IN THE SUPREME COURT OF FLORIDA



**PAUL JENNINGS HILL,**

Appellant,

v. Case No. 84,838

**STATE OF FLORIDA,**

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Appellee cannot accept Appellant's Statement of the Case and Facts. For one thing, there is no Statement of the Facts at all, as contemplated by Fla.R.App.P. 9.210(b)(3); accordingly, the State will supply such. Although the Initial Brief does contain a Statement of the Case, such is incomplete, inaccurate and contains such argumentative statements as, "The trial court's failure to comply with either Faretta or the Florida Rules of Criminal Procedure resulted in an unfair trial of constitutional magnitude." (Initial Brief at 2); accordingly, the State will re-state the procedural history as well.

### A. STATEMENT OF THE CASE

Paul Hill was indicted on August 9, 1994, on two counts of premeditated murder, one count of attempted murder and one count of shooting into an occupied vehicle, in regard to an incident which occurred on July 29, 1994 (R 1-6).[1] The Office of the Public Defender was appointed to represent Hill, and, on September 26, 1994, filed a Motion to Withdraw, contending that Hill had expressed the desire to represent himself, and further requesting that a hearing be held in accordance with Faretta v. California,

[1] (R-) presents a citation to the record on appeal, whereas (T_) represents a citation to the four volumes of transcript of Hill's trial.

422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975)(R 15-16). After some preliminary discussions that day (R 18-33), a formal Faretta hearing was held on the next day (R 35-94). On September 30, 1994, Judge Bell rendered an order, providing that Hill would be allowed to represent himself, but also that the Office of the Public Defender would be appointed "standby counsel" (R 96-8); the public defender sought review of this latter portion of the court's order, and, on January 4, 1996, this Court rendered an opinion, Behr v. Bell, 665 So. 2d 1055 (Fla. 1996), approving such appointment.

At a hearing on October 13, 1994, Hill stated that he demanded a speedy trial, and, indeed, filed a formal pleading to such effect (R 106-7; 112). The court rendered an order the next day finding the demand to be valid, and setting the time for trial for October 31, 1994 (R 113). On October 14, 1994, the State filed a Motion in Limine to preclude the raising of any defense allegedly premised upon "necessity" or "justification" based upon Hill's views on abortion (R 114-16). Six days later, Hill filed a seventy (70) page pro se response in opposition to the motion (R 117-200), and the State subsequently filed its own memorandum in support of the motion (R 201-216). A hearing was held on the State's motion on October 24, 1994 (R 218-231). At the beginning of the hearing,

Hill asked the court to allow an out-of-state attorney, Vince Heuser, to speak to the motion, adding that if such request were granted, he would like for him to be appointed standby counsel (R 218). The State opposed such request, noting, inter alia, that the public defender was already serving as standby counsel, and the request was denied (R 218-220). Judge Bell then re-inquired of Hill as to whether he still wished to represent himself, and Hill replied in the affirmative (R 221). Following argument, Judge Bell announced that he would grant the State's motion (R 228-230; 234).

Trial did, indeed, commence on October 31, 1994, and a jury was selected that day. The trial continued through November 2, 1994, and the jury convicted Hill on all counts, as charged (T 641). At the commencement of the penalty phase the next day, Appellant stated that the assistant public defenders who had served as his standby counsel had "taken care of his every need." (T 662). Hill added, however, that they just did not agree with him, "philosophically and theologically," and that he would like out of state attorneys Heuser and Hirsh to serve as his standby counsel (T 662). The State opposed this request, pointing out that neither gentleman was a member of the Florida Bar, and Judge Bell pointed out to Hill that, in the penalty phase, any standby counsel should be able to advise him as to Florida capital law (T 669-670); the

request for substitution was denied (T 670). Hill then re-affirmed that he wished to represent himself (T 671).

The penalty phase then proceeded, and, at its conclusion, the jury returned two unanimous advisory recommendations of death (T 748). The court ordered a presentence investigation report, and deferred proceedings until November 3, 1994 (T 753-4). At this hearing, it was confirmed that all parties had received the PSI, and arguments were presented, with formal sentencing deferred until December 6, 1994 (R 287-312). On December 6, 1994, Judge Bell formally sentenced Hill to death on counts I and II. As to count I, involving the murder of Dr. Britton, the judge found three (3) aggravating circumstances - that the homicide had been committed by one with prior convictions for crimes of violence, as evidenced by the contemporaneous convictions, under § 921.141(5)(b) Fla. Stat. (1993); that the homicide had been especially heinous, atrocious or cruel, under § 921.141(5)(h), Fla. Stat. (1993) and that the homicide had been especially cold, calculated and premeditated, under § 921.141(5)(i), Fla. Stat. (1993). (R 357-9). As to Count II, involving the murder of James Barrett, the court found two (2) aggravating circumstances, those relating to prior convictions and heightened premeditation (R 360-1). As to both sentences, Judge Bell found one mitigating circumstance, that relating to Hill's

lack of significant criminal history, under § 921.141(6)(a), Fla. Stat. (1993), and he stated that such had been afforded "substantial weight" (R 360, 362).

During the course of this appeal, Hill requested leave to represent himself. This Court directed the circuit court to hold a hearing on the matter, and, on June 22, 1995, held that Hill's request would be denied. Hill v. State, 656 So. 2d 1271 (Fla. 1995).

## B. STATEMENT OF THE FACTS

On July 27, 1994, Appellant went to Mike's Gun Shop on Highway 29 in Pensacola, where he purchased a Mossberg pump shotgun (T 413). That same day, Appellant Hill also traveled to the Milton Sport Shop, in nearby Milton, where be bought six boxes of double ought buckshot, specifying that such had to be 2 3/4 inch shells (T 422); five boxes contained red Winchester shells, whereas the sixth contained green Remington shells (T 423). Hill then proceeded to Champion International Shooting Range in Pace, where, on July 27th and 28th, he test fired the gun (T 425-8).

A little before 7 a.m. on Friday, July 29, 1994, Paul Hill was observed planting small white crosses on the right-of-way in front of the Ladies Center, a clinic which performed abortions, in Pensacola (T 309-310). Two police officers approached Hill and

advised that a municipal ordinance prohibited placing signs in such location, and Appellant removed the crosses (T 309-310). Appellant had previously demonstrated at this clinic, carrying a sign which said, "Execute murderers, abortionists, accessories" (T 306-9); Hill had expressed the view that security guards fell into the latter category, and also had carried a sign reading, "Disobey unjust laws" (T 403). Dr. Britton was known to perform abortions at the clinic on Friday mornings, and Colonel and Mrs. Barrett served as "escorts" for the doctor, according to a pre-arranged schedule (T 405-6). In addition to the police officers, Kathleen Meehling observed Hill walking around outside the clinic fence that morning (T 223-5).

At around this time, June Barrett and her husband picked Dr. Britton up at the Pensacola airport; she stated that the doctor was wearing a bullet-proof vest (T 555-6). As they rode to the clinic in the Barretts' pickup truck, Colonel Barrett drove, with Dr. Britton in the front passenger seat, and Mrs. Barrett in the rear "jumpseat" (T 555-6). When they arrived at the clinic, Appellant, who was well-known to Mrs. Barrett, was standing in the middle of the driveway; Hill moved aside, so that the vehicle could pass (T 557). Colonel Barrett drove the vehicle up to the steps and parked (T 560). At this point, Mrs. Barrett looked out of the back

window, and saw Appellant hold an object to his face. As her husband began to get out of the vehicle, she heard three loud shots, and glass began flying everywhere (T 560-1). Dr. Britton, who had remained in the car, asked if her husband had brought his gun, which he had not (T 560). At this point, Mrs. Barrett heard three to four more shots, and saw that blood was dripping from the front seat. She received no answer when she called out to Dr. Britton, and noted that she herself had been shot in the arm and breast (T 562-3). As she was led out of the vehicle, she saw her husband's body lying on the ground (T 563).

At least three other witnesses saw the shooting. Earl Jackson, a local fireman, saw Hill walk over to the fence around the clinic, kneel down and pick up a shotgun (T 205). Appellant then continued over to the driveway entrance, raised a gun and shot three times (T 206). Jackson saw a body lying alongside a silver-blue truck, and also heard Hill shoot at least three more times (T 206). Elizabeth Pinch, in a nearby parking lot, saw Appellant walk to the driveway entrance to the clinic, raise his gun and begin shooting (T 217-218); she also heard a second series of shots. Kathleen Meehling saw Appellant pointing a gun at an individual sitting in a vehicle parked by the clinic, and also actually saw, and heard, shots fired into the vehicle (T 226). Dorothy Disney

likewise saw Hill standing over the body of James Barrett, with a shotgun in his hand (T 235), and a number of other witnesses heard the shots and saw Hill walk out of the clinic area and down Ninth Avenue (T 251-5; 258-260; 265-7; 271-6). David Vowels testified that he had seen Appellant "kind of staggering" down Ninth Avenue, with his palms upraised, and that he had called out to Appellant to stop (T 281-5). Just as Hill did so, the police arrived (T 285-6).

Officer Holmes testified that as he drove down Ninth Avenue, he saw another police officer holding Appellant down on the ground, and that he pulled over (T 312, 354). Holmes and Officer Forehand ordered Hill to put his hands behind his head, and handcuffed him (T 312). Holmes patted down Appellant and discovered two shotgun shell holders, one on each ankle (T 313, 321); loose shells were found in the pocket of Hill's shirt, and a box of shotgun shells was also found in the rear pocket of his pants (T 322-3). As Appellant was taken over to the police car, he volunteered the following statement, "I know one thing. No innocent babies are going to be killed in that clinic today." (T 327). Both Holmes and another officer present, Steve Ordonia, expressly stated that Hill's remark had not been made in response to any question posed to him (T 326-7, 332).

A complete search was made of the crime scene. The Mossberg

shotgun was found behind a tree, and two spent shotgun shells were found nearby (T 343-4). Additionally, three spent shotgun shells were found by the gate (T 355), as well as in other locations (T 385-7). Pellets and wadding were also found at the scene, many recovered from the vehicle or the fence (T 387-394). Hill's fingerprints were found on the barrel of the shotgun, as well as upon one of the shells inside (T 459); Hill's fingerprints were likewise found on the box which originally had contained the rifle, such box found in a dumpster near Appellant's home (T 410-11; 417-18; 464-7).

FDLE firearms examiner Williams also offered extensive testimony (T 510-549). Williams was able to testify, from the location of the pellets in the driver's door of the vehicle, that firing had occurred as the door was being opened (T 520-1). Likewise, it would appear that the shooter had changed positions during the firing (T 525-6). Williams testified that he had test-fired the Mossberg, and that it functioned normally; the gun held eight shells, meaning that Hill would have had to reload, as a total of eleven shells, fired and unfired, were found either in the gun or at the scene (T 530-2, 537-8). The witness stated that the spent shells found at the scene had been fired from Appellant's shotgun (T 536). Williams also testified that there were twelve

pellets per shell, and that the pellets at the scene matched those recovered from the victims' bodies (T 539-543); the witness also stated that a bandoleer had been sewn into place on the weapon (T 543-5).

The pathologist, Dr. Cumberland, also offered extensive testimony (T 489-509). Cumberland stated that when he had arrived at the scene, James Barrett had been lying on the ground face-down immediately outside the driver's door of the truck, whereas Dr. Britton remained in the passenger side of the truck (T 494). Turning to the first victim, the pathologist testified that Barrett had died of shotgun wounds to the head, chest, arm and abdomen (T 503). Using anatomically correct mannequins, Dr. Cumberland illustrated the paths of the shotgun pellets. He first identified a fatal wound, a pellet which had entered around the back of the left shoulder and which had gone through the lobe of the left lung, perforating the pulmonary artery (T 498-9). The doctor next identified a pellet which had entered below the left nipple and continued downward into the chest cavity and into the intestines and abdominal area (T 499). Another lethal, or potentially lethal, wound was caused by a pellet which entered by the left temple and went backwards into the base of the skull and into the brain, causing a hemorrhage of brain tissue (T 499-500); another pellet

entered behind the angle of the jaw and went into the muscles at the rear of the neck (T 500). Finally, James Barrett also suffered from multiple pellet wounds to the left and right arms (T 500-1).

As to Dr. Britton, Cumberland testified that the cause of death was shotgun wounds to the head, face and right arm (T 508). The victim suffered major injuries to the head and face, with six separate shotgun wounds, four of which caused fractures, tearing and bleeding of the cranial area (T 503); the victim also suffered a gaping wound to the right arm which shattered the humerus bone and tore the skin (T 503-4). Of the four head wounds which caused trauma to the brain, all involved pellets which traveled from left to right and from front to back (T 506). One lethal wound went through the brain, whereas another entered at the midline of the forehead (T 506). Two others entered in the right forehead and fractured the skull and tore the brain tissue (T 506). The wound to the arm caused a 6 ½ tear as the slug perforated the arm from front to back (T 507). Dr. Britton also suffered superficial pellet wounds to the chest (T 507-8).

## SUMMARY OF ARGUMENT

Appellant presents six (6) claims of error in regard to his convictions of murder and attempted murder, as well as his two sentences of death. The primary claim asserted on appeal is that Hill should not have been allowed to represent himself, despite his repeated requests to do so. Appellee would contend that no error has been demonstrated. The court below fully complied with the dictates of Faretta v. California, as well as Florida's Rules of Procedure, in advising Hill of his right to counsel, as well as the dangers and disadvantages of self-representation; the court likewise made a more than sufficient inquiry into Hill's age, experience and education, as well as his understanding of the nature or complexity of the case. Any contention that Hill desired, or requested, representation by counsel is squarely refuted by the record. Further, although he was afforded the assistance of two Assistant Public Defenders as stand-by counsel, he had no right to insist that out-of-state counsel be substituted in such capacity.

Appellant also presents other challenges to his convictions, primarily relating to matters which have not been preserved through objection below. In no instance has fundamental error been

demonstrated. Appellant's claim that he should have been allowed to utilize a defense of "necessity/justification" or "defense of another" is without merit. No proffer was made below as to the evidence which would have supported such defense, thus waiving the point, and, from what can be discerned about Hill's proposed "defense", it is not one recognized by law. Regardless of the sincerity of Appellant's opposition to abortion, he was not authorized to take the law into his own hands and murder other human beings; he had no right to have the jury consider this unprecedented and obviously unworkable "defense".

In sentencing Hill to death for the murders of Dr. Britton and James Barrett, the sentencer found, inter alia, that both crimes had been cold, calculated and premeditated. Such finding was not error, and defendant's alleged "justification" can serve as no basis for a sentence other than death. Hill was afforded every opportunity to present any evidence in mitigation which he desired, and he simply chose not to do so. The instant sentences of death are proportionate, and should be affirmed.

## ARGUMENT

### POINT I

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO APPELLANT'S MULTI-FACETED CLAIM PREMISED UPON FARETTA v. CALIFORNIA, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

As his first, and primary, claim on appeal, Appellant Hill contends that his convictions and sentences of death must be vacated, on the authority of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). As best as can be determined, opposing counsel raises two somewhat contradictory assertions of error, and specifically contends that: (1) the trial court failed to comply with the dictates of Faretta v. California in securing a knowing and intelligent waiver of counsel from Hill; and (2) Hill actually wanted to be represented by counsel. Appellee would disagree with both contentions, and would maintain that the instant convictions and sentences should be affirmed in all respects.

#### (A) Relevant Facts of Record

The Office of the Public Defender was originally appointed to represent Hill, and, on September 26, 1994, filed a motion to withdraw and request for a hearing in accordance with Faretta,

given the fact that Appellant had expressed a desire to represent himself (R 15-16). A preliminary hearing was set on the motion that day (R 18-33), with the formal Faretta hearing to be held the next day. At this time, Judge Bell asked Appellant whether he would cooperate if the court appointed two mental health experts to examine him and determine his present mental condition (R 21-2). Defense counsel stated that he had affirmatively advised Hill that the State would be seeking the death penalty, and also stated that he did not see any need for Hill to be mentally examined (R 25-6).

The formal Faretta hearing commenced the next day (R 35-95). After an initial discussion as to whether the Public Defender could serve as standby counsel (R 37-48), the court asked Hill if he still wished to represent himself, even if standby counsel were not afforded; Appellant stated that he wished to represent himself with or without standby counsel (R 48-9). Appellant, upon the court's questioning, reaffirmed that he understood that he had the right to be represented by counsel, and that, in fact, attorney Loveless was extremely experienced in capital cases:

> THE COURT: Do you understand that Mr. Loveless, what I stated earlier in conversation when we were talking about the standby counsel, do you understand that Mr. Loveless is a very experienced, able, qualified advocate to represent defendants in capital cases and in which the State is

seeking the death penalty?

THE DEFENDANT: I don't believe there's any question to that, sir.

(R 50)

When asked why he wished to dispense with the services of a skilled advocate, Hill stated that representing himself would be in his best interest (R 52-3).

Hill then agreed that the charges against him were very serious, and reaffirmed that he was aware that he faced the death penalty as to the murder charges, as well as a possible life sentence on the charge of attempted murder (R 54-5). He likewise stated that he found the legal system to be "complex", but was confident that he would "understand enough" to accomplish his purpose (R 55-6); Appellant was asked if he had ever represented himself before, and stated that he had done so in church court, and had conducted several trials (R 56-7). Appellant recognized that being incarcerated could hinder his ability to prepare for trial, but stated that he still perceived it to be in his best interest to represent himself (R 58-9). When asked whether he understood that there was a certain "language" used in the legal system to which Hill would not be privy, Appellant responded, ". . I realize that there are certain difficulties in one representing himself who

hasn't gone through law school, and that's one of them. . ." (R 60); Appellant also stated that he felt that he understood enough about the Rules of Criminal Procedure and the rules of substantive law to be able to represent himself (R 56).

Judge Bell then questioned Appellant as to his age, marital status, education and health. Hill stated that he was forty years old, married with three children (R 61); he stated that he had given considerable thought to how his self-representation might affect his family (R 62). Appellant said that he was in excellent physical health, and that his hypoglycemia was controlled by diet (R 62-3). He stated that he had never suffered from any mental problems and was not currently taking any medication; he said that he was not depressed, due to his situation, but that he had a "warm, bright, optimistic outlook." (R 64-5). Likewise, the defendant stated that he had a bachelor's degree from Bell Haven College and a master's in divinity from Reform Theological Seminary (R 66-70). Hill graduated from Coral Gables Senior High School in 1973, which was where he had grown up (R 70).

The following exchange then took place:

> THE COURT: Other than obtaining your ultimate purpose, do you recognize that you will be at a serious disadvantage in representing yourself against a trained, qualified, skilled prosecutor?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. That doesn't bother you?

THE DEFENDANT: No, sir, it does not bother me.

THE COURT: Let me ask you this. If you were representing yourself and if you realized that you are at a disadvantage, would you expect the trial judge to help you because you're representing yourself?

THE DEFENDANT: No, sir.

* * * * * *

THE COURT: Okay. Do you assume that if you are representing yourself in the trial, that because you're representing yourself that I'm going to help you or any other trial judge is going to help you?

THE DEFENDANT: Not in the sense of in which you're using the words now, sir, no.

* * * * * *

THE COURT: Do you understand that if you do, in fact, represent yourself, that you will be treated and the rules and the law would be applicable the same to you as it would an attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Have you got a problem with that?

THE DEFENDANT: None whatsoever.

THE COURT: To be held by the same standard?

THE DEFENDANT: None.

> THE COURT: Do you understand, Mr. Hill, that one of the things that I've got to decide upon the motion that you filed is whether or not you have knowingly and intelligently waived your right to have an attorney represent you? You know that, don't you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: That's been explained to you I think by your attorney, is that correct?
>
> THE DEFENDANT: That's correct, sir.
>
> THE COURT: That's what Faretta is all about. You understand that, don't you?
>
> THE DEFENDANT: Yes, sir.

(R 72-4).

Following this colloquy, the judge again brought up the subject of a mental health examination, and Hill requested that the court not appoint experts, as he would not cooperate with them (R 76-7); the Assistant Public Defender later stated for the record that he had never had any reason to believe that Hill was not fully mentally competent, and that, if he had, he would not have moved to withdraw (R 89-90). At this juncture, the prosecutor was asked to question Appellant, and specifically cited the disadvantages which Hill would encounter in waiving an attorney and representing himself; the following exchange took place:

> MR. MURRAY: Mr. Hill, I mean, you understand, do you not, that the Court is indicating to

you that you're relinquishing some constitutional guarantees that every citizen has under the Constitution?

THE DEFENDANT: Yes, sir, I'm aware of that.

MR. MURRAY: And there are -- there is only probably one benefit from you doing that, and that is that you would be in control to some extent of the defense of your case?

THE DEFENDANT: I'm sure you know whether that was the only benefit, but I understand that I would be in control of my case, yes, sir.

MR. MURRAY: There's a lot of disadvantages, the Court has gone through kind of a laundry list?

THE DEFENDANT: Yes, sir.

MR. MURRAY: One of those disadvantages might be that you would want to ask a question or to present a defense. Do you understand that if you do not know how to lay a foundation, that is to say, to ask the right series of questions, if I stand up and object and the Court sustains it, that you may be essentially thwarted in your efforts to try to move forward in the particular area? Do you understand that?

THE DEFENDANT: Yes.

MR. MURRAY: Do you understand -- at least I understand, I want to be sure that you do, the trial judge had indicated very clearly to you that he will treat you the same as he does any other lawyer that appears in front of him?

THE DEFENDANT: That's been made clear to me. I understand that.

MR. MURRAY: You recognize that is a substantial disadvantage?

THE DEFENDANT: Yes, I understand that.

MR. MURRAY: Would you also accept that all of the legal scholars and writers, at least within the field of jurisprudence, uniformly agree that self-representation is -- is nearly an act of futility on the part of a defendant?

THE DEFENDANT: I wasn't aware of that -- the uniquity of the decision of the opinion on that but --

MR. MURRAY: I don't want to indicate to you that probably everybody, but the vast weight -- the vast majority of the scholars in that area indicate clearly that it's almost an act of self-destruction and in your case may be an act of self-destruction.

THE DEFENDANT: I certainly understand what you said.

MR. MURRAY: And having all those things in mind, do you knowingly and intelligently and voluntarily indicate to Judge Bell that you still want to represent yourself?

THE DEFENDANT: Most definitely.

(R 78-80).

Hill then stated that he had not been threatened or coerced in any way in reaching his decision, and that he was not displeased with the services of the Public Defender (R 81). Judge Bell then asked Hill if he could be ready for trial, if such were held in January, and Appellant replied that he would be requesting a speedy

trial (R 83). The prosecutor asked Appellant if he would abide by the court's rulings, insofar as conduct of the trial was concerned (R 86). When Hill replied that he would do so, the following took place:

> MR. MURRAY: In the event that you wanted to advance a proposition and there was an objection to that and the Judge sustained it, based upon his legal ruling, do you understand that you would have to abide by that ruling even though you may feel that it conflicts with your views of glorifying God?
>
> THE DEFENDANT: Yeah, I understand that.
>
> MR. MURRAY: Are you willing to do that?
>
> THE DEFENDANT: Yes, I am willing to do that.

(R 87).

Hill had previously stated that his ultimate goal was "to glorify God." (R 53).

Judge Bell took the matter under advisement, and rendered an order on September 30, 1994 (R 96-8). In pertinent part, the order reads:

> The Defendant has filed through his attorney a motion to represent himself at trial. In determining whether his decision to represent himself is intelligently and knowingly reached, the Court has heard testimony from Mr. Hill first as to his present and past health and physical condition, his emotional and mental health, stability, age and education level. This Court need not reach

> the merits of the reasons upon which Mr. Hill wishes to represent himself. This Court finds the Defendant, Paul Jennings Hill, to be confident, competent, articulate and intelligent, well educated and with appropriate demeanor for the courtroom setting and a more than adequate ability to express himself.
>
> This court has discussed with Mr. Hill the overwhelming disadvantage of self-representation, and the complexity of the discovery process. Mr. Hill has been advised of his right to private or appointed counsel and asserts that he wishes absolutely to represent himself at the trial proceedings.
>
> Although the Defendant has not previously represented himself in either civil or criminal proceedings, this Court observes that he has the ability to understand legal concepts and the Rules of Criminal Procedure. Mr. Hill advises the Court that should his motion be granted to represent himself, he has available a law library at the Escambia County Jail.

(R 97).

Judge Bell expressly found that Hill was capable of waiving and had knowingly and intelligently waived counsel for the trial process; the Office of the Public Defender was appointed standby counsel (R 97).

At a hearing on October 13, 1994, the court held a "supplemental" Faretta hearing, noting that, in the interim since the last hearing, Hill had represented himself "in federal court on

a trial that lasted a couple of days." (R 100). Judge Bell specifically asked Appellant if he still wished to represent himself "after you experienced representing yourself in federal court" (R 100), and Appellant answered in the affirmative (R 101). The court then questioned Hill as to some of the differences in state and federal practice, affirming that Appellant understood, for instance, that voir dire was conducted differently in the two systems. The court also reaffirmed that death was a possible penalty in this case, which would require a different sort of voir dire (R 102-3). Hill affirmatively stated that he would consult his standby counsel for guidance, as necessary (R 103).

At the hearing of October 24, 1994, Hill initially requested that out-of-state attorney Vince Heuser argue in opposition to the State's motion in limine. Following opposition by the State, the request was denied (R 218-19). After this ruling, Judge Bell specifically asked Hill if he still wished to represent himself pro se, and Hill responded that "it most certainly" was his desire (R 221).

When trial commenced on October 31, 1994, the judge again asked Hill if it was still his intention to represent himself, and Appellant replied that it was (T 9); Appellant stated that there was no doubt in his mind that if all the Faretta questions were

reiterated, his answers would be the same (T 10). The Assistant Public Defender serving as standby counsel stated that he had not noticed anything concerning Hill's conduct or behavior that would warrant not allowing him to represent himself (T 11); Appellant indicated that he wished standby counsel to sit with him at the table (T 12). Hill also stated, however, that he wished out-of-state attorneys Heuser and Hirsh to join them at the table and to be appointed "standby counsel" (T 12-13). The State objected, and such request was denied (T 13-14). The next day, when proceedings reconvened, the court again inquired of Hill as to whether he still desired to represent himself, and Appellant replied that he did (T 242-4). At the conclusion of the trial, Judge Bell noted for the record that Hill had consulted standby counsel during the proceedings (T 659).

At the beginning of the penalty phase on November 3, 1994, following Appellant's convictions on all counts, Hill stated that although the Assistant Public Defenders, serving as his standby counsel has "taken care of his every need", they just did not agree with him "philosophically and theologically" (T 662). Accordingly, Hill requested that Messrs. Heuser and Hirsh serve as his standby counsel (T 662); Appellant stated that wished to receive "advice of my own choice." (T 664). When the court reminded Hill that the

Public Defenders were well versed in capital proceedings, and that the court could not legally appoint other counsel to represent him, Appellant reiterated his desire to represent himself (T 664). Hill repeated his desire to represent himself several times during the colloquy (T 665, 666). The State opposed any substitution of standby counsel, given the fact, inter alia, that Messrs.. Heuser and Hirsh were not members of the Florida Bar, and the court denied the request (R 666-9). The court noted, and Hill conceded, that no attempts had been made for either attorney to be formally admitted so as to be able to handle any aspect of the case (T 668-9). Judge Bell likewise reiterated that Hill would need the services of someone well versed in Florida capital sentencing law (T 670), and also asked him if the Faretta inquiries were recommenced, whether his answers would be the same (T 670-1); Hill stated that they would be (T 671).

During the penalty phase, the State called two members of the Barrett family to offer "victim impact" testimony. After the first witness testified, standby Assistant Public Defender Loveless requested leave to withdraw, stating that he felt the proceedings had become "a complete travesty" (T 680). The attorney offered his opinion that this type of impact evidence was inadmissible and "totally inappropriate" (T 680-1), and the State responded by

drawing the court's attention to Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (T 681-2). Judge Bell noted that there was no question that if attorney Loveless were Hill's sole counsel, more objections would have been interposed, but he also observed that such objections would not necessarily have been sustained (T 686-7). He likewise stated that he could understand how frustrating it would be for a trial advocate to simply be utilized as standby counsel (T 687-8), and attorney Loveless stated that the source of his frustration "was not what has gone on necessarily in the guilt phase" (T 688), but rather his view that admission of the victim impact evidence, as well as some of the proposed penalty phase jury instructions, allegedly constituted reversible error (T 688-694). The motion to withdraw was denied (T 694).

Following the jury's return of advisory recommendations of death, proceedings were held on both November 30, 1994, and December 6, 1994. At each proceeding, Judge Bell asked Hill if he still wished to represent himself, and if his answers to the Faretta inquiries would be the same (R 289-290; 319-320). In all instances, Hill answered in the affirmative (R 290, 320).

**(B) Hill Knowingly And Intelligently Waived Counsel, In Accordance With Faretta**

Appellee contends that the record, as set forth above, clearly refutes Appellant's contention that the court's Faretta inquiry was insufficient, and, indeed, the Faretta inquiry sub judice would seem to be one of the most substantial of record. At a minimum, it is indisputable that Judge Bell inquired of Hill in relation to the matters specifically set forth in Fla.R.Crim.P. 3.111(d), i.e., his age, education and experience. Accordingly, Appellant's reliance upon such precedents as Chestnut v. State, 578 So.2d 27 (Fla. 5th DCA 1991), Jones v. State, 584 So.2d 120 (Fla. 4th DCA 1991), Taylor v. State, 605 So.2d 959 (Fla. 2d DCA 1992), Stermer v. State, 609 So.2d 80 (Fla. 5th DCA 1992), and Pall v. State, 632 So.2d 1084 (Fla. 5th DCA 1994), is misplaced, and this cause should be resolved in accordance with Johnston v. State, 497 So.2d 863, 868 (Fla. 1986) (Faretta inquiry required examination of defendant's age, mental status and knowledge and experience, or lack thereof, in criminal proceedings). Further, to the extent required by rule or precedent, the trial court more than adequately advised Hill of the nature or complexity of the case, as well as the dangers and disadvantages of self-representation. Judge Bell's ruling upon Hill's request to represent himself is not subject to

reversal unless an abuse of discretion has been shown. See, e.g., Kearse v. State, 605 So.2d 534, 537 (Fla. 1st DCA 1992), cert. denied, 613 So.2d 5 (Fla. 1993); Crystal v. State, 616 So.2d 150, 152 (Fla. 1st DCA 1993); Hardy v. State, 655 So.2d 1245, 1247 (Fla. 5th DCA 1995). Hill has failed to demonstrate such abuse of discretion on appeal, and no relief is warranted.

In the Initial Brief, opposing counsel argue most strenuously that Judge Bell erred in failing to advise Hill of the "nature or complexity" of the case. The State disagrees. Hill was repeatedly advised of the nature of the prosecution, i.e., that it was a capital case, as well as the fact that it involved the murder of two persons and attempted murder of a third; the nature of the potential penalties, including the death penalty, was likewise discussed (R 54-5, 102-3). This Court has previously rejected claims of error premised upon Faretta in other capital cases. Thus, there is nothing inherently "complex" about a capital case which would per se preclude self-representation. See, e.g., Jones v. State, 449 So.2d 253 (Fla. 1984) (no error found in court's allowing defendant to represent himself in capital case, despite later request for counsel and "contumacious behavior" in the courtroom, which resulted in defendant being shackled); Muhammad v. State, 494 So.2d 969 (Fla. 1986) (no error found in court's

allowing defendant to represent himself, despite allegations that defendant not mentally competent to stand trial or waive counsel); Diaz v. State, 513 So.2d 1045 (Fla. 1987) (no error in court's allowing defendant to represent himself, despite fact that defendant allegedly needed interpreter and fact that jury saw defendant in shackles as he moved around courtroom). In this case, Hill's desire to represent himself was consistent and unequivocal, and there has been no showing that this case was any more "complex" than those set forth above, such that his right to self-representation should have been denied.

It is also apparently opposing counsel's view that the court below was required to actively dissuade Hill from his chosen course of action and, additionally, to order a formal proffer of any defense by Hill, so that assessment could be made on the record of the effects which Hill's desire for self-representation might have upon such defense (Initial Brief at 14-20). Unsurprisingly, no precedent is cited for either proposition. The record below clearly indicates that both the judge and the prosecutor repeatedly advised Hill of the rights which he would be waiving by abjuring counsel, as well as the affirmative disadvantages of self-representation (R 55-6, 72-4, 78-80); in evaluating the sufficiency of a Faretta inquiry, a reviewing court can look to the

questioning, if any, by the prosecutor, as well as that by the court. See Jones, 584 So.2d at 121-2.

Judge Bell expressly advised Hill that if he represented himself, the court could not "help" him during the trial, and that he would be subject to all of the rules which any attorney would be (R 72-4). The judge likewise specifically warned Hill that, as a layperson, he would be at a disadvantage when legal terminology was used (R 60). The prosecutor specifically advised Hill that his efforts to "move forward in a particular area" could be thwarted if Hill's own inability to lay a foundation meant that the prosecutorial objections were sustained (R 78-80). The fact that Hill's proposed defense of "justification" or "defense of others" was precluded as a matter of law, see Point V, infra, had nothing to do with Hill's status as a pro se litigant, and everything to do with the fact that the defense was not legally cognizable. For purposes of this point on appeal, however, the only relevant inquiry is whether Hill was sufficiently advised of the disadvantages of self-representation, and the record below answers that question in the affirmative. Further, it has repeatedly been held that a defendant's mere lack of legal knowledge standing alone does not render him incompetent to proceed pro se, see Hardy, 655 So.2d at 1247, Crystal, 616 So.2d at 153, Kearse, 605 So.2d at 538,

and the fact that Hill handled this case differently from the manner in which an attorney might have handled it proves nothing of any constitutional significance.

In asserting reversible error as to this claim, opposing counsel are essentially contending that counsel should have been forced upon Hill, a situation which, in all respects, would resemble that in the Faretta case itself. Neither the Federal, nor the State, Constitution, see Traylor v. State, 596 So.2d 957, 968-9 (Fla. 1992), mandate such a result. If there is one thing which can be said unequivocally about the record below, it is that Paul Hill was unequivocal in his desire to represent himself. He made such request in a timely fashion, well before trial, and stated that he wished to represent himself "with or without" standby counsel (R 48-9); Hill was of mature age, literate, educated, and intelligent, and had thought about the matter long and hard. In passing upon Hill's waiver of counsel, it was not incumbent upon Judge Bell to pass upon the wisdom of his choice or to seek to change Hill's mind. Rather, the court's only objective was to secure a knowing and intelligent waiver, if that was Hill's ultimate choice, after full advisement had been made; at the time that Hill requested to represent himself, he had already been afforded some assistance by counsel, and counsel had discussed the

matter of waiver with him (R 74). As things turned out, Hill actually had the experience of representing himself in federal court prior to the actual state trial in this cause, and the offer of counsel was repeated at every critical stage below. Hill steadfastly reiterated his desire to represent himself, at every opportunity (R 100-1, 221, 289, 320; T 9-10, 242-4, 670-1).

In Godinez v. Moran, ___ U.S. ___, 113 S.Ct. 2680, 2686-8 (1993), the United States Supreme Court expressly rejected the contention that a defendant seeking to waive counsel was required to have "greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney," and noted that under Faretta itself, a defendant's "technical legal knowledge" was "not relevant" to the determination of whether a defendant was competent to waive his right to counsel; this Court had reached a comparable conclusion in Muhammad. Likewise, the Godinez court, again citing to Faretta, reaffirmed that while it was undeniable that in most cases defendants would be better able to defend with the assistance of counsel, a criminal defendant's ability to represent himself "has no bearing upon his competence to choose self-representation" (emphasis in original) (footnote omitted). Paul Hill had the right to represent himself, cf. Durocher v. Singletary, 623 So.2d 482 (Fla. 1993), and, in all

material respects, the dictates of Faretta were followed below. See Jones, supra. Reversible error has not been demonstrated, and the instant convictions and sentences should be affirmed.

**(C) Hill Never Requested The Assistance Of Counsel**

Appellant next contends that Hill "wanted" to be represented by counsel and maintains that "Hill stated that he did not want to proceed without counsel." (Initial Brief at 22-24). This claim is flatly refuted by the record. Hill stated, without equivocation, that he wanted to represent himself "with or without" standby counsel (R 48-9). The most that can be said to have occurred below is that, on occasion, Hill requested that certain out-of-state attorneys be allowed to substitute as his standby trial counsel (R 218-221; T 12-14, 662-670). At no time did Hill actually request that out-of-state counsel "represent" him, and, in each instance, Appellant stated, virtually contemporaneously with the trial court's denial of the request for substitution of counsel, that he in fact desired to represent himself (R 221; T 11, 670-1). There is no ambiguity in this record and Hill never expressed any desire to represent himself, even in the alternative.

Hill had no constitutional right to standby counsel of his choice, and this Court has recognized that the purpose of standby

counsel is "to assist the court in conducting orderly and timely proceedings." Jones, 449 So.2d at 258; Behr, 665 So.2d at 1056. Here, it would hardly have served the interest of anyone to have allowed out-of-state counsel, who are not members of the Florida Bar and, accordingly, not familiar with Florida procedure, to serve as Hill's standby counsel, especially given the fact that he had standby counsel who were well experienced in Florida capital cases. Judge Bell did not abuse his discretion in any ruling in this regard, especially given the fact that Hill conceded that counsel had never completed the necessary paperwork in order for even a temporary admission to the Bar (T 668-9). See, e.g., Bundy v. State, 455 So.2d 330, 347-8 (Fla. 1984) (court did not abuse discretion in denying out-of-state counsel's motion for leave to appear pro hac vice, in that, inter alia, defendant did not have absolute right to any particular attorney); Wheat v. United States, 486 U.S. 153, 159-160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (the Sixth Amendment right to choose one's counsel is circumscribed in several important respects; an advocate who is not a member of the bar may not represent clients, and Faretta does not encompass a defendant's right to choose any advocate if the defendant wishes to be represented by counsel).

Further, Hill, while representing himself and while receiving the assistance of two Assistant Public Defenders as standby counsel, clearly did not have the right to yet additional counsel, such as when Hill asked that attorney Heuser be allowed to speak against the State's motion in limine (R 218-221). See, e.g., McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 953, 79 L.Ed.2d 122 (1984) ("A defendant does not have a constitutional right to choreograph special appearances by counsel."); State v. Tait, 387 So.2d 338 (Fla. 1980) (defendant has no right to "hybrid" representation or to appear as "co-counsel"); Wiltz v. State, 346 So.2d 1221 (Fla. 3d DCA 1977). Reversible error has not been demonstrated.[2]

**(D) The Instant Trial Was Not A "Travesty"**

In the final section of this point, opposing counsel maintain that Hill's trial was "a complete travesty" (Initial Brief at 24), pointing out that he was precluded from presenting a defense of "necessity" or "justification", and again attacking the adequacy of the Faretta inquiry. The correctness of the court's ruling on the

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[2]In the initial brief, opposing counsel cite to the transcript of the federal proceedings, as well as to the transcript of the proceeding before Judge Sanders, when this Court directed that he hold a appellate "Faretta hearing" on Hill's desire to represent himself on appeal (Initial Brief at 22-6, et seq.). As these matters were clearly not before the trial court, reference to them on appeal is plainly improper. See State v. Barber, 301 So.2d 7, 9 (Fla. 1974).

State's motion in limine will be addressed in Point V, infra, but the State would briefly address the "travesty" allegation, which is purported to derive from a statement by standby counsel Loveless (T 680). As has been demonstrated in the prior procedural discussion, Loveless' remark was premised upon his displeasure that the State had introduced victim impact testimony at the penalty phase, and was expressly not intended to serve as any comment upon the manner in which the trial had been proceeded (T 688-694); of course, counsel's views on the admissibility of victim impact evidence has subsequently been rejected. See, e.g., Windom v. State, 656 So.2d 432 (Fla. 1995); Allen v. State, 662 So.2d 323 (Fla. 1994).

While opposing counsel apparently independently feel that the trial below was a "travesty", the fact remains that this trial was exactly what Paul Hill chose to make of it. The fact that the course of action adopted by Appellant sub judice was most definitely outside the norm of capital defendants, such does not mean that it was constitutionally impermissible. Just as a defendant who chooses to represent himself cannot later seek relief based upon attacks on his own performance, see Faretta, Behr, supra, so a defendant such as Paul Hill, who exercises his informed free will and chooses to represent himself in the fashion in which he did, can blame no one but himself if he later regrets his

decision. The instant convictions and sentences of death should be affirmed in all respects.

## POINT II

FUNDAMENTAL ERROR DID NOT OCCUR DURING JURY SELECTION

As his next claim, Appellant contends that various errors occurred during jury selection sub judice, and that, as a result, a new trial is warranted. This claim is very similar to Points III and IV, infra, in that, in each, opposing counsel scour the transcript and assert as error any matter which, in their opinion, should have been the subject of objection below, had an attorney present. As they concede elsewhere in the brief (Initial Brief at 2), Hill interposed no objection to any of these matters. Accordingly, the only issue before this Court is whether fundamental error occurred, and it is State's position that it did not. It is also the State's position that it is rather pointless for opposing counsel to raise claims of this nature, in that, nothing in Faretta implies that, in a case in which a defendant invokes his right to self-representation, a reviewing court is obliged to review the record and address any and all unpreserved claims of error which a subsequent attorney may later seek to present for review.

As to the conduct of the voir dire or jury selection, opposing counsel makes the following assertions: (1) Hill "should have

exercised at least nine of the twelve jurors" (Initial Brief at 29); (2) the State impermissibly questioned the prospective jurors on such matters as religion, abortion and gun ownership and (3) the prosecutor failed to instruct the jury that they and they "alone would make the fatal determination", as to whether the death penalty should be imposed in a given case. The latter two claims are not preserved for review, and thus are not cognizable on appeal. See e.g., Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993). Fundamental error has not been demonstrated, and no relief is warranted.

As to the last-mentioned matter, Hill has plainly misapprehended Florida law. Although Appellant, citing to a Connecticut case, insists that the jury "must understand that the death penalty cannot be imposed unless they say it should be" (Initial Brief at 30), this is simply incorrect. See e.g., Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Combs v. State, 525 So.2d 853, 857 (Fla. 1988). In any event, Hill's jury was specifically instructed at the penalty phase that their recommendation would be given "great weight" (T 726).

As to the subject of voir dire, it is well established that the scope of voir dire questioning rests in the sound discretion of

the court, and will not be interfered with unless that discretion is clearly abused. See Vining v. State, 637 So. 2d 921, 926 (Fla. 1994). Although the court had granted the State's pre-trial motion in limine involving the "justification" defense, see Point V, infra, it was certainly foreseeable, at that point in time, that Hill might seek to present a related defense, or might seek to have the court revisit its prior decision. Accordingly, it was not improper for the prosecution to briefly voir dire the venire on these matters, and certainly no precedent has been cited for the proposition that fundamental error occurred below.

As to the actual composition of the jury, the argument presented on appeal is essentially speculative and frivolous. It is certainly likely that no two attorneys would select the same jury, and the fact that Paul Hill representing himself failed to strike certain jurors whom appellate counsel might have questioned further is unsurprising. The jurors actually chosen in this case (identified at T 165-6) suffered from no fundamental disability which should have precluded their service, to the extent that relief would now be appropriate. The most that can be said is that, as to juror #618, he once spoke on the phone with Steve Banakas (a police officer who offered peripheral testimony as to the search of Hill's residence (R 407-412)); additionally, this

juror's son was once "involved" with the state attorney's office, which is not necessarily a matter which would endear the juror to the prosecution (T 39, 54). Likewise, juror #239 knew Lee Jennings, an officer who obtained fingerprints from certain evidence (T 446-451). It would be a rare trial in which a juror would not have some familiarity, no matter how fleeting, with a potential witness, and both veniremen stated that these matters would not affect their verdict (T 39, 40). As to the other jurors, the most that can be said is that juror #362 knew nothing about guns (T 94), jurors #552 and 30 attend church(T 68-9, 75) (and the pastor at #30's church had once mentioned the case), and that juror #575 had been "touched" by the abortion issue (T 78); all these veniremen stated that these matters would have no effect upon the verdict (T 69-70, 78, 95). It is difficult to see how a juror's lack of experience with firearms, church attendance or "touching" by abortion would be any more inclined to weigh in the State's favor, than in Hill's, and no basis for reversal has been presented. The instant conviction should be affirmed in all respects.[3]

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[3] Appellant also argues that the fact that Hill did not exercise a peremptory challenge on veniremen #546, who was acquainted with state witness Pinch, "proves that Faretta was not satisfied" (Initial Brief at 39). Inasmuch as veniremen #546 did not sit on the jury, this argument is hard to follow.

## POINT III

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO ADMISSION OF APPELLANT'S STATEMENT, THE USAGE OF MANNEQUINS OR CERTAIN OF THE STANDARD GUILT PHASE INSTRUCTIONS

As his next claim, Appellant raises a three-fold attack upon the fairness of his trial, contending: (1) the trial court erred in admitting his statement to the police; (2) the jury was improperly "influenced" by the mannequins used to demonstrate the location of the fatal shots on the victims' bodies and (3) the court erred in utilizing that portion of the standard jury instructions involving excusable homicide. As no contemporaneous objection was interposed in regard to any of these matters, this Court can only review these matters for fundamental error. See e.g., Ray v. State, 403 So. 2d 956, 959-960 (Fla. 1981); Davis v. State, 461 So. 2d 67, 71 (Fla. 1984). Fundamental error has not been demonstrated, and the State again questions the propriety of this claim, given the fact that Hill chose to represent himself and chose not to object to any of these matters. Cf. Faretta, supra.

Turning summarily to the first claim, opposing counsel's reliance on the Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), is misplaced. Miranda itself provides that "volunteered statements of any kind are not barred by the Fifth

Amendment and their admissibility is not affected by our holding today", 86 S.Ct. at 1630, and this Court, as well as the Eleventh Circuit, has expressly held that "voluntary incriminating statements not made in response to an officer's questioning are freely admissible." United States v. Suggs, 755 F.2d 1538, 1541 (11th Cir. 1985); Christopher v. State, 583 So. 2d 642, 645 (Fla. 1991). As this Court stated in Christmas v. State, 632 So. 2d 1368, 1370 (Fla. 1994), when a defendant voluntarily initiates a conversation with law enforcement officers in which a defendant provides information about that defendant's case, Miranda warnings are not required. The unrebutted testimony below was to the effect that Hill's statement was not made in response to any question posed to him (T 326-7, 332), and there clearly, despite Hill's argument, was no "custodial interrogation" as contemplated by Miranda. See Roberts v. United States, 445 U.S. 552, 561-2, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980) (Miranda "exception" does not apply outside of the context of the "inherently coercive custodial interrogations for which it was designed"). Accordingly, Miranda provides no basis to exclude Hill's statement.[4]

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[4] Admission into evidence of testimony concerning Hill's prior demonstrations, and actions, at the clinic, (Initial Brief at 41-2), was likewise proper, as such was clearly admissible on the issue of premeditation, and hardly became a "feature" of the trial.

As to the use of mannequins (Initial Brief at 43-4), Appellant's argument is difficult to follow. Although it is asserted that the "manikins [sic] were left in the courtroom and placed adjacent to the jury room throughout the trial" (Initial Brief at 43), the record does not support such assertion. The mannequins were not utilized until the testimony of the medical examiner, Dr. Cumberland, which did not occur until the third day of the trial (T 497-8), and there is no indication that these exhibits were in the courtroom previously or otherwise subject to the jury's view; the fact that they were removed from the courtroom, in which the jury deliberated (T 635), would certainly clearly seem to suggest that all parties were aware of the need to avoid any "contamination" in this regard. Appellant's somewhat related argument, pertaining to the fact that, without objection, the prosecution stated that the community was "counting on" the jury to return a "wise and just verdict" (T 597-8), would hardly seem to rise to the level of fundamental error, assuming, in fact, that error of any kind is perceived.

Finally, as to Appellant's complaints concerning usage of the standard jury instructions on excusable homicide or justifiable use of deadly force (T 600-1), it is again difficult to perceive any error. These instructions were not given as some sort of "insult"

to Hill, as opposing counsel apparently believe (Initial Brief at 45-6), but rather were given because they are part of the standard definition of homicide and/or manslaughter, and their omission could have led to claims of error. Cf. Rojas v. State, 552 So. 2d 914 (Fla. 1989); State v. Smith, 573 So. 2d 306 (Fla. 1990); State v. Schuck, 573 So. 2d 335 (Fla. 1991); Shere v. State, 579 So. 2d 86 (Fla. 1991). The assertion that these instructions somehow "confused" the jury, as evidenced by their written question to the court (Initial Brief at 46), is refuted by the record, inasmuch as the jury's question did not occur until deliberations at the penalty phase (T 737-746). Fundamental error has not been demonstrated, and the instant convictions should be affirmed in all respects.

## POINT IV

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE JURY INSTRUCTION REGARDING HILL'S RIGHT NOT TO TESTIFY OR THE PROSECUTOR'S CLOSING ARGUMENT AT THE GUILT PHASE

In this point on appeal, opposing counsel complain that Hill was allowed to waive the standard jury instruction on a defendant's right not to testify, and, additionally, that the prosecutor committed reversible error during closing argument at the guilt phase when he referred to the State's evidence and testimony as "unrebutted" (T 584, 595). As to the closing argument issue, no contemporaneous objection was interposed in regard to the remarks at issue, and, accordingly, the matter cannot be reviewed unless the comments rise to the level of fundamental error; this Court has previously held that remarks which allegedly constitute comments upon a defendant's silence must be preserved through objection, and do not constitute fundamental error. See Clark v. State, 363 So.2d 331, 333-4 (Fla. 1978). As to the claim involving the jury instruction, it is again extremely difficult to follow the nature of Appellant's argument.

It must be recognized that Hill was afforded the option of having the jury instructed, in accordance with the standard instructions, that they could not draw any adverse inference from

the fact that he did not testify (T 474-5). Hill specifically conferred with standby counsel regarding this matter, as well as all other matters pertaining to jury instructions, and announced on the record that he felt that the safest course would be to omit that instruction (T 477-8). Although on appeal opposing counsel contend that this result is somehow proof that "Faretta has been violated" (Initial Brief at 47), it would seem rather to be proof of the opposite, and cannot serve as any basis for relief at this juncture.

As to the prosecutor's closing argument, precedent is clear that a prosecutor may refer to the evidence "as it exists before the jury," see White v. State, 377 So.2d 1149, 1150 (Fla. 1979), and may properly refer to the evidence as "unrebutted" if such is the case. See, e.g., Smith v. State, 378 So.2d 313, 314 (Fla. 5th DCA), approved, 394 So.2d 407 (Fla. 1980) (". . . if a prosecutor could not make fair comment on the fact that the State's evidence of guilt is uncontroverted, what would be left for him to argue in a case where a defendant declined to testify?"); Elam v. State, 389 So.2d 221, 222 (Fla. 5th DCA 1980) (prosecutor's comments that State's evidence uncontroverted and unrefuted not improper); Dufour v. State, 495 So.2d 154, 160 (Fla. 1986) (prosecutor's argument that no one had come in and said testimony of state witness wrong

not incorrect or improper); Melton v. State, 638 So.2d 927, 930 (Fla. 1994) (prosecutor can review the evidence as a whole and point out that it is uncontradicted). Any error would be harmless beyond a reasonable doubt, under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), in light of the particular circumstances of this case. Fundamental error has not been demonstrated, and the instant convictions should be affirmed in all respects.

## POINT V

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE COURT'S GRANTING OF THE STATE'S MOTION IN LIMINE

As his final attack upon his convictions, Appellant contends that he is entitled to a new trial, because the State precluded him from raising a defense of "justifiable use of deadly force" or "defense of another", in that "even under the most convoluted logic, Hill should have been allowed to offer it." (Initial Brief at 50). Citing to Zal v. Steppe, 968 F. 2d 924 (9th Cir.), cert. denied, 113 S.Ct. 656, 121 L.Ed.2d 582 (1992), as well as certain Florida cases cited in the dissent therein, opposing counsel further contend, "Indeed, the defendant must be permitted to fully articulate his motive even if does not constitute a lawful defense." (Id.). The State disagrees with all the above, and would contend that reversible error has not been demonstrated.

The record indicates that, prior to trial, the State filed a motion in limine to preclude Appellant from seeking to raise any defense of "necessity" or "justification", based upon his views on abortion, stating that such defenses could not be raised as a defense to a criminal act "which was committed to prevent activity which is protected both by the United States Constitution, the

Florida State Constitution" and the various statutes (R 114-116). The State filed a memorandum in support of its motion, arguing that as a matter of law, Appellant could not show the four essential elements for such a defense, under United States v. Bailey, 444 U.S. 394, 100 S.Ct. 644, 62 L.Ed.2d 575 (1979), to the effect that, Hill: (1) had been faced with a choice of evils and had chosen the lesser one; (2) had acted to prevent imminent harm; (3) had reasonably anticipated a causal relation between his conduct and the harm to be avoided and (4) had no legal alternatives (R 201-7). The State cited a number of federal and out-of-state precedents which had uniformly precluded such defense, even in the context of relatively non-violent offenses such as trespass at an abortion facility (R 204-5). The prosecutor contended that the allowance of the instant defense would "invite anarchy", and encourage the jury to nullify the law; at minimum, the admission of evidence pertaining to the morality of abortion would distract the jury from the legal principles governing the case (R 206-7).

Appellant filed a lengthy memorandum in opposition to the State's motion (R 117-200). In such pleading, he contended that the unborn children who had been scheduled to be "killed" at the clinic that day had been in imminent peril and had need a defender (R 118); accordingly, Hill maintained that he was entitled to

assert "defense of another" (R 118-19). In his pleading, Appellant asserted that: (1) he reasonably believed that he was protecting innocent life; (2) he used reasonable force under the circumstances; (3) he was justified because he prevented imminent harm and (4) and his actions protected "another" (R 124-138). Subsequently, Appellant suggested that his actions could be analogized to those who challenged Nazi tyranny (R 169-173), or to those who harbored or assisted fugitive slaves (R 173-7). Appellant concluded by maintaining that the jury should be allowed to determine not only the facts in controversy, but also the law to be applied (R 185).

A hearing was held on the State's motion on October 24, 1994 (R 217-229). As noted earlier, Hill unsuccessfully requested that out-of-state attorney Heuser argue in opposition to the State's motion; after the denial of such request, Appellant rested on his own pleading (R 218-220, 226-7). Following argument by the State (R 221-6), the motion in limine was granted (R 228-9, 234). During the trial, Hill conferred with his stand-by counsel at the time that the State rested its case (T 565-6). At the conclusion of this discussion, Appellant stated that he "would like to present the defense that [he] offered to the court earlier." (T 566). Judge Bell pointed out that the matter had already been argued, but

added, "...if you have anything in addition to what was said earlier, I'd be happy to hear it." (T 566). Hill apparently agreed that what he wished to present had already been previously argued, and stated that the defense would rest (T 566-7).

Appellee would initially question whether any claim of error has been preserved for review, as there was no proffer below of the evidence which allegedly would have supported a defense of "justification" or "defense of another". This Court, and others, has consistently required such proffer, in regard to any claim of error involving exclusion of evidence, in order to provide for meaningful appellate review. See e.g. Jacobs v. Wainwright, 450 So. 2d 200, 201 (Fla. 1984) ("The purpose of the proffer is to put into the record testimony which is excluded from the jury so that an appellate court can consider the admissibility of the excluded testimony. Reversible error cannot be predicated on conjecture."); Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990) (same); Robinson v. State, 575 So. 2d 699, 703 (Fla. 1st DCA), cert. denied, 589 So. 2d 292 (Fla. 1991) (claim of error relating to granting of State's motion in limine not cognizable in absence of adequate proffer, as any ruling by appellate court would be "a matter of pure conjecture"). Accordingly, any claim of error has been waived.

It is anticipated that Appellant will contend that his failure to make an adequate proffer below should be excused due to his pro se status or, as set forth in Point I, due to the fact that he allegedly should not have been allowed to represent himself. Such argument must be rejected for a number of reasons. First of all, the prosecutor specifically warned Hill concerning the fact that his inability to lay a foundation could mean that he could be precluded from going forward "in a particular area" (R 78-80); Appellant insisted upon self-representation, with full knowledge of the potential consequences. Further, the granting of the State's motion in limine occurred a week prior to trial, and Hill had the opportunity to accept the representation of counsel prior to the time for the presentation of any defense testimony; instead, Hill continually insisted on representing himself (T 10, 240-4). Finally, at the point in the trial when any proffer should have been made, Hill consulted at length with stand-by counsel, and obviously could have received their assistance in making a record in this regard (T 565-7). It is not at all inequitable to conclude that any claim of error in this regard has been waived, given the fact that Hill had the clear ability to make an adequate proffer in this regard. This conclusion is inescapable, when one realizes that a short time before the October 24th hearing in this case,

Hill had represented himself in federal court and, indeed, had specifically proffered a defense of "justication" in such a manner that the federal judge could make a definitive ruling. See United States v. Hill, 893 F. Supp. 1048 (N.D. Fla. 1994).

In addition to the lack of an adequate record, there remains the fact that no viable "neccesity"/"justification" defense existed sub judice. It would appear that this is the first appeal to reach a Florida court presenting the issue of whether the defense of "necessity" or "justification" can be utilized in regard to a homicide committed at an abortion clinic.[5] In the past, attempts have only been made to raise such defense in proceedings involving trepass or other "protest-related" offenses committed at such location. These attempts have been uniformally unsuccessful. See Annotation, 'Choice of Evils', Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest, 3 ALR 5th 521 (1992); City of Wichita v. Tilson, 855 P.2d 911, 915-16 (Kan. 1993) ("Every appellate court to date which has considered the issue has held that abortion clinic protestors or 'rescuers' as they preferred to be called, are precluded as a

[5] Although Appellant seeks to cast this defense as one involving "defense of another", under §§ 766.012 and 766.031, Fla. Stat. (1993) (Initial Brief at 49-51), it is most properly characterized as one of "necessity"/"justification". To the extent that this Court discerns any difference between two defenses, such will be addressed at n.7, infra.

matter of law, from raising a neccessity defense when charged with trepass"; collection of fifty cases and brief discussion).

In Florida, the "necessity"/"justification" or "choice of evils" defense has most commonly been employed in prosecutions for trepass at nuclear facilities. See Yoos v. State, 522 So. 2d 898 (Fla. 5th DCA 1988); Linnehan v. State, 454 So. 2d 625, 626 (Fla. 2d 1984). In the latter case, the Second District, looking to certain federal precedents, cited the elements of a "necessity" or "choice of evils" defense, as: (1) a defendant's reasonable belief that his actions are necessary to avoid imminent threatened harm; (2) a lack of other adequate means to avoid the threatened harm and (3) a reasonable anticipation that a direct causal relationship exists between the acitivity taken and the avoidance of the harm. These elements are consistent with those cited by the prosecutor as deriving from United States v. Bailey, with the important addition of a fourth - that Hill was faced with a choice of "evils" and chose the lesser. See also Hill, 893 F. Supp. at 1049. Applying these matters to the case at hand, it is clear that no viable defense of "necessity" could have been presented sub judice.

The primary flaw is, of course, that Hill did not choose the lesser of two "evils". If the act of trepass cannot be justified based upon a defendant's perception that it is the lesser of two

evils, it is inconceivable how two acts of cold-blooded first degree murder, and the attempted murder of a third human being, could be regarded as a "lesser" harm. Regardless of how sincere Hill's views are as to the morality of abortion, there was no cognizable "harm" which he was authorized to seek to prevent. Abortion is not illegal, and Hill had no basis to believe that abortions which would have been performed at the clinic that day would not be in accordance with the law.[6] Indeed, in his order, Judge Vinson cited to Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and expressly found that since abortion was a constitutionally protected activity, there was no recognizable harm for abortions within the confines of the law. Hill, 893 F. Supp. at 1049. Florida, of course, allows abortions by law, see § 390.001(2), Fla. Stat. (1993), In Re T.W., 551 So. 2d 1186 (Fla. 1989), and this Court recently clarified, at least, for purposes of § 768.19, that a fetus is not a "person". See Young v. St. Vincent Medical

[6] At the federal hearing, Hill himself presented the testimony of Linda Taggart, the Administator of the Ladies Center Clinic, who stated that the clinic had never performed abortions beyond the first trimester. Hill, 893 F. Supp. at 1049-1050. Accordingly, Hill would have had no reasonable belief that abortions unauthorized by the law were to be performed on July 29, 1994, and he can obtain no sustenance from People v. Archer, 143 Misc.2d 390, 537 N.Y.S.2d. 726 (City Ct. 1988), the only precedent which could arguably support his position.

Center, Inc., ___ So. 2d. ___, (Fla. March 15, 1996); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980). Accordingly, Hill cannot satisfy two prongs of the necessity defense - that he chose the lesser "harm" and that he acted to prevent "imminent harm". See e.g., Commonwealth v. Wall, 539 A.2d 1325, 1328 (Pa. Super. 1988) ("imminent threat to unborn children" did not constitute harm for purposes of necessity defense by abortion protestor).

Hill likewise cannot satisfy the remaining criteria for a "justification" defense. Hill plainly had legal alternatives to murder, and the record indicates that he had previously participated in peaceful protests at the Clinic. The fact that Hill may have become "impatient" with such peaceful activities did not justify his taking the law into his own hands. Cf. United States v. Kabat, 797 F.2d 580, 591 (8th Cir. 1986), cert. denied, 481 U.S. 1030, 107 S.Ct. 1958, 95 L.Ed.2d 530 (1987) ("The necessity defense was never intended to excuse criminal acitivity by those who disagree with the decisions and policies of the lawmaking branches of government: in such cases the 'greater harm' sought to be prevented would be the course of action chosen by elected representatives, and a court in allowing the defense would be making a negative political or policy judgment about the course of action." ); United States v. Dorrell, 758 F.2d 427, 431 (9th

Cir. 1985) ("impatience" of protestors does not constitute "necessity" that defense of necessity requires); Zal, 968 F.2d at 929 (discussion of legal alternatives available to abortion protestors). As Judge Vinson correctly found, Hill had alternatives, far less severe and abhorrent than the action the defendant elected to take - killing Dr. Britton and Mr. Barrett, and injuring Mrs. Barrett with a shotgun. Hill, 893 F. Supp. at 1050.

Likewise, as to the causal relationship between Hill's act and harm he sought to avoid, Hill's goal was presumably to prevent abortions from occurring. It is difficult to see how murdering one doctor could have led to such result, and the murder of Mr. Barrett is completely indefensible as he had no role in the performance of abortions. To the extent that the Barretts "facilitated" the performing of abortions, by serving as escorts, one could argue that the local telephone and electric companies "facilitated" abortions by providing services to the clinic. Under Hill's "logic", this would presumably authorize him to murder everyone associated with those utilities. Cf. Youngblood v. State, 515 So. 2d 402, 404 (Fla. 1st DCA 1987), cert. denied, 520 So. 2d 587 (Fla. 1988) (necessity defense inapplicable to crime for which defendant convicted, i.e., burglary).

Thus, inasmuch as Hill can satisfy none of the criteria set forth in Linnehan or Bailey, it was not error for the court below to have precluded any assertion of the defense of "necessity" or "justification".[7] As the State correctly argued below, to have allowed presentation of this defense, as well as the introduction of any evidence allegedly in support thereof, would have invited anarchy. Hill's "defense" was that he was not subject to laws with which he disagreed, and that the jury should likewise have been allowed to acquit him of the most serious charges possible, if they were inclined to follow their own consciences as opposed to the Florida Statutes. No system of law could function in such a fashion. See e.g., City of Missoula v. Asbury, 873 P.2d 936, 939 (Mont. 1994) (not error to exclude evidence of abortion protestors' "biblical or moral justification for conduct", in that such personal beliefs do not immunize defendant from consequences of actions which violate state's criminal laws); Commonwealth v. Wall, 539 A.2d at 1329 (defendant's claim that he was justified in

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[7] To the extent that such claim is independently cognizable, it was likewise not error for the court to have precluded any "defense of another" defense, and in Zal, supra, the court relied upon its rationale for denying the "necessity/justification" defense as support for its preclusion of any "defense of other" defense. It would be an understatement to say that the legislature never contemplated that either § 776.012 or 776.031 would be utilized in the manner contemplated by Hill, and, the preceding argument demonstrates that no "imminent harm" existed which could serve to justify any of those defenses.

breaking the law because his actions were "motivated by higher principles" rejected, in that to accept such argument "would be tantamount to judicially sanctioned vigilantism" and would result in "utter chaos").

In Cawthon v. State, 382 So. 2d 796 (Fla. 1st DCA), cert. denied, 388 So. 2d 1110 (Fla. 1980), the First District held that, as a matter of law and policy, the defense of coercion was not applicable in a prosecution for homicide or attempted homicide. See also Wright v. State, 402 So. 2d 493, 497-8 (Fla. 3rd DCA 1981); Henry v. State, 613 So. 2d 429, 432 n.6 (Fla. 1992). Certainly, a similar result should obtain as to Hill's "defenses" of "justification" or "necessity". For all of the above reasons, reversible error has not been demonstrated in regard to the trial court's granting of the State's motion in limine, and the instant convictions should be affirmed in all respects.

## POINT VI

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO HILL'S SENTENCES OF DEATH

As his final claim, Appellant contends that "because of the errors committed during the guilt phase of the trial" (Initial Brief at 53), Hill's death sentences must be vacated. Hill specifically challenges the cold, calculated and premeditated aggravating circumstance, found as to both sentences, and maintains that the defendant should have been allowed to present his "justification" defense, so as to establish a "pretense of moral or legal justification." (Id.). The short response to the above is that there were no errors in the guilt phase, as demonstrated previously, and that nothing prevented or precluded Paul Hill from introducing any evidence which he wished at the penalty phase. This latter matter will be addressed in more detail, as will some of the findings in aggravation and the proportionality of the death sentences. The instant sentences should be affirmed in all respects.

### A. Relevant Facts of Record

The record in this case indicates that at the penalty phase of November 3, 1994, Appellant initially requested that two out-of-

state attorneys be substituted as his stand-by counsel; following the denial of this request, Hill re-affirmed that he wished to represent himself, and did so, with the assistance of two assistant public defenders as stand-by counsel (T 662-671). Hill then announced that it was his desire "to participate as little as possible in these proceedings," given his "opinion of this Court." (T 672). The State called two witnesses, who briefly offered victim-impact evidence as to one of the victims, James Barrett (T 677-9; 695-8). After the State rested, Appellant stated that he had nothing to say (T 699), and, in answer to the court's question, agreed that he was "not going to put on any mitigating evidence." (T 700).

The parties then held a charge conference, during which the court asked Hill if he wanted the jury to be instructed on the mitigating circumstance relating to lack of significant criminal history, as well as upon the "catch-all" mitigating circumstance; Hill stated that such instructions seemed appropriate (T 708). The following then took place:

> THE COURT: . . . Have you had a chance to discuss with your attorneys the mitigating circumstances that could be appropriately presented?
>
> MR. HILL: Yes, sir.

> THE COURT: Are there any others that you want put on this jury instruction, jury -- instructions to the jury?
>
> MR. HILL: No, Your Honor (T 709).

Following a recess, the State presented its closing argument (T 710-720). At this point, Hill began to present argument, telling the jury that they had a responsibility to protect their neighbors and to use force if necessary (T 720). The State objected, and, after a colloquy, the court overruled the objection, stating that he wanted to allow Hill "wide latitude" "to make your point and argue your case" (T 722-5). Appellant then returned to his theme, and, without objection, again told the jury that they had a responsibility to protect their neighbors' lives and to use force if necessary (T 725); Hill likewise told the jury that they could "mix his blood with the blood of the unborn," but that "truth and righteousness will prevail." (T 725). After instruction by the court, the jury returned two unanimous advisory recommendations of death (T 747-8). The State then requested that a presentence investigation report be prepared, and Hill asked if he could call witnesses at the subsequent sentencing proceeding (T 753-9).

At the hearing of November 30, 1994, Hill again indicated his desire to proceed without counsel (R 289-290). The presentence investigation report was formally moved into the record, and the

court noted that Hill "would not give any information to the investigator that was conducting the presentence investigation (R 290-1). Appellant affirmed that he had received the report and read it, and, in answer to the court's question, further stated that he had no evidence to present (R 291-2). Following the State's argument, Appellant addressed the court, and stated that, as opposed to pleading for his own life, he called upon "compassionate men to defend the unborn in the same way in which we defend born children" (R 311-12).

At the formal sentencing hearing of December 6, 1994, Hill again indicated that he wished to represent himself (R 320). The court then imposed the death sentences (R 327-339). As noted, the court found three aggravating circumstances as to the murder of Dr. Britton, and two as to the murder of James Barrett; in both instances, the court found that the aggravation outweighed the mitigation, the latter consisting of Hill's lack of significant criminal history (R 354-363). The judge's finding as to the cold, calculated and premeditated aggravator, which was common to both sentences, reads as follows:

> The Defendant had told doctors for the past six months that abortionists should be executed. On July 27, 1994, two days prior to the murder, he begins to put his plan into action. The Defendant buys the shotgun and

> ammunition. On July 27 and 28, 1994, he practices with the shotgun and ammunition. The Defendant modifies the shotgun by sewing a bandoleer on the stock to hold four rounds. The Defendant puts bandoleers and shells around each ankle. He places other shotgun shells in his pockets. The Defendant loaded the shotgun to the maximum. The Defendant has thirty rounds of 12 gauge buckshot. The Defendant was at the clinic one hour before the victims arrived. After he killed the victims, he stood in the parking lot looking over the bodies. The Defendant was looking at what he had accomplished with pride and satisfaction. This Aggravating factor was proven beyond a reasonable doubt. (R 358-9).

The judge's finding as to heinous, atrocious or cruel aggravating circumstance, found as part of the sentence for the murder of Dr. Britton, reads as follows:

> Dr. Britton as he sat in the truck was able to observe exactly what was happening. He was able to see the Defendant firing at him. Dr. Britton survived the first salvo of three shots that came into the truck and killed Colonel Barrett. Dr. Britton asked June Barrett, who was in the back seat, "Did Jim bring his gun?" Dr. Britton could see the Defendant stalking across in front of him reloading the shotgun. The Defendant was very close to Dr. Britton. The Defendant was looking at Dr. Britton, and Dr. Britton was looking at the Defendant. Dr. Britton was sitting in the passenger side of the truck. There was twenty to thirty seconds between the two salvos. Dr. Britton had twenty to thirty seconds to anticipate and contemplate his death. Dr. Britton could see the Defendant taking aim and was watching his own execution

> unfold in front of him. This Aggravating factor was proven beyond a reasonable doubt. (R 358).

**B. The Instant Sentences Of Death Should Be Affirmed In All Respects**

As noted, Appellant's primary claim on appeal is that the court below erred in not allowing him to present evidence which would have constituted a pretense of moral or legal justification, so as to preclude the finding that the homicides had been committed in a cold, calculated and premeditated manner, under § 921.141(5)(i) (Initial Brief at 53). First of all, the State would contend that the record unquestionably demonstrates that Hill had every opportunity to present any argument or evidence in mitigation which he desired. Hill availed himself of the opportunity to argue both before the judge and jury, and, at such time, set forth his views on the need to protect the unborn (T 725; R 311-312). The record contains no indication that Hill was ever precluded from offering evidence in mitigation contrary to the dictates of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) or Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

During the penalty phase, Judge Bell specifically inquired of Hill as to whether he had discussed with his attorneys the

mitigating factors which could appropriately be presented and Hill stated that he had (T 708-9). To the extent that Hill waived the presentation of mitigation, he did so knowingly and intelligently. See e.g., Allen, 662 So.2d at 328-330 (pro se defendant was entitled to control the overall objectives of his defense, including the decision to disavow mitigation); Hamblen v. State, 527 So.2d 800, 802-4 (Fla. 1988). Further, it should be noted that, in contrast to the situation in Farr v. State, 656 So. 2d 448 (Fla. 1995), the court ordered a presentence investigation report, and Hill chose not to offer any information to its preparer (R 290-2). This case does not represent an instance of a defendant denied the chance to offer mitigation to the sentencing court, and no relief is warranted as to this claim. Cf. Wuornos v. State, 20 Fla. L. Weekly S481, 483 (Fla. Sept. 21, 1995) (defendant's refusal to present case in mitigation constituted an admission of her belief that no such case existed).

It can also be said with confidence that any evidence which Hill might have wished to offer as to his views on the morality of abortion could not constitute a "pretense of moral or legal justification" for the homicides. This case is in all material respects indistinguishable from Dougan v. State, 595 So. 2d 1, (Fla. 1992). In Dougan, the defendant kidnapped and murdered a

victim chosen at random, so that he could start a "revolution and racial war", due to his belief that racial injustice had prevailed in the past. As part of the death sentence imposed, the sentencing court found that the homicide had been cold, calculated and premeditated. On appeal, Dougan attacked this aggravator, as well as the proportionality of the death sentence. This Court found both to be proper, and specifically rejected any contention that Dougan had a colorable claim of any moral or legal justification for the killing, stating,

> While Dougan may have deluded himself into thinking this murder justified, there are certain rules by which every civilized society must live. One of these rules must be that no one may take the life of another indiscriminitly, regardless of what that person may perceive as a justification. Dougan, 595 So. 2d at 6.

In words that could have been chosen expressly to apply to this case, this Court concluded:

> To hold that death is disproportionate here would lead to the conclusion that the person who put the bomb in the airplane that exploded over Lockerbie, Scotland, or any other terrorist killer should not be sentenced to death if the crime were motivated by deep-seated philosophical or religious justifications. Id.

Dougan dictates that the instant death sentences should be affirmed.

This Court has consistently upheld the finding of the cold, calculated and premeditated aggravating circumstance, as well as the death sentence itself, in other instances in which a defendant claims that his "beliefs" justified his actions. See e.g., Provenzano v. State, 497 So. 2d 1177, 1183 (Fla. 1986) (defendant's delusion that police were going to attack him did not preclude heightened premeditation or death penalty); Turner v. State, 530 So. 2d 45, 52 (Fla. 1988) (defendant's belief that his wife and other victim were lesbian prostitutes who are harming his children did not establish pretense of justification or preclude death sentence); Pardo v. State, 563 So. 2d 77, 79-80 (Fla. 1990) (defendant's belief that because victims were drug dealers, they had "no right to live" insufficient basis to excuse "executions"); Gunsby v. State. 574 So. 2d 1085, 1090 (Fla. 1991) (defendant's belief that he was "protector of the black community" and that victims, through drug dealing, were harming such, insufficient pretense of moral or legal justification); Cruse v. State, 588 So. 2d 983, 991-2 (Fla. 1991) (defendant's delusion that there was a conspiracy against him did not "provide a colorable claim of any kind of moral or legal justification for his lashing out against the community"); Trepal v. State, 621 So. 2d 1361, 1367 (Fla. 1993) (defendant's poisoning of neighbors unjustified by fact that he

regarded them as "troublesome"); Walls v. State, 641 So. 2d 381, 388 (Fla. 1994) (discussion of pretense of moral or legal justification and citation to Dougan for proposition that purely subjective beliefs of defendant cannot establish such). Further, given the extensive evidence of pre-planning, the advance procurement of the gun and vast amounts of ammunition, the reloading, the lack of resistance and the appearance of a killing carried out "as a matter of course," the cold, calculated and premeditated aggravating circumstance was properly found in all respects. See e.g., Provenzano, supra; Turner, supra; Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988); Cruse, supra; Trepal, supra; Walls, supra.

As to the other two aggravating circumstances, it is difficult to see how any challenge could be made to that involving prior, or contemporaneous, convictions for crimes of violence under § 921.141(5)(b). The State would likewise contend that the finding that the murder of Dr. Britton was especially heinous, atrocious or cruel was proper under § 921.141(5)(h); the prosecutor argued that this aggravating circumstance only applied to this murder (T 714). As this Court held in Preston v. State, 607 So. 2d 404, 410 (Fla. 1992), fear and emotional strain may be considered as contributing to the heinous nature of a murder, even when the victim's death is

almost instantaneous. The record in this case clearly supports this aggravating circumstance, in that Dr. Britton was unquestionably aware that he was going to die and that there was nothing he could do to prevent it.

Hill murdered Mr. Barrett, the driver of the vehicle first, shooting him as he sought to exit the truck. There was then a pause, during which Dr. Britton asked Mrs. Barrett if they had any way to defend themselves, i.e., whether her husband had brought his gun. When he was told that he had not, the victim must have known that he was literally a "sitting duck", positioned in a vehicle from which he could not safely escape, as a man with a shotgun drew ever closer. As Judge Bell found, the distance between defendant and victim was such that Dr. Britton could literally see the instrument of his own execution, and it cannot be a coincidence that the doctor, who was wearing a bullet-proof vest, was shot six times in the head; additionally, a slug literally tore through his arm, leaving a gapping six inch hole.

Given the fact that Hill literally stalked this victim before killing him, this aggravating circumstance was appropriate. See Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994) (aggravating circumstance properly found where second victim witnessed murder of first victim, before repeatedly being shot himself; victim

"undoubtedly suffered great fear and terror"); Gaskin v. State, 591 So. 2d 917, 920-1 (Fla. 1991) (aggravating circumstance properly found where second victim witnessed murder of first victim and was then "stalked" by defendant prior to being shot to death). Although this homicide was committed by shooting, it was truly outside the norm of capital felonies, under State v. Dixon, 283 So. 2d 1 (Fla. 1973), and the finding of this aggravating circumstance was not error; to the extent that error is perceived, it is unquestionably harmless under State v. DiGuilio, supra, given the fact that the jury likewise recommended death as to the murder of James Barrett without consideration of this factor.

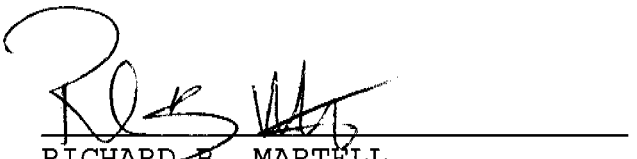
In conclusion, this was a cold-blooded, well-planned execution of two persons, in which a third person was shot and injured as well. Under every definition, these homicides are unjustified, and death is the appropriate penalty. See e.g., Dougan, supra; Trepal, supra; Provenzano, supra; Cruse, supra; Occhicone v. State, 570 So. 2d 902 (Fla. 1990). The instant sentences of death should be affirmed in all respects.

## CONCLUSION

WHEREFORE for the aforementioned reasons, the instant convictions and sentences of death should be affirmed in all respect.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. James Joseph Lynch, Jr., Esquire, Post Office Box 336, Sacramento, California, 95812-0336; Mr. Thomas A. Horkan, Jr., Esq., Post Office Box 1638, Tallahassee, Florida, 32302; Mr. Michael R. Hirsh, Esq., P. O. Box 329, New Haven, Kentucky, 40051; Mr. Roger J. Frechette, Esq., 12 Trumbull Street, New Haven, CT. 06511 and Mr. Paul Jennings Hill, #459364, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 15 day of March, 1996.

RICHARD B. MARTELL
Chief, Capital Appeals