, the jury plays a critical role and the only two options are death or life imprisonment. Thus, the considerations that require a necessity for the appointment of a successor judge in a noncapital resentencing following a guilty plea do not apply to a capital resentencing where a defendant pleads guilty. (R1, 27). Appellee notes here that the word "necessary" used in both Rule 3.700(c)(1) and in (c)(2) is not defined therein and because of the differences

alluded to by Judge Demers the word "necessary" in each context may not be identical in scope.

Appellee here adds the following argument in support of the trial court's order denying Muehleman's demand that Judge Farnell be assigned to the case.[5] Appellee would respectfully submit that Rule 3.700(c)(2) does not attempt to explain or describe what circumstances render it necessary that sentence be imposed by a judge other than the original presiding trial judge. Rather, the rule states-and enforces a policy-that **when** a replacement judge comes into play, for whatever reason, that new judge should conduct a new sentencing proceeding before a jury prior to passing sentence. Thus, the new (previously unfamiliar) judge must hear with another jury the relevant evidence prior to sentencing.

Finally, Appellant seems to characterize the lower court's ruling as merely one of convenience. The lower court certainly did not describe its actions as convenient. Indeed, the court noted that the circuit had established procedures for assigning cases and inappropriate deviations for another approach "would be

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[5] The State may permissibly advance this additional argument here. See Dade County School Board v. Radio Station WQBA, 731 So. 2d 638, 644-45 (Fla. 1999)("Stated another way, if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."); Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002)("This longstanding principle of appellate law, sometimes referred to as the 'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that reaches the right result, but for the wrong reasons so long as there is any basis which would support the judgment in the record.").

unnecessarily corrosive of the process of assignment of judges and cases, resulting in judges bouncing unnecessarily from current assignments to other assignments." (R1, 27). While Appellant may view it as a matter of convenience, the State suggests that maintaining a court system so that judicial work can be accomplished is something more than that.

While Appellant cites Madrigal v. State, 683 So. 2d 1093 (Fla. 4th DCA 1996) and Conroy v. State, 933 So. 2d 687 (Fla. 2d DCA 2006), those cases are inapposite as they dealt with interpreting and applying Rule 3.700(c)(1), the noncapital case rule instead of Rule 3.700 (c)(2). Whether they are correct or not in their context is immaterial here, as Judge Demers explained in his orders. However, other lower appellate courts have expressed alternative views. See Lambert v. State, 910 So. 2d 890, 891 (Fla. 1st DCA 2005):

> But when significant subsequent events impacting the ultimate sentencing decision have transpired and the passage of time has likely deprived the initial sentencing judge of recollection of the specifics of his or her earlier sentencing decision, there would seem to be little benefit in a rule that would require recall of the original sentencing judge for violation of probation proceedings.
>
> Our interpretation of the rule is also influenced by our recognition that a uniform requirement that original sentencing judges be recalled for violation of probation proceedings would be an "administrative nightmare." *See Lester v. State*, 446 So. 2d 1088, 1090 (Fla. 2d DCA 1984) (Grimes, J., concurring specially). Most Florida trial judges are routinely reassigned from one division to another, and they are often reassigned from one county to

> another. In fact, the original sentencing judge in the present case had been reassigned from a criminal division and into the family law division almost two years prior to the initiation of the appellant's violation of probation proceedings. The inefficiency, disruption, and delay that would be visited upon the litigants and personnel within a division to which an original sentencing judge had later been reassigned would be dramatic if that judge were required to temporarily return to the earlier criminal-division assignment each time violation of probation proceedings were initiated against a defendant the judge had placed on probation. n2 We do not believe that rule 3.700(c) was intended to require such a result.

(emphasis supplied)(footnotes omitted). See also Lester v. State, 446 So. 2d 1088 (Fla. 2d DCA 1984).

Harmless Error

Lastly, even if this Court were to deem the lower court to have committed errors, the violation of a rule of procedure can be harmless error. See e.g. Richardson v. State, 246 So. 2d 771, 774 (Fla. 1971)("...we hold that the violation of a rule of procedure prescribed by this Court does not call for a reversal of a conviction unless the record discloses that non-compliance with the rule resulted in prejudice or harm to the defendant."). Both Judge Farnell and Judge Downey were qualified to preside at trial and Judge Downey was the assigned judge for Division C. Muehleman is unable to demonstrate any resulting prejudice from the court's denial of his motion requesting reassignment of civil division Judge Farnell.

As stated in Kruckenberg v. Powell, 422 So. 2d 994, 996 (Fla. 5th DCA 1982):

Where the court has jurisdiction, it is the court, and not the particular judges thereof, that has jurisdiction over a particular cause, controversy and the parties thereto. Every duly elected or appointed judge of a court has the bare power or authority to exercise all of the jurisdiction of that court. Administrative orders evidencing internal matters of self-government of the court do not limit the lawful authority of any judge of the court, nor do they bestow rights on litigants. In legal contemplation judges, like litigants, are all equal before the law. Subject only to substantive law relating to disqualification of judges, litigants have no right to have, or not have, any particular judge of a court hear their cause and no due process right to be heard before any assignment or reassignment of a particular case to a particular judge.

The assignment and reassignment of cases in a busy multi-judge court presents a continuous administrative problem resulting, not only from the disqualification of judges in particular cases and the need to conserve judicial labor by the consolidation of companion and other related cases, but also from many other complex causes, including the rotation of judges between divisions of the court, equalization and control of individual judge case loads, the temporary absence of judges or the temporary inability of judges to perform services, termination of the service of individual judges by death, retirement or otherwise, and other good reasons. Contrary to petitioner's assertion, in the administration of the internal matters of a court the judges thereof exercise an authority that goes far beyond the judicial discretion that judges exercise in the disposition of cases and controversies before the court. A litigant does not have standing to enforce internal court policy, which is a matter of judicial administration and the proper concern of the judges of the particular court and of the administrative supervision of the judicial system. We note that the order of reassignment in the case was signed by Judge Powell as "administrative judge" and we presume that he was acting under Florida Rule of Judicial Administration 2.050(b)(5), as the designee of the chief judge of the judicial circuit who has administrative supervisory authority over such matters under Judicial Administrative Rule 2.050(b), and article V, section 2(d), Florida Constitution, and whose authority is subject to the administrative supervision of the chief justice of the

> supreme court who has such supervising authority under article V, section 2(b), Florida Constitution.

(emphasis supplied).

Fundamental Error

Fundamental error has been described as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Conahan v. State, 844 So. 2d 629, 641 (Fla. 2003); Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000). In the context of a penalty phase proceeding to constitute fundamental error it must be so prejudicial as to taint the jury's recommended sentence, i.e., that the recommendation of death could not have been made without reliance on them. See Peterka v. State, 890 So. 2d 219, 243 (Fla. 2004); Doorbal v. State, 837 So. 2d 940, 958-959 (Fla. 2003). Obviously, in the instant case, the identity of the presiding judge was not a factor, such that the recommendation of death by the jury could not have been made had someone else presided. There can be no fundamental request for reassignment of Judge Farnell to the resentencing proceeding.

ISSUE III

THE LOWER COURT CORRECTLY ALLOWED SELF-REPRESENTATION TO APPELLANT AFTER CONDUCTING THE APPROPRIATE INQUIRY PURSUANT TO FARETTA V. CALIFORNIA, 422 U.S. 806 (1975).

A defendant has the Constitutional right to waive counsel and to represent himself. See Faretta v. California, 422 U.S. 806 (1975); Logan v. State, 846 So. 2d 472 (Fla. 2003); Gore v. State, 784 So. 2d 418 (Fla. 2001); Potts v. State, 718 So. 2d 757 (Fla. 1998); Hernandez-Alberto v. State, 889 So. 2d 721 (Fla. 2004). A trial court's decision as to self-representation is reviewable for abuse of discretion. Holland v. State, 773 So. 2d 1065 (Fla. 2000). The lower court did not abuse its discretion.

While it is true that Appellant refused to answer many questions directed by the trial court, it is clear that he made his decision with eyes wide open and aware of the dangers and disadvantages of self-representation in this case and expressed his view herein that once his Faretta rights had been afforded, any repeated effort to cover these matters constituted an attempt (in his view) to force unwanted counsel upon him in derogation of his Constitutional rights.[6] Note at the beginning of the colloquy on

[6] Despite Muehleman's scholarship, Florida Rule of Criminal Procedure 3.111(d)(5) provides that "If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel." Thus, contrary to Appellant's view, neither the lower court nor the State was attempting to force unwanted counsel upon him merely by conducting the inquiry.

the prosecutor would not afford special treatment. Muehleman acknowledged receiving a copy of the charges twenty years ago, understood the one charge and understood the penalty of death or life imprisonment with a minimum mandatory of twenty-five years. Muehleman is thirty-eight years old and can read and write. He declined to answer how much schooling he had. (R2, 141-143). Muehleman responded that this case was set for trial not a hearing for the appointment of counsel and:

> "If I was advised of this, I would have brought U.S. Constitutional law on point, which says that after Faretta has been granted, any force of any manner of counsel upon the defendant is a violation of Faretta vs. California."

(R2, 147). The trial court correctly made a finding that Appellant was competent to represent himself, that he understood the significance of his actions, he understood the proceedings and was entitled to represent himself. (R2, 148). The lower court complied with this Court's ruling in Potts, *supra*, and Hernandez-Alberto, *supra*, and there is no basis for reversal by this Court.

A criminal defendant has no right to manipulate the legal system for his own whimsical purposes. Jones v. State, 449 So. 2d 253 (Fla. 1984); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Whitfield v. State, 706 So. 2d 1, 4 (Fla. 1997)("In this case, Whitfield repeatedly refused to answer the trial judge's questions and repeatedly told the judge he wanted to leave.").

While Appellant characterizes the Faretta inquiry as a "sham",

in reality the only sham is the manner in which Muehleman's enablers blame the trial court when the record shows Appellant sought to be the inmate running the asylum, seeking to manipulate everyone to accept his edict on the appropriate presiding judge or tolerate his subsequent pouting. This Court well knows from the lengthy history of Muehleman's post-conviction litigation that Appellant completely understood and opted to enforce his Faretta self-representation rights at that time and throughout this new penalty phase proceeding. See Muehleman v. State, Florida Supreme Court Case No. 79,816.

The record shows Appellant persistently throughout the proceedings insisted on representing himself and complained that any attempt to dissuade him constituted an impermissible effort to deny him his rights.

1. At the hearing on December 12, 2002, Muehleman announced that he was not going to have an attorney, that he wanted to represent himself and was contemplating waiving a jury recommendation as well. (R2, 122-124). When an assistant public defender there mentioned that Assistant Public Defender Gary Welch had previously been an assistant attorney general, Muehleman indicated that the subject of standby counsel could be addressed at the pretrial hearing on January 21. (R2, 130).

2. At the hearing on January 21, 2003, Muehleman simply asserted his claim that having Judge Farnell preside was a

jurisdictional issue. (R2, 208-210).

3. At a hearing on February 12, 2003, the court announced that Judge Demers' order had denied the defense request for Judge Farnell to preside and Muehleman asserted an intent to file a rehearing motion and continued to assert his desire for self-representation. Appellant added that he was looking at pro bono counsel as standby and said that he had a conflict with ten or twelve attorneys. (Supp. Vol. 2, 217-218). When the prosecutor suggested a Faretta hearing, the court responded that it would make a finding based on Judge Farnell's prior finding that Muehleman was competent to represent himself. (R2, 219-223). When the prosecutor expressed a desire to resolve the issue of an alleged conflict with the Public Defender's office and a discovery issue, Muehleman stated he did not wish to participate in discovery. (R2, 227, 229).

4. At a hearing on May 16, 2003, the prosecutor noted that Muehleman had sent a letter indicating that he did not intend to present any evidence or to contest the case at all. (R2, 239). The prosecutor requested a more complete Faretta inquiry. (R2, 240-241). Muehleman acknowledged having sent the letter and admitted not having listed witnesses and that he would not subpoena anybody (but had made arrangements if people showed up.) He objected to a trial because of his judge issue objection and urged there was nothing wrong with his competence. (R2, 241-246).

When the State noted that Appellant's alleged conflict with

counsel had not been resolved and requested the court appoint counsel to resolve it (R2, 251), Muehleman responded that he was the expert on defense. (R2, 253).

5. At the Faretta hearing on May 19, 2003, as stated *supra*, Muehleman repeatedly informed the trial court that it was improper to conduct a Faretta colloquy with him since he insisted that case law supported his view that repeated inquiry was improper. (R2, 139-147). Muehleman requested and was granted a one week continuance to confer with an attorney on the appellate issue of Judge Demers' ruling. (R2, 175).

6. At a hearing on May 23, 2003, Muehleman noted that he was thinking about appellate counsel for an interlocutory appeal of Judge Demers' ruling but stated he had no objection to the trial court setting a June 23 date for the penalty phase. (R2, 192-194).

7. At the Spencer hearing on September 5, 2003, Muehleman again asserted that he did not want an attorney, represented that he had no testimony to present and was aware that the consequences included his waiver of the right to present further evidence to the Florida Supreme Court (R2, 263-266). Muehleman also withdrew an objection he had raised earlier regarding the validity of the prior judgment, acknowledging the prosecutor was correct. (R2, 267-268).

At page 20 of his brief, Appellant appears to reproduce a quote from Lamarca v. State, 931 So. 2d 838, 854-855 (Fla. 2006). Appellee has no quarrel with this excerpt and would add the

paragraph of this Court that followed that quote. The complete text recites:

> In Faretta, the United States Supreme Court recognized that "the Sixth Amendment grants to each criminal defendant the right of self-representation, regardless of consequences." State v. Bowen, 698 So. 2d 248, 250 (Fla. 1997). Nevertheless, because the consequences can be severe, trial courts are required to make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that '[the defendant] knows what he is doing and that his choice is made with his eyes wide open.'" Hernandez-Alberto v. State, 889 So. 2d 721, 729 (Fla. 2004) (quoting Faretta, 422 U.S. at 835). When the trial transcript reveals that the defendant is "literate, competent, and understanding" and has been apprised of his rights, this Court will uphold the inquiry. Smith v. State, 407 So. 2d 894, 900 (Fla. 1981) (quoting Faretta, 422 U.S. at 835); see also Weaver v. State, 894 So. 2d 178, 192 (Fla. 2004) (recognizing that "[a] trial court may not impose counsel on a 'literate, competent, and understanding' defendant who has voluntarily waived his right to counsel"). The penalty phase transcript reveals that these requirements were met in Lamarca's case. The trial judge informed Lamarca that he would be at a "great disadvantage" because he did not have the legal training of the state attorney, and on numerous occasions the judge expressed his disproval of Lamarca's decision. The judge questioned Lamarca about his prior experience in the criminal justice system, recognizing that he had participated in two jury trials prior to this penalty phase, and the judge also considered Lamarca's mental condition, noting that his interactions with Lamarca during the many stages of trial indicated that Lamarca was intelligent and competent. In the end, the trial judge found that Lamarca was intelligent and that he had knowingly and voluntarily asserted his right to represent himself.
>
> Moreover, Lamarca presented no competent evidence to refute this finding. The statement Lamarca relies on to assert his claim of incompetence was part of a concise, well-articulated speech in which Lamarca declared that the jury wrongly convicted him. The fact that this argument was not wise legal strategy in the penalty phase

> does not support Lamarca's claim that the Faretta inquiry was invalid. See Weaver, 894 So. 2d at 193 (recognizing that the purpose behind the Faretta inquiry is to determine whether the defendant is competent to waive his right to counsel, "not whether [the defendant] is competent to provide an adequate defense").

Lamarca v. State, 931 So. 2d 838, 855 (Fla. 2006).

Fundamental error has been described as error that reaches down into the validity of the trial itself to the extent that a guilty verdict could not have been obtained without the assistance of the alleged error. Conahan v. State, 844 So. 2d 629, 641 (Fla. 2003); Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000). In the context of a penalty phase proceeding, to constitute fundamental error the alleged error must be so prejudicial as to taint the jury's recommended sentence, i.e., that the recommendation of death could not have been made without reliance on them. See Peterka v. State, 890 So. 2d 219, 243 (Fla. 2004); Doorbal v. State, 837 So. 2d 940, 958-959 (Fla. 2003).

The instant claim is meritless. There is no fundamental error. The record conclusively establishes that Appellant knowing his rights willfully refused to answer appropriate questions. The trial court need not be the subject of unwarranted criticism for doing its job despite Appellant's refusal to cooperate.

ISSUE IV

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN PERMITTING MEMBERS OF THE STATE ATTORNEY'S OFFICE TO READ TESTIMONY FROM WITNESSES NOW UNAVAILABLE GIVEN AT MUEHLEMAN'S PRIOR PENALTY PHASE PROCEEDING.

Appellant apparently is contending on this point that fundamental error occurred below, obviating the need for the interjection of a contemporaneous objection to preserve the issue for appellate review. Appellee disagrees and contends the claim is procedurally barred for failure to object. Steinhorst, supra. Appellee further asserts that no fundamental error has been shown. See Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000). Additionally, Appellant has failed to show the trial court abused its discretion. White v. State, 817 So. 2d 799, 806 (Fla. 2002).

The record reflects that a number of witnesses who had testified in Muehleman's previous penalty phase (following Muehleman's plea of guilty to first degree murder) over two decades ago were no longer available. For example, State Attorney Investigator Scott Hopkins testified that the homicide victim's former friend and secretary, Virginia Peterson, had died on April 2, 1996 at age 102, that the victim's daughter, Virginia Battle, had died on March 26, 1999 at age 81 and that Ronald Rewis could not be found after a diligent search; he disappeared from his sister's residence in 1991. NCIC show no activity since 1991, he

had no reported income since 1989 and had never applied for a driver's license (4th Supp. Vol. 5, R593-613).

The court found these witnesses to be unavailable and allowed the prior testimony to be used. (R, 613). Thereafter, Assistant State Attorney Kristen Howatt read the prior testimony of Virginia Peterson without any objection by the defense. (4th Supp. Vol 6, R653-670), Dawn Hoffman read the testimony of Virginia Battle (R671-682), and prosecutor James Hellickson read the testimony of Ronald Eugene Rewis (R724-748). Muehleman announced that while he was not objecting it was a standing issue of prosecutorial misconduct and that he would file a Bar complaint-that Rewis gave false testimony. (R725-726). When the prosecutor announced the conclusion of the direct testimony previously given by Rewis, Muehleman announced that he was waiving the reading of Rewis' prior cross-examination. The court announced to the jury that Muehleman made the decision not to present the cross-examination. (R744-748).

The admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion. White v. State, 817 So. 2d 799, 806 (Fla. 2002); Brooks v. State, 918 So. 2d 181 (Fla. 2005); Randolph v. State, 853 So. 2d 1051 (Fla. 2001). Discretion is abused only when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial

court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000); White, *supra* at 806; Green v. State, 907 So. 2d 489 (Fla. 2005); Perez v. State, 919 So. 2d 347 (Fla. 2005).

Appellant forthrightly acknowledges the inability to find supporting Florida law for the meritless claim that prosecutorial employees are not permitted to act as "readers" of prior testimony. (Brief, p. 22)[7] One can readily see, however, the mischief occasioned by entertaining *ab initio* on appeal a complaint about the identity of such readers. If the reader is associated with the prosecution, the defendant complains that undue weight is given to prestigious prosecutors; on the other hand, if court personnel were designated the chore of reading prior sworn testimony, clever appellate counsel would adjust the argument to be that the court had departed from its presumed neutrality by allowing its personnel to be used impermissibly as "state agents" to help the prosecution.

The simple fact of the matter is that the reading of prior testimony is merely an administrative act and it matters not who performs it (assuming they can appropriately read and recite it). Cf. Stano v. State, 473 So. 2d 1282, 1287 (Fla. 1985)(rejecting defendant's objection to a procedure whereby a deputy clerk testified that the victim's parents had testified at an earlier trial and authenticated the exhibits that had been introduced

[7] Undoubtedly, Assistant State Attorney Hellickson will be honored by Appellant's compliment as "a very distinguished member of the State Attorney's Office."

through their testimony and the court reporter read the former testimony into the record. This Court noted no impingement on the trial court's appearance of impropriety). See also United States v. Birnbaum, 373 F.2d 250, 264 (2d Cir. 1967)(prosecutor allowed to read Leonhardt's testimony); United States v. Hanrahan, 508 F.3d 962, 967, 968 (10th Cir. 2007)(court permitted witness for the Government to read Mr. Hanrahan's testimony from the first trial into evidence in the second trial; it was read into evidence by ATF Special Agent Frank Ortiz).

Appellant is not entitled to any relief based on his out-of-state authorities. In People v. Miller, 725 N.E.2d 48 (Ill. App. 2000), the appellate court reversed a conviction for several reasons. The court, for one thing, found that the trial court had abused its discretion in allowing a portion of defendant's statement about doing "bad things" because the statement was misleading, that it put the defendant in the untenable position of having to explain his statement by telling the jury about a prior juvenile conviction which the trial court had correctly ruled was inadmissible, and the statement constituted "extrinsic acts" evidence inadmissible under state law. Id. at 58-59. Additionally, the court found a violation of the defendant's right to confront and cross-examine a witness where the trial court had a transcript prepared and read to the jury where the transcript was not marked as an exhibit and the appellate court had no way to

review it to establish even whether it was identical to the trial judge's reading, nor was there a record to determine whether the transcript was even certified by the court reporter who presumably transcribed it and no record of who prepared the transcript or its source. Thus, the appellate court could not be certain the words read by the judge were actually the words spoken by the witness; and the jury returned a guilty verdict almost immediately thereafter. The inference was inescapable that the jury was persuaded by the judge's influence to reach a verdict of guilty. Id. at 58. Consequently, the appellate court reversed "for all of these reasons." In the instant case there were none of these errors.

In People v. Willis, 811 N.E.2d 202 (Ill. App. 2004), the appellate court found it an abuse of discretion for the trial court to allow the prosecution to call the presiding judge in the defendant's prior trial to confront or impeach defendant's testimony in the second trial by confirming that he had testified differently in the first trial. This had all occurred over defense objection that the judge's testimony was unnecessary since the transcripts from the first trial existed, had been testified to and could be introduced without Judge Locallo's testimony. Id. at 209. It hardly bears mentioning here, but in the instant case there was no testimony by a judge whereby the problem of undue acceptance of such testimony could result in prejudice by the jury.

In summary, this claim presented for the first time on appeal without presentation to the trial court for consideration and the opportunity to fashion a remedy acceptable to appellate counsel and his client is procedurally barred. It does not amount to fundamental error which would excuse the failure to object below to entertain appellate review now. There is no error, no abuse of discretion and this contention is meritless, if not indeed frivolous. Relief must be denied.

ISSUE V

WHETHER THE TESTIMONY OF REWIS WAS IMPROPERLY ADMITTED IN VIOLATION OF MIRANDA V. ARIZONA, 384 U.S. 436 (1966).

Muehleman next contends that the re-read testimony of Mr. Rewis was violative of Miranda v. Arizona, 384 U.S. 436 (1966) and United States v. Henry, 447 U.S. 264 (1980).

Appellee first submits that this claim is procedurally barred for the failure to object to the admission of this testimony below on this ground, Steinhorst, *supra*, Rogers, *supra*, Chandler, *supra*.

Even if this Court were to hold that Muehleman's comment suggesting prosecutorial misconduct at R, 725-726 adequately preserved this issue for appellate review, the claim is nevertheless both procedurally barred and mertiless since this Court considered and rejected the identical argument on direct appeal:

> Muehleman's next claim involves an alleged violation of his sixth amendment right to counsel. He contends that fellow inmate Ronald Rewis became a state agent for the impermissible purpose of acquiring incriminating evidence which properly lay beyond the state's reach. *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); *United States v. Henry*, 447 U.S. 264, 65 L. Ed. 2d 115, 100 S. Ct. 2183 (1980). We find in this case no violation of Muehleman's sixth amendment rights, as a review of the facts discloses that his incriminating admissions were not a product of a "'stratagem deliberately designed to elicit an incriminating statement.'" *Miller v. State*, 415 So.2d 1262, 1263 (Fla. 1982), *cert. denied*, 459 U.S. 1158, 74 L. Ed. 2d 1005, 103 S. Ct. 802 (1983) (quoting *Malone v. State*, 390 So.2d 338, 339 (Fla. 1980), *cert. denied*, 450 U.S. 1034, 68 L.

Ed. 2d 231, 101 S. Ct. 1749 (1981)).

> First, Muehleman, apparently eager to talk, approached Rewis and began to repeatedly attempt to discuss details of the crime with him. Second, after unsuccessfully attempting to dissuade Muehleman from "talking too much," Rewis approached the authorities on his own initiative. *Bottoson v. State*, 443 So.2d 962 (Fla. 1983), *cert. denied*, 469 U.S. 873, 105 S. Ct. 223, 83 L. Ed. 2d 153 (1984); *Barfield v. State*, 402 So.2d 377 (Fla. 1981). Third, Rewis was at that point instructed not to initiate any conversations with the suspect. Finally, no evidence exists in the record that Rewis' efforts were induced by promises of any form of compensation. The contingent fee arrangement reflecting an improper relationship between police and informant in *Henry* is absent in this case.
>
> In light of these circumstances, we cannot say that the authorities' eventual use of a tape recording device, wired to Rewis to record information which had been offered freely by Muehleman and previously reported by Rewis, itself violated Muehleman's sixth amendment rights. We find, as did the trial court, that the mere use of the tape recorder did not establish the more central question of whether the statements were deliberately elicited by Rewis acting in an unlawful capacity as an agent of the state. In this case, marked by Muehleman's penchant for loose talk and Rewis' turning to the authorities on his own initiative, we cannot find that the use of the tape recording device transformed these facts into a violation of Muehleman's right to counsel.

Muehleman v. State, 503 So. 2d 310, 314 (Fla. 1987).

There is no need to revisit this issue and it is both *res judicata* and law of the case. State v. McBride, 848 So. 2d 287, 289-291 (Fla. 2003)(law of the case doctrine requires that "questions of law *actually decided on appeal* must govern the case in the same court and the trial court, through all subsequent stages of the proceedings."). Florida Dept. of Transp. v. Jiliano,

801 So. 2d 101, 105 (Fla. 2001)(emphasis added). Additionally, "under *res judicata*, a judgment on the merits bars a subsequent action between the same parties on the same cause of action. See Denson v. State, 775 So. 2d 288, 290 (Fla. 2000)." Further, under Florida law, "collateral estoppel, or issue preclusion, applies when 'the identical issue has been litigated between the same parties or their privies'. Gentile v. Bauder, 718 So. 2d 781, 783 (Fla. 1998)."

Therefore, the instant claim is both procedurally barred and meritless. It is barred by the failure to adequately object below to preserve the question for appellate review. It is also barred since questions raised and decided on Appellant's prior direct appeal may not be relitigated. They are *res judicata* and law of the case. Finally, the claim is meritless as found by this Court on Muehleman's direct appeal.

ISSUE VI

WHETHER CUMULATIVE ERROR REQUIRES REVERSAL.

The claim of cumulative error is properly denied where, as here, there is no individual error. Pooler v. State, 33 Fla. L. Weekly S81 (Jan. 31, 2008); Williams v. State, 33 Fla. L. Weekly S32 (Jan. 10, 2008); Evans v. State, 975 So. 2d 1035 (Fla. 2007); Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003); Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999); Connor v. State, 976 So. 2d 852 (Fla. 2008).

PROPORTIONALITY

Finally, even though not challenged by Appellant, this Court has an obligation to perform a proportionality analysis to determine that the sentence of death is appropriate. England v. State, 940 So. 2d 389, 407 (Fla. 2006):

> We cannot, however, rewrite on the behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible than it actually was.

Muehleman v. State, 503 So. 2d 310, 317 (Fla. 1987).

Those comments are no less appropriate today than they were two decades ago. The lower court found as applicable the following statutory aggravating factors:

1. The capital crime was committed while defendant was engaged in the commission or attempt to commit a robbery. (Supp. Vol 1, pp. 102-103).

2. The crime was committed for financial gain which was merged with the preceding factor and given no independent weight. (Supp. Vol. 1, pp. 103-104).

3. The crime was committed for the purpose of avoiding arrest or effecting escape, evidenced by Appellant's seeking the assistance of a friend beforehand, his precautions to avoid discovery, and his admissions to police that the victim could identify him. (Supp. Vol. 1, pp. 104-106).

4. The homicide was especially heinous, atrocious or cruel (Supp. Vol. 1, pp. 106-107).

5. The homicide was committed in a cold, calculated and premeditated manner and without any pretense of moral or legal justification. (Supp. Vol. 1, pp. 108-109).

The single mitigator found was the comparatively weak factor of age of eighteen years and five months. (Supp. Vol. 1, pp. 109-110). Muehleman does not contend that any of the aggravating factors were erroneously found or inappropriate in the calculus to impose a sentence of death.

This Court has in prior edicts announced that HAC and CCP are two of the most serious aggravators set out in the statutory sentencing scheme. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Accord Buzia v. State, 926 So. 2d 1203, 1216 (Fla. 2006); Simmons v. State, 934 So. 2d 1100, 1123 (Fla. 2006); Monlyn v. State, 894 So.

2d 832, 838 (Fla. 2004); Dessaure v. State, 891 So. 2d 455, 473 (Fla. 2004); Everett v. State, 893 So. 2d 1246, 1262 (Fla. 2004); Globe v. State, 877 So. 2d 663, 677 (Fla. 2004); Owen v. State, 862 So. 2d 687, 703 (Fla. 2003); Nelson v. State, 850 So. 2d 514, 533 (Fla. 2003); Lynch v. State, 841 So. 2d 362, 377 (Fla. 2003); Cox v. State, 819 So. 2d 705, 723 (Fla. 2002); Card v. State, 803 So. 2d 613, 623 (Fla. 2001); Morton v. State, 789 So. 2d 324, 331 (Fla. 2001); Pearce v. State, 880 So. 2d 561, 577 (Fla. 2004).

In deciding whether death is a proportionate penalty, the Court must consider the totality of circumstances and compare the case with other capital cases, looking to the nature of and weight given to the aggravating and mitigating circumstances. See generally Hernandez-Alberto v. State, 889 So. 2d 721 (Fla. 2004); Hutchinson v. State, 882 So. 2d 943 (Fla. 2004); Parker v. State, 873 So. 2d 270 (Fla. 2004). The Court's responsibility in the instant case is made easier by the absence of any truly mitigating features; while the lower court found the age mitigator, Appellant's conduct throughout demonstrated a cunning and ruthless predatory character motivated by his own selfish goals.

The instant case is comparable to the following cases wherein this Court has approved on proportionality grounds the imposition of a sentence of death: Frances v. State, 970 So. 2d 806 (Fla. 2007) (although a double homicide, victims were killed by manual and ligature strangulation to take their car and other items of value;

no mental mitigation and aggravators included homicide during the course of a robbery and HAC); Conahan v. State, 844 So. 2d 629 (Fla. 2003)(death sentence proportionate where victim was strangled with ligature and three aggravators included during a kidnapping, HAC and CCP); Hauser v. State, 701 So. 2d 329 (Fla. 1997)(death sentence proportionate where victim was strangled and three aggravators of HAC, CCP and pecuniary gain were established). In the instant case the brutal murder of a helpless elderly man for the proceeds of a robbery-with CCP and HAC-equally mandates a finding that the trial court's imposition of a sentence of death is proper and proportionate.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court imposing a sentence of death should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Charles E. Lykes, Jr., Esq., 501 S. Fort Harrison Ave., Suite #101, Clearwater, Florida 33756, and Douglas Crow, Assistant State Attorney, Pinellas County State Attorney, 14250-49th Street North, Clearwater, Florida 33762, this 27th day of June, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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LIST OF EXHIBITS

1 ... Muehleman v. State, 853 So. 2d 420 (Fla. 2d DCA 2003)(Table)

2 ... August 4, 2003 Second District Court of Appeal Order granting with prejudice Appellant's Notice of Voluntary Dismissal in case No. 2D03-2821

EXHIBIT 1

853 So. 2d 420; 2003 Fla. App. LEXIS 14234, *

LEXSEE 853 SO. 2D 420

Jeffry A. Muehleman, Appellant/Petitioner(s), v. State Of Florida, Appellee/Respondent(s).

CASE NO.: 2D03-2821

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

853 So. 2d 420; 2003 Fla. App. LEXIS 14234

August 4, 2003, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: L.T. No.: 83-4924.
Muehleman v. State, 2002 Fla. LEXIS 2806 (Fla., Nov. 14, 2002)

OPINION

BY ORDER OF THE COURT:

Appellant's notice of voluntary dismissal is granted with prejudice.

EXHIBIT 2

045

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

August 4, 2003

CASE NO.: 2D03-2821
L.T. No. : 83-4924

Jeffry A. Muehleman, v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's notice of voluntary dismissal is granted with prejudice.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Jeffry Allen Muehleman
Honorable Crockett Farnell
Douglas Crow, Esq.
Robert J. Landry, A.A.G.
Karleen F. De Blaker, Clerk
Hon. David A. Demers
Hon. Brandt Downey, III

me

James Bitkhold
Clerk

DISTRICT COURT OF APPEAL SECOND DISTRICT STATE OF FLORIDA

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June 27, 2008

Honorable Thomas D. Hall, Clerk
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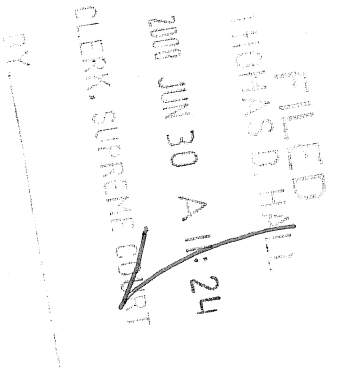

RE: Jeffrey A. Muehleman v. State of Florida
Case No.: SC05-353
Death Penalty Case

Dear Mr. Hall:

Enclosed please find for immediate filing in the above referenced case the original and seven copies of the Answer Brief of Appellee. Per Administrative Order AOSC04-84, the Answer Brief has been electronically submitted via e-mail on this date.

Sincerely,

Robert J. Landry
Assistant Attorney General

RJL/pdm
Enclosure(s)

cc: Charles E. Lykes, Jr., Esquire
Douglas Crow, Assistant State Attorney