IN THE SUPREME COURT OF FLORIDA

SAMUEL ANDREW PETTIT,

Appellant,

v. Case No. 75,565

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES CITED

FLORIDA STATUTES:

STATEMENT OF THE CASE AND FACTS

Appellant Pettit was charged by indictment with first degree murder of Norman Langston (Count I), felony murder of Langston (Count 2), attempted first degree premeditated murder of Kathleen Finnegan (Count 3), attempted first degree murder of Kathleen Finnegan (Count 4), kidnapping of Norman Langston (Count 5), kidnapping of Kathleen Finnegan (Count 6), robbery of Norman Langston (Count 7), and robbery of Kathleen Finnegan (Count 8). (R 250 - 251)

Defense counsel filed a motion to withdraw from representation, citing appellant's refusal to cooperate and Pettit's instructing counsel not to file motions or further his interests. (R 316 - 317) Counsel also filed a motion to determine appellant's competency. (R 318) A hearing was held on the motions. (R 319 - 400)

Dr. Muriel Yi Yi Myint, a licensed psychiatrist, was appointed by the court to evaluate appellant and assist the defense in his case. (R 324) Pettit was examined both for competency to stand trial and sanity at the time of the offense. (R 325 - 326) Pettit was able to communicate, appeared to be alert, his memory functions were reserved and maintained, his mood and affect were appropriate. (R 329) He was not actively hallucinating, not psychotic and no abnormalities in memory. (R 329) At that time, February 17, 1989, appellant was competent to stand trial; he understood the nature of the proceedings that he was involved in, understood what an attorney was and the role of

an attorney in a criminal case. He seemed able to communicate and had sufficient intelligence to participate in a trial and make rational decisions. (R 330) Appellant was able to relate the charges to her and he understood the charges. He was aware of the potential penalty. Pettit wanted the electric chair for murdering the prosecutor. (R 331 - 332) Appellant said he enjoys killing. (R 333) He wanted the electric chair -- he suffers from an incurable debilitating disease, Huntington's chorea. (R 334)

Dr. Robert Silver, a clinical psychologist, conducted a competency evaluation of Pettit (R 343), and opined that appellant understood the nature of the proceedings he was involved in and was competent to stand trial. (R 345) Appellant was cagey about the pending charges. (R 346) He ultimately acknowledged the death penalty as a possible sentence. He understood the role of a defense attorney. Pettit related that he had a prior criminal history and he seemed street wise. He claimed to know where he was at the time of the offense, and could disclose to his attorney what happened and he asserted no amnesia or blackouts. (R 348 - 349) He said he had an alibi. (R 350) Pettit is of an independent mind and had the ability to challenge witnesses. (R 352) He knew that if he misbehaved in court he could be ordered out of it or held in contempt. He was not retarded. (R 353) Jail would not adversely affect his ability to stand trial. (R 356) The Huntington's chorea would not necessarily render him incompetent in court. (R 357) He has

an appreciation of the charges and has a rational understanding of what's going on in the courtroom. (R 357) He knows the difference between a plea of guilty and not guilty and can make a knowing, voluntary decision whether or not to follow the advice of counsel; he can appreciate the consequences of his actions and make a knowing decision to follow or not follow advice. (R 358)

Pettit is competent to plead guilty with potential death penalty. (R 360) Pettit is not a person prone to guilt or depression. (R 364) He is not now unable to rationally assist counsel. (R 365)

It was stipulated that Dr. Wald's report could be used in lieu of his live testimony (R 370) and Wald believed that Pettit was competent to stand trial. (R 371) The court concluded that Pettit was competent to stand trial. (R 374)

Defense counsel moved to withdraw and the court made inquiry of Mr. Pettit as to his desires. Pettit said it was up to his attorneys (R 378); he acknowledged that counsel were concerned they might not agree with him as to what they were doing. (R 379) Pettit said he would prefer to plead guilty and get it over with. He understood that he had the right not to enter such a plea. (R 380) Pettit testified that he and counsel had discussed possible defenses (R 383) and Pettit did not want counsel to defend him even though counsel advised that was a bad idea. (R 384) Counsel had advised putting on a defense and calling family members to testify at penalty phase; Pettit still wanted to plead guilty and get it over with. (R 384)

He knew he had the right to an attorney to represent him and knew what an attorney was; knew that he was charged with first degree murder; that counsel had advised putting on a defense and calling witnesses and that he could be sentenced to death following a guilty plea; that Pettit's decision was contrary to counsel's advice and that as a result counsel desired to quit. (R 385 - 386) He understood the testimony of the psychologist and psychiatrist. (R 387) He agreed that he was competent. He wanted to fire his attorneys to plead guilty. (R 388) He was not on drugs or medication. (R 389) He wanted to plead guilty. (R 390) Pettit understood that he would not have an attorney at penalty phase. (R 392) He didn't want counsel bringing in testimony. (R 393) Pettit was asked about and understood the penalty procedure. (R 394) He wanted no testimony on his behalf. (R 395) He knew the death penalty was a very strong likelihood. (R 395) He knew that he could have a jury for the penalty phase and he did not want it. (R 396) He wanted the judge to decide his fate. (R 397) The penalty didn't matter to him. (R 398)

On September 18, 1989, appellant again agreed to counsel's withdrawal (R 438) and stated that if there were a trial and he testified he would say that he did it. He understood that he had the right to trial by jury and a second penalty phase proceeding (R 440); that he had the right to remain silent and the right to counsel (R 441). Appellant again acknowledged that counsel had instead advised him to go to trial and he did not want to follow

it. (R 444) He understood the charges against him. (R 445) He understood the penalties. (R 446) He had no objection to the withdrawal of counsel. The court granted counsels' motion to withdraw. (R 447, 412)

Appellant entered pleas of guilty. (R 449 - 452) He was aged twenty-seven and most of his adult life was spent in prison. He had not been adjudged incompetent or treated for mental illness or disability. (R 456) He acknowledged the penalty phase procedure and Pettit wanted the judge to decide his penalty. (R 457 - 459) He did not want a jury.

The prosecutor asked the court to appoint physicians to examine Pettit as to his Huntington's chorea for penalty phase consideration and the court agreed. (R 460 - 462) The plea was freely and voluntarily made. (R 463)

Appellant declared on October 12, 1989, that he had not changed his mind about not wanting a jury. (R 2) He again specifically waived his right to counsel. (R 3)

Kathleen Finnegan testified that on August 17, 1988, she was an assistant state attorney and at the end of the day was going to meet with other friends including assistant state attorney Norman Langston at the Greenery Restaurant and Lounge. (R 9 - 10) From there they went to the Howard Johnson's River Watch Lounge. (R 12) They decided to leave there at about 10:00 p.m. and go to her house to watch rented videos on the VCR. (R 13 - 14) She left with Langston and as he put the key in the door of the passenger's side of his car in the parking lot, a man

approached with a gun and announced that this was a hold up. (R 17)

The gunman ordered them into the front seats and she sat between Langston and the gunman in the small vehicle. (R 23) She suggested giving him their belongings but the assailant insisted on going for a ride. (R 24) The gunman told Langston to go down Taylor Road. (R 25) Then the man took her earring, watch and money. (R 27) They continued driving and the man ordered them to turn at the clearing next to Alligator Creek. (R 31) Langston stopped the car as directed and the gunman demanded his property; he gave him his watch and money. (R 34 - 37) The gunman got out, she saw the barrel of the gun and put her arms to block it and heard a gunshot. (R 38) She was wounded, then heard another shot and then more shots. She was shot a second time and Langston was hit twice in the four shots fired. (R 39 - 40) The gunman kept firing, making clicking sounds with the misfiring. (R 39 - 41) Langston squeezed her hand and Finnegan ran for help after the gunman left. (R 43 - 44) She described the gunman to Corporal Twardzik. (R 53) Ultimately, Finnegan had surgery performed on her shoulder to remove the bullet. (R 54)

State Attorney investigator Michael Dickman investigated the shooting of Langston and Finnegan. (R 61 - 62) The victim's vehicle was not readily visible from the roadway. (R 68) Langston's watch was found about thirty-five feet away from Taylor Road. (R 71)

Charlie Lee Mooney, appellant's cousin, testified that Pettit asked him to find him or sell him a gun. Appellant gave him twenty dollars, saying he wanted the gun to rob somebody. (R 77) The conversation occurred a couple of days before the shooting. Mooney obtained a gun from Aaron Blaksley. (R 78 - 79) Mooney and his cousin Chris Showell tested the weapon and it misfired (R 83); then gave it to appellant. Appellant also prepared for the robbery by making a mask out of a shirt sleeve. (R 86) Pettit also always carried a survival knife. (R 87) Afterwards, appellant was wet when Mooney saw him and Pettit told him how he shot the victims. (R 91) Pettit gave him jewelry and asked him to sell it for him. (R 92 - 93) Pettit said he got the jewelry from the people he robbed (R 95) and that the gun had misfired during the shooting. (R 96) He said he shot the victims because they had seen his face. (R 97)

Pettit planned on leaving town and asked Kenny Sheppard for a ride. (R 97 - 98)

Dr. Imami, the Medical Examiner, performed an autopsy on Norman Langston. (R 103) There were two gunshot wounds to the head. (R 107) The cause of death were gunshot wounds to the head and face. (R 113) Death was not instantaneous and there was a lot of pain. (R 115 - 117)

Sergeant Michael Gandy had been with Finnegan and Langston earlier in the evening and he became involved in the investigation. (R 119 - 1240 Gandy interviewed Kenny Sheppard on August 18 and received earrings, a watch, knife sheath and

shirt. (R 125) Kathleen Finnegan was able to identify the exhibits as taken from her by the shooter. (R 127)

Robert Jackson saw appellant on the morning of August 18. (R 136) Pettit said he had to get out of town; he had robbed and shot someone the night before. Appellant described the crime. (R 137 - 139) He said he shot the victims because they'd seen his face and could recognize him. Appellant had a gun and money. (R 139) Pettit asked him to give him a ride (R 141), later Jackson and his cousin gave appellant a ride to Naples. (R 143)

James Kilpatrick saw appellant on August 18. (R 148) Pettit asked him where he could get a firing pin for a gun. Kilpatrick fixed his gun; it didn't need a firing pin, only a tension screw for the spring. (R 149 - 150) When the television news reported the shooting of the two prosecutors, appellant said he shot them because they had seen him. (R 153)

George Patneau, Naples police officer, observed a person sleeping under some bushes. (R 160) The "sleeper" presented the officers with a corrections offender card with his name -- Samuel Pettit -- on it. (R 161) Officer Holloway removed a firearm from his front pocket. (R 162) Appellant did not comply with the request to be on the ground and had to be placed there. (R 163) Appellant was identified in court. (R 165) Appellant had previously been convicted of carrying a concealed firearm. (R 165 - 166)

Deputy John Petramala testified that in 1985, appellant assaulted him and was convicted in Case No. 85-308. (R 170)

Uta Metzger, a probation officer, stated that Pettit was released from Union Correctional Institution on June 13, 1988 and he had five years probation under the supervision of the Department of Corrections on August 17 and 18, 1988. (R 175)

The trial court heard the testimony of physicians. Dr. Lane Carlin, a neurologist, contacted Pettit pursuant to a court order to perform a neurological examination. (R 188) Appellant had a history of possible Huntington's chorea. Previous EEG's and cat scans were normal. (R 189 - 190) He thought appellant did have chorea, a progressive and not treatable disease. (R 191 - 192) The witness stated that the life expectancy is ten to twenty years from the onset of symptoms and appellant's onset of symptoms was two to three years ago. (R 194) Appellant was not under the influence of extreme mental or emotional disturbance and his ability to conform his conduct to the requirements of law was not substantially impaired. (R 195 - 196)

Dr. Harris Bonnette, a neurologist examined Pettit and felt he had all the features of Huntington's chorea. (R 208) There should be a significant progression of the process in ten to fifteen years. (R 2090 He estimated appellant's life expectancy at age 42 to 47; he is currently 27. (R 210) Pettit was not under the influence of extreme mental or emotional disturbance (R 210), nor was his ability to conform his conduct substantially impaired. (R 211)

Appellant's grandfather, Charlie Pettit, Sr., testified and briefly mentioned Huntington's disease. (R 213 - 214)

Pettit had nothing to offer. (R 215) The prosecutor gave a closing statement. (R 216 - 226)

Following Pettit's guilty plea, the trial court adjudicated appellant guilty on counts one, three, five, six, seven and eight. (R 424) Appellant was sentenced to death on count one (R 426), and to life imprisonment on the remaining counts. (R 427)

In the sentencing order the trial court found the presence of statutory aggravating factors (5)(a), (b), (d), (f) and (i), but the court did not include factors (f) and (i) in its decision. The trial court found no mitigating factors. (R 430) The court noted at the time of sentencing that it had given attention to the testimony of the grandfather. (R 239)

This appeal follows.

SUMMARY OF THE ARGUMENT

I. The lower court did not err in granting appellant's trial counsel's motion to withdraw. A full and complete inquiry was conducted into the reasons for it and appellant's willingness to proceed without counsel. The arguments presented by appellant have essentially been considered and rejected in Hamblen v. State, 527 So.2d 800 (Fla. 1988).

II. The lower court did not err in failing to consider valid nonstatutory mitigating circumstances. Appellant's failure to urge consideration of the factors he now emphasizes should preclude consideration pursuant to Lucas v. State, 568 So.2d 18 (Fla. 1990). Additionally, the court did consider all that was proffered because it said that it did. Finally, even if the Court were to conclude that insufficient attention was paid to appellant's physical illness, that is not necessarily an aspect of appellant's character under Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978).

III. Any error in the court's finding aggravating factor 921.141(5)(a) is harmless error in light of the multiple aggravating factors. Hamblen v. State, supra.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN GRANTING APPELLANT'S MOTION TO WITHDRAW FILED BY APPELLANT'S ATTORNEY.

The instant case is similar to Hamblen v. State, 527 So.2d 800 (Fla. 1988). There, a capital defendant asked the court to revoke the appointment of the public defender and allow him to represent himself; additionally, he announced his intention to plead guilty. The trial judge determined that Hamblen met the criteria for self-representation but provided two assistant public defenders to be in the courtroom as emergency backup counsel. Hamblen pleaded guilty and waived his right to have a jury consider his penalty. Id. at 801. Hamblen accepted the state's version of the facts even conceded a point as to his prior record that the state was having some difficulty establishing. He presented no evidence of mitigating factors and agreed with the prosecutor's recommendation of death. Id. at 802.

Appellant Pettit concedes at page 12 of his brief that many of the issues raised herein have already been decided adversely to appellant, citing Hamblen, supra. (Appellee observes that in footnote 2 of the Hamblen opinion the Court notes that the defendant did not want the case appealed; in the instant case appellate counsel Burns has sought to withdraw from the appeal prior to filing the brief in July and subsequent to filing the appellate brief in November, appellant moved to dismiss the instant appeal -- both motions were denied by this court.)

Counsel for appellant seeks to distinguish Hamblen by urging that in that case the defendant himself discharged his attorneys, whereas in the case sub judice the attorneys were allowed to withdraw on their own request without objection from Pettit. It is a distinction without a difference as appellant affirmatively ratified and concurred in their decision that they not represent him. (R 378 - 398) It is inaccurate to suggest that Pettit did not want to discharge his attorneys -- he wanted to fire his attorneys to plead guilty. (R 388)

Counsel for appellant argues that in Hamblen the trial court required counsel to remain as standby assistants while in the instant case they were not. That is true but irrelevant. There is no requirement in law that an attorney should be both discharged and remain as hybrid backup counsel. See United States v. LaChance, 817 F.2d 1491 (11th Cir. 1987); State v. Tait, 387 So.2d 338 (Fla. 1980).

Counsel for appellant mentions that trial counsel thought there were possible defenses or grounds in mitigation. The record reflects there were no defenses. Surviving witness Finnegan described the kidnapping of herself and Langston and the shooting by their assailant. (R 9 - 54) Appellant's cousin Charlie Lee Mooney described his providing a gun to appellant at the latter's request and appellant's subsequent admission of shooting the two victims. (R 77 - 97) Similar admissions were made to Robert Jackson (R 136 - 141) and James Kilpatrick. (R 153) Counsel for appellant does not specify the mitigation he

now refers to but evidence was presented below concerning Huntington's chorea. (R 188 - 214)

Hamblen rejected the argument, as Pettit's appellate counsel concedes, that a guardian ad litem be appointed contrary to the wishes of the criminal defendant. Current counsel presents a warmed-over approach suggesting that counsel be required to furnish the names of those who could provide mitigating testimony. But as stated in Hamblen:

> " . . . even if the judge had appointed counsel to argue for mitigation, there is no power that could have compelled Hamblen to cooperate and divulge such information."
>
> (527 So.2d at 804)

Despite appellate counsel's perhaps well-intentioned desire disapproving the decision made by his client, to force binding decisions upon an unwilling client in fundamental matters would violate Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562 (1975). And appellant does not explain how counsel ethically may violate the confidences of his client who similarly situated to Pettit insists that mitigating evidence he has disclosed to counsel not be revealed; after all, the attorney-client privilege is one for the client, not the attorney.[1]

---

[1] Appellant again specifically waived his right to counsel at the beginning of penalty phase. (R 3)

ISSUE II

WHETHER THE LOWER COURT ERRED BECAUSE ALLEGEDLY THE RECORD DOES NOT REFLECT CONSIDERATION OF NONSTATUTORY MITIGATING CIRCUMSTANCES.

In Lucas v. State, 568 So.2d 18, 15 F.L.W. S 473 (Fla. Case No. 70,653, September 20, 1990), this Court declared:

> " . . . Lucas did not point out to the trial court all of the nonstatutory mitigating circumstances he now faults the court for not considering. Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too little to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances."

(568 So.2d at 23 - 24)

The entire record is replete with appellant Pettit's disinterest in having the court award him a less serious sentence than the death penalty. Thus, the failure below to comply with Lucas should preclude acceptance of his current argument.

While the trial court may not have made a specific reference in his sentencing order to Pettit's Huntington's chorea, appellee would respectfully submit that the trial court considered it.

First of all, the trial court at sentencing specifically mentioned at R 239 that:

> " I have given attention to the testimony of his grandfather."

The grandfather had explained the appellant's family history of Huntington's disease. (R 213 - 214) Secondly, the trial

court in its order specifically rejected as mitigating factors, *Florida Statute 921.141(6)(e) and (f).* (R 430) The testimony of neurologists Dr. Lane Carlin and Dr. Harris Bonnette -- the witnesses called by the state who described appellant's Huntington's condition -- both opined that Pettit was not under the influence of extreme mental or emotional disturbance nor was his ability to conform his conduct to the requirements of law substantially implied. (R 195 - 196, R 211) Since the trial judge had to consider the testimony of Dr. Carlin and Dr. Bonnette to reach the conclusion that those mitigating factors were not established, ipso facto the court had to consider that testimony with respect to the disease. Cf. Parker v. Dugger, __ U.S. ___ (Case No. 89-5961 January 22, 1991), 48 Cr.L. 2084.

Finally, even if the trial judge had not considered appellant's Huntington's chorea as mitigating evidence, there would be no reversible error.

In Nixon v. State, 572 So.2d 1336 15 F.L.W. S630 (Fla. November 29, 1990), this Court held that Lockett did not require the jury to be instructed on the maximum sentences for the offenses of kidnapping, robbery and arson. The Court reasoned:

> "The fact that Nixon was convicted of other offenses, each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime."
>
> (text at S633)

See also Jones v. State, ___ So.2d ___, 15 F.L.W. S604 (Fla. November 15, 1990) (reversing death sentence for Booth error,

noting "A verdict is an intellectual task to be performed on the basis of the applicable law and facts . . . the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented." Id. at S 606.)

If the length of pending prison sentences is not valid Lockett - character evidence, why should the presence of disease which may merely shorten the life expectancy of a prisoner and which did not have an effect limiting the accused's mental abilities in the course of the criminal episode be any more of a valid consideration to the sentencer? This is especially so since the United States Supreme Court has announced a de-emphasis on the role of sympathy. In Saffle v. Parks, 494 U.S. ___, 108 L.Ed.2d 415 (1990), the Court opined:

> "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror."
>
> (108 L.Ed.2d at 429)

ISSUE III

WHETHER THE LOWER COURT ERRED IN FINDING FLORIDA STATUTE 921.141(5)(a) AS AN AGGRAVATING FACTOR.

The trial court found the presence of five aggravating circumstances and no mitigating.[2] The aggravating factors included:

> a. Defendant was under sentence of imprisonment when he committed the capital felony.
>
> b. The Defendant was previously convicted of a felony involving the use of violence to the person (other than Norman Langston).
>
> d. The capital felony was committed while Defendant was engaged in the commission of ROBBERY, and of KIDNAPPING.
>
> f. The capital felony was committed for pecuniary gain, at least in the sense of a gain from robbery -- but this factor seem embraced in (d) above, i.e., robbery, so I do not include it as an aggravating factor.
>
> i. The evidence is quite clear, and I so find, that Defendant intended to acquire a gun, then use it in a robbery of someone, somewhere . . . possibly at the Howard Johnson site . . . that evidence could suggest it was his intent to "leave no witnesses" in any event, but I do not include such a factor in my decision here.

(R 430)

---

[2] As indicated in his order while the court found five factors applicable, it only utilized three (a, b, and d) in the weighing process.

He challenges only the finding of factor (5)(a) urging that appellant's status as a probationer does not qualify as being under a sentence of imprisonment. Ferguson v. State, 417 So.2d 639 (Fla. 1982). While that may be true, it is apparent that the presence of two other valid unchallenged aggravating factors with no mitigating circumstances mandate affirmance of the sentence imposed without requiring a remand. See Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988), (elimination of the cold, calculated, premeditation finding would not have resulted in a life sentence). See also, Bassett v. State, 449 So.2d 803 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. 1980).

CONCLUSION

The judgments and sentences should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar ID#: 0134101
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Gregory N. Burns, Esq., P. O. Box 2194, Ft. Myers, Florida 33902, this 1ST day of February, 1991.

OF COUNSEL FOR APPELLEE.

ATTACHMENT "A"

The method used to randomly select jurors from the registered list of voters is a random generator in accordance with the Office of the State Courts Administrator and programmed by the data processing department of Walton County. In reality, a computer cannot generate numbers that are truly random, since it always generates the numbers according to a deterministic rule. However, certain generating rules produce numbers whose behavior is unpredictable enough that they can be treated as random numbers for practical purposes.