IN THE SUPREME COURT OF FLORIDA

VICTOR KLOKOC,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 74,146

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT/ ANSWER BRIEF OF CROSS-APPELLEE

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SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT ON CROSS-APPEAL

The state did not argue to the trial judge that the pecuniary gain statutory aggravating factor was supported by the facts. The state did not object when the trial judge rejected this factor. The state did not file a notice of cross-appeal until after the Initial Brief of Appellant was filed. The state has waived any right to claim the applicability of this factor by not preserving the issue. Assuming that the state's unpreserved contention will be considered, it is utterly without merit. The state is asking this Court, from a cold record, to substitute its judgment for that of the trial judge, who had the benefit of live testimony. Even at that, the record clearly shows that the murder of Elizabeth Klokoc was in no way motivated by a desire for financial gain. The state has failed to show that the trial judge committed reversible error by rejecting the pecuniary gain statutory aggravating factor.

POINT I

THE DEATH PENALTY IN THIS CASE MUST BE REVERSED BECAUSE IT IS NOT SUPPORTED BY ANY VALID STATUTORY AGGRAVATING FACTOR(S), AND THE DEATH PENALTY HERE IS OTHERWISE DISPROPORTIONATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Section 921.141(5)(i) Fla. Stat. (1987) provides that an aggravating factor exists if, "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Klokoc does not contest that the first, objective prong of the "CCP" aggravating factor applies. However, because a "pretense of moral or legal justification" can reasonably be said to exist, the factor BY ITS VERY TERMS does not apply. "The state must prove this last element beyond a reasonable doubt, in addition to other elements of this particular aggravating factor." Banda v. State, 536 So.2d 221, 224 (Fla.1988)(emphasis added).

Klokoc contends that a "pretense" of moral and legal justification exists as a matter of law because the trial court found the existence of the two statutory mitigating factors which concern a defendant's mental state at the time the murder was committed. The state counters by arguing that the crime was cold, calculated and premeditated within the definitions given those terms by this Court. In reference to the second prong of this aggravating factor, the state argues that the only pretense of moral or legal justification recognized by this Court is that of self-defense, which is not present here. Answer Brief ("AB") at 13-14.

According to the state, only self-defense qualifies under Section 921.141(5)(i) Fla. Stat. (1987) as a "pretense" of moral or legal justification:

> Where a murder is motivated out of self-defense the cold, calculated and premeditated aspects of the murder are rebutted. This court has never held, however, that mental states such as anger, irrationality or misguided "compassion" are sufficient to rebut or negate a finding that a murder is cold, calculated and premeditated.

AB at 14. Klokoc respectfully disagrees and submits that, as occurred here (R572-73), when both [1/] statutory mitigating factors which concern a defendant's mental condition at the time of the murder have been found to exist by the trial court, a "pretense" of moral or legal justification exists that, as a matter of law, precludes application of the CCP factor.

Contrary to the state's assertion, this Court has recognized that a defendant's mental state at the time a crime was committed provides extenuation insofar as the force given a statutory aggravating factor. For instance, in Amazon v. State, 487 So.2d 1 (Fla.1986), this Court commented on the relationship between the mental/emotional statutory mitigating factors and the commission of an especially heinous, atrocious or cruel murder. In pertinent part, this Court said, "In light of these mitigating

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[1]/ Section 921.141(6)(b) Fla. Stat. (1987)("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."); Section 921.141(6)(f) Fla. Stat. (1987)("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.").

circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors." Amazon, supra at 13. See also, Huckaby v. State, 343 So.2d 29, 33-34 (Fla.1977)("Our decision here is based on the causal relationship between the mitigating and aggravating circumstances.").

Logically, the interplay between the mental condition of a defendant and the crime he commits spans the spectrum of conduct which the mental problem affects, thereby decreasing the force of some statutory aggravating factors and, here, preventing the finding of this factor by providing a legitimate moral and/or legal justification. A defective mental condition rationally explains, but does not legally justify, such conduct:

> Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

Eddings v. Oklahoma, 455 U.S. 104, 116 (1982)(emphasis added).

Florida recognizes by statute that different aspects of a defendant's mental condition at the time a murder is committed may mitigate the crime in separate respects, even though the defendant does not meet the stringent statutory definition of insanity. Certainly, where the trial court finds that such mental mitigating factors apply, at the very least there must be a "pretense" of moral or legal justification that rebuts the otherwise cold and calculating nature of the murder and prevents the statutory aggravating factor from applying. This is not to say that other statuory factors do not apply; only that the CCP factor does not apply because at the very least a "pretense" of moral justification has been found to exist by a trial court.

Even assuming that the CCP factor is appropriate here, the death penalty is not, due to the statutory and non-statutory mitigating factors which were found by the trial judge. Klokoc's mental condition and background explain this crime. In light of these considerations, this murder cannot be deemed the most aggravated and least mitigated of serious crimes. The state can cite no other case where the death penalty has been based on only the CCP statutory factor, but suggests that the reason therefor is that this case is more egregious than any other case arising in the past twenty years:

> Although the cases cited by Klokoc all involve the HAC factor, this does not mean a death sentence cannot be upheld where the single aggravating factor is CCP. It is doubtful this court has carved out a rule that a death sentence can only be upheld if HAC is present. The more logical conclusion is that to date there has not been a case in which

> the murder was as egregious as this one where other aggravating factors were not present. This court simply has not been presented with the opportunity to uphold a case in which CCP is the only aggravating circumstance.

A.B. at 18 (emphasis added).

It is important that this Court recognize that the state is asking for the death penalty to be affirmed based on factors other than those contained in Section 921.141(5) Fla.Stat. (1987). Legally, this case is not the most egregious of murder cases; one statutory aggravating factor exists, and that is countered by significant statutory and non-statutory mitigating factors. It is hard to believe that, in the 20 year period following the re-implementation of the death penalty in Florida, trial courts have never had an opportunity to impose the death penalty based solely on the CCP aggravating factor. It is by far more likely that, when given the opportunities, trial courts have not imposed the death penalty because it is simply inappropriate to do so. The lack of any precedent in favor of the state's position is a clear indication that its argument is totally without merit.

The state continues, "Klokoc's death sentence is proportionate," AB at 21, but cites cases that are so dissimilar to the one sub judice that any assertion of similarity appears frivolous. The state cites the following cases as "similar" to Klokoc; Dobbert v. State, 328 So.2d 433 (Fla.1976); Hitchcock v. State, 413 So.2d 741 (Fla.1982); Tompkins v. State, 502 So.2d 415 (Fla.1986); Adams v. State, 412 So.2d 850 (Fla.1982); Doyle v.

State, 460 So.2d 353 (Fla.1984); Correll v. State, 523 So.2d 562 (Fla.1988); and, Williams v. State, 437 So.2d 133 (Fla.1983). AB at 21. None of these cases involve the CCP statutory aggravating factor; Klokoc does. All of these cases, except Dobbert, involve a jury recommendation of death; Klokoc does not. The majority of these cases, (Hitchcock, Tompkins, Doyle, Adams, and Correll), involve murders committed during the commission of a sexual battery; Klokoc does not. Three of the cases, (Williams, Correll, and Tompkins), include the statutory aggravating factor of a prior conviction of a violent felony, whereas Klokoc was found not to have a significant history of prior criminal activity. (R572).

The contention that these cases are legally comparable to Klokoc is quite absurd. The inability of the state to advance a truly comparable case where this Court has affirmed imposition of a death penalty under similar legal considerations shows that the death penalty is unwarranted here. The death penalty should be reversed and the matter remanded for imposition of a life sentence, with no possibility of parole for twenty-five years.

POINT II

THE FLORIDA DEATH PENALTY VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ART. 1, SEC. 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION BECAUSE THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DO NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY; THE FACTORS ARE PRONE TO ARBITRARY AND CAPRICIOUS APPLICATION.

The state contends that the constitutional challenges Klokoc presents are not preserved for appellate review because they were not presented to the trial court. Interestingly, in this very case, this Court would not allow Klokoc to voluntarily dismiss the instant appeal, nor would this Court permit the undersigned counsel to argue in favor of imposition of the death penalty, because the constitution requires meaningful appellate review of the imposition of the death penalty.

It is anomolous to require a truly adversary stance on appeal if it is just a matter of going through motions. A clear line of authority holds that the eighth and fourteenth amendments require truly meaningful appellate review of imposition of the death penalty. See, ex rel Tomlin, 540 So.2d 668 (Ala. 1988); State v. Copeland, 419 So.2d 899,910 (La. 1982); Williams v. State, 445 So.2d 798,810 (Miss. 1984); Mack v. State, 180 N.E. 279, 203 Ind. 355; Tuggle v. State, 119 P.2d 857, 73 Okl. Cr. 208 (1941); State v. Hester, 134 S.E. 885, 137 S.C. 145; State v. Morris, 283 P. 406, 41 Wyo. 128. The requirement of an objection to preserve an argument for appellate review is a state procedural rule that must give way to constitutional imperatives.

The federal constitutional requirements aside, this Court is independently compelled to automatically review a judgment of conviction and sentence of death pursuant to Section 921.141(4) Fla.Stat. (1987). The death penalty is unique in its finality, and because of this society has implemented mandatory checks to assure that the life of a person is never improperly taken under the authority of the government. The Legislature has recognized this and requires mandatory review even if a defendant does not wish to appeal. A defendant wishing the death penalty should not be able to avoid that mandatory review by pleading guilty and not making any objections to the trial court. Indeed, in light of the repeated decisions from this Court holding that the death penalty statutes are constitutional, presenting such purely legal arguments to a trial court first would be a useless act; a trial court cannot overrule the decisions of this Court. The lack of preservation argument by the state is without merit.

The state does not dispute the inconsistency that pervades death penalty precedent, but instead argues that such inconsistency is inevitable because, "An individual review of each death sentence is bound produce some variance in decisional law. The state submits that such a variance is attributable to the uniqueness of each case and does not demonstrate an arbitrary and capricious imposition of Florida's death penalty cases." AB at 23 (emphasis added). It is axiomatic that legal principles should remain constant. When principles adapt to the facts of cases which are "unique" only because those principles otherwise do not apply, use of the legislation is indeed arbitrary and capricious.

The state accuses the undersigned counsel of trying to "obfuscate" the issue by arguing cases "incomparable to the present case in which Klokoc carefully planned and executed the murder," AB at 25, and continues, "Rogers [2/] is the applicable rule, which receded from Herring v. State, 446 So.2d 1049 (Fla. 1984)." AB at 25. The state does not identify which cases cited by Klokoc are so "incomparable" that they "obfuscate" the issue.

In response to the accusation that the undersigned is unethically trying to blur this issue rather than accurately present it to this Court, it is respectfully submitted that this issue is "obfuscated" simply because a thorough, accurate and complete analysis of the past application of the CCP factor has that effect. To say that Rogers is now the applicable rule is simplistic and denotes a total lack of understanding of the pertinent law. Rogers may well provide the answer to what satisfies the first prong of the "CCP" statutory aggravating factor, but it does not deal in any manner whatsoever with what satisfies the second prong. THAT is the issue that is being addressed here. Rogers is completely inapposite. It says:

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their

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[2/] Rogers v. State, 511 So.2d 526 (Fla.1987)

> plain and ordinary meaning. See Tatzel v. State, 356 So.2d 787,789 (Fla.1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out . . . to design, prepare or adapt by forethought or careful plan." * * * Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our holding in Herring v. State, 446 So.2d 1049. 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question."

Rogers, 511 So.2d at 533 (emphasis added).

In short, this Court held in Rogers that the murder could reasonably have been impulsively committed on the spur of the moment, and therefore the murder did not satisfy the first element of the CCP factor. There was no need for this Court to go any further and analyze whether a pretense of moral or legal justification existed because the state failed to prove that the murder was "cold, calculated or premeditated" beyond a reasonable doubt. Contrary to the argument made by the state that all that needs to be shown for this factor to apply is a calculated murder under the definition set forth in Rogers, the legal inquiry does not stop once a cold or calculated murder is shown. If it did, the second element of the factor would be meaningless. It must be presumed that Legislature enacted the second element of the CCP aggravating factor to be applied. The state's argument that Rogers controls under these facts is completely frivolous.

POINT I ON CROSS-APPEAL

WHETHER THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN ALSO APPLIES TO KLOKOC?

Klokoc respectfully maintains that the state should not be permitted to prosecute a cross-appeal because absolutely no justification has been given to explain why the notice of cross-appeal was filed 302 days late. The argument made in Klokoc's Motion to Strike Untimely Notice of Cross-Appeal, filed March 15, 1990, is reasserted here by reference. Assuming that the state may cross-appeal, its argument is utterly without merit.

At trial, the state did not contend that the murder was committed for pecuniary gain. Rather, when the guilty plea was accepted, the state informed the court, "Just for your planning purposes, I thought that you ought to know the aggravating circumstances the state will rely on primarily will be cold, calculating and premeditated, that it was a cold, calculated, premeditated murder." (R325) Thereafter, the state argued that, under these facts, only two statutory aggravating factors applied, those being an especially heinous, atrocious or cruel murder and a cold, calculated and premeditated murder, with no pretense of justification:

> (Prosecutor) What is aggravating in this case is that I really have to think that this was done, it was just really heinous, atrocious or cruel, obviously tracking the cruel language. But I can't think of anything more atrocious or cruel than executing your own daughter for the mere joy of getting back at your wife who's left you because of the years of abuse that she has endured at his own hands.

(R247).

The prosecutor then argued that the murder was cold, calculated and premeditated, with no pretense of moral or legal justification, (R250-254), and in conclusion stated:

> (Prosecutor) Judge, when we look at all the evidence and listen to all those tapes, certainly, the execution of Elizabeth Klokoc in her bed as she slept was just an incredibly atrocious act by Victor Klokoc and he did so in the most cold, calculated and premeditated manner. The state in reviewing this has no option but to ask that the death penalty be imposed.

(R255).

Until now, there has not been the slightest suggestion from the state that the pecuniary gain factor is applicable. The prosecutor who presented the evidence did not ask the court to find the pecuniary gain factor, evidently because he did not feel that the evidence supported it. When the pecuniary gain factor was not found by the trial, the prosecutor neither objected nor filed a notice of cross-appeal, timely or otherwise. Yet, 302 days later, <u>after</u> reading Appellant's Initial Brief and seeing that never before has the death penalty been upheld by this Court based on the one lone aggravating factor found by the trial court, the state has determined from a cold record that the trial judge committed reversible error in not finding a factor which the state failed to ask him to find in the first place.

The state cites <u>no</u> authority which holds that a trial judge committed reversible error in <u>failing</u> to find this, or any other, statutory aggravating factor. As is often explained by this Court, "It is not within this Court's province to reweigh or

reevaluate the evidence presented as to aggravating or mitigating circumstances." Hudson v. State, 538 So.2d 829, 831 (Fla.1989). This Court has carefully explained its two functions in reviewing the imposition of a death sentence by a trial court.

> This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law.
>
> * * *
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great.
>
> * * *
>
> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating or mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla.1981).

It cannot reasonably be said that, under the facts of this case viewed in a light most favorable to the trial court's ruling, Victor Klokoc murdered his daughter for pecuniary gain. Certainly, it was not proved beyond a reasonable doubt that the murder was committed for pecuniary gain. The state claims, "That Klokoc was without ready cash is obvious from the tape." AB at 28, citing the underlined part of the following, (here in context):

> I stopped over to see my oldest son. He don't want me coming around there no more because his girlfriend don't like it, what's going on. So it's terrible but that's how -- they don't want me around, that's it, I don't need to live or they can put me in jail.
>
> But if she don't call me tonight, that's it, I'm going to take my youngest son's life because I don't know want him to live like that, in hurt. So it's terrible that I had to do it this way, but I just told him I ought to sell everything to help his sister, never to let no one in that warehouse, you know, but he can sell most of my stuff to give his sister some money and they can stick my ass in jail. I asked him to sell the car and he don't even want to sell that for her. I don't understand it. It's terrible.
>
> He probably won't sell nothing, she'll be suffering. She'll make it in life, though, 'cause she's strong, she's a good provider. She knows how to save her money.
>
> So I'm throwing all my wife's clothes out. I'm going to the warehouse and dump the rest of them out. If she wants to play games, I just -- I need something to take a little bit of the anger away from me. But the anger keeps building. I can't eat, I haven't eat nothing since yesterday. I mean, you know, it's -- if you have to live like this, it's terrible. Just from a seventeen-year-old kid that don't want to tell me something that he's scared of his mother. I don't understand it. So I don't know what else to do.

(SR 11).

The foregoing passage does not in any way whatsoever establish that "Klokoc was without ready cash." It instead shows concern over Elizabeth's financial condition. Indeed, Klokoc was trying to make arrangements for his material possessions to be sold and given to Elizabeth, since Klokoc intended to shoot his son. The fact that Klokoc lost a hundred dollars while making a phone call shows nothing but that he had a hundred dollars in cash to lose. Elizabeth was the only family member he could reach. In his demented state of mind, Klokoc would not see the murder of Elizabeth as any kind of opportunity whereby he would benefit financially. Rather, Elizabeth's death was intended solely to punish the Klokoc family, that is, Elizabeth's mother and her brothers. The trial court so realized.

Comparing this case to Thompson v. State, 553 So.2d 1137 (Fla.1989), the state unrealistically asserts, "Likewise, in this case Klokoc was motivated in part by revenge. However, his immediate need was to obtain the money and means to get to Ohio. Elizabeth was the ticket out. Her murder served a dual purpose - revenge on his wife and a way to get to Ohio to gloat in her presence." AB at 28. The record indicates that Klokoc owned a pickup truck which he used to go to Fort Lauderdale in an effort to find his wife. (SR19-22). Klokoc had a way to get to Ohio to gloat. The record does not show that he needed more money to do so. In Thompson, the defendant took the victim (Savoy) out to sea and tortured him into revealing the location of $500,000 that Savoy had stolen from Thompson. The trial court found five statutory aggravating factors, including a murder committed for

pecuniary gain. In upholding the trial court's finding, this Court reasoned:

> There is no doubt that Thompson's conduct was motivated in part by revenge. However, it is clear that the purpose of the beatings inflicted in the boat was to prevail upon Savoy to divulge where the money was located. As Thompson said to Savoy, "you can die easy or you can die hard." The evidence supports the conclusion that the crime was committed for pecuniary gain.

Thompson, 553 So.2d at 156.

The murder in Thompson was motivated by Savoy's theft of $500,000 from Thompson, and the heinous death inflicted on Savoy was solely to extract the location of the money. Facts such as those support the trial court's finding of a murder for pecuniary gain. The trial judge in Klokoc was, without doubt, correct in not finding that Klokoc killed his daughter to achieve pecuniary gain, in that the proof is simply not there to show the presence of that statutory aggravating factor beyond and to the exclusion of every reasonable doubt. Financial gain played no role whatsoever in Elizabeth's death. The gain Klokoc sought to obtain from the death of his daughter was purely emotional. The state has failed to demonstrate reversible error. Accordingly, this Court is asked to reverse the death penalty and to remand for imposition of a sentence of life imprisonment with no parole for twenty-five years, in that the death penalty is not supported by any valid statutory aggravating factors and it is otherwise disproportionate to the cases where the death penalty has been approved.

CONCLUSION

Based on the argument and authority set forth in this brief and the intial brief of appellant, this Court is asked to reverse the death penalty and to remand for imposition of a life sentence with no possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida, 32114, this 20th day of April, 1990.

LARRY B. HENDERSON
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