IN THE SUPREME COURT OF FLORIDA

RONALD WAYNE CLARK, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 77,553

ON APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General
Florida Bar No. 239161

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND THE FACTS

The State generally accepts the defendant's statement but would note the following:

FACTS: ISSUE I
(Waiver of Mitigation)

Ronald Clark was neither insane nor incompetent to stand trial. (R 54-57). Clark was examined at various times by a host of mental health experts including Dr. Miller (R 54-57), Dr. Macaluso (R 63-70), Dr. Chaknis (R 25, in relation to Clark's other murder case, but noted here) and Dr. Barnard (R 44). Despite some initial intent to rely upon an insanity defense (see R 23), that decision was scrapped in favor of an intoxication defense, pretrial (TR 68-69, R 112).

During trial, Clark testified on his own behalf, under oath (TR 647) and attested to his detailed, post-arrest statement blaming Mr. Hatch (in detail) for the crime. (TR 649). Clark testified that he had Prozac and Thorazine prescriptions and that he was stable and competent. (TR 648). The defense rested, arguments were made and a guilty verdict (for "felony" murder) was returned. (TR 756).

The next morning, January 25, Mr. Clark, through counsel, declared that no testimony or evidence would be offered during the penalty phase. (TR 787-788). The Court carefully inquired of Mr. Clark his awareness of his rights, his understanding of what his attorney said and his health (including whether he was on drugs). (R 787-791). After a brief recess, the Court questioned Clark a second time (R 792) and then determined that Clark was competent and well able to make this decision, (R

743). Mr. Clark's brief fails to mention this second interrogation. (Brief, at 18).

FACTS: ISSUE II

The trial judge was fully aware of the fact that, in this case, "robbery" and "pecuniary gain" had to be merged (if found) into just one aggravating factor. (TR 816). In his sentencing order, Judge Wiggins noted that both factors applied, as did an additional factor (prior conviction). (R 203-210). No mitigating factors were found. (R 203-214). The Court's decision does not specify the number of aggravating factors (i.e., two or three) balanced against "zero" mitigating factors.

FACTS: ISSUE III

The Court properly allowed Lt. Calhoun to testify regarding his investigation of Mr. Clark's other first degree murder. (TR 771 et seq.). Defense counsel made an initial, anticipatory "hearsay" objection (TR 773) but noted that he understood that hearsay might be admissible during the penalty phase. (TR 774).

FACTS: ISSUE IV

No factual development is necessary.

SUMMARY OF ARGUMENT

The Appellant does not challenge his guilt and raises four challenges to his death sentence.

Claim one alleges that Clark should have been compelled to put on a defense whether he wanted one or not. This clearly is not the law.

Claim two alleges, without record support, that the trial judge "doubled" two aggravating factors despite telling the jury not to do *so.*

Claim three is a meritless challenge to the admission of hearsay evidence, during the penalty phase, regarding his prior murder conviction. The issue is clearly devoid of merit.

Claim four questions the trial court's sentencing decision of grounds of proportionality, disparate sentencing and alleged "mitigating" evidence. All these claims lack factual and/or legal support.

ARGUMENT: ISSUE I

THE TRIAL COURT DID NOT ERR IN ALLOWING A COMPETENT DEFENDANT TO EXERCISE HIS RIGHTS DURING TRIAL.

Mr. Clark's first point on appeal actually raises three separate claims. First, Clark alleges that the trial court "erred" in allowing him to make a strategic decision regarding his own defense. Second, Clark alleges that the jury did not make an informed decision. Third, Clark alleges that the trial judge violated Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). We will dispose of each of these arguments in order.

(A) Failure to force the defendant to call witnesses

The constitutional right to trial by jury belongs to the defendant, not the state. It is, therefore, the defendant's right to exercise or waive that constitutional right, free from the heavy, paternalistic, hand of the state. The fact that a defendant may have a defense or arguably "might" win a trial does not lessen the defendant's ability to choose. Allen v. Rodriguez, 372 F.2d 116 (10th Cir.1967); Lo Conte v. Dugger, 847 F.2d 745 (11th Cir.1988); United States v. Buckley, 847 F.2d 991 (1st Cir.1988).

When a defendant elects to waive trial, the duty of the trial court is to conduct an appropriate inquiry prior to accepting any plea. Boykin v. Alabama, 395 U.S. 238 (1969). A similar duty of inquiry attaches when a defendant simply elects

not to put on evidence during the penalty phase. Henry v. State, 16 F.L.W. S593 (Fla.1991).[1]

Although some nebulous "interest of society" (in the spectacle of a full trial) has been alleged, the notion has been rejected because the "right" in question belongs to the defendant personally. Hamblen v. State, 527 So.2d 800 (Fla.1987); Anderson v. State, 574 So.2d 87 (Fla.1991). Similarly, the exercise of Mr. Clark's rights, by Mr. Clark, is not "suicide," because Clark still must qualify for the death penalty before it can be imposed. Mere agreement with a lawful sentence is not "suicide." Gilmore v. Utah, 429 U.S. 1012 (1976).

Mr. Clark cites to Klokoc v. State, 16 F.L.W. S756 (Fla.1991) for the proposition that Courts can and should intervene in the conduct of an unwise defense and force parties into litigation whether they seek it or not. Again, this argument suggests that the people's constitutional "rights" are not their own but, rather, belong to some benevolent higher authority who, in turn, "tells us how Lo exercise them."

Klakoc, supra, would violate fundamental constitutional concepts if it stood for such a bizarre approach to the constitution. In point of fact, Klokoc does not stand for the proposition Mr. Clark suggests.

We would also direct the Court's a tention to the record and decisions in Agan v. State, 445 So.2d 326 (Fla.1983); Agan v. State, 503 So.2d 1254 (Fla.1987) and Agan v. Dugger, 508 So.2d 11 (Fla.1987). Mr. Agan preempted counsel and waived both phases of his capital trial.

Mr. Klokoc murdered his innocent nineteen year old daughter as an act of vengeance towards his estranged wife. Klokoc did not Cooperate with his attorney but he apparently did cooperate with another, specially appointed, attorney. Klokoc also represented himself and cross-examined penalty phase witnesses. Klokoc again refused to cooperate with appellate counsel. Therefore, it is not apparent that Klokoc did not want to defend himself.

We submit that this Court's action in the Klokoc case stemmed from this Court's separate, statutory, duty to review every death penalty. Pettit v. State, 17 F.L.W. (Fla.1992). The **Klokoc** case, therefore, is factually and legally different from the one at bar, and thus does not warrant the relief sought by Mr. Clark.

(B) The jury's "informed" decision

In any courtroom proceeding jurors only learn facts proffered by the parties. It would be surreal to suggest that juries must be given every possible fact supporting every possible theory of defense - even if inconsistent - so that they can be "fully" informed.

We do not know what the advisory jury would have been told or what rebuttal or cross-examination the state would have utilized in response. For example, we do not know how Dr. Macaluso would have withstood impeachment or cross-examination, nor do we know how persuasive other doctors - who found Mr. Clark sane and competent - would have been if their testimony was inconsistent with the record or their diagnoses of sanity.

Johnson v. Dugger, 16 F.L.W. S459 (Fla.1991); Sochor v. State, 16 F.L.W. S297 (Fla.1991); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir.1989); **Bundy** v. **Dugger, 850 F.2d 1402** (11th Cir.1988).

Mr. Clark displayed a detailed memory of the events leading up to, during and after this crime, that is inconsistent with any intoxication, "blackout" or other mental mitigating factor. Since this was not Mr. Clark's first capital murder, "character" evidence would also have been futile. Mr. Clark **was** obviously aware of this since he had already received one sentence of death, and, as he observed, did not impress the jury or the court in that other case. Thus, Clark cannot demonstrate either error in not offering evidence or any resulting prejudice.

(C) The judge's decision

Finally, Clark's brief cites **Lockett v. Ohio, 438 U.S. 586** (1978) and **Eddings** v. Oklahoma, **455** U.S. 104 (1982) for the proposition that judges must not only "consider" all mitigating evidence, but must insure its production and presentation as well. This novel theory enjoys no legal support.

Under Clark's theory, judges would cease to function as neutral and detached magistrates. Instead, judges would be part of the defense team, overseeing all strategic decisions and supervising the investigation of the case. Judges are not second-tier defense attorneys and Clark's suggestion cannot be taken seriously.

The duty of the trial judge was to examine that mitigating evidence which the defendant wanted him to consider. Lucas v. State, 568 So.2d 18 (Fla.1979). **In Agan v. State, 445** So.2d **326**

(Fla.1983), the trial judge was found not to have committed Lockett error by "failing" to consider factors proffered by Agan's counsel, just as the trial judge at bar carefully reviewed the trial record and the expert evaluations proffered by counsel. Still, in our case as in Agan, the evidence did not reasonably establish any nonstatutory or statutory mitigation and no evidence was proffered by the defense. Mr. Clark was not insane, incompetent or impaired, His own experts removed the prospect of such a defense even without cross-examination or impeachment by the state.

It should be kept in mind, however, that Mr. Clark did not want his assorted evaluations offered as mitigating evidence.

ARGUMENT: ISSUE II

THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT.

Mr. Clark's second point on appeal is another stream-of-consciousness essay which begins by discussing whether certain aggravating factors were "doubled" and then drifts off into a discourse on Campbell v. State, 571 So.2d 415 (Fla.1990).

Mr. Clark told the trial court he did not want to offer or rely upon any mitigating evidence of any kind. When the court published its sentencing decision, Clark did not object on the basis of Lockett v. Ohio, 438 U.S. 586 (1988) or Campbell v. State, 571 So.2d 415 (Fla.1990). As such, he cannot raise either issue on appeal. Clark v. State, 363 So.2d 331 (Fla.1978); Steinhorst v. State, 412 So.2d 332 (Fla.1982). Certainly Mr. Clark cannot be allowed to manufacture his own error, thus disrupting the State's effort to secure justice.

Without waiving this point, we would note that the trial judge instructed the advisory jury that it could not apply both the "robbery" and "pecuniary gain" factors due to the prohibition against "doubling" aggravating factors. (TR 816). It is presumed that the judge did not act in disregard of his own instructions. See Card v. **Dugger,** 512 So.2d **829 (Fla.1987); Spaziano v. Dugger, 557** So.2d 1372 (Fla.1990).

Thus, even though both of these factors were found, the silence of the sentencing order does not indicate that they were separately applied.

Regarding Campbell, supra, we would note that no mitigating factors were established, or even offered, by Mr. Clark. Although the trial court reviewed the record, there was nothing pertinent to discuss given Clark's waiver. Alsa, Campbell, on its face, was drafted to assist trial judges in passing sentence and not to create a new "procedural escape hatch." Richardson v. **State, 246** So.2d **771** (Fla.1971) for the guilty to obstruct justice.

It is clear that Mr. Clark cannot raise these issues on appeal and certainly cannot allege or show any error.

ARGUMENT: ISSUE III

THE TRIAL COURT DID NOT ERR IN ADMITTING "HEARSAY" TESTIMONY.

During the penalty phase of Clark's trial the court heard testimony regarding Clark's other capital murder case. Clark, of course, confronted the witness (Lt. Calhoun), as well as David Hatch and Brian Corbett, during that trial and certainly had the right - as well as the ability - to cross-examine Calhoun or utilize that trial record in response to Calhoun's testimony.

Clark offered nothing on his own behalf and Clark's conviction (guilt) and sentence of death in the other capital murder case clearly did exist. Thus, Clark's complaint involves the use of "hearsay," the content of which he does not even dispute. The admission of this evidence was proper. **Dragovich** v. State, 492 So.2d 350 (Fla.1986); Perri v. State, 441 So.2d 606 (Fla.1983).

Given Clark's refusal to put on any mitigating evidence, his newly discovered concern for "due process" rings hollow indeed. To grant Clark a new penalty phase proceeding before a new jury would be the epitome of injustice. Clark's post-trial desire to change his strategy should not be entertained, much less indulged. Corry v. Wilson, 405 F.2d 110 (9th Cir.1968).

ARGUMENT: **ISSUE IV**

THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT TO DEATH.

The Appellant's final argument on appeal actually raises several distinct arguments relating to the propriety of his death sentence. First, Mr. Clark alleges that "a premeditated murder, during the commission of another felony, simply **does** not qualify for the death penalty." (Brief, at 40). Second, Clark alleges that the record establishes several "mitigating factors" which were not properly considered by the court. Third, Clark suggests that he and his codefendant have received disparate treatment.

Mr. Clark does not challenge the two significant statutory aggravating factors relied upon by the trial judge. The murder at bar was committed in the course of a robbery. The murder, in addition, was Clark's second capital crime. No mitigating

evidence was offered or admitted into evidence to offset these factors. Against this backdrop we will review Clark's three arguments.

(A) Felony murder

Clark suggests that death is not an appropriate or available punishment for felony murder. The argument is clearly incorrect,

The Florida Legislature has determined that death is appropriate in felony murder cases and has written that determination into the law of this state. See § 921.141, **Fla. Stat.** Appellate courts do not have discretion to rewrite statutes or disregard legislative intent, even *so,* this Court has never doubted the applicability of the death penalty to cases involving a murder committed in the course of a robbery. Adams **v. State, 341** So.2d **765** (1976); Eutzy **v.** State, **458** So.2d **755** (Fla.1984)(murder and robbery of cab driver); Hargrave **v. State, 366** So.2d **1** (Fla.1979)(murder of convenience store clerk during robbery); Burr v. State, 466 So.2d 1051 (Fla.1985)(robbery and execution of store clerk); Johnson **v.** State, **442 So.2d 193** (Fla.1983)(robbery and **murder** of bartender); **Pettit** v. State, 17 F.L.W. **S41** (Fla.1992)(robbery and murder of shoppers); Wickham v. **State, 16 F.L.W. S777** (Fla.1991)(murder and robbery of good samaritan motorist).

Mr. Clark's cited case of Rembert **v.** State, **445 So.2d 337** (Fla.1984) upheld the lower court's finding of felony murder (during a robbery) as an aggravating factor but reversed the defendant's sentence because three other aggravating factors were improperly applied and the trial court failed to consider a

substantial body of mitigating evidence. In Clark's cited case of **Caruthers v. State, 465** So.2d **496** (Fla.1985), again, felony-murder (during a robbery) was upheld as an aggravating factor even though the facts of the case led to a reversal of the death sentence,

Of all Mr. Clark's cited cases, however, **Proffitt** v. **State,** 510 So.2d 896 (Fla.1987) may have been his poorest choice.

The **Proffitt** opinion states that the mere fact that a murder was committed during **a** burglary could not offset the mitigating evidence at bar. In doing so, however, this Court distinguished **Proffitt** from Mason **v.** State, **438** So.2d **374** (Fla.1983), a case in which a death sentence was upheld because - in addition to the felony-murder factor - the defendant had a prior conviction for a violent offense. Thus, if anything, Praffitt explains why death is appropriate here. Mr. Clark not only robbed and murdered his victim, this was his second capital murder conviction and second sentence of death.

(B) "Mitigating Evidence"

No mitigating evidence was offered during the penalty phase of this trial or during the special hearing ordered by the court in February of 1991.

At the February he ring, defense counsel asked the court to take notice of a pretrial competency evaluation (admitted into evidence at a pretrial hearing) by Dr. Miller and a report by Mr. Macaluso that had been filed with the court. (TR 830-836). **The** reports, however, were not submitted as evidence. No evidence was offered to corroborate or prove much of the background

information (particularly as to Clark's childhood) relied upon by the experts, and no evidence linking these evaluations to the statutory mitigating factors (or even to the crime, as any kind of mitigation) was offered as well.

Dr. Miller's report recognized the existence of a possible, mild, mental disorder but specifically found Clark to have been both sane and competent. Dr. Macaluso's report was much more favorable, but it was largely based upon hearsay and it was not placed in evidence.

Even though the trial court may have examined these reports, it cannot be said that Clark established any mitigating factors.

Section 90.702, Fla. Stat., governs the admission and use of expert testimony. The trial court had to qualify any expert (as an expert) prior to accepting any opinion. **Johnson** v. State, **438** So.2d 774 (Fla.1983). The court was also required to compel the introduction of a necessary evidentiary predicate for any opinion. Ladd v. State, 564 So.2d 587 (Fla.2nd DCA 1990). Thus, the Court could not simply accept, say, Dr. Macaluso, as an expert without a predicate being laid (including voir dire[2] by the state) or a stipulation by the parties. Also, the mere fact that Clark told his doctor about child abuse or past psychiatric care does not establish or prove those particular factors. Ladd, (id).

We would note it is unfair to the state to deprive it of voir dire and cross-examination by filing pretrial reports, refusing to put on a defense, and then citing hearsay from those reports as "evidence" on appeal. See State v. **Jones,** 204 So.2d 515 (Fla.1967); Thomas v. State, **326 So.2d 413 (Fla.1975).**

Given the fact that the "experts" at bar were never qualified in open court as experts capable of evaluating mental mitigating factors, and given the uncorroborated hearsay upon which their opinions were based, it cannot be said that Clark offered "strong" or "uncontested" mitigating evidence. The state could not call and impeach Clark's witnesses for him, and it cannot fairly be subjected to their alleged opinions at this time.

At most, the trial record showed that Hatch and Clark had an unknown quantity of alcohol prior to planning and committing this crime. Clark was not too drunk to plan the crime, procure a weapon, shoot the victim, drive the victim's truck, hide the body, complete the robbery (taking the victim's shoes) or even return to the body later, tie blocks to it and throw it in the river (to better dispose of it). Every act by Mr. Clark was lucid, goal-directed, oriented to time, place and situation and, in sum, sane and competent.

Under these facts, the mere use of alcohol does not have any nexus to the crime and cannot overcome the statutory aggravating factors at bar. Sochor v. State, 16 F.L.W. S297 (Fla.1991); **Lambrix v.** State, 534 So.2d 1151 (Fla.1988). In fact, the mere use of alcohol does not establish "intoxication," **Lambrix,** id; **Jacobs** v. State, 396 So.2d 1113 (Fla.1981); **Linehan** v. State, 476 So.2d 1262 (Fla.1985), especially under these facts.

One final factor to consider when reviewing Clark's alleged "incapacity" or intoxication is the incredibly good and detailed memory he displayed when his insanity defense gave way to an effort to blame the murder on Mr. Hatch.

It was for the trial court to determine whether or not Clark proved the existence of any mitigating factor and that determination, absent an abuse of discretion, will not be disturbed on appeal. **Sochor, supra;** King **v. Dugger,** 555 So.2d 355 (Fla.1990); **Scull** v. State, **533** So.2d 1137 (Fla.1988).[3]

Clark offered no evidence in mitigation, no evidence to corroborate any abuse as a child and no evidence of intoxication beyond the mere consumption of some alcohol, offered in the guilt phase (by the state, actually). The state was not given a chance to contest any expert opinions and no expert opinions were admitted, during the penalty phase, in the manner required by law. In fact, notwithstanding his lawyer's arguments, Clark himself did not even want any mitigating evidence offered or argued, thus raising the possibility that the Court really had nothing it could consider anyway. Lucas v. **State, 568** So.2d **18** (Fla.1990); Holmes v. State, 374 So.2d 944 (Fla.1979).

If Clark ever offered mitigating evidence, he still failed to establish any firm mitigating factor.

(C) Disparate sentencing

Clark also alleges that possibly his codefendant, Hatch, was the trigger-man and complains that Hatch received a 25 year sentence for second-degree murder.

In Pettit v. State, 17 F.L.W. S41 (Fla.1992) this Court upheld a trial court's refusal to find, as mitigating, evidence of alcohol use and a debilitating disease when these problems had little or no impact on the defendant's crime. See also Koon **v. State, 513** So.2d **1253 (Fla.1987).**

Hatch entered a plea bargain and received a lesser sentence after testifying against Clark. Those facts justify and explain any "disparate" sentence. Smith v. State, 365 So.2d 704 (Fla.1978). Of course, any defendant can still be sentenced to death even if a less culpable codefendant gets "life." **Eutzy** v. **State, 458** So.2d 155 (Fla.1984); **White v. State,** 415 So.2d **719** (Fla.1982); **Mendyk v. State, 545** So.2d **846** (Fla.1989); **Rogers v.** State, 511 So.2d 526 Fla.1987).

Clark contends that the return of a "felony-murder" as opposed to "premeditated murder" verdict somehow proves that the jury felt Hatch was the trigger-man. That is rank speculation. It is just as logical to assume that the jury:

(a) Felt that the dominant motive was robbery, or

(b) Felt that Clark did not particularly want to kill **this** victim but had a general intent to **kill** whoever he robbed.

The bottom line is that there is only one crime of "first degree murder" in this state ("felony" and "premeditated" being alternative methods of proving intent) and Clark was found guilty of that crime. Even if, as Clark alleges, the evidence created a "liar's contest" between Hatch and Clark, there was substantial record evidence that Clark was the trigger-man as well as the instigator of this crime.

Hatch's plea cannot save Mr. Clark.

CONCLUSION

The death sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General
Florida Bar No. 239161

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL **32399-1050**
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nancy A. Daniels, Public Defender, and W.C. McLain, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida **32301** this 19 day of February, **1992**.

MARK C. MENSER
Assistant Attorney General